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‘Fraud’ is a word that people find easier to use than to define. Partly for this reason, it is difficult for lawyers to summarise the way in which their particular jurisdictions deal with it. Some of the sources of their laws will be domestic and will have evolved over time. Others will be recent international conventions, where regard must be had to the decisions of other jurisdictions.

But these difficulties aside, the problems that fraud generates pose unique challenges for the legal system of any country. First, there will be forensic issues: to what lengths should the court go to discover what actually happened? Here different jurisdictions place different priorities on what their courts are for. Some treat the court process as an almost sacrosanct search for truth. The courts of my own jurisdiction tend towards this end of the spectrum. Others regard it as a means of resolving disputes efficiently and providing certainty for the litigants. Often courts in this category allow no witness evidence and no procedure for disclosure of documents, regarding both as disproportionately burdensome for any benefit they might provide.

Second, there is the question of whether the court should mark conduct that is ‘fraudulent’ as particularly abhorrent, in civil proceedings. All will criminalise fraudulent behaviour, but not all will penalise fraudulent conduct by enhancing the victim’s compensation or by depriving the fraudsters of arguments that might have been available to them if they had been careless rather than dishonest.

Third, there is the question of innocent parties: to what extent should victims of fraud be given enhanced rights over ‘victims’ of ordinary commercial default? In some jurisdictions, it is said that victims of fraud part with their assets – at least to some extent – involuntarily while commercial counterparties take risks with their eyes open. Hence, victims of fraud can, in some circumstances, be allowed to retrieve assets from an insolvency before ordinary trade counterparties or ‘general creditors’ do so.

Lawyers have been mulling over the rights and wrongs of solutions to the problems that fraud presents for centuries. They will never stop doing so. The internationalisation of fraud in the past 40 years or so, however, has meant that they argue about these problems not only with lawyers of their own country, but also with lawyers from other jurisdictions. Rarely nowadays will a fraudster leave the proceeds of fraud in the jurisdiction in which they were stolen. The 1980s and early 1990s saw quite pronounced attempts by fraudsters to ‘arbitrage’ the various attitudes and priorities of different jurisdictions to retain what they had taken. Perhaps the highest-profile example of this was the use of jurisdictions in which banking secrecy was a priority as a conduit to which the proceeds of fraud would be transmitted. Another well-known strategy was the use of corporate devices and trusts as a means of sheltering assets from those who deserved to retrieve them.
A number of factors have served to make this more difficult. The growth of international conventions for the harmonisation of laws and enforcement of judgments is clearly one factor. Perhaps more notable, however, has been the international impetus to curb money laundering through criminal sanctions. These have, however, been first steps, albeit comparatively successful ones. There is still a huge amount to be done.

I have specialised in fraud litigation – virtually exclusively – since the late 1980s. My chosen area has brought me into contact with talented lawyers all over the world. I remain as fascinated as I was at the outset by the different solutions that different countries have to the problems fraud creates. I am sometimes jealous and sometimes frustrated when I hear of the remedies for fraud that other jurisdictions offer or lack. When I talk to lawyers who enquire about my own jurisdiction, I frequently see them experiencing the same reactions too. The comparison is more than a matter of mere academic interest. Every month brings some study by the government or private sector tolling the cost of fraud to the taxpayer or to society in general. My own interest goes beyond ordinary ‘balance-sheet’ issues. When I deal with fraudsters, particularly habitual or predatory ones, I still retain the same appalled fascination that I experienced when I encountered my first fraudster, and I share none of the sneaking admiration for them that I sometimes see in the media; they are selfish, cruel and immature people who not only steal from their victims, but also humiliate them.

No book sufficiently brief to be useful could ever contain all the laws of any one jurisdiction relating to fraud. The challenge, unfortunately, for a contributor to a book like this lies as much in what to exclude as in what to say. This guide contains contributions from eminent practitioners the world over, who have, on the basis of their experience, set out what they regard as critical within their own jurisdictions. Each chapter is similarly structured for ease of reference with similar headings to enable the reader to compare remedies with those in other jurisdictions, and each contributor has been subject to a strict word limit. Despite there being a huge amount more that each would have been perfectly justified in including, I still believe this book to be an enormous achievement.

Once again, we have some of the foremost experts in the area from an impressive array of jurisdictions contributing. I have often thought that true expertise was not in explaining a mass of details but in summarising them in a meaningful and useful way. That is exactly the skill that a work like this requires and I believe that this edition will continue the high standard of the previous four. I have come across a number of the authors in practice, and they are unquestionably the leaders in their fields. I hope that other readers will find the work as useful and impressive as I do.
Chapter 1

ARGENTINA

Guillermo Jorge

I  OVERVIEW

As with most civil law jurisdictions, Argentina has historically resorted to ‘generic’ remedies for civil asset recovery: compensation for damage and restitution within proceedings of a civil nature – whether exercised within the criminal law proceeding (e.g., the victim acting as a complainant) or in a separate (usually subsequent) civil action. On the criminal side, there is independent, usually post-conviction, confiscation of proceeds of crime.

With a strong focus on decreasing corruption and organised crime, the administration that took office in 2015 has passed some important reforms that are already impacting asset recovery. On the civil side, a 2015 reform of the Civil Code upgraded the remedies against fraud and simulation and added a separate action for unjust enrichment. On the criminal side, two statutes passed in 2016 increased the possibility of detecting and prosecuting economic crimes by establishing leniency agreements for defendants and economic rewards for whistle-blowers. In addition, regulatory reforms to the anti-money laundering system have increased the reporting obligations for gatekeepers. In 2018, a regime establishing corporate criminal liability for corruption-related offences entered into force, aligning corporate incentives for preventing corruption and cooperating with anticorruption authorities. Finally, the Senate is expected to pass in 2018 a civil forfeiture regime that has already been approved by the House of Representatives.

II  LEGAL RIGHTS AND REMEDIES

i  Civil remedies

The most commonly used remedies for civil recovery purposes in Argentina are damages and recovery motions, although victims may also seek results through other specific motions that have been incorporated, strengthened or clarified in the Civil and Commercial Code (AC&CC), which entered into force in August 2015. These include motions against fraud and simulation, motions to request the nullity of acts in cases of malice, motions for subrogation of the debtor’s rights and a specific action against unjust enrichment that is potentially useful in cases where no other cause of action is available.

All remedies can be sought against both individuals and legal persons.

1  Guillermo Jorge is a partner at Governance Latam.
**Damages**

Damages are governed by the principle of complete compensation provided by Article 1716 AC&CC. The breach of an obligation, as well as the violation of the generic duty not to harm another, entitles the injured party to receive full compensation.

Civil liability may be attributed on the basis of either objective or subjective factors. The latter includes negligent and intentional damage. Regarding objective liability – for instance, breach of obligations to achieve a certain result – negligence is irrelevant and does not exonerate a party from liability. Article 1724 AC&CC defines negligence as the omission of due diligence according to the nature of the obligation and the circumstances of the time, place and individuals involved. By contrast, intentional damage is defined as being carried out on purpose or with a manifest indifference to a third party’s interest. In the absence of a specific provision, liability will be attributed on the basis of negligence.

Claimants must prove that they have suffered a certain (non-hypothetical) and subsistent damage. The AC&CC contemplates the reparation of direct damage suffered by the victim of the breach, as well as indirect harm, where a third party’s interest is injured as a consequence of the harmful event.

Further, claimants must show there is an adequate causal link between the events that took place and the production of an injury. To warrant reparation, damage must be the immediate consequence of a harmful act or a foreseeable remote result. Immediate consequences are defined as those that ‘normally happen in the natural and ordinary course of things’. Those resulting from a connection with a different fact are called mediate consequences. Compensation encompasses the loss or diminution of the victim’s assets, loss of profits and loss of chance. The latter is due if its contingency is reasonable and it has a proper causal link with the fact that caused the damage.

As a general rule, the burden of proof of damage, attribution factors, defences and causal links lies with the party invoking them. However, the court has some discretion to assign this duty upon consideration of which party is better able to provide evidence.

Victims are entitled to full reparation (i.e., the restitution of their situation to the state it was in prior to the harmful event). Claimants are allowed to request the restitution of specific assets; however, if this were partially or totally impossible, excessively onerous or abusive, restitution shall be stipulated in cash. Only in cases of non-contractual actions causing negligent damage may the judge mitigate the damages for equity reasons by considering the debtor’s assets, the personal situation of the victim and the circumstances of the fact that caused the damage (Article 1742 AC&CC).

Claims can be filed against the people directly responsible for the commission of the harmful act or omission, or for the failure to comply with an obligation. Under specific circumstances provided by law, third parties may also be indirectly liable. For example, abettors may incur civil responsibility up to the extent of the damage caused by their participation (in contrast with criminal liability for abetting, which does not take the extent of the damage into account for sentencing purposes). Moreover, principals are objectively liable for damage caused by those under their dependence. The lack of discernment on the part of an agent does not exonerate the principal. Legal persons are also liable for damage caused by their directors or administrators in the performance of their duties. In cases of indirect liability, a motion can be filed jointly or separately against the individuals directly responsible for causing the damage and the third persons indirectly responsible.
When it is foreseeable that an unlawful act or omission will produce, maintain or worsen damage, the AC&CC allows motions enabling the judge to order the appropriate preventative measures. Claimants must prove a legitimate interest in the prevention of the damage; no attribution factors are required at this point.

**Motion for recovery (restitution)**

Victims of fraud may choose to file a motion for recovery, which is a remedy for the owner of a specific asset to uphold his or her rights against divestment. The judge may order the restitution of the asset in whole or in part, as well as the rectification of public registries if applicable (Articles 2252 to 2261 AC&CC).

Claimants are given the option to request either the reinstatement of the *in rem* right or compensation for damage. If they choose the first route, they are allowed to claim complementary reparation for damage; however, they lose the right to initiate a motion for recovery if they pick the second route. Motions for recovery shall not proceed for the recovery of immaterial objects, fungible assets, accessories when the main asset is not claimed or future goods at the moment of restitution.

Although it may be thought of as an *in rem* remedy, claims must be presented against the person holding the asset. In the specific case of stolen automobiles, the motion may be filed against the person who has registered them on public records in his or her own name.

Third-party possessors in good faith may not ask the claimant in a motion for recovery for the reimbursement of the price they paid for stolen non-registered movable property. An exception to this rule is made for third parties who have purchased the goods at a public sale or at a store where similar others were sold, or for a usual seller. Third parties may also request a reimbursement in the case of registered movable assets that were inscribed on the record in good faith. When reimbursement proceeds, the complainant may in turn require repayment by the bad-faith seller.

Motions for recovery over non-registered movable property may not be exercised against good-faith purchasers, but the outstanding amount of the price may be claimed. For the purposes of this provision, a purchaser may not allege good faith if he or she has acquired real estate or registered property through an act in which the titleholder of the asset did not intervene.

**Motions against fraud and simulation**

Victims of fraud can use a special motion for unenforceability against debtors that attempt to produce or worsen their insolvency by disposing of their assets. Through this action, acts of divestment and waivers of patrimonial rights carried out by debtors can be declared unenforceable to creditors (Articles 338 to 342 AC&CC). Claimants are required to show that their credit precedes the contested actions and that the third party was aware, or ought to have been aware, that the act produced or worsened the debtor’s insolvency.

A motion can also be used against illicit simulation when an illicit act is concealed under the appearance of another, contains untrue clauses or dates, or appears to produce effects for intermediaries that are not its true beneficiaries, causing harm to third parties. This action purports to declare the simulated act void and can be filed by any third party whose rights or legitimate interests are injured by the simulated act (Articles 333 to 337 AC&CC).

The AC&CC regulates the effects of both motions with regards to third parties in analogous terms. Fraudulent or simulated acts do not produce effects against the creditors of the acquirer of the assets who may have in good faith executed the goods involved in the fraud. Motions against subsequent asset owners may only proceed when they have acquired
the assets for free or in bad faith (i.e., when the subsequent owner is complicit in the fraud or in the simulated character of the act; bad faith is presumed regarding fraud when the acquirer was aware of the insolvency).

Subsequent acquirers in bad faith and those who concluded contracts with the debtor in bad faith are jointly and severally liable for the damage caused to the creditor who filed the motion, when the rights have been transmitted to a good-faith subsequent owner or have otherwise been lost to the creditor. Contractors in good faith and for free are also liable, though strictly to the extent of their profit.

**Motion for nullity in cases of malice**

When one of the parties in a legal act or a third person has made false assertions or employed any artifice, guile or contrivance to obtain the carrying out of the act, the injured party may request a judge to declare the act void because of malice, as provided in Articles 271 to 275 of the AC&CC. For the motion to proceed, the use of malice must be grave and determinant of the other party's will. This motion may not be invoked if malice has been reciprocal.

**Motion for subrogation**

Motions for subrogation can be used when a debtor is reluctant to exercise his or her patrimonial rights and this reluctance affects creditors. A creditor may in these cases 'take the debtor's place' by subrogating his or her rights to obtain fulfilment of the credit. For example, if a debtor refuses to appear in a probate proceeding, creditors may replace him or her before the court.

The debtor must be cited to intervene in the corresponding proceedings and may use as a defence any cause of extinction of the credit. Subrogation does not apply for rights that may only be exercised by their bearer. Motions for subrogation are contemplated in Articles 739 to 742 of the AC&CC.

**Unjust enrichment**

When no other remedy is available, the new AC&CC allows the creditor to file a motion for unjust enrichment. Any person who has obtained profit without a legitimate cause at the expense of another must compensate the patrimonial loss they caused. If the profit consists in the acquisition of an asset, it must be returned if it is still held by the defendant at the time of the initiation of proceedings.

**Defences in civil procedures**

Respondents in civil procedures may oppose an exception stating that the limitation period has passed. Judges are unable to declare this ex officio; they may only do so at the parties’ request at the stage of submission of their statement.

In the absence of a specific provision, the general term of limitation is five years, counted from the moment an obligation became enforceable. Claims for compensation for damage are subject to a limitation period of three years. Motions to obtain the unenforceability or nullity on the grounds of fraud, simulation and malice have a limitation term of two years counted from the moment when the act in question could have been known. Motions for recovery are imprescriptible, so respondents could not base their defence strategy on the grounds of limitation under these proceedings.
The limitation period can be suspended, stopping the count of the term for the duration of the suspension. At the end of that suspension, the count continues from the point where it was when the suspension started. Limitation periods may be suspended (e.g., by a formal request to the defendant to comply with an obligation or by soliciting a pre-judicial mediation).

Limitation periods may also be interrupted (making the limitation term begin anew) by the debtor’s acknowledgement of the claimant’s right, or by the filing of a court claim and by any petition made before the judge by a right holder with the purpose of confirming its right.

Defendants may also allege incompetence as an exception when submitting their statement. Civil proceedings should be brought before the civil courts of first instance. Argentina has both federal and local courts. Cases must be brought before the federal jurisdiction when they involve a ‘federal interest’ in terms of Article 116 of the National Constitution (e.g., if they involve a national public official). Pursuant to Article 75(12) of the National Constitution, non-federal proceedings regarding goods or persons located in a specific province must be brought before the local courts of that province.

Finally, in fraud claims, respondents usually defend themselves by rejecting that the elements of fraud are present, or proved. Facts and evidence are at the core of any asset recovery litigation.

**ii Criminal remedies**

Although the Argentine criminal system has been traditionally linked to the primary objective of punishing wrongdoers, victims’ rights – including the recovery of losses – have gradually been incorporated into the criminal procedure.

Pursuant to Articles 82 to 86 of the National Criminal Procedure Code of Argentina (ACrPC) anyone ‘particularly offended’ by an offence shall be entitled to appear as a complainant or ‘private, ad hoc prosecutor’, and as such to carry the procedure forward. Under the federal criminal procedure, where the investigation is conducted by investigative magistrates, victims exercising these rights have similar powers to those available to the public prosecutors: to request as well as produce evidence, to argue before the court and to challenge the court’s decisions through appeals. Following the Supreme Court decision of 1998 in *Santillán, Francisco Agustín,*² victims may even pursue the conviction of a defendant if the public prosecutor decides not to prosecute the case. After some hesitation, lower courts have followed this precedent.

The main source of restitution or compensation for victims in criminal procedures is that of confiscation. Under Article 23 of the Argentine Criminal Code (ACrC), confiscation of the proceeds of crime must be ordered as part of the criminal judgment: ‘forfeiture of the goods used to commit the crime and that of the goods and product or profit obtained from the crime for the benefit of the national State, of the provinces or the municipalities, except for the rights of restitution or compensation of the victim and third parties’.

Although asset forfeiture has in principle been thought of as a mechanism to benefit the state, it is increasingly considered as a procedure to give victims back what they have had stolen from them. In accordance with Article 29 of the ACrC, criminal courts have the power to order restitution, compensation to victims, their families and third parties, and any other

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necessary measures to restore the statu quo ante. All persons responsible for a crime are jointly and severally liable for the compensation for damage, and those profiting from the effects of a crime are responsible for reparations up to the amount of their participation.

Asset forfeiture has an accessory legal nature: as a general principle, it will be ordered when a conviction has been obtained. Nevertheless, there are certain circumstances where no prior judgment is required for the forfeiture to be ordered. In the case of crimes against the economic and financial order (including money laundering, terrorism financing, insider trading and other market-based offences), goods shall be forfeited in a definitive manner without need of a criminal judgment when the defendant cannot be tried because of his or her death or escape, the application of the statute of limitations, or any other grounds for suspension or extinction of the criminal action. The same is authorised when the defendant has admitted to the illicit origin or use of the goods, although it is required in these situations that the illicit origin of the goods or the material fact they are related to have been proven.

Besides, forfeiture can be obtained through criminal settlements (probation), as authorised by Article 76 of the ACrC, which stipulates that the accused benefiting from the settlement shall relinquish those goods that presumably would have been forfeited if a sentence had been passed.

Forfeiture shall be ordered against the principal, or against a legal person if the active party or its accessories have acted as an agent or as an organ, member or manager of the legal person, and when the product or profit has benefited the principal or the legal person. When the assets in question endanger public security, forfeiture can be ordered even if it affects third parties. However, third parties’ right to reparation is preserved if they acted of good faith. In cases where the product or profit of a crime gratuitously benefits a third party, forfeiture shall be executed against them.

Victims may also choose to appear in criminal proceedings as civil complainants (Article 1774 AC&CC, and Articles 87 to 96 ACrPC). Participating in the criminal proceedings as a civil complainant allows the victim to submit a civil complaint before the criminal court for damages arising from the crime. The civil complaint can be directed at both the criminal defendant or defendants and third parties. The application shall be submitted in writing in the investigative stage and the civil complainant shall participate in the proceedings as necessary to prove the existence of the crime and the damage caused, and request the corresponding provisional measures, restitution and reparations.

Acting as a civil complainant within criminal proceedings is not yet a consolidated practice in Argentina, possibly because of a lack of trust in the criminal courts’ criteria to assess and grant damages, but it is becoming increasingly familiar as an alternative to be chosen, on a case-by-case basis, to parallel civil and criminal litigation.

The applicable framework for independent civil and criminal proceedings resulting from the same fact is found in Articles 1774 to 1780 of the AC&CC. When a criminal complaint is filed prior to a civil one or during its course, the judgment in the civil proceedings must be stayed until the criminal process is concluded. Certain situations are exempt from this rule, for example, when an undue delay in the criminal proceedings produces in practice the frustration of the right to compensation, or when the civil proceedings are based on objective responsibility.

While the law only forbids the civil judgment, in practice, litigants and courts are reluctant to spend time and resources in producing evidence in civil actions when a criminal proceeding is ongoing. The reason for this is that the criminal judgment produces the effect of res judicata with regards to the civil proceedings, both on the existence of the facts and
guilt. When the criminal judgment decides that the facts did not take place or the defendant had no participation, this cannot be discussed before the civil court; nevertheless, if it is found that the events do not entail criminal responsibility on the part of the defendant, his or her liability may be discussed before civil courts. A criminal judgment delivered after the conclusion of a civil trial has no impact whatsoever on the latter.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Civil interim relief

The Argentine National Code of Civil Procedure (ANCCP) includes an array of interim measures that are available pre-judgment to prevent the dissipation of assets. Complainants may present a written motion for precautionary measures before or after the initiation of the main proceedings, showing that there is legal cause and that any delay may trump the purpose of a future judgment.

A common form of relief for securing assets is the ‘embargo’ (Articles 209 et seq. ANCCP). An embargo limits the disposition and enjoyment of specific assets, although it does not entail the taking of the asset by the court (seizure). Only the assets necessary to pay the debt at issue and trial expenses can be subject to embargo, and the AC&CC and case law state that some assets cannot be subject to embargo at all, generally when they are linked to human dignity (e.g., minimum salary, retirement pay), to a defendant’s profession or work (e.g., necessary tools), or to the state’s interests (e.g., the state’s non-movable assets).

Moveable assets may also be seized when an embargo would prove inadequate to secure the complainant’s alleged right. In deciding the seizure of assets, the judge will assign the ‘most convenient’ depository, which can be either a person or a public office, and fix their remuneration. Naturally, assets that cannot be subject to embargo cannot be seized either.

In cases where the respondent’s assets are unknown, the claimant can request a general restraint of the defendant’s assets (Article 228 ANCCP).

Criminal seizure

The ACrC provides in Article 23 that judges may adopt from the beginning of judicial proceedings the necessary precautionary measures to ensure the forfeiture of the real estate, goodwill, deposits, vehicles, computers, technical elements and any other good or in rem right over which forfeiture may presumably apply.

The ACrC provides for seizure and embargo, the first directed at securing movable assets both as evidence and for their potential forfeiture after a conviction (Article 231); the second to secure the fines, compensation and other costs to be imposed against the defendant (Article 518).

The fact that asset recovery has historically been outwith the mindset of Argentine courts and prosecutors as a goal of criminal procedures made our criminal system scarcely adequate for asset-tracing purposes. However, this trend has been changing during the past decade; for example, prosecutors are now required to trace and freeze the assets from the beginning of the investigation of corruption offences, money laundering and other economic crimes. Indeed, a new Asset Recovery Unit was created in 2015 to assist prosecutors in this account.
ii Obtaining evidence

Pursuant to Article 378 ANCCP, evidence in civil proceedings may be produced by the means expressly provided by law (witnesses, expert witnesses, documentary evidence, etc.) or decided by the judge, ex officio or upon request of the interested party, provided that the means are not contrary to ‘morality, freedom of the parties or third-parties, or are not expressly prohibited’.

Information can be obtained from third parties other than the defendant through production orders or testimonial means of evidence. Parties can request civil courts to order public and private entities to produce information about ‘specific, clearly tailored, discussed facts’ (Article 396 ANCCP). Any person older than 14 years may be asked to testify as a witness (Article 426 ANCCP), although close relatives of the defendant are excluded from this provision (Article 427 ANCCP). Witnesses must provide their testimony under oath. They are allowed to refuse to testify in special cases, such as when giving testimony would expose them to criminal liability, or when they are under professional, military, scientific, artistic or industrial privilege.

Complainants may obtain evidence from law enforcement and regulatory agencies by issuing a request for information, as stipulated in Article 396 ANCCP. Furthermore, individuals may gather public information from administrative agencies by requesting its disclosure in accordance with the Freedom of Information Act that entered into force in September 2017. Public information on, inter alia, vehicles, non-movable assets, taxes, ownership of registered trademarks, patents and industrial designs, company directors, statutes and acts is also available to the public.

Two important statutes for collecting evidence were passed in 2016. Of these, Law 27,304, which entered into force in October 2016, introduced the possibility of negotiating leniency agreements between prosecutors and defendants charged with specific crimes, including insider trading, money laundering, market manipulation, all forms of bribery and corruption and some forms of organised crime. Information leading to the recovery of assets is one of the types of information accepted for these agreements. The other, Law 27,319, which entered into force in November 2016, established several special investigative techniques, including controlled delivery, undercover agents and the possibility for law enforcement authorities to economically compensate whistle-blowers providing information about economic and organised crimes.

In the context of a private investigation, special attention is to be given to the scope of privacy and labour rights (both protected by the Constitution, Articles 17 and 18). Law 26,388 established that emails are to be deemed private correspondence, rendering their unauthorised use forbidden. Case law has consistently held that, as emails are personal and password protected, they are part of the individual’s private sphere, which may not be affected without a judicial order. Therefore, employers can only access emails sent or received from work electronic addresses if that is consented to (i.e., if included in the internal norms of a company or if contractually agreed) (Articles 64, 66 and 86 of Law 20,744). Finally, there are precedents allowing employers to access emails sent or received by their employees where exceptional circumstances of urgency, flagrancy or necessity apply.

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3 National Criminal Chamber of Appeals, GRS y otros /nullidad y costas, 2015.
4 Civil and Commercial Court of Appeals, Redruello, 2004.
Argentina

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Since 2000, Argentina has established and periodically improved a comprehensive anti-money laundering system in accordance with international standards. The system is fairly standard. Law 25,246 defined the money laundering offences, created the Financial Intelligence Unit (FIU) and defined a long list of gatekeepers and their legal duties. The FIU exercises regulatory, supervisory and sanctioning powers over all gatekeepers and also has the right to appear as ad hoc prosecutor in criminal cases where money laundering is a charge.

The basic offence is defined as follows:

[The person who converts, transfers, manages, sells, encumbers, conceals or in any other way puts into circulation in the market, assets stemming from a crime, with the possible consequence that the origin of the original or surrogate assets acquires the appearance of a licit origin, and provided that their value exceeds the sum of three hundred thousand pesos ($300,000), whether through a single act or by the reiteration of various interrelated acts.

The threshold at the time of writing is the equivalent to US$10,000.

Money laundering is sanctioned with imprisonment of three to 10 years and a fine between two and 10 times the amount of the transaction. Aggravating circumstances include engaging in this conduct routinely, and when the author is a public official and engages in this conduct during the exercise of his or her duties.

In spite of its alignment with international standards, the system remained ‘on the books’ for quite some time. This lack of political will to enforce the system, coupled with indications that the FIU was using financial information to punish political opponents, prompted the Financial Action Task Force (FATF) in 2011 to place the country in its grey list, where the country remained until 2014. Apart from showing serious commitments to enforce the law, to be excluded from the list, the FATF also required the government to punish self-laundering and to amend the regulatory framework, which was done in 2013.

The FIU president appointed in 2016 has taken the lead in showing the gatekeepers that the new administration is ready to enforce the anti-money laundering system. In that regard, he has been very actively participating in the asset-recovery efforts in prominent cases of drug trafficking, trafficking in persons and corruption. Nonetheless, the FIU still has a formidable job ahead to re-educate the gatekeepers in improving the quality of suspicious transaction reports and to re-educate its own analysts to ensure that they have the necessary skills to provide useful criminal intelligence to the law enforcement authorities. In July 2017, the FIU issued Regulation 30-E, moving from a ‘normative system’ to a risk-based approach to preventing money laundering. The Regulation requires the financial industry to annually evaluate risks and adopt proportional measures to mitigate them. The basic duties of ongoing due diligence and performing enhanced due diligence with respect to certain clients (e.g., offshore vehicles, politically exposed persons and trusts), to keep records for 10 years and to report suspicious transactions have been updated, taking into account best international standards as well as local practices of the financial industry.

Banking secrecy is not an obstacle to investigations in Argentina. Regulated by Articles 39 and 40 of Law 21,526 on Financial Institutions, financial entities are free to share information on lending transactions and shall not disclose information on borrowing transactions except when requested by any court, the Central Bank or tax collection agencies,
provided that the request refers to a specific taxpayer that is subject to assessment proceedings. Pursuant to Law 25,246, banks shall not deny information on the basis of banking secrecy with regards to their duty to produce reports of suspicious transaction (Article 14, Section 1).

ii Insolvency

The main remedies established by Argentine Law in the context of rescue and insolvency are judicial restructurings, which allow the debtor to restructure its outstanding debts while maintaining the administration of its estate; out-of-court restructurings to negotiate a restructuring plan outside the formal framework of a judicial restructuring; and liquidation proceedings, the purpose of which is to sell all the assets of the debtor and distribute the cash among the creditors.

The judicial restructuring can only be filed by a debtor on cessation of payment. If the restructuring plan is approved by more than 50 per cent of the creditors holding at least two-thirds of the total outstanding amount of the unsecured claims and it is approved by the court, it becomes binding on all non-consenting creditors.

During the judicial restructuring, the debtor maintains the administration of its estate under the supervision of a receiver appointed by the court, but he or she cannot pay any claim made before the application of the restructuring and must request the court’s authorisation to perform any act exceeding the ordinary course of its business (such as disposing of certain assets). The debtor can also request the lifting of any precautionary measures over his or her assets, if necessary to continue with his ordinary commercial activity. Moreover, interest accruing on pre-application claims is suspended, pending collection actions are stayed and new legal actions based on pre-application claims are prohibited.

If the debtor fails to approve the plan, bankruptcy will be declared and a liquidation proceeding will automatically begin. In the case of corporations, limited liability companies, cooperatives and legal entities in which the state is a shareholder, any third party and the debtor can try to obtain the creditors’ consent to a new plan consisting of the acquisition by a third party of the shares of the entity and the proposal of a new restructuring.

The out-of-court restructuring procedure is negotiated between the debtor and the creditors outside the formal framework of a judicial restructuring and it is then submitted for judicial confirmation, but no receiver is required to be appointed by the court. Majorities required for judicial restructuring apply. During negotiation of the plan, there is no stay on debt collection. All pending collection actions are suspended when the legal announcement required by law is published, after the debtor submits the plan for confirmation.

Bankruptcy can be declared when the debtor’s judicial restructuring plan fails, or at the direct request of a creditor or the debtor. The main consequence of liquidation proceedings is that the debtor is dispossessed of all assets. A receiver is appointed by the court to convert all the assets into cash and distribute them among the creditors.

With the declaration of insolvency, pending collection actions are stayed, but creditors with a security interest (pledge or mortgage) can initiate foreclosure at any time and separately.

The liquidation proceeding is quite inefficient and can last for several years. It can be terminated because of lack of assets (which involves a presumption of fraud), on final distribution or if the debtor obtains the consent of all its creditors.

Argentine bankruptcy law provides for the extension of the declaration of bankruptcy to third parties (Articles 160 to 172 of Law 24,522). The legally appointed receiver of the assets, as well as any creditor, may request the extension from the judge acting in the insolvency proceedings. Extension takes place in the following circumstances:
when a person, acting in appearance in the bankrupt’s name, acts in his or her own personal interest in fraud to his or her creditors;

b when a person controlling a bankrupt company has unduly deviated from its corporate interest, subjecting it to unified management in the interest of the controlling company or the business group to which it belongs. A controlling party is defined as a person who directly or through another controlled company holds an interest that affords him or her the required voting percentage to adopt corporate decisions; or each person who, acting jointly, holds an interest in that same percentage; and

c when a commingling of assets and debts between the bankrupt and a third party has occurred, which impedes their clear distinction.

The extension shall not apply to other individuals who form part of an economic group with the bankrupt unless any of the aforementioned circumstances is present.

Regarding transnational cases, an insolvency declaration issued by a foreign court constitutes grounds to open insolvency proceedings in Argentina at the request of the debtor or a local creditor. A creditor is considered local if his or her claim is to be satisfied in Argentina, regardless of his or her nationality or domicile. The only purpose of the insolvency proceedings in this case is to sell the assets located in Argentina and distribute the proceeds among local creditors. A bankruptcy declared abroad cannot be invoked against local creditors to dispute their rights over the assets located in Argentina, or to set aside any agreement that they may have entered into with the debtor.

If the debtor is also declared bankrupt in Argentina, the creditor in the foreign bankruptcy proceedings can enforce their claims on the balance once the claims recognised in Argentina have been satisfied. To obtain recognition of his or her claim, a foreign creditor must prove that a local creditor (whose claim is satisfied in Argentina) would be recognised in a proceeding in the foreign creditor’s country under equal conditions (reciprocity standard).

### iii Corporate criminal liability for corruption

On 1 March 2018, Law 27,401 establishing criminal corporate liability for bribery and other corruption-related offences entered into force. The Law encourages corporate cooperation in the prevention and investigation of corruption. Legal entities may be exempt from penalties and administrative responsibility if they have implemented a compliance programme, the minimum requirements of which are defined in the Law. Entities may also be exempt from penalties if they self-reported their unlawful actions to the authorities and returned all undue benefits. Companies can also settle the case by signing an ‘effective cooperation agreement’ whereby, in exchange for the release of useful and verifiable information that clarifies the unlawful event under investigation, the prosecutor can substantially reduce the sanctions imposed on the company.

### iv Arbitration

One of the main advantages of arbitration is its swiftness; therefore, it is very uncommon that a fraudster will consent to being subjected to this alternative dispute resolution procedure. The Civil Code, however, does not prevent the possibility of solving civil aspects of fraud through arbitration.

Arbitration used to be governed by local laws and has scarcely been used. The new Civil Code updated all previous regulations and made them coherent as a consequence of its wider development in countries commercially relevant to Argentina.
v Fraud's effect on evidentiary rules and legal privilege

There are no specific provisions in Argentina regarding lifting legal privilege or reducing the scope of rights in the context of evidence collection within fraud investigations. Attorney–client privilege and the right to defence are protected through robust constitutional provisions.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

In principle, Argentine civil law is applicable to every person in the Argentine territory, whether permanently or temporarily, including foreigners. Additionally, Argentine law contains a number of rules of international private law to settle conflicts of laws (Articles 2594 to 2671 AC&CC). According to these, rules of international private law contained in international treaties take precedence over local provisions of this nature.

In absence of a treaty, Argentine law establishes the applicable law governing specific instances as follows:

a legal capacity is regulated by the law of the person's domicile;
b patrimonial effects of marriage are governed by the law of the first conjugal domicile;
c inheritance proceedings are regulated by the law of the deceased person's domicile at the moment of his or her death;
d contracts: in the absence of a specific agreement by the parties, the law of the place of fulfilment of the contract shall apply;
e civil liability, in the absence of a specific provision, is governed the law of the country where the damage is produced;
f securities are ruled by the law of the place where they were issued;
g property rights: for non-movable property, the law of their location applies; for registered property, the law of the state where it is registered applies; and for movable property, the law of the place where they are situated applies; and
h statutes of limitations are governed by the law that applies to the substance of the matter.

ii Collection of evidence in support of proceedings abroad

International cooperation on this matter is ruled by bilateral treaties and, in their absence, by reciprocity. Argentina has signed numerous treaties regionally (such as the Montevideo Treaties of International Procedural Law of 1889 and 1940, made with Bolivia, Brazil, Colombia, Paraguay, Peru and Uruguay), bilaterally (e.g., with China, Russia and Tunisia) and globally (such as the Hague Evidence Convention of 1972).

Regarding reciprocity, pursuant to Article 132 ANCCP, Argentine judges will satisfy foreign requests if they are requested by 'courts with jurisdiction according to Argentine rules of international jurisdiction' and do not affect the 'principles of public order of Argentine law'.

Moreover, Articles 2611 and 2612 of the AC&CC establish as a general rule that Argentine judges should provide broad judicial cooperation in civil, commercial and labour matters through international letters rogatory or direct communication. Argentine courts generally satisfy foreign requests, based on reciprocity, although it could entail a slow process.

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

Pursuant to Article 2603 of the Civil Code, judges may issue any precautionary measure when acting in the principal fraud proceeding, regardless of the localisation of the assets or
parties abroad; at the request of a foreign competent judge, or in urgent cases if the assets or
the parties may be found in the country; or when a request for the recognition or execution
of a foreign judgment has been issued.

iv Enforcement of judgments granted abroad in relation to fraud claims

Law 24,767 and the relevant treaties between Argentina and other jurisdictions provide the
legal framework to meet foreign requests of legal assistance in criminal proceedings. Law
24,767 is used both to interpret treaties and to fill any gaps. Legal assistance is dependent on
the existence or offering of reciprocity (Article 3). The central authority on legal assistance
is the Ministry of Foreign Affairs, both according to Law 24,767 and to the cooperation
treaties, with the sole exception of the cooperation treaty with the United States, which
establishes as the central authority the Ministry of Justice and Human Rights.

Specifically regarding provisional measures, Argentina does not require that the
prosecuted crime be a crime in Argentina, unless the required provisional measures include
investigative measures requiring a restriction of constitutional rights (seizures, home searches,
monitoring of people, interception of mail and telephone calls). The provisional measures
requested would be applied following Argentine law. If the Ministry of Foreign Affairs
decides to give effect to the provisional measure in question, it will solicit the intervention
of the Ministry of Justice and Human Rights, which will call for the intervention of the
competent authority (Article 74). If the measure demands the intervention of a judge, it shall
be requested by the Prosecution Office (Article 74, Paragraph 3).

Regarding civil proceedings, Argentina's Civil Procedure Code provides that judgments
granted abroad shall be enforceable according to the treaties signed with the granting country.
Pursuant to Article 517, where there are no treaties in place, judgments granted abroad shall
be enforceable if:

a. they are *res judicata* granted by a court with jurisdiction according to the Argentine
   rules of international jurisdiction;

b. the right of defence was properly guaranteed to the defendant;

c. they meet the legal requirements to be considered enforceable according to both sets
   of legislation;

d. they do not affect the principles of public order or Argentine law; and

e. they are not incompatible with another judgment pronounced by an Argentine court.

All requirements must be fulfilled concurrently.

v Fraud as a defence to enforcement of judgments granted abroad

As a general principle, if it can be proven that the judgment was obtained fraudulently, it will
not be enforceable. In civil matters, this is deduced from Article 517 of the AC&CC.

In criminal procedures, there is no explicit rule, but case law has recognised the
application of ‘fraudulent *res judicata*’, as defined by the Inter-American Court of Human
Rights, as a trial in which due process has not been respected, and by the Rome Statute of
the International Criminal Court as a proceeding that was ‘not conducted independently or
impartially in accordance with the norms of due process recognised by international law and
were conducted in a manner which, in the circumstances, was inconsistent with an intent to
bring the person concerned to justice’ (Article 20).
VI CURRENT DEVELOPMENTS

A number of draft bills have been sent to Congress in an attempt to strengthen the anti-corruption system, and propose measures against organised crime. These include a civil forfeiture regime to allow state authorities, without the requirement of a criminal judgment, to confiscate assets strongly presumed to have an illicit origin. Congress, however, is discussing whether to allow a civil forfeiture regime that is independent of criminal proceedings, or simply a 'non-conviction-based forfeiture regime' for cases where conviction is unlikely. Both drafts are being debated in the Senate and a final bill is expected to be in force by the end of 2018.
Chapter 2

AUSTRALIA

Christopher Prestwich

I OVERVIEW

The Australian legal system provides a range of options for a victim of fraud or breach of fiduciary duty who is seeking to ‘trace’ the misappropriated property or recover the loss suffered:

a A victim of fraud will typically seek compensation through civil proceedings.

b Proceedings can be brought against the fraudster or the person who committed the breach. In addition, the victim may have claims against any persons who were ‘knowingly involved’ in the fraud or breach, or against the recipient of the misappropriated property.

c Where the misappropriated property can be sufficiently identified and the victim can establish a proprietary interest in that property, that proprietary interest will rank ahead of competing claims by any other creditors. Accordingly, an insolvency of the fraudster will not necessarily preclude the victim from recovering the loss.

d A broad range of orders are available from the Australian courts to assist the victim. These range from orders for compensation and the return of property to orders freezing the assets or permitting the victim to search premises where evidence may be held.

e Where a victim is seeking to ‘trace’ assets, Australian courts ‘have favoured practicality over strict logic’. In other words, Australian courts will adopt a practical and common-sense approach, and even if each link in the chain of accounts through which the money has passed cannot be connected, the court will be willing to draw appropriate inferences as to what occurred.

f The broadest range of remedies that are available to a victim arise in equity. Where fraud or theft is involved, Australian law does not require a pre-existing trust or fiduciary relationship to apply to the lost assets for equitable remedies to be available.

The causes of action and remedies that might be available to a victim arise under statute, at common law and in equity. They include both personal and proprietary claims, the latter of which will involve tracing.

‘Tracing’ is not of itself a claim under Australian law. Australian courts have approved the statement by the House of Lords in Foskett v. McKeown that tracing is neither a claim

1 Christopher Prestwich is a partner at Allens. This chapter was written with assistance from Jacques McElhone, an associate at Allens.
2 Justice Mark Leeming, ‘Proprietary relief and tracing in equity’ (2016) 90 ALJ 92 at 94.
nor a remedy; rather, it is a process by which a claimant demonstrates what has happened to the claimant’s property, identifies its proceeds and justifies a claim to those proceeds as being the claimant’s property.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Claims against the person who commits the fraud or breach of duty

Criminal remedies

In matters such as the misappropriation of company funds and fraudulent misrepresentation in company sales or equity raisings, criminal proceedings are sometimes brought by the regulator, the Australian Securities and Investments Commission (ASIC) rather than by the police. ASIC has powers to bring criminal proceedings under legislation, including the Corporations Act 2001 (Cth) (Corporations Act) and the Australian Securities and Investments Commission Act 2001 (Cth). While ASIC may seek compensation orders as a result of the conduct in question, its focus is often on seeking criminal sanctions (including imprisonment) or seeking civil penalty or banning orders.

The Director of Public Prosecutions (DPP) may also prosecute cases such as fraud. While the DPP’s focus will typically be obtaining a criminal conviction, there are procedures under which, following a successful criminal prosecution, a victim can apply for compensation orders in that criminal proceeding.6

Civil remedies

Where property is misappropriated, the victim’s primary recourse will often be a civil claim against the person who committed the fraud or breach of duty. As stated above, where the relevant conduct infringes legislation administered by ASIC, ASIC can also bring civil claims. Causes of action available to the victim include:

a misleading or deceptive conduct: where the fraud has occurred in the context of business, a claim may be available for misleading or deceptive conduct;

b breach of duty: fraudulent conduct by a company director can result in pecuniary penalty orders,7 compensation orders,8 equitable claims for constructive trust over profits, account of profits or equitable compensation. Breaches of duty by trustees can also be remedied by equitable claims;

c money had and received: where money has been taken, a claim for money had and received on the basis of unjust enrichment may be available;

d tort of deceit: where the victim suffers loss by relying on a fraudulent representation by the defendant that the defendant intended the victim to rely upon, a claim may be made for damages;9 and

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6 See, for example, the Victims Rights and Support Act 2013 (NSW) and equivalent other state legislation.
7 Section 1317G of the Corporations Act 2001 (Cth).
8 Section 1317H of the Corporations Act 2001 (Cth).
e. torts of conversion and detinue: where goods have been taken, claims may lie for conversion and detinue. This is likely to be most relevant where money has been taken by cheque fraud.10

The basis for the claim against the primary wrongdoer is likely to be straightforward. However, as a practical matter, civil claims are often of limited value in terms of recovering the property or obtaining damages, as assets are regularly dissipated or removed from the jurisdiction, and the wrongdoer may either disappear or file for bankruptcy.

Where the fraud has been committed by an employee in the course of doing acts that he or she is empowered to do by his or her employer in the course of employment, the employer may also be found vicariously liable for the employee’s fraudulent acts.11

Claims against persons who assist in committing the fraud or breach of duty

A better source of potential recovery for the victim may be a claim against a third party who participated in, was knowingly involved in, or assisted the person who committed the fraud or breach of duty.

That type of ‘knowing involvement’ claim is illustrated by Australia’s longest-running piece of litigation, which is proceedings brought against a syndicate of banks arising out of the collapse of the Bell group. Those proceedings concerned, in summary, claims that the directors of the Bell group companies breached their duties to those companies, and that the banks had the requisite knowledge of the breaches to be held liable as constructive trustees. Judgment was entered against the banks for A$1.75 billion.12 Set out below are potential causes of action against ‘accessories’ to the breach or to the fraud.

Other claims that may be available against accessories include claims for the tort of conspiracy and the tort of negligence.

Civil accessorial liability – statute

The Corporations Act and the Australian Consumer Law (ACL)13 both contain accessorial liability provisions:

a. Under the ACL, damages can be sought against both a person who contravenes the statute (e.g., by engaging in misleading or deceptive conduct) and ‘a person involved in the contravention’.14 A person is involved in the contravention if that person, *inter alia*, aids or abets the contravention, counsels the contravention or induces the contravention.15

b. Similarly, damages can be sought under the Corporations Act against persons who are ‘involved’ in a contravention of that Act (e.g., breaches of directors’ duties).16

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10 See, for example, *Perpetual Trustees Australia Ltd v. Heperu Pty Ltd* [2009] NSWCA 84.
11 *Pioneer Mortgage Services Pty Ltd v. Columbus Capital Pty Ltd* [2016] FCAFC 78.
12 *Westpac Banking Corporation v. Bell Group Ltd (in liq)* (No. 3) (2012) 44 WAR 1, which was appealed to the High Court but settled prior to judgment.
13 Schedule 2 of the Competition and Consumer Act 2010 (Cth) (formerly known as the Trade Practices Act 1974 (Cth)).
14 Section 236 of the Australian Consumer Law.
15 Australian Consumer Law definition of ‘involved’ (Section 2).
16 See Sections 79 and 1325 of the Corporations Act.
A claim against an accessory involves considerations that can make it considerably more difficult to establish than a claim against the principal wrongdoer. To illustrate this, some of the issues that often arise in an accessorial liability claim arising out of a misrepresentation inducing the sale of a business at an inflated price include:

a. The accessory’s knowledge: it is not necessary to show that the alleged accessory knew that the conduct in question (i.e., the misrepresentation to the purchaser) was unlawful. It is sufficient if they had actual knowledge of the ‘essential matters’ of the principal’s contravention, which are that a representation was made and that the representation was false.  

b. The quality of the accessory’s knowledge: actual rather than constructive knowledge of the falsity of the representation is required to found an accessorial liability claim. In cases of wilful blindness, an inference could be made of actual knowledge.

c. Corporate knowledge: where the accessory is a corporation, whether the knowledge of a particular individual can be imputed to the corporation may be a live issue.

d. Causation: a person may be knowingly involved in a contravention and liable in damages even if that person’s conduct was not causally connected with the contravention.

e. Identifying the right parties to sue: if the misrepresentation was contained in a disclosure document, damages may be available from, inter alia, the directors of the body making the offer (although there are defences that may be available to the directors, such as the due diligence defence).

Civil accessorial liability – equity

In equity, the two main heads of accessorial liability are the two limbs of Barnes v. Addy, which are knowing assistance in the breach of trust or fiduciary duty, and knowing receipt of trust property. Knowing receipt is discussed further below. A knowing assistance claim under Australian law has four elements: the existence of a fiduciary duty (as trustee or otherwise); a ‘dishonest and fraudulent’ breach of that duty in the sense of being morally reprehensible; knowledge of the dishonest and fraudulent breach on the part of the third party; and assistance in that breach by the third party.

To establish knowing assistance, the actions of the third-party assistant must have had ‘some causal significance’ – that is, that ‘the plaintiffs must prove that the defendants’

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17 Yorke v. Lucas (1985) 158 CLR 661 at 667–668 (Mason ACJ, Wilson, Deane and Dawson JJ). However, in a different factual context, the precise ‘essential matters’ of which knowledge must be established may be open to dispute; Lifeplan Australia Friendly Society Ltd v. Ancient Order of Foresters in Victoria Friendly Society Ltd [2017] FCAFC 74.


21 Section 729 of the Corporations Act 2001 (Cth).


24 The High Court held in Farah Constructions Pty Limited v. Say-Dee Pty Limited [2007] HCA 22; (2007) 230 CLR 89 that the level of knowledge required is at least knowledge of circumstances that would indicate the facts to an honest and reasonable person (i.e., something short of actual knowledge or wilful blindness can be sufficient to found a knowing assistance claim in equity).
conduct made a difference, in the sense that it advanced the primary breach in some way’, although English law suggests it is not necessary to establish a precise causal link between the assistance and the loss. The equitable remedies that are available if the claim is established are discussed below.

**Criminal accessorial liability for fraud**

There are also criminal consequences for an accessory to fraud. A person who, before or during the commission of the offence, intentionally encourages or assists another to commit a crime may be charged for the offence itself. To be liable, an accessory must have actual knowledge of the essential facts and circumstances of the principal offence, and must aid, abet, counsel or procure the commission of the offence.

**Claims against third parties who receive or transmit the proceeds of fraud or breach of duty**

Where proceeds of fraud or a breach of duty have been transferred to a third party, the victim may be able to recover that property from the third party or be compensated for the loss under a range of civil remedies. Establishing a proprietary interest in the misappropriated property will enable the victim to rank ahead of all other creditors in respect of that property.

**Common law remedies**

The main remedies at common law against a third-party recipient of property are actions for money had and received, and for conversion and detinue.

A detailed discussion of those remedies is beyond the scope of this chapter. However, it should be noted that the common law remedies have some notable limitations. They rely on the plaintiff establishing a legal title to property that needs vindicating, which requires being able to trace title to the property at common law. There are some common forms of mixing that will result in legal title to the property no longer being traceable. For example, if a director misappropriates company funds, pays those funds to a relative and the relative mixes the funds with his or her own funds, that will end the company’s common law chain of title.

**Equitable remedies**

Equitable remedies are broader and more flexible than common law remedies. They include declarations of ownership and constructive trust, declarations of charge, an account of profits and equitable compensation.

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27 Giorgianni v. R (1985) 156 CLR 473 at 482–483, 486–8 (Gibbs CJ), at 494–495 (Mason J), at 500, 505–506 (Wilson, Deane, Dawson JJ); 58 ALR 641; 59 ALJR 461.

28 The precise terms used for the conduct of the accessory varies among different states and territories.
Proprietary claims

Equity will recognise proprietary claims, via a constructive trust or charge, in more situations than the common law because equity will trace into mixed funds as well as into any property that is substituted for the original asset, including any proceeds of sale of the property.29 Tracing is not restricted to cases involving breach of fiduciary duty (e.g., misappropriation by a director of company funds). In Black v. S Freedman & Company, the High Court recognised a right to trace funds against a thief on the basis that stolen money is held on constructive trust by the thief. The company that was the true owner was able to trace the moneys that were paid over to the thief’s wife.30 It was not suggested that the thief’s fiduciary relationship with the company was a necessary element to the tracing claim.

Some specific issues that might arise in a proprietary claim are:

a Property transferred away: the proprietary remedies consequent on tracing do not impose any personal liability. Once the property leaves the recipient’s hands, the remedies are no longer available against that recipient.

b Bona fide purchaser for value without notice: the remedies will not be enforceable against a bona fide purchaser for value of the property without notice of the victim’s equitable interest.31

c Indefeasibility of Torrens title to land: it is generally not possible to trace into land held by a registered proprietor under the Australian Torrens title system. This is because Torrens legislation gives indefeasible title to the individual recorded as the registered proprietor of land on the Torrens register. However, title is defeasible against a person who becomes the registered proprietor of the land through fraud, or any person who derives title through them who is not a bona fide purchaser for value without notice.32

d Mixing and priority rules: complex apportionment and priority rules apply when tracing into a volunteer third-party recipient’s hands. By way of example:
  • if the recipient purchases something valuable with money withdrawn from the mixed account, the victim may be entitled to claim that property;33
  • in the event the plaintiff’s property is traced into a fund that mixes the plaintiff’s property with a third party’s property, the plaintiff and the third party will share the mixed fund in proportion to their contributions,34 with the third party having the onus to prove his or her contribution;35 and
  • in the event a third party uses the plaintiff’s money on improvements to the third party’s own assets, the plaintiff will not be able to trace into the improved asset. The plaintiff may not, in that case, have a remedy.36

e Tracing into overdrawn bank account: it is not possible to trace into an overdrawn bank account that remains overdrawn even after the misappropriated money is paid into it.

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30 (1910) 12 CLR 105 at 110 (O’Connor J).
33 Re Oatway; Hertlet v. Oatway [1903] 2 Ch 356; (1903) 88 LT 622.
34 In re Diplock; Diplock v. Wintle [1948] Ch 465 at 539, 541; [1948] 2 All ER 318.
as the money has ‘no identifiable existence after the payment’. It may be possible to trace into an account that is in credit, although occasionally overdrawn; however, this approach has been criticised.

If a plaintiff establishes a proprietary entitlement to certain assets via tracing, the court has no discretion to deny a remedy, although it may have a discretion as to which remedy is applied.

**Personal claims**

An equitable claim that imposes personal liability on the recipient is the claim for ‘knowing receipt’ under the first ‘limb’ of *Barnes v. Addy*. A detailed discussion of that claim is beyond the scope of this chapter, but in summary, where a third party receives property that has been misapplied in breach of fiduciary duty with knowledge of the breach of duty, equity will hold the third party as a constructive trustee of the property; and equity will impose on the recipient of the property the trustee’s personal obligation to restore property to the trust. If the trust property leaves the recipient’s hands, equitable compensation may be ordered against the recipient.

To illustrate how such a claim would work in the context of a director’s misappropriation of company funds (e.g., by paying them to a relative), to establish a claim against the recipient of the funds, the company would need to show:

- the recipient received trust property. The weight of authority is that the first limb of *Barnes v. Addy* applies not only to trust property in the strict sense but also property to which a fiduciary obligation attaches, for example, company property;
- the recipient knows that the property is trust property and that it is being applied in breach of trust or fiduciary duty.

The quality of knowledge the recipient must have of the breach is not conclusively settled in Australia. Recent cases suggest that

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40 Alesco Corporation Limited ACN 008 666 064 v. Te Maari [2015] NSWSC 469 at [151].
41 (1874) LR 9 Ch App 244; Consul Development Pty Ltd v. DPC Estates Pty Ltd (1975) 132 CLR 373; Farah Constructions Pty Ltd v. Say-Dee Pty Ltd (2007) 230 CLR 89.
mere knowledge of circumstances that would put an honest and reasonable person on inquiry is not sufficient, but that any of the following types of knowledge identified by Peter Gibson J in *Baden v. Société Générale* will suffice:

- actual knowledge;
- wilfully shutting one’s eyes to the obvious;
- wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make; and
- knowledge of circumstances that would indicate the facts to an honest and reasonable person.

**Criminal liability**

A third-party recipient may be criminally liable for receiving stolen property if he or she knows that the property was stolen at the time of receiving the property.

**ii Defences to fraud claims**

**Limitation periods**

The limitation period in Australia for statutory and common law claims is six years. However, in cases of concealed fraud, the limitation period will only run from the time the fraud is discovered.

For equitable claims, the position is more complex. There is no limitation period, but equity may apply a limitation period by analogy with an equivalent statutory claim. For example, directors owe both statutory and equitable duties to corporations. A six-year limitation period applies to a claim for breach of the statutory duty, and a time bar may be applied to an analogous claim for breach of the equitable duty.

**III SEIZURE AND EVIDENCE**

**i Securing assets and proceeds**

In the case of fraud, there is an obvious risk of assets that would otherwise be available to meet a judgment being moved or dissipated. A party may apply to the court for a freezing order to preserve assets in aid of a contemplated proceeding to prevent abuse of the court’s process.

An applicant seeking a freezing order will typically bring an *ex parte* application for it. To obtain a freezing order, the applicant must, *inter alia*:

- prove that judgment has been given in its favour or that it has ‘a good arguable case’ on its claim;


47 Crimes Act 1900 (NSW) Section 188; Criminal Code (NT) Section 229(1); Criminal Code (Qld) Section 433; Criminal Code (WA) Section 414; Criminal Code (Tas) Section 258; Criminal Code 2002 (ACT) Section 313; Crimes Act 1958 (Vic) Section 88(1); and Criminal Law Consolidation Act 1935 (SA) Section 134(5), 134(6).
prove by evidence that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because the relevant assets might be, for example, removed or disposed of.\textsuperscript{48} The applicant does not need to provide demonstrable proof that, in the absence of the making of an order, assets will inevitably be disposed of. Rather, the court will consider whether there is a real risk that assets will be dealt with so as to prevent the satisfaction of a judgment.\textsuperscript{49} As to evidence, in a case concerning a misappropriation of company funds by a director, evidence might be led of the director’s lack of probity. Other relevant evidence might include the respondent’s corporate structure, the nature of its assets, evidence of past disposals of assets and any evidence of an intention to transfer assets; and
c
give an undertaking as to damages.

Orders can also be sought against third parties who hold or control assets beneficially owned by a respondent (e.g., banks).

If an \textit{ex parte} freezing order is made by the court, it operates only until the first \textit{inter partes} return date. On that occasion, the applicant bears the onus of establishing why the order should continue, and the respondent will have the opportunity to argue as to why the order should be discharged.

\textbf{Asset disclosure orders}

In addition to a freezing order, the court has the power to make ancillary orders for the purpose of obtaining information about the frozen assets, or as to whether an order should be made at all. The most common type of order made is that the respondent disclose, by way of affidavit, the nature, value and location of its assets.

\textbf{ii} Obtaining evidence

\textbf{Search orders}

A party seeking to preserve evidence for use in a proceeding may apply to the court to obtain a search order.

An application for a search order is brought \textit{ex parte}. To obtain a search order, the applicant must show:

\begin{itemize}
\item[a]\textit{a} a strong \textit{prima facie} case on an accrued cause of action;
\item[b]\textit{b} that if a search order is not made, the potential or actual loss to the applicant will be serious; and
\item[c]\textit{c} sufficient evidence that the respondent possesses important evidentiary material and that there is a ‘real possibility’ that the respondent might destroy that material or cause it to be unavailable for use in a subsequent court proceeding. The requirement for showing a ‘real possibility’ of destruction of evidence will typically require evidence of fraud or dishonesty on the part of the respondent.
\end{itemize}
Some practical matters that arise in the context of a search order are:

a the court requires that the search party must include an independent solicitor, nominated by the applicant and appointed by the court to supervise and report back on the search;

b the proposed orders must list the items to which the search order will apply. Where the premises are likely to include electronic items, it is useful to include a provision requiring that the search order cover any ‘cloud’ data that are not physically held on the premises but are accessed through electronic equipment on the premises;

c the orders must also list the people who will comprise the search party. It may be necessary to include an independent computer expert who can identify, search and image electronic materials;

d the materials obtained during a search order are kept in the custody of the independent solicitor until the first inter partes return date. On the return date, the court will consider what is to be done with the seized materials and any claims of confidentiality or privilege in the materials; and

e a separate application must be brought for access to the seized materials.

**Restricted travel**

The Australian courts have jurisdiction to make orders restraining a defendant from leaving the jurisdiction and requiring the delivery up of any passports.

**Pre-action discovery and subpoenas**

Before commencement of proceedings, evidence can also be obtained by an application for pre-action discovery from the proposed defendant.

Third parties who were somehow involved in and facilitated the wrongdoing (even innocently) can be ordered to give limited discovery for the purposes of identifying the proper defendants to a proposed action (a Norwich Pharmacal order). Where a proceeding is on foot, material can be obtained from third parties by issuing subpoenas requiring the third party to produce relevant documents to the court.

**ASIC examinations**

In circumstances in which ASIC is investigating a wrongdoing, it may conduct private examinations of persons it believes can give information relevant to the matter. ASIC may then give a copy of a written record of that examination, together with a copy of any related ‘book’ (document), to a person’s lawyer if the lawyer satisfies ASIC that the person is carrying on, or contemplating, a proceeding in respect of the matter that was the subject of the investigation.\(^{50}\) Subject to some limited exceptions, the record of that examination is admissible as evidence in a subsequent proceeding against the wrongdoer.\(^{51}\)

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\(^{50}\) See Section 25 of the Australian Securities and Investments Commission Act 2001 (Cth).

\(^{51}\) See Section 76 of the Australian Securities and Investments Commission Act 2001 (Cth).
IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Banks' liabilities for forged and fraudulently made payment instructions

Where a bank makes payment under the direction of a forged cheque and debits its customer's account for the amount paid, the bank will be liable to its customer for the unauthorised payment. In the absence of a genuine signature by the drawer customer, there is no valid cheque and no mandate.\(^{52}\) The bank will almost always be found to have paid out its own money rather than the customer's, unless the customer has failed to use ordinary care to prevent cheques being forged or fraudulently altered (e.g., by leaving gaps that enable easy alteration to figures or words), or has failed to disclose to the bank any knowledge of related forgery, or is otherwise estopped from denying the cheque's validity (e.g., by making a representation ratifying the forgery).\(^{53}\)

In the event of a payment instruction that has been fraudulently made by an authorised signatory outside the signatory's authority, it would appear that a bank can, in limited circumstances, be found liable for paying under the fraudulent mandate even though the instruction appears to have been properly signed. Australian courts have recognised the existence of a duty to question a valid mandate in certain circumstances,\(^{54}\) but the precise scope of the duty is not well defined. The likely standard is that a banker should question a mandate where a reasonable and honest banker with knowledge of the relevant facts would consider that there was a serious or real possibility that the customer was being defrauded or that the funds were being misappropriated.\(^{55}\)

Money laundering

The Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)\(^{56}\) and its related Rules\(^{57}\) require financial institutions to undertake customer identification procedures, perform ongoing customer due diligence and report suspicious matters. This legislation introduced high investigatory burdens on financial institutions. As a result, behaviour that had been sufficient to protect financial institutions from a claim for money had and received may no longer be adequate. For example, banks accepting deposit instructions from a fraudster or the fraudster's agent without first checking the title to the funds have successfully maintained a defence of adverse change of position in the past,\(^{58}\) but may no longer be able to.\(^{59}\)

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52 See also Section 32(1) of the Cheques Act 1986 (Cth): a forged drawer's signature is wholly inoperative unless there is an estoppel against the person whose signature it purports to be, or the person has ratified or adopted the signature.


56 See Sections 32, 36, 41, 43 and 81–84. The federal government has indicated it is working on extending the reforms to lawyers, accountants, trust and company service providers, real estate agents and jewellers.

57 See Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (Cth), Chapter 4.


ii Insolvency
The insolvency of either the fraudster or the defrauded person can lead to additional avenues for the recovery of money or obtaining information in the wake of fraud.

Where a fraudster is made bankrupt, a trustee-in-bankruptcy has extensive powers that can be used to require the bankrupt to provide information about his or her dealings, and there are a number of claims available to the trustee-in-bankruptcy to pursue against persons to whom the fraudster transferred money. For example, transfers of property for no consideration or less than market value that took place in the five years before the commencement of the bankruptcy are void as against the trustee-in-bankruptcy as an undervalued transaction.60

Where the defrauded entity becomes insolvent, extensive information-gathering powers are available to an external administrator of that entity. For example, a liquidator of an insolvent company can apply to court for leave to conduct a public examination. The court may require a person to attend court to give evidence and be cross-examined about the corporation’s examinable affairs.

iii Arbitration

Fraud as basis for refusing to enforce a foreign award
The International Arbitration Act 1974 (Cth) provides that a court may refuse to enforce an award if it would be contrary to public policy. Unlike equivalent legislation in many other countries, the Australian statute expressly provides that fraud can render enforcement of an arbitral award contrary to public policy: the enforcement of a foreign award would be contrary to public policy if ‘the making of the award was induced or affected by fraud or corruption’.61

Court relief in support of arbitral awards
Where a plaintiff is taking steps to seek to enforce an arbitral award in its favour and the defendant has assets in Australia, one of the options that the plaintiff might consider is applying to the Australian court for a freezing order in respect of those assets if there is a risk that they would otherwise be dissipated. A decision by the Federal Court of Australia in Coeclerici Asia (Pte) Ltd v. Gujarat NRE Coke Limited62 provides an example of the Court being willing to grant a freezing order over shares owned by that company prior to enforcement of the arbitral award.

iv Fraud’s effect on evidentiary rules and legal privilege
The civil standard of proof (the balance of probabilities) applies to civil allegations of fraud. However, given the seriousness of the allegations, the tribunal of fact must be ‘reasonably satisfied’ before fraud can be found.63

60 Section 120 of the Bankruptcy Act 1966 (Cth).
61 Section 8(7A)(a) of the International Arbitration Act 1974 (Cth).
63 Briginshaw v. Briginshaw (1938) 60 CLR 336. Certain state legislation now prescribes the standard of proof in civil proceedings: See, for example, Section 140, Evidence Act 2008 (Vic).
A ‘crime and fraud’ exception applies to claims for legal professional privilege in Australia, although that tag is a misnomer. As explained by the High Court in *Commissioner of Australian Federal Police v. Propend Finance Pty Ltd*:

*Communications in furtherance of a crime or fraud are not protected by legal professional privilege, because the privilege never attaches to them in the first place. While such communications are often described as ‘exceptions’ to legal professional privilege, they are not exceptions at all. Their illegal object prevents them becoming the subject of the privilege.*

In determining whether that ‘exception’ precludes a claim for legal professional privilege being made, relevant considerations are it is the client’s state of mind that is relevant, not the solicitor’s; the exception is not limited to the actual crime or fraud itself and includes communications made to further an illegal purpose; and a mere allegation of fraud will not be sufficient, rather a *prima facie* case of fraud must be established by evidence.

### V INTERNATIONAL ASPECTS

#### i Conflict of law and choice of law in fraud claims

The applicable law for a claim arising out of fraudulent conduct or breach of fiduciary duty is the law of the place of the wrong, which is the place where the relevant conduct took place (subject to any mandatory statutes of the forum). If proceedings are brought in Australia in respect of such wrongs, this may mean there is no ability to serve process on an overseas defendant pursuant to the relevant court rules. It may also provide a basis on which an Australian court may decline to exercise its jurisdiction to hear the claim.

Determining where the wrong took place can be complex where cross-border communications are involved. The communication might be made in one country but acted on in another. The position under Australian law is that the act is committed at the place to which the communication is directed, whether or not it is acted upon there.

#### ii Collection of evidence in support of proceedings abroad

Australia has acceded to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970. Each state and territory has passed legislation that gives power to the relevant Supreme Court to make orders for the collection of evidence upon receipt of a letter of request from a foreign court. The types of orders that a court can make include ordering the attendance of witnesses for examination; ordering the production of documents; and ordering the inspection, preservation, detention or custody of any property.

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64 (1996–7) 188 CLR 501 at 556, per McHugh J.
66 *AWB Limited v. Honourable Terence Roderic Hudson Cole (No. 5) [2006] FCA 1234*.
iii Seizure of assets or proceeds of fraud in support of the victim of fraud
Where there is sufficient prospect that a foreign court will give judgment in favour of a plaintiff in a foreign proceeding, and that judgment will be registered or enforced in an Australian court, the Australian court has jurisdiction to make a freezing order against the prospective judgment debtor and its assets in Australia.70

iv Enforcement of judgments granted abroad in relation to fraud claims
Judgments obtained abroad for matters such as fraud or breach of fiduciary duty can be enforced in Australia in the same way as any other judgment. There are, however, various criteria that must be met before a foreign judgment can be enforced in Australia.

The statutory scheme
The Foreign Judgments Act 1991 (Cth) provides a statutory scheme for the recognition and enforcement of judgments from various foreign countries with which Australia has made reciprocal arrangements.71 The Australian court will register the judgment at any time within six years of its date if the following requirements are met: the judgment must be final and conclusive; the judgment must be for a sum of money (punitive damages are not excluded from registration, although judgments for taxes, fines and penalties are excluded); and the judgment cannot be registered if it has been wholly satisfied or it could not be enforced in the country of the original court.

The common law scheme
At common law, there are four well-established requirements for the recognition and enforcement of foreign judgments in personam:

a the foreign court must have exercised jurisdiction over the judgment debtor that Australian courts will recognise;

b the foreign judgment must be final and conclusive;

c there must be an identity of parties; and

d the foreign judgment must be for a certain sum.

Subsequent enforcement steps
Once a judgment against a corporation is entered or recognised in Australia, it is commonly enforced by issuing a statutory demand to the corporation. If the corporation fails to pay the debt or have the demand set aside, the judgment creditor is entitled to bring proceedings to have the corporation wound up in insolvency.

Possible enforcement steps against individuals include petitioning for bankruptcy, serving an examination notice, obtaining a writ of execution, obtaining a garnishee order or obtain a charging order over property owned by the judgment debtor.

71 As specified in the Foreign Judgments Regulations 1992 (Cth).
v  Fraud as a defence to enforcement of judgments granted abroad

A judgment will not be enforceable in Australia if the defendant is able to establish that the judgment was obtained by fraud. The principles that the court will apply when a plaintiff alleges fraud as a basis for resisting enforcement of a judgment include the following:  

\( a \)  the party asserting fraud must show that there has been a discovery of fresh facts that would provide a reason for setting aside the judgment;  

\( b \)  mere suspicion of fraud is not sufficient. The party asserting fraud must establish that the new facts are so material that it is reasonably probable that the action will succeed. The proof of the facts should be clear and cogent such as to induce, on a balance of probabilities, an actual persuasion of the mind as to the existence of the fraud;  

\( c \)  proof of perjury by a witness in the original proceeding will not of itself be sufficient. The plaintiff will need to establish that the defendant knew the true state of affairs and knowing it, called a witness to give a false and perjured account; and  

\( d \)  it must be shown that the successful party was responsible for the fraud that taints the judgment under challenge.

Having regard to the public interest in finality of litigation, resisting the enforcement of a judgment on the basis of an alleged fraud is not straightforward. Further, if the alleged fraud was known at the time of the original proceedings or raised in those proceedings, it seems likely that an Australian court would hold that estoppel prevents the alleged fraud being raised at the time of enforcement.

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72 See *Wentworth v. Rogers* (No. 5) (1986) 6 NSWLR 534.  
75 See M Davies, AS Bell and PLG Brereton, *Nygh’s Conflict of Laws in Australia* (2013) at [40.65].
Chapter 3

BAHAMAS

Sean N C Moree, Michelle I Deveaux and Knijah Knowles

I OVERVIEW

The Commonwealth of the Bahamas is an archipelagic nation situated south-east of the United States. Blessed with crystal blue waters, white sandy beaches and tropical temperatures, the Bahamas has long been acknowledged for its vibrant tourism industry. In addition to tourism, the Bahamas has earned a reputation as a compliant and transparent offshore financial services jurisdiction, frequently utilised by successful companies and high-net-worth individuals seeking investment and wealth management advice, and tax and estate planning opportunities. Maintaining the trust and confidence of financial institutions around the globe, specifically those in the banking, investment and trust businesses requires a flexible legal infrastructure capable of adjudicating complex disputes, and a statutory and common law framework capable of protecting the rights of those doing business within the jurisdiction, both of which the Bahamas boast.

The Bahamas is a former colony of Britain; as such, much of its law, except where codified, modified or replaced by statute, is based, to a large extent, on the common law of England. While Bahamian courts are not bound by decisions of the English courts, decisions emanating from England and other Commonwealth jurisdictions represent persuasive authority. The Privy Council, composed of judges from the United Kingdom, serves as the highest appellate court of the Bahamas. As a result, Bahamian courts are bound by decisions of the Privy Council.

With the growth of its financial services industry, the Bahamian legislature and judiciary have developed a comprehensive legal regime to combat fraudulent activity. Below we will examine the various remedies available to those who are the victims of fraud, the procedures for accessing these remedies, and recent legal developments both in the Bahamian courts and in statutes enacted by the Bahamian Parliament.

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1 Sean N C Moree is a partner, Michelle I Deveaux is a senior associate and Knijah Knowles is an associate at McKinney Bancroft & Hughes.
2 Section 2 Declaratory Act 1799, Chapter 2, Statute Laws of The Bahamas.
3 This relates specifically to actions that originate from the Bahamas and those that relate to common law principles.
4 On 25 May 2018 the Bahamian Anti-Money Laundering legislation was repealed and replaced with a new Financial Transactions Reporting Act and a new Proceeds of Crime Act aimed at establishing and strengthening procedures that conform with international standards of risk assessment, fraud reporting and asset recovery.
II LEGAL RIGHTS AND REMEDIES

Both Bahamian statute and the common law recognise a number of rights and provide various remedies for obtaining redress against fraud. While the requisite elements of fraud are well settled, the causes of action that have developed over time to address fraudulent conduct reflect the dynamic nature of fraud: fraudulent disposition claims, fraudulent misrepresentation and deceit, conversion, breach of trust, constructive trusts and unjust enrichment. Third parties to a fraud may also be held liable for unlawful means conspiracy, lawful means conspiracy, dishonest assistance and knowing receipt. Criminal offences with fraudulent elements include theft, fraudulent breach of trust and dishonest appropriation.

i Civil liability and remedies

Fraudulent dispositions

To protect against the deliberate disposition of assets to avoid creditors’ claims (such as judgment debts) the Fraudulent Dispositions Act 1991 (FDA) vests creditors with the statutory right of action to recover property that has been disposed of ‘with the intent to defraud’.

The FDA is a unique enactment with far-reaching effect as it relates to both actual and contingent liabilities and gives the court jurisdiction over dispositions made whether or not the property is situated in the Bahamas.

Should the court find the transferee or any predecessor to be a bona fide purchaser, the FDA empowers the court to vest the transferee with a first charge on the property for the amount of costs incurred in defending the claim to set aside the disposition. Section 4(3) of the FDA, a highly controversial provision, extinguishes the creditor’s right of action unless the claim is brought within two years of the disposal of the property.

Fraudulent misrepresentation and deceit

Claims of fraudulent misrepresentation (also known as deceit) often arise in respect of contractual relationships where that party has been induced by deliberately false representations on which they rely. If it can be shown that (1) a representation was made knowingly without belief in its truth, or recklessly as to whether it be true or false, and (2) the reliance on that representation was justifiable, the court may order that the property be restored to the owner.

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5 Sections 4 and 5 of the FDA.
6 Such a disposition is voidable and liable to be set aside if the creditor can prove that the transferor’s intention was to wilfully defeat an obligation due to that creditor that existed prior to the disposition and of which the transferor had actual notice. The creditor must also prove that the transferee either provided no consideration for the disposition or the consideration was significantly less than the value of the subject property.
7 Section 2 of the FDA in relation to the definition of ‘obligation’.
8 Section 3 of the FDA.
resulted in damage, a claim for fraudulent misrepresentation is sustainable.\textsuperscript{10} The more grave the allegations of fraudulent misrepresentation, the higher the probability required to be met by a plaintiff in satisfying the standard of proof on a balance of probability.\textsuperscript{11}

\textit{Conversion}

Conversion is established by proving that a wrongdoer has taken property with the intent of exercising rights that are inconsistent with the true owner's right of possession. In the event that liability is established, damages will reflect the value of the property at the time of conversion and may include, if pleaded, compensation for loss of profits. The House of Lords\textsuperscript{12} has now settled that conversion can only apply to tangible property and will not apply to claims for the loss of contractual rights or a chose in action.\textsuperscript{13}

\textit{Constructive trusts}

A constructive trust is an equitable remedy imposed by a court to benefit a party that has been wrongfully deprived of its rights.\textsuperscript{14} Bahamian courts have adopted principles of English law in the finding and recognition of a constructive trust where property has been dealt with in an unconscionable manner, such as profiting from unlawful acts or unauthorised dealings by a fiduciary.\textsuperscript{15} An example of this is the Bahamian case of \textit{Elliott v. Associated Bahamian Distillers Autos, Brewers Ltd.}\textsuperscript{16} There the court found that where a company purchased certain preference shares with monies from an employee pension plan, contrary to the provisions of the trust, that company will be considered a constructive trustee of the dividends of those shares. The court further found that it could impute to the company the knowledge of the trust where the company that held the plan and the company in which the preference shares were bought shared a common director.\textsuperscript{17}

\textit{Unjust enrichment}

A cause of action in unjust enrichment arises when the defendant acquires an interest or value in assets that benefits him or her at the expense of the plaintiff in circumstances where


\textsuperscript{12} The House of Lords is now referred to as the Supreme Court.

\textsuperscript{13} See \textit{OBG v. Allan} [2008] 1 AC 1.

\textsuperscript{14} The deprivation must be due to a person obtaining a legal proprietary right that they should not possess.


\textsuperscript{16} Ibid.

\textsuperscript{17} Ibid.
it is unjust that the defendant be permitted to retain the assets or value. This often applies to a transfer of interest or value by mistake, but may also apply to instances of fraudulent misrepresentation or deliberate misappropriation of assets.18

**Remedies available against third party**

*Conspiracy*

A victim of fraud may also obtain remedies against one or several third-party wrongdoers on the ground of conspiracy. This may take the form of lawful means conspiracy or unlawful means conspiracy. Both torts require proof of an agreement between two persons calculated to injure the economic interests of another person. In *The Central Bank of Ecuador and others v. Ansbacher (Bahamas) Limited and others*19 the court held that the tort of unlawful means conspiracy could not be sustained on evidence that directors had acted under an honest mistake as to the worth of investments.20 The evidence of the loss and damage is integral to establishing both categories of tort.21

*Dishonest assistance*

A third party who assists in a breach of trust may be liable for the tort of dishonest assistance22 if it can be shown that by an objective standard he or she had knowledge that participation in the transaction was contrary to acceptable standards of honesty. Acting in reckless disregard for the rights or possible rights of the beneficiaries can amount to dishonesty.23 The elements of dishonest assistance are often complex and specific to the case before the court. The objective test set out in *Barlow Clowes International Ltd (In Liquidation) v. Eurotrust International Ltd*24 clarified the often confusing ratio of the House of Lords decision in *Twinsectra Ltd v. Yardley*,25 which introduced elements of subjectivity.26 This test holds liable all actors involved in the

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18 In the case of *Villeneuve and another v. Gaillard and another* [2011] 3 BHS J No. 127 the Privy Council on appeal from the Bahamian court considered the compensation applicable on a claim for unjust enrichment in relation to the sale of shares at an inflated price, procured by an investment manager pursuant to a fraudulent misrepresentation. It must also be noted that unless there is a defence to the claim, the equitable remedy of restitution will often require the return of the value or asset (if it can be retransferred) or create an obligation to repay.


20 Cf. with *Total Network SL v. Revenue Customs Commissioners* 2008 All ER (D) 160 (HL) the unintentional consequence of injury is sufficient to prove the tort.

21 Following the decision in *Central Bank of Ecuador et al v. Conticorp* [2015] UKPC 11, the Bahamian court recently found in *III Dune Capital Partners 7 Inc. v. Bay Spring International Ltd. and others* [2017] 1 BHS J No. 99 that it is a legal impossibility for companies having common directors to conspire with each other.

22 Previously formulated as knowing assistance. See *Selangor United Rubber Estates v. Graddock* (1968) 1 WLR 1555.


26 See Lord Hoffmann Decision: ‘Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant’s mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree.’
trustee’s misappropriation of trust assets and will extend even to those who are professional advisers of the trustee in circumstances where their dishonest acts result in the dissipation of trust property.

**Fraudulent preference**

The court has the power to set aside as invalid a transfer made by a company that is insolvent and unable to pay its debts where the transfer was intended to give a creditor preference over others or was made with the intent to defraud its creditors.\(^{27}\) Where a fraudulent preference payment is discovered during winding up proceedings, there is no need to commence a separate action to seek a declaration or clawback of assets transferred as a result of a suspected fraudulent preference.\(^{28}\)

**Tracing**

Tracing is a process that precedes the grant of a remedy for recovery of assets dissipated or transferred as a result of fraudulent dealings. The jurisdiction is often utilised in tandem with or for the purpose of facilitating an equitable right to the property or assets being traced. The object is to assert equitable or proprietary rights in traceable proceeds by showing that the value of the asset was used to acquire another or a series of other assets.\(^{29}\)

**Criminal liability and remedies**

The intent to defraud is defined in the Penal Code as the intent to cause any gain or possibility of gain at the expense of another by means of forgery, falsification or other unlawful acts.\(^{30}\) The Bahamian Penal Code governs fraudulent conduct through several provisions that create criminal offences such as obtaining by false pretences,\(^{31}\) stealing or theft,\(^{32}\) fraudulent breach of trust,\(^{33}\) dishonestly receiving\(^{34}\) and dishonest appropriation.\(^{35}\)

\(^{27}\) The transfer must have occurred within six months of a liquidation. In respect of companies, see Section 241 Companies Winding UP Amendment Act 2011, Section 239 in respect of offences of officers with intent to defraud creditors, and in respect of international business companies, Section 160 of the International Business Companies Act.

\(^{28}\) AWH Fund Limited (In Compulsory Liquidation) v. ZCM Asset Holding Company (Bermuda) Limited [2017] 1 BHS J No. 47.

\(^{29}\) See Federal Republic of Brazil and another v. Durant International Corp and another [2016] AC 297, in which the Privy Council cautioned against the expansion of the remedy as an equitable proprietary claim.

\(^{30}\) Section 17 of the Penal Code, Chapter 84, Statute Laws of The Bahamas.

\(^{31}\) Where a defendant makes representations as to a state of facts known by him or her to be untrue. See Section 144 of the Penal Code.

\(^{32}\) The offence is established where one dishonestly appropriates a thing of which he or she is not the owner. See Section 45 of the Penal Code. Proving embezzlement of money by a trustee is difficult, as it must be proven that either the trustee admitted the appropriation was dishonest or he or she concealed or absconded with the asset or the proceeds refusing to disclose the same according to his or her duty. See Section 57 of the Penal Code.

\(^{33}\) The offence is established if a person dishonestly appropriates an asset, the ownership of which is vested in him or her as trustee. See Section 48 of the Penal Code.

\(^{34}\) The offence is established if a person receives anything of value that he or she knows to have been obtained by commission of an offence. See Section 148 of the Penal Code.

\(^{35}\) This is an appropriation made without a claim of right and with the knowledge or belief that the appropriation is without the consent of the owner or of the person for whom the person appropriating acts as trustee. There is no need to prove actual knowledge of the identity of the owner but rather it would
Defences to fraud claims

Waiver

The common law defence of waiver by affirmation arises when it can be proven that the plaintiff was aware of, or agreed to, a state of affairs that the plaintiff knew to be untrue yet expressly waived, either by word or conduct, any liability arising therefrom.

Limitation

The general limitation period applicable to actions in contract, tort or upon breach of trust is six years from the date of accrual of the cause of action. Actions founded on a deed carry a 12-year limitation period. On an action for fraud or mistake, the limitation period does not begin to run until the fraud, mistake or the deliberate concealment of it has been discovered or could, with reasonable diligence, have been discovered. An action shall not be brought in relation to a judgment after six years from the date on which the judgment became enforceable. On actions against a trustee for fraud or fraudulent breach of trust, there is no limitation period.

Change of position

Change of position is a defence exclusive to third-party unjust enrichment claims. It cannot be utilised to defend against claims of knowing receipt and will only succeed where a full and frank account of the dissipation of assets is given. The court must be satisfied that at the time of trial, the position of the defendant has in good faith changed to his or her detriment, so that it would be inequitable to require him or her to make restitution.

Illegality and public policy

The doctrine of illegality does not permit a party to benefit from his or her own wrongdoing. Public policy also affords a defence to fraud claims where the claims cannot be founded on an illegal act. In the Bahamas, the defence will fail unless strictly pleaded and proven.

suffice that the accused had reason to believe that some person other than himself or herself had a certain or uncertain interest in the property whether as owner or in some other manner. This certainly accounts for the interest of a beneficiary, a bailee or person holding title less than ownership. See Section 49 of the Penal Code.

The UK Court of Appeal has ruled that the defence cannot vitiate the effect of the provisions of the UK Misrepresentation Act. However, because of the absence of a similar statute in the Bahamas, the defence still exists in the Bahamas.

Section 5(1), Limitation Act, Chapter 83, Statute Laws of The Bahamas (Limitation Act); Section 33 Limitation Act in respect of breach of trust claims.

Section 5(2) Limitation Act.

Section 41(1) Limitation Act.

Section 41(2) Limitation Act.

Section 5(3) Limitation Act. See the recent decision in Perfect Luck Investments Limited et al v. CTF BM Holding Ltd. et al. [2017] 2 BHS J No. 122, which calls into question the decision in Bahamas Commonwealth Bank v. Lewis (1996) BHS J No. 96, which was decided prior to the House of Lords decision of Lowsley v. Forbes (1999) AC 239.

Section 33(1) Limitation Act.


III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Mareva injunctions

Mareva injunctions\(^{45}\) or freezing orders, remain the primary mechanism available to secure assets or the proceeds of fraud pending the determination of court proceedings.

The jurisdiction of Bahamian courts to grant Mareva injunctions emanates from Section 21(1) of the Supreme Court Act.\(^{46}\) The criteria to successfully obtain a Mareva injunction is well settled, specifically:

\(a\) a substantive cause of action against the defendant;\(^{47}\)

\(b\) a ‘good arguable case’ against the defendant;\(^ {48}\)

\(c\) a real risk exists of dissipation of assets as a result of unjustifiable conduct; and

\(d\) where the application is \textit{ex parte}, the applicant must give full and frank disclosure.\(^{49}\)

In addition to the aforementioned, the court will take into consideration the strength of the applicant’s case and whether it is ‘just and convenient’ to grant the injunction.\(^{50}\)

To protect defendants against losses suffered as a result of an injunction should the plaintiff’s claim be unsuccessful, an applicant seeking a Mareva injunction must be willing to give an undertaking in damages to the court.\(^{51}\)

It is now settled that in the Bahamas there is no entitlement to a free-standing injunction; an applicant must have an underlying cause of action and file proceedings in the Bahamas prior to or contemporaneous with the application for a Mareva injunction.\(^{52}\) Where the need for the injunction is urgent, an application can be made for injunctive relief \textit{ex parte}\(^{53}\) (i.e., without notice to the defendant), but this should only be done in circumstances of last resort.

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45 Named after the case \textit{Mareva Compania Naviera SA v. International Bulk carriers SA} [1975] 2 Lloyd’s Rep 509, in which the first injunction of this kind was made.

46 Chapter 52, Statute Laws of The Bahamas, Section 21(1). The court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.


48 Ibid.

49 The procedure governing the application is set out in Order 29 of the Rules of the Supreme Court (RSC).

50 See footnote 47.


53 Order 29 RSC.
Once an injunction is obtained, it is incumbent on the plaintiff to press on with the action as rapidly as possible, as delay in the prosecution of the action is a ground for discharge of the injunction.\(^54\) The Privy Council case of *Walsh v. Deloitte*\(^55\) confirmed that Bahamian courts have supranational jurisdiction to grant *Mareva* injunctions.\(^56\)

**ii  Obtaining evidence**

**Anton Piller injunction**

*Anton Piller* orders allow an applicant to search specific premises for documentation essential to the applicant’s case in appropriate circumstances.\(^57\) The criteria necessary to obtain an *Anton Piller* order have not substantially changed since its inception in 1976.\(^58\) An applicant must establish:

- \(a\) an extremely strong *prima facie* case on the merits of the underlying dispute;
- \(b\) conduct or activity by the defendant that results in very serious potential or actual harm to the claimant’s interests;
- \(c\) clear evidence that the defendant has in his or her possession incriminating documents or materials; and
- \(d\) a real possibility that those documents or materials may be destroyed before an application could be issued on notice.

The order will only be made when there is no alternative means or mechanism of ensuring that justice is done for the plaintiff.\(^59\) If it is possible to obtain the required documents by other means, alternate avenues should be explored prior to any application for an *Anton Piller* order.

**Discovery**

Order 24 of the Rules of the Supreme Court (RSC) governs the ability of parties to proceedings to inspect any non-privileged documents ‘which are or have been in the possession, custody or power of the parties and relate to the matters in question in the action’. While discovery

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\(^{54}\) See footnote 47, at para. 26.

\(^{55}\) [2001] UKPC 58.

\(^{56}\) See para. 9: ‘The Bahamas legislature has not enacted the equivalent of subsection (3) of section 37, which gives the court express power to grant *Mareva* relief in respect of assets within the jurisdiction, whether or not the defendant is “domiciled, resident or present” within that jurisdiction. Nevertheless, their Lordships consider that the jurisdiction to grant such relief in respect of assets within or without the jurisdiction and against residents or foreigners was well established in England before the 1981 Act was passed: see *Third Chandris Shipping Corporation v. Unimarine S.A.* [1979] QB 645 and *Barclay-Johnson v. Yuill* [1980] 1 WLR 1259 (jurisdiction against residents) and *Derby & Co Ltd. v. Weldon* [1990] Ch. 48 (worldwide restraints). The courts of the Bahamas have a similar jurisdiction.’

\(^{57}\) Typically the application is made *ex parte*.

\(^{58}\) See *Anton Piller KG v. Manufacturing Processes* [1976] Ch. 55.

\(^{59}\) Ibid. at page 783 per Lord Denning, at paras. (e) and (f), ‘such an order can be made by a judge *ex parte*, but it should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties; and when, if the defendant were forewarned, there is a grave danger that vital evidence will be destroyed, that papers will be burnt or lost or hidden, or taken beyond the jurisdiction, and so the ends of justice be defeated; and when the inspection would do no real harm to the defendant or his case’.
and inspection can be ordered at any time, it is generally conducted after the close of pleadings. This process is facilitated through the exchange of a list of documents by each party to the action followed by an inspection of the documents listed therein. Where a document that is not included in the list of documents is sought by a party, Order 24 Rule 7 RSC allows a party to apply to the court for an order requiring the opposing side to indicate whether the document is in its possession or control.

**Third-party orders**

**Norwich Pharmacal order**

These orders compel third parties with no direct nexus to the dispute, who inadvertently become involved in the wrongdoing of another party, to disclose pertinent information in their possession. The jurisdiction to grant such orders is only exercised by the courts when they are satisfied that it is absolutely necessary.

To be successful, an applicant must establish that:

- a wrong has been carried out, or an argument can be made that a wrong has been carried out, by an ultimate wrongdoer;
- the third party has information required to enable action to be brought against the ultimate wrongdoer; and
- the person against whom the order is sought (1) assisted in facilitating the wrongdoing (albeit unknowingly); and (2) is able, or is likely to be able, to provide the information necessary to enable the ultimate wrongdoer to be sued.

**Bankers Trust order**

These orders are very similar to Norwich Pharmacal orders but relate specifically to compelling a bank to disclose information normally protected by client confidentiality. To obtain a Bankers Trust order an applicant must, inter alia, establish clear evidence of fraud, be willing to give an undertaking in damages to the bank, and undertake not to use any information disclosed for collateral purposes.

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60 See Order 24 rule 7 RSC.

61 *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] AC, 133, 175 per Lord Reid, ‘that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should cooperate in righting the wrong if he unwittingly facilitated its perpetration.’

62 *Ashworth Hospital Authority v. MGN Ltd.* [2002] 1 WLR 2033 HL.


64 *Bankers Trust Co v. Shapira and others* [1980] 3 All ER 353.

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IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Banking

The relationship between bankers and customers in the Bahamas is primarily contractual and commences upon the opening of the bank account. It is an implied term of any banking contract that the bank will keep its customers’ information confidential. A bank can only legally disclose customer information where (1) it is required by law to do so; (2) it has a public duty to do so; (3) it is in the bank’s own interests to require disclosure; or (4) the customer consents to the information being disclosed.

Having set out the duties of the bank, it is the customer’s duty when issuing a cheque to avoid doing so in a manner that facilitates fraud. It is a customer’s further duty to inform the bank as soon as he or she is aware of any fraudulent activity on his or her accounts.

Money laundering

On 25 May 2018, a new Proceeds of Crime Act (POCA) came into force, which expanded the offence of money laundering to include situations where a person ought to reasonably have suspected that, ‘he has entered, or is entering into an arrangement which facilitates, by whatever means, the acquisition, retention, use, concealment or the control of proceeds of crime by or on behalf of another person’.

In conjunction with the enactment of the POCA, a new Financial Transactions Reporting Act was enacted, which expanded the categories of entities considered financial institutions, thereby expanding the amount of businesses required to report suspicious transactions.

ii Insolvency

Insolvency proceedings are governed by a suite of legislation that include various provisions aimed at countering fraudulent conduct in the event that a company becomes insolvent. The

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65 Breach of any of the terms contained in the contract follow the normal course of civil proceedings.
67 Ibid. at page 473. See also the Financial Transactions Reporting Act, which sets out particular instances where banks are required to report customer information to the Central Bank of the Bahamas. Section 19 Banks and Trust Companies Regulation Act, Chapter 316, Statute Laws of The Bahamas.
69 Ibid.
70 See discussion below in Section VI.
71 Section 10 Proceeds of Crime Act, No. 4 of 2018.
72 Under the revised Act, the requirement to conduct customer due diligence, when establishing new business relationships remains along with the requirement to report suspicious transactions if they arise.
Companies (Winding Up Amendment) Act 2011 provides specific protection for companies against fraud where it is anticipated the company will be wound up. Sections 228–233 deal with offences of fraud and general provisions, covering the following scenarios:

- fraud in anticipation of winding up;
- attempts to defraud creditors on wind up;
- misconduct of officers, directors and professional service providers; and
- material omissions from company statements of affairs.

A key element required in all the aforementioned offences is that there must be an intention to defraud.

### iii Arbitration

Section 90 of the Arbitration Act, provides that an arbitral award may be set aside on the basis of a serious irregularity, which includes arbitral awards secured by fraud. The procedure for doing so is by application to the Supreme Court. The threshold that must be met to establish that the arbitral award was secured as a result of fraud is high; it is not sufficient to show that one party inadvertently misled the other, however carelessly.

### iv Fraud’s effect on evidentiary rules

In civil proceedings, allegations of fraud must be specifically pleaded in the statement of claim or counterclaim. It is not permissible to leave fraud to be inferred from the facts of a case, nor is it permissible to set out vague or general allegations of fraud within a statement of claim. When alleging fraud, a plaintiff must clearly prove the facts on which it is asserted that the fraud arises. Failure to specifically plead, particularise or set out the grounds on which fraud is alleged is a basis for the striking out of a claim.

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74 Section 228 of Companies (Winding Up Amendment) Act 2011.
75 Section 229 of Companies (Winding Up Amendment) Act 2011. The opposite position is canvassed by Section 262 of the Companies Act, which makes void any property dispositions made with the primary purpose of preferring one creditor over the other.
76 Section 230 of Companies (Winding Up Amendment) Act 2011.
77 Section 231 of Companies (Winding Up Amendment) Act 2011.
78 Section 90(1) Arbitration Act, No. 52 of 2009.
79 ‘There must be some form of dishonest, reprehensible or unconscionable conduct that has contributed in a substantial way to obtaining the award. The authorities are unclear as to whether these adjectives are all disjunctive or whether reprehensible or unconscionable conduct is more accurately seen as another way of describing dishonest conduct.’ See Celtic Bioenergy Ltd. v. Knowles Ltd. [2017] EWHC 472 (TCC) at para. 67.
80 Order 18 rules 8 and 12 of the Rules of the Supreme Court.
V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

The Bahamian court will assume jurisdiction of a matter where a foreign defendant is personally served with process within the jurisdiction or voluntarily submits to the jurisdiction of the court. Where it is necessary to serve a foreign defendant out of jurisdiction, leave of the court is normally required unless leave is not required by virtue of statutory provision. In a recent judgment of the Bahamian Supreme Court, this exception was held to apply to claims relating to trusts governed by Bahamian law.

ii Collection of evidence in support of proceedings abroad

The Evidence (Proceedings in Other Jurisdictions) Act facilitates the production of evidence within the Bahamas for use in foreign proceedings. The application for this relief is made to the Supreme Court in pursuance of a request by or on behalf of the foreign court in which the civil proceeding has been instituted. On receipt of the application the Supreme Court is empowered to make any order necessary to give effect to the request, inclusive of an order for the examination of witnesses, the production of documents, preservation and detention of property and the medical examination of any person. The procedure for application is governed by Order 65 RSC. The Mutual Legal Assistance (Criminal Matters) Act governs the taking of evidence in aid of criminal proceedings in a foreign court.

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

The POCA provides for the seizure or forfeiture of assets or proceeds of fraud and empowers the court, among other things, to obtain disclosures of information, and to restrain and confiscate property. Any assets or funds that are the subject of any of the aforementioned provisions of the POCA are paid into the Confiscated Assets Fund. The POCA does provide for victims of fraud to receive payments from the Confiscated Assets Fund as compensation for any losses suffered as a result of the fraud. The POCA also authorises payments to third parties with an interest in confiscated assets.

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84 This is normally achieved by entry of an appearance to the action.
85 Order 11 rule 1(2) RSC.
86 RTL v. ALD and others [2014] 3 BHS J No. 83.
87 Chapter 66, Statute Laws of The Bahamas.
88 See Sections 3 and 4 Evidence (Proceedings in Other Jurisdictions) Act.
89 Section 8 Evidence (Proceedings in Other Jurisdictions) Act. Order 65 of the Rules of the Supreme Court provides that the application is made ex parte (see Order 65 rule 2) and supported by way of affidavit. The examination of any witnesses is done in accordance with Order 39 rules 5–10 and 11(1)–11(3) (see Order 65 rule 4(2)).
90 Chapter 98, Statute Laws of The Bahamas. The request is made to the Attorney General as the competent authority under the Act.
91 See Section VI for further details.
92 Sections 18, 19 POCA 2018.
93 Sections 24, 25 and 26, in respect of international requests, and Sections 33–44, on confiscation and recovery orders, POCA 2018.
94 Established by Section 52 of the 2000 Proceeds of Crime Act.
95 Section 91(2)(a) POCA 2018.
96 Section 91(2)(d) POCA 2018.
iv Enforcement of judgments granted abroad in relation to fraud claims

Foreign judgments may be enforced in the Bahamas by way of registration or by suit. The statutory procedure available under the Reciprocal Enforcement of Judgments Act 1999 provides the basis for registration of certain foreign judgments as a preliminary step to their enforcement in the Bahamas. This only applies to judgments obtained in jurisdictions with which the Bahamas has reciprocal enforcement treaties. There are currently 10 such jurisdictions.98

Alternatively, a judgment creditor who is entitled to be paid a money judgment under a foreign court order may commence an action or make a counterclaim based on the foreign judgment, or may rely on the foreign judgment by way of defence. A successful action brought in respect of the foreign judgment will entitle the judgment creditor to enforce the foreign judgment debt, as if it were a judgment made by the courts of the Bahamas.99

v Fraud as a defence to enforcement of judgments granted abroad

No judgment shall be registered or enforced in the Bahamas if it has been obtained by fraud.100 If it should be discovered that a foreign judgment that was registered was obtained by fraud, the recognition will be set aside.

VI CURRENT DEVELOPMENTS

i Legislation

The POCA was a substantial overhaul of the statute it repealed.101 The noteworthy additions include:

a Part V, which is entitled Non-Conviction-Based Civil Forfeiture, allows the Crown to apply for standard civil orders (e.g., freezing orders and property seizure orders) in proceedings where it is asserted that an entity or person is in possession of or has benefited from the proceeds of crime.

b Part VI, entitled Cash and Personal Property, enables ‘cash or personal property which is, or represents, property obtained through unlawful conduct, or which is intended to be used in unlawful conduct, to be forfeited in civil proceedings before the Court’.

c The granting of an order for civil forfeiture, which is defined as, ‘an order in rem, granted by the Supreme Court in the exercise if its civil jurisdiction to forfeit to the Crown property that is or represents proceeds or instrumentalities or terrorist property’.102 The burden of proof on the application is on the balance of probabilities and the property

98 Barbados, Bermuda, Jamaica, Leeward Islands, St Lucia, Trinidad and Tobago, British Guiana (now Guyana), British Honduras (now Belize), Australia and the United Kingdom; see Application of Act Order under Section 6 of the Reciprocal Enforcement of Judgments Act, Chapter 77, Statue Laws of the Bahamas.
100 Section 3(2)(d) Reciprocal Enforcement of Judgments Act.
101 Various aspects of fraud are criminalised in the Penal Code. Section 350 criminalises the falsification of company accounts and records with the intent to defraud. The fraudulent concealment of documents in mortgage actions is criminalised by Section 355 of the Penal Code. Obtaining credit facilities by way of fraud is canvassed by Section 352 of the Penal Code. Similarly, see Section 353 of the Penal Code for money lending by false pretences.
102 Section 50(1) POCA 2018.
subject to the forfeiture order must be within the Bahamas. It is not necessary to show that the property was derived directly or indirectly, in whole or in part, from a particular criminal offence or that any person has been charged in relation thereto. It is only necessary to establish that the property in question is comprised of proceeds from a criminal offence.

The court may make an order freezing property where it believes the same to be the proceeds of crime. Applications can be made ex parte and heard in camera. The court need only be satisfied that there are reasonable grounds to believe the property or part thereof are the proceeds of crime. Where a property freezing order would not be appropriate, the POCA allows for the grant of a property search and seizure order.

Any person who asserts an interest in any of the properties covered by the above orders and seeks to oppose the grant of the civil forfeiture order or exclude their interest must file an appearance in the action in accordance with the RSC. If the court is satisfied on a balance of probabilities that the property is indeed the proceeds of a crime but the owner of the property is a legitimate owner, the court may take any steps it considers necessary to protect the legitimate owner’s interests.

As POCA is only two months old, there are no reported cases dealing with the operation of the newly enacted provisions. The powers contained in the POCA raise interesting questions about the priority of claims, specifically where a creditor is seeking damages. For instance, if a creditor is seeking damages relating to a fraudulent preference claim in tandem with the Crown seeking the forfeiture of assets, will the Crown’s claim prevail over that of the creditor?

ii Case law

**AWH Fund Limited (in Compulsory Liquidation) v. ZCM Asset Holding Company (Bermuda) Limited SCCiv App No. 256 of 2014**

The pertinent facts of the case are straightforward. The liquidator of AWH believed a payment to the respondent to be a fraudulent preference. A summons was filed seeking a declaration that (1) the payment was an undue or fraudulent preference payment and therefore invalid within the meaning of Section 160 of the International Business Companies Act 2000 (the IBC Act), (2) the former directors of the company were guilty of misfeasance or breach of

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103 Section 50(2) POCA 2018.
104 Section 50(3) POCA 2018.
105 Section 50(3) POCA 2018.
106 Section 51 POCA.
107 Section 51(5) POCA 2018.
108 Section 53(1)(a) POCA 2018.
109 Section 54(5) POCA 2018.
110 Section 55 POCA 2018. Similar powers are promulgated in Part VI of the Act with particular reference to the search, seizure or freezing of cash and personal property obtained as a result of unlawful conduct; unlawful conduct being described as any act that is unlawful under any law in the Bahamas that occurs outside the Bahamas and is unlawful under the law of that jurisdiction (see Section 63(1) POCA 2018). Interestingly, it is the magistrate’s court that decides on a balance of probabilities whether the conduct alleged constitutes unlawful conduct (see Section 63(2) POCA 2018).
trust by allowing the payment. A subsequent *ex parte* summons was filed seeking leave of the court to serve the summons out of the jurisdiction. The registrar granted leave, which was subsequently set aside by a judge of the Supreme Court.

Two issues were before the Court of Appeal:

a. whether the liquidator’s application pursuant to Sections 160 and 161 of the IBC Act for declarations in respect of the suspected fraudulent preference, suspected misfeasance or breach of trust of the company’s former directors are a part of the winding up process such that they can (as the appellant submitted) be properly prosecuted within the course of ongoing winding up proceedings simply by issuance of an interlocutory summons, or whether such claims ought properly (as the respondent contended) to be commenced by an originating process, such as a writ or originating summons or motion; and

b. whether it was permissible for the registrar to grant leave to the liquidator to serve the summons out of the jurisdiction.

In relation to the first issue, the Court of Appeal determined that an application under Section 160 of the IBC Act can be commenced by way of summons pursuant to Rules 4(3) and 6(2) of the Companies Winding Up Rules.

In the Court’s view, Sections 160 and 161 of the IBC Act did not lay out a specific procedure for determining how fraudulent preference claims must be brought. To accept the respondent’s view would require the Court to add words to the Sections that were not there.

In relation to the second issue, the Court of Appeal determined that the judge’s decision that an interlocutory summons could not be served out of the jurisdiction was wrong and based on too narrow an interpretation of Order 11 Rule 8(4). As such, the learned judge ought to have permitted the summons to be served out of the jurisdiction.

The Court of Appeal decision was appealed and is currently before the Privy Council.

**Ivanishvili v. The Registrar of the Bahamas (2017) 2 BHS J No. 119**

In *Ivanishvili* the Supreme Court held that although an amendment to Section 166 of the IBC Act repealed and replaced the provisions for restoration, leaving no provision for a company to be restored once voluntarily dissolved, the Court had the inherent power to restore such a company in circumstances where the dissolution of the company was occasioned by fraud and the dissolution resulted in injury or loss. The Court ordered the restoration of the company to enable the company to join litigation in Singapore, so as to further investigate the alleged fraud and secure assets that may be available to the company.

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111 See paras. 31–40 of the decision.
112 The fraudulent conduct of a client relationship officer of the bank justified the restoration of the company to engage foreign proceedings for asset recovery.
Chapter 4

BELGIUM

Hans Van Bavel and Tobe Inghelbrecht

I OVERVIEW

Belgian civil and criminal law provides fraud victims and victims of dishonesty with several avenues to ensure they are compensated for any damage they incur as a result of fraud or dishonest behaviour.

Victims can choose to pursue a civil claim for damages. Belgian civil law has no separate provisions dealing specifically with asset tracing and recovery, or with the gathering of evidence to support claims arising out of fraud or dishonesty. Victims of fraud or dishonesty must therefore rely on the general actions available under Belgian civil law. Typical civil remedies include a claim for liability in tort or contract, depending on the case.

Alternatively, victims of fraud or dishonesty can initiate a police or criminal investigation. The criminal authorities in Belgium seem to be more and more willing to assist parties seeking asset recovery if the offence is sufficiently serious.

The Belgian legal system is a civil and non-adversarial one. This means that in criminal law, the public prosecutor carries out both the investigation and prosecution of criminal offences. However, a victim itself (e.g., of fraud), can take any one of the three following steps to initiate a police or criminal investigation, or to take his or her case directly to court:

a First, a victim can file a complaint, free of charge, with the public prosecutor’s office, which supervises and directs police investigations. However, this avenue has a downside: the public prosecutor decides, at his or her discretion and in view of the office’s priorities, whether or not to investigate the case. In addition, should a police investigation be initiated based on this complaint, the victim will not have access to the case file, because the details of police investigations are not made public. Therefore, the victim has no guarantee that the perpetrator will be prosecuted. Should the investigation be pursued, and should it require the use of invasive investigative techniques, such as wiretaps, searches or arrests, the public prosecutor will instruct the investigating judge to order these measures to be executed – in whichever way the judge considers necessary – and the case will move forward as described below.

b Second, the victim can file a claim directly with the investigating judge to avoid the risk that the case would be closed without a full examination. However, this requires the victim to pay a lump sum based on the scope (e.g., difficulty) of the case. Unlike the public prosecutor, the investigating judge has the duty to investigate all exculpatory or incriminating evidence. If the investigating judge considers that the case requires

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1 Hans Van Bavel is a partner and Tobe Inghelbrecht is an associate at Stibbe. This chapter constitutes an update of the 2015 chapter to which Bart Volders, Jachin Van Doninck and Karlien Vanderhauwaert (all former attorneys at Stibbe) also contributed.
Belgium

no further investigation, he or she will present it to the Council Chamber. The Council Chamber will then decide whether there is reasonable suspicion to believe that a criminal offence has been committed and whether the case should be referred to a trial court. In addition, the claimant (i.e., the victim) may request access to the file and may propose that additional investigative measures be taken.

Third, if the perpetrator can be identified and the criminal offence is not punishable by imprisonment for a period of five years or more, the victim can summon the perpetrator directly to appear before the police court or criminal court. This avenue is hardly available for complex cases, because the claimant will have to bear the full burden of proof in that case.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

The choice of the appropriate remedy that is available to a victim of fraud or dishonesty, be it criminal or civil, will ultimately depend on the specific circumstances of the matter at hand. Whereas in civil litigation, victims of fraud or dishonesty must revert to general causes of action (such as liability in contract or tort), the Belgian Criminal Code provides for specific sanctions of several acts of dishonesty or deceit. Article 496 of the Belgian Criminal Code (BCC) is the general provision that sanctions individuals who have committed fraud and deception (i.e., where an individual has used some scheme or artifice to defraud someone of his or her assets).

In addition, Article 491 of the BCC covers abuse of trust. It sanctions individuals who have committed intentional embezzlement or squandering of goods that were handed over to him or her under the obligation to return the goods or use them for a specific purpose. Article 492 bis BCC sanctions an individual who has abused a company’s goods or credit. Finally, Articles 489, 489 bis and 489 ter of the BCC cover bankruptcy fraud by sanctioning members of a company’s management or directors for having committed fraud during the company’s bankruptcy proceedings.

Defrauding another person often involves the handling of defrauded property, and this is covered by Article 505 and 505 bis of the BCC on money laundering and the handling of proceeds from a criminal offence. Anyone who knowingly handles proceeds from criminal offences can be prosecuted in Belgium, even if the original criminal offence was committed abroad.

Finally, legal entities can be criminally sanctioned as well. If a court holds a legal entity responsible for a criminal offence committed solely by an identifiable person associated with that entity, it may convict them both jointly if it finds, based on the concrete circumstances of the case, that the physical person has committed the offence knowingly and willingly regardless of the guilt form required by law. Where the criminal offence has not been

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2 For further discussion of anti-money laundering rules see Section IV.
3 Article 505, Section 2 of the BCC.
4 Article 5 of the BCC.
intentionally committed, the judge will have to verify who – either the legal entity or the physical person – has committed the most serious negligence. Only that person or entity can be convicted.

In all these cases, the victim of the criminal offence can file a claim for damages before the criminal court.

**Venue and territorial jurisdiction**

The fraud victim can bring his or her claim either before the criminal court hearing the criminal case or before a civil court. Belgian criminal courts have jurisdiction over any criminal offence committed in Belgium as well as certain criminal offences committed abroad. In particular, for the criminal offences based on fraud discussed above, Belgian courts can hear cases in which the accused are Belgian nationals or residents who allegedly committed such criminal offences abroad, provided that the act is also illegal in the country where it was committed (‘double incrimination’), and, if the victim is not a Belgian national, the foreign government submits an official complaint to the Belgian government (to avoid simultaneous investigations abroad and in Belgium).

In practice, if a victim files a criminal complaint in several jurisdictions, the Belgian public prosecutor may take this into account and decide not to pursue the case further in Belgium so as to avoid an infringement of the *ne bis in idem* principle.

Regarding the availability of Belgian venues for civil claims, Belgian courts will have jurisdiction over tort claims if Belgium is the place where the harmful event occurred (i.e., either the place where the damage occurred, or the place of the event that gives rise to and is at the origin of that damage).

For contractual claims, availability of a Belgian venue for those claims will largely depend on the nature of the contract, or whether Belgium is the place where the relevant obligation was performed (or had to be performed).

In both contractual and tortious cases, the defendant may always be sued in Belgium if he or she is domiciled in Belgium, or parties may (subject to certain restrictions) agree on a choice-of-forum clause.

**Standing**

A person (i.e., a claimant) has standing before the civil courts to sue another person (the defendant) if the former has the required personal ‘interest’ to do so. This may be defined as every material or moral benefit – actual but not theoretical – that the claimant may obtain from the suit. Barring *ad hoc* legal exemptions, civil action groups therefore lack by way of principle the required standing, unless their claim relates to some personal harm suffered

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5 Article 3 of the BCC; a crime is considered to be committed in Belgium as soon as any of the elements of the crime occurred in Belgium. It is therefore not sufficient for a crime to be considered to have been committed in Belgium if only the effects of the crime resulted there.

6 Article 4 of the BCC.

7 Article 7 of the introductory title to the BCC.


9 Article 7.1 of the Recast Brussels I Regulation.
compensation of fraud or dishonesty can be in the form of restitution, damages, or both. The compensation must restore the victim to the hypothetical situation as if the criminal offence had not occurred, whereby the offence is replaced by its lawful alternative. Damages may (depending on the case) include the account of lost profits. No Belgian court can award punitive damages, even in the event of fraud.

Compensation can be sought from any person who committed a fault that caused the claimant harm. If the victim chooses to file a claim for damages before the criminal courts, the criminal conviction of the accused will be considered sufficient proof of a fault in the subsequent civil trial. In that situation, a fraud victim can claim compensation from any convicted person if the victim can prove that the wrongdoing caused him or her harm (harm and causality being the other two conditions for compensation). The accused could be the offender, an accomplice, or an accessory before or after the fact, including a person who received or transmitted the proceeds of fraud. Finally, damages for harm resulting from fraud committed in the course of employment can equally be sought from the fraudster’s employer, even if the company itself is not criminally liable for the fraud.12

ii Defences to fraud claims

Anyone sued for fraud or dishonesty may contest the victim’s claims by arguing that one or more of the elements of the crime, or one or more conditions for civil liability (fault, damage, causality) are not proven.

Another defence might be the time bar. As a rule, the limitation period for claiming damages based on contractual liability expires 10 years after the claim has arisen.13

10 Article 17 of the Belgian Civil Code.
11 Article 3 of the introductory title to the BCC; Belgian Court of Cassation, 3 April 2007, P07.0041.N; 24 October 2006, P06.0696.N; 11 February 2003, P02.0608.N.
12 Article 1384 of the Belgian Civil Code.
13 Article 2262 bis, Section 1, Paragraph 1 of the Belgian Civil Code.
claims based on tortious liability on the other hand (including claims on the grounds of fraudulent impoverishment to the detriment of one’s creditors) are time-barred when five years have passed since the claimant learned of (1) the damage, or the increase thereof, and (2) the identity of the liable person. This claim in tort is in any event time-barred 20 years after the fraudulent act was committed, regardless of the knowledge of the claimant about the aforementioned elements (1) and (2).14

Time bars for civil damage claims may be suspended or extended on various grounds. An extension can be achieved, *inter alia*, by bringing a claim before a judge (either by initiating proceedings or by way of written submissions in the framework of pending court proceedings). An extension may also be obtained by sending a written notice drawn up according to certain requirements by an attorney.15 After the cause for extension has ceased to be in effect (e.g., when the proceedings have come to an end), a full new limitation period will start. When the limitation period elapses, the claimant may no longer judicially enforce his or her claim (but the ‘natural obligation’ remains in effect indefinitely, meaning that spontaneous payment of the corresponding damages will not be considered undue).

The criminal prosecution of anyone who committed any of the forms of fraud described above is time-barred five years after they have committed the crimes.16 However, this five-year limitation period may equally be extended or suspended on various grounds.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

*Seizure of assets and proceeds pending civil proceedings*

Securing assets and proceeds can be achieved through a ‘conservatory’ attachment (which essentially ‘freezes’ the assets). This form of attachment is opposed to an ‘executory’ attachment, which entails the (forced) liquidation of the attached assets and the distribution of the proceeds to the creditor, usually after the (civil) conviction of the perpetrator.17

A creditor seeking conservatory attachment must in principle request permission from the judge of seizure to obtain an order for the attachment measures. However, in some instances he or she may instruct a bailiff to perform such an attachment measure merely on the basis of exhibits provided by the creditor himself. The documents must in that event constitute proof of the claim.18

A conservatory attachment limits the debtor’s powers to dispose of the attached assets, but it does not deprive the debtor of his or her proprietary rights to said assets. The debtor also remains in possession of the assets. The creditor must make a separate request if he or she prefers to have these assets put under the custody of a third party (which request may be heard by different courts, depending on the case).19

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14 Article 2262 *bis* Section 1, Paragraph 2-3 of the Belgian Civil Code.
15 Article 2244 of the Belgian Civil Code.
16 Article 21 of the introductory chapter to the BCC.
17 Both attachment measures are dealt with by the Belgian Code of Civil Procedure (see Articles 1413–1493 (conservatory attachment) and Articles 1494–1675 of the Code of Civil Procedure (attachment in execution)).
18 Article 1445 Belgian Code of Civil Procedure.
A conservatory attachment can be made on the debtor’s movable and immovable property. The creditor may also have goods attached that are held by a third party; for example, (most commonly) a bank. Such an attachment affects all the debtor’s funds in the bank account at the date of the conservatory attachment, irrespective of the amount of the attaching creditor’s claim. However, the creditor may choose to limit the conservatory attachment to a certain sum only (e.g., to avoid counterclaims based on ‘abuse of attachment’ in situations where the attached funds largely exceed the creditor’s claim).

Seizure of assets and proceeds pending the criminal trial
Both the public prosecutor and the investigating judge may, during the investigation, order the seizure of any goods that can be the subject of a confiscation order upon an eventual conviction (see below), or that can serve to establish the truth or to avoid the disappearance of the goods prior to trial.20

Confiscation after a conviction
If the accused is sentenced for an offence that qualifies as a serious crime or major offence according to Belgian law,21 the court must order the confiscation of the object of the criminal offence and the items used for committing the criminal offence if they are property of the convicted person, as well as the confiscation of the proceeds of the criminal offence. The court can also order the confiscation of the financial gains resulting from the criminal offence, including any assets acquired from the original gains of the criminal offence and any income generated from its investment, but only if the public prosecutor specifically requested this last element.22 If the assets are not found among the possessions of the convicted person, the judge will estimate the total value of these assets and will order the confiscation of goods that have an equivalent value. The court will order the restitution to the civil claimant of any confiscated goods or money belonging to him or her.23 The court can also order the confiscation of assets located outside Belgium.24

Obtaining evidence
Obtaining evidence in civil matters
There is no specific action available under Belgian civil procedural law that can be used to obtain evidence in cases of fraud or dishonesty. As such, victims of fraud or dishonesty, who carry the burden of proof, will have to rely on the generally available actions to obtain information in support of their claim in court.

Full-fledged document discovery or disclosure as known under US or UK law does not exist in Belgian civil litigation. However, upon request by a party to the proceedings, a Belgian court may order the production of certain documents that are in the possession of either another party to the proceedings or a third party.25 The documents must contain the evidence

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20 Articles 28 bis Section 3, 35, 35 bis, 35 ter and 89 of the BCCP.
21 Article 1 of the BCC.
22 Articles 42, 43 and 43 bis of the BCC. In the event of a conviction for money laundering, the confiscation of the laundered goods or monies is mandatory.
23 Article 43 bis of the BCC.
24 Article 43 ter of the BCC.
of a certain fact that can be relevant (material) for the outcome of the case. To avoid fishing expeditions, the party making the request must precisely identify and describe the requested documents as well as the facts for which the documents may provide supporting evidence. A party may request the production of documents during the proceedings on the merits, or in separate proceedings (e.g., preliminary relief). The party may request that the relevant court additionally orders the payment of a periodic penalty as a means of enforcement of the main order to produce the documents.

**Obtaining evidence in criminal matters**

In criminal matters, the public prosecutor and the civil claimant carry the burden of proving, beyond reasonable doubt, that the accused committed the alleged criminal offence. Belgian criminal procedure does not have rules on the evidential value of elements of proof; the prosecutor can present all evidence that was legally collected during the investigation to prove the facts and the court can evaluate freely the credibility of the evidence submitted. Evidence gathered in violation of procedural rules can be excluded and removed from the file (by the Council Chamber or Chamber of Indictment) or excluded from the debates (before the trial court) if the procedural rules that are violated are sanctioned with nullity, or the breach is so severe that the reliability of the evidence is lost or the rights of defence of the accused have been violated.

**IV FRAUD IN SPECIFIC CONTEXTS**

i **Banking and money laundering**

Three types of criminal acts constitute money laundering:

a the acquisition, trading, possession or management of proceeds from a criminal offence, assets acquired therewith or income derived from the investment thereof (illegal gains);

b transferring or converting illegal gains to hide their illegal origin, or to assist criminals in escaping the legal consequences of their actions; and

c hiding or concealing the origin or ownership of illegal gains.

Under the first and last of these criminal provisions, the money launderer must have known or should have known about the illegal origin of the assets; however, this does not require the prosecutor to be able to pinpoint the specific criminal offence at origin, but rather to show that the assets cannot result from any legal activities, and to show that the money launderer should have known this. Finally, the perpetrator of the criminal offence that generated the illegal proceeds cannot be prosecuted for money laundering unless the criminal offence that generated the illegal proceeds was committed abroad and the perpetrator cannot be prosecuted in Belgium for that criminal offence. The court must order the confiscation of the proceeds from crime with regard to all perpetrators and co-conspirators.

26 Article 326 of the Belgian Code of Criminal Procedure (BCCP).
27 Article 154 of the BCCP.
28 Article 32 of the BCCP.
29 Article 505 Section 1, 2°–4° of the BCC.
In addition, measures to prevent money laundering require certain institutions and individuals, including banking institutions, to notify the Belgian Financial Intelligence Unit of any suspicious transactions.\textsuperscript{31}

\section*{ii Insolvency}

As explained earlier, Article 489, 489 \textit{bis} and 489 \textit{ter} of the BCC specifically covers bankruptcy fraud by sanctioning members of a company’s management or directors for having committed fraud in relation to the company’s bankruptcy.

Several civil remedies are also available to creditors seeking protection from acts by the insolvent party that occurred right before the insolvency and by which the insolvent party intended to fraudulently harm the rights of said creditors (e.g., wilful impoverishment or the granting of unfair advantages to other creditors).

\section*{iii Arbitration}

In a manner similar to most other jurisdictions, arbitral tribunals having their seat in Belgium may not find a person guilty of criminal offences. Parties may only opt for arbitration in Belgium if the dispute that is submitted to the decision of the arbitrators has a ‘patrimonial’ nature. Although most arbitrations deal with contractual liability, nothing prevents an arbitral tribunal from deciding on claims arising out of tortious liability. Tortious liability is, as a rule, arbitrable under Belgian law.

Therefore, depending on the circumstances of the matter at hand and subject to an agreement to that effect, an arbitral tribunal in Belgium may adjudicate disputes involving claims for liability in tort or contract that result from fraud or dishonest behaviour of a certain party. Such a tribunal cannot, however, order a conservatory attachment of assets (see Section III.i). Any party to the arbitration proceedings may request such an attachment from the Belgian state courts, which can issue injunctions in aid of either domestic or foreign arbitration proceedings.

\section*{V INTERNATIONAL ASPECTS}

\section*{i Conflict of law and choice of law in fraud claims}

If the fraud claim encompasses one or more cross-border elements, the Belgian civil court should (after it has found that it has jurisdiction: see Section II.i) determine the applicable law on the basis of Belgian conflict-of-law rules.

Matters of procedure are usually governed by local law (\textit{lex fori}), meaning that a Belgian court will apply Belgian civil procedure law to any procedure pending in Belgium.

Next, the Belgian court will determine the law applicable to the merits of the case. For tortious claims, it will do so on the basis of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation). By way of a general rule, the applicable law is the law of the country where the damage occurs (\textit{lex loci damni}), irrespective of where the event giving rise to the damage occurred (\textit{locus acti}) and irrespective of where the indirect consequences

\footnote{Law of 11 January 1993, as amended, Belgian Official Gazette 2 February 1993, p. 2,828; the Law was last amended in 2014 (see Section IV).}
of that event occurred. However, if both he or she who suffered the damage and he or she whose liability is at stake had their habitual residence in the same country when the damage occurred, the substantive law of that country will apply. Furthermore, if it follows from all circumstances of the case that it is manifestly more closely connected to another country, or in the event of a choice-of-law clause, the lex loci damni will not apply either.

If the claim is based on contractual liability, the Belgian civil court will determine the law applicable to the merits on the basis of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation). This Regulation gives (in principle) precedence to a choice-of-law clause, in the absence of which the type of contract will be the relevant criterion to determine the applicable law (e.g., a sales contract is governed by the law of the country of residence of the seller). Some exceptions do apply, as well as specific rules for all contracts that the Rome II Regulation does not expressly deal with.

Both Rome Regulations have a universal scope of application, meaning that any law specified by the Regulation might apply (even the law of a non-Member State). A Belgian court will therefore only rarely apply the Belgian Code of Private International Law (which moreover provides for some comparable criteria).

Finally, under Belgian private international law rules, Belgian courts must apply a foreign law in accordance with the interpretation given to it in the relevant foreign country.

### ii Collection of evidence in support of proceedings abroad

How evidence can be collected to support foreign civil or criminal proceedings depends on which state requested the international assistance.

#### Collection of evidence in support of foreign civil proceedings

Within the EU, the gathering of evidence in civil and commercial matters is governed and facilitated by Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (Evidence Regulation). Its contents are largely similar to those of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Convention). The Evidence Regulation allows direct communication between EU Member State courts through the use of standard forms. These courts can request one another to gather evidence in the other’s home jurisdiction. The Evidence Regulation even provides for a procedure through which the courts of an EU Member State can go and gather the relevant evidence abroad themselves.

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32 Article 4(1) of the Rome II Regulation.
33 Article 4(2) of the Rome II Regulation.
34 Article 4(3) of the Rome II Regulation.
35 Article 14 of the Rome II Regulation.
36 Article 3 of the Rome II Regulation.
37 Article 15(1) of the Belgian Code of Private International Law.
38 Denmark is not a party to the Evidence Regulation.
In instances where the Evidence Regulation is not applicable, the Belgian authorities may take evidence for the purpose of non-domestic civil court litigation on the basis of the Hague Convention of 1 March 1954 on Civil Procedure or on the basis of its national law. Belgium is not a party to the 1970 Hague Convention.

**Collection of evidence in support of foreign criminal investigations**

Belgium has implemented the EU Directive regarding the European Investigation order in criminal matters, in the Act of 22 Ma 2017.

Consequently, requests to and from another EU Member State that has also adopted this Directive, will be recognised and executed. The Act covers almost all investigative measures, such as interviewing witnesses, information and monitoring of bank accounts, obtaining information that the executing authority already has, and (with additional safeguards) interception of telecommunications. An authority may only refuse the execution of a European Investigation Order on the grounds mentioned in Article 11 of the Act (human rights, territoriality, national security and double jeopardy). The executing authority may, however, opt for a less intrusive measure if it allows achieving similar results.

As regards incoming requests from states outside the EU, Belgium is a party to a number of multilateral and bilateral treaties that stipulate that the contracting parties must provide mutual assistance to each other in criminal matters, including the collection of evidence in support of foreign criminal proceedings.

Finally, in the absence of a mutual assistance treaty, any request for assistance in criminal matters could be granted based on international comity.

### Seizure of assets or proceeds to support criminal proceedings abroad

Belgium’s Law of 5 August 2006 governs requests by competent criminal authorities of other EU Member States for the seizure of assets located in Belgium. Seizure orders must

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39 The ECJ has endorsed such taking of evidence without recourse to the Evidence Regulation (ECJ C-170/11, Lippens and ECJ C-332/11, ProRail).
41 Within the framework of the Council of Europe: European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters and its additional protocols of 17 March 1978 and 8 November 2001; in addition to the Council of Europe members, the treaty has also been ratified by Brazil, Israel and South Korea. In the European Union: Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, the Agreement of 19 December 2003 between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol. In the framework of the Benelux Union: the treaty of 27 June 1962, concerning extradition and mutual assistance in criminal matters between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands.
42 For example, the Agreement of 25 June 2003 on Mutual Legal Assistance between the EU and the US. Another example is the Agreement of 30 November and 15 December 2009 on Mutual Legal Assistance in criminal matters between the EU and Japan. However, there is no reference to the implementation or transposition of the agreement by Member States of the EU.
be accompanied by a certificate in Dutch, French, German or English, and are subject to approval by the investigating judge. The investigating judge must render his or her decision on whether to issue the order within 24 hours, if possible, and no later than within five days. The seizure order will be executed in accordance with Belgian law, and execution will be refused if seizure is not available for equivalent criminal offences under Belgian law. In addition, certain grounds for refusal exist, including immunity, ne bis in idem, or serious risks of violating Article 6 of the European Convention on Human Rights. Any person whose rights are prejudiced by the seizure may oppose the measure before the investigating judge.

Requests for the seizure or confiscation of assets in Belgium made by non-EU Member States that are party to a bilateral or multilateral agreement on mutual assistance with Belgium are executed in accordance with the Law of 20 May 1997 on international cooperation with regard to the execution of seizures and confiscations. Several conditions apply:

a the requesting state has entered into a bilateral or international agreement with Belgium;

b the requesting party is a judicial authority;

c the facts of the case or similar facts would also constitute a criminal offence in Belgium;

d the suspect has not been convicted in Belgium for the same facts; and

e a similar case in Belgium would warrant seizure or confiscation by the Belgian criminal authorities.

iv Enforcement of judgments granted abroad in relation to fraud claims

The enforcement of foreign civil case judgments rendered in another EU Member State (e.g., in relation to fraud claims) falls under the realm of the aforementioned Recast Brussels I Regulation. Its predecessor, the Brussels I Regulation, continues to apply to judgments given in legal proceedings instituted before 10 January 2015, and to authentic instruments and court settlements approved or concluded before that same date. Judgments within the scope of the (old) Brussels I Regulation can be enforced in another EU Member State if they are enforceable in the Member State of origin and if, moreover,
the party seeking enforcement has successfully applied for a declaration of enforceability in the country where it seeks the enforcement. The foreign judgment shall not be enforced if it infringes upon one or more of the grounds for refusal listed in Articles 34 or 35 of the Brussels I Regulation (e.g., if it is contrary to the international public policy of the Member State where the enforcement is sought). Under no circumstances may the foreign judgment be reviewed on its merits.

The Recast Brussels I Regulation now drops the requirement of a prior declaration of enforceability. According to the new provisions, a judgment rendered in an EU Member State will be recognised in the other Member States without any specific procedure, and, if enforceable in the Member State of origin, will be enforceable in the other Member States without any prior declaration of enforceability. Questions of recognition and enforcement will only be dealt with if the party against whom recognition or enforcement is sought, actively applies for a refusal (see also Section V.v).

If no convention or EU regulation applies (and subject to the application of a lex specialis), the enforcement of foreign judgments is subject to the provisions of the Belgian Code of Private International Law (Articles 22–31). As a rule, all judgments (on the merits) in civil and commercial matters (subject to their enforceability in the country of origin) are (in principle) eligible for enforcement in Belgium. The party seeking such enforcement must apply for a declaration of enforceability before the competent Belgian court of first instance. Enforcement is not subject to any reciprocity requirement between Belgium and the country of origin. The Belgian enforcement court will not review the merits. However, enforcement is subject to the foreign judgment not infringing upon any of the grounds for refusal that are exhaustively listed in Article 25 of the Belgian Code of Private International Law (e.g., the classic international public policy exception; see also Section V.v).

The enforcement of foreign criminal case judgments

The enforcement of judgments in criminal matters rendered by the courts of other EU Member States is governed by the Law of 5 August 2006. The request for the judgment’s enforcement must be accompanied by a copy of the court’s decision and a certificate in French, Dutch or English. Unlike seizure orders, other EU Member States’ judgments in criminal matters can be executed by the Belgian public prosecutor without requiring the approval of the investigating judge. The judgments will be executed in Belgium in accordance with Belgian law. In addition to the general grounds for refusal, such as immunity, ne bis in idem or serious risks of violating Article 6 of the ECHR, specific grounds for refusal exist as well. These include the Belgian statute of limitations for the collection of criminal fines, the acts partially or entirely being committed in Belgium, and the defendant’s right to be heard. Finally, double incrimination does not apply if fraud is involved.

As with orders for seizure of assets, the enforcement of confiscation orders issued by non-EU Member States is governed by the Belgian Law of 20 May 1997 (see Section V.iii).

50 Articles 36 and 39 of the Recast Brussels I Regulation.
51 Article 23, Section 3 of the Belgian Code of Private International Law.
52 This ground for refusal does not apply to money laundering.
v  Fraud as a defence to enforcement of judgments granted abroad

Article 34(1) of the Brussels I Regulation states that a Belgian court may refuse recognition or enforcement of a foreign judgment if the judgment ‘manifestly’ runs counter to (Belgian international) public policy. The Recast Brussels I Regulation provides for the same defence, but the competent court will only refuse enforcement on that ground after an application to that effect by the party against whom enforcement is sought (see Section V.iv). The Brussels I Regulations also provide for other grounds of refusal.

Article 25(1) of the Belgian Code of Private International Law similarly does not allow recognition or enforcement of a foreign judgment if the result of that recognition or enforcement is manifestly incompatible with (Belgian international) public policy.

The concept of (Belgian international) public policy encompasses both procedural and substantive public policy. The court will in that respect consider the extent to which the matter is connected to the Belgian legal order, as well as the seriousness of the consequences that might result if it were to recognise or enforce the foreign judgment.

Even though fraud is not available before the Belgian courts as an autonomous defence to prevent the enforcement of a judgment granted abroad, Belgian courts may consider that a judgment tainted with fraud contravenes Belgian concepts of international public policy, and is therefore not eligible for enforcement in Belgium.

VI  CURRENT DEVELOPMENTS

Several initiatives are being taken at the EU level. In particular, a proposal for regulation on the creation of an EU prosecutor’s office that would oversee and assist national prosecutors in their prosecution of fraud cases for the misappropriation of EU funds is currently pending.53

Another noteworthy instrument, which entered into force in 2017, is Regulation (EU) No. 655/2014 of 15 May 2014, establishing a European account preservation order (EAPO). It provides for a procedure facilitating cross-border debt recovery in civil and commercial matters. It applies to situations where the debtor holds a bank account in an EU Member State other than the one where the EAPO application is made or where the creditor is domiciled. The order obtained by the creditor in his or her home country, will not require a prior recognition or declaration of enforceability to be enforceable in another Member State.

Many aspects of Belgian judicial law are currently subject to a wave of ongoing reforms, but the topics discussed in this chapter do not seem likely to be affected. The chapters in the Civil Code regarding the law of obligations are under fundamental revision as well; the act approving this revision was imminent at the time of writing. Furthermore, the class action mentioned above in Section II.i also became available to groups of SMEs in 2018.

53 Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office; see https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013PC0534:en:NOT.
Chapter 5

BELIZE

Nigel Ebanks¹

I OVERVIEW
As the global footprint of Belize's international financial services industry expands, so too does the volume and complexity of domestic litigation stemming from this sector. This includes asset recovery actions arising from the regrettable misuse of Belize companies and structures in the perpetration of fraud. Belize's courts have proven willing, adept and invaluable in coming to the aid of victims of dishonesty.

II LEGAL RIGHTS AND REMEDIES
Belize, a former British colony and member of the British Commonwealth of Nations, is governed by a Westminster style parliamentary democracy on the basis of a written Constitution. English common law therefore forms the basis of Belize's legal system. It is expressly incorporated into Belize law.

As it relates to actions stemming from fraudulent or dishonest conduct, compensatory remedies that can be sought in Belize generally include those that are available at English common law. Victims of dishonesty may seek compensation by way of private law court actions brought as actions in tort, particularly those torts relating to fraud and dishonesty, or as asset-tracing actions, which are primarily based on common law trust principles.

i Civil and criminal remedies
Compensatory remedies that can be sought against the person who committed the fraud primarily include damages, orders for the payment or return of money, orders to give an account and orders for the delivery-up of property. Such remedies would be based on the following causes of action that are known to Belize law:

a breach of trust;
b money had and received;
c fraudulent conversion;
d fraudulent misrepresentation; and
e deceit.

With the exception of remedies for fraudulent misrepresentation, these compensatory remedies can also be sought against the persons who assisted the fraudster. They can also

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be sought against third parties who may have received or helped to transmit the proceeds of fraud. In addition, the following causes of action may also be available against such third parties:

\[ a \] knowing receipt; and

\[ b \] dishonest assistance.

The above causes of action are actionable in the Belize Supreme Court where the value of the claims exceeds approximately US$7,500.

Most often, victims of fraud require immediate and effective relief. Cases can be brought relatively quickly: that is to say, generally within the time required for preparing and filing adequate pleadings. The procedural rules of the Belize Supreme Court, the Belize Supreme Court (Civil Procedure) Rules 2005, allow for applications to be brought without notice in the first instance and treated on an urgent basis. This means that an aggrieved person may file an action promptly and have it heard within a reasonably short time. Common experience is that these actions would be heard within about three to five days of filing depending on availability on the court’s calendar of pending actions.

The usual periods of limitation provided for under Belize law apply equally to asset-tracing and recovery actions. There is generally a period of limitation of six years from the date on which the cause of action accrued to the claimant. This applies to actions in both contract and tort.

To bring a claim for compensatory relief, a claimant must be able to show that he or she has an actionable cause of action against the defendant or defendants. That cause of action must be one known to Belize law. The Supreme Court of Belize must have jurisdiction to determine the particular dispute. It must also have jurisdiction over the parties to the dispute and all parties that may be joined in the action before the Court. Alternatively, a claimant may show that he or she has a judgment against the defendant or defendants that remains unsatisfied. This especially applies where that judgment is one enforceable in Belize, whether enforceable according to the provisions of Belize’s Reciprocal Enforcement of Judgments Act, or otherwise enforceable.

A claimant may have standing in his or her own right. A claimant may also have standing to bring an action in a trustee or representative capacity.

As far as the requirements to bring these actions can be generalised across the various causes of action outlined in this chapter, it is fair to say that a claimant must be able to show:

\[ a \] that he or she has been the victim of some fraud or dishonesty;

\[ b \] that the fraud or dishonesty was perpetrated by the defendant or defendants;

\[ c \] that the fraud or dishonesty has caused the claimant or claimants loss;

\[ d \] the extent of the actual loss; and

\[ e \] that the above circumstances have given rise to a valid cause of action that is actionable in Belize as against the defendant or defendants.

Where the action is brought as a tracing action, the claimant must also be able to show that he or she is the owner of the property being traced or has a valid claim to that property, for example as a judgment creditor under a judgment that is due for payment and remains unsatisfied.

\[ 2 \] Reciprocal Enforcement of Judgments Act, Chapter 171 of the Laws of Belize, re 2011.
ii Defences to fraud claims

The main elements of the defences to these actions, particularly those based on fraudulent misrepresentation and deceit, include:

- that the defendant’s statement or representation that is complained about involves no ‘fraud’ or ‘dishonesty’;
- that the defendant had no intention of inducing the claimant to act upon the relevant representation or statement;
- that the defendant did not, in fact, rely on the representation or statement; and
- that the claimant has not suffered any loss or damage as a consequence of relying upon that misrepresentation.

Where the action is brought as a tracing action, a defendant may plea that he or she does not have possession or control of the asset being traced, or that the claimant has no right to or interest in that asset.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Freezing orders are available in Belize as provided for by its Civil Procedure Rules. Section 18 of the Supreme Court of Judicature Act of Belize\(^3\) confirms the existence and extent of the Belize Court’s original jurisdiction:

18. (1) There shall be vested in the Court, and it shall have and exercise within Belize, all the jurisdictions, powers and authorities whatever possessed and vested in the High Court of Justice in England . . .

(2) Subject to rules of court, the jurisdiction, powers and authorities hereby vested in the Court shall be exercised as nearly as possible in accordance with the law, practice and procedure for the time being in force in the High Court of Justice in England.

The learned authors of *Commercial Litigation: Pre-Emptive Remedies*\(^4\) lend clear and very useful guidance on the ‘jurisdiction’ of the English court to grant interim injunctions.

*The meaning of jurisdiction In the context of the grant of an interim injunction the word “jurisdiction” is ambiguous. In the strict sense of the word, the court has no jurisdiction where it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised. Conversely, the court has jurisdiction in the strict sense, where the defendant can be served with a claim form in respect of the claim . . .

Jurisdiction in the strict sense The cause of action must be justiciable in the courts of England and Wales. It follows that:

(a) the cause of action must be recognized as a matter of English law; and
(b) the courts of England and Wales must have territorial jurisdiction over the Respondent. Thus:

i. the respondent must be capable of being served within the jurisdiction; or

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3 Supreme Court of Judicature Act of Belize, Chapter 91 of the Laws of Belize, re 2011.
ii. the applicant must be able to serve a claim form upon the respondent notwithstanding the fact that it is not possible to serve the respondent within the jurisdiction either:

• in accordance with CPR 6.32 (in respect of Scotland and Northern Ireland) and CPR 6.33 (in respect of countries out of the United Kingdom) . . . ; or

• with the permission of the court in accordance with CPR 6.37 and PD 6B para 3.1.

Consistent with the above, Part 17 of the Civil Procedure Rules provides for the granting of freezing orders and other remedies in a listed but non-exhaustive fashion: while, Part 7 provides for service of the court’s process outside the jurisdiction of Belize with the court’s permission, thereby providing an avenue for the Belize court to assert jurisdiction over foreign defendants. In *Lauro Rezende v. Companhia Siderurgia Nacional and International Investment Fund Limited*,5 the Belize Court of Appeal confirmed that the Belize Supreme Court has the jurisdiction to grant such freezing orders over foreign defendants where the Court’s permission is first obtained to serve such defendants outside the jurisdiction of Belize.

Apart from the granting of freezing orders, the Belize Supreme Court may also order the appointment of receivers over companies or over specific property. This includes the power to appoint receivers with such powers of management as the Court finds appropriate. The power to appoint receivers may be exercised in addition to the power to grant freezing orders.

**ii Obtaining evidence**

Obtaining evidence is usually a litigant’s priority. Helpful information typically concerns the ultimate beneficial ownership of companies; transaction records; internal corporate records; information on asset holdings; and business correspondences. This information, or the lack of it, often determines a case’s outcome.

**Searches of the International Business Companies Registry**

Consistent with privacy provisions, only very limited information on each Belize international business company (IBC) is publicly accessible. This information is accessible through searches of the records of the International Business Companies Registry. Publicly available information on Belize IBCs is limited to the following:

a. the company’s name;
b. its date of incorporation;
c. its share capital (amount only);
d. the name and address of the registered agent;
e. the registered office address;
f. certified copies of its certificate of incorporation; and
g. certified copies of its memorandum and articles of association.

Information beyond this is protected by laws that compel registered agents to keep such information confidential. Further information can only be revealed voluntarily by the company’s officers and members or by the company’s registered agent. Otherwise, the court can compel the holders of the information to disclose it under proper circumstances.

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Disclosure orders

The Belize Supreme Court is empowered to aid claimants by granting disclosure orders in appropriate cases. Typically, such discretionary relief is in the nature of Norwich Pharmacal or Bankers Trust orders.6

In granting these orders, the court is exercising its jurisdiction to come to the aid of persons who would otherwise have insufficient information to commence an action against a wrongdoer or who would otherwise have insufficient information to trace assets that they rightfully own or have a valid claim to. To qualify for Norwich Pharmacal relief, an applicant needs to prove to the court that he or she has suffered a legal wrong; the respondent has information that can identify or assist in identifying the wrongdoer by virtue of being mixed up in or facilitating the wrongdoer’s actions; and the granting of the relief is necessary (i.e., that the disclosure of the information is required to enable the applicant to take effective action).7

The Bankers Trust element of such applications normally introduces additional bases on which the applicant qualifies for the disclosure of information in asset-tracing claims: specifically, that the applicant has been defrauded of his or her property, and that the respondent has information that can assist in tracing that property.8

The court will normally require from the applicant several usual undertakings. Primary among these is an undertaking that the applicant will bear the reasonable costs incurred by the respondent in complying with such an order or in providing such information. The court will normally also include terms within the order restricting the use of the information obtained.

Effectiveness

These remedies often prove extremely useful. First, the court will permit these disclosure applications against non-parties to a suit: in effect, otherwise innocent third parties. In fact, these forms of court action fall within a very limited class of actions available against persons in respect of whom an applicant has no cause of action. Secondly, this relief is often pre-action in nature, being granted before a litigant commences a claim. Thirdly, the court can grant these orders in local satellite proceedings in aid of main proceedings taking place, or about to take place, elsewhere.

iii Securing assets and proceeds

Belize law allows for tracing actions based on common law principles of constructive and resulting trusts. These are the most direct ways of reaching assets or the proceeds of fraud. One may also freeze such assets or proceeds in anticipation of a civil judgment. The civil judgment can then later be attached to the assets or proceeds. These options are available in respect of both foreign and domestic claims.

Defences and answers asserting that the Belize court has no jurisdiction are perhaps the most common way of thwarting attempts to seize or secure assets. Whether a Belize court has jurisdiction over a matter is often determined by a mixture of common law jurisdictional principles, domestic statutes and domestic rules of civil procedure and practice. As a general rule, it is perhaps fair to say that the stronger the connection between the salient features

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of a dispute and the jurisdiction of Belize, the greater the chances that a Belize court will accept that is has jurisdiction over that dispute and the parties to it. Factors that ground such a connection to this jurisdiction will often include:

- the fact that the parties to an action (whether natural or juridical) are Belizean or domiciled in Belize;
- the fact that the action concerns property (real or personal) located within the country of Belize;
- the fact that the parties have chosen Belize law as the governing law of the agreement or deed from which the dispute arises;
- the fact that the parties have agreed to voluntarily submit to the jurisdiction of the Belize Courts in the event of a dispute; or
- the fact that the parties have taken some active and material step in the Belize proceedings on the basis of which that party can be deemed to have submitted to the jurisdiction of the Belize court, or waived his or her right to challenge its jurisdiction, or both.

Belize law may also expressly seek to secure or preserve for the Belize court jurisdiction regarding particular subject matters, persons or disputes. For example, Section 104 of Belize’s International Business Companies Act expressly states:

140. For the purposes of determining matters relating to title and jurisdiction but not for purposes of taxation, the situs of the ownership of shares, debt obligations or other securities of a company incorporated under this Act is in Belize.  

Likewise, Section 141 of the Act also enables Belize IBCs to apply to the Belize Supreme Court for declarations on the interpretation of the Act or the memorandum and articles of association of that applicant company. Section 141 preserves the jurisdiction of the Belize court to make such declarations. Furthermore, it most importantly deems a person acting on such a declaration to have properly discharged his or her fiduciary or professional duty in the subject matter of the application:

141. (1) A company incorporated under this Act may, without the necessity of joining any other party, apply to the court, by summons supported by an affidavit, for a declaration on any question of interpretation of this Act or of the Memorandum or Articles of the company.  

(2) A person acting on a declaration made by the court as a result of an application under subsection (1) of this section, shall be deemed, in so far as regards the discharge of any fiduciary or professional duty, to have properly discharged his duties in the subject matter of the application.

Whether the court does have jurisdiction with respect to a dispute or over a particular disputant is generally the first question that a Belize court will seek to decide before hearing the parties on the substance of a dispute. Consequently, successful jurisdictional challenges are often fatal to asset-tracing and recovery actions. Tactically, they are highly appealing because of their immediate and devastating effect even before a claim is able to get off the ground.

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9 International Business Companies Act, Chapter 270 of the Laws of Belize, re 2011.
Attempts to seize are also often met with *forum non conveniens* challenges. Whether the Belize court is the most convenient or appropriate forum for the resolution of a dispute also factors heavily into the consideration of these applications. The degree of connection between the salient features of the dispute and the jurisdiction is again often the strongest determining factor. Unlike successful jurisdictional challenges, a successful *forum non conveniens* challenge will generally only result in a stay of the action. This temporarily neutralizes the action in Belize while, it is assumed, the parties will divert or have diverted their efforts to the resolution of the dispute in another jurisdiction.

Interim freezing orders are also available. These applications must be made promptly. From a practical perspective, the supporting affidavit evidence must demonstrate the following:

- that the Belize court has jurisdiction over the subject matter of the dispute and the parties to it;
- that the applicant has an actionable cause of action against the respondent or respondents;
- the particulars of the applicant’s claim against the defendant;
  - that the applicant has a good arguable case that he or she will succeed at trial;
  - the amount of his or her claim; and
  - fairly state the points made against it by the defendant;
- that the respondent has assets that he, she or it is about to dissipate before the judgment or award is satisfied unless a freezing order is granted; and
- that the balance of convenience favours the granting of the freezing order.  

There are also other procedural requirements, primary among which are the requirements for the applicant to make full and frank disclosure of all material facts and provide an undertaking as to damages that the granting of the order may cause to any third party. The supporting evidence should also demonstrate that the applicant has the means and ability to honour the undertaking if called upon to do so.

Attempts to freeze assets will often fail where it is shown that the applicant has no claim or a very weak claim to the assets or proceeds sought to be frozen.

IV  FRAUD IN SPECIFIC CONTEXTS

i  Banking and money laundering

The Money Laundering and Terrorism Prevention Act 2008 (MLTPA) provides for the freezing of funds by way of restraining orders. For all intents and purposes, the effect of a restraining order under this statute is very similar to the effect of a freezing order obtained in a private action. The Director of Public Prosecutions or the Financial Intelligence Unit (FIU) may apply to the Supreme Court for a restraining order. The application can be made without notice to those parties affected. Once made, there is generally an anti-tipping-off order or mechanism put in place to restrain those third parties such as banks and other financial institutions who become aware of the fact that the restraining order has been made and is in place. This prevents them from tipping off any person that such an order is in place.

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11 The Money Laundering and Terrorism Prevention Act 2008 (as amended by Act No. 4 of 2013 and Act No. 7 of 2014).
Restraining orders are generally intended to freeze the proceeds of crime. The restraint is predicated upon a money laundering offence. Money laundering offences must be, in turn, predicated upon some criminal offence.

The MLTPA provides that an applicant must satisfy certain strict requirements to obtain a restraining order. Section 39 of the MLTPA states that an application for a freezing order may be made *ex parte*, and shall be in writing and accompanied by an affidavit stating:

- *a* where the accused has been convicted of a serious crime, the serious crime for which he or she was convicted, the date of the conviction, the court before which the conviction was obtained and whether an appeal has been lodged against the conviction;
- *b* where the accused has not been convicted of a serious crime, the crime for which he or she is charged or about to be charged, or is being investigated, and the grounds for believing that the defendant committed the offence;
- *c* a description of the property in respect of which the restraining order is sought;
- *d* the name and address of the person who is believed to be in possession of the property;
- *e* the grounds for the belief that the property is tainted property in relation to the offence or that the accused derived a benefit directly or indirectly from the commission of the offence;
- *f* where the application seeks a restraining order against property of a person other than the defendant, the grounds for the belief that the property is tainted property in relation to the offence and is subject to the effective control of the accused or is a gift caught by the MLTPA; and
- *g* the grounds for the belief that a forfeiture order or a pecuniary penalty order may be or is likely to be made under this part in respect of the property.

Section 39 thereby sets down the minimum evidentiary requirements and establishes the threshold of proof that an applicant must meet on applying to court for a restraining order. Section 40 of the MLTPA goes on to state the case that the applicant must make out before the court may grant a freezing order:

40. (1) Subject to this section, where the Director of Public Prosecutions or the Financial Intelligence Unit applies to the Court for a restraining Order against property and the Court is satisfied that,

(a) the accused has been convicted of a serious crime or has been charge or is about to be charged with or is being investigated for a serious crime;

(b) where the accused has not been convicted of a serious crime, there is reasonable cause to believe that the property is tainted property in relation to an offence or that the accused derived a benefit directly or indirectly from the commission of the offence;

(c) where the application seeks a restraining order against property of a person other than the accused, there are reasonable grounds for believing that the property is tainted property in relation to an offence and that the property is subject to the effective control of the accused or is property held by the defendant or a gift caught by this Act; and

(d) there are reasonable grounds for believing that a forfeiture order or a pecuniary penalty order may be or is likely to be made under this part in respect of the property,

the Court may make an order,

(i) prohibiting the defendant or any person from disposing of or otherwise, dealing with, the property or such part thereof or interest therein as is specified in the order, except in such manner as may be specified in the order.
ii Insolvency

Sections 108 and 109 of the Belize International Business Companies Act provide that a company that has been struck off the International Business Companies Register can be restored upon application of any of the following parties: the company, a member, a creditor or a liquidator. Furthermore, a company that has been struck off the Register remains liable for its debts. Once restored, the company's capacity to be sued is restored. Therefore, a creditor of an IBC who is a victim of fraud perpetrated in the name of, or through the use of, that IBC can have a company restored upon his or her application. That creditor may then proceed to sue the company for recovery. The company is then subject to court orders of the Belize court, both interim and final, being made against it.

It is arguable that in Belize, a voluntary liquidation that has been proceeded upon on the basis of fraud or with the intent to defraud creditors can be overturned upon application to court for a declaration to that effect.

iii Arbitration

The Supreme Court of Belize may set aside an arbitration award where that arbitration or award has been improperly procured according to Section 12(2) of the Arbitration Act. It is submitted that the rubric 'improperly procured' includes awards procured through fraudulent or deceptive means.

iv Fraud’s effect on evidentiary rules and legal privilege

The presence of fraud may result in shifting the ordinary evidence of the burden of proof in litigation. For instance, it is settled that in cases brought under Section 149 of Belize’s Law of Property Act for relief on account of fraudulent conveyances, the normal incidence or burden of proof shifts from claimant to defendant once the claimant has established that a transaction was done for consideration that was short of full consideration. It then becomes for the defendant to prove that the transaction was bona fide and not made with the intent to defraud creditors:

In an action to set aside a conveyance ... the onus of proof of intent to defraud rests upon the Plaintiff where the conveyance is for valuable consideration. Where, however, the conveyance is voluntary, and even perhaps where it is for valuable consideration short of full consideration, then on proof that at the time of its execution ... the natural consequence of the conveyance was to defraud creditors, or that the circumstances under which the conveyance was effected bore one of the indications or badges of fraud subsequently mentioned, the onus of disproving an intent to defraud passes to the defendant.13

It is submitted that in Belize, the usual common law position that documents, correspondences and communications that are a part of a crime or fraud are not privileged applies.

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12 Arbitration Act, Chapter 125 of the Laws of Belize (RE 2011).
V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims
As stated above, where the issues in a case touch and concern more than one jurisdiction, it is generally accepted that a court will determine that the applicable law will be the law of the jurisdiction with the strongest connection to the salient features of the case. Where the parties have chosen the law of a particular jurisdiction as the governing law of a contract or deed, a Belize court will generally give effect to the parties’ choice of law.

ii Collection of evidence in support of proceedings abroad
The law and practice in Belize enables the collection of evidence locally to be used in support of proceedings abroad. So, for instance, a party may make an application to the Belize court for third-party disclosure orders with the aim of securing evidence for use in foreign proceedings. These include Norwich Pharmacal orders and Bankers Trust orders, as discussed above.

Similarly, one may make requests for such information directly to the Director of International Financial Services who may, in his or her discretion, require disclosure from any international financial service provider that may have the information.

iii Seizure of assets or proceeds of fraud in support of the victim of fraud
Where actions are brought primarily by way of asset-tracing claims or private law actions for damages, the fruits of the litigation will generally be for the individual claimant. This especially applies in tracing actions where the basis of the claim is the claimant’s assertion of ownership of the funds or assets. The result of these actions, where successful, will generally be a pronouncement by the court affirming or declaring the claimant’s ownership and consequential orders for the payment or delivery of the property.

In other cases, the FIU may rely on its powers to seize assets with the aim of restoring property to its lawful owner, who, in some cases, will have been a victim of fraud. Procedurally, the FIU will be required to go through the process of freezing the assets or proceeds of fraud on an interim basis, then satisfy the court that the property is the property of that victim before the court makes a final order or declaration of ownership.

iv Enforcement of judgments granted abroad in relation to fraud claims
In Belize, there are two main methods of enforcing judgments granted abroad. First, judgment may be enforced under the Reciprocal Enforcement of Judgments Act. This Act generally applies to judgments emanating from competent courts in the United Kingdom and other countries of the Commonwealth. Secondly, a judgment may be enforced by suit on the judgment sought to be enforced outside the provisions of the Reciprocal Enforcement of Judgments Act. This generally involves suing upon the foreign judgment as a bare contract debt in the Belize Supreme Court. In both cases, the judgment must generally be one for payment of a specified sum of money that has been granted by a competent court after consideration of the merits of the case. The judgment must be final and conclusive, which includes that it is not subject to appeal.

v Fraud as a defence to enforcement of judgments granted abroad
According to Section 11(1) of the Reciprocal Enforcement of Judgments Act, satisfactory proof that a judgment has been obtained by fraud is a defence to the enforcement of
judgments granted abroad and a basis for the Belize court to set that judgment aside. This applies to cases where enforcement is sought under the Reciprocal Enforcement of Judgments Act and by *suit de novo* on the judgment.

VI CURRENT DEVELOPMENTS

Belize, like the rest of the offshore world, continues to contend with international pressure to reform its international financial services sector. There continues to be sustained international pressure to increase the amount of publicly available information on offshore entities and to strengthen the regulation of the sector generally. The effects may be twofold if these trends continue to take hold in ways that, from a positive perspective, engender greater access to information. First, Belize offshore vehicles may become less attractive for use in the perpetration of fraud. Second, where it turns out that these vehicles are so misused, the task of arresting their misuse may be made easier. From another perspective, though, it is possible that these trends may dissuade legitimate users of our services from using them. Whether that delicate balance can in fact be struck remains to be seen.
Chapter 6

BRAZIL

Leonardo Adriano Ribeiro Dias and Aitan Canuto Cosenza Portela

I  OVERVIEW

Fraud can assume many faces. One of the biggest challenges for legal professionals is to seek, identify and nullify transactions made by debtors in financial troubles (particularly businesses and their owners or controlling shareholders) who aim to hide assets from their creditors.

Generally, before a loan is granted, the lender demands information from the borrower to analyse his or her capacity to perform the loan. In this, it is paramount that a full scenario of the financial situation of the debtor be provided, so that the lender can assess the assets available, be aware of the outstanding liabilities and measure the risk involved, which can be compensated by a collateral or a higher interest rate.

Furthermore, given that the capital structure of Brazilian firms is generally centred on the figure of a controlling shareholder (who is normally the manager of the company), it is customary for lenders to demand that this person be jointly liable with the main debtor, so that his or her assets can be reached in the event of default.

The problem arises when creditors try to enforce their rights and find only an empty shell, namely a company without assets that is a compromised operation; or a debtor under a formal insolvency procedure for the ‘bad’ company, while safe harbour has been granted to the ‘good’ company, which is led by a straw man through another company with a different name but that is, in fact, the same business.

Brazilian law provides a framework for creditors and other victims of dishonest practices to obtain the annulment of transactions involving transference of assets, and to obtain seizure of the assets. However, a preliminary step consists of finding evidence about the debtor and suspect transactions involving his or her assets, as well as how and when to use the evidence. This task demands the use of specific tools, deep knowledge and multiple skills in several areas of law, so that assets can be traced and recovered.

Whenever there are strong elements of proof concerning diversion of assets and fraudulent transactions, Brazilian courts tend to be responsive to their claims, so that the due process of law can be granted.

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II LEGAL RIGHTS AND REMEDIES

Brazilian rules against fraud and diversion of assets are spread through a set of civil, commercial, procedural and criminal laws. Certain rules are applicable depending on the specific situation.

i Civil and criminal remedies

The Brazilian Civil Code (BCC) has a specific chapter regarding defects of contracts, including the regulation of fraud against creditors. In this context, free transference of assets or releasing of debts, if carried out by an insolvent debtor, or by a debtor whose insolvency resulted from the transactions, can be annulled by pre-existing unsecured creditors as harmful to their rights. Secured creditors whose collateral became insufficient have the same right.

Fraud can only be alleged by a person who already held a credit against the debtor at the time of the fraudulent transference, as the law assumes that when the credit came into existence (either through a loan or by means of another legal relationship), the creditor should know the economic and financial situation of the debtor.

Onerous contracts of the insolvent debtor shall also be void when insolvency is notorious, or there are reasons that are known to the other party.

In all situations mentioned above, the creditor can file a defeasance action against the debtor who committed the fraud, the person who received the asset or third parties who received them in bad faith.

A different situation provided for in Brazilian law is fraud against creditors in execution action. It consists of an institute with procedural nature, set forth in Article 792 of the Brazilian Code of Civil Procedure (BCCP) of 2015, which assumes that there is an execution procedure in course, regardless of the insolvency of the debtor. From the perspective of the creditor who filed the execution action, the transference is not void but ineffective, which implies that a defeasance action is not necessary and the asset can be seized during the execution procedure.

The BCC, in its Article 167, also punishes parties involved in sham transactions, which are considered null and void when:

a they appear to confer or transmit rights to people different from those to which they are actually conferred or transmitted;
b they contain untrue statements, confessions, conditions or clauses; or
c the instruments are backdated or postdated.

A sham transaction is a matter of public policy and can be declared by the judge on his or her own initiative and authority at any time and level of jurisdiction in a pending litigation, regardless of the bringing of a defeasance action.

Furthermore, the BCCP also provides for urgent measures (i.e., seizures) that can be taken in the beginning of a lawsuit, without the defendant’s knowledge. The BCCP also brings up the brand-new early evidence procedure, which can be requested before the commencement of the appropriate lawsuit, whenever:

a there is a grounded fear that it will become impossible or very difficult to verify certain facts pending the action;

2 Articles 158–165, BCC.
the evidence to be produced is likely to lead to plea negotiation or a suitable method of dispute resolution; or

previous knowledge of the facts can justify or avoid the filing of a claim.

For companies that have formally ceased their activities, Article 1,146 of the BCC allows recognition of business succession in the case of establishment transference. Apart from formal establishment purchases and sales, this possibility arises when there is evidence that another company is carrying out the same line of business at the same address of the debtor, but the managers and shareholders are different. Generally, in these cases, the managers of the debtor are acting by means of an intermediary and it is possible to reach the assets of the new company.

A similar and common approach is to disregard the legal entity, provided for in Article 50 of the BCC, the regulation of which is implemented by Articles 133–137 of the BCCP. According to Brazilian law, the doctrine on disregarding the legal entity is applicable in two situations: deviation from purpose or equity confusion. While the former implies the use of the company by their managers or shareholders for purposes different from those aimed by the law and the corporate by-laws, the latter represents a messy overlap between the company’s assets and liabilities and its shareholders’ or managers’ assets and liabilities, so that money flows from one side to the other without legal justification. As a consequence, the court can declare that certain obligations of the company be extended to the particular assets of its managers or shareholders. The reverse of this doctrine is also permitted by law.

In an insolvency context, pursuant to Articles 129 and 130 of the Brazilian Bankruptcy Law (BBL), certain transactions executed during a period before the opening of a liquidation procedure and set forth in law can be considered ineffective before the estate regardless of the fraudulent intention. On the other hand, all transactions carried out with the intention of harming creditors can be revoked, whenever it is proven that there is a fraudulent collusion between the debtor and third parties and the effective loss is supported by the estate.

Moving to the criminal sphere, the Brazilian Criminal Code devotes one chapter to fraud, including fraudulent larceny. This crime, as provided for in Article 171, is when an individual obtains, for himself, herself or third parties, an illicit advantage to the detriment of another person by inducing that person to make, or be sustained in, an error, by means of trickery or any other fraudulent means. The punishment for this crime is one to five years in prison, and a fine.

It is important to emphasise that this crime has four prerequisites:

- obtaining an advantage;
- causing injury to someone;
- for this purpose, there must be an element of deceit; and
- as a consequence, someone was led to make a mistake.

Another crime that merits attention is pledge defrauding, which involves the sale of pledged collateral by the debtor in possession of the collateral to third parties, without the consent of the creditor, regardless of whether the debtor obtained an economic advantage in the sale. This crime is provided for in Article 171, Paragraph 2, Subsection III, of the Brazilian Criminal Code, and the punishment is the same as that for fraudulent larceny.

Article 172 of the Brazilian Criminal Code specifies the crime of simulating trade bills, which consists of issuing invoices, trade bills or sales notes that do not correspond to the
goods sold or services rendered. This crime directly affects the credit market, as the invoices or trade bills are normally discounted in a bank against immediate cash. The punishment is two to four years in prison, and a fine.

Further, the crime of receiving stolen goods is specified in Article 180 and consists of acquiring, receiving, transporting or hiding an object while knowing of its illegal origin. It is also required that the person has the purpose of obtaining benefit for himself, herself or a third party; the punishment for this offence is one to four years in prison, and a fine.

Brazilian law also criminally punishes money laundering conduct that is verified when someone hides or disguises the nature, origin, location, disposition, movement or ownership of goods, rights or amounts coming directly or indirectly from previous crimes. Here, the main goal is to give a legal appearance to assets that are criminally obtained. Punishment involves three to 10 years in prison, and a fine.

The likelihood of success in each case will depend on the level and nature of the evidence of fraud brought before the judge, as well as the court in which the claim is proposed. The low volume of claims and the high qualification of the clerks can contribute to faster and favourable results.

At the end of 2016, Brazilian courts had almost 80 million pending legal processes, of which 51.1 per cent referred to execution actions, including tax executions (which represented 38 per cent of the total pending cases).\(^3\) Besides this, in the pre-judgment phase, ordinary proceedings (e.g., defeasance actions) before state courts took an average of one year and four months for the law court decision to be made, while an execution action took four years and six months.\(^4\) This difference can be explained because the execution action only ends when the debt is fully paid. However, after a final court decision in a legal process, the plaintiff has to enforce it, and another period starts to run, which makes the procedure longer.

Furthermore, according to the 2017 World Bank’s Doing Business Report, a claim in São Paulo Civil District Court takes about 731 days to be resolved, from the moment the plaintiff files the lawsuit in court until payment.\(^5\) Within this period, it takes 480 days until trial and judgment, while enforcement of the judgment requires 210 days. This process can be shortened if the plaintiff has an execution instrument, and enforcement procedures can start immediately.

It is important to highlight that these time frames can change drastically depending on the court before which the claim is filed. For example, an execution action in the state of Pernambuco takes about seven years to be resolved, while in the state of Minas Gerais such an action takes less than four years.\(^6\)

The choice of venue must observe the rules of the BCCP, but will be governed basically by the general rule (the domicile of the defendant) or the jurisdiction chosen in the contract by the parties. Arbitration clauses are allowed for claims related to transferable property rights and are recommended for complex matters, but enforcement procedures must be initiated before the regular courts.

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\(^4\) National Justice Council op cit, p. 131.


\(^6\) National Justice Council op cit, p. 135.
As a rule, initiating a court procedure in Brazil entails the payment of court costs, which vary according to the state and are based on the value of the matter in controversy. In 2017, the cost of starting a civil claim in São Paulo was one per cent of the value of the matter in dispute, limited to 75,210 reais. In addition, to bring a claim to court, the plaintiff must pay attorneys’ fees, which can be negotiated on a case-by-case basis. Other costs can arise, depending on the claim; for example, in relation to court clerks, registrars, seizures and appeals.

The 2017 World Bank’s Doing Business Report found that the cost of a claim in São Paulo Civil District Court, considering the cost for court fees and attorney fees, is 20.7 per cent of the value of the matter in controversy.7

For plaintiffs who live abroad, the BCCP states that they must post bond for court costs and fees if they do not have real estate in Brazil to assure payment of these. The bond is not required in enforcement procedures (such as execution actions), counterclaims or in the case of express waiver in international treaty or agreements to which Brazil is a signatory.

Filing an execution action, which is the fastest way to recover assets and values, demands an execution instrument, as listed in Article 784 of the BCCP and basically involves documents representing an unquestionable and payable right. The most common are promissory notes, checks, debentures, banking credit certificates and any particular document signed by the debtor and two witnesses in which the debtor recognises his or her obligation.

Execution instruments arising from other countries do not depend on any ratification by Brazilian courts, although their effectiveness is subject to the formation requirements of the law of the place of execution, and Brazil must be indicated as the place of performance of the obligation.

If the claimant does not hold an execution instrument, he or she must file an ordinary proceeding and get a judicial execution instrument, which can be further enforced.

In any context, if a fraudulent transference is identified, the first and most important step for claimants is to gather as much evidence as possible to show the judge that the debtor is surely dilapidating or hiding his or her assets from creditors. Each specific situation must be carefully analysed so that the strategy to be followed can be defined, either in the civil or the criminal field.

ii Defences to fraud claims

Defences vary from case to case. The Brazilian Constitution grants defendants a due process of law that comprehends the possibility of a full defence, following an adversary system in which one party must be granted the opportunity to challenge the arguments brought by the other party.

In fact, by their nature, executory actions are less likely to be challenged and defendants can manage a motion to stay collection, claiming the unenforceability of the execution instrument, incorrect seizure or erroneous appraisal, amounts that are higher than those due, improper accumulation of executions and any subject matter that could be claimed in an ordinary procedure.

In actions involving fraud, before they are declared, the judge must notify the third party that acquired the asset to file a third-party defence within 15 days.

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On the other hand, in an ordinary procedure, the defendant will have the opportunity to defend himself or herself in a broad manner, including evidence-finding represented by witnesses, documents, statement of the other party and expert proof.

The defendant may claim at any time during the court action or procedure that credit has lapsed or is statute-barred, in which case, a credit cannot be enforced, or a transaction subject to annulment can be revalidated. For example, the limitation period within which a defeasance action must be brought is four years, counted from the day the fraudulent transference was executed, while the collection of unquestionable debts must be made within five years and the payment of an instrument of credit can be demanded in three years.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

According to Article 300 et seq. of the BCCP, on the commencement of a lawsuit, as a preliminary injunction *ex parte*, the creditor may file for an urgent protection request whenever there is evidence of the probability of the right and of danger of damage or risk to the useful result of the process. The request can be justified when there is evidence of fraud involving the transference of assets, aiming to hide them from creditors. Urgent protection may be effected by seizure, registration of protest against disposal of property and any other suitable measure to assure the right. On the other hand, the request will be denied whenever there is danger of irreversibility of the effects of the decision.

In addition, the claimant is responsible for losses caused by the effectiveness of the urgency request if:

a the court’s final decision is unfavourable;

b the claimant does not provide the necessary means for summoning the defendant within five days;

c the urgency request ceases to be effective; and

d the judge recognises the loss of the procedural right or the occurrence of prescription.

A similar effect can be achieved through execution actions. According to Article 799, Section VIII of the BCCP, the claimant may request urgent measures in the initial complaint whenever there is strong evidence of asset diversion or a deep economic or financial crisis – as proven by the recent growth of lawsuits against debtors, the amounts involved, recurring losses in financial statements (when publicly available) or discontinuance of activities.

Through such a request, it is possible, without the previous knowledge of the debtor, to seize bank accounts and investments in real time by means of the Bacenjud system. This is a system that interconnects the courts to the Central Bank of Brazil and the banking institutions, to expedite requests for information and the transmission of judicial orders to the national financial system, via the internet.

For vehicles, a similar approach is possible via Renajud, an online system of judicial restraint of vehicles created by the National Justice Council, which links the courts to the national traffic department (Denatran) and allows research and real-time dispatch of judicial orders for vehicle restrictions, including attachment records, to the database of the national registry of motor vehicles (Renavam).
The seizure of real estate is also possible in São Paulo through the online system ARISP (Sao Paulo Real Estate Registers Association, for real estate located in São Paulo). For other states, seizure must be carried out by way of an official letter (generally in a physical form) from the court.

These effects can also be achieved under Article 828 of the BCCP, which allows the claimant to obtain a preliminary certificate from the court and record it with the real estate registry or other registries of debtor’s assets subject to seizure, attachment or freezing. The certificate indicates the court authority for the execution action, the parties and the amount involved. Any sale of, or burden imposed on, the relevant asset will be presumed to be in breach of the execution action.

Quotas of limited liability companies can also be seized in accordance with a court order to this effect. This will be recorded in the company’s summary card, in the commercial registry, preventing any change in the articles of association of the company, including the sale of the equity interest. For joint-stock companies, the seizure must be recorded in the registered share register.

Seizure of trademarks is also possible, and this must be registered with the National Institute of Industrial Property. The BCCP also expressly allows the seizure of credits in the name of the debtor, parts of the revenues of the debtor (in the case of companies, as long as it does not make the business impracticable) and rent that the debtor receives.

A similar approach can be taken through the brand-new procedure of early evidence production, allowed in cases where there is a justified fear that the verification of certain facts during a forthcoming lawsuit will be impossible or very difficult. In theory, this procedure is applicable in cases where an asset dilapidation has been identified that will not be possible to prove in the future. However, the most advisable strategy would be to seize the assets through an urgent protection request.

Pending the outcome of a foreign or domestic claim (except execution action), if fraudulent transferences are identified, an independent lawsuit for fraud may be filed against creditors, including an urgent protection request to freeze the assets on the verge of being transferred. However, strong evidence must be shown to convince the court of the risk of damage and the probability of the right over the assets.

ii Obtaining evidence

Obtaining evidence of fraud is considered a challenge, as the financial statements of the vast majority of Brazilian companies are not publicly available. Therefore, information from the market is a starting point, as is confirmation of a relevant decrease in the business of the debtor.

In the event of default, when there is no more dialogue with the debtor, a diagnosis of the debtor’s assets is paramount to guide the strategy that will be followed. This task involves several out-of-court procedures and investigations.

First of all, it is necessary to know what collateral was offered, its current situation and who possesses it. If the collateral was sold by the debtor, there can be civil and criminal consequences, as mentioned above.

Second, the apparent situation of the debtor must be identified, gathering all available information about its activities, assets and debts. This task involves several steps that begin with research on courts’ websites to find claims against the debtor. If he or she is not found at his or her known address or addresses, this represents a strong sign that his or her activities were shut down.
Likewise, high quantities of civil, fiscal and labour claims involving relevant amounts indicate the existence of deep financial or economic crisis that precedes the asset concealment. Lawsuits can also reveal what assets other creditors are pursuing.

Furthermore, online research on the federal revenue website can show whether the debtor is regular or inactive, as well as if he or she provided an email address or phone number.

An additional approach consists of accessing the debtor’s website and trying to find out where he or she carries out his or her activities, who the debtor’s clients are and what line of business the debtor has developed. On Google Street View, it is also possible to identify the debtor’s headquarters or plants and check whether there is another company operating there, indicating the continuation of business through a new company.

Also, research in the commercial registry in the name of the company debtor and its partners can reveal the incorporation of new companies with the intention of receiving assets or assuming the activities of the debtor, while the creditors litigate against an empty shell. Changes in the debtor’s capital stock or in his or her capital ownership may also draw researchers’ attention, as the old partners joint liability to the company can be changed by fake partners, to protect their personal assets.

Research of trademarks in the National Institute of Industrial Property may reveal whether valuable and famous marks have been transferred at no cost or for low amounts, which may also indicate an attempt to hide assets from creditors.

Moreover, research on real estate registries can track transference of real estate in an insolvency situation. In São Paulo, research can be conducted online through the ARISP website at a low cost. Similar research is available for vehicles, aircraft and boats.

Finding debtors and their managers through social networks such as Facebook or LinkedIn can reveal what they are doing and where, and indicate whether they have assets that nobody was aware of. However, news reports can also tell us if a company is in a troubled situation, has ceased activities or has filed for judicial recovery.

IV FRAUD IN SPECIFIC CONTEXTS

i Insolvency

Bmart Brinquedos is an important player in the toys retail market in Brazil. In 2016, it filed for the Brazilian reorganisation procedure (judicial recovery) in substantive consolidation, declaring a total debt of 120 million reais, distributed among banks, suppliers and workers.

Its CEO, founder and controlling quota holder was guarantor for and jointly liable with Bmart for several loans with Brazilian banks. In 2015, aware of the fact that judicial recovery under the BBL is applicable only to companies, and that credits can be enforced against a guarantor who is a natural person, the CEO and his family began the concealment of several valuable personal assets, particularly real estate. Furthermore, with a view to surviving the reorganisation procedure, he also tried to hide valuable company assets, including the profits from Christmas sales and trademarks.

A few months before filing for judicial recovery, the CEO incorporated an individual limited liability company (EIRELI). He then changed the articles of association of the other 25 companies of the group to remove all his relatives from the partnership, leaving only himself as partner of the companies alongside his EIRELI. In other words, he became his own partner in 25 limited liability companies, which is questionable from the perspective of Brazilian law.
Besides this, he incorporated two other companies: one a business managing trademarks, and the other a family holding company investing in real estate. While Bmart's trademarks were transferred for the small amount of 100 reais to the first company, the CEO increased the capital stock of the second company by transferring to it all real estate in his name, and weeks later sold all his quotas to his sons against a payment of 16 instalments, the first of which would become due five years later. Considering that the group and its CEO had borrowed a large amount of money from the banking market, the fraud was manifest.

In parallel, another EIRELI was incorporated by the brother of the CEO in the same place, the main distribution centre of Bmart's stores, to work as the new main supplier of the group. Actually, the new company worked as a brass plate company, as it was not subject to the judicial recovery and could buy goods from the real suppliers under better conditions, as well as hiding the profits of the stores and not being monitored by the insolvency practitioner or the judge.

Finally, the billings of the insolvent companies were being transferred directly to the CEO's EIRELI and could not be reached by the creditors, as that company was also outside the judicial recovery process. This practice can also be considered a tax crime. Additionally, it was proved that the reorganised companies were paying the personal debts of the CEO.

After intense research and reconstruction of all steps adopted by the CEO and the group, one creditor filed a request for urgent protection against the CEO and all parties involved, in secret, aiming to seize all assets that had been transferred fraudulently. The order was granted and, furthermore, the creditor filed a defeasance action and an execution action.

The matter was brought before the insolvency judge, who called a hearing in which the CEO recognised the diversion of assets. As a consequence, the prosecutor requested the commencement of a criminal procedure and a trustee was nominated by the judge to supervise the day-to-day operations and authorise all cash movements. In the end, the creditor and the CEO reached a settlement and the actions proposed by the creditor were shelved.

V INTERNATIONAL ASPECTS

International legal cooperation can be understood as a formal way of requesting from another country some judicial measure, investigation or administrative action in relation to a concrete case in progress. The effectiveness of justice in the context of intensified relations between nations, whether in respect of commercial, migration or information matters, increasingly requires a state to adopt a proactive and collaborative approach.

A concrete example of the importance of international legal cooperation is Lava Jato, or Operation Car Wash, the largest investigation of a scheme of systemic corruption, bribery and money laundering in Brazil, involving large companies and politicians.

In three years, the operation conducted 183 requests for cooperation with 43 different countries. Of these countries 14 provided information through active requests and also requested information for cooperation.

According to the Operation Car Wash task force:

*The amount of international cooperation celebrated within this operation demonstrates a scenario that should become more common in the next years and in the development of future research. The exchange of information between authorities in different countries with the aim of combating transnational crimes and unraveling a series of illicit crimes committed, beyond the country itself.
is a reality that only tends to grow. And in three years, the investigation of the country’s biggest corruption scandal reinforces that this is a path without a return and of fundamental importance for the progress of the work carried out both in Brazil and in other countries.8

Until March 2017, the exchange of information between the authorities of the countries allowed the recovery of almost 756 billion reais abroad, of which 594 billion reais have already been repatriated.

Furthermore, in 2015, the BCCP reinforced international cooperation between jurisdictions, according to international treaties ratified by Brazil. This cooperation may involve:

a. summonses, subpoenas and judicial and extrajudicial notifications;
b. gathering evidence and obtaining information;
c. ratification and enforcement of decisions;
d. granting of urgent remedies;
e. international legal assistance; and
f. any other judicial or extrajudicial measures not prohibited by Brazilian law.

Nonetheless, the Brazilian Constitution still determines that foreign decisions depend on ratification by the Superior Court of Justice to be enforced in Brazil and, unless an international treaty says differently, this procedure has to be followed.

VI CURRENT DEVELOPMENTS

Brazilian law has evolved in the past years in terms of enforcement procedures and the punishment of acts related to fraud, in both the civil and the criminal spheres. A great number of legal procedures are now electronic, which makes them faster, and makes decisions more effective. Furthermore, online seizure procedures such as the Bacenjud and Renajud systems have greatly facilitated the recovery of assets.

However, certain practices should be improved, such as registry services, as most of these are expensive, slow and are not provided as online services, impeding deeper research into assets and the prompt implementation of seizure or freezing orders.

Apart from this, a draft bill of law to reform the BBL is being prepared by the Ministry of Finance, involving specific rules about fraudulent practices in preparation for judicial recovery, to make the recognition and prevention of such practices easier.

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Chapter 7

BRITISH VIRGIN ISLANDS

*Tim Prudhoe and Alexander W Heylin*

I OVERVIEW

i Legal system in the BVI

The British Virgin Islands (BVI) is a British overseas territory in the Leeward Islands of the Caribbean applying English common law principles. Much of the legislation in the BVI is modelled on (and in some cases directly imports) English statutes. There is a growing body of domestic common law and, where there are gaps, common law from England and other Commonwealth jurisdictions is considered persuasive.

The BVI has a similar court structure to England, and the Commercial Court – as a division of the Supreme Court (also known as the High Court) – handles disputes arising from trade or commerce. In April 2009, a new commercial division of the court was opened in the BVI. Generally, under Parts 69A and 69B of the Eastern Caribbean Supreme Court Civil Procedure Rules (Application to the Virgin Islands) (Amendment) Order 2009, subject to a statutory discretion to include other (i.e., non-qualifying) cases, a case is suitable for determination in the Commercial Court if it is a commercial claim, namely arising out of the transaction of trade or commerce. The minimum value for a claim to be brought in the Commercial Court is US$500,000. The discretion to include cases outside these qualifying criteria is exercised on the basis of the claim still being of a commercial nature and one that warrants being in the commercial list.

Civil asset recovery litigation will usually proceed in the Commercial Court. If criminal proceedings are brought, these will usually be commenced in the criminal division of the Supreme Court. The BVI is a member of the Eastern Caribbean Supreme Court (ECSC), and the ECSC Civil Procedure Rules (CPRs) are the binding procedural rules used in the Supreme Court. Appeals from the Supreme Court are to the ECSC Court of Appeal, which sits three times a year in the BVI. Appeals from the ECSC Court of Appeal are to the Judicial Committee of the Privy Council.

BVI statutes of potential relevance include the BVI Business Companies Act 2004, the BVI Insolvency Act 2003 and the BVI Evidence Act 2006. In the asset-recovery context, it is worth noting that the Privy Council (hearing a Cayman Islands appeal in 2005) concluded that Section 122 of the Bankruptcy Act 1914 – which requires courts in former colonial or Commonwealth territories to assist each other in bankruptcy matters – was still in force.
in British Overseas Territories despite its repeal in England (Al Sabah and Another v. Grupo Torras SA [2005] UKPC 1). The BVI courts are very familiar with asset recovery matters and have issued a number of pro-creditor decisions in recent years. The Black Swan freezing injunction is a well-known example, and is discussed later in this chapter.

ii Publicly available information

In common with other territories with a similar constitutional relationship with the United Kingdom, there has been a fundamental change in the position of this important area in the past year. In BVI, specifically, this has been via the Beneficial Ownership Secure Search System Act 2017 (the Act), which was further amended on 16 June 2017. The Act enables the creation of a new Beneficial Ownership Secure Search System (BOSS). This information is not available to the general public, but only to specific government bodies identified under the Act. Beneficial owners will not be informed when a search is made via BOSS. This is because of concerns about tipping off a beneficial owner. There is no equivalent ‘sideways’ route to this information via a Freedom of Information-type Act as in the United Kingdom, and that may itself drive business to BVI.

The Act requires registered agents for BVI entities to make certain information on the beneficial owners of all BVI companies and limited partnerships accessible by a secure government search system. The Act applies to corporate and legal entities, which, for the purposes of the Act, means companies incorporated or existing under the laws of the BVI. The Act, which entered into force on 30 June 2017, implemented the agreement the governments of the BVI and the United Kingdom entered into on 8 April 2016. A number of other overseas territories entered into similar agreements, which provide for a fundamental change to the amount of information that can be obtained by government entities about ownership of offshore entities. It provides the legal framework for recording accurate beneficial ownership information and the disclosure of that information to law enforcement authorities in jurisdictions with which the BVI has entered into bilateral agreements similar to the UK Exchange of Notes.

The Act requires that registered agents maintain a database of the corporate and legal entities for whom they act as registered agent (the RA Database). The RA Database is private. It will, however, be searchable by certain BVI governmental bodies via BOSS, which enables an electronic secure search of each RA Database. At the moment, only UK authorities can request the BVI authorities to provide beneficial ownership information that will be accessible through the BOSS system. The information accessible through BOSS will be the name, residential address, date of birth and nationality of each BVI company’s beneficial owner.

In respect of each beneficial owner to whom the Act applies, registered agents will be required to retain the following information:

- **a** name;
- **b** residential address;
- **c** date of birth; and
- **d** nationality.

6 The Act, Section 10(3)(b)(i).
7 The Act, Section 10(3)(b)(ii).
8 The Act, Section 10(3)(b)(iii).
9 The Act, Section 10(3)(b)(iv).
The only authorities entitled to request that a search of the RA Database be carried out are:

- the BVI Financial Investigation Agency (FIA);  
- the BVI Financial Services Commission;  
- the BVI International Tax Authority;  
- the BVI Attorney General’s Chambers.

Information held by registered agents will be retained for five years following the dissolution, or other cessation, of the corporate and legal entity.

In addition, the BVI has several of tax information and exchange agreements with other countries and has implemented both the US and UK Foreign Account Tax Compliance Acts. Typical information available to the public includes:

- company information, including:
  - the present and historical status of a BVI company;
  - the identity of the registered agent;
  - the place of its registered office;
  - the date when it was incorporated;
  - certificates of good standing (available to any member of the public for a BVI company);
  - the contents of its memorandum and articles of association; and
  - registered charges (if any);
- list of entities regulated by the BVI Financial Services Commission;
- court documents and judgments;
- Land Registry: can provide certain details, including confirmation of the owner of BVI land or real estate upon application;
- BVI Ship Registry: certain information regarding vessels registered under a BVI flag; and
- list of disqualified directors.

### iii Regulation and law enforcement

The legislative agenda of the BVI continues to reflect current global initiatives in terms of finance-related legislation and proceeds of crime:

- Financial Investigation Agency (Amendment) Act 2017:
  - Section 2(a) of the Act permits the Director of the FIA to provide information to the Commissioner of Police where such information may relate to the commission of a criminal offence, whereas previously this was restricted to financial offences.
  - Section 2(b) of the act expands the FIA’s duty to report evidence to the police force to include financial offences.
  - Section 2(c) repeals the provision that restricted the FIA from participating further in an investigation it had reported to the police force without being ordered to do so by the Governor or the Attorney General or being requested to assist by the Commissioner of Police.

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10 The Act, Section 13(6)(a).
11 The Act, Section 13(6)(b).
12 The Act, Section 13(6)(c).
13 The Act, Section 13(6)(d).
14 The Act, Section 11.
b Criminal Justice (International Cooperation) (Amendment) Act 2017 (which amends legislation from 1993).\(^{15}\) Section 4 of the recent amendment removes the requirement for a country or territory to be designated by a statutory instrument before a statutory instrument can be published, providing for enforcement by an order made by their courts.

c Drug Trafficking Offences (Amendment) Act 2017. Section 2 changes the terminology used from ‘designated country’ to ‘requesting country’.

d Proceeds of Criminal Conduct (Amendment) Act 2017:
- Section 2 of the Act amends the definition of ‘police officer’ from only encompassing the director and an investigating officer of the Financial Investigation Agency, to ‘including’ the director and an investigating officer of the Agency.
- Section 7 of the Act expands the circumstances in which offences can be created in contravention of a code of practice to include entities regulated by the Financial Investigation Agency, and permits the Minister of Finance to determine what proportion of fines paid to the FIA may be used by the agency.
- Sections 4 and 5 change the terminology regarding enforcement of external confiscation orders and proceedings from ‘designated country’ to ‘requesting country’.

The financial services industry in the BVI is regulated by the BVI Financial Services Commission (FSC). The FSC is an autonomous body that reports to the Premier, the BVI Cabinet and the House of Assembly. Intelligence concerning financial crimes is controlled by the FIA, which was established under the Financial Investigation Agency Act 2003. The powers of the FIA were enhanced under the Financial Investigation Agency (Amendment) Act 2017,\(^{16}\) giving greater discretion and an enhanced role. The FIA has a number of statutory powers to assist it with collecting evidence and liaising with national and overseas authorities to prevent financial crime. The Financial Investigation Unit (FIU) is the specialist unit within the BVI police force responsible for investigating financial crime. The FIU works in tandem with the FSC and FIA to investigate and prevent financial crimes.

II LEGAL RIGHTS AND REMEDIES

i Civil claims

*Claims against persons who committed a fraud*

In this area, the BVI has many of the rights and remedies that would be available to a victim of fraud in England and Wales.

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\(^{15}\) Criminal Justice (International Cooperation) Act 1993.

\(^{16}\) An example of an important change is:

a The replacement of Section 4(2)(f) with: ‘(f) may, subject to this Act and to such conditions as may be determined by the Director, provide information to the Commissioner of Police where such information may relate to the commission of a criminal offence, including a financial offence’.

b The replacement of Section 4(8) with: ‘(8) Where in the performance of its functions, the Agency becomes aware of evidence that a criminal offence, including a financial offence, has or may have been committed in the Territory, the Agency shall report the matter to an appropriate officer of the Police Force, and that officer or such other officer as the Commissioner may designate shall from time to time take over the investigation.’

c The repeal of Section 4(9) – which previously meant the FCA had no further role in investigations.
Clawback claims
If the individual who committed the fraud has personally appropriated the assets in question, clawback claims may be initiated against him or her. These are considered further below.

Restitutionary claims
The potential grounds for a claim of unjust enrichment are numerous, but those relevant to asset recovery include illegality, duress, lack of consent, mistake, failure of basis or free acceptance. The BVI would grant restitution, being either a personal money judgment or proprietary relief.

Damages claims
Common damages claims may include breach of contract, misrepresentation or deceit. Claims may also be available for breach of fiduciary duty or breach of trust. These claims are commonly brought against directors of BVI-domiciled asset-holding companies and may be made against joint-venture partners as well.

Director claims may be made under statute or common law. Under BVI statute, directors owe fiduciary duties to act in good faith, honestly and in the best interests of the company, as well as to use their powers for a proper purpose.

Simple derivative actions are allowed in the BVI with the court’s permission. Whether double derivative actions are allowed (i.e., actions brought in the name of another company that is, in turn, owned by the BVI company) is determined by the lex fori of the proposed action. These actions are not permitted in the BVI itself.

Constructive and resulting trusts
A claimant may seek constructive or resulting trusts over misappropriated assets. The former may arise when it is unconscionable for the owner of property to retain a beneficial interest in the property over that of the claimant. By contrast, resulting trusts arise from an intention by the individual transferring the trust property that he or she should retain his or her beneficial interest in it. The Quistclose (or purpose) trust is a special form of resulting trust that arises where the person transferring the trust property does so with an intention that it be used for a specific purpose.

Claims against persons assisting a fraud
Dishonest assistance is a recognised cause of action in the BVI. The test for dishonesty in the BVI is whether the party’s state of mind, intelligence and knowledge at the relevant time

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18 The BVI would likely follow recent English case law allowing claims for breach of fiduciary duty to be made against an individual principal of a corporate joint-venture partner: Rosi River Ltd v. Waverley Commercial Ltd, [2013] EWCA Civ 910.
19 Business Companies Act 2004 (BCA 2004), Sections 120–121.
20 BCA 2004, Section 184C(1)(a).
21 Microsoft Corporation v. Vadem Ltd, BVIHCVAP 2013/0007 at [14].
22 Ibid. at [13].
would be deemed dishonest by objective ordinary standards.²³ Remedies can be personal (typically a money judgment reflecting compensation for loss or an account of profits) or proprietary (typically a declaration of constructive trust).

Claims against directors of a BVI company that has been used as a vehicle for fraud may also be possible, even if the directors were not themselves involved or complicit in the fraud. Claims may be made for breach of a director’s duty of skill and care (i.e., negligence and breach of fiduciary duty).²⁴

The liquidators of an insolvent BVI company may also bring claims against directors for misfeasance, fraudulent trading (making transfers of company assets with intent to defraud creditors), or insolvent trading (making transfers of company assets at the time the company was, in fact, insolvent).²⁵

**Claims against third parties receiving the funds**

*Knowing receipt*

A claim can be made when a third party receives assets in breach of trust or in breach of fiduciary duty, when that third party knows the assets, in fact, belonged to the claimant and were disbursed in breach of trust or fiduciary duty. Remedies may include personal remedies (compensation) or proprietary ones (such as tracing or a constructive trust).

*Fraudulent conveyance*

The BVI has incorporated historic legislation from England that allows a claimant to void a transfer of assets made with intention to defraud creditors.²⁶ Although there have been few published fraudulent conveyance cases in the BVI itself, the law is based on Section 172 of England’s Law of Property Act 1925, and the voluminous English case law concerning that provision will have persuasive application in the BVI.²⁷

*Insolvent distribution*

A company can claw back distributions to members made when it was insolvent either at the time of or immediately after the distribution.²⁸ The court will order the distribution to be returned to the company. Alternatively, a personal claim may be made against the director for the value of the loss not recovered from the member.²⁹

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²³ *Akai Holdings (in liquidation) v. Brimlow Investments* BVIHCV 2006/0134.

²⁴ Section 122 of the BCA 2004. However, it is common for the articles and memorandum of association to contain exculpatory provisions limiting or excluding liability for directors, indemnifying them, or both.

²⁵ Recent case law confirms that an unliquidated damages claim does not ‘count’ as a loss or liability that would make a BVI company insolvent for the purposes of insolvent trading: *Mackellar v. Khoo Kin Yong et al*, BVIHCMAF2013/0008.


²⁷ There are some differences, though. In particular, the definitions of ‘conveyance’ and ‘property’ are more limited in the BVI Act than the English Act. In the BVI Act, the definitions of these (and other) terms is not qualified by the words ‘unless the context otherwise requires’. This has two immediate complications: the definition of ‘property’ in the BVI Act does not include money, and further, a conveyance must be ‘in writing’.

²⁸ BCA 2004, Section 58.

²⁹ BCA 2004, Section 58(2).
Unfair preference

Unfair preference claims may be brought to recover disbursements made within the two-year period prior to the appointment of liquidators of an insolvent BVI company if the receiving party is connected to the company, and made within six months otherwise.30 The disbursement must put the receiving party in a better position than if he or she were a creditor in the insolvency proceedings.

Undervalue transaction

Undervalue transaction claims may be brought when the BVI company is insolvent and has made disbursements for no consideration or insignificant consideration.31

ii Defences to fraud claims

The defences to the claims above are usually factual, that is to say, that some element of the claim has not been made out on the evidence. Often, this element is dishonesty.

In addition, there are ‘safe harbour’ defences of good faith, lack of notice of intention to defraud or good consideration to most of the clawback and equitable claims outlined above. Third-party claims may also be defended on the grounds of change of position by the party receiving the misappropriated assets.

There is no statutory bar on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter, but rather discretion to stay (i.e., suspend) the civil proceedings. The CPRs restrict the use of documents disclosed in civil proceedings being used by the parties outside those civil proceedings. However, the BVI would follow the line of cases commencing (at least in modern times) with Jefferson Ltd v. Bhetcha [1979] 1 WLR 898 at 904 and culminating in the English Court of Appeal decision in Attorney General of Zambia v. Meer Care & Desai [2006] EWCA Civ 390 and in which the defendants facing concurrent civil and criminal proceedings (the civil proceedings taking place in England) were given the protection of the civil proceedings being ring-fenced, such that nothing in those civil proceedings could be used against the defendants in the criminal context. See also Swallow v. Commissioners for Revenue and Customs [2010] UKFTT 481 (TC), John Walters QC.

iii Limitation periods

Cause-of-action limitation periods are governed by statute and broadly follow the English framework. The limitation periods for most of these claims is six years from the date on which the cause of action accrued or, in respect of claims made in insolvency, six years from the date of the appointment of liquidators. Thus, the statute of limitation will differ depending on the cause of action, as set out in the Limitation Act (Chapter 43). For example, the relevant limitation period for claims based in tort or contract is six years; the same limitation period applies for the enforcement of a debt or an award.

Applicable limitation with respect to claims against trustees differs by reference to the way in which the claim is characterised and whether the trust on which the claimant relies pre-exists the conduct relied on, so as to found the cause of action. When a breach of fiduciary duty in the absence of deliberate concealment is based on the same facts as a claim for either

30 Insolvency Act 2003, Section 245.
31 Insolvency Act 2003, Section 246.
a claim in contract or in tort, then the same six-year period will apply. However, when the fiduciary has deliberately concealed facts relevant to the cause of action, then the limitation will not apply (for example, an undisclosed interest in a transaction), but considerations of laches (unjustified delay causing prejudice to the defendant in defence of the claim) will still be necessary in respect of consideration of a claim. When fraud is involved, the limitation period will not begin to run until the plaintiff has discovered the fraud.\footnote{Limitation Ordinance 1961, Section 25.}

\textbf{iv Criminal remedies}

While the BVI has a well-developed criminal asset forfeiture regime, primarily through the Proceeds of Criminal Conduct Act 1997 (as amended), in practice there are few criminal asset forfeiture cases. There have been no large-scale or widely publicised criminal prosecutions for offences under the 1997 Act, nor have there been any significant recoveries of assets through criminal proceedings, in recent times.

The 1997 Act allows the BVI court to compensate a victim of a crime out of the tainted funds the state recovered as proceeds of crime.\footnote{Proceeds of Criminal Conduct Act 1997, Section 6(4).} For the reasons given above, this is somewhat academic.

There is no equivalent of the United Kingdom’s Fraud Act 2006 at present in the BVI. Many fraudulent offences – for example, directors or officers obtaining property by deception, obtaining a pecuniary advantage by deception, making false accounting and making false statements with the intent to deceive shareholders or creditors – are contained within the Criminal Code 1997.

\textbf{III SEIZURE AND EVIDENCE}

\textbf{i Securing assets and proceeds}

\textit{Freezing orders}

The BVI court may grant a freezing order on a domestic or, in suitable cases, a worldwide basis. These are granted if:

\begin{itemize}
\item[a] the applicant has a good, arguable case;
\item[b] the court uses its discretion to decide whether an order is ‘just and convenient’; and
\item[c] the defendant presents a risk of asset flight.
\end{itemize}

These orders are often coupled with a disclosure order regarding the defendant’s assets to ensure that the freezing order is effective (i.e., by which to ‘police’ the order). Orders can be granted \textit{ex parte}, but cannot exceed 28 days. A claimant who successfully obtains an interim freezing order must give an undertaking for damages and costs with the object of compensating the defendants if the claimant should ultimately be unsuccessful at the trial and the court should later find that the defendants have suffered loss as a result of the grant of the order.

The Court of Appeal, however, has demonstrated a reluctance to grant worldwide relief, given the expense and inconvenience to respondents.\footnote{Eastern Caribbean Industrial Corporation Berhad v. Vela Financial Holdings Limited BVIHCV 2005/046.} Jurisdiction of the courts in the BVI is based on Section 24(l) of the West Indies Associated States Supreme Court (Virgin Islands)
Ordinance (Chapter 80) and is ordinarily ancillary to the court’s substantive jurisdiction. Typically, the freezing order is made personally against the respondent, rather than against specific assets.\(^{35}\) However, the BVI court can also grant an order for the ‘detention, custody, or preservation’ of specific assets that are the subject of a proprietary claim.\(^{36}\)

One of the most important cases in this area was *Black Swan Investment*.\(^{37}\) In this case, Justice Edward Bannister QC found that a freestanding freezing order could be granted in the BVI, even when no proceedings were contemplated in the jurisdiction and there was no cause of action against the BVI respondent.\(^{38}\)

**Provisional liquidators**

A more drastic option than a freezing order, in which the claimant seeks the ultimate winding-up of a BVI company, would be the appointment of provisional liquidators. Creditors or shareholders can apply, although not persons claiming only a beneficial ownership in the company.\(^{39}\)

The applicant must show that the company’s assets are being dissipated and satisfy the court that the appointment of provisional liquidators is either necessary to preserve the value of the company’s assets or necessary in the public interest.

**Interim receivers**

The court can appoint a receiver to preserve assets that are liable to dissipation pending the outcome of a claim. However, an applicant must demonstrate to the court that it ought to exercise its discretion to make the appropriate order and that the assets in the respondent’s control would be liable to enforcement if the applicant is successful at trial.\(^{40}\)

There are three requirements for appointment:

\(a\) there must be sufficient evidence to show a good, arguable case;

\(b\) there must be property to be preserved; and

\(c\) the claim must not be frivolous or vexatious.

The appointment of a receiver is often regarded as a remedy of last resort, and the receiver is usually appointed *ex parte* when the court is faced with allegations of fraud and immediate action is needed to prevent the court’s orders from being rendered futile.

**Evidence**

Evidence and information, which are separate concepts in BVI and English common law, can be obtained in the BVI both at the pre-action stage and during the proceedings themselves. The regime for first-party discovery – that is, discovery from the defendant him or herself

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35 To give it practical effect, the order may need to be served on the custodian of the assets (such as a bank holding the account) or the entity controlling the transfer of legal title (such as the registrar of ships, or the registered agent in respect of BVI shares). That entity would then be in contempt of court if it assisted transferring title in breach of the order.

36 CPR 17.1(1)(h)(ii).

37 See footnote 4.

38 See footnote 12.


40 *Yukos CIS Investments Limited & Ors v. Yukos Hydrocarbons Investments Ltd & Ors* HCVAP 2010/028.
– is wider than third-party discovery; indeed, the CPR does not contain any provisions for third-party discovery, unlike in England and Wales. In broad terms, in civil cases, the law of evidence of England and Wales has been adopted in the BVI. The primary test is one of relevance; that is, evidence is admissible if, ‘if it were accepted, could it rationally affect, whether directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings’ (Section 63 of the Evidence Act 2006).

Sections 67–79 of the Evidence Act 2006 make admissible (in prescribed circumstances):

a hear say documentary evidence;
b the statement of an unavailable witness who previously made an out-of-court statement;
c the out-of-court statement of an available witness while testifying;
d expert reports; and
e oral opinion evidence.

Preserving evidence
The BVI court will grant a search order if the applicant demonstrates an extremely strong *prima facie* case, potential or actual serious damage, clear evidence that the respondent has the items in his or her possession, and that there is a real possibility that the respondent may destroy that material.41

Pre-action disclosure
There is no pre-action disclosure in the BVI.42 However, the rules on interim injunctions may provide some relief through *Norwich Pharmacal* jurisdiction (described below). Disclosure can be ordered ancillary to a freezing order made before or at the outset of proceedings for information on which assets the freezing order ‘bites’, so as to police the order. Against this, however, the BVI court has ruled that such ancillary disclosure will not be ordered in support of a *Black Swan* injunction.43

Disclosure in the course of proceedings
The BVI follows English procedure and practice in respect of first-party disclosure.44 Documents can be withheld on the grounds of privilege. This can be either litigation privilege (documents prepared for the dominant purpose of providing professional legal services in relation to actual or contemplated legal proceedings, or documents prepared for the dominant purpose of preparing for or conducting the proceedings) or legal professional privilege generally (documents prepared for the dominant purpose of giving the client legal advice).

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41 CPR 17.1(1)(l). This is also known as an *Anton Piller* order.

42 The CPR has no protocol for pre-action disclosure of documents or other evidence, and there have been no published cases in which such disclosure has been permitted. There is no equivalent legislation in the BVI to Section 33 of the Senior Courts Act 1981 in the United Kingdom, which confers a power to order pre-action disclosure on the High Court. Even though the BVI can ‘import’ procedural law from England and Wales (West Indies (Associated States) Supreme Court Act 1967, Section 11), there must be a pre-existing jurisdiction for that procedural law to govern (*Veda Doyle v. Agnes Deane*: HCVAP2011/20). In the case of pre-action disclosure, there is not.


44 CPR Part 28.
Privilege can be defeated by fraud. That does not mean that, if a privileged document discusses or relates to fraud, the privilege is overcome; the document must itself be used in furtherance of the fraud to defeat privilege.

There is no regime for third-party disclosure in the BVI. However, as the power to order disclosure stems from the court's inherent jurisdiction, it is likely that the BVI court would order it if a compelling case were made for third-party disclosure. The BVI court is entitled to – and indeed must – apply English procedural rules when there is a gap in the local procedural rules and the court has the underlying power to grant the relief sought. This seems to be precisely such a scenario.

Third-party disclosure

There is no statutory basis for third-party disclosure or pre-action disclosure as is now possible under English procedural law (English Civil Procedure Rules 34.16 and 34.17). The remnant of the old equitable bill of discovery, the Norwich Pharmacal order, is possible in the BVI and most often obtained when a person, through no fault of their own, has become involved in the tortious acts of another and facilitates his or her wrongdoing. This gives rise to a duty to assist the person who has been wronged by giving them full information, including as to the location of assets (see Al-Rushaid Petroleum Investment Company et al v. TSJ Engineering Consulting Company Limited, BVIHCV(Com) 37/2010), and disclosing the identity of the wrongdoers. This is subject to the usual provisos in respect of Norwich Pharmacal relief (including that it be relevant, necessary to enable the assertion of rights and not simply a mechanism for accelerating standard disclosure, and that it follow the 'mere witness rule').

Norwich Pharmacal orders have been made in the BVI in support of foreign proceedings and against the registered agents of respondent companies incorporated in the BVI (see, e.g., JSC BTA Bank v. Fidelity Corporate Services Limited et al, HCVAP 2010/035; Jeremy Outen et al v. Mukhtar Abyazov, HCVAP 2011/30) to disclose details of the BVI company's assets. As an equitable remedy, the grant of Norwich Pharmacal relief is subject to the exercise of discretion.

Disclosure orders can also be made ancillary to a freezing order in the BVI (as in England and Wales). The High Court has recently ruled that this is not, however, available against a 'non cause of action' defendant (i.e., in support of a Black Swan freezing order): Bascunan v. Elsaca BVIHC (Com) 2015/0128.

Evidence at trial

Evidence for use at trial is governed by the Evidence Act 2006. Evidence is admissible that is 'relevant' (which distinguishes the test for admissibility for the test for disclosure). Evidence in chief is provided by way of witness statements that are prepared and circulated in advance of trial. Parties do not normally take depositions of an adverse party's witnesses before trial.

Norwich Pharmacal orders

One of the most widely used tools for obtaining information is the Norwich Pharmacal order. This order permits a victim of a wrong to seek information from a third party, or

from the wrongdoer himself or herself, which is necessary to assert or vindicate the victim’s legal rights. Norwich Pharmacal orders have been the subject of several widely publicised decisions in the BVI:

- in *Morgan & Morgan Trust Corporation Limited v. Fiona Trust & Holding Corporation et al.*, the Court of Appeal confirmed that a Norwich Pharmacal order compels the production of information to enable a party to put forward its case. It further ruled that it is not an injunction capable of being appealed at an interlocutory stage without leave;

- in *JSC BTA Bank v. Fidelity Corporate Services Limited*, the Court of Appeal ruled that registered agents are caught within the Norwich Pharmacal jurisdiction and can be compelled to supply information about their end clients (assuming that the information is necessary for the vindication of the applicant’s legal rights). This decision has clear importance in the asset recovery context in the BVI, where BVI companies owned by nominee shareholders (typically the registered agent, its principals, or both) are often used to hold assets; and

- in *Jorge Yarur Bascunan v. Daniel Yarur Elsaca*, Bannister J recently ruled that Norwich Pharmacal orders are not available in support of foreign proceedings. This decision appears to contradict certain obiter comments in the Morgan & Morgan judgment from the Court of Appeal, so will be treated with caution by practitioners, in the absence of an authoritative statement of principle from the Court of Appeal. That is especially so in insolvency cases, in which the Privy Council recently affirmed (obiter) the availability of Norwich Pharmacal relief to foreign liquidators in the seminal *Singularis* case. Although that was a decision in respect of Bermuda, it will be considered highly persuasive in BVI.

### Bankers trust orders
These are orders made against financial institutions to disclose information allowing the applicant to trace misappropriated funds.

### Information-gathering by liquidators
The Insolvency Act 2003 gives liquidators the power to obtain information from parties involved in the ownership, management or promotion of a company. These powers, however, do not extend to obtaining information from third parties that simply received funds from the company.

### Obtaining evidence from other jurisdictions
Information may be obtained through courts in other jurisdictions to assist in civil proceedings.

The BVI is a signatory to the 1970 Convention on Taking Evidence Abroad in Civil or Commercial Matters, and it is pursuant to this convention that letters rogatory requests

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47 *Morgan & Morgan Trust Corporation Limited v. Fiona Trust & Holding Corporation et al (Appeal 24/2005).*

48 *Morgan & Morgan* was recently considered, but not followed, in England by Teare, J in *AB Bank Ltd v. Abu Dhabi Commercial Bank PJSC [2016] EWHC 2082 (Comm).*

49 *JSC BTA Bank v. Fidelity Corporate Services Limited (Appeal 35/2010).*

50 *Jorge Yarur Bascunan v. Daniel Yarur Elsaca BVIHC (COM) 2015/0128.*

are usually pursued. The proceeding must be civil or commercial in nature and in respect of actual or contemplated proceedings in the BVI. The permissible breadth of such questions would obviously require input from legal practitioners in the receiving state. Typically, when there are asset-dissipation issues, such requests are not appropriate because of the notice of these provided to the target of the request.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering
As the BVI does not have any bank confidentiality legislation and does not have a large banking sector, money laundering has not been as prominent issue in the BVI’s banking industry as it has in some other offshore jurisdictions. The BVI’s anti-money laundering regime applies more to the trust company and fiduciary services sector than the banking sector. Sanctions under the Anti-Money Laundering and Terrorist Financing Code of Practice 2008 (as amended) can be imposed by the court through proceedings brought by the BVI Director of Public Prosecutions.

The level of transparency into beneficial ownership has been one of the most contentious issues facing the government in recent times. As they currently stand, the Anti-Money Laundering Regulations, which have been updated numerous times since first passed in 2008, require that registered agents maintain particulars of the beneficial owners of BVI companies themselves or are able to retrieve this information from a third-party ‘introducer’ – who introduced the particular client to the registered agent – ‘without delay’. This information is accessible to the BVI regulator, either on its own initiative or at the request of a foreign regulator.

ii Insolvency
The Insolvency Act 2003 makes comprehensive provision for the liquidation of companies. The insolvency regime is designed to be simple and efficient. For example, members of a BVI company have the power to place it into insolvent liquidation without the need for a court application. This can save a significant degree of time and money.

Part XVIII of the Insolvency Act 2003 governs recognition of foreign office holders, but is not yet in force. Foreign office holders must therefore seek assistance in the BVI via other channels – these may include common law assistance or ad hoc assistance for specific orders under Part XIX of the 2003 Act. Orders under Part XIX can only be made on a case-by-case basis; there is no ‘general’ recognition.

iii Arbitration
The BVI has recently enacted modern arbitration legislation based largely on the UNCITRAL Model Law, to which the BVI is a signatory. This creates a simplified process for the

52 BCA 2004, Section 199.
53 Part XIX has only been extended so far to Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the United States.
registration of arbitral awards made under the New York Convention in the BVI, subject to the standard New York Convention defences in Article V. The BVI court has generally taken a pro-enforcement stance on enforcement.\textsuperscript{56}

In addition, the BVI has sought to promote itself as a centre for domestic arbitration with the creation of the BVI International Arbitration Centre. Its board has now been constituted and it is ready to handle cases. Currently, the Arbitration Centre is expected to apply the UNCITRAL Model Rules, but there is provision in the Arbitration Act 2013 for the Centre to write its own rules of arbitration.

\section*{V \hspace{2em} INTERNATIONAL ASPECTS}

\textbf{i \hspace{2em} Conflict of law and choice of law in fraud claims}

The choice of law position also follows English common law, whereby issues of substantive law are governed by the \textit{lex causae} and procedural matters governed by the \textit{lex fori}. When it is necessary to decide a question of foreign law, the BVI court will do so on the basis of the expert evidence of foreign lawyers.

\textbf{ii \hspace{2em} Collection of evidence in support of proceedings abroad}

The BVI court will act on letters of request (letters rogatory) for evidence in support of foreign proceedings. The Evidence (Proceedings in Foreign Jurisdictions) Ordinance\textsuperscript{57} enacted the Hague Evidence Convention in the BVI. Letters of request can therefore be made to the High Court by overseas courts, either under the Hague Convention or common law, to request assistance in the collection of evidence. As noted above, however, the BVI court recently refused to grant \textit{Norwich Pharmacal} orders in aid of foreign proceedings.

Additionally, the BVI court is expected to follow the Privy Council ruling in \textit{Singularis}, so that foreign liquidators applying to the BVI court for discovery assistance at common law will have to show that they are not exceeding the powers available to them in a domestic insolvency of the originating jurisdiction and that there is no other way for them to obtain the information or material sought.\textsuperscript{58}

\textbf{iii \hspace{2em} Seizure of assets or proceeds of fraud in support of the victim of fraud}

The BVI court will issue a freezing order against a BVI-domiciled company that has assets in the jurisdiction liable to be seized in execution of an (anticipated) foreign judgment: the \textit{Black Swan} order.\textsuperscript{59} The \textit{Black Swan} jurisdiction has been expanded further, with the BVI court since showing a willingness to freeze both BVI-sited and foreign assets of an asset-holding company incorporated in the BVI that is owned by the defendant to a potential foreign judgment.\textsuperscript{60}

\textsuperscript{56} \textit{Hualon Corporation v. Marty Limited} BVIHC (COM) 2014/0090.
\textsuperscript{57} \textit{CAP} 24.
\textsuperscript{58} \textit{Singularis}, see footnote, at [24].
\textsuperscript{59} See footnote 4.
\textsuperscript{60} \textit{Natali Osetinskaya v. Usillett Properties Inc} BVIHCV 2013/037.
iv Enforcement of judgments granted abroad in relation to fraud claims

The BVI has tended to be a pro-enforcement jurisdiction. Foreign money judgments are enforceable at common law as an action on a judgment. The usual route is to apply for default judgment (if the BVI action is not defended) or summary judgment (if it is) on the debt created by the foreign judgment. Normally, there will not be a merits review of the foreign judgment. Judgments from certain Commonwealth countries can also be registered under statute.\(^{61}\) Non-money judgments are not directly enforceable under either route.

Enforcement of the foreign judgment can be resisted on the grounds that:

\begin{itemize}
\item[a] it violates public policy;\(^{62}\)
\item[b] it was obtained by fraud;
\item[c] it was obtained in breach of natural justice (e.g., the defendant was not afforded an adequate opportunity to present his or her case);
\item[d] the foreign court lacked personal jurisdiction over the defendant (as determined by BVI rules);
\item[e] it is not for a liquidated sum; or
\item[f] the judgment is not final and conclusive.
\end{itemize}

Registration can be resisted on broadly similar grounds, although a foreign judgment subject to appeal is not registrable under statute, whereas it is considered final and conclusive under the common law route.\(^{63}\) Additionally, there is an overarching requirement that it is just and convenient to register the foreign judgment, but this is not a separate defence to registration in itself.\(^{64}\) There is a one-year time period to register a foreign judgment under statute and six years at common law.

A foreign judgment can also be indirectly enforced through the initiation of insolvency proceedings in the same manner as an unsatisfied arbitral award.\(^{65}\) This route is not used regularly, but has real advantages:

\begin{itemize}
\item[a] Assuming there is no defence to enforcement, the debtor has to pay to avoid insolvency, even if it not actually insolvent. This creates an immediate pressure on the debtor that enforcement or registration would not.
\item[b] It is cheaper than issuing enforcement or registration proceedings, which can take several months and several hearings; issuance of the statutory demand itself does not require a court hearing and the application for the appointment of liquidators is typically dealt with in a single hearing.
\end{itemize}

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\(^{61}\) Reciprocal Enforcement of Judgments Act 1922.

\(^{62}\) For example, it is a judgment to enforce, directly or indirectly, a foreign revenue or penal law. One specific issue is that the Trustee Act 1961 specifically provides – at s 83A(19) – that a foreign judgment contrary to provisions of the 1961 Act relating to BVI trusts should be regarded as against public policy and should not be enforced in the BVI. This was recently confirmed in *Lucita Walton et al v. Leonard George de la Haye* BVIHCVAP2014/0004.

\(^{63}\) The BVI court has ruled that an outstanding appeal to the European Court of Human Rights is not an appeal for the purposes of the 1922 Act: *JSC BTA Bank v. Mukhtar Ablyazov* [2013] 5 JBVIC 0201.

\(^{64}\) *JSC BTA Bank v. Mukhtar Ablyazov* [2013] 5 JBVIC 0201.

v  International agreements
By virtue of its status as a British overseas territory, a number of international agreements concerning mutual legal assistance have been extended to the BVI. Requests for cooperation can be made under the US–UK and Cayman Islands Treaty on Mutual Assistance in Criminal Matters, the Vienna Convention, the United Nations Convention Against Corruption and the UN Convention against Transnational Organised Crime.66

vi  Fraud as a defence to enforcement
When a claimant tries to enforce an overseas judgment in the BVI, a defendant may argue that the judgment was obtained by fraud. The court will not allow the enforcement of a judgment gained through fraud when the fraud was perpetrated by either the claimant or the foreign court.

VI  CURRENT DEVELOPMENTS
The issue of transparency into beneficial ownership continues to take centre stage in the BVI, as it does in other British overseas territories. It is too early to know what impact the efforts around an international arbitration centre will have in terms of disputes activity and the obvious aim of driving work (and revenue) to the jurisdiction. Meanwhile, the BVI Commercial Court continues with its steady diet of cross-border litigation and insolvency. BVI companies continue to be a focus for disputes among overseas combatants. A recent example of this, on the derivative claim front, was the refusal of permission to bring such a claim (by which shareholders were seeking to bring multiple valuable claims in the Florida courts) in *Sumitomo Mitsui Trust (UK) Ltd. and others v. Spectrum Galaxy Fund Ltd.*67

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Chapter 8

CANADA

John J Pirie, Matthew J Latella, David Gadsden and Michael Nowina

I OVERVIEW

The Canadian legal system provides a range of options for victims of fraudulent conduct. The causes of action and remedies available to victims arise under statute, at common law and in equity. They include personal and proprietary claims, the latter of which may involve tracing.

Canadian courts will assist foreign courts and arbitral tribunals if victims of fraud choose to pursue their claims in other jurisdictions. Once a foreign judgment or award is rendered, Canadian courts will rarely refuse an application to enforce. It may also be possible to freeze a defendant's assets in Canada pending recognition and enforcement proceedings.

Canada is a federal state comprising 10 provinces and three territories, and lawmaking power is divided among the federal and provincial governments. In any dispute, one or more of several bodies of substantive and procedural law may apply to a particular issue, including the tracing of assets. With the exception of Quebec, all the provinces have legal systems based on English common law.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Claims against the person who committed the fraud or breach of duty

Criminal proceedings

The broad wording in the general fraud offence at Section 380(1) of the Criminal Code of Canada (Criminal Code) enables the police to investigate and Crown counsel to prosecute allegations of fraud of any kind. The hallmarks of criminal fraud are dishonesty by the perpetrator and deprivation to the victim. The general fraud offence is augmented by numerous provisions tailored to deal with specific fraud-related activities under the Criminal Code, as well as under other statutes. In addition to penal sanctions, restitution or disgorgement can be sought.

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2 For a more detailed review of topics discussed in this chapter, see www.canadianfraudlaw.com.
3 The laws of the province of Quebec are based on the Napoleonic Code, and thus may differ significantly.
   An analysis of Quebec law is beyond the scope of this chapter.
4 Criminal Code, RSC 1985, c C-46, Section 380.
Civil remedies
There are a multitude of civil claims that can be brought by a victim of fraudulent conduct, including:

a fraud: where dishonest conduct leads to deprivation to the victim, a claim under the broad umbrella of civil fraud may be available;

b fraudulent misrepresentation and the tort of deceit: often referred to by the courts interchangeably, with the core components being a false statement, whether made knowingly, recklessly or with wilful blindness, and reliance on the truth of the statement by the person to whom it is made;

c breach of fiduciary duty: certain relationships, such as those of corporate officers or directors, will give rise to specific obligations because the relationship is one characterised as fiduciary, and fraudulent conduct will invariably constitute a breach of a fiduciary's duty;

d unjust enrichment: where monies are received resulting in an enrichment and corresponding deprivation without a juristic reason, claims for unjust enrichment may be brought; and

e conversion: this claim may be brought where property rights in chattels have wrongly been interfered with by another person.

Claims against persons who assisted in committing the fraud or breach of duty

Criminal proceedings
Persons who assisted in committing the fraud or breach of duty may also be criminally prosecuted under the Criminal Code for aiding or abetting. This requires that the assisting person, whether by act or omission, knew that the fraudulent party intended to commit fraud.

Civil remedies

Knowing assistance
The leading case in Canada is the Supreme Court of Canada's decision in Air Canada v. M&L Travel Ltd, which involved a breach of trust by a company operating as a travel agency that inappropriately transferred monies from a trust account to the company's general operating account. In addition to suing the company, a claim for knowing assistance was brought against the directors for causing the company to breach its trust obligations.

The elements of the tort of knowing assistance are:

a there must be a fiduciary duty or trust;

b the fiduciary or trustee must have breached that duty fraudulently and dishonestly;

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6 A representation is made recklessly when it is made with complete disregard for its truth or falsity.
7 R v. Briscoe, [2010] 1 SCR 411. The doctrine of wilful blindness imputes knowledge to a person where his or her suspicions have been aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries.
10 [1993] 3 SCR 787.
the third party must have had actual knowledge of both the fiduciary relationship or trust and the fraudulent and dishonest conduct; and

d the third party must have participated in or assisted the fraudulent and dishonest conduct.  

The ‘knowledge’ required by the third party may be actual knowledge, recklessness or wilful blindness. Constructive knowledge alone, however, is insufficient to give rise to liability.

In addition to damages, equitable remedies can be granted against third parties who knowingly assisted or received funds from a fraudulent breach of trust or fiduciary duty.

**Claims against directors or officers**

The directors and officers of a corporation owe a duty to ‘exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances’. In the context of fraud by a corporation, directors and officers may be liable for personal tortious conduct.

In addition, where corporate directors or officers act improperly, claims may also be brought under the statutory remedy of an oppression claim. To succeed, the claimant must demonstrate that the directors have acted in an oppressive manner, or have been unfairly prejudicial to or unfairly disregarded the interests of stakeholders.

While damages are the typical remedy for claims against directors and officers, oppression remedy legislation affords the courts broad discretion to fashion creative remedies, such as setting aside transactions or restraining the impugned conduct.

**Conversion**

Conversion is a voluntary act by one person inconsistent with the ownership rights of another. Conversion is distinguishable from criminal theft because conversion requires no proof of dishonesty. Conversion is also distinguishable from unjust enrichment in that there must be proof of the intentional inference with the property of another.

**Claims against third parties who may receive or help transmit the proceeds of fraud**

**Criminal proceedings**

There are a number of Criminal Code offences that are applicable to third parties who receive or help transmit the proceeds of a fraud: possession of property obtained by crime;
trafficking in property obtained by crime;\textsuperscript{17} and possession of property obtained by crime for the purposes of trafficking.\textsuperscript{18} Generally, for liability to attach to the third party, he or she must have had knowledge that all or part of the property was obtained by crime.\textsuperscript{19}

\textbf{Civil remedies}

\textit{Knowing receipt}

Conceptually related to knowing assistance, the constituent elements are a trust or fiduciary relationship; the third party receiving property from the trust or fiduciary relationship in his or her own personal capacity; and the third party having actual or constructive knowledge that the property was transferred in breach of trust or fiduciary duty. Liability does not extend beyond the property that the third party knows (or is deemed to know) has been received in breach of trust or fiduciary duty.\textsuperscript{20}

\textit{Statutory remedies}

Pursuant to Section 437(2) of the \textit{Bank Act},\textsuperscript{21} it is possible to freeze deposits at a Canadian bank. The statutory requirements to obtain a freeze are as follows: the funds must be traced to the deposit account; the wrongdoer and the Canadian bank must both be defendants to an originating process; and the bank must have been served with notice of the originating process. This can be a powerful remedy where the bank account information of the wrongdoer is known.\textsuperscript{22}

\textit{Equitable remedies and tracing}

There are a variety of remedies that can be imposed, including an equitable charge over the property, an accounting of profits and a constructive trust.

An equitable charge may be applicable depending on the nature of the fraudulent conduct. In one case where a bank’s registered land mortgage was found to be invalid as a result of a fraud by one of the co-owners of the property, the court, relying on the principle of equitable subrogation, imposed an equitable charge because the bank had been induced to advance funds to repay a valid mortgage.\textsuperscript{23}

To support the remedy of a constructive trust for unjust enrichment, there must be a finding of an enrichment and that the contribution of the claimant to the property in question must be substantial and direct to warrant the imposition of a constructive trust.\textsuperscript{24} As a remedy for wrongful conduct, a constructive trust may also be imposed where:

\begin{itemize}
  \item the wrongdoer was under an equitable obligation;
\end{itemize}

\begin{itemize}
\item \textsuperscript{17} Ibid., Section 355.2.
\item \textsuperscript{18} Ibid., Section 355.4.
\item \textsuperscript{19} \textit{R v. L’Heureux}, [1985] 2 SCR 159.
\item \textsuperscript{21} SC 1991, c 46.
\item \textsuperscript{22} In \textit{Royal Bank v. Rastogi}, [2011] OJ No. 202 (ONCA), Ontario’s highest appellate court decided that 437(2) did not inhibit the court’s powers to make orders directing payment of those funds. Without obtaining an injunction, the court held in this case that the plaintiff bank had no right to freeze accounts belonging to one of its customers by simply initiating a lawsuit against its customer and ordered the release of the funds when the plaintiff bank failed to establish any legal entitlement to the funds.
\item \textsuperscript{24} \textit{Peter v. Beblow}, [1993] 1 SCR 980.
\end{itemize}
the property in question must have derived from activities of the wrongdoer in breach of the equitable obligation;

c the victim shows a legitimate reason for seeking the remedy; and

d there must be no factors (such as rights of third parties) that would render the constructive trust unjust.25

Canadian courts may use tracing orders as a method of determining what assets rightfully belong to the victim of fraud. Tracing orders are available to help victims of fraud identify recoverable assets when they have become mixed with other property or funds.

ii Defences to fraud claims
Exclusion or waiver clauses purporting to provide immunity from the consequences of fraudulent conduct are not enforceable on the principle that ‘fraud unravels all’. Similarly, a defence based on the suggestion that a victim with better due diligence would not have suffered a loss will not succeed where fraud is shown.

Limitation periods provide a potentially viable defence to claims. Statutes enacted by each province govern limitation periods in Canada and most range from two to six years. These limitation periods will apply to common law claims but their application to equitable claims varies across Canada. Limitation periods begin to run when the fraudulent activity is discovered, but most provinces have enacted final or ‘ultimate’ limitation periods that run for 10 to 20 years from the date that the cause of action arises, regardless of when it was discovered.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

The Mareva injunction
The Mareva injunction is an extraordinary remedy created by the courts of England to address the fact that the general rule prohibiting execution before judgment meant assets could be unavailable to satisfy any eventual judgment. Dubbed one of ‘the law’s two nuclear weapons’,26 it was confirmed to form part of the common law of Canada in a 1985 decision of the Supreme Court of Canada, Aetna Financial Services v. Feigelman.27 However, Aetna did not establish a rigid test for the new remedy. Rather, it established certain broad parameters, without imposing an inflexible prescription. The Court summarised the ‘gist of the Mareva action’ as follows: the right to freeze exigible assets within the jurisdiction, regardless of where the defendant resides; there must be a cause of action between the plaintiff and defendant, which is justiciable before the courts of that jurisdiction; and there is a genuine risk of disappearance of assets, either inside or outside the jurisdiction.28

28 Ibid. at Paragraph 26. Note: unlike the ‘shady mariner’ scenarios that gave rise to the creation of the remedy in the United Kingdom, the Supreme Court was not called upon to engage in an analysis of fraud or dissipation by way of the removal of assets from Canada.
In recent years, as Marevas have been sought in more varied scenarios, many involving fraud, the requirements for a Mareva injunction have been relaxed somewhat. A recent Ontario Superior Court decision held that the risk of dissipation can be inferred in cases where the inference arises from circumstances of the alleged fraud, taken in the context of all the surrounding circumstances. Such circumstances include evidence suggestive of the defendant’s fraudulent criminal activity or a pattern of prior fraudulent conduct. However, the requirement to have evidence of dissipation would not be automatically addressed, simply because the plaintiff established a strong prima facie case in fraud, and the inference would also be available when a strong prima facie case is established for other causes of action.

The Supreme Court in Aetna seemed to favour the ‘strong prima facie case’ requirement adopted by the Ontario Court of Appeal a few years prior, while also noting that the Ontario approach was ‘somewhat narrower’ than the ‘good arguable case’ standard from the UK jurisprudence. The balance of convenience must also favour the issuance of the order. This branch of the analysis involves a detailed consideration by the court of the competing interests at play: principally, the plaintiff’s interest in avoiding a dry judgment and the defendant’s interest in not having assets detained prior to judgment. Of course, the variables cannot be viewed as watertight compartments: if a plaintiff has an extremely strong case on the merits, the risk that the defendant will have its assets detained unnecessarily is correspondingly diminished; hence, the balance of convenience is more likely to favour the plaintiff.

In British Columbia, courts have adopted a flexible approach, employing a two-step test for a Mareva injunction, so as to not render the judge ‘a prisoner of a formula’, but to allow courts to do justice as between the parties in any given case. The British Columbia Court of Appeal has also recognised that almost every Mareva injunction is likely to inconvenience another party in some way, and has emphasised that ‘the overarching consideration in each case is the balance of justice and convenience’. One aspect of the test that remains constant, and is of vital importance, is the requirement to provide an undertaking to indemnify the respondent and any third party who might be adversely affected by the order for any damages suffered as a result of the injunction. Depending upon the party seeking the injunction and its assets, or lack thereof, in the jurisdiction, it might be necessary to fortify the undertaking by way of posting security.

Mareva injunctions are typically, but not always, sought on an ex parte basis. While there had remained some residual reluctance among some jurists to grant this relief without notice, a recent appellate decision by the Ontario Divisional Court reaffirms the spirit of the

30 Ibid., at Paragraph 64.
32 Aetna, footnote 27, Paragraphs 29–30. Aetna surveyed multiple jurisdictions’ case law on Marevas, but refrained from articulating a strict formula, perhaps because the entire discussion was considered obiter, given that it did not directly apply to the interprovincial asset transfer at issue in that case.
33 A term borrowed from an injunction case decided by the former Chief Justice of Canada Beverley McLachlin, while she was a member of the BC Court of Appeal in British Columbia (Attorney General) v. Wale (1986), 9 BCLR (2d) 333 (CA), at 346 (aff’d at [1991] 1 SCR 62).
35 Silver Standard, Ibid., at Paragraph 20; see also Tracy, Ibid., at Paragraph 41.
Mareva injunction, including the appropriateness of granting the relief on an ex parte basis. In overturning a judge who had refused to grant the relief ex parte and refrained from properly identifying the fact that a prima facie case had been made out in fraud, the appellate court, itself hearing the matter on an ex parte basis, recognised that there are sufficient safeguards built into the remedy to prevent abuses. As with any ex parte relief, it is crucial that full, frank and fair disclosure be made to the ex parte judge of all material facts, particularly those that would tend to support the position of the party against whom the injunction is sought. Such disclosure should include sufficient detail to allow the ex parte judge to determine the correct value of the underlying claim and, accordingly, of the assets to be frozen.

Model Mareva orders have been developed in particular jurisdictions, serving as a guide when determining the appropriate parameters for this extraordinary relief. In some provinces, such as Ontario, the ex parte order has a specific shelf life (10 days) within which it must be renewed on an inter partes basis. These hearings are to be conducted on a de novo basis, drawing on all evidence filed by both sides, including any admissible evidence obtained by the plaintiffs as a result of the ex parte order. Mareva injunctions can be framed so as to freeze assets solely in a particular jurisdiction within Canada or on a broader, even worldwide, basis. In Ontario, a recent decision provided for a worldwide Mareva injunction where the defendant had no assets in the jurisdiction. A compelling factor in granting the injunction was evidence based on information from Hong Kong lawyers, that the Canadian order would assist in securing a freezing order in Hong Kong.

Finally, while Mareva injunctions are typically sought pre-judgment, there is authority for granting a post-judgment Mareva, which can be useful in securing assets in circumstances where a judgment debtor may seek to deplete, move or otherwise deal with assets, pending the outcome of an appeal.

Other remedies

There are other remedies that can be of assistance in securing assets and proceeds prior to judgment, in a fraud claim, in addition to the Mareva injunction. These include certificates of pending litigation (designed to provide notice of a claim against real property to prevent its sale or encumbrance) and orders under specific provincial rules of civil procedure (e.g.,

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39 For example, Ontario’s model order can be found at www.ontariocourts.ca/scj/files/forms/com/ mareva-order-EN.doc.
41 For a recent example of a Canadian court relying on evidence obtained as a result of an ex parte order at the inter partes return, see Noreast Electronics Co. v. Danis, [2018] OJ No. 597. A contrary view was expressed in another recent decision, Lee v. Chang, [2018] OJ No. 674, although it is difficult to reconcile that decision with the requirement that the reviewing court decide the matter de novo, based on all evidence and arguments presented by both sides. Indeed, the English Court of Appeal, which created the Mareva and Anton Piller remedies, regarded such a position as ‘wholly absurd’ (see WEA Records Ltd v. Visions Channel 4 Ltd et al., [1983] 2 All E.R. 589 (C.A.).)
42 Innovative Marketing, footnote 34.
43 SFC Litigation Trust (Trustee of) v. Chan, 2017 ONSC 1815. This decision may signal a step towards a more flexible approach to granting Mareva orders in Ontario.
44 First Majestic Silver Corp v. Davila, 2013 BCSC 1209.
Ontario’s Rule 44 for the preservation of personal property and Rule 45 for the preservation of a specific fund). However, none provide as broad, flexible and potent a remedy as the *Mareva* injunction.

ii Obtaining evidence

**Anton Piller orders**

The other of ‘the law’s two nuclear weapons’ is the *Anton Piller* order (the *AP* order). While *Mareva* injunctions are aimed at preserving assets that might otherwise be placed beyond the reach of a plaintiff or the court, *AP* orders are aimed at preserving evidence that might otherwise be removed or destroyed. The *AP* order allows a plaintiff or his or her solicitors ‘to enter the defendant’s premises so as to inspect papers, provided the defendant gives permission’. Since the defendant is ordered to give this ‘permission’, and the *AP* order is obtained on an *ex parte* basis, it has long been considered that the remedy ‘may seem to be a search warrant in disguise’.

The Supreme Court of Canada has established a four-part test for granting an *AP* order:

a the plaintiff must demonstrate a strong *prima facie* case;

b the damage to the plaintiff of the defendant’s alleged misconduct, potential or actual, must be very serious;

c there must be convincing evidence that the defendant has in its possession incriminating documents or things; and

d it must be shown that there is a real possibility that the defendant may destroy the material before the discovery process can do its work.

*AP* orders can be a powerful anti-fraud tool, sometimes used in conjunction with *Mareva* injunctions to halt fraudsters in their tracks. However, with the great power of these remedies comes both great responsibility and a certain fragility. Judicial discomfort with the draconian nature of *AP* orders continues in modern Canadian jurisprudence. Given the scope for potential unfairness to parties against whom *AP* orders are made, particularly regarding the seizure of privileged or otherwise confidential material, the remedy for abuse of the power can be the dissolution of the order, damages and, in some cases, the disqualification of counsel for the party who obtained the order.

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45 Model *AP* orders have been developed in certain Canadian provinces, providing a useful consistency in the manner in which Canadian courts are to balance the competing interests at play in such situations, which are, as case law has demonstrated, fraught with challenges. For example, Ontario’s model order can be found at www.ontariocourts.ca/scj/files/forms/com/anton-piller-order-EN.doc.


49 In the 2006 case, *Celanese* (see footnote 41), the Supreme Court of Canada removed counsel of record for a plaintiff found to have crossed these lines. In *Celanese*, disclosure of solicitor–client confidences took place after the search was completed, as a result of what the Supreme Court characterised as ‘a combination of carelessness, overzealousness, a lack of appreciation of the potential dangers of an *Anton Piller* Order and a failure to focus on its limited purpose, namely the preservation of relevant evidence’ (emphasis in original).
Norwich Pharmacal orders

In some cases in which a fraud is suspected but key evidence that may confirm or bolster such a cause of action lies with one or more third parties, Canadian courts can make a Norwich Pharmacal order requiring the third party to produce information, after considering five factors:
a. whether the applicant has provided sufficient evidence to raise a valid, bona fide or reasonable claim;
b. whether the applicant has established a relationship with the third party from whom the information is sought such that it establishes that the third party is somehow involved in the acts complained of;
c. whether the third party is the only practicable source of the information available;
d. whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure; and
e. whether the interests of justice favour obtaining of the disclosure.  

Norwich Pharmacal orders are typically served on financial institutions and internet service providers, and can serve to assist in both proving a fraud was committed and in recovering assets obtained by fraud, including by determining the location of a defendant or a defendant’s assets (or both). In Voltage Pictures LLC v. John Doe, the Federal Court of Appeal ruled that internet service providers were to bear the brunt of the costs associated with collecting, storing and disclosing customer information relating to breaches of copyright, pursuant to a legislative regime that allows for disclosure requests, similar to Norwich Pharmacal orders.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Commercial credit and loan fraud

Following the global financial crisis, banks operating in Canada experienced an increase in incidents of misrepresentation made to induce or maintain commercial loans. Canadian courts have been open to finding liability against borrowers and their principals in these cases, with liability typically resting on claims for fraudulent misrepresentation or deceit, negligent misrepresentation, breach of fiduciary duty and claims for breach of the statutory duty of care owed by directors to the borrowing corporation and creditors.

From a damages standpoint, in an action based on misrepresentation, the bank is entitled to be put in the same position it would have been in had the representation not

51 GEA Group, Ibid., at Paragraph 51.
been made. The court is entitled to infer that in the event that the fraud or misrepresentation induced the bank to enter into the loan, the bank would not have otherwise entered into the loan at all.54

**Bank liability flowing from fraudulent customer conduct**

Banks operating in Canada have seen an increase in claims made by third parties, in particular claims by investors alleging that the bank was negligent in failing to spot or act upon red flags of a customer’s fraud. These claims, which include class proceedings, are typically framed in negligence and assisting breach of trust.

While Canadian courts have historically been reluctant to impose a duty on banks to inquire into customer activities, recent case law suggests that a bank’s internal oversight procedures and its response to unusual account activity will now be the subject of more rigorous analysis, with potentially less weight being accorded to the traditional ‘proximity’ defences.55

**Money laundering**

Banks, including authorised foreign banks, are designated reporting entities under the Federal Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA).56

Banks must also have procedures that are in compliance with the Financial Action Task Force’s (FATF) anti-money laundering and combating the financing of terrorism (AML/CFT) recommendations.57

The Financial Transactions and Reports Analysis Centre of Canada is responsible for ensuring compliance by banks with the PCMLTFA and its regulations. Banks are also subject to Guideline B-8 ‘Deterring and Detecting Money-Laundering and Terrorist Financing’58 issued by the Office of the Superintendent of Financial Institutions Canada (OSFI).

As a result of the requirements of the PCMLTFA, its regulations and the OSFI Guideline, banks must implement AML/CFT controls that include the following elements:

- a board and senior management oversight, including reporting to senior management;
- b an appropriate individual responsible for implementation of the programme;
- c an assessment of inherent money laundering and terrorist financing risks;
- d written AML/CFT procedures that are kept up to date;
- e a written and ongoing training programme;
- f self-assessment of controls; and
- g an effectiveness test.

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54 Fiorillo v Krispy Kreme Doughnuts Inc (2009), 98 OR (3d) 103 (ONSC).
56 SC 2000, c 17 [PCMLTFA].
57 In 2007 and 2008, the federal government of Canada implemented significant changes to the PCMLTFA and its regulations to ensure that the legislative framework was in line with international standards. Additional amendments to the identification and reporting requirements in the PCMLTFA were announced in 2016 to take full effect on 17 June 2017. Additional regulatory changes were made in June 2018.
ii  Insolvency

Victims of fraud by an insolvent individual or entity can face a range of challenges. An insolvent individual may be judgment-proof, while an insolvent entity may enter bankruptcy protection, complicating the asset-recovery process.

Receiverships will often be a viable remedy where fraud involving an entity is suspected. It may be appropriate to have a receiver appointed to collect incoming revenue and manage the affairs of the business in the interests of creditors. Receiverships can be instrumental in transferring control of the available assets to the receiver while an investigation is conducted, and in preventing the debtor from diverting assets in the interim.59

Receiverships have been used in a number of recent securities fraud cases. Once the receiver has reconciled available funds, unless the allocation proves unworkable, the remaining balance is to be distributed to investors on the basis of the lowest intermediate balance rule.60

It is also possible, and useful where fraud is suspected, to seek the appointment of a receiver, at least initially, for the limited purpose of gaining access to the books and records of a company.61 Typically, this form of receivership order will not authorise a receiver to operate the business. In referring to this type of receivership, the Ontario courts have adopted the phrase ‘investigative receivership’. The Court of Appeal for Ontario affirmed that an investigative receivership can be useful in certain circumstances, but cautioned that these receivership orders must be carefully tailored so the authority given to the receiver will aid in the recovery process, but not be so broad as to permit a receiver to ignore the basic rights of parties and others.62

Where an entity that appears to have been used for a fraud is rendered bankrupt, a trustee in bankruptcy has extensive powers to investigate the entity and to require its principals to provide information about the company’s dealings.63 Among other powers, the trustee has the ability to examine the bankrupt and ‘any person reasonably thought to have knowledge of the affairs of the bankrupt’.64 Creditors and other interested persons also have the ability to apply for an order directing examination of the bankrupt and related persons, and directing the production of relevant documents.65 These are powerful tools that can provide victims of a fraud with insight into the scheme and the flow of funds.

With respect to fraudulent conveyances or preferences, in Canada there are federal and provincial statutory provisions to protect creditors from transactions designed to put assets beyond their reach on the eve of insolvency. One common provision used to set aside such transactions is contained in the BIA, which permits non-arm’s-length transactions to be attacked if they occurred within 12 months of bankruptcy.66 Arm’s-length transactions can

59 A receiver can be appointed over a debtor’s property by contractual right, or by court appointment. The most common statutes used in Canada to secure a court-ordered receivership are the federal Bankruptcy and Insolvency Act (BIA), the provincial Courts of Justice Acts and the provincial Securities Acts.
63 See, for example, Section 164(1)–(3) of the BIA, RSC 1985, c B-3.
64 Ibid., Section 163(1).
65 Ibid., Section 163(2).
66 Ibid., Section 95(1)(b).
be attacked under the BIA if they occurred within three months of bankruptcy.67 A further useful provision of the BIA is found in Section 96, by which a creditor can move to set aside transfers to related parties at undervalue.68

Bankruptcy will not release the bankrupt from any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity, nor will it discharge any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation.69

iii Arbitration

Canadian courts have shown a willingness to consider applications to set aside arbitral awards on grounds of fraud, particularly with respect to domestic arbitration awards.70 A number of the provincial arbitration statutes expressly permit a party to apply to the court to set aside an award on the basis that the award was obtained by fraud.71

Internationally, all Canadian provinces have adopted the UNCITRAL Model Law on International Commercial Arbitration72 (the Model Law) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards73 through their respective provincial statutes.74 Article 34 of the Model Law provides for the presumptive validity of international awards by establishing the exclusive criteria for having an arbitral award set aside by local courts at the place of arbitration. Using the same criteria, Article 36 establishes the criteria for when a court can refuse to enforce a foreign arbitral award, including that the recognition or enforcement of the award would be contrary to the public policy of the state. The Model Law does not refer expressly to fraud, but its history makes clear that fraud was intended to be permitted as a ground for annulment on the basis of public policy.75

67 Ibid., Section 95(1)(a).
68 Under Section 96 of the BIA, in certain circumstances a creditor may be permitted to set aside a transfer at undervalue if it occurred within the five-year period preceding bankruptcy.
69 BIA, Section 178(1)(d)–(f).
71 In Ontario, for example, see Section 46(1)(9) of the Arbitration Act, SO 1991, c 17.
75 Gary Born, International Commercial Arbitration (Kluwer Law International, 2009) at pp. 2632–35. See also Re Corporacion Transnacional de Inversiones, SA de CV v. STET Int'l, [1999] OJ No. 3573 (ONSC), aff'd [2000] OJ No. 3408 (CA), leave to appeal to SCC refused, [2000] SCCA No. 581, where a party moved to set aside an international award (unsuccessfully). In denying the application, the Court confirmed that fraud can be a basis for setting aside an international award on public policy grounds. The standard to set aside or
In addition, a recent decision of the British Columbia Court of Appeal shows that in the right circumstances, the Court is now open to granting a Mareva injunction to aid in enforcement of an international arbitral award.76

iv Effect of fraud on evidentiary rules and legal privilege

Neither solicitor-client privilege or litigation privilege will protect communications shown to be prima facie in furtherance of a future crime or fraud. It is immaterial whether the lawyer is an ‘unwitting dupe’ or a ‘knowing participant’ in the illegal activity.77 There have been cases where the court ordered production of the files of the lawyer for a defendant who had acted in a transaction alleged to have been fraudulent. That said, before finding an exception to privilege, the Supreme Court of Canada has emphasised the importance of the conduct being carried out with the knowledge and advice of counsel.78 The Court cited, by example, the need to maintain privilege over communications in which a lawyer counsels against illegal projects.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

In Canada, the court will look at whether there is a sufficiently strong connection between the forum and the parties or the matter in determining whether it has jurisdiction over a matter with international components (i.e., jurisdiction simpliciter). Three grounds are considered in making this assessment: the presence of the defendant in the forum; consent of the parties to the jurisdiction of the court; and assumption of jurisdiction based on the existence of a real and substantial connection.

Presence-based jurisdiction

Several Canadian provinces have adopted a model law regarding jurisdictional matters79 that stipulate that the residence of a personal defendant in the forum is considered a sufficient basis for a court’s finding of jurisdiction.80 However, an assertion of jurisdiction may face challenges where it is based solely on the plaintiff’s residence.81

Foreign corporations may be served in any of the common law provinces or territories if service of the originating process can be made upon the corporation in accordance with refuse to enforce an award based on fraud is high. An award will likely not be annulled if the applicant had an opportunity to rebut its opponents’ claims at the arbitration hearing. The applicant must show deliberate fraud, or evidence so strong that the fraud would reasonably be expected to be decisive at the hearing.76

Sociedade-de-Fomento Industrial Private Ltd v. Pakistan Steel Mills Corp (Private) Ltd, [2014] BCJ No. 1056 (BCCA). Pakistan Steel Mills application for leave to appeal this decision to the Supreme Court of Canada was dismissed with costs on 18 December 2014.


Ibid., at Paragraph 58.

79 For example, British Columbia Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c 28 (CJPTA BC).


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the local rules of practice. Extra-provincial corporations that carry on business in the jurisdiction but do not maintain a place of business for doing so are generally required to have a registered office or business address, or an agent for service.

**Consent-based jurisdiction**

Where the parties so consent, the court’s jurisdiction is deemed vested by agreement of the parties, and Canadian courts have been prepared to give effect to such agreements unless ‘strong cause for not doing so is shown’. Further, if the defendant attorns to the jurisdiction of the court (that is, fails to challenge jurisdiction and responds to the merits), he or she will be considered to have submitted to the jurisdiction of the court to determine the dispute.

**Assumed jurisdiction**

The Supreme Court of Canada has affirmed the ‘real and substantial’ test as the appropriate common law rule for the assumption of jurisdiction in cases where the parties have not agreed expressly to a Canadian forum. The real and substantial test, which emphasises the principles of order, stability and predictability, involves the consideration of a set of non-exhaustive presumptive factors to be considered in determining whether the assumption of jurisdiction is appropriate:

- the defendant is domiciled or resident in the province;
- the defendant carries on business in the province;
- the tort was committed in the province; and
- a contract connected with the dispute was made in the province.

Where the plaintiff successfully establishes the presence of any of these connecting factors, a rebuttable presumption of jurisdiction arises. The onus then shifts to the defendant to prove that, notwithstanding the presence of a presumptive connecting factor, the matter does not have a real and substantial connection to the Canadian forum.

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82 Alberta Rules of Court, Alta Reg 124/2010, Rule 11; CJPTA BC, Sections 7–9; CJPTA NS, Sections 8–10; CJPTA SK, Sections 6–8; Ontario Rules, Rule 16.02(1)(c).
83 Wilson v. Hull, [1995] 128 DLR (4th) 403 (Alta CA): in deciding whether a foreign corporation is carrying on business in the jurisdiction, the court will consider factors such as whether the defendant is engaged in some serious business activity; whether the defendant devotes time, labour, skill or effort in the jurisdiction; whether the activity carried on in the jurisdiction is of some importance or significance to the business endeavour of the defendant; and whether there is some continuity or consistency to the business activity as distinct from an isolated transaction or series of transactions.
85 CJPTA BC, Section 3; CJPTA NS, Section 4; CJPTA SK, Section 4.
86 While the presumptive connecting factors are most pertinent to claims in tort, courts have also considered the presumptive factors for the assumption of jurisdiction in the context of contractual disputes. See, for example, Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP, [2016] 1 SCR 851.
88 Courts have also considered the presumptive factors for the assumption of jurisdiction in the context of contractual disputes. See, e.g., Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP, 2016 SCC 30.
90 Ibid., at Paragraph 95.
**Forum non conveniens**

In addition to determining whether it has jurisdiction simpliciter, the Supreme Court of Canada has affirmed that the exercise of jurisdiction also requires adherence to principles of fairness and efficiency.\(^{91}\) That is, at a second stage of analysis, Canadian courts also consider whether they should exercise jurisdiction – *forum conveniens*.\(^{92}\) This analysis tempers the potential rigidity of the jurisdiction simpliciter rules.\(^{93}\)

Canadian common law courts will exercise discretion to grant a stay of proceedings on the ground of *forum non conveniens* where it is satisfied that there is a clearly more appropriate forum in which the case may be tried more suitably in the interests of all the parties and the ends of justice.\(^{94}\)

### ii Collection of evidence in support of proceedings abroad

Canada is not a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. As such, parties seeking to compel evidence located in Canada for use in a foreign proceeding must do so by obtaining and enforcing ‘letters of request’, also known as ‘letters rogatory’. While letters rogatory can be enforced through various bilateral conventions that provide for the taking of evidence on a reciprocal basis in connection with civil and commercial matters,\(^{95}\) the more common practice is to seek production of evidence by way of federal\(^{96}\) or provincial legislation.\(^{97}\)

Canadian courts balance two broad considerations for such requests: the impact of the proposed order on Canadian sovereignty and whether justice requires that the taking of commission evidence be ordered. In line with the principle of comity of nations, Canadian courts will give a foreign request for assistance full force and effect unless it is contrary to public policy or otherwise prejudicial to the sovereignty or the citizens of the jurisdiction.\(^{98}\)

### iii Seizure of assets or proceeds of fraud in support of the victim of fraud

#### Criminal

Under the Mutual Legal Assistance in Criminal Matters Act (MLACMA),\(^{99}\) a foreign state may request the enforcement of an order for the restraint or seizure of property situated in Canada providing certain preconditions are met, including that:

\(\textit{a}\) the request is made by a treaty partner, by a state or entity designated in the Schedule to the MLACMA, or by a state or entity with which Canada has entered into an administrative arrangement;

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\(^{92}\) *Oakley v. Barry*, [1998] NSJ No. 122 (NSCA) at Paragraph 55. The concept of fairness in determining jurisdiction simpliciter should be considered from the point of view of both the plaintiff and the defendant.


\(^{94}\) *Amchem Products Incorporated v. British Columbia (Workers’ Compensation Board)*, [1993]. 1 SCR 897.

\(^{95}\) See, for example Norway, CTS 1935 No. 15; Poland, CTS 1935 No. 18; Portugal, CTS 1935 No. 17; Spain, CTS 1935 No. 12; and Sweden, CTS 1935 No. 13.

\(^{96}\) Canada Evidence Act, RSC 1985, c C-5, Part II.

\(^{97}\) For example, in Ontario, the Evidence Act, RSO 1990, c E.23, Section 60.


\(^{99}\) RSC 1985, c 30 (4th Supp), Section 9.3.
b the request includes a copy of the restraint or seizure order issued by a court of criminal jurisdiction in the requesting state;
c the person to whom the property relates is charged with a criminal offence in the requesting state; and
d the foreign offence with which the person is charged would be an indictable offence under Canadian law had the conduct been committed in Canada.

A foreign state may request the enforcement of an order for the forfeiture or confiscation of criminal proceeds or property on similar grounds, but the person to whom the property relates must be convicted of a criminal offence in the requesting state (with no possible further appeals of conviction).

The Minister of Justice of Canada (Minister) must refuse the requests of a foreign state if any of the preconditions are not met. Even where all preconditions have been satisfied, the Minister has the discretion to refuse such requests for various other reasons, including where it is in the public interest to do so. In addition, if the requirements of the MLACMA cannot be satisfied, a foreign state may submit a request for restraint, seizure, forfeiture or confiscation of assets to the Royal Canadian Mounted Police.

Civil

Civil asset forfeiture laws in Canada confer on Canadian provinces the authority to seize and obtain title to property used for or derived from the commission of an unlawful act, even where the illicit activity may not otherwise be readily actionable as a criminal offence. Civil forfeiture enables the victims of crime to recover illegally acquired assets from an individual or an entity through a direct action against their property without the requirement of a prior criminal conviction of the forfeiting party.

Civil forfeiture is initiated when a law enforcement agency or the designated agency under the applicable legislation commences proceedings against the property in question on behalf of the applicable province’s Attorney General. Proceedings are initiated by the Crown in rem against the property itself, and thus can be commenced without joining the owners or possessors of the property as defendants.

iv Enforcement of judgments granted abroad in relation to fraud claims

Canadian courts will recognise a foreign judgment where they are satisfied that the foreign court properly claimed jurisdiction over the subject matter of the litigation pursuant to the ‘real and substantial connection’ test articulated above; the judgment must be for a definite and ascertainable sum; and the judgment must be final and conclusive.

100 Ibid., Section 9.4.
101 See, for example, in Ontario, Civil Remedies Act, 2001, SO 2001, c 28.
102 See, for example, British Columbia Ministry of Justice, ‘Civil Forfeiture in British Columbia’, online: Ministry of Justice, http://www2.gov.bc.ca/gov/content/safety/crime-prevention/civil-forfeiture-office/civil-forfeiture.
103 *Four Embarcadero Center Venture v. Mr Greenjeans Corp* (HCJ) (1988), 64 OR (2d) 746 (ON SC), aff’d (1988), 65 OR (2d) 160 (ONCA).
Notably, the fact that a judgment may be the subject of an appeal to a higher court will make it no less final, but a Canadian court may stay local execution pending the outcome of the foreign appeal.

Foreign judgments in Canada may also be recognised by statute through registration under reciprocal enforcement legislation.

v Fraud as a defence to enforcement of judgments granted abroad

Even where a foreign judgment otherwise meets the requirements for recognition and enforcement in Canada, it may still be impeached and denied on the basis that it was obtained by fraud. A foreign judgment is presumed valid and a court will not generally relitigate the merits of the claim. The burden of proof, therefore, lies on the party seeking to impeach the judgment to demonstrate that it was obtained by fraud of one of two types: fraud going to the jurisdiction of the foreign court, which can always be raised, or fraud going to the merits of a foreign judgment, which can only be challenged for fraud where the allegations are new and not the subject of prior adjudication. As held by the Supreme Court of Canada in the 2003 case of Beals v. Saldanha: 'Where material facts not previously discoverable arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment.'

VI CURRENT DEVELOPMENTS

In March 2018, the Ontario Superior Court of Justice released its decision in 1169822 Ontario Ltd v. Toronto-Dominion Bank, which dealt with the liability of a bank for negligence and knowing assistance in a breach of trust. The defendant bank had provided bank accounts and a small amount of credit to a client that went by the name of Seaquest. After the plaintiffs lost their investments following Seaquest’s fraudulent breach of trust and subsequent insolvency, they instituted an action against the bank. The Court ruled that the evidence did not establish that the bank had actual knowledge of the fraudulent actions of Seaquest. Furthermore, the Court ruled that banks do not owe an independent duty of care to avoid economic loss arising from a constructive knowledge of a fraudulent breach of trust.

Also, Canadian courts have recently reaffirmed that civil and criminal fraud can be committed by a material omission of facts. In April 2018, the British Columbia Supreme Court released its decision in Wang v. Shao in which the Court ruled that an ‘incomplete statement may be as misleading as a false one and such half-truths have frequently been treated as legally significant misrepresentations’. This decision follows earlier decisions from Ontario courts.

106 See, for example, Canada–United Kingdom Civil and Commercial Judgments Convention Act, RSC 1985, c C-30.
I OVERVIEW

China's legal system has gradually improved to accommodate the country's continued economic development, and it serves an increasingly active role in handling cross-border crime. While no specialised legislation has been enacted to address fraudulent conduct, there are various provisions under laws and regulations that provide remedies for fraud victims to trace and recover assets.

At a basic level, fraud victims may seek criminal and civil remedies in China. Fraudulent conduct can consist in various criminal offences, such as illegal fundraising, fraud and embezzlement. Victims generally report their cases to the public security bureau (the major criminal investigation agency), which has relatively broad powers and can take quick action against the perpetrators of fraud and the assets in their possession. However, the public security bureau will often characterise as civil fraud those cases that occur during normal business transactions or that do not involve numerous victims, and will advise victims to seek civil remedies in such cases. Furthermore, although criminal punishment does require the compensation of victims, priority is given to stopping the criminal conduct and imposing punishment. Thus, victims may not be fully compensated through criminal proceedings and may have to seek recovery through civil proceedings.

Victims may establish their civil claims based on a number of laws depending on the particulars of each case, such as the General Provisions of the Civil Law, the Tort Liability Law, the Contract Law, the Company Law, and various financial laws and regulations. Victims can apply for property or conduct preservation measures (which are similar to freezing and restraint orders or injunctions) before or after filing a civil litigation or arbitration case, pending the outcome of a final judgment or award, which is often crucial for a successful recovery.

The Chinese legal system also features a regime enabling foreign victims to trace and recover assets in China while pursuing criminal or civil remedies in other jurisdictions. The regime includes recognition and enforcement of foreign judgments and arbitral awards, and freezing, confiscating or returning the proceeds of fraud through criminal judicial mutual assistance mechanisms, among other measures. That said, in practice, there are various obstacles for victims trying to take advantage of this regime. For example, interim measures or injunctions granted during litigation or arbitration proceedings in other jurisdictions are generally not enforceable in China. Also, China adopts foreign currency control policies.

1 Ronghua (Andy) Liao is a partner at Han Kun Law Offices. The author acknowledges the contribution of his colleagues, including Haiqing (Shirley) Liao, Chunyao (Alan) Lin and Junxin (Sam) Ye.

2 For the purposes of this article only, references to the People's Republic of China (China) do not include the Hong Kong Special Administrative Region, the Macau Special Administration Region or Taiwan.
and transferring money into or out of China must be done in accordance with the relevant laws and regulations. In the absence of clear implementing rules, banks may be reluctant to execute an order for the return of the proceeds of fraud. In general, successful asset recoveries in China must be well planned and structured by assessing all potential legal remedies.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Civil remedies

There are numerous civil remedies available to the victims of fraud under Chinese law. The General Principles of the Civil Law defines fraudulent conduct as that which purposely represents false information to the victim, or disguising any fact so as to induce the victim into making a false declaration of will. Recourse for victims of a fraud to trace and recover assets includes those generally available under contract law, tort law, trust law and company law.

Contract law

Where a victim of fraud is induced to enter into a contract against his or her will, courts or arbitral tribunals will generally find the contract to be revocable at the option of the victim. The legal effect of revocation is that the parties to a contract will be restored to the status quo ante, the assets acquired through performance of the contract will be returned to their original owners and any future obligations under the contract will no longer be binding. Monetary compensation may be available where specific assets cannot be physically or legally returned.

In addition to revoking the contract, victims are also allowed to request perpetrators of fraud to undertake liability for breach of contract and compensate for the losses incurred by the victim, including resale losses, production losses and operating losses, among others. This may provide more effective remedy to the victims compared with the revocation approach.

Victims of fraud may also seek a remedy where no formal contract has been established, such as for damage suffered during negotiations and in concluding the contract. In this case, damages are not typically calculated based on the benefits that a victim would have obtained had the contract been performed and the representations had been truthful. Rather, damages are restricted to the victim's losses in reliance, which generally includes the direct cost of disbursements, such as transportation and communications fees. The victim may be entitled to compensation in the case of certain indirect losses, such as the loss of transaction opportunities. Such losses, however, are typically difficult to prove in practice.

5 Contract Law, Art. 58.
6 Contract Law, Art. 42.
Tort law

There is no precise concept of the tort of deception in China. However, this does not mean that victims of fraud cannot obtain a remedy under tort law. Based on general tort liability, the victim of a fraud is certainly able to bring tort claims for damages or restitution against the perpetrators of fraud and those who abet them.

Unlike remedies under the Contract Law, persons may be held jointly and severally liable under tort law where they aid, counsel, direct or join in committing a fraudulent act or help to transfer the proceeds of fraud, although the tortfeasors are not in privity of contract with the victims.

The Company Law

The Company Law provides that each of a company's directors, supervisors and senior management personnel has a loyalty and due diligence duty to the company. The duty of loyalty and due diligence is yet to be well developed, but it is generally regarded as similar to the fiduciary duty under the common law system. Duty of care, a concept similar to fiduciary duty, can also be seen in the Trust Law.

Where there is a fiduciary relationship between the victim and the perpetrator of the fraud, the victim may claim damages in respect of the damage suffered or the profits the perpetrator or fiduciary has obtained. If the victim chooses to claim for profits, it is not necessary to show that a loss has been suffered. A typical example of this kind of claim is where company directors or executives negotiate and receive commissions for transactions between the company and other parties. Under the Company Law, directors and executives are obligated to return such commissions to the company. This kind of claim has an advantage over other claims under contract law and tort law, which can only be successful if the victim proves the occurrence of losses.

In some cases, frauds involve abuse of the independent legal person status of corporations and the limited liability of shareholders. Specifically, the perpetrator of a fraud may be a corporate shareholder who uses the corporate form to commit a fraud and then relies upon the limited liability afforded to shareholders as a defence against direct or indirect liability for the fraud. Seeking to pierce the corporate veil under the Company Law is an appropriate approach in such circumstances, since it allows courts to hold controlling shareholders jointly liable for the obligations of the corporation. The core element to support piercing the corporate veil is to show that the controlling shareholder did not treat the corporation as an independent entity; for example, where the property and business of the corporation has been commingled with those of the controlling shareholder. However, in judicial practice it is often difficult for victims to succeed in piercing the corporate veil, except in the context of one-person corporations where the sole shareholder, rather than the victim, is obligated to prove that the corporation's assets are independent of the sole shareholder's assets.

9 Company Law, Art. 148.
10 Company Law, Art. 20.
11 Company Law, Art. 63.
In practice, it is not unusual for the shareholders or actual controllers of a company to intentionally deregister the company to evade debts that the company owes to its creditors. Under the Company Law, creditors may make a special claim against the directors, controlling shareholders and the actual controllers of a company that has been deregistered under a false liquidation report.\textsuperscript{12} Under such circumstances, all the directors, controlling shareholders and the actual controllers may be held jointly and severally liable for the debts of the deregistered company.

**Criminal remedies**

In addition to civil remedies, law enforcement authorities can charge the perpetrator of the fraud with criminal offences, such as fraud, contract fraud and illegal fundraising, under the Criminal Law. Victims should consider the following procedural and substantive matters to successfully resolve their cases.

**Procedure for cases involving civil and criminal liability**

In a civil case where the facts may constitute criminal fraud, courts will dismiss the fraud claim or suspend the enforcement of the civil judgment supporting the fraud claim and then transfer the relevant case materials to the public security bureau or procuratorate, which will review the materials and conclude whether to file criminal charges. If the procuratorate does not intend to file criminal charges or the court holds that the case does not constitute a crime, the victim has the right to re-initiate his or her suit based on the fraud claims or to request the court to resume the enforcement of the civil judgment.

Where the evidence in a civil fraud case may relate to a suspected crime or contain indicia of a suspected crime, the court will continue to hear the fraud claim or execute a civil judgment supporting the fraud claim and refer the evidence to the public security bureau or the procuratorate.

**Order for return and recovery of assets in criminal proceedings**

In criminal proceedings, law enforcement authorities will often have seized, sealed or frozen the assets illegally obtained by the perpetrator. If the ownership of the assets is clear, victims may be allowed to recover the assets at an early stage after duly performing the relevant formalities. Where the ownership of the assets is unclear, the assets will be returned to the victims pro rata after the criminal judgment or ruling becomes legally binding, less any amounts that individual victims have already recovered.\textsuperscript{13}


ii Defences to fraud claims

Statute of limitations

Chinese civil law generally supports the argument that a wrongdoer should not be subject to civil liability claimed by a claimant after the expiry of a statute of limitations, which may vary with the nature of the claims.14 For example, a claim for rescission of a contract because of fraud must be brought within one year of the date on which the victim becomes aware or should have become aware of the fraud and, in any event, within five years of the date the fraud was committed.15 The statute of limitations for fraud claims based in tort or relating to breaches of fiduciary duty and piercing the corporate veil is three years from the time the victim became aware or should have been aware of the fraud and in no event more than 20 years from when the fraud was committed.16

For all claims except those otherwise stipulated by law, such as termination or revocation of a contract, limitation periods are generally allowed to be suspended, or renewed, when some specific requirements have been satisfied.17 Courts do not recognise the advance waiver by parties of the statute of limitations.18

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

When seeking civil remedies by initiating civil litigation or arbitration in China, the victims of fraud may apply to the competent Chinese court for preservation of the perpetrator’s assets.19 Asset preservation is a legal proceeding by which claimants may seal or freeze assets of the counterparty for a limited period. After a final judgment or arbitral award is rendered, claimants may then apply for enforcement against the subject assets.

Grant of a preservation order

When granting a preservation order, Chinese courts consider only whether the claimant’s interests in the later judgment or arbitration award may be jeopardised because of the defendant’s action or any other reasons.20 Moreover, courts normally will not require the claimant to produce evidence to prove that the claimant’s interests may be jeopardised. Rather, this condition may be easily met by a statement made in the application. Therefore, when seeking preservation of a perpetrator’s assets, claimants need not show the prima facie case for their legal rights; however, courts may require claimants to produce some evidence preliminarily to show their legal standing.

15 Id., Art. 152.
16 Id., Art. 188.
17 Id., Arts. 188, 194, 195 and 199.
18 Id., Art. 197.
20 Id.
Provision of security

Generally, Chinese courts will require claimants to provide security for an asset preservation application. The form of security traditionally includes cash, real property and guaranties provided by designated security companies. In recent years, it has become more and more common for the courts to accept guaranties provided by insurance companies, which are more popular among claimants because of their lower cost.

Procedures, periods and durations

Normally an asset preservation application shall be submitted along with a case admission file. Since a case admission file already includes a statement of claims and supporting evidence, a claimant normally needs only to submit an additional application for asset preservation. In about one week after a court has accepted the application, the court will inform the claimant of its intention to grant the order and require the claimant to provide security or require the claimant to provide additional materials (e.g., the defendant’s asset information) before the order can be granted. Courts rarely dismiss an asset preservation application outright. After the order is granted by a ruling, the court may take another week (depending on the type and location of the assets to be preserved) to effectively preserve the subject assets. Bank deposits may be frozen for a period of one year, and all other assets may be preserved for up to three years, commencing from the date of enforcement. The preservation period can be renewed by an application before its expiration if the lawsuit is still pending or the final ruling or judgment has not been satisfied at the end of the period.

Asset preservation in a Chinese arbitration proceeding

Claimants can also apply for asset preservation in arbitration proceedings administered by a Chinese arbitration institution. Claimants usually need to submit the application to the arbitration institution and the institution will forward the application to the competent Chinese court to enter and enforce the ruling. Chinese courts treat these applications forwarded by arbitration institutions no differently from those filed directly with the court in civil litigation cases.

Preservation measures before initiating a lawsuit

In emergency cases, fraud victims may also apply for preservation of relevant assets before filing a litigation or arbitration case if, without immediate action, the victim’s rights and interests will suffer irreparable harm. In such cases, the court has to make the ruling within 48 hours and, if the application is approved, the court will enforce the preservation order immediately. However, if the victim fails to file a litigation or arbitration case within 30 days of the preservation of assets, the court will lift the preservation measures.

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21 Civil Procedure Law, Art. 100.
22 Civil Procedure Law, Art. 101.
23 Id.
Seizure of assets to secure the enforcement of a judgment or arbitration award

A claimant, after obtaining an effective court judgment, ruling or arbitral award, can file an application to a competent court for enforcement. After the court accepts the application, the claimant can request the court to seize or preserve any of the perpetrator's identifiable assets, with no security requirement.

Seizure of assets in criminal proceedings

In criminal investigations, law enforcement authorities are empowered to seize and place under seal property and articles relevant to the crime, which generally include proceeds of the crime, tools used to commit the crime and other property and articles related to the crime. However, the purpose of law enforcement authorities in taking these measures is primarily to obtain evidence of the crime rather than to recover the victim's losses.

Obtaining evidence

In criminal proceedings, law enforcement authorities have broad powers to collect evidence. Rules on the exclusion of evidence are not as well established in China as in other jurisdictions, and thus the methods used to collect admissible evidence in criminal proceedings are extensive. In civil proceedings, however, fraud victims have very limited means to collect evidence. Normally, a fraud victim and his or her attorney will take one or more of the following measures to collect evidence from perpetrators or relevant third parties.

Attorney investigation orders

Courts increasingly issue attorney investigation orders to attorneys who need to collect evidence from third parties such as banks, hospitals and company registration offices. While Chinese law does not yet provide uniform rules on the issuance of attorney investigation orders, many local courts take the position that an investigation request made by attorneys in accordance with an investigation order is equivalent to an investigation request made by court officers. Enforceability of these orders varies depending on local rules issued by the High Court of each province. For example, the Shanghai High People's Court does not provide for any legal consequences for persons who refuse to comply with an investigation order, whereas the Chongqing High Court provides that refusal to comply with an investigation order without reasonable cause is subject to coercive measures.

Evidence preservation proceedings

For evidence that could be lost or no longer be obtained in the future, victims can apply to the court to take measures to preserve the relevant evidence. Technically, victims can apply to preserve evidence with or without a lawsuit, although courts are generally more willing to grant such applications with or during a lawsuit. Courts do not often grant evidence preservation orders, in part because the circumstances under which such orders are granted are very narrowly tailored.

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25 Civil Procedure Law, Art. 81.
Facts found by effective court judgments or arbitration awards

Under Chinese law, claimants can base claims on facts established by an effective court judgment or an arbitration award, with no need to further prove the facts. Therefore, for example, where a fraud case follows a criminal proceeding, the fraud victim can use in his or her civil suit the facts established in the criminal judgment. The victim can also apply to review and copy the criminal fraud case file, which will allow the victim to take extensive advantage of the investigation authority’s discovery work.

Requests for production made during trial

Chinese law does not contain provisions for discovery procedures such as document production; however, if a perpetrator refuses to produce evidence in its possession, the victim can request the perpetrator to produce the evidence during trial. If the perpetrator refuses to produce the evidence without due cause, the court may conclude that the content of the concealed evidence supports the victim's claims.

IV  FRAUD IN SPECIFIC CONTEXTS

i  Banking and money laundering

Banks’ liabilities in the context of a fraudulent transfer

Banks are legally obligated to safeguard the lawful rights and interests of their clients. Thus, banks may be found liable in the case of fraudulent bank card transactions. For example, in a case adjudicated by the Nanjing Intermediate People’s Court, the bank was required to fully compensate the depositor for failing to identify a fraudulent transaction. The court reasoned that the bank was obligated to improve its anti-fraud technology to protect client deposits, and the bank could not be relieved of this liability unless there was evidence demonstrating that the depositor mishandled his account information. This viewpoint has also been adopted in proposed judicial rules that the Supreme People’s Court has recently issued for public comment.

In accordance with relevant provisions under the Anti-Money Laundering Law, banks require their customers to provide valid identity documents and regularly review and monitor their customers’ identities. Where a fraudulent transfer wires money into a perpetrator’s bank

30 Provisions on Several Issues in Trying Cases Involving Bank Card Disputes (Draft for Comment) (Sup. People’s Ct.; issued 6 June 2018 for public comment until 30 June 2018).
account, the receiving bank may also be subject to tort-based claims for damages by the depositor. Instances exist where banks have been held liable for negligence in reviewing and verifying identity documents in cases of fraud.

Money laundering

Money laundering is a criminal offence under the Criminal Law.\(^\text{32}\) The Supreme People’s Court issued a judicial interpretation in 2009 regarding the application of law in the trial of money laundering and other criminal cases, which clarifies certain elements of the establishment of the crime of money laundering.\(^\text{33}\)

The People’s Bank of China is the primary competent authority with respect to anti-money laundering, and promulgates rules pursuant to the Anti-money Laundering Law. Under these provisions, banks are required to implement sound internal controls and procedures to prevent money laundering and to report suspected instances of money laundering. These measures include customer identity verification, customer identity and transaction record-keeping and reporting of large-sum or suspicious transactions.

ii Insolvency

The Enterprise Bankruptcy Law was passed in 2006,\(^\text{34}\) and was designed to bring the bankruptcy system in line with international standards as China transitions from a plan-oriented economy to a market-oriented economy. One of the main purposes of the Enterprise Bankruptcy Law is to achieve equitable treatment and sufficient compensation for all creditors. Thus, as in many other jurisdictions, bankruptcy administrators have the power to revoke or invalidate certain transactions, recover assets in the case of fraud and demand compensation from the legal representative of the insolvent enterprise and also those directly responsible for the insolvency.

Revocable transfers

The bankruptcy administrator has the power to revoke acts relating to transfers of property for no consideration or at a patently unreasonable price, guarantees for unsecured debts, the satisfaction of debts not due and waivers of debts that occur within one year of the court’s acceptance of the bankruptcy petition.\(^\text{35}\) Because of this mechanism, it is not uncommon in practice that a defrauded creditor chooses to file a bankruptcy petition against the debtor when there is minimal compensation available. Nevertheless, it is notable that the courts have great discretion in deciding whether to accept bankruptcy petitions.

\(^{32}\) Criminal Law, Art. 191.

\(^{33}\) Interpretation of the Supreme People’s Court on Several Issues Concerning the Specific Application of Law in the Trial of Money Laundering and Other Criminal Cases (Sup. People’s Ct., Fa Shi [2009] No. 15; promulgated 4 Nov. 2009, effective 11 Nov. 2009).


\(^{35}\) Id., Art. 31.
**Preferential payments**

Repayments by a bankrupt debtor to certain creditors are revocable if they are made within six months of the court’s acceptance of the bankruptcy petition, except for those that benefit the debtor’s bankruptcy estate or are made pursuant to a court ruling or arbitral award.36

**Fraudulent transactions**

Bankruptcy debtor transactions are invalid where they involve concealment or dissipation of assets to evade debts, or the fabrication or recognition of false debts.37 Furthermore, the persons directly responsible for the fraudulent transactions may be sentenced to incarceration or subject to a fine, or both.38

### iii Arbitration

The Contract Law recognises the doctrine of separability of dispute resolution clauses,39 and thus the validity of a dispute resolution clause will not be affected when a contract becomes invalid, is revoked or terminated. Where a contract becomes revocable because of fraudulent conduct during its formation, any agreement to arbitrate within the contract will survive revocation.

If the evidence on which a domestic arbitral award is based is proven to be false, the arbitral award may be set aside in the revocation review proceedings40 or be ruled as unenforceable in the enforcement proceedings.41 In contrast to the treatment of domestic arbitral awards, Chinese courts will not conduct a substantive review of foreign-related arbitral awards. Thus, fraud claims against evidence are not a statutory condition to set aside or refuse the enforcement of foreign-related arbitral awards. However, if the signatures on a contract are false or the signatories are not authorised to sign the contract without apparent agency, this will mean no agreement to arbitrate existed and will cause the arbitral award to be unenforceable.42

### iv The effect of fraud on evidentiary rules and legal privilege

In both civil and criminal trials, the evidence provided by one party is generally examined by the opposing party from the perspectives of authenticity, legality and relevance, although the standards of proof and evidentiary rules vary in these two different proceedings.

Evidence obtained through infringing on the lawful rights of others or by violating prohibitive provisions of law may not be used to establish the facts of a civil case.43 However, acquiring evidence through deception or misrepresentation may still be admissible in civil proceedings. For example, evidence that the owner of intellectual property rights obtains while under an assumed name from a suspected infringer will generally be admissible

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36 Id., Art. 32.
37 Id., Art. 33.
38 Criminal Law, Art. 162.
39 Contract Law, Art. 57.
41 Civil Procedure Law, Art. 237.
43 Civil Evidence Provisions, Art. 68.
into evidence. In criminal proceedings, collecting evidence through deception is generally prohibited, with a limited exception in the case of undercover investigations, provided that no measures are used such as inducing others to commit crimes, endangering public safety or seriously threatening the personal safety of others.

Unlike common law legal systems, the Chinese legal system does not have an exact concept of legal privilege. The Attorneys Law generally requires lawyers to keep in confidence information that comes to their knowledge during a representation, except where the information indicates that the client or others are preparing to commit or are currently committing crimes that endanger national security or public safety, or seriously jeopardise the personal safety of others. There are no special rules regarding lawyers’ duty of confidentiality in the context of fraud.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

Under the Contract Law, the parties to a contract are allowed to make a choice of law only when a foreign-related civil relationship is established. Chinese law further clarifies that a civil relationship shall be recognised as foreign-related if any one of the following elements is present:

- at least one party involved is foreign;
- at least one party’s habitual residence is located outside China;
- the object in dispute is located outside China;
- the legal facts that establish, change or terminate the civil relationship take place outside China; or
- other circumstances that can be deemed as a foreign-related civil relationship.

Where a contractual relationship exists between the victim and the perpetrator of the fraud, and the contract contains a choice-of-law clause, Chinese courts will apply the chosen law to claims arising out of terms of the contract, regardless of whether the chosen law otherwise has a connection to the relationship. For tort claims, however, Chinese courts will instead apply lex loci delicti, the law of the place of common habitual residence of the parties or a separate choice of law should the parties so agree.

44 Criminal Procedure Law, Art. 50.
45 Id., Art. 151.
In the absence of agreement as to the choice of law, Chinese courts will apply the law of the habitual residence of the party whose performance of the contractual obligations best reflects the nature of the contract or other law that has the most significant relationship with the contract,\(^{49}\) except where the provisions of relevant international treaties apply.\(^{50}\)

**ii Collection of evidence in support of proceedings abroad**

Foreign courts and lawyers are not empowered to summon witnesses to testify or to collect evidence in China for use in foreign legal proceedings. Chinese law permits evidence to be collected from a foreign national in China at the national’s embassy or consulate;\(^{51}\) however, collection of evidence in support of proceedings abroad is mainly conducted through international conventions or bilateral treaties.

China joined the Hague Evidence Convention in 1997,\(^{52}\) under which the Ministry of Justice of China is designated as the central authority for receiving and transmitting letters of request for taking evidence from the competent authorities of other contracting states. Upon receipt, the Ministry of Justice will forward requests to the Supreme People’s Court for review, which will then forward them to a lower court for execution. The Supreme People’s Court issued detailed implementation rules in 2013 regarding the handling of civil judicial assistance requests generated in accordance with bilateral treaties or international conventions, including the Hague Evidence Convention.\(^{53}\) Requests for evidence will generally be supported, so long as the execution of the request does not harm China’s sovereignty, national security, the public interest, or the witness is not privileged or is obligated to refuse to give evidence. However, the process may be very time-consuming and replies typically take more than one year.

As of February 2018, China has signed bilateral treaties with approximately 65 countries for judicial assistance in criminal or civil matters, most of which cover evidence collection. The Supreme People’s Court has issued special arrangements for evidence collection with respect to the Hong Kong and Macau Special Administrative Regions and Taiwan, which are regarded as separate legal jurisdictions.

In addition, there exists some cooperation for evidence collection between certain competent authorities, such as law enforcement. This assistance is based on the Interpol operating framework. Pursuant to the framework, victims of cross-border fraud may report their cases to the national central bureau of Interpol located in their home country, which

\(^{49}\) Id., Art. 41.


\(^{51}\) Civil Procedure Law, Art. 277.


will then transfer the case to the relevant national central bureau with a request to take action. However, Interpol tends to focus on high-profile cases and does not publicise its working procedures. Thus, reporting to Interpol is not a standard approach and may only work in certain cases.

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

Chinese courts and public security bureaus that accept the fraud claims of a foreign victim may act to preserve the assets of the perpetrator or the proceeds of the fraud. Where the legal proceeding is initiated outside China, the foreign victim will have few direct means of preserving assets or proceeds and must instead rely upon bilateral treaties on judicial assistance. We note that most bilateral treaties relating to judicial assistance in criminal matters cover the seizure of assets and handover of illegal gains, among other matters.

iv Enforcement of judgments granted abroad in relation to fraud claims

China is not yet a signatory to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Under Chinese law, bilateral treaties or the principle of reciprocity may constitute a basis for recognising and enforcing most types of foreign court judgments (excluding foreign divorce judgments). There is no official or clear definition of reciprocity under Chinese law. The judicial practice in China is that a Chinese court may recognise or enforce a foreign judgment only if Chinese court judgments have been previously recognised or enforced in the jurisdiction in which the court is located. Thus, it is not certain in practice whether Chinese courts will accept requests for reciprocity. In fact, Chinese courts have rarely recognised foreign court judgments in the absence of a treaty. Judgments rendered by courts in the Hong Kong and Macau Special Administrative Regions and Taiwan are recognised and enforced under separate judicial arrangements.

No special rules exist on the enforcement of foreign judgments in relation to fraud claims and thus fraud claim-based judgments will comply with the same rules and procedures as other types of judgments.

v Fraud as a defence to enforcement of foreign judgments

Once the preconditions for the enforcement of a foreign judgment are satisfied, a Chinese court will examine the enforceability of the foreign judgment in accordance with the Civil Procedure Law and international treaties. Generally the defences to enforcement include: (1) whether the judgment is final and effective; (2) whether the enforcement is contrary to the basic principles of Chinese law or harms China’s sovereignty, security or is against public policy; (3) whether the party has been duly served with a default judgment; and (4) whether there are parallel proceedings handled by Chinese courts between the same parties and based on the same facts, among others.

55 Civil Procedure Law, Art. 281.
56 The recognition and enforcement of divorce judgments rendered by a foreign court is subject to Provisions of the Supreme People’s Court on the Issues Concerning the Procedures for PRC Citizens to Apply for the Recognition of Divorce Judgments by Foreign Courts. In practice, Chinese courts have recognised many foreign divorce judgments.
57 Civil Procedure Law, Art. 282.
To our knowledge, existing Chinese laws and treaties do not expressly prohibit the recognition and enforcement of foreign judgments obtained by way of fraud. However, Chinese courts may nonetheless refuse to recognise such foreign judgments because they are contrary to basic Chinese legal principles or are against public policy.

VI CURRENT DEVELOPMENTS

China's announcement of the Silk Road Economic Belt and the 21st Century Maritime Silk Road (also collectively known as the Belt and the Road Initiative) signals the country's strong desire to integrate into the world economy. A reliable and well-developed legal system is crucial to attracting foreign investment, and thus in recent years China has made progress in improving its legal system, particularly in the area of international cooperation.

i  A Chinese court enforces a US civil judgment for the first time

On 30 June 2017, the Wuhan Intermediate People's Court issued a verdict ordering the recognition and enforcement of a commercial judgment rendered by the Los Angeles County Superior Court in the US state of California. This marks the first time that a Chinese court has recognised and enforced a commercial judgment from a US court, which is of landmark significance and will encourage more efforts to seek enforcement of US court judgments in China. However, judgments made by Chinese courts lack binding effect, unlike those under the common law system. It is thus yet to be observed whether reciprocity between China and the United States will be widely accepted by Chinese courts. The recognition and enforcement of US court judgments will still depend on the particulars of each case.

ii  China's approval of the 2005 Choice of Court Convention

China approved the Hague Convention on Choice of Court Agreements on 12 September 2017. The convention seeks to promote the recognition and enforcement of judgments among its contracting states. According to the convention, the substantial preconditions for enforcement include: the existence of an exclusive choice of court agreement, specifically, the choice of courts of one contracting state or one or more specific courts of one contracting state should be deemed to be exclusive unless otherwise provided. Contracting states currently include the European Union (including the United Kingdom), Singapore, Mexico, the United States and Ukraine. Although the convention must still be ratified by the National People's Congress before it becomes effective in China, the convention is expected to promote the use of court litigation as a dispute resolution mechanism for disputes among China and other contracting states.

iii  Legislation on international criminal judicial assistance

A milestone legislative event in international cooperation in dealing with criminal cases is the forthcoming Law of the People's Republic of China on International Judicial Assistance in Criminal Matters, the initial draft of which was deliberated by the Standing Committee of the

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National People’s Congress and issued for public comment in December 2017. The second reading is planned for August 2018 and the law is expected to be formally promulgated and become effective following a third reading in accordance with Chinese legislative procedures.

International criminal judicial assistance is defined in the draft legislation to include the service of documents, investigation and collection of evidence, arrangement of witnesses to testify or assist in the investigation, seizure, sealing and freezing of property, the confiscation and return of illegal gains, notification of the results of criminal proceedings and other related judicial assistance. In the context of asset recovery, the draft legislation will produce the first comprehensive law to stipulate very detailed procedures and documentation requirements for the presentation, receipt and handling of requests from China or foreign countries for the attachment and return of property overseas. The Law on International Judicial Assistance in Criminal Matters is intended to fill the systemic gap that has existed in international criminal cooperation between China and other countries. Once the legislation becomes law, it will significantly promote the implementation of international conventions, especially with respect to tracking down fugitives and recovering assets overseas.

Chapter 10

CYPRUS

Menelaos Kyprianou

I OVERVIEW

Although Cyprus has a relatively low level of domestic fraud cases, such cases are increasingly arising from the international business activities that are carried out here. The island has developed into a regional business and financial centre mainly because it has a wide network of treaties with other countries for the avoidance of double taxation. Cyprus international business commonly involves setting up a range of complex corporate structures with different layers of entities situated in multiple jurisdictions, and cross-border transactions involving counterparties spread across different parts of the world. The courts and the relevant state authorities are, therefore, now often called upon to offer assistance and remedies to foreign victims of fraud whose assets have ended up in Cyprus.

Victims of dishonesty can seek redress in Cyprus through the civil or criminal jurisdiction of the courts or with the assistance of state authorities. As regards the legal system, the principles of common law and of equity are followed very closely by the Cyprus courts, and all the means available to a victim of fraud in England and other common law countries are also available in Cyprus.

In the Supreme Court of Cyprus judgment in Avila Management Services Limited and another v. Stepanek and others,2 which concerned a disclosure application in the context of an international fraud case, it was stated that:

The common law, dynamic and flexible as it is, aided always by the principles of equity, has never stopped evolving, falling back and adapting itself to the current demands of the economic and social nature of society. Through the judgments of outstanding lawyers, the base that provides the armoury or the shield against the rapidly developing local and worldwide situations has continuously developed, slowly, carefully and steadily.

The common law and the principles of equity are expressly stated in Section 29 of the Courts of Justice Law3 as sources of law to be applied by the Cyprus courts in the exercise of their civil and criminal jurisdiction, and the above excerpt shows the respect with which Cyprus courts follow these principles in practice.

1 Menelaos Kyprianou is a partner at Michael Kyprianou & Co LLC.
2 Civil appeal 54/2012, dated 27 June 2012.
3 Law 14/60.
Moreover, as a member of the EU, Cyprus has adopted into its legal system legislation aimed at the prevention and investigation of criminal fraud offences and that provides for the exchange of information with other countries. Cyprus has also entered into a number of relevant international conventions and bilateral treaties.

In its 2011 report on Cyprus, the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (Moneyval), a monitoring body of the Council of Europe, stated that: ‘Cyprus has a comprehensive, generally robust and well-balanced confiscation and provisional-measures regime which gives competent authorities the ability to freeze and confiscate assets in appropriate circumstances.’

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Beyond the obvious personal actions that are available for damages sustained as a result of fraudulent activities or for unjust enrichment, the Cyprus courts, in their civil jurisdiction, also recognise proprietary principles. Restitution can therefore be ordered of assets that are identifiable as proceeds of a crime. Trust principles are also recognised and applied by the Cyprus courts. A person may therefore be deemed to hold assets as a constructive trustee for the victim of a fraud. In the Supreme Court of Cyprus judgment in *Pirillos v. Konnari*, it was stated, citing English authorities on the point, that: ‘The principle is that where a person holds property in circumstances in which in equity and good conscience it should be held or enjoyed by another, he will be compelled to hold the property in trust for that other.’ In the subsequent case of *Tsaggaris v. Gavriilides and others*, the Supreme Court, citing *Pirillos*, confirmed that a plaintiff can rely on the principles relating to the creation of a constructive trust to recover assets that are in the form of immovable property.

As will be seen in more detail below, the civil courts also have the power to issue freezing injunctions over assets situated in Cyprus and abroad. They can also issue disclosure orders against defendants and against innocent third parties for wrongdoers to be revealed and for assets to be traced. Under certain circumstances, these freezing and disclosure orders can be issued to support proceedings that have been filed or will be filed abroad.

In the field of criminal law, the Unit for Combating Money Laundering (MOKAS) is a multidisciplinary unit established within the structure of the Law Office of the Republic and is composed of officials from the Attorney General’s office, the police and the Customs and Excise Department, as well as of financial experts. It has been set up and given powers on the basis of the Prevention and Suppression of Money Laundering and Terrorist Financing Law 2007 and its amendments (AML Law). The AML Law is in accordance with Council Directive 91/308/EEC of 10 June 1991 and Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 on prevention of the use of the financial system for the purpose of money laundering.

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5 (2001) 1B CLR 1153.
6 (2003) 1A CLR 472.
7 Law 188(I)/2007.
The AML Law criminalises the laundering of illegal funds that derive from criminal activities that are punishable with terms of imprisonment exceeding one year (described in the AML Law as 'prescribed offences'), and requires all financial institutions, investment companies, insurance companies, lawyers, accountants and estate agents to apply strict procedures so that their services are not used for money laundering purposes.

On the basis of the AML Law, MOKAS has the power, in the context of any investigation that it is conducting, to ask the courts for the issuance of a disclosure order that can be addressed to any person, including banks, that may have in its possession information related to the investigation. It can also ask the courts, on an ex parte basis, for an order freezing assets that may have derived from money laundering. This includes the issuance of freezing orders against suspects outside the jurisdiction.

Moreover, the AML Law gives MOKAS the power to confiscate the proceeds from the commission of prescribed offences and, prior to this, to issue restraint or charging orders in relation to them.

The AML Law also provides for the enforcement of foreign orders under certain circumstances, and the cooperation of Cyprus with countries with which it has entered into conventions or bilateral agreements and with Member States of the European Union.

ii Defences to fraud claims

Under Cyprus law, a plaintiff’s equitable title to property is defeated and the right to trace is lost in the following circumstances: if the property reaches the hands of a bona fide purchaser; if it would be inequitable to allow the plaintiff to trace the assets. The usual example here is where a person, after receiving the assets, changes his or her position in a way that would make it unjust for him or her to be ordered to return these; and if the claimant’s property disappears or is mixed up with that of the defendant, thereby forming a new product.

As regards time limits, a claim based on a tort must be filed within six years of the time at which the cause of action arose. Where there is fraud, however, time starts to run from the moment that the plaintiff became aware of the relevant facts or could, with reasonable diligence, have become aware of these.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

As one would expect given the common law influence on the Cyprus legal order described above, the means that are available to a victim of dishonesty in England and other common law countries to secure assets and proceeds and to obtain evidence are available in Cyprus, too. Indeed, if in its evolving nature the common law made available new means to such victims, it is likely that the Cyprus courts would soon follow suit.

Injunctions freezing the assets of a defendant

Injunctions freezing the assets of a defendant until the conclusion of main proceedings that have been filed against him or her can be issued ex parte on the combined basis of Section 32 of the Courts of Justice Law9 and Section 9 of the Civil Procedure Law. Essentially, for a court

9 Law 14/60.
to issue such an injunction it must be satisfied that the matter is urgent, that the applicant has a strong *prima facie* case against the defendant and that, if the injunction is not issued, it will be difficult or impossible for justice to be delivered at a later stage.

For many years, the Cyprus courts declined to issue freezing injunctions in relation to assets that were situated abroad. This changed with the issuance of the Supreme Court of Cyprus’ judgment in the case of *Seamark Consultancy Services Limited v. Joseph P Lasala and Others*. Here, the Supreme Court confirmed as correct the first instance judgment whereby a freezing injunction over assets situated outside the jurisdiction was issued. The Supreme Court noted that the English courts had adopted the same approach (starting with the case of *Derby & Co Ltd and Others v. Weldon and Others*), and that the injunction had an *in personam* effect, meaning that if it was breached, sanctions can be imposed on persons within the jurisdiction who are responsible for this breach.

Recently, in assessing the broad powers conferred on the courts pursuant to Section 32, the Supreme Court cited *Seamark Consultancy Services Limited v. Joseph P Lasala and Others* and added that:

> The Cyprus courts, following the English Courts, held that they should adopt a line of judgments in order to meet the rapid changes in technology and the communication sector as well as . . . modern change in the ways people trade. The transactions concluded in all parts of the world within minimum time through the electronic system and the transfer of money from one account to another, from one country to another, in almost minimum time require new approaches in relation to the issuance of interim orders so that they provide an effective weapon in the hands of the parties until the conclusion of the dispute.

Injunctions freezing assets until the conclusion of proceedings filed or to be filed abroad can also be issued on the basis of the following:

1. **The International Arbitrations Law**: on the basis of this law, a Cyprus court can issue an injunction freezing the assets of a defendant in Cyprus until the conclusion of ‘international arbitration’ proceedings filed or to be filed against the defendant either in Cyprus or abroad. An ‘international arbitration’ is defined by this law as one where:
   - at the time of conclusion of the agreement providing for arbitration, the parties to this agreement had their business seat in different countries; or
   - the place where the arbitration will take place or to which the subject matter of the agreement is more closely connected is outside the country where the parties have their seat of business. (In the now leading case of *Commerzbank Auslandsbanken Holding AG and another v. Adeona Holdings Limited*, the Supreme Court of Cyprus (reversing the first instance judgment) issued freezing injunctions and disclosure of information injunctions in support of foreign arbitration proceedings before the International Chamber of Commerce.)

10 (2007) 1 CLR 162.
11 (No. 2) [1989] 1 All ER 1002.
12 See footnote 9.
14 Law 101/87.
b Article 35 of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012: on the basis of this provision, a Cyprus court can issue freezing injunctions over assets in Cyprus in aid of proceedings that have been filed or are to be filed in the courts of another EU Member State. Both of the above provisions are very regularly applied by the Cyprus courts.

ii Obtaining evidence

There are various ways in which a claimant may obtain documentary evidence or information. On the basis of the civil procedure rules, a defendant can be ordered to disclose under oath the documents in his or her possession that are relevant to the pending case, while witnesses can also be summoned to adduce relevant documents in their possession.

Perhaps more importantly, the courts also have the power to issue what are known as Norwich Pharmacal disclosure orders. On this basis, a third party not necessarily involved in any wrongdoing may be ordered to produce relevant documents and information. These documents can be requested on the basis that they are needed to discover the wrongdoers or because information is needed for a case to be filed and pleaded. In the Avila case (see Section I) the Supreme Court confirmed that disclosure orders on this basis can be issued for proceedings to be filed abroad.

Disclosure orders on this basis are very commonly issued against banks by the Cyprus courts. In a recent case, a major international pharmaceutical company discovered, through the use of private investigators, that certain individuals were selling counterfeit copies of its products through a website. It was also discovered that proceeds from these sales were being paid into bank accounts in a Cyprus bank. A disclosure order was issued against the bank, ordering the bank to disclose the beneficial owners of these bank accounts and also details of the movement of the bank accounts. Such orders are also issued very commonly in tracing actions where the victims of fraud need to find out where their money has been transferred.

A person who, in breach of a disclosure order, refuses to make disclosure is liable to face contempt proceedings, which are of a quasi-criminal nature.

As noted above, disclosure orders can also be issued in the context of the AML Law. Section 46 of the AML Law provides that the disclosure order may be granted if the court is satisfied:

a that there is a reasonable ground to suspect that a specified person has committed or has benefited from the commission of a prescribed offence;

b that the information is likely of itself or together with other information to be of substantial value to the investigation;

c that the information is not privileged; and

d that it is in the public interest for the information to be disclosed.

The provisions of Section 46 of the AML Law were considered by the Supreme Court of Cyprus in the case of Edrinotio Ltd and others. Here, MOKAS obtained a court injunction ordering four local banks to disclose information in relation to the bank accounts of 59 companies. MOKAS applied for this injunction following a request for legal assistance made

16 Based on the judgment issued in the English case of Norwich Pharmacal Co and others v. Commissioners of Customs and Excise [1973] 2 All ER 943.

17 Certiorari application No. 60/2012.
towards it by the Russian Federation. This was in the context of investigations carried out by the Russian police against a number of ex-officials of the Bank of Moscow who were suspected of defrauding the bank and illegally transferring funds to bank accounts held in Cyprus by these 59 companies.

After the issuance of the above injunction, the 59 companies filed a certiorari application at the Supreme Court seeking its annulment. They based their claim on certain provisions of the Cyprus Constitution that safeguard the inviolability of correspondence and the right to privacy.

On the correspondence point, the Supreme Court held that the bank documents that were ordered to be disclosed could not be classified as correspondence and rejected the relevant submission. On the right to privacy issue the Supreme Court held that the bank documents in question could not be considered as being of a private nature; and that, in any event, the case was covered by the exception provided for by the Constitution that permits an infringement of the right to privacy for reasons pertaining to the public interest and the protection of the rights of other persons.

The Supreme Court therefore rejected the certiorari application and held that the disclosure orders had been issued lawfully by the court.18

Preserving evidence

This can be achieved through the issuance, in the context of a civil case, of an Anton Piller order,19 which can be issued on an ex parte basis.

In its judgment in the Stepanek case,20 the Supreme Court laid out the conditions for the issuance of such an order, which it described as a ‘nuclear weapon’ in the hands of a plaintiff:

a the plaintiff must be able to demonstrate that it has a strong prima facie case;
b the activities of the defendant are causing very serious damage to the plaintiff;
c there is reliable evidence that the defendant does possess incriminating documents or other evidence; and

d there is a real danger that the defendant may destroy the relevant documents or evidence if it becomes aware that court proceedings will be filed against it.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Substantial international business, which as mentioned above is mainly tax-driven, is conducted in and through the Cypriot banking sector. Such international business involves various features such as complex corporate structures, cross-border transactions with counterparties in various jurisdictions, introduced business and the use of nominee shareholders or directors and trusts.

Relevant in this context, MOKAS applies the AML Law; as we have seen, it has powers to obtain disclosure orders, as well as orders to freeze and confiscate assets.

18 The aforesaid was recently reiterated in Melouskia Commercial Ltd and others v. Chumachenco Alisa and others, civil appeal E71/2013, dated 30 September 2014.
19 From the English case of Anton Piller KG v. Manufacturing Processes Ltd and Ors [1976] 1 All ER 779.
20 Certiorari application No. 10/2011.
Arbitration
As noted above, Cyprus courts, on the basis of the International Arbitrations Law,\(^\text{21}\) can issue injunctions in aid of international arbitration proceedings that have been filed or are to be filed abroad.

Effect of fraud on evidentiary rules and legal privilege
Under Cypriot law, secrecy and confidentiality provisions are not generally a bar to the issuance of disclosure orders in the event that fraud has been established. The Banking Law\(^\text{22}\) specifically provides for the lifting of secrecy in respect of banking information in the course of an investigation by any authority, including requests by a foreign authority. The Cyprus courts have also consistently held that the public interest in the prevention and detection of crime supersedes the obligation of secrecy and confidentiality that a bank owes to its customer.

In the context of the AML Law, Section 46(3) provides that an order for disclosure shall have effect despite any obligation for secrecy or other restriction upon the disclosure of information imposed by law or otherwise. The only exception to this is if the information is considered to be ‘privileged’. Privileged information is defined as:

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[a] \text{ communication between an advocate and a client for the purposes of obtaining professional legal advice or professional legal services in relation to legal proceedings whether these have started or not, which would in any legal proceedings be protected from disclosure by virtue of the privilege of confidentiality under the law in force at the relevant time; Provided that a communication between an advocate and a client for the purposes of committing a prescribed offence shall not constitute privileged information.}
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INTERNATIONAL ASPECTS

Conflict of law and choice of law in fraud claims
As regards the criminal jurisdiction of the Cyprus courts to try fraud cases, this is determined by Section 5 of the Criminal Code. To the extent that is relevant for our purposes, the criminal courts of Cyprus have jurisdiction to try all offences committed: within the territory of the Republic; in any foreign country by a citizen of the Republic if the offence is one punishable in the Republic with imprisonment exceeding two years, and the act or omission constituting the offence is also punishable by the law of the country where it was committed; and in any foreign country by any person if the offence is one to which, under any international treaty or convention binding on the Republic, the law of the Republic is applicable.

As regards civil jurisdiction to try fraud cases, Section 21 of the Courts of Justice Law provides that the district courts have jurisdiction over claims where the cause of action has arisen within the boundaries of the district wherein the court is situated, or where any one of the defendants reside or have their place of business within such boundaries.

\(^{21}\) Law 101/87.

\(^{22}\) Law 66(1)/97.
Applying the common law principles of private international law, the Cyprus courts will also, under certain circumstances, assume jurisdiction in relation to torts that have been committed abroad. In the Supreme Court of Cyprus judgment in the case of *Jupiter Electrical (Overseas) Limited and Anor v. Savvas Costa Christides*,\(^23\) the following was stated:

> In the light of all pertinent considerations we are inclined to hold – (and no argument to the contrary has been advanced before us) – that in the present case the trial court has jurisdiction to examine whether the respondent would be entitled to sue the appellants in respect of a civil wrong committed abroad; in accordance with the earlier referred to principle of Private International Law the respondent can do so only if he does establish that the event which caused him the injuries is actionable as a civil wrong according to Cyprus law and it is also actionable according to the law of Libya (see Dicey & Morris on The Conflict of Laws, 9th ed., p. 938); in this respect the said principle has been stated in a slightly different way than that in which it has been stated in the Georghiades case, supra, because since that case was decided such principle has been modified by the decision of the House of Lords in *Boys v. Chaplin* [1971] AC 356.

Mention must again be made of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 in relation to conflicts of law within the EU context. The starting point here, on the basis of Article 4, is that subject to the provisions of the Regulation, ‘persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State’.

The Regulation then sets out the limited number of circumstances under which persons domiciled in one Member State may be sued in the courts of another Member State. Article 7(2) and (3) are relevant, providing that a person domiciled in a Member State may, in another Member State, be sued:

1. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;
2. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

ii **Collection of evidence in support of proceedings abroad**

In the field of criminal law, the relevant domestic legislation concerning the provision of mutual legal assistance is the Law on International Cooperation in Criminal Matters (the Law).\(^24\) This Law provides, *inter alia*, that a Cypriot court before which there are pending proceedings can, on its own motion or on the application of the prosecution or the defence, issue a written request to foreign authorities for assistance in the provision of evidence to be used in Cypriot court proceedings. In addition, at the stage of the investigation of an offence, the prosecuting authority can issue a request for the assistance of a foreign authority to obtain evidence.

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\(^{23}\) [1975] 1 CLR 144.

\(^{24}\) Law 23(I)/2001.
The Law likewise provides that a foreign court or authority can submit a written request for assistance to obtain evidence to be used in foreign court proceedings or in relation to a criminal investigation that is taking place in that country. The Law prescribes a certain procedure involving the courts to be followed for the information requested to be obtained.

The Law provides that it applies to all the countries of the European Union, to specified Commonwealth countries and to all countries with which Cyprus has signed a bilateral convention or is committed by a multilateral international convention for cooperation in matters of criminal procedure.

In the context of civil proceedings (see Section III), the Norwich Pharmacal procedure can also be used to obtain evidence to be used in foreign court proceedings.

iii Enforcement of judgments granted abroad in relation to fraud claims

The rules concerning the procedure on the recognition, enforcement and execution of foreign judgments are contained in the Law Providing for the Recognition, Registration and Enforcement of Judgments of Foreign Courts. This Law applies to all cases in which the recognition, registration and enforcement of decisions of foreign courts are requested.

Under Section 3(1) of this Law, the decision of a foreign court is the decision of the court or arbitral organ or organ of a foreign country with which the Republic of Cyprus has concluded or is connected with an agreement for mutual recognition and enforcement of judicial decisions and arbitral awards and which is enforceable in the country issuing the decision.

On the basis of the above, judgments can be registered and enforced in Cyprus as follows:

a under the provisions of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 in relation to judgments that have been issued in other EU Member States;
b under the provisions of Regulation (EC) No. 805/2004 creating a European enforcement order for uncontested claims in the context of the EU;
c under the provisions of the Law on International Arbitration in Commercial Matters and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). As a signatory to the New York Convention, Cyprus enforces awards made in foreign states that are signatories to the Convention; and
d under the provisions of any bilateral agreement that Cyprus has entered into for the mutual recognition and registration of judgments.

VI CURRENT DEVELOPMENTS

During the course of the negotiations regarding the financial support to be given to Cyprus in the first quarter of 2013, the financial system of Cyprus came under extensive scrutiny. One aspect that was examined was the anti-money laundering procedures in force, as well as their application.

Moneyval was commissioned by the Cyprus authorities and the providers of international financial support to carry out an in-depth review of the effectiveness of Cyprus’s

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anti-money laundering regime. The report\textsuperscript{27} concludes that ‘in general, the banks interviewed demonstrated high standards of knowledge and experience of AML/CFT issues, an intelligent awareness of the reputational risks they face and a broad commitment to implementing the customer due diligence requirements set out in the law and in subsidiary regulations issued by the Central Bank of Cyprus’. Certain concerns were expressed in relation to features associated with international banking business, for which certain recommendations were proposed for implementation.\textsuperscript{28}

\textsuperscript{27} Special Assessment of the Effectiveness of Customer Due Diligence Measures in the Banking Sector in Cyprus, published on 24 April 2013.

\textsuperscript{28} Ibid., pp. 5–7 and 51–31.
I OVERVIEW

The Dominican Republic is a prime location for investment, because of its pristine beaches; strategic location; tourism incentives and favourable environment for direct foreign investment; equal treatment for nationals and foreigners; and social, political and economic stability. This attracts both investors and money launderers. As Robert Hunter stated in the preface to the previous edition of *The Asset Tracing and Recovery Review*, ‘Rarely nowadays will a fraudster leave the proceeds of fraud in the jurisdiction in which they were stolen.’

Traditionally the Dominican Republic has used common remedies for asset recovery, such as compensation for damage, restitution for fraudulent misrepresentation inducing the sale of a company at an inflated price, fraudulent misuse of funds that the wrongdoer has legal title to or control of to the detriment of the beneficial owner, criminal acts and money laundering.

In an effort to strengthen the Dominican legal system against money laundering, on 31 May 2017, a new Anti-Money Laundering and Terrorist Financing Law No. 155-17 (the Money Laundering Law) was enacted. This Law includes provisions for transparency and sharing of available information among economic agents, and for asset forfeiture.

The Dominican Criminal Code (Articles 401–409) and Dominican Criminal Procedure Code set out general provisions prohibiting fraud. Additionally, the Commercial Companies and Limited Liability Individual Enterprises Law (No. 479-08) establishes specific legal provisions concerning:

\[ a \] fraudulent misrepresentation;
\[ b \] fraudulent company incorporation and material fraudulent statements;
\[ c \] fraudulent use of the company assets against the best interest of the company; and
\[ d \] the transfer of company assets while in a liquidation process.

Other relevant sectoral laws are the Monetary and Financial Law (No. 183–02) and its implementing regulation, the Securities Exchange Law (No. 19-00) and its implementing regulation, Law 189-11 on Mortgage Development and Trusts, and the Corporate Restructuring and Judicial Liquidation Law (No. 141-15).

The Dominican Republic is signatory to the United Nations Convention against Transnational Organized Crime and its protocols dated 15 November 2000 (ratified on 12 September 2006), which promotes international legal cooperation to prevent and effectively
combat transnational organised crime. International legal cooperation and its procedures are set out in the Money Laundering Law, and these are used against money laundering arising from illicit trafficking in drugs and controlled substances and other serious infringements.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

The Dominican Criminal Procedure Code provides that criminal action may be public, private or combined, enabling victims to initiate actions to obtain compensation through both civil and criminal proceedings. In the Dominican Republic, civil proceedings are more suitable for private entities seeking to pursue asset recovery.

Therefore, any injured party can bring a civil lawsuit for damages and losses incurred as a result of a crime. For civil liability to arise, three requirements must be met: fault, damage and causation thereof.

The civil action for the compensation of damage caused, or for the restitution of assets, may be filed by all those who have suffered as a result of this damage, including their heirs and their legatees, against the defendant and the person that is civilly liable.

Moreover, civil lawsuits can be brought and adjudicated by the competent criminal court as part of the criminal proceedings. The plaintiff can also bring a civil action in the competent civil court. The criminal proceedings have to be decided first or jointly with the civil lawsuit.

Ordinary legal remedies are also available, including disgorgement of illegal profits and the seizure of assets employed for money laundering activities.

The Money Laundering Law gives powers to the Dominican authorities to cooperate with other governments and their agencies in the investigation and prosecution of crimes and the recovery of the illegal proceeds. The Dominican Republic, through the Dominican Republic Attorney General’s Office, has signed mutual legal assistance agreements with several countries, including the United States of America, Colombia and Brazil, among others. In addition, the Dominican Attorney General’s Office has provided assistance to the United Kingdom, Italy, Switzerland, Canada, the Netherlands, Germany, Spain and Romania, among other countries, in this regard.

Interim measures

Interim and enforcement measures of protection are available and recommended to the parties to secure a fraudster’s or debtor’s assets. The interim measures of protection available to the parties to secure such assets include:

a attachment of movable property;
b freezing of bank accounts and other financial instruments;
c establishment of compulsory mortgages establishing a prohibition on selling or encumbering real property; and
d the filing of a lis pendens on the title deed to the property.

These measures are available to any party with credible grounds and a legal interest in being granted security. However, unless the requesting party has a secured credit, an authorisation must be requested before the competent judge to apply one or more of the interim measures of protection indicated above.
**Accomplices**

The Criminal Code considers the following to be accomplices (who are thus subject to the penalties established therein): those who, through gifts, promises, threats, abuse of power or authority, machinations or guilty plots, provoke a crime or give instruction to commit it, as well as those who have knowingly helped or assisted the perpetrator or perpetrators of the crime, either in facilitating or carrying out the crime. The Criminal Code also considers as accomplices those who knowingly have hidden, in whole or in part, assets stolen or acquired by means of a crime.

**Claims and criminal proceedings**

An investigation may be initiated if there is evidence that the perpetrator has acquired illicit proceeds as a result of a criminal activity. Indictments presented by the Dominican Republic Attorney General’s Office are normally accepted by the courts. The success of a claim for asset recovery depends on the interim measures taken in the investigation process or pretrial, to prevent the dissipation of the assets.

Judicial processes in criminal courts in the Dominican Republic may take from 18 to 24 months, depending on the complexity of the case. Cases are tried in two tiers of courts: first instance and appellate courts. Cases are also regularly tried in the Supreme Court of Justice.

Those who have suffered a direct harm may participate as plaintiff in criminal proceedings. The Dominican Criminal Procedure Code (Article 83) considers as victim:

1. the person directly offended by the punishable act;
2. the spouse, cohabiting partner, biological or adoptive parents, relatives within third degree in a family or second degree in affinity, the heirs, in punishable acts whose result is the death of the offended directly;
3. partners, associates or members, regarding punishable acts that affect a company, committed by those who direct, administer or control the company.

The Dominican Republic has no insurance or fund for the restitution of victims.

The Money Laundering Law has imposed obligations on certain institutions and professionals (financial and non-banking financial institutions, lawyers, accountants and public notaries) intended to prevent, deter and detect money laundering. This includes reporting suspicious activities, such as certain cash transactions and unusual or suspicious transactions, among other things. These institutions or professionals must therefore voluntarily report any activity or transaction where there is evidence or certainty that it is related to money laundering to the Financial Analysis Unit (UAF). The UAF is the technical unit of the National Committee against Money Laundering and Terrorism Financing, which is ascribed to the Ministry of Finance. This unit will analyse all reports of suspicious transactions and elevate reports to the Dominican Republic Attorney General’s office.

Once an investigation regarding money laundering or capital gains derived from criminal activities has been initiated, the competent judicial authority may request interim measures, without prior notification or hearing, a provisional restraining order or immobilisation, to preserve the availability of assets, products or instruments related to the alleged infringement, until a final ruling is issued.
ii Defences to fraud claims

The statute of limitations on the criminal legal action shall be effective:

a upon the expiration of a term equal to the maximum penalty, in offences carrying a prison sentence. In any case, this period shall not exceed 10 years or be less than three years; and

b at the expiration of the one-year period in the case of offences punishable by non-custodial sentences or arrest.

However, the statute of limitations for money laundering infractions depends on the severity of the infraction. For very serious infractions, the prescribed statute of limitations is within five years, serious infractions within three years and minor infractions within one year of the date on which the infraction would have been committed. In cases of continued activity, the limitation period will start on the date of finalisation of the activity or the date of the most recent act. The infractions are described in the Money Laundering Law (Articles 69–71).

A liable third party has the same rights as the defendant with regards to his or her defence, concerning his or her civil interests. The ruling is subject to appeal.

Criminal proceedings may be discontinued for the following reasons: the defendant’s death; the statute of limitation has elapsed; amnesty; and abandonment of the legal action (for civil proceedings), among others.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

The Dominican Civil Code provides that when there is danger of dissipation of assets to elude payment of a debt a conservatory attachment order may be placed upon a debtor’s assets, prior to a final ruling on the case.

Interim measures are established in the Dominican Civil Procedure Code, the Dominican Criminal Procedure Code and the Law establishing the Supreme Administrative Court, respectively. The main objective is to ensure the availability of assets to satisfy a claim and personal attendance to proceedings.

In addition, the Money Laundering Law provides that when a person is convicted for a violation under this Law the court will order the assets, products and instruments related to the offence be seized and allocated as established under the Law. Also, the Money Laundering Law provides that during the proceedings the competent judicial authority may issue a provisional seizure or restraining order to preserve relevant assets up until a final ruling has been issued.

With regards to the seizure of assets or the proceeds of money laundering activities, the judge of the competent investigation, at the request of the Dominican Republic Attorney General’s Office, shall order, at any time and without a service of process or prior hearing, an order for the seizure or restraining of movable properties or banking products, or a preventive annotation and an opposition to the transfer of real properties, to preserve the assets, products or instruments related to the infraction, pending a judicial final decision with the force of res judicata.

The Dominican Republic Attorney General’s Office may exceptionally adopt, by means of a reasoned decision, the precautionary measures indicated above when the delay may jeopardise the investigation or distract the assets.
Obtaining evidence

The Constitution is the main legal provision regarding evidence in the Dominican Republic; stating that all evidence must be obtained according to the legally prescribed provisions, under penalty of nullity (Article 68). Also, the Dominican Civil Code (Articles 1315 et seq.), the Dominican Civil Procedure Code and the Dominican Criminal Procedure Code (Book IV, Titles I–V) establish the general provisions concerning evidence, including the types of admissible evidence.

Pursuant to the Criminal Procedure Code (Article 22), ‘evidence will only have value if it is obtained and incorporated to the process in accordance with the principles and norms of this code’. The two principal criteria are: that the evidence has been obtained licitly and in accordance with the applicable formalities and procedures (Article 166). Punishable offences and their circumstances may be proven by any means of evidence allowed, except express prohibition (Article 171). The admissibility of evidence is subject to its direct or indirect reference and its usefulness in discovering the truth, with respect to the subject matter under investigation, as provided therein.

Pursuant to the Dominican Civil Code, there is liberty of evidence in civil proceedings. Therefore, any type or means of evidence is considered admissible, unless specifically prohibited by law. The legally provided forms of admissible evidence are:

- a written evidence;
- b testimony;
- c presumptions;
- d confession; and
- e oath.

For criminal procedures, the Criminal Procedure Code also establishes the freedom of evidence and indicates the following, among others, as means of evidence:

- a inspections (of public places, residences and other private spaces);
- b testimony;
- c expert witnesses;
- d seizure of documents and articles; and
- e interception of communication.

To obtain evidence, parties to a claim may submit a motion to compel the production of documents held by a third party, as provided for in the Civil Procedure Code.

Other provisions, such as the Law on Free Access to Public Information No. 200-04, establish the right to obtain public information from any government agency.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Financial and Exchange Intermediation Entities have established internal procedures and control for the preparation, approval and application of the policies related to ‘Know Your Customer’, in compliance with the provisions of the Monetary and Financial Law No. 183-02 and the Money Laundering Law. Pursuant to the Money Laundering Law, banks and financial entities are parties that are obligated to prevent, detect, evaluate and mitigate the risk of money laundering and the financing of terrorism. Other obligated parties are lawyers, notaries, accountants and real estate agents, among others.
However, because of the recent enactment of the Money Laundering Law, which repeals the Anti-money Laundering Act 72-02 of 7 June 2002, banks and other financial entities are currently reviewing their procedures to prevent and detect money laundering, to adhere to the new requirements.

**ii Insolvency**

The Restructuring and Liquidation of Companies and Business Entities Law No. 141-15 (Article 213) provides that, upon recognition of a foreign proceeding, the foreign representative is entitled to request the verifier, conciliator or liquidator to initiate actions for the recovery of assets belonging to the estate, and for the annulment of acts entered into for the defrauding of creditors. To date, there has not been an insolvency proceeding in the Dominican Republic pursuant to Law No. 141-15.

Law No. 141-15 is not applicable to entities controlled by the state, to financial entities ruled by the Monetary and Financial Law, to stockbrokers, investment fund management companies, securities centralised deposits, stock exchanges, securitisation companies and any other participant in the securities markets, except for publicly traded companies and companies governed by Law on Securities Market No. 19-00.

**iii Arbitration**

Law No. 489-08 for Commercial Arbitration (the Commercial Arbitration Law) provides that disputes on matters of free disposition and transaction, which is where parties have the power to enter into an agreement in accordance with applicable civil and commercial provisions, including those in which the state is a party, may be submitted to arbitration.

The Commercial Arbitration Law provides that cases involving public policy cannot be subject to arbitration (Article 3). This does not prevent arbitrators from applying public policy measures, nor the parties from agreeing to include arbitration clauses in contracts for matters regulated by the state.

The Dominican Civil Code establishes that parties may enter into an agreement upon the civil interest that results from a crime; nevertheless, this settlement agreement does not prevent the public action. In addition, parties may require precautionary measures to the courts before and after the constitution of the arbitral tribunal. The arbitral tribunal is also entitled to order precautionary measures, at the request of a party. The decision rendered by the arbitral tribunal may be subject to an annulment action and to the requirements of recognition and execution of arbitral awards.

The Commercial Arbitration Law provides the procedure for the enforcement of arbitration awards and the Private International Law (No. 544-14) establishes the provisions for the recognition of foreign judgments, including the parties’ obligations and the limits of the court proceedings. However, generally Dominican courts do not distinguish between the procedures for foreign arbitration awards and court judgments.

**iv Fraud’s effect on evidentiary rules and legal privilege**

Evidence must be obtained according to the legally prescribed provisions. Evidence not obtained in accordance with the means and processes established in the relevant laws is illegal or unlawful and has no effect or validity. For the same reason, evidence obtained through violence, coercion or criminal methods is unlawful and shall be dismissed by the judge.
The Dominican Republic enacted the Code of Ethics of the Law Profession in 1983 (Decree No. 1290 of 2 August 1983). However, professional legal privilege can be waived by the judge.

V INTERNATIONAL ASPECTS

i Conflicts of laws and choice of law in fraud claims

The judicial authorities in the Dominican Republic are competent to exercise criminal jurisdiction against persons who have been charged with committing illicit acts in the territory in which they exercise their jurisdiction.

The Private International Law (No. 544-14) regulates in matters of conflicts of laws:

a jurisdiction of local courts;

b applicable law; and

c recognition and enforcement of foreign decisions in the Dominican Republic.

ii Collection of evidence in support of proceedings abroad

The Dominican Republic provides legal assistance and requests on the basis of multilateral and bilateral treaties and based on rules of international reciprocity. The Criminal Procedure Code, as well as the Money Laundering Law, provide for international legal cooperation.

When interaction with foreign authorities or regulators is required, the Dominican Republic Attorney General’s Office interacts with those authorities, making use of the options available under the rules applicable to mutual legal assistance and international cooperation (the Dominican Constitution, Article 26; the Criminal Procedure Code, Article 155; the Money Laundering Law, Articles 17–21), in addition to the applicable international treaties ratified by the Dominican Republic.

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

The Dominican Republic is signatory to:

a the United Nations Convention Against Transnational Organized Crime;

b the Inter-American Convention on the Taking of Evidence Abroad, executed on 19 July 1977 by the Members of the Organisation of American States;

c the Model Treaty on Mutual Assistance in Criminal Matters;

d the Inter-American Convention Against Corruption;

e the Inter-American Convention Against Terrorism; and

f the United Nations Convention Against Corruption.

Decree No. 288-96, establishing the Regulation of Law No. 50-88 for Drugs and Controlled Substances of the Dominican Republic, provides for international cooperation and the seizure or forfeiture of assets, products or instruments relating to an offence of illicit traffic or related offences.

Also, pursuant to the Money Laundering Law, the Dominican Republic Attorney General’s Office may conduct or respond with appropriate measures in relation to the request for assistance of a competent authority of another state, to identify, locate, detect and seize goods, products or instruments related to infractions provided for in that Law. Measures such as the distribution, repatriation and recovery of assets of illicit origin can also be conducted.
iv Enforcement of judgments granted abroad in relation to fraud claims

Article 91 of the Private International Law provides that:

For the process of exequatur of foreign decisions of a contentious nature, the Civil and Commercial Chamber of the Court of First Instance of the National District shall be competent.

Proceedings are conducted ex parte, which implies that the plaintiff is not obligated to inform the defendant of the claim, and no hearings are conducted. The plaintiff empowers the court by means of a simple motion with the appropriate exhibits that serve to prove the grounds that the judge should inspect on the merits. The court must limit its intervention to review due process principles and public policy consistency between the foreign decision and the local system. The local decision on the exequatur claim may be subject to an ordinary remedy of appeals before the competent court of appeals, once an appeal is submitted the challenged decision is stayed until a definitive decision from the court of appeals is issued. In any case, if the original judge rejects the exequatur claim the plaintiff may reinsert the claim, as ex parte decisions lack res judicata.

v Fraud as a defence to enforcement of judgments granted abroad

Dominican courts may refuse to execute a foreign judgment if the decision does not meet the requirements in the country in which it was issued to be considered as authentic, or those that Dominican laws require for its validity.

VI CURRENT DEVELOPMENTS

Currently the Dominican Congress is studying a bill on Extinction of Ownership of Illicitly Acquired Assets and Civil Forfeiture, by which assets that have been used to, or intended to hide or mingle proceeds from a crime, or are a product of a wrongful act, will be subjected to a court decision on forfeiture of illicit goods even before there has been a ruling to determine criminal liability.

For the past few years, Congress has also been looking into a new Criminal Code and a new Civil Code.
Chapter 12

ENGLAND AND WALES

Robert Hunter and Jack Walsh

I  OVERVIEW

The courts of London have become a focus for fraud litigation since the growth of electronic banking transfers in the mid 1980s. One reason for this has been the relative ease with which the English courts have taken jurisdiction over defendants overseas (see Section V). Another was the development by the English courts of international freezing orders in the late 1980s and early 1990s. Perhaps, however, the principal reason has been cultural. Judges in England have shown the determination to adapt the law to ensure that its historical and outmoded features do not prevent victims from obtaining remedies for fraud, particularly international fraud, when they can fairly be provided.

The following features of English fraud litigation commonly strike litigants from overseas as unusual.

First, where victims of fraud wish to seek compensation for what has happened to them, they have commonly done this through civil rather than criminal proceedings. Aside from the lower standard of proof applicable in civil courts, there are a number of reasons for this. While it is open to a private individual or business entity to bring a criminal prosecution, this has traditionally been a matter that is left to state prosecuting authorities. While those state authorities are pursuing the prosecution, the victim who has made a complaint to them will have very little influence over how the prosecution is conducted and, in particular, on whether it is pursued or abandoned. It is therefore not possible for a fraudster to ‘compromise’ criminal proceedings commenced by the state authorities by paying the victim. Moreover, while it is possible to obtain compensation for victims of fraud after a conviction, the state prosecution process has typically not been as responsive to the victim’s needs as civil proceedings; the criminal courts exercise a fairly ‘rough and ready’ approach to compensation. That said, in part because of budgetary restraints, there has been a degree of retrenchment on the part of state authorities from fraud prosecutions. Victims of fraud offences – Virgin Media being one example – have increasingly used the criminal courts’ range of powers both as a deterrent and as a means of depriving fraudsters of their gains. The private prosecutor will necessarily have far greater control of the conduct of the proceedings and may make pragmatic decisions. The criminal courts’ powers of confiscation and enforcement are increasingly robust and compensation to victims may be awarded from sums confiscated.

1 Robert Hunter is a partner and Jack Walsh is a senior associate at Edmonds Marshall McMahon Ltd. The authors would like to express their gratitude to Andrew Young, Sam Waudby, Eytan Storfer and Rupert Wheeler, who assisted in the preparation of this chapter.

Second, very large parts of English law are not codified. Most criminal law relevant to fraud claims is set out in statutes, the most notable being the Fraud Act 2006 and the Proceeds of Crime Act 2002. Civil remedies, however, have evolved by a system of ‘precedent’ whereby judges decide what the law is in a series of decisions in cases that are reported and relied upon subsequently. Thus, for example, it is possible to trace the modern action for ‘deceit’ back to a remedy that used to be available in medieval times against people who lied in court proceedings. Similarly, remedies for breach of trust and breach of fiduciary duty (described below), which have their own specific history under the law of equity, can be traced back to decisions that were made in the Middle Ages. This system of precedent, whereby judges have traditionally been said to ‘discover’ the law (but in reality make it), relies on strict rules about each case having to conform to the principles decided in previous cases depending upon whether the court that decided the previous case was a superior or inferior one.

Finally, English civil remedies for fraud generally split into two categories: first, there are remedies that are available for those who commit wrongs (most notably deceit, breach of trust and breach of fiduciary duty); second, there are those that exist for people who receive money to which the victim has a better claim. These remedies are called remedies in ‘restitution’ or sometimes remedies for ‘unjust enrichment’.

II LEGAL RIGHTS AND REMEDIES

i Civil remedies

The tort of deceit

To be liable to the victim of a fraud in the tort of deceit:⁴

a the fraudster must have made a ‘representation’ that is untrue (or, in some situations, failed to correct a representation that he or she knows has become untrue);

b the representation must have been made by the fraudster knowing it to be untrue (or to have become untrue) or being indifferent as to whether it was true;

c the representation must have induced the victim to act in a manner that harmed him or her, or his or her interests; and

d the victim must have suffered damage in consequence.

While English lawyers are generally familiar with this or similar formulations of the tort of deceit, it contains a substantial amount of legal jargon that requires explanation.

A representation

A representation is a statement of some kind. For example, if the fraudster tells his or her victim that their funds will be invested in a profitable scheme when in fact he or she knows it will simply be spent on luxuries for the fraudster, the statement would be an ‘untrue representation’ or ‘misrepresentation’. The representation usually applies to past or present events, but can sometimes simply be one of the fraudster’s own beliefs. Promises are not misrepresentations unless the person who makes them knows that they will not be fulfilled.
(in which case he or she has misrepresented his or her state of mind). In the example given, the fraudster has lied about what he or she believes will happen to the money, and hence the representation will be false even though the money has not yet been given to the fraudster, invested or spent. Similarly, the representation can be by conduct alone rather than spoken or written words. Leaving falsified accounts for a due diligence team to discover and act upon in a corporate acquisition would usually be a ‘representation by conduct’ that the accounts were genuine. Sometimes representations will not be outright lies, but half-truths that a fraudster knows will be misunderstood by his or her victim. Statements of this kind would be regarded as ‘false’ because of how the fraudster knew they would be interpreted, even if it was possible to interpret them in a way such that it was not untrue.

Difficulties exist where a statement is made that is true when it is made, but becomes untrue before the victim of fraud acts upon it. However, statements of this kind are capable of giving rise to fraud claims. Much of the emphasis of the claim against the fraudster will be upon his or her dishonesty (see below).

Knowledge of untruth
This relates to the knowledge or indifference of the fraudster that his or her representation was false. Carelessness is not enough. It is necessary to demonstrate that the fraudster either knew that what he or she said was untrue, or did not know because he or she did not care one way or the other whether it was true or false. Little difficulty exists where it is possible to show on present facts that the fraudster said something that he or she was aware was not the case. However, it is often possible for fraudsters to say that they made statements that were false believing what other people had told them themselves or having forgotten information that was inconsistent with them. In these situations, the court will decide whether it believes the fraudster having heard all the evidence and, most importantly, witness evidence at trial.

Greater difficulties arise where the fraudster does not know whether the statement was true or false because he or she has failed to look into the matter. Sometimes, the situation will arise because the fraudster has been careless, and mere negligence will not be enough to make him or her liable. On other occasions, however, the fraudster will have suspected what he or she said to be false but made no enquiry as to the facts for fear of finding out this was the case. Situations of this kind are called ‘wilful blindness’ or ‘blind-eye’ knowledge. The general rule is that it is not enough for the fraudster to be generally uneasy about what he or she said – he or she must have actually entertained a specific suspicion as to the fact that it would make what he or she said untrue and deliberately decided not to investigate that suspicion before making the representation.

Inducement and reliance
It is commonly thought by those who defend fraud claims against them that it will assist them to prove that the victim would have acted as he or she did even if he or she had not been lied to. Indeed, this kind of assertion is frequently made in cases where the fraud has

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7 Hallows v. Fernie [1868] LR 3 Ch App 467.
9 Derry v. Peek [1889] 14 App Cas 337.
10 AIC Ltd v. ITS Testing Services (UK) Ltd [2005] EWHC 2122 (Comm).
induced the victim to enter into a contract with the fraudster (see below). It is not, however, an answer to the victim’s claim. The court will not look at whether the victim would have done what he or she did without the lie anyway.11 It will simply ask two questions. First, it will consider whether the representation was ‘material’. A representation is material where it would naturally induce someone to act on it in the way that the victim acted. Hence, a statement by a fraudster that investment A is more profitable than a competitor’s investment B would be material to an ordinary investor’s decision to purchase investment A, but not to purchase investment B. Second, the representation must have actually induced the victim to have acted upon it, but as said above, this does not involve the victim showing that he or she would not have acted in that way if the representation had not been made to him or her. It is sufficient to show that it was simply a significant part of this decision-making. Many victims of fraud will say that the lie that was made to them made them more comfortable about coming to a decision that they might have come to in any event. This does not stop their actions succeeding. Indeed, it is often the reason the lie has been told.12 The victim does not need to prove that they believed the lie to be true, just that it influenced them.13

While the test of ‘inducement’ is often a light one, it must still be the case that the fraudster’s misrepresentation played a part in the victim’s decision to act as he or she did. Cases in which the victim has been lied to after he or she has acted do not usually give rise to fraud claims. Hence, where the victim has invested in some dubious scheme and those running it have lied to him or her about why they cannot return his or her funds, an action based upon those lies alone will not usually result in a fraud claim because the victim had already parted with his or her money before he or she was lied to.14 It is necessary to found the action on something that the victim has done in consequence of the lie that was told to him or her.

**Damage**

It is not possible to bring civil proceedings (at least of this kind) where no damage has been suffered simply to prove a moral point.15

**Fraudulent misrepresentation**

Where the fraud leads to the victim entering into a contract with the fraudster, this is a form of the tort of deceit known as ‘fraudulent misrepresentation’.16 The victim has the right to monetary damages and has an option to rescind the contract.17

Rescission is the reversal of a contract so that the parties are put back in the position they were in before they entered the contract. Rights and assets transferred under the contract are

12 Holmes v Jones [1907] 4 CLR 1692.
returned to their original owners and future obligations are no longer binding.\(^{18}\) The victim of a fraudulent misrepresentation has a right to require rescission even if this is inconvenient or disproportionate, but not where it is impossible.\(^{19}\)

Under Section 2(1) of the Misrepresentation Act 1967, a victim of any misrepresentation will have the right to the same level of damages that would be awarded in the case of a fraudulent misrepresentation unless the misrepresentor can prove that he or she had, up until the point the contract was made, reasonable grounds to believe the representation was true. This gives the more generous measure of damages to victims of negligent misrepresentations, but in such cases the court will have discretion to refuse rescission.\(^{20}\)

### Special feature of actions in deceit

There are several unusual features relating to an action for the tort of deceit, which are described below.

First, while it is not necessary to demonstrate that the fraudster actually regarded what he or she did as fraudulent, he or she will generally be regarded as ‘dishonest’ if the tort of deceit is proved against him or her. As will be seen below, the English courts adopt a higher burden of proof where a claimant seeks to establish dishonesty because people are more readily presumed to have acted honestly. It will therefore be necessary to prove all the ingredients of the action so strongly that the court can be confident that dishonesty can be found against the fraudster.\(^{21}\) If there is another plausible explanation for what happened that does not involve the fraudster acting dishonestly, the action will fail. While the tort of deceit is therefore difficult to prove, it is often alleged because once it is established, a number of consequences follow that are very much to the victim’s advantage. The remainder of the ‘special features of claims in the tort of deceit’ describe these advantages.

Second, if the tort of deceit is established, the victim will be entitled to all the damage that he or she has suffered as a result of his or her acting on the representation. Hence, for example, if the victim is induced by a fraudulent misstatement to buy a company and, having acquired shares in the company, the business fails, it will not be necessary for the victim to establish that it was foreseeable that the victim would suffer this loss because of the lie that the fraudster told. It will simply be sufficient to show that the loss was caused by the victim’s purchase of the shares. Hence, in *Smith New Court Securities v. Scrimgeour Vickers (Asset Management) Ltd*,\(^{22}\) the claimant bought shares in Ferranti on the basis of false representations made by the defendant. The value of those shares then plummeted following the discovery of a different and entirely unrelated fraud. It was held that the claimant was entitled to be put back in the position that he would have enjoyed had he not purchased the shares at all. In other words, the loss that resulted from the discovery of the unrelated fraud was to be borne by the fraudster.

Finally – and most importantly – it is no defence to an action in the tort of deceit that the victim of the fraud was careless. Very frequently fraudsters, particularly those who induce investors to part with their money for shares in worthless companies or investment schemes, will claim that the victim should have made his or her own enquiries about the scheme and

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\(^{18}\) *Newbigging v. Adam* [1886] 34 Ch D 582.

\(^{19}\) *Oakes v. Turquand* [1867] LR 2 HL 325.


that the victim’s loss is, in substance, the victim’s own fault. Once it has been established that the victim acted on the fraudster’s misrepresentation, it will not matter that the victim was careless in believing it, nor that the victim should have made other enquiries in addition to relying upon the representation. It is almost invariably the case that victims of fraud are careless or negligent to some degree, but as a clear rule of law based upon moral principle, the fraudster is the last person to be in a position to complain that the victim believed or relied upon him or her.23

**Breach of trust**

Many frauds, particularly those relating to investment schemes, work through the fraudster representing to the victim that while the fraudster has control of the victim’s money, it will be used only for the victim’s benefit, or that it will be held subject to certain securities or used only for specific purposes. If the fraudster obtains the victim’s money from him or her having suggested that this will be the case when there is no intention to hold it in that way at all, a claim in deceit can be made by the victim because the fraudster has misrepresented his or her state of mind (see above). However, claims of this kind will also give rise to claims for ‘breach of trust’.

A trust usually arises where property (often money) is held by one person for the benefit of another. In situations of this kind, under English law, ownership of the property often splits. The person who is holding the money (known as the ‘trustee’) has ‘legal title’ to it, which usually gives the right to immediate control of the money. The person for whose benefit the money is held usually has a separate property right called an ‘equitable interest’ or ‘beneficial interest’ in the property, which usually carries with it the right to enjoy the property. The trust relationship was created by a branch of law known as ‘equity’ (see above), but it is commonly said that it evolved from situations in medieval times when knights would leave their property under the control of others while they went to fight in the crusades.

A finding by the court that there is a trust relationship will normally (but not inevitably) bring with it a number of assumptions about the parties’ rights. It will generally be assumed that the trustee owes a number of duties recognised by the law of equity to the beneficiary. These usually include an obligation not to make any profit from the trust fund to which the beneficiary has not specifically agreed.24 Hence, for example, where a fraudster takes money from a number of different investors saying that he or she will aggregate them for some fictitious investment where, in fact, he or she simply intends to skim the interest from them, this will often be a breach of this duty. Second, the trustee is normally obliged not to put himself or herself in a position where his or her interests with regard to the money conflict with those of the beneficiary unless, again, this has been explicitly agreed to.25 Finally, and most importantly, the trustee is obliged to hold the money according to the terms of the trust. If he or she does not do so, he or she will face action for breach of trust.

Hence, for example, if a fraudster takes money from a victim on the basis that he or she intends to use it to make a specific purchase or to invest it in a particular fund, if the fraudster uses it for a different purpose, he or she would be liable for breach of trust. If a trustee wrongly transfers property in breach of trust and the transfer causes the property to be lost to the trust fund, the trustee is usually under an immediate obligation to restore to the trust

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24 *Imperial Mercantile Credit Association v. Coleman* (1873) LR 6 HL 189 at 198.
25 *Bray v. Ford* [1896] AC 44 at 51.
fund whatever has been taken out. If restitution is not possible or appropriate, the victim may be entitled to monetary compensation from the trustee, to put the victim in the position that would have obtained had the breach not occurred.26

There is some dispute in English law as to whether, if the transfer of the funds is fraudulent, it will not matter that the loss would have happened anyway. In *Bairstow v. Queen’s Moat House plc*,27 company directors, acting dishonestly, had paid money away from the company as dividends. In doing so, they had failed to comply with the relevant laws, but it was probable that the dividends could have been lawfully paid in any event. The question in the case was whether the directors were liable only for the difference between the unlawful dividends and the lawful dividends that they could have paid or whether they were liable for the full amount. The English Court of Appeal held that they were liable for the full amount. The potential availability of arguments of this kind is one of the reasons claimants in fraud cases will often seek to formulate their claims in this way.

**Breach of fiduciary duty**

Fiduciary duties are part of the law described as ‘equity’, as mentioned above. A fiduciary is, under English law, someone who is obliged – in some respects – to put someone else’s interests before their own. Trustees are therefore fiduciaries because they are obliged to put the interests of the beneficiary before their own in relation to the property that they hold for them. Agents are also fiduciaries in relation to the interests of their principals, as are company directors who act as the agents of their companies. Under English law, most professionals act as fiduciaries for their clients as they have an obligation to put their client’s interests before their own when giving advice. The significance of these duties is very great in fraud cases where the fraudster will often seek to suggest to the victim that he or she is someone the victim can trust and upon whose advice and guidance the victim can rely.

There is much debate as to the scope of fiduciary duties, but generally speaking they involve an obligation not to act contrary to the interests of the person to whom the duty is owed28 and not to permit a position in which the fiduciary’s interests might come into conflict with those of the principal.29 In each case, it is a defence to show that the principal gave his or her informed consent to what was done. A good example of where a fraud claim will involve a breach of fiduciary duty is where trustees take money for investment purposes but use it for investments in which they themselves are personally interested. Claims of this kind often give rise to ‘secret profits’.

Another very common situation involving fiduciary duties is, of course, bribery. In a situation where an agent negotiates a commission for him or herself of which the principal is not informed, in return for committing the principal to a contract of arrangement, the agent has permitted his or her own interests in negotiating the commission to conflict with those of the principal in entering into the most favourable arrangement extracting the best terms available from it.30 The taking of the commission will therefore be regarded as a breach of fiduciary duty.

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29 *Bray v. Ford* [1896] AC 44 at 51.
30 *Ross River Ltd v. Cambridge City FC* [2008] 1 All ER 1004 at 203.
It is not necessary to succeed in an action for breach of fiduciary duty for the victim of the fraud to show that he or she has suffered loss (although he or she may have done so). The victim may choose to claim from the fraudster or fiduciary either the loss that the victim has suffered or the profit that the fraudster has made. A bribe or secret commission received by an agent is held on trust by the agent for its principal, allowing the principal to claim a proprietary remedy against the bribe or secret commission itself, rather than a personal remedy against the agent. Claims of this nature therefore have an advantage over claims in deceit that can be made only if the victim has suffered damage (see above).

**Liability of persons who assisted in the fraud**

Fraud actions usually involve attempts by victims to establish liability on the part of those who were accessories to the fraudster’s activities in some way. The principal means by which they do this are set out below.

**The tort of conspiracy**

Where the victim of fraud proves that he or she has suffered damage as a result of unlawful action that has been taken pursuant to a plan made between the defendant and someone else to injure him or her unlawfully, he or she is likely to have an action against that person for ‘unlawful means conspiracy’. According to the Court of Appeal in *Kuwait Oil Tanker SAK v. Al Bader*:32

A conspiracy to injure by unlawful means is actionable where the Claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the Defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the Defendant to do so.

A typical example will be where two or more parties agree to bribe the director of a company to persuade him or her to commit the company to less favourable contractual terms that would otherwise be available. The receipt of the bribe by the director would be a breach of fiduciary duty (see above) and thus unlawful. The situation would, however, give rise to a number of other potential actions that the company, as a victim, could bring against those involved, including actions for deceit and breach of fiduciary duty and dishonest assistants in a breach of fiduciary duty (see below). There is some debate about whether the unlawful means used have to be ones that would give rise to a cause of action of the claimant.

A broad range of acts may constitute unlawful means. In *JSC BTA Bank v. Khatipov*,33 the Supreme Court confirmed that contempt of court – in that case breaching worldwide freezing and receivership orders – could constitute unlawful means for the purposes of the tort of conspiracy.

Another issue relates to the level of knowledge required by the defendant of the unlawful means for him or her to be said to be party to the conspiracy. In the case just cited, the Court of Appeal approved a statement by the judge at first instance:

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31 *FHR European Ventures LLP and others (Respondents) v. Cedar Capital Partners LLC (Appellant)* [2014] UKSC 45.

32 [2000] 2 All ER (Comm) 271.

If several people agree to enable each other to steal from their employer, lending their support in different ways at different times and taking different shares of the proceeds (or even each retaining for himself what he takes), each of them is party to the agreement pursuant to which all of the thefts take place. In those circumstances there is in my judgement no need for each to be fully aware of the circumstances of each theft in order for him to be liable as a conspirator provided that the theft in question falls within the scope of the agreement.

Similarly, the courts are resistant to arguments by defendants that they should be liable simply for those parts of the conspiracy that they have assisted in. There is also authority to suggest that when new people become parties to an existing conspiracy, they may be liable for damages caused by it prior to them joining it.

A further requirement is that the defendant must have intended to injure the victim. However, for the purposes of the kind of conspiracy described above, it does not need to be shown that the infliction of damage was his or her sole intention, or even his or her predominant purpose. In *Lonrho Plc v. Al-Fayed (No. 1)*34 Lord Bridge said:

> [W]hen conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests, it is sufficient to make their action tortious that the means used were unlawful.

### Inducing a breach of contract

It is very commonly the case that accessories will persuade directors or employees of the victim of the fraud to break their contractual obligations to him or her. In these circumstances, they are often joined to the proceedings in an action for inducing a breach of contract.35 For these purposes, it will not matter that the precise terms of the contract are not known to the defendant.36 It will be enough that he or she knows enough about the relationship to appreciate that what he or she is doing would be a breach of the contractual obligations that are owed to the victim. It will also be sufficient if the defendant does not know of the contract because he or she has ‘turned a blind eye’ (see above) to the possibility that it might exist.37 Recently, the courts have limited the type of act that can amount to an inducement to breach a contract. The inducement should normally be a promise or reward of an obvious tangible benefit, rather than vague enticements.38

Note that when a director is acting within his or her authority and *bona fide* interests of his or her company, he or she cannot be liable for inducing a breach of contract on the part of his company.39

There is some debate as to whether, when the contractual duty is one that is also fiduciary, it is possible to sue the defendant for inducing a breach of contract.

36 *Stratford & Son Ltd v. Lindley* [1965] AC 269 HL.
37 *Emerald Construction Co Ltd v. Lowthian* [1966] 1 WLR 691.
38 *R(Emblin) v. Revenue and Customs Commissioners* [2018] EWHC 626.

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The tort of negligence

Finally, it is common to see actions brought against accessories for the tort of negligence. In some situations, English law imposes an obligation upon parties to take reasonable care not to damage the interests of others. However, the courts have been concerned, in cases where the loss is purely economic rather than financial, to avoid circumstances in which parties, particularly professionals, can be liable to anyone for their carelessness damages. The question that the court will address in deciding whether the defendant’s carelessness should make him or her responsible for the financial loss of the claimant is usually expressed as whether the defendant owed the victim of fraud ‘a duty of care’.

It is clear that a duty of care may arise where the defendant has made a negligent misstatement to the victim of fraud in circumstances where it is obvious that he or she will rely upon it and might suffer loss if the statement is wrong as in the case of Hedley Byrne & Co Ltd v. Heller & Partners Ltd. It is plain that in some circumstances auditors may owe a duty of care to the company to identify fraud discovered in their audit. However, it will usually be extremely difficult to establish that third parties, other than the company that has relied upon audited accounts that have been negligently prepared and thereby concealed the existence of fraud, should be liable to them.

In the many and varied situations in which parties’ carelessness (and in particular failure to spot fraud) may damage other parties, it is difficult to predict with certainty when a duty of care will be owed. Popular tests currently include the ‘assumption of responsibility’ test, in which the court will look at the facts to determine whether the defendant assumed any responsibility towards the claimant, and the incremental approach, by which the court tends to see whether there have been previous similar cases and follows them rather than extracting some fundamental principle from them.

The following, however, are situations that are commonly encountered in fraud litigation where negligence claims may be asserted:

a Where a customer company of a bank has an employee who, despite the fact he or she is acting within the scope of the bank’s mandate, is engaged in a fraud, the bank may owe the customer a duty of care to alert it to the fraud if it should have been spotted. However, the courts have repeatedly emphasised that bankers are not detectives and that the basis of the relationship between a banker and its customer is one of trust. Strong evidence will therefore be needed to show that the bank was or should have been alerted to impropriety.

b A bank receives funds from a third party who is not a customer who has (untruthfully) been told by a fraudster that the sums will remain in a blocked account. The bank fails to spot that the customer is engaged in a fraud on the third party. In these circumstances, it is usually very difficult to assert the duty of care to the third party.

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England and Wales

A surveyor who is responsible for certifying that goods have been loaded on board a ship by issuing a certificate to that effect without inspecting them is liable to the buyer under a documentary credit. This is because he or she knew the seller would use the certificate to obtain payment via the letter of credit.45

A bank is served with a freezing injunction (see below) but carelessly fails to comply with it, with the consequence that the defendant fraudster was able to withdraw money from the frozen accounts that should have become available to the claimant. The bank owed the claimant no duty of care.46

The varied outcomes of these cases illustrate how policy greatly influences the court’s decision as to whether there is a duty of care.

Third-party recipients or transmitters of the proceeds of fraud

A traditional ‘trust’ arrangement has been described above. One person, a ‘trustee’, agrees to hold property on behalf of someone else, ‘a beneficiary’. In these circumstances, the trustee is usually holding the ‘legal interest’ in the money and has control of it, while the beneficiary usually holds the ‘equitable interest’ in the property and has the right to enjoy it. In some situations, the court will hold that someone is acting as a trustee when he or she did not agree to do so, simply because he or she should regard him or herself morally as holding the money for someone else. These situations are sometimes referred to as ‘constructive trust’ situations, although the term is an English law construct used to describe a variety of very different things.

Many cases of fraud involve ‘constructive trusts’, and the victim of fraud will be regarded as holding the ‘equitable’ or ‘beneficial’ interest in the money, notwithstanding that it has been taken from him or her. Relying on their interest in the money, victims can sue someone who has taken the money for themselves under a claim for ‘knowing receipt’ or sue someone who has helped to keep the money from them under a claim for ‘dishonest assistance’.

Knowing receipt

To succeed in a claim for knowing receipt, the claimant has to show first of all that there is a trust or constructive trust relationship of the kind just described; secondly, that the money that he or she parted with is the same money as the defendant received; thirdly, that the defendant’s receipt was ‘beneficial’; and fourthly, that it was ‘unconscionable’. The first of these requirements has been described above. The second depends upon the application of rules described as the ‘tracing rules of equity’. Space does not permit a description of these here. The third requires the defendant to have taken the money for him or herself. Hence, a bank that takes money to discharge its customer’s overdraft will have engaged in a ‘beneficial’ receipt of the money, while a bank that simply transmits money through its customer’s account will not, because it has not taken the benefit of the money for itself. Much debate arises regarding the fourth requirement. If the recipient knows that the money is the proceeds of fraud, then it is almost certain that his or her receipt is ‘unconscionable’. It also

seems likely that a careless failure to appreciate that the money constitutes the proceeds of fraud may also suffice, although it will depend upon the seriousness of the circumstances and the conduct of the recipient.

**Dishonest assistance**

People who induce others to commit breaches of fiduciary duty can be liable if they act dishonestly when they do so. For this purpose, the test of dishonesty is not the subjective question of whether the person appreciates that what he or she is doing is wrong, but whether the court would regard it as so from an objective viewpoint.47 Such claims are very commonly made against parties who seek to conceal or divert the proceeds of fraud to ensure that the victim is unable to recover them. Frequently, therefore, they are seen against banks and professionals who are engaged in what are, in effect, money laundering schemes. The test of proof of dishonesty is, however, a high one, and claims of this nature need strong evidence to succeed.48

In the case of knowing receipt, the victim can recover the amount that the defendant received. In the case of dishonest assistance, the victim is entitled to recover the loss that he or she suffered as a result of the scheme in which the defendant persisted. The victim may also be able to claim an account of profits from a dishonest assister, provided the profits in question have a sufficient causal connection with the dishonest assistance.49 This can result in difficult considerations in determining what exactly the scheme was and whether there were one or several schemes involved.

## ii Defences to fraud claims

### Limitation of actions

As a matter of policy, English law provides that wrongdoers should not be subjected to the threat of legal action for an indefinite period after the actions to which they relate occur. For example, a general claim in tort will only be able to be brought within six years of the loss being suffered by the victim, this being the accrual of the cause of action.50 However, where the cause of action is based on the fraud of the defendant, such as in a claim for deceit, policy dictates that different rules should apply and time will not start to run until the victim discovers, or should have discovered, the actions of the fraudster.51 In this context, ‘should have discovered’ means that the victim has to show that unless he or she took exceptional measures, not reasonably to be expected of him or her, he or she would not have discovered the fraud.52

Therefore, where a fraudster carefully and effectively hides his or her scheme from the victim, such that the victim is unaware of the deceit, time will not start to run until the victim becomes aware of, or had he or she been taking reasonable care in his or her affairs would have become aware of, the fraud.

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49 *Novoship (UK) Ltd and others v. Nikitin and others* [2014] EWCA Civ 908.
50 Limitation Act 1980, Section 2.
51 Limitation Act 1980, Section 31(a).
52 *Paragon Finance v. DB Thakerar & Co* (1999) 1 All ER 400.
Additionally, where the fraudster has deliberately concealed any fact relevant to the victim’s right of action, time does not start to run until the victim discovers, or should have discovered, the concealment.

For claims of fraudulent breach of trust by a fiduciary, there is no time limit on the victim’s ability to bring a claim against the fraudster. The limitation defence will, however, be available to dishonest assistors and knowing receivers of trust funds.

This also applies to what is referred to as a breach of ‘constructive trust’. However, a distinction is drawn between a case where a transfer of money held on trust (‘trust property’) is made as part of a fraudulent breach of trust, where no limitation period applies, to where a fiduciary fraudulently receives money to which a victim may be given a personal claim in equity, in which case a six-year limitation period will apply. Confusingly, both cases are described as a fraudulent breach of constructive trust. However, in the latter case the property is not trust property. An example of this would be where the director of a company improperly receives a bribe to secure the company agreeing to a waiver of debt; as a director, he or she has fiduciary duties to his or her company, and the money he or she receives is in breach of those duties; however, the money itself was never trust property. Although this is the current state of the law, it is a debated point in a complex area of law and depends on the specific facts of each case.

iii Criminal remedies

In addition to civil claims brought by the victim of fraud, a fraudster may also be subject to criminal prosecution under a number of different offences.

The fraudster will commit the criminal offence of fraud if he or she carries out the fraud through a false representation to the victim (or anyone else) as to a fact, law or state of mind, or a failure to disclose information that he or she is under a legal duty to disclose. In each case, the fraudster must have the intention to make a gain for him or herself or another, or to cause loss to another, or to expose another to the risk of loss. The first of these offences would clearly very frequently be the case where the fraudster lies to the victim to make a profit.

These offences require proving that the fraudster has acted dishonestly. Dishonesty in criminal law recently received substantial scrutiny by the Supreme Court in *Ivey v. Genting Casinos*. The test has been brought in line to reflect the civil law (above), and now only requires that the act was objectively dishonest, applying the standards of ordinary reasonable people. This removes the ‘second limb’ of dishonesty, which required proof that the defendant realised that what he or she was doing was wrong by those standards.

There is a further offence if the fraudster is in a position where he or she is expected not to act against the financial interests of the victim, for example if the fraudster is an employee,

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53 Limitation Act 1980, Section 21(1)(a).
55 Limitation Act, Section 38.
56 See Sinclair Investments (UK) Ltd *v.* Versailles Trade Finance Ltd (In Administration) [2011] EWCA Civ 347 and in the High Court at [2010] EWHC 1614 (Ch) where this distinction was drawn with particular reference to limitation periods.
57 Fraud Act 2006, Sections 1, 2 and 3.
or is under a fiduciary duty such as an agent or trustee (discussed above) and dishonestly abuses that position, even by omission, with the requisite intention.\footnote{Fraud Act 2006, Section 4.} Each of these three offences can carry a term of imprisonment of up to 10 years.

If the fraudster has created, copied or used a false document to mislead his or her victim into thinking it is genuine, and thereby to cause the victim to act in some way prejudicial to his or her interests, he or she is guilty of an offence of forgery.\footnote{Forgery and Counterfeiting Act 1981, Sections 1–4.} Such an offence can carry a term of up to 10 years’ imprisonment.\footnote{Forgery and Counterfeiting Act, Section 6.} Other commonly seen offences include the common law – and self-explanatory – offence of conspiracy to defraud and the offence of fraudulent trading,\footnote{Companies Act 2006, Section 993.} which, although primarily designed to target the carrying on of a business with the intention of defrauding creditors, is drafted widely enough to capture all manner of fraudulent trading practices.

Beyond these more specific offences, it will often be possible to rely on the simple criminal charge of theft, where the fraudster has dishonestly taken someone else’s property intending to keep that property permanently.\footnote{Theft Act 1968, Section 1.}

There are also very wide provisions in English law criminalising acts that consist of the giving or receiving of bribes. Space does not permit a full outline of these offences, but broadly, where the fraudster gives a bribe to someone who is in a position of trust, or of whom there is otherwise a reasonable expectation that he or she will act in good faith or impartially in carrying out any activity connected with a business or trade, and hopes by giving the bribe to secure improper performance of any such activity, the fraudster will be guilty of an offence of bribery.\footnote{Bribery Act 2010, Sections 1, 3–5.} This will also be the case where the fraudster him or herself requests, agrees to receive or receives a bribe in connection with the improper performance of any such activity.\footnote{Bribery Act 2010, Section 2.} These offences extend to bribery involving public officials, employees and other people representing corporate bodies. The Bribery Act 2010 is noteworthy for its novel ‘failure-to-prevent’ provisions, criminalising commercial organisations that do not have in place adequate procedures to prevent persons acting on their behalf from offering bribes.\footnote{Bribery Act 2010, Section 7.}

More recently, the Criminal Finances Act 2017 amended the Proceeds of Crime Act 2002.\footnote{See introduction to Criminal Finances Act 2017.} Part 3 of the 2017 Act makes both UK and non-UK companies criminally liable for failing to prevent the facilitation of UK or foreign tax evasion in circumstances where the company neglects to have ‘reasonable’ prevention policies in place.\footnote{See Criminal Finances Act 2017, Sections 45–47.}

The introduction of these new failure-to-prevent offences represents a continuing departure from the longstanding ‘directing mind’ concept of corporate criminal liability. The expanded scope of corporate criminal liability may result in more Deferred Prosecution Agreements, which are an alternative to prosecution for corporate entities and which, although introduced by the Crime and Courts Act 2013, have been only rarely used since.

There are also provisions of the criminal law that allow for the restraint and recovery of money that constitutes, or represents, the proceeds of crime. Restraint – akin to an

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60 Fraud Act 2006, Section 4.
62 Forgery and Counterfeiting Act, Section 6.
63 Companies Act 2006, Section 993.
64 Theft Act 1968, Section 1.
65 Bribery Act 2010, Sections 1, 3–5.
66 Bribery Act 2010, Section 2.
67 Bribery Act 2010, Section 7.
68 See introduction to Criminal Finances Act 2017.
69 See Criminal Finances Act 2017, Sections 45–47.
interim freezing injunction in civil proceedings – can be sought by certain state agencies at the investigation stage, or by a prosecutor once criminal proceedings have commenced.\textsuperscript{70} Confiscation proceedings arise upon conviction.\textsuperscript{71} Alternatively, the state can bring a claim in a civil court to recover any money that is, or represents, property obtained through unlawful conduct even where no criminal conviction has been secured.\textsuperscript{72} To make such a claim, it will suffice to show that on the balance of probabilities the unlawful conduct has occurred and that this is the gain from that conduct.

Property obtained through unlawful conduct may be followed into the hands of third parties who receive the property from the fraudster, or receive the property from the first recipient, and so on. Significantly, it is not necessary to prove that the receipt by the third party of the property was ‘unconscionable’; indeed, it is not necessary to establish the state of mind of the recipient at all. Recovery will not be possible, however, where the third party purchases any property for valuable consideration. The property may also be traced into any funds that represent the original property.\textsuperscript{73}

The Criminal Finances Act 2017 introduces Unexplained Wealth Orders (UWOs).\textsuperscript{74} UWOs apply to politically exposed persons or persons suspected of being or having been involved in serious crime or persons connected with a person so suspected. A UWO requires the respondent to explain their interest in property. The property identified in a UWO may then become subject to an interim freezing order while restraint or confiscation proceedings are pursued.

A fraudster convicted of a criminal charge can be made to pay his or her victim under a compensation order, made upon an application or of the court’s own motion.\textsuperscript{75} An application for such an order is made by the prosecutor rather than the victim unless, in the case of a private prosecution, they are one and the same. There is no upper limit on the amount of compensation the Crown Court may order, but it will only make realistic orders that it believes the fraudster will be able to pay within a reasonable time.\textsuperscript{76} Compensation orders will also be limited to the loss ‘resulting from’, that is to say occasioned directly by, the fraudster’s offences of which he or she is convicted or that are taken into account during sentencing.\textsuperscript{77} The procedure adopted for the making of a compensation order is a summary one, inapt for detailed enquiry,\textsuperscript{78} and an order will only be made where the loss is readily ascertainable.\textsuperscript{79} Any award made should not exceed the sum that would be awarded by a court in civil proceedings.\textsuperscript{80} The court may order both confiscation and compensation arising from the same loss. In the event that the fraudster has insufficient assets to satisfy both orders, the court prioritises the victim in that sums recovered by the state pursuant to a confiscation order may go towards any shortfall in compensation to the victim.\textsuperscript{81} Separately, where property has

\begin{flushleft}
\textsuperscript{70} Proceeds of Crime Act 2002, Sections 40–41.
\textsuperscript{71} Proceeds of Crime Act 2002, Sections 6–13B.
\textsuperscript{72} Proceeds of Crime Act 2002, Sections 240–245.
\textsuperscript{73} Proceeds of Crime Act, Sections 300–310.
\textsuperscript{74} Criminal Finances Act 2017, Sections 1–3.
\textsuperscript{75} Powers of the Criminal Courts (Sentencing) Act 200, Sections 130–133.
\textsuperscript{76} R v. Hacker [1988] 10 Cr App R (S) 388.
\textsuperscript{77} R v. Grimes [1993] 14 Cr App R (S) 790.
\textsuperscript{78} R v. Stapylton [2012] EWCA Crim 728.
\textsuperscript{79} R v. Donovan [1981] 3 Cr App R (S) 192.
\textsuperscript{80} R v. Flinton [2008] 1 Cr App R (S) 96.
\textsuperscript{81} Proceeds of Crime Act 2002, Section 13.
\end{flushleft}
been obtained by theft, blackmail or fraud, the criminal court may, upon the application of the victim or of its own motion, make an order for the restitution of the property stolen or its value. An order for restitution will, however, only be made in the ‘plainest of cases’. Where there is doubt about the rights of the parties or there is an issue in dispute, the matter will be left to be decided in the civil courts.

Despite the creation by statute of various bodies to investigate and prosecute fraud, the right to bring a private prosecution is expressly preserved in English and Welsh law. In recent years, victims of fraud have noticed a reluctance – or lack of resources – on the part of the police in particular to pursue fraud investigations. To a great extent, the nationwide ActionFraud online portal has replaced traditional methods of reporting fraud. Instead, victims of fraud have been increasingly exercising their rights as private prosecutors to pursue justice, punishment, deterrence and – quite properly – compensation and confiscation against fraudsters. There is now a solid body of case law clarifying the scope of the private prosecutor’s access to the powers of the criminal courts, particularly in terms of confiscation, as to which see the recent R (Mirchandani) v. Somaia. Essentially, almost all the tools of the state prosecutor are available to the private prosecutor. The position is somewhat different in respect of investigatory powers prior to a prosecution. It is also clear that it is only rarely impermissible for criminal and civil proceedings concerning the same subject matter to be conducted concurrently, even if the prosecutor is also the claimant in the civil case.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

In England, it is possible to obtain an order before an action has been started, during the course of the action or after judgment has been granted in favour of the victim of fraud, called a ‘freezing injunction’, which can freeze all property belonging to the defendant. Similar ‘proprietary injunctions’ can be obtained where the claimant is seeking to freeze property in which he or she has an equitable interest (see above).

Both freezing and proprietary injunctions can attach to assets wherever they are in the world. A freezing injunction affects the defendant and, if he or she does not obey it, makes him or her potentially liable for contempt of court and sanctions involving fines or imprisonment. It would also affect third parties who break the terms of the order, or help or commit the defendant to break them, but only if those third parties are in England or subject to the jurisdiction of the English court.

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83 See R v. Ferguson 54 Cr App R 410; R v. Calcutt and Varty 7 Cr App R (S) 385.
84 Prosecution of Offences Act 1985, Section 6.
85 [2017] EWCA Crim 741. See also R (Virgin Media) v. Zinga, referred to at footnote 2.
86 See the line of cases including Mote v. Secretary of State for Work and Pensions [2007] EWCA Civ 1234.
87 Civil Procedure Rules Part 25 and Practice Direction 25A.
Freezing orders can be granted to freeze assets inside or outside England and anywhere in the world,\textsuperscript{88} in support of English proceedings or proceedings in other countries anywhere in the world;\textsuperscript{89} and in support of arbitration proceedings wherever they are taking place.\textsuperscript{90} They are not, however, available against foreign states unless that state has given written consent.\textsuperscript{91} Despite the fact that freezing and proprietary orders are available in potentially a broad range of situations, they are granted sparingly.

To obtain a freezing injunction, the applicant must show:

\begin{itemize}
\item[a] that he or she has a good arguable case. This does not mean that it necessarily has more than a 50 per cent chance of success, but it must have some substance to it;
\item[b] that there are assets that the injunction would catch; and
\item[c] that there is a real risk that the judgment will not be satisfied in view of what the defendant is likely to do.
\end{itemize}

The applicant must also provide an undertaking to pay any damages that the defendant suffers as a result of the injunction having been granted when it should not have been.

There is no ‘right’ to a freezing injunction; it is very much for the court to decide whether one is appropriate given all the circumstances. In addition, unlike a similar relief in other jurisdictions, a freezing injunction does not give security in the insolvency of the defendant. It is possible to obtain a freezing injunction without notifying the defendant and, indeed, most freezing injunctions are obtained in this way. However, in these circumstances, the applicant will have to satisfy an obligation of ‘full and frank disclosure’\textsuperscript{92} whereby he or she explains to the court any arguments that the defendant might have made, had he or she been present, as to why the injunction should not have been granted. The requirements for a proprietary order are similar, save that it is sometimes said that the strength of a case to support one need not be so high.

\section*{ii Obtaining evidence

\textbf{Search orders}}

A search order is an order available to litigants in England and Wales entitling them and their representatives (usually lawyers and forensic accountants) to enter a defendant’s premises and search for a copy of and remove documents or material that may be used in court proceedings.\textsuperscript{93} They are also available against a third party, even where there is no cause of action against that party and no third-party disclosure order in place.\textsuperscript{94} To obtain a search order, there must be a very strong \textit{prima facie} case; good evidence that the defendant’s actions have resulted in serious damage to the claimant’s interests; and very clear evidence that the defendant will have on his or her premises ‘incriminating documents’ or other items, and

\begin{itemize}
\item[88] Derby & Co Ltd and Others v. Weldon and Others (No. 6) [1990] 3 All ER 263.
\item[89] Civil Jurisdiction and Judgments Act 1982, Section 25.
\item[91] State Immunity Act 1978, Section 13(2)(a).
\item[92] Siporex Trade SA v. Comdel Commodities Ltd [1986] 2 Lloyd’s Rep 428.
\end{itemize}
that there is a real possibility that he or she will dispose of them if he or she learns that the claimant might apply for one.\(^95\) Search orders are therefore almost always granted \textit{ex parte}, and the duty of full and frank disclosure is taken very seriously.

Search orders are increasingly common in fraud litigation in England and Wales where the claimant wishes to establish what has happened to the proceeds of fraud but believes that the defendant will not comply with court orders of the \textit{Norwich Pharmacal} kind or otherwise (see below) that are intended to enable him or her to track them down. Almost always, search orders entail copying of computer records held by the defendant.

Because the search order is such an extreme remedy, very careful safeguards are set out to ensure that they are not used oppressively. They will normally be executed in the presence of an independent solicitor (the supervising solicitor) who will ensure that they are not abused and resolve any issues relating to their execution.

Should the defendant fail to comply with the search order by refusing the claimant and the supervising solicitor access to his or her premises, he or she could be found in contempt of court, the punishment for which can be imprisonment or a fine.

\textbf{\textit{Norwich Pharmacal orders}}

A \textit{Norwich Pharmacal} order requires someone to disclose documents or information to the applicant, often a victim of fraud. Frequently, they are sought to identify those who have assisted in perpetrating the fraud, to explore the full nature of the fraud or, perhaps most commonly, to trace assets that are subject to proprietary claims (see above). Very commonly, when the victim of a fraud discovers that his or her money has been misappropriated, he or she will apply for a \textit{Norwich Pharmacal} order against a bank (sometimes called a \textit{Bankers Trust} Co v. Shapira\(^96\) order). The intention of such an order is to obtain information about where funds have gone, or who has received them or assisted in transmitting them for the purposes of no-receipt or no-existence claims.

Again, the order is not available as of right, but the court will decide on the basis of all the information available to it whether it is appropriate to grant it. To obtain such an order, it is necessary to demonstrate that the respondent has been involved in the defendant’s wrongdoing, if only unwittingly.\(^97\) A bank that innocently transmits funds that later turn out to be the proceeds of fraud would be therefore be ‘involved’. However, if it has taken no action in connection with the fraud, the risk is that it will be regarded as a ‘mere witness’ and a \textit{Norwich Pharmacal} order will not be available. It is also necessary to show that there are no other relevant provisions or procedures available under English law by which information could be obtained, that the respondent is likely to have relevant documents or information, and that there is a good arguable case if there is wrongdoing.

\textit{Norwich Pharmacal} relief is invariably used in respect of respondents and material within the jurisdiction. Whether it can be used outside the jurisdiction has been seriously doubted.\(^98\)

\textbf{Disclosure}

In civil proceedings in English courts, parties are typically ordered to disclose a list, to the court and the other parties, of all documents on which they rely; that adversely affect their

\(^{95}\) Ibid.  
\(^{96}\) [1980] 1 WLR 1274.  
\(^{97}\) \textit{Norwich Pharmacal Co v. Customs and Excise Commissioners} [1974] AC 133.  
own case; that adversely affect another party’s case; and that support another party’s case.\textsuperscript{99}
This is known as ‘standard disclosure’. The court can order, with or without the agreement of the parties, that a different level of disclosure is required, and will often do so to ensure that only a proportionate disclosure exercise is undertaken.\textsuperscript{100}

Of the documents disclosed in the list, the other party will have the right to inspect those documents that are not privileged. There are many grounds of privilege, but the most pertinent are:
\begin{itemize}
  \item[a] legal advice privilege: communications by which a client seeks or receives legal advice from a lawyer are privileged;\textsuperscript{101}
  \item[b] litigation privilege: communications made or received by a party that have the predominant purpose of relating to the litigation are privileged;\textsuperscript{102} and
  \item[c] privilege against self-incrimination: a party is not required to disclose documents that might incriminate him or her or increase his or her exposure to criminal prosecution. This will be relevant where the conduct complained of would be a crime.\textsuperscript{103}
\end{itemize}

Disclosure occurs after proceedings have been commenced, so the fraudster will have had time to destroy or conceal evidence. A party can apply to the court for an order for pre-action disclosure,\textsuperscript{104} but this relies on the cooperation of the party being asked for documents. In cases where there is a risk of evidence being destroyed or concealed, a search order (see above) should be considered.

A party can apply to the court for an order that specific documents are searched for and made available for inspection by another party\textsuperscript{105} or a third party,\textsuperscript{106} and there is EU legislation governing the obtaining of evidence from other countries in the EU.\textsuperscript{107}

\bf{Letters rogatory}

A letter rogatory is a request from a court in one country to the judiciary of a foreign country to perform a specified act that might otherwise violate the foreign country’s sovereignty if done without approval. By way of example, letters rogatory can be used to request evidence from a foreign jurisdiction. In many cases, foreign letters rogatory are sent to firms of solicitors in England who then register them in the English High Court and assist in relation to the implementation of the order. It is similarly possible for a letter rogatory to be sent to the courts of another jurisdiction as part of proceedings in England.

\begin{flushleft}
\textsuperscript{99} Civil Procedure, Rules 31.6.
\textsuperscript{100} Civil Procedure Rules 31.5.
\textsuperscript{102} Wheeler v. Le Marchant [1881] LR 17 Ch D 675.
\textsuperscript{103} Lamb v. Munster [1882–83] LR 10 QBD 110, but see Fraud Act 2006, Section 13, for an important exception to this rule.
\textsuperscript{104} Civil Procedure, Rules 31.16.
\textsuperscript{105} Civil Procedure, Rules 31.12.
\textsuperscript{106} Civil Procedure, Rules 31.17.
\end{flushleft}
IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

There are two types of cases where English courts have assessed banks’ liabilities where fraud is present: first, where a bank acts on forged payment instructions, and secondly, where a bank acting within its mandate fails to spot fraud.

Banks’ liabilities for forged payment instructions

In the first scenario, a bank is usually unprotected where, for example, a fraudster forges a signature on a bill of exchange or otherwise lacks authority to draw a bill. The bank can, however, attempt to claim an estoppel (e.g., by showing an express representation from the customer accepting the forgery that means it would be unfair to allow the customer to contradict that representation) or adoption (see the Greenwood case below).

Banks’ liabilities for fraud when acting within mandate

As a general principle, persons dealing with companies are not bound to inquire into whether the internal procedures of that company to delegate the necessary power to an employee have been followed. However, where for example a payment instruction was fraudulently made by an employee of a company without express authorisation, this general principle has been found not to apply, and banks have been found liable to the company for accepting instructions from unauthorised employees of that company.

Customers’ obligation not to act fraudulently

Customers owe their bank a duty to refrain from preparing or ordering individual payment orders in a way that makes fraud or forgery simple or likely: see London Joint Stock Bank Ltd v. Macmillan. If a customer writes a cheque in a manner that makes fraud simple or likely (e.g., by leaving blank spaces that make alterations and additions straightforward), he or she may be guilty of a breach of a duty he or she owes to the bank, and may be liable to the bank for any loss sustained by the bank as a natural and direct consequence. The customer does not, however, owe a wider duty to take reasonable precautions in the management of its business to identify forged cheques and prevent them from being presented to its bank.

Customers also owe their bank a duty to inform it of any known forged payment order as soon as they become aware of it: see Greenwood v. Martins Bank Ltd. If they do not, the courts will not allow them to assert that there has been a forgery. However, a customer does not owe a broader duty to the bank in circumstances where a reasonable person would have been merely put on enquiry of fraud.

Money laundering

Banks and their employees can be criminally liable under the Proceeds of Crime Act 2002 if they accept deposits of that money either knowing or suspecting that it has been generated

109 Ruben v. Great Fingall Consolidated Ltd [1906] AC 549.
110 [1918] AC 777.
111 Tai Hing Cotton Mill v. Liu Chong Hing Bank Ltd [1986] AC 80, PC.
112 [1933] AC 51.
by criminal activity\textsuperscript{114} such as criminal fraud or if they fail to disclose suspicious transactions to nominated officers or the authorities.\textsuperscript{115} Banks and their employees can also be subject to civil or criminal liability and fines under the Money Laundering Regulations 2007 if they do not have systems and procedures in place to identify customers and suspicious transactions.\textsuperscript{116}

\textbf{ii Insolvency}

There are various statutory provisions that protect creditors from particular transactions designed to put assets beyond their reach, which are beyond the scope of this book. In addition to these provisions, it is possible for individuals to face liability to the company for fraudulent trading and wrongful trading.

\textbf{Fraudulent trading}

A liquidator of a company can seek a court declaration that anyone who was knowingly party to a fraudulent business must make a contribution to the company’s assets.\textsuperscript{117} Fraudulent trading requires more than simply creating more debts in the company when the directors knew that the company was insolvent. Actual dishonesty must be shown. It is not only directors who may be liable; banks have been found to be parties to fraudulent trading as a consequence of their employees’ knowledge.\textsuperscript{118} Any recovery becomes part of the general funds available to the liquidator to distribute to the company’s unsecured creditors.

\textbf{Wrongful trading}

Section 214 of the Insolvency Act 1986 provides for claims to be brought against directors and former directors who continued the trading of the company when they knew, or ought to have realised, that there was no reasonable prospect that the company would avoid going into insolvent liquidation. Liability arises if, on a net basis, it is shown that the company is worse off as a result of the continuation of trading.\textsuperscript{119} Dishonesty is not required, and accordingly there is a lower burden of proof than that required to prove fraudulent trading.

There are various provisions that assist office holders administering the insolvency of a company to investigate such claims. Section 235 of the Insolvency Act 1986 requires, \textit{inter alia}, former directors and employees of the company to cooperate with an office holder (without a court order being first obtained) and provide them with such information concerning the company and its promotion, formation, business, dealings, affairs or property as the office holder may at any time after the relevant date reasonably require.\textsuperscript{120} There are also further wide-reaching provisions allowing office holders to apply for private examinations of directors and secretaries of the company.\textsuperscript{121}

\begin{itemize}
\item \textsuperscript{114} Proceeds of Crime Act 2002, Sections 327–329.
\item \textsuperscript{115} Proceeds of Crime Act 2002, Sections 330–332.
\item \textsuperscript{116} Money Laundering Regulations 2007/2157, Regulations 42 and 45.
\item \textsuperscript{117} Insolvency Act 1986, Section 213(2).
\item \textsuperscript{118} \textit{Bank of India v. Morris} [2005] EWCA Civ 693.
\item \textsuperscript{119} \textit{Re Marini Ltd (the liquidator of Marini Ltd v. Dickenson and Others)} [2003] EWHC 334.
\item \textsuperscript{120} Insolvency Act 1986, Section 235(2).
\item \textsuperscript{121} Insolvency Act 1986, Section 236.
\end{itemize}
iii Arbitration

Under the principle of separability, the invalidity or rescission of a contract does not necessarily mean that the agreement to arbitrate contained within it is invalid or unenforceable.\textsuperscript{122} Separability is a matter for the law governing the contract.\textsuperscript{123} The arbitration agreement may therefore be affected in instances where the law governing the contract does not recognise the doctrine of separability.

There are also some grounds of invalidity that may affect an agreement to arbitrate itself. These grounds relate to circumstances where the contract itself was never entered into – for example, where a signature was forged or a signatory lacked authority.\textsuperscript{124} It is also theoretically possible for an arbitration clause to be invalid because of a fraudulent inducement, or if there was a misrepresentation relating to the effect or presence of the arbitration clause itself.

Arbitration awards may be set aside when obtained through fraud.\textsuperscript{125}

iv Fraud’s effect on evidentiary rules and legal privilege

A judgment must be set aside because it was obtained by a party’s fraud if there was a conscious and deliberate dishonesty relating to, for example, evidence or action relevant to the judgment;\textsuperscript{126} and the evidence or action was material and causative.\textsuperscript{127}

Materiality should be measured by assessing the impact of a party’s fraud on the evidence that supported the original decision.\textsuperscript{128}

In criminal proceedings, the guilt of the defendant must be proved ‘beyond reasonable doubt’, and this applies in cases of criminal fraud.\textsuperscript{129}

In civil cases in the English courts, judgment is given ‘on the balance of probabilities’. This applies irrespective of the seriousness of the allegation made.\textsuperscript{130} However, in the circumstances of an individual case, it may be inherently unlikely that fraud or reprehensible behaviour has occurred, and therefore cogent evidence will be required.\textsuperscript{131}

If fraud is alleged in a civil case, it must be specifically pleaded. This means the specific allegation of fraud must be set out in the initial written submissions made by the parties before the trial.\textsuperscript{132}

The ordinary rule of English law is that parties to litigation are not required to disclose legal advice received from their solicitors or communications between client and solicitor relating to the proceedings (see above). However, it has been confirmed that communications between a client and solicitor will not be privileged if the purpose of the client is to seek advice to further or facilitate crime or fraud.\textsuperscript{133} In \textit{Kuwait Airways Corporation v. Iraqi Airways Corporation} (Perjury II) [2005] EWHC 2524 (Comm).

\textsuperscript{122} \textit{Premium Nafta Products Ltd v. Fili Shipping Co Ltd} [2007] UKHL 40.
\textsuperscript{123} \textit{Astrazeneca UK Ltd v. Albemarie International} [2010] EWHC 1028.
\textsuperscript{124} \textit{Nigel Peter Albon v. Naza Motor Trading SDN BHD} [2007] EWHC 665 (Ch).
\textsuperscript{125} \textit{Celtic Bioenergy Ltd v. Knowles Ltd} [2017] EWHC 472; Section 68(2)(g) Arbitration Act 1996.
\textsuperscript{126} \textit{Ampthill Peerage case} [1977] AC 547.
\textsuperscript{127} \textit{Sphere Drake Insurance plc and another v. Orion Insurance Company plc} [1999] EWHC 286 (Comm).
\textsuperscript{128} \textit{Kuwait Airways Corporation v. Iraqi Airways Corporation} [2005] EWHC 2524 (Comm).
\textsuperscript{130} \textit{Hornal v. Neuberger Products Ltd} [1957] 1 QB 247.
\textsuperscript{131} \textit{H (Minors), Re} [1996] AC 563.
\textsuperscript{132} \textit{D & G Cars Ltd v. Essex Police Authority} [2013] EWCA Civ 514.
\textsuperscript{133} \textit{Kuwait Airways Corporation v. Iraqi Airways Company} [2005] EWCA Civ 286.
Company, the Iraqi Airways Company’s correspondence with its solicitors relating to a trial in which it had conspired with a key witness to deceive the English court was held not to be privileged.

V INTERNATIONAL ASPECTS

i Conflict of laws

There is a complex body of law detailing the circumstances in which the courts of England and Wales will accept jurisdiction over foreign fraudsters that can be broadly split into two categories: the traditional common law rules and the European regime, which includes the Brussels Regulation, the 2007 Lugano Convention and various other conventions with broadly similar terms.

The European regime takes precedence over the traditional common law rules, applying to civil and commercial matters principally where the defendant is domiciled in an EU Member State or certain other non-EU European countries. The guiding principle of the regime is that defendants should be sued in the courts of the Member State of their domicile. Therefore, if a fraudster is domiciled in Germany, the starting point is that they should be sued in relation to their fraud in Germany. However, the regime also provides various other grounds of special jurisdiction that allow a claimant to start proceedings against a defendant in a different jurisdiction, for example, where the parties have an exclusive jurisdiction agreement. Special jurisdiction is also granted in relation to torts to the place where the harmful event occurred or may occur; this would allow a European-domiciled fraudster to be sued under certain circumstances in England so long as it could be shown that the harm caused by the fraud occurred there.

When the European regime does not apply, the common law rules allow the English courts (depending on the circumstances) to take ‘exorbitant’ jurisdiction over defendants, whether domiciled in the jurisdiction or not, with jurisdiction based on service of proceedings or submission to the jurisdiction by the defendant. A non-European fraudster can, therefore, with the permission of the court, be served abroad with proceedings allowing the English courts to take jurisdiction. In deciding whether to grant permission to serve proceedings abroad, the English court must decide whether it is the most appropriate forum for resolution of the dispute, or if not whether justice nevertheless requires that the case be tried in England. The court usually assesses factors such as convenience and expense, governing law and the places where the parties reside and carry on business. The court retains discretion to stay proceedings on several grounds even if there is effective service, including, for example, where there is a more appropriate forum, or where a jurisdiction agreement between the parties points to another forum.

134 The rules relating to choice of law in connection with fraud claims cannot be summarised usefully within the space available here.
135 Article 2 Brussels Regulation.
136 Article 5(3) Brussels Regulation.
137 This doctrine is known as forum non conveniens.
139 Ibid.
ii Enforcement

Foreign judgments can be enforced in England and Wales through various means, depending on the jurisdiction of the original judgment. The European Enforcement Order Regulation provides a streamlined procedure for enforcing uncontested judgments of a court of an EU Member State in another Member State. The Brussels Regulation and 2007 Lugano Convention broadly provide that a claimant who has obtained a judgment from a Member State (and certain other jurisdictions) may enforce that judgment in England and Wales without issuing separate proceedings. Certain UK statutes provide for the enforcement of foreign judgments, obtained in mostly Commonwealth countries, in England and Wales. If none of the above provisions apply, the common law regime applies, requiring fresh legal proceedings to be instituted with the judgment creditor suing on the foreign judgment as a debt often on a summary judgment basis.

iii Fraud as a defence to the enforcement of judgments granted abroad

Whether a fraud defence can be raised in relation to the enforcement of a foreign judgment depends on where the judgment was granted.

Where enforcement of a foreign judgment is sought under the Commonwealth-related statutes, there are explicit provisions that provide a defence against enforcement if the judgment was obtained by fraud. Where enforcement of foreign judgments not covered by the aforementioned regime or the European regime is sought, the common law similarly provides a defence.

However, there are no specific grounds allowing a court to refuse to enforce a judgment covered by the Brussels Regulation or Lugano Convention on the basis that the judgment was obtained by fraud. The European regime does, however, provide defences on public policy grounds that allow for a fraud defence to be raised in certain limited circumstances.

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141 See, for example, Administration of Justice Act 1920, Section 9(2)(d) and Foreign Judgments (Reciprocal Enforcement) Act 1933, Section 4(1)(a)(iv).
I

OVERVIEW

The German law system features a variety of criminal law and civil-law remedies for tracing and recovering assets lost through fraudulent actions. Although the tracing of those assets is mainly done by way and during the course of criminal law investigations, recovery and compensation can be achieved by civil lawsuits and subsequent enforcement of judgments rendered.

i  Criminal law enforcement

Domestic and overseas fraud and money laundering offences (as far as German criminal authorities are competent) are primarily investigated by the public prosecutor's offices and their special departments with the support of the police. Unless otherwise mandated (e.g., by a state public prosecutor’s office), the Federal Criminal Police Office (BKA) generally does not conduct its own investigations into fraud and money laundering but is, inter alia, responsible for the collection and analysis of information on cross-border offences, and providing central databases and support to the state police forces (e.g., by delegating investigators to them).

The level of transparency in financial matters has increased over the past few years, leading to effective criminal law enforcement, which also benefits aggrieved persons with regard to recovery of their assets. In this regard, the German Money Laundering Act (MLA) sets out identification, recording and notification obligations of financial institutions and a wide number of other persons and businesses to help the state prosecution services trace profits from serious criminal activities, combat money laundering and prevent illegal funds being introduced into the financial system. According to the 2016 annual report of the Financial Intelligence Unit (FIU), which is the addressee of notifications under the MLA, in 2016 the number of reported cases of suspected money laundering increased to 40,690 – an enormous 40 per cent compared with 2015, resulting in a new peak since the introduction of the MLA in 1993.

Following legislative changes to the Criminal Code and the Code of Criminal procedures in July 2017, law enforcement authorities have more extensive procedural means
to effectively confiscate assets and the victim is no longer obliged to obtain a civil award, but may collect the confiscated assets from the public prosecution office upon a final decision of the criminal court (see Section II.i).

ii Overview of the German system of civil justice

Regardless of any criminal investigation into fraud cases, every person injured by fraudulent action is free to take action under civil law, for example, to assert claims for recovery or damages before the civil courts.

At the larger regional courts, which are the entry-level courts for cases with a value in dispute of more than €5,000, there are chambers for commercial matters that are, inter alia, basically competent for cases of directors’ liability with regard to their company or post-M&A disputes between companies, including disputes for fraudulent misrepresentations. In addition, some of the larger regional courts have formed specialised chambers for certain kinds of dispute, such as banking or securities matters. The judges sitting in these specialised chambers often have an in-depth understanding of the legal as well as business issues arising in their respective fields of expertise.

The average period between the commencement and conclusion of a civil action is around five to nine months at trial level before the regional courts, and between six and nine months at first appellate level before the higher regional courts. Of course, complex fraud litigation cases may take longer, in particular when involving time-consuming elements such as the taking of evidence abroad.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Civil remedies

Damages

A legal person affected by fraud can bring claims for damages in tort against everyone who illegally and culpably caused damage to it pursuant to Section 823(2) of the German Civil Code in conjunction with a statute intended to also protect the damaged person. Thus, not only a company’s own employees or (former) directors who breached their duties with regard to their company can be held liable by the same, but also third parties (e.g., when they teamed up with or assisted a dishonest employee, handled stolen goods or bribed an employee of a damaged company).

Given the possible lack of financial power of individuals, whether a company can be made responsible for actions of its dishonest directors or other employees may become crucial for a successful outcome of the litigation. Under German law, business associations are liable for any damage that a member of a board or a duly appointed representative may, in carrying out his or her duty, cause to a third party. A company could also be liable for damage caused on the part of normal employees for a failure of internal organisation and supervision of its employees, provided that proper organisation and supervision would have prevented the fraud.

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3 For example, under Section 263 of the Criminal Code for fraud, Section 266 of the Criminal Code for breach of trust or Section 261 of the Criminal Code for money laundering.
4 Section 31 of the Civil Code.
5 Section 831 of the Civil Code.
If the victim is able to make out the claim, generally speaking the defendant is obliged to restore the victim to the position he or she would have been in had the circumstance obliging him or her to pay damages not occurred, or if such restoration is not possible or not sufficient to compensate the victim in money. The court cannot award punitive or treble damages as is the case in common law jurisdictions.

In general, the injured person bringing forward the claim has to show and prove the alleged losses caused by the fraudulent action. There can, however, be specific evidentiary rules in fraud cases (see Section IV. iv).

Restitution of benefits

A victim of a fraud may also make claims for the restitution of benefits that another person unjustifiably obtained in connection with the fraud, in particular based on the provisions for unjustified enrichment. In the present context, such claims aim at siphoning off benefits gained by the defendant in connection with the fraud and which actually belong to the victim.

Restitution of profits gained by the disposal of a victim’s assets can only be achieved in two cases. First, this is possible if an unauthorised person, be it an employee of the victim or a third party, disposes of these assets and the decision is effective against the victim. This might happen, for example, where the person acquiring the assets from the unauthorised person obtains title to them and, thus, the company is not entitled to reclaim these particular assets (see Section II.i). Second, the victim can also siphon off the profits if the person passing on the assets knew that they did not belong to him or her and that he or she was not entitled to do so.

The victim basically has to prove that the defendant obtained a benefit and the extent of that benefit. However, the defendant can be obliged to disclose necessary information, and possibly to make a statement in this respect, if the victim does not know the relevant facts through no fault of his or her own.

Restitution of physical objects

In the case of theft or embezzlement of assets, the victim may demand restitution of those particular assets, including physical objects, on the basis of a claim for damages (because of the defendant’s primary obligation to restore the victim’s position) or based on a claim for unjustified enrichment given the prerequisites for such claims.

Furthermore, the victim may also have a claim for restitution of particular physical objects against any person who is currently in possession of those objects even though that person has not acted culpably or illegally with regard to the victim. Such a claim as the latter, for restitution of objects in the present context, ordinarily requires the victim to still have title to the objects in question (as to title as defence, see Section II. ii).

Criminal remedies

As initially stated, as of July 2017, the victim of criminal activity is no longer obliged to pursue the final recovery of assets or (financial) compensation mainly through civil proceedings. Pursuant to new German law, the confiscation of proceeds of a crime may be ordered by
the criminal courts even if potential civil claims by injured persons exist. Thus, not only do the criminal law measures for tracing and securing assets (see Section III.i) serve to secure such civil claims, but criminal law also provides for the recovery of assets immediately in the criminal proceedings.

The rules on extended confiscation now apply for any criminal offence (formerly, extended confiscation was limited to a catalogue of serious crimes). The court is not required to determine or prove the specific criminal offence if the court is convinced that the assets derive from criminal activities. According to the new German law, stand-alone confiscation may also be ordered if the criminal offender cannot be pursued or convicted for specific serious crimes, such as money laundering. To secure an effective future confiscation by the criminal court, the public prosecution offices have the power to attach and seize assets upon initial suspicion.

Furthermore, the new law provides for a procedure integrated into the criminal proceedings to indemnify the victims. Upon a final and binding decision on the confiscation by the criminal court, confiscated assets will be realised by the public prosecution offices to the benefit of the victims, who will then receive the proceeds. If the confiscated assets are not sufficient to indemnify the victims, insolvent proceedings will be opened.

German criminal procedure law also provides that injured persons may assert civil claims against the accused person arising from a criminal offence in the criminal proceeding by way of a joinder procedure. In practice, however, the joinder procedure did not play a significant role in fraud and especially white-collar crime cases, and recovery has been sought through civil proceedings.

ii Defences to fraud claims

Title

A defendant faced with a claim for restitution of a stolen or embezzled physical object may invoke the defence that he or she obtained title to the object. This may be the case where he or she acquired the object in good faith (i.e., believing that the asset did belong to the person disposing of it). Thus, for example, a company could claim its belongings from anyone who knowingly accepted them from its dishonest employee.

However, a victim of fraud may still have title to its belongings regardless of whether the current possessor acquired them in good faith: according to German law, a person basically cannot lose title to objects that were removed from his or her possession without his or her consent; thus, he or she may claim restitution of those objects. However, where the victim agrees to an object being given away – even if the consent is based on incorrect assumptions because of fraud – a third party can obtain title to it. In the latter case, the company might lose its property but can claim the financial damage it suffered from the wrongdoer.

8 Section 73(1) of the Criminal Code.
9 Section 73a of the Criminal Code.
10 Section 76a(4) of the Criminal Code.
11 Section 111e–111g of the Code of Criminal Procedure.
12 Section 459h of the Code of Criminal Procedure.
13 Section 403 et seq. of the Code of Criminal Procedure.
Statute of limitations

As a standard defence, a defendant may invoke the statute of limitations. The standard limitation period of three years\textsuperscript{14} applies to tort claims. The limitation period starts to run at the end of the year in which the claim arose and the victim obtained (or should have obtained without gross negligence) knowledge of the circumstances giving rise to the claim and of the identity of the wrongdoer.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Civil procedural means

German law provides for two general categories of provisional relief, attachment and preliminary injunction, which can also serve to preserve assets to safeguard the interests of the victim of any fraudulent action.

Attachment

An attachment secures a monetary claim. Therefore, it is the proper remedy for a victim intending to preserve the alleged wrongdoer’s assets to secure a possible claim for damages and compensation against the latter.

In addition to the attachment claim, the victim must demonstrate a ground for attachment. A ground for attachment exists if there is reason to fear that the enforcement of a subsequently rendered judgment in Germany (see Section V.iii, on the enforceability of foreign judgments in Germany and the consequences for attachments) would otherwise be frustrated or made considerably more difficult because of the actions or the financial situation of the defendant. The attachment of the defendant’s assets must, therefore, be necessary to protect provisionally the claimant’s prospects of executing a judgment rendered in the future. A ground for attachment might also be assumed if there are reasons to believe that the defendant’s conduct qualifies as fraud or embezzlement of assets.

Depending on the circumstances, the court may notify the defendant of the application, set a deadline for a written response and schedule an oral hearing. The court will then issue an order of attachment. However, in most cases the court will not schedule a hearing, but will issue an attachment order \textit{ex parte}. This allows the claimant to obtain a court order securing its claims without giving the defendant time to thwart the security. Furthermore, this procedure is very fast. Normally, it does not take more than two or three days, sometimes even only hours, from filing the application to obtaining the court order.

Preliminary injunction

A preliminary injunction secures all non-monetary claims. The victim applying for a preliminary injunction must have a claim with respect to the assets it wants to preserve by way of injunctive relief. Therefore, the preliminary injunction would be the proper remedy if the victim seeks to preserve its specific assets to secure a claim for recovery of those assets.

\textsuperscript{14} Section 195 of the Civil Code.
As a victim must demonstrate a ground for an attachment, similarly the victim further has to state the reason why an injunction is necessary to safeguard its rights. Both the injunction claim and the injunction ground have to be supported by prima facie evidence.

The procedure for rendering an injunction order or judgment is largely identical to the one in attachment proceedings. However, the court can only render a decision without an oral hearing in extremely urgent cases.

Use of criminal compulsory measures

German civil procedural law does not allow compulsory measures such as a search of premises or seizure of assets on behalf of private persons for the purpose of tracing assets for civil proceedings. However, such compulsory measures are admissible in criminal investigations. They may also be used for the private interests of the aggrieved person, who could thus also benefit from the special investigative powers for its private litigation.

In the course of a criminal investigation, the public prosecutor is also entitled to trace and secure assets to support the aggrieved company’s possible civil claims arising out of the alleged criminal offence. For these purposes, the available means are search and seizure as well as the attachment of assets. The only prerequisite is that the company has a civil claim (e.g., for the recovery of assets, damages or unjustified enrichment) against the accused person arising from the criminal offence. It does not matter when the company intends to enforce the claim or if it intends to do so at all.

Against this background, it can be advantageous for an aggrieved person to notify the public prosecutor of facts that relate to the dispute and that allegedly constitute a criminal offence, even though an obligation to report on alleged crimes generally does not exist under German law (with the exception of money laundering offences under certain circumstances and crimes that are not relevant in the case at hand). The goal is to bring about a criminal investigation. The public prosecutor is under a legal obligation to initiate investigations when notified of a reasonable suspicion of a crime having been committed. Via the special powers used in the course of that investigation, it might be possible to trace and secure (otherwise hidden) assets and evidence (see Section III.ii), and to make it easier to enforce civil claims.16

ii Obtaining evidence

Civil means

One of the fundamental principles of German civil procedural law is that each party itself has to obtain the evidence it needs. Therefore, an extensive pre-action disclosure by the defendant or third parties, as is the case in common law jurisdictions, is not provided for by German law. German civil procedural law features other concepts to cope with the claimant’s possible deficiencies regarding information and evidence. In addition, however, German law also provides some specific, albeit limited, instruments to obtain information from the defendant or third parties prior to commencing an action.

15 Section 111b of the Criminal Procedure Code.
16 As to the information rights and duties of (damaged) companies in relation to criminal law enforcement agencies in the context of internal compliance investigations, see details in Wetten/Mann, DStR 2014, p. 655 et seq.
Overview of general procedural concepts

With regard to the claimant’s lack of information and evidence, German law features the following concepts.

First, it is admissible to plead certain facts as true even if the party has little evidence that they are true. It may, for example, be sufficient to state only general observations indicating certain facts, or to provide reasonable assumptions. The party may try to substantiate the allegations in more detail and to prove them in the course of the proceedings.

Second, in fields where the opponent typically has better knowledge of particular facts, its response to the claimant’s allegations must be more precise and must rebut the allegations in a more detailed way. Where specific information and evidence is typically not available to the claimant, but is available to the defendant, the burden of providing and proving the facts may even shift.

Third, the defendant (as well as the claimant) is required to state truthfully and completely all the alleged facts on which its defence is based. Violations of this obligation may constitute a criminal offence under German law.

Against the above background, the victim’s need to obtain information and evidence prior to commencing an action is therefore not as strong as in common law jurisdictions.

Enforcing substantive law claims for disclosure

In addition to the above concepts compensating for the claimant’s information deficiencies, German law provides for specific instruments to obtain information prior to commencing an action. In this regard, disclosure may either be based on a contractual or a statutory claim against a third party or the defendant:

a. the claimant may have contractual claims for disclosure of information (e.g., a harmed company against its employees);

b. irrespective of a contractual relationship, the claimant may be entitled to ask the possessor of an object for an inspection of the object. For this to be the case, the company must have a claim in respect of that object against its possessor or wish to obtain certainty as to whether such a claim exists. Such a claim could be, for instance, a claim for recovery of assets; and

c. the claimant may also be entitled to claim inspection of a document against its possessor. Unlike the above right for inspection of other objects, this right does not require that the company have a claim in respect of the document, but the content of the document must be related to the claimant.

17 Federal Court of Justice, Decision of 10 February 2015 (Docket No. VI ZR 343/13), NJW-RR, 2015, p. 1279 et seq. with special regard to damage claims for infringements of criminal law. See also Federal Court of Justice, Decision of 24 October 2014 (Docket No. V ZR 45/13), ZIP, 2015, p. 263 et seq., as to the required precise pleading of the second acquirer of a mortgage if the owner of the land invokes, based on concrete and comprehensible facts, that the second acquirer knew that the original beneficiary acquired the mortgage only fraudulently.

18 Section 809 of the Civil Code.

19 Section 810 of the Civil Code.
If the wrongdoers or third parties do not comply with the above claims, they need to be enforced in a separate civil lawsuit prior to commencing an action against the wrongdoers. In a pending lawsuit, the court may order the production of information under certain restrictions. The above claims for inspection, however, may also be enforced by way of a preliminary injunction.

Criminal means and inspection of criminal files

In the course of a criminal investigation, the public prosecutor will use its special powers to collect a host of information.

The premises or other assets of the suspect and of third parties as well as these persons themselves may be searched to trace evidence for the criminal offence under investigation. An item that might serve as evidence may be secured. If the possessor of the item resists handing over the possible evidence voluntarily, the public prosecutor may seize it compulsorily.

The victim of a fraudulent action planning a civil lawsuit may make a request for inspection of the files that contain the information gathered by the above means via an attorney. To be successful, the attorney needs to state a justified interest to inspect the files. It will often be sufficient for the attorney to truthfully state that his or her client intends to prepare a civil action against the person accused in the criminal proceedings, and that the information contained in the files may be relevant for this purpose. However, the request for inspection of files will generally be rejected prior to the conclusion of the investigation.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

German anti-money laundering legislation is contained in Section 261 of the Criminal Code, which makes money laundering a criminal offence, and in the MLA, which sets out identification, recording and notification obligations of financial institutions and other persons (see Section I.i).

Because of criticism by the Financial Action Task Force – an intergovernmental body established in 1989 at the OECD by, inter alia, Germany – that there were shortcomings in the German legal system with regard to anti-money laundering and terrorist funding legislation,20 and by the European Union with regard to Germany’s implementation of the Third EU Directive on Money Laundering, the MLA was considerably amended in 2012. In particular, the types and numbers of individuals and businesses that are obliged under the MLA were significantly increased. Where before financial institutions, lawyers, auditors and trustees were affected by the former German anti-money laundering law, now nearly the entire retail and wholesale sector is also affected. Pursuant to the 2016 annual report of the FIU (see Section I.i), in 2016 the vast majority of suspicious transaction reports (approximately 99 per cent) were still filed by the financial sector.

In June 2015, the Fourth EU Directive on Money Laundering21 came into force, and was implemented by Germany in June 2017. Again, along with other laws, the MLA was

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20 The FATF has submitted the Third Follow-up Report, Mutual Evaluation of Germany, June 2014, concluding that Germany had made sufficient progress in addressing the deficiencies identified in its 2010 mutual evaluation report, and could be removed from the regular follow-up process; accessible at www.fatf-gafi.org/topics/mutualevaluations/documents/follow-up-report-germany-2014.html.

largely revised with the aim of preventing and combating money laundering and terrorist financing more effectively. Besides having new provisions on the reorganised FIU (see Section I.i.), the MLA provides for the establishment of a central register to which companies have to report information on their beneficial ownership. The information stored therein is accessible not only to (criminal) law enforcement agencies, but also to all persons who are able to demonstrate a legitimate interest with respect to money laundering, terrorist financing and associated predicate offences, such as corruption, tax crimes and fraud.

The Federal Financial Supervisory Authority (BaFin) is responsible for the prevention of money laundering offences and terrorist financing in the financial sector. In this capacity, BaFin supervises financial institutions to assess whether they comply with measures designed to prevent money laundering and terrorist financing.

ii Insolvency

Civil liability may arise as a consequence of criminal insolvency offences. For example, directors of a company face criminal liability as well as civil liability for damage with regard to third parties for failing to comply with their duty to file for insolvency within the necessary time after the occurrence of the insolvency.22

Another aspect with regard to asset recovery in the context of insolvency is the power of the insolvency administrator under German insolvency law to challenge, under certain circumstances, transactions that have been entered into within certain periods before the commencement of insolvency proceedings. For example, a gratuitous benefit (i.e., any benefit to which the receiver was not entitled) is voidable and, if challenged by the insolvency administrator, has to be restored if it was granted in the four years prior to the filing for insolvency.23

The same applies to transactions entered into on behalf of the insolvent company in the 10 years prior to the petition for commencement of the insolvency proceedings, or after such a petition, with the intent of harming the company’s creditors, if the beneficiary of the transaction had knowledge of this intent at the time of the transaction.24 This is actually relevant in practice: first, it is not necessary that the relevant intent on the part of the insolvent company to harm creditors was the primary purpose of the transaction; it suffices that the persons representing the company were aware of this consequence and accepted it. Second, whether the beneficiary of the transaction had knowledge of the intent to harm creditors is presumed in various cases set by law or developed in case law (e.g., in cases where the beneficiary knew that the illiquidity of the company was imminent and that the transaction was detrimental to the creditors of the company).25

22 Section 15a(4) of the Insolvency Act.
23 Section 134(1) of the Insolvency Act.
24 Section 133(1) of the Insolvency Act.
25 Ibid.; cf. Federal Court of Justice, Decision of 21 January 2016 (Docket No. IX ZR 84/13), Wertpapiermitteilungen 2016, p. 366 et seq. and Decision of 8 January 2015 (Docket No. IX ZR 198/13), Der Betrieb, 2015, p. 301 et seq.; if the creditor knew that the debtor ran a kind of Ponzi scheme, this is deemed to be an indication that the creditor also knew that the debtor’s illiquidity was at least imminent.
Finally, the insolvency administrator has special information rights as regards the insolvent company and its directors or other representatives with respect to circumstances relating to the insolvency proceedings.\(^{26}\) On that basis, the director of the insolvent company even has to disclose facts that could constitute a claim of the company against him or her.\(^{27}\)

### iii Arbitration

Under German arbitration law, both local courts and arbitral tribunals have the power to order interim measures of protection (e.g., to attach property to secure payment claims or to secure evidence that could be relevant for the tribunal’s decision).\(^{28}\)

If the arbitral award conflicts with public policy, the aggrieved party may request the setting aside of the award before the local court.\(^{29}\) Although the local court has no right to review the legality of the arbitral award with respect to substantive issues, it may set aside the award if it was attained by means of bribery, fraud, false statements or perjury.\(^{30}\)

### iv Fraud’s effect on evidentiary rules and legal privilege

There are particular fraud-related evidentiary rules under German law. One example is shown above with regard to the possible challenge of particular transactions by the insolvency administrator (see Section IV.ii).

Another example concerns general damage claims, in which the burden of proof regarding damage caused by fraudulent activity, which lies with the claimant, may be supported by the procedural possibility of a German court estimating the losses if the exact calculation appears too difficult or costly,\(^{31}\) or even by the alleviation of the burden of proof altogether. Such alleviation, for example, has been developed by case law in favour of a company whose employee has accepted bribes for awarding a contract for goods and services: the company can at least claim an amount equal to the bribe without being required to further calculate and prove an actual loss in this amount. This is based on the assumption that the bribing party will generally increase the price for the goods and services to be paid by the company by the amount of the bribe to refinance the bribe.

### V INTERNATIONAL ASPECTS

### i Conflict of law and choice of law in fraud claims

Under German law, a distinction must be made between the applicable law with regard to torts and damages arising therefrom and the jurisdiction of German courts; one does not necessarily follow the other.

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26 Sections 97, 101 of the Insolvency Act.
27 See Federal Court of Justice, Decision of 5 March 2015 (Docket No. IX ZB 62/14), ZIP, 2015, p. 791 et seq.
28 Sections 1033 and 1041 of the Civil Procedure Code.
29 Section 1059(2) No. 2(b) of the Civil Procedure Code.
30 See Higher Regional Court Cologne, Decision of 7 August 2015 (Docket No. 1 U 76i/14), SchiedsVZ 2015, p. 295 et seq.; as to the similar legal situation with regard to fraud as a defence to enforcement of foreign judgments, see Section V.v.
31 Section 287 of the Civil Procedure Code.
International jurisdiction

When an action is filed with a German court, the court first determines the international jurisdiction of the German courts.

Generally, the courts at the place of the domicile of any individual person or seat of a company have international jurisdiction over the individual or company respectively.

In addition, with particular respect to torts, the courts both at the place in which the tort was committed and at the place where the damage occurred have international jurisdiction.\(^{32}\)

Even if the defendant has no domicile in Germany and no element of the tort occurred in Germany, lawsuits concerning monetary claims against the non-domiciliary can come within the jurisdiction of the German court in whose district the non-domiciliary's assets are located.\(^{33}\) It is acknowledged in case law, however, that for a German court to assume jurisdiction based on this provision, the subject matter of the dispute must have a ‘sufficient domestic link’ to Germany. Such a sufficient domestic link may exist, for example, where the plaintiff is a German resident or one of the parties has German nationality.

Applicable law

If the case has an international dimension, the German court determines the applicable substantive law based on the German and European conflict of law rules. By applying these rules, the court may conclude that foreign substantive law is applicable to the case. Pursuant to Article 4(1) of Rome II, for example, the law of the place where the damage occurred applies to tort matters.

However, in tort matters the conflict-of-law rules also allow the parties to choose the applicable law.\(^{34}\) Therefore, if all parties plead under German law, a court might take this as an implicit choice of German law by the parties. This might even be done if the parties were seemingly unaware of the possibility that foreign law could apply to their case.

ii Collection of evidence in support of proceedings abroad

German authorities and both the civil and criminal courts execute requests for the taking of evidence in support of civil or criminal proceedings abroad. A general precondition is that the foreign authority issues a request for assistance, the request is granted and the particular measure is permissible under or not contrary to German law.

German civil courts grant judicial assistance by taking evidence in accordance with the Brussels Evidence Regulation, the Hague Evidence Convention and bilateral international treaties, and based on the international principles of judicial assistance contained in the Regulation on Judicial Assistance in Civil Matters.

The interaction between German criminal prosecution services and courts, respectively, and other overseas authorities by way of mutual assistance and other cooperation in criminal matters is governed by a number of multilateral or bilateral treaties and by the German Code on International Judicial Assistance in Criminal Matters. Germany has become a signatory to a number of treaties that are designed to facilitate cross-border asset recovery, such as

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\(^{32}\) Section 32 of the Civil Procedure Code.

\(^{33}\) Section 23 of the Civil Procedure Code.

\(^{34}\) Article 14 of Rome II.

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

Civil means
It is possible to attach property in Germany in support of (pending) civil proceedings abroad. However, since attachment proceedings under German law are designed to protect provisionally a plaintiff’s payment claims and its prospects of executing a (foreign) judgment rendered in the future, an attachment will only be ordered by the court if a future judgment can be enforced in Germany.

If not otherwise provided for in a convention, the recognition and enforcement of foreign judgments in Germany is only possible if, inter alia, reciprocity is guaranteed (see Section V.iv). According to the German Federal Court of Justice, the reciprocity is guaranteed if the recognition and enforcement of a German judgment in the foreign country is not considerably more difficult than the recognition and enforcement of the foreign judgment in Germany. Such reciprocity may not be guaranteed in the relationship between Germany and several non-European countries. In consequence, an attachment of property in Germany is not possible in support of pending proceedings in those countries.

Criminal means
When German authorities grant judicial assistance to overseas investigators they can use any of the powers referred to above. Assistance can therefore include investigative measures such as the taking of statements or execution of searches, seizure of evidence, the service and enforcement of orders and decisions, as well as the extradition of individuals. Judicial assistance cannot be granted if it would contravene German public policy.

iv Enforcement of judgments granted abroad in relation to fraud claims
Enforcement of foreign civil judgments in Germany is governed by European law (in particular the Brussels Regulation 2012) international treaties, or – if neither of the latter applies – by German statutory law.35

In the latter case, upon request of the judgment creditor the competent German court has to decide on the enforceability of the foreign judgment. The German court will deny enforceability if the judgment cannot be recognised. There is a set of grounds according to which a foreign judgment is not recognised,36 of which the lack of reciprocity and the contradiction of public policy are to be highlighted in the context of fraud litigation.

In a decision of 1992, the Federal Court of Justice refused the enforcement of a US award for punitive damages as contradicting German public policy.37 The Court held that German civil law focuses on the compensation of the plaintiff and does not intend to punish the defendant; German law clearly distinguishes between the law of damages and public prosecution and criminal law. Recent case law, however, tends to be more inclined to accept

35 Sections 722 et seq. and 328 of the Civil Procedure Code.
36 Section 328(1) Civil Procedure Code.
punitive damages. As in 2013 and 2015, the Federal Constitutional Court held that a (class) action for punitive damages did not *per se* conflict with essential principles of the rule of law.\(^{38}\) However, that decision dealt with the service of the action for punitive damages in Germany; the enforcement of those actions has not been tested in court in recent times.\(^{39}\)

v Fraud as a defence to enforcement of judgments granted abroad

The German court has no right to review the legality of a foreign judgment to be enforced in Germany.\(^{40}\) Therefore, in principle the defendant cannot prevent the enforcement of a foreign judgment in Germany on the grounds that the factual basis of the judgment is incorrect.

However, if the foreign judgment was obtained by the intentional giving of false evidence in the course of the proceedings, or otherwise illegal manipulation of the outcome of the foreign proceedings contrary to public policy, this can under certain circumstances be set against the enforcement of the foreign judgment.\(^{41}\) The defendant opposing the enforcement carries the burden of proof for the facts constituting the fraudulent nature of the judgment. Furthermore, it has to be taken into account whether the defendant exhausted all remedies available during the foreign proceedings to prevent the fraudulently obtained judgment. In a 2014 decision, the Federal Court of Justice confirmed that a defendant is not entitled to invoke the intentional giving of false evidence by the claimant against the enforcement if the defendant appealed, or could have appealed, in the relevant country against the foreign judgment to be enforced in Germany.\(^{42}\)

VI CURRENT DEVELOPMENTS

Even though it was put again on the political agenda by the governmental coalition agreement in early 2018, as before in 2013, a corporate criminal law for multinational corporations has still not been implemented. The coalition agreement provides for extended ‘sanctions law’ for corporations. It remains to be seen if this subject – which has been revived by ‘Dieselgate’ (the Volkswagen emissions scandal that began in September 2015) – will come into effect in the near future.

Successful legislative developments have been initiated on an EU level. Germany implemented the Fourth EU Directive on Money Laundering (see Section IV.i) in 2017. Meanwhile, in June 2018, the European Commission published the Fifth EU Directive on Money Laundering. The Directive provides further amendments regarding virtual


\(^{39}\) Cf. Federal Court of Justice, Decision of 22 June 2017 (Docket No. IX ZB 61/16), *Wertpapiermitteilungen* 2017, p. 1428 et seq.: the court held that the enforcement of an Italian decision awarding the defendant lump-sum damages (possibly exceeding its actually proven cost of proceedings) because of vexatious litigation of the claimant was lawful as the damages did not contradict German public policy. The lower courts had come to the same conclusion reasoning, *inter alia*, that the damages were not comparable to US punitive damages.

\(^{40}\) Section 723(1) of the Civil Procedure Code.

\(^{41}\) Federal Court of Justice, Decision of 29 April 1999 (Docket No. IX ZR 263/97), *Bundesgerichtshofscheidungen*, Vol. 141, p. 286 et seq. (*Prozessbetrog*).

currencies, beneficial ownership registers and business relations or transactions in which high-risk countries are involved. The Directive must be implemented by 10 January 2020. To date, it is not possible to make predictions regarding the outcome of the German implementation process.
Chapter 14

GIBRALTAR

Charles Simpson

I

OVERVIEW

Gibraltar is a British overseas territory and the United Kingdom is responsible for its external relations. By virtue of this status and Article 355(3) of the Treaty on the Functioning of the European Union, EU law currently applies to Gibraltar.

The Gibraltar courts provide a wide range of remedies for local and foreign claimants who are victims of dishonesty and fraud.

The availability of these remedies depends on the facts and strength of the evidence that give rise to any such claim. In general terms, the courts will act to assist victims of fraud in the tracing and recovery of assets.

Normally, such claims will be brought in the context of a civil suit commenced in Gibraltar or alternatively, in aid of substantive proceedings commenced elsewhere. The most common types of civil fraud claims are claims brought in the tort of deceit, fraudulent misrepresentation, claims for breach of trust or breach of fiduciary duty, equitable proprietary claims or other restitutionary type claims.

In civil claims, the court has a wide discretion to grant interim and final orders to assist in the tracing and preservation of assets as well as to enable a victim to obtain information and help to recover property that has been misappropriated or simply to freeze and preserve assets in support of any such claim.

In the context of criminal proceedings, the principal investigatory body is the Royal Gibraltar Police and any prosecution is brought by the Attorney General’s Chambers locally. In cases having a criminal context, the Royal Gibraltar Police also have extensive powers to obtain information as well as to preserve assets.

In addition, financial services business is governed by the Financial Services Act and the local regulator is the Financial Services Commission (FSC). In appropriate circumstances, the FSC can commence proceedings for restitution subject to the terms of the Financial Services Act and other relevant financial services legislation locally.

II

LEGAL RIGHTS AND REMEDIES

The Supreme Court of Gibraltar has equivalent jurisdiction to the High Court of England and Wales in respect of civil claims and therefore has jurisdiction to grant equivalent remedies both in an interim and final context.

1 Charles Simpson is a partner at Triay & Triay. The information in this chapter was current as of September 2017.
In the civil context, the victim (in the absence of having commenced substantive proceedings elsewhere) will need to commence a civil claim against the perpetrators of the fraud in Gibraltar.

Whether there is any advantage in bringing claims based on the tort of deceit or in fraudulent misrepresentation as against other claims that may exist for breach of contract or negligent misstatement or misrepresentation will need to be considered and assessed at the outset. As indeed consideration will need to be given to the necessity of seeking interim relief (e.g., a freezing injunction or a search order).

If the identity of the perpetrator is unknown, it will be necessary for the victim to seek a non-party disclosure order or *Norwich Pharmacal* relief against an innocent party such as an individual or corporation who has become mixed up in the fraud through no fault of their own but who is able to provide information as to the identity of the fraudster or alternatively information to assist in the tracing of assets. In the context of a pre-action disclosure order or a *Norwich Pharmacal* order, the applicant will normally be required to meet the costs of the disclosing party both incidental to the application and also in respect of the costs of complying with any disclosure order made.

In the event that a civil claim is issued against the fraudster the compensatory remedies that can be sought are as follows:

- damages;
- an injunction;
- an account (including an account of profits) or inquiry as to damage;
- equitable compensation; and
- interim remedies (e.g., freezing injunction).

To bring a civil claim locally, the court must have jurisdiction and the onus is on the claimant to establish jurisdiction in the absence of a submission by the opposing party.

EU law applies to Gibraltar by virtue of Gibraltar’s status as a territory in respect of which the United Kingdom is responsible for its external relations. Jurisdiction is often therefore founded under the Revised Brussels Regulation or alternatively the Brussels or Lugano Conventions, which also apply locally by virtue of the Civil Jurisdiction and Judgments Act.

If neither the Revised Brussels Regulation nor the Brussels or Lugano Conventions apply then appropriate consideration will need to be given to the question of jurisdiction, for example, on the basis that jurisdiction is founded on the basis that the wrongdoing was committed in Gibraltar or alternatively that the damage or harm was suffered by the victim in Gibraltar.

Insofar as there are persons who may have assisted the fraudster in perpetrating the fraud, then it is open to the victim to consider the issue of a claim against the third party on the grounds of dishonest assistance or knowing receipt, or alternatively to commence other restitutionary proceedings.

In a claim for breach of trust or fiduciary duty, the claimant will need to establish the existence of the duty concerned either in a trustee or fiduciary context and to prove the breach of the duty by the trustee or fiduciary.

A fiduciary will be in breach of his or her duty if the fiduciary makes a profit by virtue of his or her office and as a remedy will be required to account to the victim in respect of any benefit gained as a result. Significantly the fiduciary is required to account regardless of a need to prove bad faith on the part of the fiduciary concerned, although there may be
circumstances where a conflict between a fiduciary and an individual interest may have been waived by the principal. Clearly whether this is the case will depend on the nature of the evidence and the relevant facts.

Insofar as claims for dishonest assistance are concerned, the following must be proved:

a) the existence of a trustee or fiduciary relationship;
b) that there has been a breach of trust or fiduciary obligation owed to the claimant in which the defendant has assisted;
c) that the defendant has acted dishonestly; and
d) that the defendant’s conduct has resulted in loss to the claimant.

There can also be dishonest assistance by an accessory third party after the initial breach of trust or fiduciary duty. For example, where the breach involves the misappropriation of trust assets then liability can extend to third parties who assist the fraudster in hiding the assets following any initial breach of trust or fiduciary duty beyond the original misappropriation of the funds from the trust fund concerned. However, in cases of dishonest assistance, any statement of case must identify and particularise what the defendant did to assist in the breaches of fiduciary duty or trust, how the assistance caused, contributed or resulted in the claimant’s loss and how the defendant is alleged to have acted dishonestly in assisting the main perpetrator.

A review of the law on what constitutes dishonesty for the purpose of dishonest assistance was set out by Mr Justice Jack, Puisne Judge in the recent local decision of Lavarello & Hyde v. Jyske Bank (Gibraltar) Limited Claim No. 2014 L 81 Supreme Court of Gibraltar 17 May 2017, where reference is made to Mr Justice Rose’s decision in the English case of Singularis Holdings Limited v. Daiwa Capital Markets Europe Limited [2017] EWHC 257 (Ch). There are two sorts of relevant dishonesty:

a) actual dishonesty, where the third party assists with actual knowledge of the fraud or breach of fiduciary duty; and
b) blind-eye (or Nelsonian) dishonesty, where the third party has suspicions of the fraud or breach of fiduciary duty but makes a conscious decision not to make enquiries (i.e., wilful blindness). An honest person does not ‘deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless’, in accordance with Lord Nicholls in Royal Brunei Airlines Snd Bhd v. Tan 2 AC 378 at page 389F-G.

In cases of dishonest assistance against a corporate entity, a particular individual (or particular individuals) must be identified as having acted dishonestly given the fact that, although a company has legal personality and capacity, it functions through human agents. In turn, the accessory is liable in equity to make good any loss that the beneficiary has suffered as a result of the breach that the accessory has participated in, and such a claim can include a claim for an account of profits.

Subject to the nature of the evidence, the conduct of the individual or corporation concerned may be sufficient to enable a claim to be brought against the party on the basis that it is a party and fellow conspirator in the alleged fraud or act of dishonesty.

To succeed in a civil claim, the claimant will need to prove the claim on the balance of probabilities as distinct from the criminal burden of proof. However, while the civil burden of proof applies, the more serious the allegation the more cogent the evidence in support needs to be. The law in this regard was neatly summarised by Mr Justice Jack in his judgment in

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Re Wardour Trading Ltd (unreported, Supreme Court of Gibraltar 15 February 2015) where reference was made to the House of Lords decision in Re: B (Children) [2008] UKHL 35, Mr Justice Lewison’s (as he then was) decision in Ultraframe v. Fielding [2005] EWHC 1638 (Ch) and also, Lord Nicholls in Re H [1996] AC 563, where he said: ‘The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.’

The court also has extensive jurisdiction to grant interim relief in support of a claim. In that regard, the court can grant freezing injunctions or search orders provided the necessary procedural and evidential hurdles are overcome by the applicant concerned.

The English Civil Procedure Rules (CPR) apply to Gibraltar by virtue of the Supreme Court Act locally and also, the local Supreme Court Rules largely apply the CPR.

As stated above, the Supreme Court has equivalent jurisdiction to the High Court, which means the court can in appropriate circumstances make an order for a freezing injunction or alternatively it can also grant a proprietary injunction or alternatively appropriate injunctive relief ordering the detention, custody or preservation or any property or asset to which a claim is made.

The court also has jurisdiction to grant orders against a third party or a fraudster ordering the provision of information or disclosure in relation to matters that are the subject of a claim.

The jurisdiction to grant injunctive relief and to grant other interim remedies is also stand-alone and available even when the substantive proceedings have been commenced outside Gibraltar by virtue of Section 17 of the Civil Jurisdiction and Judgments Act. The latter is equivalent to Section 25 of the English Civil Jurisdiction and Judgments Act. The Court of Appeal has granted a Norwich Pharmacal order under this Section in aid of foreign proceedings in Portugal – see the decision of Secilpar SL v. Fiduciary Trust Ltd (Gibraltar Court of Appeal 24 September 2004). The Section itself on its face prevents it being used to obtain evidence. However, a distinction has been made between the provision of information to assist foreign proceedings and the provision of evidence.

Possible defences to ‘fraud’ claims will obviously depend on the nature of the allegations made in any claim or in any prosecution brought and the type of claim or offence in respect of which the defendant is charged.

In a non-fraud civil context and generally speaking, the limitation period in respect of contractual claims is six years from the accrual of the cause of action (e.g., the breach of contract) and in tort claims six years from the date the cause of action accrues (i.e., normally from the date damage is caused by the tort) and in cases of breach of trust, six years after the breach.

However, in fraud claims these time limits can be extended in cases of fraud or concealment of the cause of action and time limits start to run from the date when the cause of action could, with reasonable diligence, have been discovered. It is therefore conceivable that a defendant may therefore run a limitation defence in a fraud claim.

Other likely defences will focus on the allegations of dishonesty or fraud to the effect that the evidence is not sufficiently cogent to support any such claims or that the defendant’s state of mind was not dishonest. In certain circumstances, it may be appropriate for a defendant to seek or to defend such claims on a summary basis if the evidence or pleaded case does not provide a sufficient basis to support the allegations made and therefore has no prospect of success.
Where allegations of fraud or dishonesty are to be made in evidence or in pleadings counsel have a duty to ensure that any such allegations are supported by material that attests to such serious allegations. To make or persist in making such allegations without material to support the allegations may amount to professional misconduct and can also in appropriate circumstances result in a wasted costs order or disciplinary action against the lawyer concerned.

**Malpractice claims under Part 10 of the Insolvency Act 2011**

Section 258 of the Insolvency Act 2011 establishes a summary remedy against delinquent officers of a company and any person who has acted as liquidator, administrator or receiver of a company or any person who has been concerned in the promotion, formation, management, liquidation or dissolution of a company. Proceedings may be taken against such a person under Section 258 if it appears that any such person has misapplied or retained or become accountable for any money or other property of the company or has been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company. The Section does not establish any new cause of action but provides a convenient procedure in liquidation to facilitate the recovery of property or money from a person such as a director who has committed a misfeasance, for example, the sale of the company’s assets at an undervalue or the making or improper payment or secret profits. The relevant limitation period for bringing such a claim will be determined by the nature of the cause of action on which the claim is based. No limitation period is applicable if the nature of a director’s alleged breach of fiduciary duty is such as to render him or her liable and accountable as a trustee of the company’s monies or assets. See Section 26(1)(b) of the Limitation Act 1960 or in respect of any fraudulent breach of trust or fraud to which the trustee was a party under Section 26(1)(a).

Section 259 of the Insolvency Act 2011 contains a statutory provision and civil remedy in respect of fraudulent trading on the application of an appointed liquidator of a relevant company. The effect of the Section if established is to declare that any persons who were knowingly parties to fraudulent trading are liable to make such contributions to the company’s assets as the court thinks proper. Fraudulent trading in this context includes any business carried on by the company concerned with intent to defraud creditors of the company or any other person or any business carried on for any fraudulent purpose. Liability under this Section can be imposed on a wide circle of individuals who have participated in the fraudulent activity and therefore extends beyond directors, officers and promoters of the company. The liquidator’s right of action under this Section is subject to a period of six years from the date on which the powers under this Section are exercisable given Section 4(1)(d) of the local Limitation Act 1960. In that regard, the liquidator’s powers are exercisable following the date of his or her appointment as liquidator.

Section 260 of the Insolvency Act 2011 also contains a statutory provision in respect of insolvent trading. This Section enables a liquidator of a relevant company to apply for an order against a person who is or has been a director of the company for an order that the director makes a contribution, if any, to the company’s assets as the court considers it proper if it is satisfied that:

1. at any time, before the commencement of the liquidation of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation; and

2. he or she was a director of the company at that time.
In principle, liability under Section 260 arises from the moment when the director concerned has either actual or constructive knowledge that there is no reasonable prospect that the company would avoid insolvent liquidation and yet permits the company to continue to trade and incur liabilities after it was known or ought to have been known. Section 260(3) provides a defence to a director if he or she can show that, at the time when he or she knew or ought to have known that there was no reasonable prospect that the company would avoid going into liquidation, he or she took every reasonable and possible step to minimise the loss to the company’s creditors. The limitation period for a liquidator to bring an application against a director under this Section is six years from the date of the liquidator’s appointment.

Under Section 263 of the Insolvency Act, any monies paid to or recoveries made either under Section 259 or 260 are deemed to be assets of the company that are available to pay unsecured creditors.

Section 263 and Sections 263A–263E also contain criminal offences, including those in respect of fraudulent conduct, malpractice in anticipation and, after the commencement of a liquidation, misconduct in the course of a liquidation and in respect of false representations to creditors.

Part 11 of the Insolvency Act 2011 also makes provision for disqualification orders against directors and others (e.g., a shadow director, a voluntary liquidator or a receiver of a company). An application for a disqualification order can be made under Section 268 within six years of the date on which the company concerned became insolvent. The court can make such an order against a person:

- who has been convicted on indictment of an offence in connection with the promotion, formation, management or dissolution of a company that is or becomes insolvent or of an offence under the Insolvency Act that relates to a company that at any time becomes insolvent;
- has had an order made against him or her under Section 259 or Section 260 of the Insolvency Act; and
- who is a director, shadow director, voluntary liquidator or receiver who has been guilty of fraud in relation to the company or of any misfeasance or breach of duty as a director, voluntary liquidator or receiver of the company or where the court is of the opinion that the person’s conduct is such to make him or her unfit to be concerned in the promotion, formation or management of companies or in their liquidation or dissolution.

Under Section 271(4), the period of disqualification shall not exceed 10 years.

**Compensation Order under Criminal Procedure and Evidence Act 2011**

A compensation order can be sought against a person who has committed an offence pursuant to Section 595(1) of the Criminal Procedure and Evidence Act 2011. Such orders are available in respect of injury, loss or damage as a result of the offence, although where the offence is in relation to Part 16 of the Crimes Act 2011 (fraud), if the assets are recovered, any damage done to any such assets is treated as having arisen from the offence. In the Supreme Court, the amount of compensation is within the discretion of the Court, although in the magistrates’ court it is limited to £20,000.

The court also has the power to make a restitution order under Section 600(2) of the Criminal Procedure and Evidence Act when a person is convicted of an offence.
III SEIZURE AND EVIDENCE

In the civil context, it is open to a party in appropriate circumstances to make an application for an interim remedy pursuant to CPR Part 25.1. The types of interim remedies that can be ordered include the following:

a an interim injunction;
b an interim declaration;
c an order for the detention, custody or preservation of relevant property or the inspection of relevant property;
d a freezing injunction restraining a party from removing from the jurisdiction assets located in Gibraltar or from dealing with assets whether located in Gibraltar or elsewhere;
e an order directing a party to provide information about the location of relevant property or assets that are or may be the subject of an application for a freezing injunction;
f a search order; and
g an order for a specified fund to be paid into court or otherwise secured where there is a dispute over a party’s right to the fund in question.

Any application for such an interim order must be made in compliance with the requirements of CPR Part 23 and the court has jurisdiction to grant an interim remedy regardless of whether there has been a claim for a final remedy of that kind in the substantive claim. The onus is on the applicant to make out and satisfy the court that it should grant the interim remedy sought. Normally applications for freezing injunctions or search orders are made initially on an ex parte basis as putting the opposing party on notice of any such an application would serve to defeat the object of the applications.

To obtain a freezing injunction, the claimant must demonstrate that:

a he or she has a cause of action or good arguable case;
b there is a serious risk that if the defendant is not restrained by an injunction that the assets will be removed from the jurisdiction or otherwise dissipated or disposed of so as to frustrate any judgment that might be obtained later; and
c it is just and convenient for the court to make the order sought.

When making a freezing injunction, the court usually makes an ancillary order requiring the defendant to give disclosure or provide information concerning his or her assets or disclose information to assist in the tracing of alleged misappropriated assets. As part of any such application, the applicant will be required to provide an undertaking as to damages in the usual form.

Under the Insolvency Act, it is also possible to apply for the appointment of a provisional liquidator of a company pursuant to Section 161 of the Insolvency Act 2011. The court may appoint a provisional liquidator under this Section if the company consents to the appointment or the court is satisfied that the appointment is necessary for the purpose of maintaining the value of assets owned or managed by the company, or is otherwise in the interests of creditors or in the public interest.

It is also possible to apply to appoint an interim receiver to secure and protect relevant property.

i Obtaining evidence

Letters of request from foreign courts in respect of evidence required for foreign court proceedings (whether criminal or civil) are dealt with under the provisions of the local

In short, the court has power to require evidence to be taken in appropriate circumstances and as directed by the court. The court will consider the formal letter of request and will generally accede to such requests provided they are not considered irrelevant, tantamount to a fishing expedition (e.g., pretrial disclosure of documents requests) or frivolous or vexatious.

Any application made to give effect to a letter of request must be focused and in that regard, the court will be loath to make a general disclosure order. Instead, the court normally makes orders for the disclosure of specified documents or specified categories of documents as opposed to orders in very general terms that the court is likely to consider are too widely drafted.

One further issue to consider in the context of applications to give effect to letters of request from foreign courts is the issue of privilege. In that regard, a witness cannot be compelled to provide evidence if the witness is entitled to claim privilege from giving such evidence either as a matter of Gibraltar law or under the law of the requesting court. Normally, it is for the recipient of any order to assert the privilege concerned and in the absence of such an assertion being accepted by the applicant, the court will need to determine the issue in the context of the application or any return date.

Any claim for privilege under the foreign law concerned will need to be supported by expert evidence from the foreign jurisdiction concerned.

### IV FRAUD IN SPECIFIC CONTEXTS

#### i Banking and money laundering

Under Part IV of the Crime (Money Laundering and Proceeds) Act 2007, the court has power to make restraint orders and confiscation orders.

The court has power to make a restraint order under Section 30 of the Act and the application is made by application by the prosecutor.

Under Section 23(1) of the Act, the power to make confiscation orders is discretionary and gives the court power in addition to dealing with the offender in any other way ‘to make an order requiring him to pay such sum as the court thinks fit’.

Part II of this Act creates money laundering and other associated offences, for example, assisting another to retain the benefit of criminal conduct or failure to notify the Gibraltar Financial Intelligence Unit if a person undertakes relevant financial business and knows or suspects or has reasonable grounds to suspect that another person is engaged in money laundering or is attempting to launder money.

Under the Act, the court also has power to make charging orders in respect of realisable property as well as the appointment of a receiver in respect of realisable property.

In the recent case of *Lavarello & Another v. Jyske Bank* (unreported) Supreme Court of Gibraltar 17 May 2017, Mr Justice Jack considered and found Jyske Bank liable for dishonest assistance in respect of a claim made that the bank dishonestly assisted the former law firm Marrache & Co to misappropriate client monies and also, on the ground of knowing receipt. The Court considered the application in Gibraltar of the case of *Rowlandson v. National Westminster Bank Limited* 1978 1 WLR 798 and also, Section 85 of the Solicitors Act 1974 and a banker’s duty in relation to the operation of client accounts. Both sides in the action accepted that Section 85 did not release a bank from liability for dishonest assistance, whether as a matter of actual knowledge or Nelsonian blind-eye knowledge. Mr Justice Jack
in turn held that Section 85 does not release a bank from its liability for dishonest assistance, whether as a result of actual knowledge or Nelsonian blind-eye knowledge, but also held that the Section creates a strong presumption, on which bankers can rely, that solicitors’ client accounts are being conducted in a proper manner and that therefore a banker’s duty to investigate transactions must be considered against the background of the statutory presumption. The judgment is currently the subject of appeal. The author is respectfully of the view that the application of Section 85 of the English Solicitors Act 1974 to Gibraltar is questionable given the provisions of Section 33 of the Supreme Court Act 1960, which only extends the law in England relating to barristers and solicitors to the latter, and not to banks, in Gibraltar.

ii Insolvency

Liquidators and administrators of companies (as well as trustees in bankruptcy) have extensive powers under the Insolvency Act 2011 to obtain court orders requiring persons in possession of information or documents relating to a company or a bankrupt to disclose the material. Section 240(1) expressly gives a liquidator or other office holder of a company power by notice in writing to require the provision of information concerning a company, including its promotion, formation, business, dealings, accounts, assets, liabilities or affairs as reasonably required by the officer holder concerned. The notice may be sent to a wide range of individuals, including officers and former officers of a company, any member or former member of a company, any employee or former employee and any person who is or has been a receiver, accountant or auditor of the company. Provision is also made under Section 241 for the examination of a person under Section 240(1)(c) by an officer holder. In addition, an application can be made for an examination before the court under Section 242 of the Insolvency Act. Section 402 of the Insolvency Act permits an application to be made (where a bankruptcy order has been made and before the discharge of the bankrupt) by the trustee in bankruptcy or the official receiver for an order for a person as defined in Section 402(2) to appear to be examined concerning the affairs of the bankrupt. A person under this Section includes the bankrupt, his or her spouse or former spouse, any person known or believed to be indebted to the bankrupt and any person appearing to the court able to give information concerning the bankrupt or the bankrupt’s dealings, affairs, assets or liabilities. There are also various bankruptcy offences set out in Part 14 of the Act, including those relating to the concealment of assets, false statements and the fraudulent disposal of assets.

As referred to above, Part 10 of the Insolvency Act contains relevant statutory provisions in relation to malpractice and enables a liquidator of a company to commence proceedings against directors of companies on the basis of alleged insolvent or fraudulent trading as well as other courses of action.

iii Arbitration

Under Section 32 of the Arbitration Act, the court has power to make interim remedies in aid of arbitration proceedings, including security for costs, discovery of documents or interrogatories, interim injunctive relief, the appointment of a receiver as well as the preservation of any goods that are the subject of an arbitration reference.

iv Fraud’s effect on evidentiary rules and legal privilege

Neither legal advice privilege nor litigation privilege attaches to communications between a legal adviser and a client produced for the purpose of committing or furthering a fraudulent
act or crime. The obvious reason is because it is not part of a lawyer’s duty to further (whether knowingly or not) a fraudulent act and consequently no privilege attaches to any such communications with that purpose, as any such privilege would be contrary to public policy.

V INTERNATIONAL ASPECTS

The Revised Brussels Regulation applies in Gibraltar for the time being, pending the outcome of Brexit. It provides general rules with respect to jurisdiction in respect of civil or commercial matters and applies in respect of disputes between EU nationals or corporations.

In matters relating to tort, quasi-delict or delict, the courts of the Member State where the harmful event occurred or may occur will have jurisdiction. In relation to contractual claims, the courts of the Member State that is the place of performance of the obligation in question will have special jurisdiction. Generally speaking in fraud cases, the court will have jurisdiction if the fraud occurred in Gibraltar.

If the parties have agreed a choice of law clause attributing jurisdiction to a particular Member State then that court will usually have jurisdiction (in the absence of the courts of another Member State having special jurisdiction) subject to compliance with certain formalities, including the fact that the agreement should be in writing or conforming to general trade practice.

In the event that an opposing party seeks to commence proceedings in another jurisdiction then the courts of that jurisdiction should proceed to stay the claim pending the determination of the issue of jurisdiction by the courts of the Member State that the parties have agreed in the jurisdiction clause.

As stated above, the Evidence Act contains statutory provision to enable the taking of evidence in aid of foreign proceedings whether civil or criminal in nature upon receipt of a request from the foreign court concerned. In respect of criminal matters, the European Convention on Mutual Assistance in Criminal Matters applies and Gibraltar has enacted relevant local legislation in the guise of the Mutual Legal Assistance (European Union) Act. In addition, there is also the Mutual Legal Assistance (international) Act, which deals with the provision of assistance to foreign states or territories.

Insofar as the freezing or seizure of assets is concerned, in civil proceedings the appropriate course is to seek an appropriate interim remedy, usually an injunction in appropriate terms.

The methods available to enforce foreign judgments in Gibraltar will depend on the location of the identity of the country where the judgment originates. In the majority of cases enforcement is by way of registration of the judgment.

Judgments emanating from Member States of the European Union are generally enforceable under the Revised Brussels Regulation or alternatively in limited circumstances under the Brussels and Lugano Conventions, which also apply in Gibraltar by virtue of its EU status.

The main exceptions when a judgment will not be recognised under the Revised Brussels Regulation are when:

- recognition of the judgment would be contrary to public policy;
- it was given in default of appearance and the defendant was not served with the document that instituted the proceedings in sufficient time and in such a way as to enable the defendant to arrange his or her defence;
- the judgment is irreconcilable with another judgment between the same parties; or
- the court that made the judgment lacked jurisdiction.
In addition, the Administration of Justice Act 1920 also applies to Gibraltar by virtue of the English Law Application Act. Gibraltar also has an equivalent act to the English Foreign Judgments (Reciprocal Enforcement) Act 1933 in the guise of the Judgments (Reciprocal Enforcement) Act 1935. The relevant countries within the application of the 1933 Act include Australia and the Australian States, the Isle of Man, Guernsey, Jersey, India and Pakistan. Under this Act, the judgment must be for a sum of money (not from fines or unpaid taxes) and it must be final or conclusive. The Act has effect subject to the provisions of the local Civil Jurisdiction and Judgments Act 1993.

It is also possible to seek to enforce a judgment for a fixed sum of money at common law. Judgments will not be recognised at common law if:

a. the proceedings were contrary to natural justice;
b. the judgment was obtained by fraud;
c. recognition of the judgment would be contrary to public policy; or
d. the foreign court lacked jurisdiction.

If the judgment is not for a fixed sum of money and provided the claimant has the same cause of action in Gibraltar, proceedings could be instituted in Gibraltar on the basis of the foreign judgment and seek summary judgment on issues determined by the foreign court.

Generally speaking, the courts will not look behind the substantive merits of a judgment that a claimant seeks to enforce. However, if the judgment was obtained by fraud then this can act as a defence to a judgment that is sought to be enforced either at common law or under the provisions of the 1933 or 1920 Acts.

VI CURRENT DEVELOPMENTS

The most recent decision on the issue of dishonest assistance is the decision of Lavarello & Another v. Jyske Bank (Gibraltar) Limited (unreported) Supreme Court 17 May 2017. That decision contains an interesting review and analysis of the law relating to dishonest assistance and knowing receipt, with specific reference to a banker’s duty of enquiry. That judgment is currently the subject of an appeal to the local court of appeal.

Relatively recent legislation in Gibraltar has focused on an extensive update of local companies and insolvency legislation as well as criminal legislation. The Crimes Act 2011 created the statutory offence of fraud under Section 415 as well as other fraud-related offences under Part 16 of the Act. At present, it is not envisaged that there will be any further fraud-specific legislation enacted.
Chapter 15

HONG KONG

Randall Arthur, Joyce Xiang and Calvin Koo

I OVERVIEW

Hong Kong is a major international financial centre with a global network of individuals and entities utilising the region’s sophisticated financial services. As such, a range of assets including liquid cash, securities, real property and tangible physical goods are all commonly held within, or routed through, Hong Kong.

The stability and success of the Hong Kong financial system, however, requires, inter alia, a well-functioning legal system that can reliably address any disputes, including those arising from fraud. Fortunately, Hong Kong’s common law legal system and courts are well-positioned to determine such disputes, provide redress for claims sounding in fraud and facilitate asset investigation and recovery efforts. Generally, victims of fraud and dishonesty in Hong Kong may obtain compensation through civil tort claims, with requested relief in the form of damages, restitution, seizure of goods or property, injunctions, constructive trusts or account of profits. Victims of dishonest criminal activity may also be in line for compensation in connection with a criminal judgment through statutorily provided restitution.

Hong Kong law provides several avenues for discovering information germane to asset tracing and recovery. Although Hong Kong is a business and investor-friendly environment where banks and financial institutions typically strive to protect the privacy and confidentiality of their clients in accordance with local law and internal company policies, these companies do and must routinely obey court orders for disclosure. Hong Kong’s sophisticated courts, however, do not issue such orders haphazardly and are frequently called upon to balance applications for disclosure against competing interests of privacy. Key legislation relevant to fraud-related civil asset recovery includes the High Court Ordinance, Evidence Ordinance, Rules of High Court, and Personal Data (Privacy) Ordinance, and each may affect the admissibility of evidence and access to evidence used in asset recovery efforts.

From a criminal case perspective, individuals and entities may look to the Hong Kong police force (particularly the Commercial Crime Bureau, the Organized Crime and Triad Bureau and the Joint Financial Intelligence Unit) or the Independent Commission Against Corruption, or both, to trace and confiscate proceeds of crime. Civil parties, however, should be aware that it is extremely difficult to obtain evidence from law enforcement and regulatory agencies for use in civil proceedings, as they are subject to the Personal Data (Privacy) Ordinance. Usually, law enforcement and regulatory agencies refrain from releasing data to any person unless that person is the subject of the data or a relevant person (e.g.,

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parent of a minor). Legislation relevant to fraud-related criminal asset recovery includes the Organized and Serious Crimes Ordinance, which provides for restraint of assets or charge of property to preserve it for the purpose of satisfying a confiscation order, as well as the Mutual Legal Assistance in Criminal Matters Ordinance, which regulates assistance in criminal matters between Hong Kong and places outside Hong Kong, and thus may be relevant to the confiscation of proceeds of crime that has crossed borders.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Civil actions against persons who committed a fraud

Depending on the specific circumstances of the matter, there are a few civil claims sounding in various types of tort that a victim of fraud may bring against the person who committed the fraud. These include the following, each with particular forms of relief.

Fraud

Fraud generally involves some manner of deceit practised by the defendant and may take several forms, such as fraudulent misrepresentation, deceit and fraudulent inducement and, in the context of insolvencies, fraudulent conveyance and fraudulent trading. An action for damages is the most common relief sought for fraud, although other remedies, including those equitable in nature, may also be sought.

Breach of fiduciary duty

Breach of fiduciary duty, whereby a wrongdoer owes a duty to the victim (such as the type directors and officers owe to companies), yet acts in a manner that the wrongdoer does not honestly believe is in the victim’s best interests or is for an improper purpose. An action for damages may be warranted for such a breach, but other remedies, including injunctive relief or an account of profits to recover any ill-gotten profits, may also be appropriate.

Unjust enrichment

Unjust enrichment, whereby someone receives a benefit at the victim’s expense such that it would be unconscionable for the defendant to retain the benefit. An action for money had and received seeks restitution for unjust enrichment, although in certain circumstances the relief sought may be stylised as a repayment of a loan.

3 Grand Field Group Holdings Ltd v. Chu King Fai and Ors [2014] HKCU 1470.
Conversion
Conversion, whereby a fraudster has effectively misappropriated the victim's property.\(^5\) An action for restitution or damages, or both, is the natural remedy, and where the property has been sold, a victim may pursue an action for money had and received.\(^6\)

Civil actions against persons who assisted in the commission of a fraud
There may also be civil claims against persons who assist the primary fraudster in the commission of the wrongdoing as follows.

Conspiracy
Conspiracy, whereby there is an agreement between the conspirator and the fraudster with intent to injure the plaintiff, acts carried out pursuant to that agreement and intention, and damage to the victim.\(^7\)

Dishonest assistance
Dishonest assistance, whereby the defendant dishonestly assists with another's underlying breach of trust or fiduciary duty, with resulting loss.\(^8\)

Civil actions against third parties who may receive or help transmit the proceeds of fraud
Claims may also be brought against third parties that receive or handle the proceeds of fraud. In particular, plaintiffs may pursue constructive trust claims in pursuit of equitable relief against third parties who knowingly receive trust property or its traceable proceeds that were transferred in breach of trust. Claims may also be brought against third parties who knowingly assist in a trustee's breach of trust.\(^9\)

Standards of proof
Under Hong Kong law, civil claims are adjudicated based upon the balance of probability test, which effectively is a ‘more likely than not’ standard. Stronger evidence is required to establish the balance of probability for allegations that are more serious in nature because the court presumes that the more serious the allegation, the less likely it is to have occurred.\(^10\) For example, fraud is usually less likely than negligence,\(^11\) so in cases alleging fraud, although

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\(^9\) See, for example, LexisNexis Halsbury’s Laws of Hong Kong, [400] Trusts, [400.095], Knowing receipt or dealing; recipient liability, [400.098], Knowing assistance in breach of trust: accessory liability.
\(^10\) Re H & Ors (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563; see also A Solicitor (24/7) v. Law Society of Hong Kong [2008] 2 HKC 1.
\(^11\) Id.
the technical standard remains the same, what evidence is required to meet that standard is inherently greater. There are also strict rules in place when pleading allegations of fraud, such that the plaintiff must have an evidentiary basis before making such pleadings.

**Criminal actions against persons who committed a fraud**

Criminal claims related to fraud typically arise in connection to the following:

- where goods have been stolen and a person is convicted of any offence with reference to the theft, the court may order restitution;\(^{12}\) or
- the Criminal Procedure Ordinance provides for restitution where any person is convicted of an indictable offence (i.e., more serious offences) such as this.\(^{13}\)

**Criminal actions against persons who assisted in the commission of fraud**

Criminal claims against persons who assist in fraud include:

- where the agreement itself is the crime; and
- where aiders, abettors and accessories, which the Criminal Procedures Ordinance identifies as any person who aids, abets, counsels or procures the commission by another person of any offence, are guilty of the underlying offence.\(^{14}\)

**Criminal actions against third parties who may receive or help transmit the proceeds of fraud**

The Organized and Serious Crimes Ordinance, *inter alia*, creates offences relating to the proceeds of crime. For example, a person that knows, or has reasonable grounds to believe, that property in whole or in part directly or indirectly represents a person’s proceeds of an indictable offence, such as the ones above, commits an indictable offence him or herself, which is subject to a restitution order.\(^{15}\)

**Standards of proof**

For criminal actions, the prosecution bears the burden of establishing the charges beyond a reasonable doubt.\(^{16}\)

**Defences to fraud claims**

Civil fraud claims must be brought within six years of the date on which the cause of action accrues, but in fraud matters, pursuant to the Limitation Ordinance, this clock does not begin to run until the plaintiff discovers the fraud or could, with reasonable diligence, have discovered it.\(^{17}\) Plaintiffs, however, cannot act against an innocent third party who purchased the property for valuable consideration and without notice of the fraud – in other words, at the time of the purchase, the third party did not know or have reason to believe that a fraud

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12 Id. at Section 30.
13 Criminal Procedure Ordinance, Cap 221, Section 84.
14 Criminal Procedures Ordinance, Cap 221, Section 89.
15 Organized and Serious Crimes Ordinance, Cap 455, Section 25; Criminal Procedure Ordinance, Cap 221, Section 84.
16 See HKSAR v. Choi Kuk Shek, Kendy and Ors [2003] HKCU 1026; see also A Solicitor (24/7) v. Law Society of Hong Kong [2008] 2 HKC 1.
17 Limitation Ordinance, Cap 347, Section 4.
had taken place. Such innocent third parties instead possess defences to claims against them in connection with the property at issue, such as unjust enrichment arising from fraud, which otherwise might ensnare the blameless.

In criminal matters, for serious offences – which are likely to include matters relating to fraud – there is no formal time limit for the commencement of a prosecution (in contrast to minor ‘summary offences’, which generally have a six-month limitation period starting from the commission of the offence).

III SEIZURE AND EVIDENCE

i Civil actions

Securing assets and proceeds

With respect to civil matters, there are several forms of interim relief available in Hong Kong to prevent the dissipation of assets by, and to seek discovery from, those alleged to be involved in fraud.

Mareva injunction

A Mareva injunction is a court order preventing a defendant from dealing with, moving or disposing of his or her assets. In other words, the defendant’s assets are ‘frozen’ such that any attempt to transfer or dissipate those assets would violate the court’s order, subject to contempt of court penalties. The order is also binding on third parties to the extent that any third party who is served with the order and subsequently assists the defendant in moving his or her assets will also be in contempt of court. Thus, in practice, Mareva injunction orders are routinely served on banks at which defendants maintain accounts, which results in the banks taking immediate steps to freeze the accounts.

The Mareva injunction also requires the defendant to make disclosures regarding all owned assets and may, in certain circumstances, require third parties, such as banks, to disclose information relating to the defendant’s assets held by them. Because of the considerable restriction such an injunction places on a defendant, there are several hurdles a plaintiff must overcome before securing such an injunction. Among these are that the plaintiff establish:

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\begin{align*}
& a \quad \text{a good arguable case on the underlying merits of the action;} \\
& b \quad \text{that the defendant has assets within the jurisdiction;} \\
& c \quad \text{that there is a real risk that defendant will dissipate the assets; and} \\
& d \quad \text{that the balance of convenience is in favour of granting the application.}
\end{align*}
\]

18 Id. at Section 26.
20 Sweet & Maxwell, Hong Kong Civil Procedure, 2016, Volume 1, Part A, Section 1 Rules of the High Court, Order 29 Interlocutory Injunctions, Interim Preservation of Property, Interim Payments, Etc. 1. Application for Injunction (O.29, r. 1), 29/1/65 Requirements for Mareva Injunction, 693; see also Lam Sik Ying, administrator for the Estate of Lam Tim alias Stan Lam Tim, deceased v. Lam Sik Shi & Anor [2011] HKCU 100.
Mareva injunction applications may initially be made *ex parte*, but ultimately the defendant will have an opportunity to challenge and set aside the order.\(^{21}\) Where an application for a *Mareva* injunction is made *ex parte*, the plaintiff has an obligation to make full and frank disclosure to the court of all relevant material facts, including those not in his or her favour.\(^{22}\) A failure to make full and frank disclosure may result in the injunction being discharged.\(^{23}\) Plaintiffs seeking a *Mareva* injunction must also give an undertaking to pay to the defendant any damages the defendant might suffer from the injunction should it later transpire that the injunction should not have been granted.\(^{24}\) The court may also require the plaintiff to fortify this undertaking by making a payment into court or providing some other type of security (such as a bank guarantee).\(^{25}\) Hong Kong judges may grant a *Mareva* injunction in support of proceedings outside Hong Kong, and, in certain narrow circumstances, a ‘worldwide’ *Mareva* injunction that applies to assets located both in and beyond Hong Kong.\(^{26}\)

**Anton Piller order**

Where a plaintiff is concerned that a defendant may hide or destroy evidence, he or she may seek an injunction requiring the defendant to permit the plaintiff to enter the defendant’s premises to enable the inspection, seizure and removal of documents relating to the underlying matter. This injunction is historically known as an ‘*Anton Piller*’ order and is aimed at preventing destruction of evidence. The plaintiff must establish that:

\[
\begin{align*}
 a & \text{ there is a strong \textit{prima facie} case for a cause of action; } \\
 b & \text{ the potential or actual damage to the plaintiff must be very serious; } \\
 c & \text{ there must be clear evidence that the defendant possesses the items at issue; and } \\
 d & \text{ there is a real likelihood (more than a mere possibility) that a defendant might destroy the material.} \quad \text{(27)}
\end{align*}
\]

As with the *Mareva* injunction, the application may be made *ex parte* with a full and frank disclosure,\(^{28}\) but is subject to the defendant’s later opportunity to move to set aside the order.\(^{29}\)

**Prohibition against debtors leaving Hong Kong**

Pursuant to Order 44A of the Rules of the High Court, a plaintiff or holder of a judgment in its favour (a judgment creditor) may apply *ex parte* to the court for an order prohibiting a debtor from leaving Hong Kong, thus ensuring the debtor cannot escape to a more judgment-proof

\(^{22}\) Id. at 29/1/71 Full and Frank Disclosure, Balance of Convenience, 695–696.
\(^{23}\) Id.
\(^{24}\) Id. at 29/1/20 Introduction, 679.
\(^{25}\) Id. at 29/1/24 Fortifying undertaking, 680.
\(^{26}\) See, for example, *Dadourian Group Int Inc v. Simms* [2006] 3 All ER 48; see also *RACP Pharmaceutical Holdings Ltd v. Li Xiaobo* [2007] 3 HKCU 636.
\(^{27}\) *Giant Electronics Ltd v. In-Tech Electronics Ltd* HCA 15823/1999.
\(^{28}\) *Anthony James Hatton v. Dorothy Jane Furness & Ors* [2009] HKCU 249.
\(^{29}\) Sweet & Maxell, Hong Kong Civil Procedure, 2016, Volume 1, Part A, Section 1 Rules of the High Court, Order 29 Interlocutory Injunctions, Interim Preservation of Property, Interim Payments, Etc, 8. Allowance of income of property pendent lite (O.29, r.8), 29/8/20 Anton Piller Orders – Search and Seizure, 707; 29/8/32 Setting aside and discharge of orders and appeals, 710.
The court will grant the application only where the prohibition is reasonably and properly conducive to the enforcement of a judgment involving money or property. If the judgment amount is still to be assessed or property is to be delivered, the court will make the order only where there is probable cause for believing the debtor is about to leave Hong Kong and that enforcement will thereafter be impeded.

**Interim attachment of property**

Order 44A also provides for the interim attachment of property of a defendant where a defendant, with intent to obstruct or delay the execution of a judgment, is about to dispose of property. In such a circumstance, the plaintiff may apply to the court for an order requiring the defendant to provide security sufficient to satisfy any judgment that may be rendered against him or her in the action. Failing provision of such security, the court may direct any property of the defendant to be attached as security.

**Appointment of receiver or provisional liquidator**

Where just and convenient, the Hong Kong court may appoint a receiver to recover and protect assets that defendants obtain in connection with fraudulent activity. The receiver may then realise and distribute the assets among victims of the fraud. Similarly, in circumstances where fraud was perpetrated through a company that was, or has now become, insolvent by way of the fraud, the court may appoint a provisional liquidator to preserve that company’s assets pending the determination of a winding-up petition against the company.

**Obtaining evidence**

Prior to securing assets and proceeds, potential plaintiffs in civil proceedings may need more information and evidence about the assets and proceeds before bringing an action. Plaintiffs seeking information on assets of a putative defendant may do well by searching public resources such as land, companies, business, trademark and vehicle registries as part of their investigative efforts.

In addition, Hong Kong’s Rules of the High Court provide statutory rules on discovery and inspection of records for parties to a proceeding. In general, this encompasses documents that are or have been in the parties’ possession, custody or power relating to the matters in question. Parties are to serve lists of such documents within 14 days of the close of pleadings in the action. Outside these statutory rules, the court may also, upon application, make

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30 Rules of High Court, Cap 4A (O44A, Rule 2).
31 Id.
32 Id.
33 Id. at Rule 7.
34 Id.
35 Id.
36 Organized and Serious Crimes Ordinance, Cap 455 Sections 15–17.
37 Id.
38 Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32 Section 193.
39 Rules of High Court, Cap 4A (O 24).
40 Id.
other discovery orders. A few of these orders, briefly described below, are often key to fraud actions in particular, as they seek information from third parties who may have evidence about a wrongdoer or the wrongdoer’s assets that would be otherwise unavailable.

**Norwich Pharmacal order**

Before an action is commenced, a proposed plaintiff may seek a *Norwich Pharmacal* order from the court to obtain documents from an innocent party that unknowingly facilitated or was caught up in the wrongdoing of others. Such orders are often employed to identify wrongdoers previously unknown to the plaintiff, obtain evidence in support of proposed proceedings against wrongdoers or identify assets belonging to wrongdoers. For example, an innocent third party (such as a bank) may hold funds derived from fraud, and a *Norwich Pharmacal* order may require that third party reveal from whom the funds were obtained, and any documentation evidencing that transfer. The plaintiff may then take this information and use it as a basis of a cause of action against a defendant he or she can now identify. To obtain such an order, the proposed plaintiff must establish that:

- there is a *prima facie* case against the unknown alleged wrongdoer;
- the target of the order was involved in some way in the matter;
- the target of the order must be the only practical source of information available;
- the target will be compensated for his or her expenses in complying with the order; and
- the public interest in disclosure outweighs privacy concerns. 41

**Evidence from banks**

A *Bankers Trust* order is effectively a *Norwich Pharmacal* order targeted at an innocent third-party bank to provide information that enables tracing of funds that is normally otherwise protected by the bank’s duty of confidentiality. 42

Similarly, under the Evidence Ordinance, a party to a proceeding may apply to the court to order that a bank’s books be opened to that party for the purposes of discovery in a matter. 43

There have been occasions where the court has allowed discovery orders to be obtained against banks as part of a *Mareva* injunction order, specifically in circumstances where the plaintiff maintains that it has a proprietary interest in the funds held in a specific account.

**iii Criminal actions**

With respect to criminal matters, law enforcement authorities have certain powers to gather evidence and identify, trace and freeze proceeds, while certain other actions to restrain and seize assets lie with the prosecutor.

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41 *Sweet & Maxell Hong Kong Civil Procedure*, 2016, Volume 1, Part A, Section 1 Rules of the High Court, Order 24 Discovery and Inspection of Documents, 2. Discovery by parties without order (O.24, r.2), 24/2/1 Action for discovery, 571–572.


43 Evidence Ordinance, Cap 8 Section 21.
Evidence gathering
The Hong Kong police force acts pursuant to the Police Force Ordinance with respect to evidence-gathering procedures and seizure of suspected property. Prosecutors are likely to have the benefit of receiving evidence gathered by law enforcement, and in particular circumstances may pursue their own applications to the court for evidence-gathering orders.

Restraint of assets or property
Under the Organized and Serious Crimes Ordinance, a prosecutor may move for the restraint of assets or property to prohibit a defendant that has benefited from an offence specified under the Ordinance – including those arising from fraud – from dealing with any realisable property. Where such a restraint order is in place, the court may appoint a receiver to take possession of any realisable property, or otherwise manage or deal with the property. In addition, an authorised officer may also seize restrained property to prevent its removal from Hong Kong.

Charging order
The Organized and Serious Crimes Ordinance also allows for the prosecutor to apply to the court for a charging order on realisable property that has the effect of securing payment to the government backed by the property charged. Such an application may be made *ex parte* but is subject to those affected by it applying for its discharge.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering
Hong Kong has a specific anti-money laundering ordinance, the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institution) Ordinance, which came into effect in 2012. This Ordinance works together with other ordinances, such as the Organized and Serious Crimes Ordinance, to deal with specific money laundering issues that may arise in the context of potential fraudulent activity. For example, under the Anti-Money Laundering Ordinance, financial institutions are required to conduct customer due diligence and maintain certain records, whereas the Organized and Serious Crimes Ordinance requires reporting of suspicious transactions.

Separately, Hong Kong’s Banking Ordinance addresses fraudulent activity by making fraudulent inducement to make a deposit a basis for a claim of fraud.

44 Police Force Ordinance, Cap 232.
45 Organized and Serious Crimes Ordinance, Cap 455, Section 15.
46 Id.
47 Id.
48 Id. at Section 16.
49 Id.
50 Anti-Money Laundering and Counter-Terrorist Financing (Financial Institution) Ordinance, Cap 615.
51 Id.; Organized and Serious Crimes Ordinance, Cap 455, Section 25A.
52 Banking Ordinance, Cap 155, Section 93.
ii Insolvency

In the context of insolvency, a defrauded creditor has the option of issuing a winding-up petition and applying for the appointment of a provisional liquidator where a company is concerned, or presenting a bankruptcy petition where an individual is concerned. The liquidator or trustee can force the debtor to provide information on assets, and he or she can claw back fraudulently conveyed property. Specifically, where a transfer is deliberately made to place assets outside a creditor’s reach, the conveyance is voidable and may be set aside, except where made in good faith for valuable consideration and without notice of intent to defraud creditors.53 In addition, a liquidator or trustee may challenge the validity of unfair preference transfers, which occur when an insolvent company or bankrupt individual repays a creditor prior to the commencement of its winding up or bankruptcy, thus putting that creditor in a better position than it would otherwise be in liquidation or bankruptcy.54 The applicable time period for these unfair preference transfers are two years prior to the commencement of the winding up if the creditors are ‘associates’ (such as directors or employees), or six months for any other creditors.55 These powers seek to prevent fraudsters from finding a way to funnel money to themselves or associates.

Furthermore, the Bankruptcy Ordinance criminally penalises debtors that intentionally do not fully disclose or deliver to the trustee all his property, make material misstatements or omissions, fraudulently convey property, or otherwise act in ways designed to intentionally frustrate the insolvency process.56

iii Arbitration

Under Hong Kong’s Arbitration Ordinance, unless otherwise agreed to by the parties, a party can challenge an arbitral award on the ground of serious irregularity, which, inter alia, includes the award having been fraudulently obtained.57

iv Fraud’s effect on evidentiary rules and legal privilege

Hong Kong law respects legal professional privilege, including a crime or fraud exception to the privilege, similar to other common law jurisdictions. This exception identifies communications made in furtherance of a crime as not privileged.58

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

With respect to the conflict of law, generally Hong Kong courts evaluate four issues in determining whether personal jurisdiction over a defendant has been satisfied. First, Hong Kong courts determine whether a defendant may be deemed to have submitted to Hong

53 Conveyancing and Property Ordinance, Cap 219, Section 60.
54 Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32, Section 266B.
55 Id.
56 Bankruptcy Ordinance, Cap 6, Section 129.
57 Arbitration Ordinance, Cap 509, Sections 99–102 and Schedule 2.
Hong Kong courts review whether a defendant was effectively served with the originating process in Hong Kong.\(^{59}\) Third, in cases where service is not possible or applicable in Hong Kong, the Hong Kong courts examine whether the court has jurisdiction to grant leave for service outside Hong Kong.\(^{60}\) Fourth, Hong Kong courts evaluate the appropriateness of exercising jurisdiction in a given circumstance (e.g., issues of forum conveniens).\(^{61}\)

With respect to the choice of law, Hong Kong courts apply Hong Kong law to issues of procedure. Where there is a choice of law issue as to substantive law, Hong Kong courts, like many commonwealth jurisdictions, apply lex causae principles — principles that evaluate the proper applicable law to a given issue.\(^{62}\) In fraud cases, this may require an evaluation of where particular misrepresentations or actions at issue occurred.

### ii Collection of evidence in support of proceedings abroad

If a foreign proceeding has already commenced or is contemplated, plaintiffs may seek from the relevant foreign court a letter of request directed at the Hong Kong authorities, seeking assistance in obtaining evidence.\(^{64}\) Assuming the foreign court issues the letter of request, local Hong Kong counsel would then make an ex parte application in Hong Kong attaching that letter of request and seeking an order from the Hong Kong court for the discovery sought in the letter of request. Alternatively, where putative plaintiffs seek pre-action information or disclosure from an innocent third party in Hong Kong, they may apply to Hong Kong courts for a Norwich Pharmacal order in support of their contemplated proceedings abroad.\(^{65}\) The general requirements for such an application are discussed in Section III.ii.

### iii Seizure of assets or proceeds of fraud in support of the victim of fraud

Overseas plaintiffs may utilise Section 21M of the High Court Ordinance to seize assets or proceeds of fraud located in Hong Kong. Specifically, Section 21M authorises Hong Kong courts to grant various forms of interim relief in relation to proceedings that have been or are to be commenced outside Hong Kong and are capable of giving rise to a judgment that may be enforced in Hong Kong, which is generally a final and conclusive money judgment.\(^{66}\) Therefore, interim relief mechanisms, such as those described in Section III.i, are available to victims of fraud provided that the requisite elements are met. For example, victims may wish to pursue a worldwide Mareva injunction to freeze a defendant’s assets globally. A plaintiff that successfully secures this assistance can continue pursuing foreign proceedings without having concurrent proceedings in Hong Kong.

With respect to criminal matters, the Mutual Legal Assistance in Criminal Matters Ordinance provides for the cross-border restraint and seizure of property in Hong Kong.

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60 Id.
61 Id.
62 Id.
63 Id. at 2.008.
64 Evidence Ordinance, Cap 8, Sections 75–77.
66 High Court Ordinance, Cap 4A, Section 21M; see also *JSC BTA Bank v. Mukhtar Kabulovich Abyzov* [2014] 5 HKC 209.
in connection with an offence committed outside Hong Kong. The Hong Kong Secretary for Justice may request an appropriate counterpart authority outside Hong Kong to make arrangements to enforce Hong Kong confiscation orders, and similarly, foreign authorities may make requests to the Secretary for Justice to enforce external confiscation orders.67

iv Enforcement of judgments granted abroad in relation to fraud claims
Hong Kong law has established judgment enforcement rules with respect to judgments granted abroad. The technical process by which such enforcement occurs varies based on where the foreign judgment was granted. Judgments from 15 countries (Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Italy, Israel, Malaysia, the Netherlands, New Zealand, Singapore and Sri Lanka) can be registered in Hong Kong by statute pursuant to the Foreign Judgments (Reciprocal Enforcement) Ordinance.68 Where this Ordinance is applicable, this method of judgment enforcement in Hong Kong tends to be preferable to other routes as it is simpler – essentially, all that is needed is an ex parte application to the court, although potential defences include a foreign court’s lack of jurisdiction, improper service, procurement of the judgment by fraud, public policy concerns and concerns that the rights under judgment are not vested in the person applying for the enforcement.

Judgments from mainland China are covered by its own ordinance, the Mainland Judgments (Reciprocal Enforcement) Ordinance. This Ordinance is similar to the Foreign Judgments (Reciprocal Enforcement) Ordinance and pertains to registration of money judgments for disputes arising out of commercial contracts (excluding employment and matrimonial contracts).69 The judgments at issue cannot be in respect of a tax, fine or penalty, and defences include those described above with respect to the Foreign Judgments (Reciprocal Enforcement) Ordinance.70

Where the above ordinances are not applicable, judgment creditors will need to commence substantive proceedings in Hong Kong by suing on the foreign judgment (and usually applying for summary judgment) to seek recognition of the foreign judgment and realisation of the assets. This tends to require proof that the foreign judgment is a final judgment, for a fixed sum and from a competent court.71 Defences include lack of jurisdiction, breach of natural justice, fraud and where enforcement is contrary to public policy.72

v Fraud as a defence to enforcement of judgments granted abroad
As noted above, a judgment obtained by fraud is a defence to the Foreign Judgments (Reciprocal Enforcement) Ordinance, the Mainland Judgments (Reciprocal Enforcement) Ordinance and common law actions in Hong Kong to enforce a foreign judgment.

67 Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525, Sections 11–12.
68 Foreign Judgments (Reciprocal Enforcement) Ordinance, Cap 319.
69 Mainland Judgments (Reciprocal Enforcement) Ordinance, Cap 597.
70 Id. at Section 5.
71 Id.
72 Id. at Section 18.
VI CURRENT DEVELOPMENTS

i Court of Final Appeal (CFA) clarifies test for Section 21M applications

In late 2016, the CFA clarified the legal principles applicable in making an order under Section 21M of the High Court Ordinance, which enables plaintiffs to freeze assets located in Hong Kong in aid of foreign proceedings, notwithstanding that no substantive proceedings are contemplated in Hong Kong.

In *Compania Sud Americana de Vapores SA v. Hin-Pro International Logistics Limited*,73 the CFA set out a two-stage test in determining whether to grant such relief.

**First stage**

The starting point is to consider whether, if the proceedings that have been or are to be commenced in the foreign court result in a judgment, that judgment is one that the Hong Kong court may enforce.

Next, the court will consider the same questions as if a *Mareva* injunction were sought in support of a local proceeding, namely:

- whether the plaintiff has a good arguable case; and
- whether there is a real risk that the defendant will dissipate its assets if the *Mareva* injunction is not granted.

**Second stage**

If the first stage is satisfied, the court will consider whether granting such relief would be unjust or inconvenient owing to the fact that the substantive claim is being litigated in a foreign court.

In relation to the first stage, the CFA found that the Court of Appeal had misinterpreted the English case law, and held that the correct test is whether the plaintiff had a good arguable case in the foreign court, rather than to consider the strength of the substantive claim under Hong Kong law.

ii Obtaining evidence in civil and commercial matters between mainland China and Hong Kong

As one of the milestones to the road to enhancing mutual judicial assistance between Mainland China and Hong Kong, the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the HKSAR74 (the Arrangement) came into force on 1 March 2017. The Arrangement provides a channel with greater certainty and efficiency for the courts in one jurisdiction to seek assistance from the courts in the other jurisdiction, by way of letter of request, to obtain evidence for use in civil and commercial matters in the requesting jurisdiction. Under the Arrangement, the request for assistance has been simplified as the letter of request no longer needs to go through intermediary bodies.75 It’s also notable that the scope of assistance provided by the

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74 Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the HKSAR.
75 Articles 2 and 3 of the Arrangement.
two jurisdictions are not identical (with the PRC courts having the ability to request a wider scope of assistance from the Hong Kong courts). The Arrangement is generally welcomed in the legal industry, but how this Arrangement would affect practice is yet to be seen.

### iii Two consultations to enhance the anti-money laundering regime

At the beginning of 2017, the Hong Kong government announced two consultations to enhance anti-money laundering and counter-terrorist financing regulation in Hong Kong. One is a proposal to amend the Companies Ordinance (Cap 622) to require companies incorporated in Hong Kong to maintain beneficial ownership information. The other is a proposal to amend the Anti-Money Laundering and Anti-Terrorist Financing (Financial Institutions) Ordinance (Cap 615) to require designated non-financial businesses and professions to observe statutory customer due diligence and record-keeping requirements. With a combined consultation conclusions paper issued on 13 April 2017, the government decided to implement the proposals and aim to introduce the amendment bills into the Legislative Council by July 2017.

### iv Revised Guide to Asset Recovery in Hong Kong

The Department of Justice revised its Guide to Asset Recovery in Hong Kong in March 2017. The Guide sets out the procedures for restraint, confiscation and repatriation of proceeds of crime pursuant to international request for legal assistance to Hong Kong.

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76 Article 6 of the Arrangement.
77 Consultation on Enhancing Transparency of Beneficial Ownership of Hong Kong Companies.
78 Consultation on Enhancing Anti-Money Laundering Regulation of Designated Non-Financial Businesses and Professions.
79 Consultation Conclusions of Consultations on Legislative Proposals to Enhance Anti-Money Laundering and Counter-Terrorist Financing Regulation in Hong Kong.
80 Guide to Asset Recovery in the Hong Kong Special Administration Region.
I  OVERVIEW

While the general principles of asset tracing in India are set out in the trusts law, civil procedure and criminal law, the Indian courts have yet to substantively address these issues. The absence of precedent and jurisprudence is surprising given India's robust, if dilatory, judiciary and the circumstances that inform India's dismal ranking on the transparency index.

While Indian law recognises the supervening claim of a \textit{bona fide} purchaser for value without notice, the conflicting demands of a claimant who has suffered fraud against the rights of such a \textit{bona fide} purchaser have yet to be decided by Indian courts.

As set out in this chapter, the elements required for Indian courts to develop the jurisprudence for asset tracing already exist in Indian law, and this will arguably develop as efforts to increase transparency succeed. Interestingly, in India this may well develop at the criminal law level and not as a result of civil actions.

II  LEGAL RIGHTS AND REMEDIES

i  Civil remedies

Tracing is the most sought remedy in respect of fraud under civil law. Recourse is generally available under contract law, company law and tort and trust law.

\textit{Law of tort}

Generally, the law of tort in India is similar to the law of tort in England; consequently, fraud and conversion are recognised in India as follows:

\begin{itemize}
  \item \textit{a} the act of wilfully making a false statement with the intent that the plaintiff acts in reliance on it, and which he or she does and suffers harm in consequence, is a fraud in tort;\footnote{Bradford Building Society v. Borders, 1941 2 All ER 2015.}
  \item \textit{b} fraudulent representation is an essential constituent of deceit. For a representation to be fraudulent, the person committing fraud must be aware of its falsity, or be indifferent to its truth, and have made the representation with the intent of inducing the victim to act on it and consequently cause him or her damage; and
  \item \textit{c} conversion is an act of wilful interference with movable property without lawful justification in a manner that is inconsistent with the right of another, thereby depriving the other of the use and possession of the movable.
\end{itemize}

\footnotesize

1 Justin Bharucha and Sonam Gupta are partners at Bharucha & Partners.

Those who abet a tortious act have equal liability to those who commit the wrong. A person procuring a wrongful act from another is liable if he or she knowingly induces that wrongful act. All persons who aid, abet, direct or join in committing a wrongful act are joint tortfeasors who are liable jointly and severally to the injured party.

The principal remedy for a tort is an action for damages. In certain cases, an injunction restraining any dealing in or with the property obtained by fraud may also be obtained in addition to damages. Another remedy that may be available is specific restitution of property.

**Contract law**

The principal legislation governing contracts in India is the Indian Contract Act 1872 (Contract Act). Section 19 of the Contract Act allows a party to nullify a contract in cases where consent to the contract by a person was caused by coercion, fraud or misrepresentation. Any such person may also insist that the contract be performed and that he or she be put in the position in which he or she would have been if the representations made had been true.

Fraud under the Contract Act includes acts committed by a party to the contract, acts committed with that party's connivance, or acts committed by that party's agent, with the intent to deceive another party thereto or his or her agent, or to another party thereto or his or her agent, or to induce him or her to enter into a contract.

In addition to claiming rescission of the contract on account of fraud (where the rescinding party is liable to restore any benefit received under a contract that is voidable), a claimant may also bring a civil suit for damages.

As a general rule, damages are calculated based on the position that a plaintiff would have been had the representation been true, as opposed to the position he or she is in owing to the fraud. A claim for effective restitution would likely necessitate an action to trace a specific asset.

**Corporate law**

**Fraud under the Companies Act 2013 (Companies Act)**

Section 447 of the Companies Act defines fraud to include an act or omission with the intent to deceive or gain an advantage over, or to cause injury to, a company, its shareholders or its creditors, regardless of whether or not there is in fact any wrongful gain or wrongful loss.

Section 448 of the Companies Act additionally provides that any false statements made in, *inter alia*, the financial statements, prospectus and reports of a company will be treated as a fraud against the company.

Penalties for fraud in terms of the Companies Act include imprisonment and fine.

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3 Section 17 of the Contract Act defines fraud as the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; the active concealment of a fact by one having knowledge or belief of the fact; a promise made without any intention of performing it; and any other act fitted to deceive, or any such act or omission as the law specially declares to be fraudulent. However, it is also clarified that failure to disclose a fact will not constitute fraud, unless circumstances show that an individual had a duty to speak, or that silence would amount to speech. This would be the case, for example, where parties stand in a fiduciary relationship to one another.

4 Section 17 of the Contract Act.

5 Section 64 of the Contract Act.


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Interestingly, the Companies Act also allows for a company or any of its members, creditors or contributories to complain about the wrongful possession of any of the company’s property by an officer or employee. While not strictly tracing, we believe that this is likely to provide the basis for a tracing action should facts permit an aggrieved party to seek this remedy.

The Companies Act stipulates that the fraudulent management of a company’s affairs, including fraudulent acts or misconduct on the part of the management, and the formation of a company for unlawful or fraudulent purposes, are grounds for the compulsory winding up of a company.

**Investigative authorities**

The police, the Central Bureau of Investigation, the Directorate of Enforcement, the Serious Fraud Investigation Office (SFIO), the Securities and Exchange Board of India and the National Company Law Tribunal are the authorities empowered to investigate economic offences, which may include fraud. While the SFIO was established in 2003 by the Indian government, it was established once again, after a review of its functioning, in 2015 under the Companies Act. In the year ending on 31 March 2017, the SFIO had completed 87 investigations, more than doubling the number of investigations completed in the year ending on 31 March 2015. We believe that over time it will be the principal investigative authority for matters concerning public fraud, while the police will continue to investigate economic offences against individual persons and companies.

At Indian law, for every offence committed by a company or its officers, the company and the officer in default are held liable, as far as the Companies Act is concerned, making the directors and the management of the company vicariously liable for the acts of the company subject to their involvement in the conduct of its business.

**Trust law**

The Indian Trusts Act 1882 allows beneficiaries of a trust to bring an action against trustees for a ‘breach of trust’, essentially being a breach of the trustees’ duties towards the beneficiary. This would include improper acts such as fraud on part of the trustees of an express trust or a constructive trust.

If trust property reaches the hands of a third party inconsistently with the trust’s aims, the beneficiary may institute a suit for a declaration that the property is comprised in the trust. Where a trustee has disposed of the trust property and the money or other property received can be traced into his or her hands, or the hands of his or her legal representative or legatee, the beneficiary has the same rights as he or she would to the original trust property.

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7 Section 452 of the Companies Act.
8 Section 271 of the Companies Act.
9 The SFIO is charged to investigate cases characterised by complexity and having interdepartmental and multidisciplinary ramifications; and substantial involvement of public interest to be judged by size, either in terms of monetary misappropriation or in terms of persons affected and the possibility of investigation leading to or contributing towards a clear improvement in systems, laws and procedures.
10 Section 3 of the Indian Trusts Act 1882.
11 Section 63 of the Indian Trusts Act 1882.
ii Defences under civil law

The Sale of Goods Act\(^\text{12}\) and the Transfer of Property Act\(^\text{13}\) protect a buyer who, in good faith and without notice of defect in title, purchases an asset without notice of the vendor’s defect in title to that asset. While these protections are circumscribed by the stipulations of the relevant statute, they should provide a defence to a tracing action where the asset concerned has been alienated by the counterparty to the impugned contract.

More specifically:

\(\text{a}\) an action for damages in tort would fail if the claim is not founded or is found to be malicious;

\(\text{b}\) at contract, Indian law provides for a carve out that, for consent caused by misrepresentation or by silence, fraudulent within the meaning of the Contract Act, the contract is nevertheless not voidable if the party whose consent was so caused had the means of discovering the truth;

\(\text{c}\) for breach of trust, a trustee may claim that the beneficiary has by fraud induced the trustee to commit the breach; or that the beneficiary, being competent to contract, willingly concurred with the breach, or subsequently acquiesced therein;\(^\text{14}\) and

\(\text{d}\) the Limitation Act 1963 prescribes the limitation period within which any claim may be filed, outside which time the claim will be dismissed by the courts irrespective of whether limitation is set up as a defence, unless a sufficient cause is shown for not raising the claim within the limitation period.\(^\text{15}\) If the knowledge of the right or title on which a claim is founded or any document to establish a claim is fraudulently concealed, the limitation period begins to run from the time the plaintiff discovers or could, with reasonable diligence, have discovered the fraud; or from the time the plaintiff first had the means of producing or compelling the production of a concealed document.\(^\text{16}\) In the case of a continuing tort, the limitation period continues to run at every moment during which the tort persists.\(^\text{17}\)

iii Remedies under criminal law

Offences and penalties under the Indian Penal Code 1860 (Penal Code)

The Penal Code is the principal legislation describing criminal offences, and it recognises acts of criminal conspiracy, criminal misappropriation of property, criminal breach of trust, cheating, dishonest or fraudulent removal or concealment of property, and forgery as offences.

Fraud

The Penal Code defines ‘fraudulently’ and a person is said to do a thing fraudulently if he or she does that thing with the intent to defraud, but not otherwise.\(^\text{18}\) To constitute fraud under the Penal Code, there must be deceit or an intention to deceive; and injury, actual or possible,

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\(\text{12}\) Which applies to property not being immovable property subject to the Transfer of Property Act.

\(\text{13}\) Which applies to immovable property.

\(\text{14}\) Section 23 of the Indian Trusts Act 1882.

\(\text{15}\) Sections 3 and 5 of the Limitation Act 1963.

\(\text{16}\) Section 17 of the Limitation Act 1963.

\(\text{17}\) Section 22 of the Limitation Act 1963.

\(\text{18}\) Section 25 of the Penal Code.
or the intention to cause actual or possible injury. A general intention to defraud, without the intention of causing wrongful gain to a person or wrongful loss to another, is sufficient to cause conviction. The act of deceiving a person, fraudulently or dishonestly and thereby inducing him or her to deliver any property to any person, consent that the property be retained by any person, or commit an act or omission that causes or is likely to cause damage to the property, is punishable under the Penal Code as an offence of ‘cheating’.

Dishonest misappropriation or conversion of property by a person entrusted with that property constitutes an offence of ‘criminal breach of trust’.

In sum, the act of fraud forms an essential component of several offences and the offender is liable to be proceeded against and convicted in accordance with the procedural laws prescribed in this respect.

**Offences relating to property**

Property that has come into a person’s possession through theft, extortion, robbery or criminal misappropriation, or in respect of which criminal misconduct is committed, whether within or outside India, is construed as stolen property. However, if the stolen property subsequently comes into the possession of a person legally entitled to its possession, it ceases to be classified as stolen property.

Receipt and retention of stolen property are offences under the Penal Code. Habitual receiving and selling of stolen property and the act of assistance in the concealment of stolen property are recognised as separate offences under the Penal Code.

Courts have the power to trace and identify property that they reasonably believe to be stolen by conducting an inquiry, investigation or survey and for this purpose may issue summons for the production of any document or information that they consider necessary for the purpose of carrying out the investigation.

Property identified as stolen is forfeited to the government free from all encumbrances. Where certain properties are commingled, the court will identify and specify to the best of its knowledge those properties it believes are the proceeds of crimes. When in respect of any property to be forfeited to the government the source of only part of the property is proven to be stolen, an option will be given to the person affected to pay a fine equal to the market value of that part of the property in lieu of forfeiture, upon payment of which the order of forfeiture shall be revoked.

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19 *The Indian Penal Code*, Ratanlal and Dhirajlal, 32nd edition, p. 106.
20 *Dhunum Kazee*, 1882 9 Cal 53, 60.
21 Section 410 of the Penal Code.
22 Section 411 of the Penal Code.
23 Section 412 of the Penal Code.
24 Section 105C(1) of the Code of Criminal Procedure read with Section 105D(1) of the Code of Criminal Procedure.
25 Section 91 of the Code of Criminal Procedure.
26 Section 105H(3) of the Code of Criminal Procedure.
27 Section 105H(2) of the Code of Criminal Procedure.
28 Section 105I(1) of the Code of Criminal Procedure.
29 Section 105I(2) of the Code of Criminal Procedure.
Abetment

Unless expressly provided for, an abettor of an offence, where the act abetted is committed in consequence, is punishable with the same punishment as provided for the offence, unless the Penal Code makes a provision to the contrary. The term ‘abetment’ under the Penal Code includes the abetment of an act in India that is committed outside India and that would constitute an offence if committed in India.

Procedural laws

Offences associated with fraud are essentially cognisable and the law permits police officers to investigate any cognisable offence without the order of a magistrate. The police, after recording the relevant information, may arrest the persons concerned including suspects, without a magistrate’s order, and thereafter record the relevant information and produce the detainees before a magistrate.

iv Defences under criminal law

Period of limitation

The Code of Criminal Procedure 1973 (the Code of Criminal Procedure) prescribes the period of limitation for cognisance of offences. However, limitation is prescribed only for those offences punishable with imprisonment of up to three years and irrespective of this bar, courts may take cognisance of an offence after the expiry of the limitation period in the interests of justice.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Efforts to secure assets may be taken pending the outcome of a claim and the procedures will vary depending on whether the claim is civil or criminal in nature.

Civil proceedings

The Code of Civil Procedure 1908 (Code of Civil Procedure) sets out the procedural requirements for civil actions in India and provides options to the claimant for attachment before the judgment and appointment of a receiver.

Attachment before judgment

At any stage of a dispute, if a court is satisfied that the defendant is about to dispose of or remove the whole or part of the property from the jurisdiction of the court with the intent to
obstruct or delay the execution of any decree that may be passed against the defendant, the court may order the defendant to furnish security or to show cause as to why he or she does not need to furnish security.

If the defendant fails to do as ordered, the court may order the specified property to be attached. The attachment will, however, not affect any rights of third parties against the attached property that have accrued prior to the attachment; and not bar any person holding a decree against the defendant from applying for a sale of the attached property in execution of the decree.

Indian courts have viewed granting an order for attachment as a drastic and extraordinary measure to be used sparingly and strictly in accordance with the Code of Civil Procedure when the court is satisfied that the plaintiff has a *prima facie* case and the defendant is about to dispose of his or her property.

**Appointment of a receiver**

A court may, when it considers it to be just and convenient, order:

- the appointment of a receiver of any property;
- remove from any person possession of the property;
- commit the property to the possession of the receiver; and
- confer rights in relation to the property on the receiver.

A receiver will not be appointed:

- unless the plaintiff proves *prima facie* that he or she has a very strong chance of succeeding in the suit and shows adverse and conflicting claims to the property along with some danger or emergency or loss of his or her own right demanding immediate action;
- if it has the effect of depriving a *de facto* possession, as that may cause irreparable wrong; and
- if the party making the application comes to court with unclean hands.

Additionally, the court must exercise sound and judicial discretion and must take into consideration all the circumstances of the case as may be required to provide justice.

**Criminal proceedings**

Criminal proceedings may be more efficacious, as courts and the police have broader powers with respect to seizure of property under the Code of Criminal Procedure. The courts are, *inter alia*, authorised to issue summons for the production of any documents or information as may be considered necessary for an investigation or inquiry, and to issue search warrants, including to any place outside India with which the Indian government has made arrangements. A police officer may be authorised by a magistrate to, *inter alia*, enter and search any place and take into possession any property that is reasonably suspected to be stolen, or seize any property that he or she, on his or her own accord, suspects to be stolen or that creates suspicion of an offence.

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39 Section 91 of the Code of Criminal Procedure.
40 Section 93 of the Code of Criminal Procedure.
41 Section 105 of the Code of Criminal Procedure.
42 Section 94 of the Code of Criminal Procedure.
43 Section 102 of the Code of Criminal Procedure.
Obtaining evidence

In civil proceedings, the plaintiff may apply to the court to issue summons requiring a witness to be present in court, or the court may *suo moto* summon for the same reason any person who, after the issuance of the summons, is under a duty to be present and give evidence, or produce any document in his or her possession or power, as may be directed by the court.

Where a party to a suit refuses to give evidence when required, the court may pronounce judgment against that party or make any order it deems fit.

In criminal proceedings, courts have the power to summon any person as a witness and examine them, or to examine any person in attendance,\footnote{Section 311 of the Code of Criminal Procedure.} and to recall or re-examine any person at any stage of a proceeding.

Investigators may summon any person who appears to be acquainted with the facts and circumstances of the case,\footnote{Section 160 of the Code of Criminal Procedure.} although statements recorded in investigations are of limited evidentiary value.\footnote{Section 161 of the Code of Criminal Procedure.}

IV  FRAUD IN SPECIFIC CONTEXTS

i  Banking and money laundering

**Banking**

*Central bank regulations*

The Reserve Bank of India regulates the banking sector in India and promulgated the Master Direction on Frauds dated 1 July 2016 (the Master Direction) to address, *inter alia*, frauds related to cheques and loans.

The Master Direction requires banks and financial institutions to frame policies for fraud risk management and investigation, and to report any discovered frauds. Any matter in which a criminal process has been initiated otherwise than by the police must be treated as a fraud.

The Master Direction was further amended to provide for an online, searchable central fraud registry based on instances of reported fraud. The registry is currently accessible only by banks.

The Reserve Bank of India has also released regulations limiting customer liability in unauthorised or fraudulent electronic banking transactions.\footnote{Reserve Bank of India Circular on Customer Protection – Limiting Liability of Customers in Unauthorised Electronic Banking Transactions, dated 6 July 2017.} These regulations require banks to provide mechanisms for reporting unauthorised electronic transactions and limit customer liability if the customer informs the bank of the unauthorised transaction within a specified number of days.
Negotiable instruments
Under Indian law, any person who obtains a negotiable instrument by fraud is not entitled to claim the amount due thereon. However, a holder of such an instrument in ‘due course’ who acquired the instrument for consideration without notice of fraud may make such a claim.

Money laundering
The Prevention of Money Laundering Act 2002 stipulates, inter alia, that the ‘proceeds of crime’ including any property obtained or increased in value, directly or indirectly, as a result of criminal activity related to a scheduled offence under the Act, may be seized and forfeited. Where property is taken or held outside India, ‘proceeds of crime’ also include property equivalent in value held within India.

India has reciprocal arrangements with contracting states to deal with cases of money laundering.

ii Insolvency
Pursuant to extant law, an ‘act of insolvency’ includes transfer of property that would otherwise be void because of fraudulent preference were the debtor adjudged an insolvent. The property of the insolvent vests in the official assignee, and remedies against an insolvent are available to creditors only as prescribed under law.

If during the insolvency resolution process or liquidation process of a company it is found that the business was being carried out with a fraudulent purpose or with the intent to defraud the creditors, action may be taken against the persons who were knowingly involved in carrying out the business, including requiring them to make such contributions to the assets of the company as may be deemed fit. An officer of the company may also be punished for commission of fraud prior to the insolvency commencement date.

An order of discharge operates against liabilities, save for those incurred as a consequence of fraud or as means of any fraud. A fraud by the debtor is grounds for refusal of absolute discharge.

iii Arbitration
In 2009, a division bench of the Supreme Court of India had held that an issue of fraud requires adducing and elaborate examination of evidence, and is therefore beyond the competency of an arbitrator. However, in 2014, a single judge of the Supreme Court of India held in favour of the arbitrability of fraud while noting that allegations of fraud to void an arbitration contract for delaying or avoiding reference to arbitration have become routine.

A division bench of the Supreme Court settled the position in October 2016 by holding that a mere allegation of fraud cannot be reason to set aside an arbitration agreement and the court can only set aside an arbitration agreement if:

48 Section 58 of the Negotiable Instruments Act 1881.
49 The bona fide purchaser would also be protected in respect of property discussed earlier.
50 In December 2016, the Ministry of Corporate Affairs started notifying the Insolvency and Bankruptcy Code 2016 in tranches. Part III of the Insolvency Code governing individuals is yet to be notified.
51 Sections 66 and 73 of the Insolvency Code.
52 N Radhakrishnan v. Maestro Engineers & Ors, 2009 (13) SCALE 403.
54 A Ayyasamy v. A Paramasivam & Ors, AIR 2016 SC 4675.
a the allegations of fraud are so serious that they may constitute a criminal offence;
b the allegations of fraud and resulting issues are so complex that they can be decided
only by a civil court upon the review of voluminous evidence; and
c fraud is alleged against the arbitration provision itself or the parent contract.

iv Fraud’s effect on evidentiary rules and legal privilege
In certain cases, fraud has the effect of relaxing strict evidentiary rules. Illustratively, ordinarily,
to give contents of a document that are in the possession of another party as secondary
evidence, notice must be given to the party possessing the document except if the party has
obtained possession of the document by fraud. Similarly, oral evidence, usually inadmissible,
is permitted where fraud is sought to be proven as a ground to invalidate the contract.55

Separately, while information received by lawyers during the course of their engagement
is privileged and confidential, the prohibition from disclosure ceases to apply where the lawyer
has observed any fact showing that any fraud has been committed after the commencement
of his or her engagement.56

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims
While there are no specific rules in relation to fraud claims, Indian courts generally respect
an express choice of the parties in relation to the law governing the contract provided that
the choice is ‘bona fide and legal’.57 The law chosen must relate to the subject matter of the
contract or the parties in some manner, and must not be designed to overcome some specific
prohibitions prescribed in the laws of the jurisdictions in which the parties reside or to which
the transaction in some manner relates. Consequently, where the fraud arises out of a contract
with an express choice-of-law provision, sufficient nexus needs to be established for an Indian
court to honour the provision.

ii Collection of evidence in support of proceedings abroad, and seizure of assets or
proceeds of fraud in support of the victim of fraud
In criminal proceedings, the Code of Criminal Procedure and the Fugitive Economic
Offenders Ordinance (the Ordinance) provide enabling provisions to secure the arrest of
persons and the seizure of property with respect to contracting states with which India
has arrangements.

If a court in India receives a warrant of arrest issued by a court in a contracting state for
any person requiring him or her to attend or produce any document or thing, it may execute
the warrant as if it were issued within India.

Where the government receives a letter from a contracting state requesting attachment
of property in India resulting from the commission of an offence in that state, the government
may forward the letter to an Indian court, which may authorise the tracing of the property.
If the property is believed to be concealed or disposed of by the police officer conducting the

55 Section 92 of the Indian Evidence Act 1872.
56 Section 126 of the Indian Evidence Act 1872.
57 British India Steam Navigation Co Ltd. v. Shanmugavilas Casheiv Industries and Ors (1990) 3 SCC 481.
search, the property may be seized. Further, as a result of the investigation and after hearing the affected person, if it is established that the properties are the proceeds of a crime, the court may forfeit the properties in favour of the government.

In civil proceedings, Rules 18 to 22 of Order XXVI of the Code of Civil Procedure allow a high court to issue a commission for examination of a witness situated in India upon a request made by a foreign court to obtain the evidence of that witness in any proceeding before it.

iii Enforcement of judgments granted abroad in relation to fraud claims

To enforce a foreign decree or a judgment passed by a court located in a reciprocating territory, an execution application may be filed in an Indian court having competent jurisdiction (such as a court within whose jurisdiction the immovable property of the judgment debtor is located)\(^{58}\) under the Code of Civil Procedure, and the decree of judgment may be executed in India as if it had been passed by an Indian court.\(^{59}\)

In respect of a court located in any country other than a ‘reciprocating territory’, a fresh suit upon judgment may be filed within three years of the date of the foreign judgment. The foreign suit will be treated merely as evidence against the defendant and will not be binding on the Indian courts. However, where a certified copy of the foreign judgment is produced, Indian courts will proceed on the assumption that it was passed by a court of competent jurisdiction. While considering the foreign judgment, Indian courts are not permitted to decide on the accuracy of the judgment, but only to ensure that the foreign court has applied its mind to the facts of the case and the law on the point.\(^{60}\)

iv Fraud as a defence to enforcement of judgments granted abroad

Any judgment or decree would be enforced in India unless the judgment:

\(a\) has not been pronounced by a court of competent jurisdiction or on the merits;

\(b\) on the face of it is founded on an incorrect view of international law, or has not recognised Indian law where that law is applicable;

\(c\) was obtained in proceedings opposed to natural justice or by fraud; or

\(d\) sustains a claim founded on a breach of any law in force in India.\(^{61}\)

Courts have previously held that a foreign judgment would be hit by Section 13(e) of the Code of Civil Procedure (i.e., inconclusive on account of being obtained by fraud) where the foreign court was misled or tricked, as a result of which the judgment or order came to be passed.\(^{62}\) However, the Supreme Court of India, while noting that there is an essential distinction between mistake and trickery, has observed that while a judgment cannot be set aside on the ground in the case of former, it ought to be set aside in cases of the latter.\(^{63}\)

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\(^{58}\) Illustratively, the United Kingdom, Aden, Fiji, Singapore, Malaya, Trinidad and Tobago, New Zealand, the Cook Islands (including Niue) and the Trust Territories of Western Samoa, Hong Kong, Papua and New Guinea, Bangladesh and the United Arab Emirates.

\(^{59}\) Section 44 of the Code of Civil Procedure.

\(^{60}\) *Formosa Plastic Corporation Ltd v. Ashok Chauhan & Ors* 76 (1998) DLT 817.

\(^{61}\) Section 13 of the Code of Civil Procedure.


VI CURRENT DEVELOPMENTS

The Indian government has, over the past few years, taken several measures to curb the use of ‘black money’, namely money held outside the formal economic system. In 2015, the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015 was notified to address the issue of undisclosed income and assets held outside India by Indian residents. In 2016, the Income Declaration Scheme was declared, which permitted taxpayers to disclose previously undisclosed domestic income and assets subject to payment of tax, a surcharge and a penalty with respect to the income and assets disclosed.

Asset tracing is currently neither an effective nor efficient remedy in India. According to the Reserve Bank of India’s Financial Stability Report dated 26 June 2018, the monetary value of frauds in 2017–2018 increased to more than 300 billion rupees, with public sector banks accounting for about 85 per cent of this total. However, there have been recent instances of attaching the wrongdoer’s assets, such as the ‘Punjab National Bank Scam’, involving more than US$2 billion and allegedly driven by the diamond dealer Nirav Modi, and Mehul Choksi, the prime accused. Based on a report filed by the Central Bureau of Investigation, the Enforcement Directorate registered a money laundering case against the accused for cheating Punjab National Bank into issuing fraudulent letters of understanding in connivance with certain bank officials, without complying with the procedural requirements, causing immense financial loss to the bank. The Enforcement Directorate is in the process of attaching the accused’s assets for allegedly engineering the scam. However, the accused absconded in February 2018, well before the news broke in India, and are purportedly in the United Kingdom, continuously changing locations. The Indian government is currently seeking the extradition of the accused.

Following the scam, the Reserve Bank of India decided to discontinue the practice of issuance of letters of understanding and letters of comfort for trade credits for imports into India.64

Given the increasing number of financial frauds and instances of offenders fleeing India to evade the process of law, the Ordinance was promulgated on 21 April 2018. The Ordinance essentially empowers the investigating agency (i.e., the Enforcement Directorate) to attach the properties of the fugitive economic offender that are proceeds of crime in India and abroad prior to convicting the offender for the scheduled offence and paying off the lenders by selling off the confiscated properties.

It is essential that tracing develops and is recognised as an appropriate remedy in Indian law. At this time, it is unclear whether the lead will be taken by the courts of civil law or the courts addressing criminal matters, but we hope that there will be significant progress on these matters in the near future. Arguably, in the absence of effective asset tracing, the government’s stated objective of improving transparency will remain, in large measure, unfulfilled.

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64 Reserve Bank of India Circular on Discontinuance of Letters of Undertaking (LoUs) and Letters of Comfort (LoCs) for Trade Credits dated 13 March 2018.
OVERVIEW

Ireland has a robust, well-regulated funds industry. Almost €5 trillion worth of assets are administered in Dublin, which is the largest hedge fund administration centre in the world and Europe’s leading hedge fund domicile.

Ireland is a common law jurisdiction. A written Constitution was brought into force in 1937. Legislation must be compatible with the principles laid down by the Constitution, which also sets out the fundamental rights of citizens, including property rights.

The Commercial Court is a division of the High Court that deals with high-value business disputes. Where the value of a dispute exceeds the Court’s threshold of €1 million and a party applies for entry to the Commercial Court with sufficient urgency, the Court is likely to exercise its discretion to admit the case and will then fix tight deadlines for the progression of the case. The Court has full jurisdiction to grant such emergency measures as are available under Irish law, including Mareva injunctions.

In the criminal context, there is a unit of the Irish police force dedicated to the investigation of fraud (the Garda Bureau of Fraud Investigation), a statutory agency charged with the recovery of assets representing the proceeds of crime (the Criminal Assets Bureau), and a Director of Corporate Enforcement, which has a role in prosecuting those guilty of criminal breaches of company law, although more serious offences are prosecuted by the Director of Public Prosecutions.

LEGAL RIGHTS AND REMEDIES

i  Civil remedies

Causes of action arising from a fraud may include, *inter alia*, claims for deceit, negligent misstatement, breach of fiduciary duty, breach of trust, dishonest assistance, knowing receipt, conspiracy and inducement of a breach of contract. Some of these are considered below.

Deceit

To establish the tort of deceit under Irish law, the plaintiff must prove:

\( a \)  a representation consisting of something said, written or done;

\( b \)  that the defendant was the person who made the representation;

\( c \)  that the plaintiff was the person to whom the representation was made;

\( d \)  that the representation was both false and fraudulent;

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1 Peter Bredin, Jamie Ensor and Keith Robinson are partners at Dillon Eustace.
that the representation was a material inducement to the plaintiff to act on it;
that the plaintiff did in fact alter his or her position on foot of the representation; and
that the plaintiff thereby suffered damage.²

The standard of proof to establish fraud is on the balance of probabilities,³ although the
courts have indicated that the degree of probability required should always be proportionate
to the nature and gravity of the issue to be investigated,⁴ which suggests a slightly higher
standard of proof than usually applies in civil claims. Fraudulent intent may be inferred from
the circumstances.⁵ Recklessness by the party making the representation as to whether the
representation is true or false may be sufficient to establish fraud.⁶

An innocent principal will be liable in deceit for a representation made by an agent that
the agent knows to be false and that was made with actual or ostensible authority. Similarly,
an innocent employer will be liable for deceit by a dishonest employee if done within the
course of employment where the employee has actual or ostensible authority to act. However,
an employer will have no liability for unauthorised statements.⁷

A defendant who is found guilty of the tort of deceit will be liable to compensate the
plaintiff in damages for the plaintiff’s losses. The remoteness criterion applied is the ‘direct
consequences’ rule, rather than the more limited ‘reasonably foreseeable’ rule that applies to
actions in negligent misrepresentation.⁸

In Irish law, it is possible in certain circumstances to pierce the corporate veil and for
a director of a company to be held personally liable because of his or her close proximity to
a tortious act.⁹

Breach of fiduciary duty

A fiduciary must account for unauthorised profits generated from his or her fiduciary
position, or in circumstances involving a conflict between his or her duty and his or her
interest. To establish liability to account, there must be a connection between the fiduciary
position and the profit made.¹⁰

The Companies Act 2014 regulates the fiduciary duties of company directors. It provides
that the duties set out therein are owed to the company alone. Directors’ duties include:
a duty to act honestly and responsibly in relation to the conduct of the affairs of
the company;
a duty to exercise their powers only for purposes allowed by law;
a duty not to use the company’s property, information or opportunities for their own
or anyone else’s benefit unless expressly permitted; and

² Harlequin Property (SVG) Limited and Harlequin Hotels and Resorts Limited v. Padraig O’Halloran and
Finance v. Charlton [1979] IR 149.
⁸ Northern Bank Finance v. Charlton [1979] IR 149.
A director who acts in breach of duty shall be liable to account to the company for any gain that he or she makes directly or indirectly from the breach of duty, or to indemnify the company for any loss or damage resulting from that breach, or both.

Regarding untrue statements in a prospectus, in the context of fraud that induces the sale of a company at an inflated price, the Companies Act 2014 provides for the liability of a number of persons to pay compensation to all persons who acquire any securities on the faith of a prospectus for the loss or damage they may have sustained by reason of any untrue statement included therein or any omission of information required by EU prospectus law to be contained in the prospectus. Such persons include the issuer of the securities and every person who is a director of the issuer at the time of the issue of the prospectus. Criminal offences are also provided for under the Companies Act 2014.

**Dishonest assistance**

A party who dishonestly assists in a breach of trust or fiduciary obligation will be liable in equity to make good the loss to the beneficiary. To establish the assister's liability, the state of mind of the trustee is not required to be proven to be dishonest.

**Conspiracy**

The tort of conspiracy under Irish law occurs where two or more people act together with the predominant purpose of damaging another, even if the act done to the injured party would be lawful if done by an individual (lawful means conspiracy), or where two or more persons agree or combine to carry out a lawful purpose by unlawful means (unlawful means conspiracy). The plaintiff must suffer loss as a result of the conspiracy to succeed in an action.

**Inducement of breach of contract**

An accessory to a fraud may be liable for the tort of inducement of breach of contract. The defendant must have some knowledge of – or be wilfully blind as to – the existence and terms of the contract and some level of subjective intent to bring about the breach. Inducement involves active persuasion or enticement of the contracting party to break the contract (i.e., more than information or advice).

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11 Companies Act 2014, Section 228.
12 Companies Act 2014, Section 1349.
**Knowing receipt**

Liability for knowing receipt of the proceeds of fraud may be established where the recipient had actual or constructive knowledge of the breach of trust. The position in this regard is therefore different from the current position under English law, which requires an element of unconscionability on the part of the recipient to be demonstrated for liability to attach.

A person in receipt of money or property can be obliged to effect restitution to another where it would be unjust for him or her to retain it.\(^\text{16}\)

**Tracing**

In addition to the various remedies that may follow a finding of liability in cases of tort or breach of contract, such as damages, injunctive relief and specific performance, there are additional remedies that may be ordered in favour of the victim of a fraud to enable that party to recover his or her property.

The process of tracing has long been accepted by the Irish courts as a means of identifying assets that have been transferred by one party to another for the purpose of making a proprietary claim to those assets even where mixed with other assets, such as in a bank account. It is necessary that the person received the money as trustee or as a person occupying a fiduciary relation to another.\(^\text{17}\) A person who is entitled to any equitable interest in any property, real or personal, will be entitled to trace the property, for so long as it continues to exist and even though it may have been mixed with other property, into the hands of anyone in a fiduciary relationship with him or her and into the hands of any third party, except a *bona fide* purchaser for value without notice of the fiduciary relationship.\(^\text{18}\)

The entitlement to trace into an overdrawn bank account has not yet been considered by the Irish courts.

**Constructive trust**

The Irish courts will, in appropriate circumstances, impose the remedy of a constructive trust to satisfy the demands of justice and good conscience, preventing the trustee from acting in breach of good faith\(^\text{19}\) and enabling the plaintiff to claim a proprietary interest in the property. If the imposition of such a trust is likely to prejudice other innocent parties, for example, other creditors in the liquidation of a company, it may be necessary for the plaintiff to prove fraud on the part of the defendant.\(^\text{20}\)

**Criminal remedies**

The most relevant offences under Irish law in the context of fraud are those provided for by the Criminal Justice (Theft and Fraud Offences) Act 2001, as amended, and include theft, making a gain or causing loss by deception, false accounting and forgery.

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\(^{16}\) *Dublin Corporation v. Building and Allied Trade Union* (1996) 2 ILRM 547, Supreme Court.

\(^{17}\) *Re Shannon Travel Ltd*, Unreported, High Court, 8 May 1972.


\(^{20}\) *Re Custom House Capital Ltd* [2013] IEHC 559.
Where property has been stolen and a person is convicted of an offence relating to the theft, the court convicting the person may make the following orders:

\(a\) an order requiring anyone having possession or control of the property to restore it to any person entitled to recover it from the convicted person. This includes property in a state that is a designated state for the purposes of the Criminal Justice (Mutual Assistance) Act 2008;

\(b\) on the application of a person entitled to recover from the convicted person any other property directly or indirectly representing the stolen property, an order that other property to be delivered or transferred to the applicant; or

\(c\) an order that a sum not exceeding the value of the stolen property shall be paid, out of any money of the convicted person that was taken out of his or her possession when arrested, to any person who, if that property were in the possession of the convicted person, would be entitled to recover it from him or her.\(^{21}\)

**Defences to fraud claims**

The limitation period for claims in contract and tort is generally six years from the date of accrual of the cause of action.\(^ {22}\) A lack of knowledge will not postpone the limitation period: the date of the plaintiff’s knowledge of his or her cause of action is only relevant to personal injuries claims. However, where the action is based on the fraud of the defendant or his or her agent, or the cause of action has been concealed by fraud, the period of limitation will not begin to run until the fraud has been discovered or could, with reasonable diligence, have been discovered.\(^ {23}\)

No period of limitation under the statute of limitations applies to an action against a trustee or any person claiming through him or her where the claim is founded on fraud or a fraudulent breach of trust to which the trustee was party, or the claim is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his or her own use.\(^ {24}\) However, the equitable defences of laches and acquiescence may be raised as defences to such an action.

As matters stand under Irish law, the limitation period for claims against parties guilty of knowing receipt or dishonest assistance is not clear.\(^ {25}\)

**III SEIZURE AND EVIDENCE**

**i Securing assets and proceeds**

**Mareva injunctions and freezing orders**

Irish courts will grant a freezing order, a *Mareva* injunction, or both, in appropriate circumstances to prevent the disposal of assets and to require their preservation.

Such orders are often sought on an *ex parte*, interim basis, meaning that a high degree of disclosure of material facts is required on the part of the plaintiff.

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\(^{21}\) Criminal Justice (Theft and Fraud Offences) Act 2001, Section 56, as amended.

\(^{22}\) There are exceptions, such as a claim against the estate of a deceased person, for which the limitation period is two years for causes of action accruing prior to death.

\(^{23}\) Statute of Limitations 1957, Section 71.

\(^{24}\) Statute of Limitations 1957, Section 44.

A *Mareva* injunction may be granted before or after judgment where it is feared that the defendant will attempt to remove, conceal or dissipate assets prior to enforcement of a judgment.

If the plaintiff contends that he or she is the owner of assets held by the defendant, the courts may grant freezing orders prohibiting the defendant from disposing of the asset pending trial and preventing anyone on notice of the order from dealing with it.

The court has the power to make such ancillary orders as may be required to ensure that an injunction that it has granted is effective. Such ancillary orders may in appropriate circumstances be made on an *ex parte* basis and may include restraining reporting of the injunction, discovery of documents, disclosure by the defendant of his or her assets, cross-examination of defendants, tracing orders, the appointment of a receiver over assets and an order requiring a bank to disclose details of bank accounts to facilitate a tracing order in cases of fraud.

Where warranted by the facts, the court will grant an injunction to restrain the dissipation by the defendant of extraterritorial assets. An application for recognition of such an injunction may be required in the local jurisdiction.

The granting of a *Mareva* injunction is at the discretion of the court. There are a number of matters to be proven by the plaintiff:

- the plaintiff has a substantive cause of action;
- he or she has a good arguable case;
- the defendant has assets;
- there is a risk that the defendant will dissipate assets to evade his or her obligations to the plaintiff. The intention of the defendant is key in Irish law. As direct evidence of a defendant’s intention to move assets out of the jurisdiction will rarely be available at the interlocutory stage, the court will consider the circumstances, such as the nature of the alleged wrongdoing, the defendant’s experience of moving assets and the type of assets (liquid or otherwise); and
- the balance of convenience favours the grant of the injunction.

In addition, the behaviour of the parties will be a factor considered by the court.

As with any interim or interlocutory injunction, the plaintiff must give an undertaking to pay damages to the defendant should it transpire at trial that the injunction should not have been granted and that the defendant suffered loss as a result of the injunction. The plaintiff will also be required to pay the reasonable costs and expenses of third parties in complying with the order.

As an injunction is an equitable remedy, the application may be refused if any of the equitable maxims apply. So, for instance, if there has been delay on the part of the plaintiff, or if the plaintiff comes to court with unclean hands, the court may exercise its discretion to refuse the injunction.

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28 As set out by the Supreme Court in *Caudron v. Air Zaire* [1985] IR 716.
The Companies Act 2014 provides for the granting of an order restraining a director or other officer of a company, or the company, from removing his or her, or the company's, assets from the state, or reducing the assets below a specified amount. Creditors are among the parties who have standing to seek such an order.29

After judgment has been obtained, a creditor may be able to obtain a garnishee order in respect of a debt owed by a third party to the defendant, and may also be entitled to appoint a receiver to property in which the defendant has an interest.

The High Court has power under the Proceeds of Crime Act 1996, as amended, to make orders for the preservation or disposal of property deemed to be proceeds of crime. As applications for such orders may only be made by the Irish police, the Revenue Commissioners or the Criminal Assets Bureau, this legislation may not be of assistance to a party seeking urgent pretrial relief and wishing to have some control over the timing and manner of the application. Instead, such a party would be advised to make its application for interim relief pursuant to the inherent jurisdiction of the court, or under the Companies Act 2014, or both, if appropriate.

ii Obtaining evidence

Discovery

In Irish civil litigation procedure, the parties are entitled to seek disclosure from each other of all documents relevant to the issues in dispute (the process known as discovery). In certain circumstances, discovery may also be sought from parties who are not involved in the proceedings. Typically, discovery takes place after the pleadings have been exchanged. Therefore, a party requiring urgent disclosure of documents, or who is concerned that documents or other evidence may be at risk of being destroyed, should consider one of the orders described below, which are only available in exceptional cases and which are subject to strict requirements.

Search order (Anton Piller order)

In exceptional cases, the court will grant an order known as an Anton Piller order permitting a plaintiff to take evidence from a defendant's premises to preserve it. The plaintiff will not be permitted by this order to forcibly enter premises. He or she requires the defendant's consent to enter the premises, which, if refused, may constitute contempt of court by the defendant.

The granting of an Anton Piller order is at the court's discretion. A number of matters must be proven before the court will consider granting such an order, as follows:

a the plaintiff has a substantive cause of action;
b he or she has a strong case;
c there must be clear evidence that the defendant has incriminating documents or materials in its possession and that there is a real possibility that these will be disposed of or destroyed; and

d actual or potential damage, for which damages would not be an adequate remedy.30

29 Companies Act 2014, Section 798.
The party seeking an *Anton Piller* order will be required to give a number of undertakings, including an undertaking as to damages, and to explain the meaning of the order to the party on whom it is served. The defendant will be entitled to obtain legal advice on an urgent basis and may seek to withhold documents that incriminate him or her.

**Disclosure order (Norwich Pharmacal order)**

A party wishing to ascertain the identity of a wrongdoer may be able to obtain a *Norwich Pharmacal* order requiring a third party to disclose that information. Such an order might, for example, be made against an internet service provider to disclose the owner of an IP address.

**Schedule of assets**

As an ancillary order to assist in giving effect to *Mareva* relief, a defendant can be compelled to disclose a schedule of his or her assets in an affidavit.

**Disclosure by banks**

Under the Bankers’ Books Evidence Acts, a party to proceedings may obtain an order that he or she may inspect and take copies of entries in a banker’s book for the purposes of the proceedings. Such an order can be made at the interlocutory stage where the plaintiff can show wrongdoing. As with any of the exceptional orders discussed in this section, the court will exercise great caution in deciding whether to grant this type of order, particularly if the account belongs to a person who is not a party to the proceedings.

**Travel restrictions (Bayer order)**

If there is a concern that a defendant will leave the country with the intention of frustrating the administration of justice or an order of the court (e.g., a *Mareva* injunction), the court may, in extremely exceptional circumstances, grant an order restraining a party from leaving the country and compelling him or her to deliver up his or her passport.

**IV FRAUD IN SPECIFIC CONTEXTS**

i **Banking and money laundering**

**Cheques: banks’ liability to customers**

Where a cheque is payable to a person who endorsed it to a customer of the paying bank and the bank ought to have raised concerns regarding the cheque, the paying bank may be liable for negligence if it did not make appropriate enquiries.

However, a paying bank that in good faith pays on a cheque to a person not entitled to the payment can avail of a number of statutory defences, for example under the Bills of Exchange Act 1882. However, these defences are not available where the cheque has been forged or altered without authorisation. In that event, the bank has no valid mandate from its customer and may be liable to its customer for a payment on foot of the forged cheque. The bank may have a right of action against the payee to recover the payment because of
a mistake of fact. In Irish law, if the payee is insolvent, where monies are paid by mistake into the account of a company, the monies do not form part of the assets of that company at the date of its liquidation and there may be a right to trace those monies.\(^{31}\)

A collecting bank may be liable to the true owner of a cheque in the tort of conversion or to account for money had and received where it collects the proceeds of a cheque for someone other than the true owner. In such cases, the bank can avail itself of a statutory defence if it has acted in good faith and without negligence, judged by the standard of the reasonable and careful banker. A failure by the bank to meet its obligations in respect of opening accounts and knowing its customers\(^{32}\) may deprive the bank of this statutory defence.

When holding items deposited with it for safe custody, a bank also owes a duty to its customers that the items are not released to the wrong person.

**Payment orders: banks’ liabilities to customers**

Banks are expected to comply strictly with their customers’ payment orders by issuing corresponding payment orders that precisely match that of their customer. In limited circumstances where a bank is permitted to refuse a payment order, the bank must inform the customer at the earliest opportunity that it is refusing the payment order and provide an explanation, to the extent possible. Banks are also entitled to reject a payment order where the customer has breached the agreed terms and conditions governing the account, or where making the payment would be considered unlawful, for example, in the case of suspected fraud. In general, a bank must refrain from executing a payment instruction where it believes (acting reasonably) that the instruction is an attempt to misappropriate funds.

The Payment Services Regulations (PSRs) provide that a payment transaction is authorised only if the customer has consented to its execution and where the consent is in a form agreed between the customer and the bank. If a third party obtains a customer’s details or payment device and sends a payment instruction to the bank, the obligation on the bank to assess whether it had the consent to process the transaction would be dependent on the terms of the contract between the parties.

Where fraudulent payment instructions are given to a bank and a bank acts in accordance with those instructions, recent cases have held that a customer’s bank will not be liable for facilitating the defrauding of its customers, so long as it follows established banking practice.\(^{33}\) The courts also recognise that where a bank is dealing with a huge number of daily transactions, it could not be expected to easily spot signs of fraudulent activity.\(^{34}\) While many of the cases in this regard are English cases, they are likely to have a persuasive effect in the Irish courts. Banks are generally liable to customers for frauds that do not involve the customer authorising payment, for example, where a card is stolen or the customer is the subject of a payment scam.


\(^{32}\) Under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.


\(^{34}\) *Singularis Holdings Limited (in official liquidation) v. Daiwa – Capital Markets Europe Limited* [2017] EWHC 257 (CH).
Customer’s duty of care not to facilitate fraud

A customer also owes its bank a duty of care not to allow fraud, including the duty to refrain from drawing cheques or other payment orders in such a manner as to facilitate fraud or forgery and the duty to inform the bank of any forgery of a cheque as soon as he or she becomes aware of it.

The PSRs provide that a bank’s customer would be liable for all losses arising because of an unauthorised payment transaction if the losses were incurred by the customer because of the customer acting fraudulently or by failing, intentionally or by acting with ‘gross negligence’, to use any payment device in accordance with its terms and to notify the bank without undue delay (and no later than 13 months after the debit date) of the loss, theft, misappropriation or unauthorised use of a payment device, or failing to take reasonable steps to keep the personalised security features of a payment device safe.

Customers’ duty to banks

A victim of a fraud should bear in mind his or her duties as a customer to his or her bank. These duties include the duty to inform the bank of any forgery of a cheque purportedly drawn on his or her account as soon as he or she becomes aware of it, a duty to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery, and a duty to keep secure his or her account details, as well as any additional duties imposed under the customer’s contract with the bank.

Money laundering

The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, which implemented the Third Money Laundering Directive, created a range of offences relating to money laundering and imposed extensive duties on banks and their employees in relation to customer due diligence and the reporting of suspicious transactions.

In addition to criminal sanctions, civil liability in the context of money laundering may also arise for a bank on the basis of knowing assistance or knowing receipt. The Irish courts have said that in the context of competing duties of the banker to effect an order and to combat fraud, a banker must refrain from executing an order if and for so long as the banker is put on inquiry in the sense that he or she has reasonable grounds for believing that the order is an attempt to misappropriate a customer’s funds. The bank may be liable for knowing receipt if it can be proven to have constructive knowledge of the source of the funds or to have acted with a lack of probity in receiving the monies.

Information systems

The Criminal Justice (Offences Relating to Information Systems) Act 2017 commenced on 12 June 2017. The principal purpose of the Act is to transpose the EU Directive (2013/40/EU) on attacks against information systems. The Act creates five offences:

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36 As amended by the Criminal Justice Act 2013.
Ireland

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a unauthorised access of information systems (e.g., hacking);
b interference with information systems or with data on such systems;
c interference with data without lawful authority;
d interception of transmission of data to or from information systems; and
e the use of tools to facilitate the commission of these offences.

This new legislation, which provides for significant sentences, will also be relevant in the context of electronic-based fraudulent activities.

ii Insolvency

Transaction having the effect of a fraud on creditors

Under Irish law, when a company is insolvent or near insolvency, its assets are held for the benefit of its creditors.

The Companies Act 2014 provides for the reversal of transactions that have the effect of a fraud on the company, its creditors or members. Where either a receiver of the property of a company is appointed, the company is placed into examinership or a liquidator is appointed and it can be shown to the satisfaction of a court that any property of the company was disposed of and that the effect of the disposal was to perpetrate a fraud on the company, its creditors or its members, then a court may order any person who appears to have the use, control or possession of the property or the proceeds of the sale or development of it, to deliver it or pay a sum in respect of it to the receiver, examiner or liquidator, as the case may be. In deciding whether it is just and equitable to make such an order, the court shall have regard to the rights of persons who have bona fide and for value acquired an interest in the property that is the subject of the application.39

The court will not require that a liquidator or creditor challenging a transaction prove intent to defraud creditors, rather, they will only have to show that the effect of the transaction was to perpetrate a fraud. A court is unlikely to regard a transaction as having the effect of a fraud if the transaction was concluded on market terms and not at an undervalue so that the balance sheet of the company was not immediately adversely impacted by the transaction.

Fraudulent and reckless trading

If, during the course of the winding up of a company or while a company is in examinership, it appears that any officer of the company was knowingly a party to reckless trading or intended to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose, the court may – on the application of the liquidator, the examiner of the company, a receiver of property of the company or any creditor – declare that officer to be personally responsible, without any limitation of liability, for the liabilities of the company.40 To have standing to make this application to the court a creditor must have suffered loss or damage as a consequence of the fraudulent or reckless trading. One of the principal challenges for successfully pursuing a fraudulent-trading action is that it requires proof of actual dishonesty involving ‘real moral blame’.41

39 Companies Act 2014, Sections 443, 557 and 608.
40 Companies Act 2014, Section 610.
41 Maughan J, In Re Patrick & Lyons Limited [1933] Ch 786.
**Misapplication of company funds**

If, during the course of winding up a company, it appears that any person who has taken part in the formation or promotion of the company, or any past or present officer of the company or its holding company, has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any misfeasance or other breach of duty or trust in relation to the company, the court may compel that person to repay or restore the money or property or any part of it respectively with interest at such a rate as the court thinks just, or to contribute such a sum to the assets of the company by way of compensation as the court thinks just. This application may be made by the liquidator, any creditor or the Director of Corporate Enforcement.42

**Examination**

In the context of a liquidation, the High Court has extensive powers to summon before it persons having information about a company’s affairs or property. Such persons may be summoned for examination and required to produce records.43

**Inspections**

Under Part 13 of the Companies Act 2014, the court may appoint inspectors with wide powers to investigate the affairs of a company. This appointment may be made by the court on the application of a creditor, a director, not less than 10 members or one member holding one-tenth or more of the paid-up share capital of the company or the Director of Corporate Enforcement.

iii **Arbitration**


**Interim measures**

Under the 2010 Act, the High Court has the same power of issuing interim measures in relation to arbitration proceedings as it has in relation to proceedings before the Irish courts, irrespective of whether their place is in Ireland.

Under the Model Law, unless otherwise agreed, the arbitral tribunal can grant interim measures to include providing a means of preserving assets out of which a subsequent award may be satisfied. These powers under the Model Law may be of less practical use than an application to the Court, particularly if relief is sought against a party that is not a party to the arbitration agreement (e.g., the debtor's bank).

An interim measure shall be recognised in Ireland as binding, and enforced upon application to the High Court, irrespective of the country in which the interim measure was issued. Enforcement may only be refused for the reasons set out in the Model Law (e.g., public policy).

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42 Companies Act 2014, Section 612.
43 Companies Act 2014, Section 671.
Setting aside an arbitral award on grounds of fraud

Under the 2010 Act and the Model Law, there are limited grounds upon which an arbitral award may be set aside. In the case of fraud, it would be necessary to argue that the award is in conflict with the public policy of the state. A party who wishes the Court to set aside an arbitral award on this ground has 56 days from the date on which the circumstances giving rise to the application became known or ought to have become known to apply to the High Court.44

iv Fraud’s effect on evidentiary rules and legal privilege

Legal advice privilege and litigation privilege will not attach to communications if their purpose is to conceal crime or fraud, or if they are in furtherance of the same. This is the position whether the lawyer is aware of the criminal or fraudulent purpose of the communication or advice or not. To persuade a court that privilege does not attach, it will not be sufficient to allege fraud, and some prima facie evidence that the allegation has a basis in fact must be given.45

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

Jurisdiction under the Brussels Recast Regulation

The basic rule under the Brussels Recast Regulation (the Regulation) is that persons domiciled in a Member State shall be sued in the courts of that Member State and may only be sued in the courts of another Member State under the rules provided in the Regulation.

One such rule is that in matters relating to tort (e.g., deceit), a person domiciled in a Member State may be sued in the courts of the place where the harmful event occurred or may occur. Where there is a claim for damages or restitution based on an act giving rise to criminal proceedings, a person may be sued in the court seised of those proceedings provided that court has jurisdiction under its own law to entertain civil proceedings.

Article 25 of the Regulation provides that if the parties to a dispute have agreed that a court of a Member State is to have jurisdiction to settle the dispute, then regardless of the parties’ domicile that court shall have jurisdiction, which shall be exclusive unless the parties have agreed otherwise.

Under the Regulation, an application may be made to the Irish courts for such provisional (including protective) relief as may be available under Irish law, even if the courts of another Member State have jurisdiction over the substance of the dispute. The Regulation also provides for enforcement in one Member State of a judgment given in another Member State ordering a provisional or protective measure.46

The Regulation applies to Irish judgments and orders, such that, for example, a Mareva injunction or freezing order granted by an Irish court should be recognised without special procedure and enforced in a summary manner by the courts of a fellow Member State.

44 Arbitration Act 2010, Section 12.
46 Article 42 of the Regulation.
Jurisdiction at common law

Common law principles apply where the defendant is not domiciled in a Member State. Under Irish law, the general principle is that service of process is the foundation of the court’s jurisdiction. An individual may be subject to the jurisdiction of the Irish courts even if he or she is only in Ireland for a short time and the claim has no connection with Irish law, provided he or she is properly served while in Ireland. There are a number of exceptions to this.

If a defendant is not in the state and cannot be served, the proceedings may be so closely connected with Ireland or Irish law that the Irish courts should assume jurisdiction. The Rules of the Superior Courts provide an exhaustive list of the circumstances in which Irish court proceedings may (at the court’s discretion) be served on a person who is outside Ireland. One such category is where the action is founded on a tort committed within the jurisdiction. A further category is where any injunction is sought as to anything to be done within the jurisdiction. Such an injunction must, however, be sought as a primary relief and not an ancillary relief. In practice, this means that an Irish court is likely to refuse jurisdiction where Mareva-type relief is sought in respect of assets within Ireland in circumstances where the defendant has no other connection with Ireland.\(^\text{47}\)

Collection of evidence in support of proceedings abroad

Criminal context

The Criminal Justice (Mutual Assistance) Act 2008 (the 2008 Act) gave effect to a number of international agreements between the state and other states relating to mutual assistance in criminal matters, including the European Conventions on Mutual Assistance in Criminal Matters of 1959 and 2000 and the EU–US Agreement on Mutual Legal Assistance. The 2008 Act provides for, *inter alia*, the granting of account information orders and account monitoring orders in respect of bank accounts in financial institutions in Ireland for the purpose of a criminal investigation in another jurisdiction (if that jurisdiction is a designated state).

Civil context

Regulation (EC) No. 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters has been given effect in Ireland by the European Communities (Evidence in Civil or Commercial Matters) Regulations 2013. These regulations and the associated court rules permit the Circuit Court to issue a witness summons to require attendance of the witness for examination under oath before the Court, and to make any order, where relevant, for the production by any person of any document or object referred to in the order.

The Foreign Tribunals Evidence Act 1856 governs the taking of evidence in Ireland for proceedings in the courts of a state that is not a Member State of the EU, and involves the use of letters rogatory. Ireland is not a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and Irish courts therefore do not have jurisdiction to hear applications to take evidence pursuant to this Convention.

Seizure of assets or proceeds of fraud in support of the victim of fraud

See Section III.i, in respect of interim relief, and Section VI.i, in relation to the international dimension.

\(^{47}\) *Caudron v. Air Zaire* [1985] IR 716.
In the criminal context, the 2008 Act provides for the recognition and enforcement in Ireland of a provisional order made in criminal proceedings in a designated state preventing the destruction or disposal of property that could be subject to confiscation or evidence in those proceedings.

iv Enforcement of judgments granted abroad in relation to fraud claims

Judgments relating to civil and commercial disputes are enforceable in Ireland. The criteria to be met and procedures to be followed depend on the location of the court in which the judgment was granted. If granted by the courts of a Member State of the EU, recognition and enforcement is governed by the Regulation. The Lugano Convention applies between Iceland, Norway and Switzerland and Member States of the EU. Recognition and enforcement of judgments from non-EU courts is less straightforward and is governed by common law principles.

Pursuant to the 2010 Act, the New York Convention in relation to the enforcement of foreign arbitral awards has the force of law in the state.

v Fraud as a defence to enforcement of judgments granted abroad

One of the limited grounds upon which a judgment from the court of a Member State may be refused recognition and enforcement by an Irish court under the Regulation is where recognition would be manifestly contrary to the public policy of Ireland. The use of the word ‘manifestly’ in the Regulation is considered to have further narrowed the availability of this ground for non-recognition.48

In cases to which the Regulation does not apply, a foreign judgment is impeachable for fraud on the part of the party in whose favour judgment is given or fraud on the part of the court pronouncing the judgment.49

In the context of arbitration, Article 36 of the Model Law permits the court to refuse recognition or enforcement where this would be contrary to the public policy of the state. Corruption, bribery and fraud are likely to constitute grounds for refusing to recognise a foreign arbitral award.50

VI CURRENT DEVELOPMENTS

It remains to be seen what the implications of Brexit will be for the recognition and enforcement in the United Kingdom of judgments obtained in Ireland, and the assistance that Irish courts can provide in aid of proceedings in the United Kingdom.

The Supreme Court has recently decided that funding of a plaintiff by a professional litigation funder is a breach of the laws prohibiting maintenance and champerty. In light of this finding, litigation funding will not be possible in Ireland until the introduction of appropriate legislation.

Since January 2017, it has been possible in certain cases to apply for a European account preservation order pursuant to Regulation (EU) No. 655/2014. The test for this is broadly similar to the test for a Mareva injunction. An applicant may apply to the courts of

50 Travaux Préparatoire to the Model Law.
one Member State for an order freezing funds of a defendant held in another Member State up to a specified amount without the need for any further order in the latter Member State. Such an order may be granted before proceedings are initiated, as well as after judgment has been obtained.

Finally, the Law Reform Commission is currently examining potential gaps in Irish law on fraud offences. In early 2016, it published an issues paper seeking views on several matters, including whether offences similar to mail fraud and wire fraud offences in the United States should be enacted in Ireland. It is likely to be several years before any legislation that may be recommended by the Commission is enacted.
I OVERVIEW

A relevant peculiarity of the Italian legal system to be taken into account when selecting the civil or criminal route to asset recovery is the possibility of the victim – in the event that a crime has caused damage – bringing a civil action for restitution and damages directly within the criminal proceedings, through ‘standing as civil party’ in such a criminal proceeding. This has significant advantages, including the possibility of benefiting from the actions and powers of public prosecutors (obtaining documentary and witness evidence, tracing tainted funds, etc.), and the possibility of obtaining from the criminal court (even at a pretrial stage) a criminal ‘conservative seizure’; this is the usual measure employed to protect the assets of the state or of the victim of the crime, consisting of the freezing of the defendant’s assets to prevent their dissipation (with entitlement to be satisfied with precedence on such assets in cases of conviction and confiscation).

Although funds or assets deriving from fraud (or other crime) are not typically channelled to Italy’s jurisdiction to escape recovery, money laundering legislation is very effective in the Italian system and provides powerful tools for obtaining recovery in terms of both criminal and administrative sanctions; these sanctions can lead to the freezing of tainted funds and to the seizure or tracing of relevant banking documentation (see Section II.i and Section IV.i).

Significant cases of high-profile fraud, and related procedures for asset tracing and recovery, have taken place in Italy in recent years, such as the leading case concerning the collapse of the Parmalat group, which is reported on further below.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Civil remedies

The main cause of action in civil asset recovery cases is civil tort, defined by the law as ‘any fact intentional or negligent which causes unlawful damage to others’, and which obliges the author to pay damages.\(^1\) Often, the mentioned cause of action may concur with the one of

\(^1\) Roberto Pisano is managing partner, Valeria Acca is associate and Chiara Cimino is counsel at Studio Legale Pisano.

\(^2\) Article 2043 of the Civil Code.
breach of contract,\(^3\) and the two actions may also be exercised in parallel. Proprietary claims have a limited relevance in the typical scenario of fraudulent behaviours affecting money or other fungible goods.

In a civil recovery action, the typical remedy is restitution (where possible) and damages.

The civil action for damages ordinarily has a five-year statute of limitations from the moment of the tort, but if the act also represents a criminal offence, and the statute of limitations for the criminal offence is longer, then the longer criminal statute of limitations period applies.\(^4\) In addition, if the civil action is brought during the longer criminal statute of limitations period, this qualifies as an interruption of the civil statute of limitations, and the original five years provided for by civil law recommences running from the moment in which the decision on the criminal proceeding becomes final.

In the course of the civil trial, the court, at the request of the party, can order a third party (including law enforcement and regulatory agencies) to produce documents or other things that it considers necessary to decide the case.\(^5\) However, a party cannot request the court to order a third party to disclose a certain document possessed by it, unless there is no way for the party to obtain it directly.

Discovery as known in common law jurisdictions is not provided for by the Italian legal system: accordingly, the parties have no duty of disclosure unless the court so orders.

According to the main legal principle regarding the burden of proof, anyone who claims a certain right or entitlement has to prove the underlying facts and the grounds for it; in turn, anyone who objects to the aforesaid right or entitlement has to prove the facts on which the objection is based.\(^6\) For the taking of evidence (interrogatories, testimonies, technical expertise, etc.), see Section III.ii.

A summary proceeding has recently been introduced in the Italian system by Law No. 69/2009.\(^7\) This route can be selected by the claimant in the event the dispute falls under the jurisdiction of a single judge (this covers a wide range of actions) and not of a panel of judges. The proceeding is identical to the ordinary one for the first stage – the filing of the writ of summons by the claimant and the first written response by the respondent – but it is much more concise during the stage of the taking of evidence. If, however, the judge evaluates that the proceeding requires an ordinary taking of evidence and declares so by a non-appealable order, the proceeding continues in accordance with the ordinary rules.

Another type of summary proceeding is represented by the ‘injunction proceeding’,\(^8\) which can be selected by creditors of a cash amount of money or of a determined quantity of fungible goods who have written evidence of it. If proper evidence is provided, the judge issues \textit{ex parte} an order of injunction to the debtor to pay or deliver the relevant goods within a certain deadline (usually 40 days). Within the same deadline, the debtor is entitled to challenge the injunction, in which case the proceeding will continue in a fully adversarial way in accordance with the ordinary rules. In the absence of such a challenge, and in cases of non-compliance with the injunction, the procedure for its enforcement can start.

\(^3\) Article 1218 et seq. of the Civil Code.
\(^4\) Article 2947 of the Civil Code.
\(^5\) Article 210 et seq. of the Code of Civil Procedure.
\(^6\) Article 2697 of the Civil Code.
\(^7\) Article 702 \textit{bis} et seq. of the Code of Civil Procedure.
\(^8\) Article 633 et seq. of the Code of Civil Procedure.
Criminal remedies

As explained above, the most effective route to trace and recover assets is often the criminal one, because of the possibility of benefiting from the actions and powers of public prosecutors (for obtaining documentary and witness evidence, tracing tainted funds, etc.), and to obtain a court order granting the freezing of the defendant’s assets to prevent their dissipation (with entitlement to be satisfied with precedence on the assets in cases of conviction and confiscation).

Public prosecutors are responsible for the investigation and prosecution of all criminal offences, and in that context they also identify and trace related proceeds of crime, and request their freezing and later confiscation by the competent judge or court. Public prosecutors are not part of the government but are professional magistrates, and their duty to bring criminal prosecutions is compulsory, not discretionary (unless they find that no crime has been committed and request dismissal from a competent judge).

The positive effects of the victim bringing a civil action for restitution and damages directly within criminal proceedings through ‘standing as civil party’ in such a criminal proceeding can be maximised by using the statute of the money laundering criminal offence, provided for by Article 648 bis of the Criminal Code. This statute punishes with imprisonment from four to 12 years anybody who, with knowledge and intent, substitutes or transfers money, goods or other things of value deriving from an intentional crime, or carries out, in relation to that benefit, any transactions in such a way as to obstruct the identification of its criminal provenance.

In addition to the extremely severe prison sentence mentioned above, the law provides for the compulsory confiscation of the relevant money or goods in the event of conviction (and the related possibility of freezing assets at a pretrial stage).

Furthermore, because they provide the possibility of the competent Italian body (the Financial Intelligence Unit) imposing the suspension of ‘suspicious transactions’ on financial intermediaries, the administrative provisions on money laundering can also assist victims’ efforts to trace assets and prevent their dissipation.

This is consolidated by Italian case law in that confiscation applies not only to the proceeds directly and immediately deriving from crime, but also to any other property acquired by the offender through the investment of the unlawful proceeds.9 However, the burden to prove rigorously all the transfers and modifications deriving from the original proceeds of crime lies on the public prosecutor.

With regard to confiscating property acquired by a third party or close relatives, the general principle, with a few exemptions, is that confiscation does not take place when a ‘person extraneous to the crime’ (a third party in good faith) has ownership of the items potentially subject to confiscation: in such a case, the items should be handed over to the third party. However, Italian case law has consolidated the adoption of a very strict notion of a ‘person extraneous to the crime’, according to which any subject who has, through his or her conduct, made the commission of the crime easier, cannot be considered ‘extraneous’ to the crime, and – although not criminally liable – is not entitled to prevent confiscation or obtain the restitution of the relevant items. In particular, according to case law, the only

subject who can be considered extraneous to the crime is the subject who did not have any kind of link – direct or indirect, because of a lack of vigilance or other causes attributable to negligence – with the commission of the crime.  

In accordance with these principles, only in very limited situations has case law maintained that close relatives could be considered persons extraneous to the crime, and as such had title to prevent confiscation.

The law expressly provides that criminal conservative seizure is converted into garnishment when the judgment convicting the defendant to pay civil damages to the ‘civil party’ becomes final. In addition, the law provides that the forced enforcement on the assets seized takes place in accordance with the provisions of the Code of Civil Procedure and that the money deriving from the sale of these assets is firstly paid to the civil party under title of damages and to refund its costs for the proceeding, and only subsequently is it used for the fines, costs of the proceeding and any other amount to be paid by the defendant to the state.

In the event that the victim of the crime does not request standing as civil party in the frame of the criminal proceeding, it can in any case claim ownership of the assets subject to confiscation by intervening before the court of execution of the confiscation (as a third party in good faith or person extraneous to the crime). If a dispute arises about the ownership of the assets to be confiscated, the court of execution shall remit the case to the civil court of first instance to determine legitimate ownership.

Finally, from a practical point of view, it is more fruitful for a defrauded party to obtain information and evidence from law enforcement and regulatory agencies for use in civil proceedings by filing a criminal complaint, and at the end of the criminal investigations to request from the public prosecutor access to the ‘public prosecutor file’ (containing all acts carried out and evidence gathered by the public prosecutor in the course of the investigations, including the information and documentation mentioned above). Following case law, such a request is usually granted.

ii Defences to fraud claims

The most common and effective defences to fraud claims are:

a lack of jurisdiction (see Section V.i);
b elapsing of the statute of limitations for the relevant civil tort or criminal offence (as mentioned in Section II.i, the civil action for damages ordinarily has a statute of limitations period of five years from the moment of the tort; however, if the fact also represents a criminal offence, and the statute of limitations for the criminal offence is longer, then the longer period applies); and
c acquisition of the assets by a third party in good faith (although Italian case law has adopted a very strict interpretation of this point; see above).

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10 Court of Cassation, No. 16,405 of 21 April 2008.
11 Article 320, Paragraph 1.
12 Article 320, Paragraph 2.
III  SEIZURE AND EVIDENCE

i  Securing assets and proceeds

Civil remedies

To prevent the dissipation of assets by the suspects in a fraud (as in any other circumstances where there is a material risk of dissipation), Italian law provides for conservative seizure, which can be requested by the claimant and ordered by the court on the suspects’ assets even at the pretrial stage.13

In terms of procedure, the seizure order can be issued ex parte where knowledge by the target could prejudice the successful execution of the order; in such cases, a hearing is subsequently fixed within a maximum of 15 days, at which the target is entitled to raise his or her defence and the order is subject to confirmation, amendment or revocation by the court. Otherwise, the court decides on an application for conservative seizure after a hearing at which all relevant parties are entitled to make their representations.14

The subject of the seizure order can be movable goods or real estate or rights existing towards third persons. The order is not usually issued in relation to specific assets to be seized but with the indication of a maximum amount to be subject to seizure, with the consequence that the claimant will have to trace the assets on which to carry out the enforcement of the order.

As far as the substantive requirements for conservative seizure are concerned, they are represented by the fumus boni iuris and periculum in mora. The first is a prima facie evidence of the existence of the right that the seizure order is aimed at protecting; the second is the serious and concrete risk that delay could compromise the satisfaction of the right.

Conservative seizure is instrumental to a full trial on the merits, aimed at assessing the existence of the right claimed, after which a sentence could then be enforced by targeting the assets subject to conservative seizure. However, conservative seizure can also be granted during the trial stage and after a judgment on the merits, on condition that the aforementioned requirements are fulfilled.

Criminal remedies

The following interim measures are provided for by the Italian criminal system:

a  ‘preventive seizure’,15 which is the measure typically aimed at freezing the proceeds of crime (and the instrumentalities of crime) in view of a future confiscation (following the issue of the final conviction sentence);

b  ‘evidentiary seizure’,16 which is the measure typically aimed at collecting the evidence necessary to prove the commission of a certain crime; and

c  conservative seizure,17 which is the measure typically aimed at protecting and restoring the assets of the state, or of the victim of the crime, by freezing the assets of the defendant to prevent their dissipation (in substantive analogy with the conservative seizure provided for civil purposes).

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13 Article 669 bis et seq. and Article 671 et seq. of the Code of Civil Procedure.
14 Article 669 sexies.
15 Article 321 et seq. of the Code of Criminal Procedure.
16 Article 253 et seq. of the Code of Criminal Procedure.
17 Article 316 et seq. of the Code of Criminal Procedure.

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Preventive seizure and conservative seizure can only be ordered by a judge or court, on application by the public prosecutor and, in the case of conservative seizure, also by the victim or civil party.

There are specific provisions for the practical modalities of execution of preventive seizure in relation to targeted assets. In particular, preventive seizure is executed:

- on movable goods and assets, according to the civil procedure for garnishment;
- on real estate and registered movable goods, through the entry of the seizure in the relevant registers;
- on the assets of a company or enterprise, through the entry of the seizure in the register of enterprises and, where necessary, through appointing a special receiver; and
- on shares and quotas of companies, through the entry of the seizure in the company’s books and in the register of enterprises.

### ii Obtaining evidence

**Civil proceedings**

The taking of evidence (interrogatories, testimonies, technical expertise, etc.) is carried out within the trial and is governed by the court mainly on request of the parties. With regard to documentary evidence, the parties may produce all the documents that, from their perspective, prove the grounds of their claim. With regard to oral evidence, by contrast, previous court authorisation is required.

With a few exceptions, the court can freely evaluate any evidence at its discretion, but has to provide the reasons for the evaluation in the written grounds of the judgment. The decision of the court has to be based on the evidence submitted by the parties and, in addition, on the facts not specifically challenged and on the factual notions of common knowledge.

Where a defendant fails to respond to a writ of summons within the deadlines stipulated by the law, a ‘default of appearance’ is declared by the competent court. This does not mean an automatic adjudication of the case in favour of the claimant, but simply that the decision of the court will be based only on the evidence provided by the claimant (with no objections from the defendant).

Unlike in criminal proceedings, defendants in civil proceedings do not have a right to silence. If the formal interrogatory of a defendant has been requested by the claimant and granted by the court, in relation to a detailed list of relevant circumstances, and the defendant does not attend or refuses to answer without justified grounds, the court, having evaluated all the other evidence, can consider the claimant’s account of the relevant circumstances confirmed.

**Criminal proceedings**

With respect to the taking of evidence in a criminal trial, a crucial role is played by the oral evidence given by public prosecutor and defence witnesses before the court. In this regard, the main theoretical principle governing the taking of evidence is that of ‘fair trial’, provided for by Article 111 of the Constitution, according to which the trial must establish parity between

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18 Articles 104 and 104 bis of the implementing legislation of the Code of Criminal Procedure.
20 Article 115 of the Code of Civil Procedure.
the positions of the prosecution and the defence before an impartial judge with third-party status, it must be of a reasonable duration and, in that context, the defendant must have the possibility of defending and examining the prosecution witnesses who have made statements against him or her. Documentary evidence also has to be authorised by the court.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

As explained above (see Sections I and II), money laundering legislation is very effective in the Italian system and is a powerful recovery tool.

The statute on the criminal offence of money laundering22 is particularly effective (see Section II.i) and provides for the compulsory confiscation of the relevant money or goods in the event of conviction, and for the related possibility of freezing assets at a pretrial stage.

In addition to the above, the administrative provisions on anti-money laundering, contained in Legislative Decree No. 90 of 25 May 2017 (Decree No. 90), which implemented the Fourth Anti-Money Laundering Directive in Italy,23 can also be very effective.

In essence, this legislation imposes on relevant subject categories (financial intermediaries, professionals, etc.) certain anti-money laundering obligations, the most significant of which are the following:

a customer due-diligence obligations, mainly consisting of the following activities:

• identifying the customer, and verifying the customer’s identity on the basis of documents, data or information obtained from a reliable and independent source;
• identifying and verifying the identity of the beneficial owner;
• obtaining information on the purpose and the intended nature of the business relationship or professional service; and
• conducting of ongoing monitoring in the course of the business relationship or professional service;

b record-keeping obligations; and

c reporting obligations: according to Articles 35–42 of Decree No. 90, the ‘relevant subjects’ have to disclose to the competent authority (the Financial Intelligence Unit) ‘suspicious transactions’ relating to money laundering and terrorist financing. Failure to disclose a suspicious transaction does not amount to a criminal offence, but is penalised by the imposition of fines and other administrative sanctions.24 The Financial Intelligence Unit can impose the suspension of the relevant suspicious transactions on financial intermediaries.

It can be seen from the foregoing that the administrative anti-money laundering legislation represents an additional and effective tool to support victims’ efforts to trace, recover and prevent the dissipation of defrauded assets.

22 Article 648 bis of the Criminal Code.
23 Directive 2015/849/EU.
24 Articles 58–61 of Decree No. 90.
ii Insolvency

Insolvency typically results from a fraud of significant dimensions, in which company assets are diverted from their ordinary purpose (the carrying on of business activity) and misappropriated for the personal interests of the company managers or shareholders.

Many examples are found in the Italian case law of recent years. The most significant, for its magnitude and impact on the related aspects of asset tracing and recovery, is the collapse in 2003 of the Parmalat group, in relation to which many criminal and civil proceedings are still pending in Italy and will continue in future years.

After the adjudication of bankruptcy of the group’s various companies, either the appointed commissioner of the group, or the thousands of shareholders and bondholders whose investments had suddenly dramatically decreased, brought a civil action for damages within the criminal proceedings by standing as civil party against the various defendants (Parmalat’s managers and auditors, as well many foreign banks and their officers, which allegedly continued to provide finance to the group although aware of the perilous state of its finances, to obtain fees allegedly higher than the market standard).

Furthermore, many actions against the same defendants were lodged in the civil arena by the same commissioner of the Parmalat group and the relevant shareholders and bondholders to obtain recovery of the original investments and to claim related damages.

As most of these criminal and civil proceedings are still pending, the Parmalat case represents an ideal case study for understanding the Italian system of asset tracing and recovery, and in particular the peculiar interplay that exists between criminal and civil actions.

iii Arbitration

The role of arbitration in connection with fraud and asset recovery is very limited in the Italian context.

iv Effect of fraud on evidentiary rules and legal privilege

As far as legal privilege is concerned, public prosecutors theoretically do not have the power to seize, or request the production of, documents that are subject to legal professional privilege (i.e., correspondence between the suspect and his or her defence lawyer, or documents relating to the suspect’s criminal defence) unless the documents represent the ‘elements of the crime’. In practice, however, protection granted by legal professional privilege is more effective at trial – to prevent the use of documents covered by privilege as evidence – than at the investigative stage (when documents covered by privilege are often seized).

In any case, documentation or communications from in-house counsel are not covered by legal professional privilege. Furthermore, in the event of criminal investigation, Italy’s labour law does not protect personal data and documents of employees from search and seizure.

Fraud allegations, and related procedures for asset tracing and recovery, do not modify the above conditions regarding legal privilege nor those regarding evidentiary rules (see Section III.ii).

25 Article 103 of the Code of Criminal Procedure.
V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

The relevant criteria for the jurisdiction of Italian civil courts are provided for by Law No. 218 of 31 May 1995 (Law on Private International Law). According to Article 3, Italian jurisdiction exists when the defendant is domiciled or resident in Italy, or when he or she has a representative authorised to stand in trial. Additionally, Article 3 provides that Italian jurisdiction also exists when the criteria laid down by the Convention of Brussels of 27 September 1968 are met.

With respect to interim measures, Article 10 of the Law on Private International Law provides that Italian jurisdiction exists when the interim measure should be executed in Italy or when the Italian court has jurisdiction on the merits of the case.

The lack of jurisdiction should be objected to by the defendant in his or her first brief of defence, to be filed at least 20 days before the first hearing. When this condition is met, the lack of jurisdiction can then be assessed at every stage and instance of the proceeding. In relation to proceedings in absentia, or when Italian jurisdiction is excluded by international provisions or by the fact that the action concerns real property located abroad, the lack of jurisdiction can be assessed ex officio by the court.

ii Collection of evidence in support of proceedings abroad

The most relevant provisions are those of EC legislation (with respect to EU countries) and of the international conventions signed by Italy, while Italian domestic law ordinarily applies only to supplement and regulate the aspects not regulated by this legislation.

The most relevant domestic provision in this respect is Article 69 of the Law on Private International Law, which states:

a the judgments and the orders of foreign judges concerning examination of witnesses, technical assessments, swearing or other means of evidence to be taken in Italy are executed by decree of the court of appeal of the place where the acts have to be taken;

b if the request is made by the judge itself, the request has to be made through diplomatic channels;

c the court decides in chambers and, in the event it grants the execution, sends the acts to the competent judge;

d the taking of evidence or the execution of other evidentiary acts not provided for by Italian law can be ordered on condition that they do not conflict with the principles of the Italian system; and

e the taking of evidence or the execution requested is regulated by Italian law, but the forms expressly requested by the foreign authority are complied with on condition that they do not conflict with the principles of the Italian system.

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

The procedure is explained, from a civil and criminal standpoint, in Section III.i.

26 Articles 11 and 4 of the Law on Private International Law.
iv  Enforcement of judgments granted abroad in relation to fraud claims

As with the collection of evidence, the most relevant provisions are those of EC legislation and of the international conventions signed by Italy; ordinarily, Italian domestic law only supplements and regulates aspects not regulated by this legislation.

With regard to EU countries (except Denmark), the enforcement of foreign judgments is governed by EC Regulation No. 44/2001, the basic principle of which is that the procedure for making a judgment given in one Member State enforceable in another must be as efficient and rapid as possible. As a consequence, the declaration that a judgment is enforceable is issued virtually automatically by the court of the requested state (for Italy, the court of appeal of the place of execution) after purely formal checks of the documentation supplied.\(^{27}\) Within that framework, however, in an adversarial procedure in which the defendant considers one of the grounds for non-enforcement to be present, he or she is entitled to appeal against the declaration of enforceability.

In addition, EC Regulation No. 805/2004, provides for the abolition of *exequatur*, and the creation of a European enforcement order, for ‘uncontested claims’ (namely all situations in which a creditor, given the verified absence of any dispute by the debtor as to the nature or extent of a pecuniary claim, has obtained either a court decision against that debtor or an enforceable document that requires the debtor’s express consent, such as a court settlement or an authentic instrument). According to EC Regulation No. 805/2004, such a procedure offers ‘significant advantages’ as compared with the *exequatur* procedure provided for by EC Regulation No. 44/2001, ‘in that there is no need for approval by the judiciary in a second Member State with the delays and expenses that this entails’.

As far as non-EU countries are concerned, the enforcement of foreign judgments is dealt with by a number of bilateral treaties signed by Italy, which regulate the related requirements. In the absence of an applicable treaty, and to supplement EC and international legislation where necessary, Italian domestic law applies, the main provisions of which are those laid down by Articles 64 and 67 of the Law on Private International Law.

In particular, Article 67 provides that an Italian civil proceeding aimed at the formal recognition of the foreign judgment before the Court of Appeal of the place of execution is necessary only in the event of a challenge to the recognition, or of a forced enforcement of the foreign judgment being required.

In contrast, if there is no challenge to the recognition or no enforcement is required, foreign judgments are recognised in the Italian legal system without need for a specific civil proceeding, on condition that the following requirements are fulfilled (Article 64):

a  the judgment was issued by a judge who had jurisdiction according to the principles on jurisdiction of the Italian legal system;

b  the writ of summons was brought to the knowledge of the defendant according to the procedural rules of the *lex fori*, and the defendant’s fundamental rights of defence were not breached;

c  the parties had regular standing in trial according to the *lex fori*, or ‘default of appearance’ was declared in accordance with that law;

d  the judgment has become *res judicata* according to the *lex fori*;

e  the judgment does not conflict with another judgment issued by an Italian judge that has become *res judicata*;

\(^{27}\) Article 33 et seq.
there is no pending proceeding before an Italian judge on the same subject and between
the same parties that started prior to the foreign proceeding; and
the judgment does not produce effects contrary to Italian public order.

v Fraud as a defence to enforcement of judgments granted abroad
The defence should be raised by challenging the recognition of the foreign judgment, in
accordance with the procedure explained above (see Section V.iv). However, in most situations,
such a defence will not stop the recognition and enforcement of the foreign judgment, but
only create a related cause of action for the defrauded party against the fraudster.

VI CURRENT DEVELOPMENTS
As explained above (see Section IV.ii), the Parmalat case is an ideal case study for an
understanding of the Italian system of asset tracing and recovery, and in particular the interplay
between criminal and civil actions. The evolution and outcomes of the many criminal and
civil proceedings generated by the collapse of the Parmalat group that are still pending will
forge case law for years to come, consolidating the most authoritative courts’ interpretation in
relation to issues of fraud, abuse of powers by company managers and shareholders, and asset
tracing and recovery, in both the criminal and civil arenas at domestic and international level.

New cases of alleged significant fraud committed by company managers or shareholders
continue to arise, such as that of the bank Monte dei Paschi di Siena and of the insurance
company Fondiaria-Sai. Criminal and civil proceedings are currently pending in relation to
these cases in an effort to identify and prosecute the individuals and entities responsible for
criminal violations, and to trace and recover the related assets subject to misappropriation.
The development of these cases will also have a significant impact in determining the concrete
features of the Italian system of asset tracing and recovery.
Chapter 19

JAPAN

Kenji Hashidate, Takahiro Mikami, Makoto Sato, Kaoru Akeda and Daiki Imaizumi

I OVERVIEW

The civil and criminal codes of Japan provide several means by which a fraud victim may recover assets from a person who has committed the fraud or from a third party who has received the assets from a fraud perpetrator. In addition, to ensure effective redress for fraud victims, various statutes have been enacted and amended that address the different types of fraud, along with statutory provisions that alleviate or shift the burden of proof for the plaintiff’s benefit in certain cases, as well as various provisions designed to prevent assets acquired through fraud from being dispersed and lost. These laws were developed for the purpose of addressing domestic fraud as well as cross-border fraud, and the government actively continues to introduce legislation on a regular basis that is geared towards preventing fraud and recovering assets.

To recover assets, a fraud victim would commonly bring an action in court. Japan has adopted a three-tier court system, with one level for trials of first instance and two levels of appeal, and it is not uncommon for a trial in the first instance to last at least a year, or longer in cases involving more complicated matters. As far as trials taking place at the courts of first instance are concerned, the Act on the Expediting of Trials stipulates that ‘[t]he objective of expediting trials shall be to conclude the proceedings of the first instance in as short a time as possible within a period of two (2) years’, thereby giving an upper limit of two years for the duration of any trial at a court of first instance. In practice, however, these limits are often exceeded.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Criminal remedies

There are several criminal statutes in Japan that prohibit numerous types of fraud, including fraud, breach of trust, embezzlement of social activities, as well as specially stipulated

1 Kenji Hashidate is the managing partner, Takahiro Mikami is a partner and Makoto Sato, Kaoru Akeda and Daiki Imaizumi are associates at Hashidate Law Office.
3 Article 246 of the Penal Code (Act No. 45 of 24 April 1907).
4 Article 247 of the Penal Code.
5 Article 253 of the Penal Code.
penalties found in statutory articles such as Articles 197(1) and 207(1)(i) of the Financial Instruments and Exchange Act.\(^6\) In the event that a defrauded asset is seized as a result of a criminal investigation, said asset is generally returned to the fraud victim.

Additionally, under the Act on Punishment of Organized Crimes and Control of Crime Proceeds, the proceeds obtained through the commission of asset-related offences, such as fraud and receipt of high interest rates (a violation of the Investment Act), can be forfeited (confiscation and collection of equivalent value) from offenders if the criminal activity was conducted as an organisational group or if money laundering occurred.\(^7\)

These forfeited assets are monetised and maintained as a compensation fund. In accordance with the Act on Issuance of Remission Payments Using Stolen and Misappropriated Property, compensation is paid to the victims from the fund.

**Civil remedies**

Civil remedies, as opposed to criminal remedies, are the most straightforward method for recovering assets.

**Compensation for damage**

There are various pieces of legislation under which a fraud victim may claim damages from a perpetrator. For example, a person who has intentionally or negligently infringed upon the rights or legally protected interests of others will be liable to provide compensation for any resulting damage.\(^8\) Therefore, if a fraud is perpetrated, a fraud victim may bring an action and claim for damages pursuant to Article 709 of the Civil Code.

In addition, the Companies Act\(^9\) stipulates that if an officer of a company neglects his or her duties, he or she will be liable to the company for damages arising as a result thereof.\(^10\) Therefore, if an officer of a company neglects his or her duties by way of a breach of trust or embezzlement, the company itself may make a claim against the relevant officers for any damages arising as result, pursuant to Article 423 of the Companies Act.

Furthermore, according to the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Fair Trade Act),\(^11\) an enterprise that engages in private monopolisation, unreasonable restraint of trade or other unfair trade practices is liable for damage suffered by another party.\(^12\) Therefore, a party injured by an enterprise's establishment of a cartel or collusive bidding may lead to an action for damages against said enterprise pursuant to Article 25 of the Fair Trade Act.\(^13\)

Other than the foregoing, there are many other remedies by which fraud victims may make claims for damages. Specifically, there are certain statutory provisions that, under certain circumstances, allow for the alleviation or the shifting of the burden of proof normally required to be shown by a claimant in court (see Section IV.iv). In addition, the time that

\(^{6}\) Act No. 25 of 13 April 1948.  
\(^{7}\) Articles 13 and 16 of the Act on Punishment of Organized Crimes and Control of Crime Proceeds.  
\(^{8}\) Article 709 of the Civil Code (Act No. 89 of 27 April 1896).  
\(^{9}\) Act No. 86 of 26 July 2005.  
\(^{10}\) Article 423(1) of the Companies Act.  
\(^{11}\) Act No. 54 of 14 April 1947.  
\(^{12}\) Article 25 of the Fair Trade Act.  
\(^{13}\) An action for damages pursuant to Article 25 of the Fair Trade Act shall be brought before the Tokyo District Court as a court of first instance in accordance with Article 85-2 of the Fair Trade Act.
a claimant has to file suit varies in fraud cases depending upon the particular circumstances of the fraud in question because of differences in the various statute of limitation periods for each type of fraud (see Section II.ii). Therefore, it is important for fraud victims to file suit after having taken into consideration the ease with which a fraud can be proved pursuant to the possible applicable actions available to a claimant and the amount of compensation that can be awarded for each possible claim, taking into account the features and context of the alleged fraud.

**Demand for return (except for cases where fraud victims demand the return of money)**

If a person who has committed fraud or a third party who received an asset from the perpetrator retains it, the fraud victim may file a civil suit to assert his or her ownership over the asset and to reacquire the asset. If a fraud victim is defrauded of money, the victim may obtain damages by asserting a damages claim, as indicated above.

**ii Defences to fraud claims**

**Compensation for damage**

Each fraud claim is governed by a particular limitation period after the expiration of which a claim cannot be asserted upon a debtor’s affirmative invocation of the defence. For example, the right to demand compensation for damage on property rights in tort will be extinguished by the operation of prescription if it is not exercised by the victim or his or her legal representative within three years of the moment he or she came to know of the damage and the identity of the perpetrator. In addition, a court decided that the applicable period of prescription for an action made pursuant to Article 423 of the Companies Act is 10 years from the time damage is incurred as a result of a company officer’s neglect of duty. Furthermore, the right to demand compensation for damage pursuant to Article 25 of the Fair Trade Act expires three years from the date on which an order by the Fair Trade Commission becomes final and binding. As the limitation periods and their commencement points vary according to the applicable laws and regulations, it is essential for a fraud victim to take into account what the applicable limitations periods are when filing a suit.

**Demand for return**

If a third party acquires a defrauded asset (movable property only) peacefully, faultlessly and openly as part of a good-faith transaction, the third party immediately acquires any rights exercisable with respect to the movable property despite the fact that the previous holder (the perpetrator) did not have any authority (such as ownership) to retain or dispose of it. In addition, a person who peacefully, openly and, for a period of 20 years, possesses property belonging to another with the intention of owning it, acquires the ownership thereof. The period of this adverse possession is reduced to 10 years if all the conditions listed above are met and if the adverse possessor was without knowledge and was not negligent upon taking possession. In these cases, the asset in question will not be returned to the fraud victim.

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14 Article 724 of the Civil Code.
15 Supreme Court Case 2006 (Ju) No. 1074.
16 Article 26(2) of the Fair Trade Act.
17 Article 192 of the Civil Code.
18 Article 162 of the Civil Code.
### III SEIZURE AND EVIDENCE

#### i Securing assets and proceeds

Even if a victim of fraud receives a ruling allowing him or her to recover assets and proceeds with enforcement, the ruling would be meaningless in the event a perpetrator has no seizable funds. Therefore, to ensure effective redress for victims of fraud, they may file petitions seeking a temporary restraining order (TRO)\(^{19}\) preventing the transfer or loss of assets, to be issued before a decision on the merits, provided a *prima facie* case (i.e., the production of sufficient evidence as to allow the trier of fact to infer the facts at issue and rule in the party’s favour) can be made as to both the applicant’s right to the property in question and the necessity of preserving the property.\(^{20}\)

**Order for provisional seizure**

Where a fraud victim claims damages against a perpetrator, the victim may, as security for the satisfaction of the claims, provisionally seize assets (immovables, movables and claims) possessed by the perpetrator by means of an order for provisional seizure.\(^{21}\)

**Order of provisional disposition**

Where a fraud victim seeks to recover his or her assets either from a perpetrator or from a third party who received the assets from a perpetrator, the victim may seek to have the status and condition of any such assets maintained, and in addition may seek to secure the return of the assets by means of an order of provisional disposition prohibiting a respondent from disposing of them.\(^{22}\)

**Effect of a TRO**

Once an order for provisional seizure or an order of provisional disposition is issued, a perpetrator is prohibited from disposing of any assets provisionally seized or restrained by any such order, and if the perpetrator disposes of any such affected defrauded assets to a third party, the fraud victim may enforce the order regardless of the nature of the disposal. In addition, as stated in Section II.ii, although each claim is governed by a particular period of limitation, a filing of a petition for a provisional seizure or a provisional disposition would toll the limitation period and prevent a claim from being extinguished.\(^{23}\)

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19 An order for provisional seizure and an order of provisional disposition.
20 Article 13(2) of the Civil Provisional Remedies Act (Act No. 91 of 22 December 1989).
21 Article 20(1) of the Civil Provisional Remedies Act.
22 Article 23(1) of the Civil Provisional Remedies Act.
23 Article 147(ii) of the Civil Code. Note, with regard to Article 147(ii), the 2017 amendment of the Civil Code described in Article 149. To clarify: provisional seizure and provisional disposition result in the deferral of completion of prescription; the completion of prescription does not occur until six months from the termination of the provisional seizure and provisional disposition. This amendment will take effect from 1 April 2020.
Duration
A court may issue a TRO without holding oral arguments, and the demonstration of a prima facie case would be sufficient. In addition, a TRO is to be enforced within 14 days of its issuance and may be executed even before the order is served upon the obligor.

Provision of security
Generally, the issuance of a TRO may, to prevent the process from being abused, be conditioned on a deposit being made with the court by the claimant. Although deposits are refunded upon completion of the provisional procedure enforcement, the deposit requirement may nevertheless impose a burden on victims who lack sufficient funds.

Obtaining evidence
In criminal proceedings, an investigating authority is empowered to collect whatever evidence may be necessary, with very few limitations. In contrast, in civil proceedings, a fraud victim and his or her attorney have limited authority to collect evidence on their own. Nevertheless, although discovery procedures such as witness depositions and extensive document demands have not been adopted in Japan, there are several evidence-collection measures that fraud victims can use to collect evidence from a perpetrator or a third party (such as, for example, a bank with which the perpetrator has deposited assets acquired through fraud).

Voluntary disclosure
Fraud victims may collect evidence by requesting, through a court or a bar association to which their attorneys belong, that the third-party holder of a relevant document, whether it be a public or private entity, provide the requested document, or by making a disclosure request directly to the opponent with respect to a document relevant to the issues in the case. Being purely voluntary, however, the above processes may not be effective.

Compulsory measures
Fraud victims may file a petition for a court order requesting that a perpetrator or a third party disclose a document that falls under a particular category of evidence that is required to be submitted pursuant to Article 220(i), (ii), (iii) or (iv) of the Code of Civil Procedure. If a party does not comply with such an order, the court may recognise as true the requestor’s allegations concerning the facts purported to be reflected in the document. If a third party does not comply with such an order, the court would then order that the non-complying third party pay a non-criminal fine of up to ¥200,000. Therefore, this process is more effective.

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24 Article 3 of the Civil Provisional Remedies Act.
25 Article 13 of the Civil Provisional Remedies Act.
26 Article 43(2) and (3) of the Civil Provisional Remedies Act.
27 Article 14 of the Civil Provisional Remedies Act.
29 Article 226 of the Code of Civil Procedure.
31 Article 221(1) and 223(1) of the Code of Civil Procedure.
32 Article 224 (1) of the Code of Civil Procedure.
33 Article 225 (1) of the Code of Civil Procedure.
than the voluntary measures listed above in allowing fraud victims to collect evidence, as penalties are provided for. Where the party in possession of evidence has evidence that falls under Article 220(iv) of the Code of Civil Procedure, however, and can demonstrate that the release of the evidence would be likely to infringe upon the possessor’s privacy, or is related to a suit pertaining to a criminal case, juvenile record or other similar circumstance, the party in possession may be released from the obligation to submit the evidence.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Some Japanese statutes include criminal penalties against certain money laundering activities.\(^{34}\) For example, the Act of Special Case of Narcotics and Psychotropics Control Law, etc. for the Prevention of Any Action Fostering Illicit Conduct concerning Controlled Drugs under International Collaboration\(^ {35} \) stipulates criminal penalties for the concealment or receipt of profits resulting from certain crimes relating to controlled drugs;\(^ {36} \) the Act on Punishment of Organised Crimes and Control of Crime Proceeds\(^ {37} \) stipulates criminal penalties for controlling a business using illegal profits as well as the concealment or receipt of profits arising from certain crimes;\(^ {38} \) and the Act on Prevention of Transfer of Criminal Proceeds (the Transfer Proceeds Act)\(^ {40} \) stipulates criminal penalties for the wrongful assignment, delivery or provision of a bank passbook.\(^ {41} \)

As defined in the Act on Punishment of Organised Crimes and Control of Crime Proceeds, ‘profits arising from certain crimes’ include:

- acquiring profits arising from, or in compensation for, any of the criminal actions listed in the exhibit to the Act, committed for the purpose of obtaining unfair property benefits;\(^ {42} \)
- providing funds for the commission of certain crimes, including but not limited to providing funds for the import of raw materials used for the production of stimulants;\(^ {43} \)
- obtaining benefits resulting from a bribe given to a foreign public officer;\(^ {44} \) and
- obtaining a benefit from providing funds for terrorism.\(^ {45} \)

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\(^{34}\) Atsushi Yamaguchi, *Economic Criminal Law* (Shojihomu Co Ltd, 2012) p. 121.

\(^{35}\) Act No. 94 of 5 October 1991.

\(^{36}\) Articles 6 or 7 of the Act of Special Case of Narcotics and Psychotropics Control Law, etc. for the Prevention of Any Action Fostering Illicit Conduct concerning Controlled Drugs under International Collaboration.


\(^{38}\) Article 9 of the Act on Punishment of Organised Crimes and Control of Crime Proceeds.

\(^{39}\) Article 10 or 11 of the Act on Punishment of Organised Crimes and Control of Crime Proceeds.

\(^{40}\) Act No. 22 of 31 March 2007.

\(^{41}\) Article 28 of the Transfer Proceeds Act.

\(^{42}\) Article 2(2)(i) of the Act on Punishment of Organised Crimes and Control of Crime Proceeds.

\(^{43}\) Article 2(2)(ii) of the Act on Punishment of Organised Crimes and Control of Crime Proceeds.

\(^{44}\) Article 2(2)(iii) of the Act on Punishment of Organised Crimes and Control of Crime Proceeds.

\(^{45}\) Article 2(2)(iv) of the Act on Punishment of Organised Crimes and Control of Crime Proceeds.

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Since ‘criminal actions listed in the exhibit to the Act’ described in (a) cover almost all the serious crimes included in the Penal Code and other criminal statutes, the Act has broad application.\(^{46}\)

In one instance, the Tokyo District Court determined that a situation in which a criminal defendant, under a false name, converted profits amounting to ¥258.2 million obtained from one of the crimes listed in the exhibit to the above Act into US dollars constituted the concealment of profits arising from a crime.\(^{47}\)

In addition to criminal penalties, the Transfer Proceeds Act imposes on specified business operators (e.g., a financial institution) certain obligations, one of which is an obligation to identify a customer upon conducting any of several specified transactions within a specified business field (e.g., financial business) with any such customer;\(^{48}\) another of which is an obligation, upon finding that assets received in a specified business field appear to have been the product of crime, or upon finding that a customer has committed a crime related to the concealment of profits in a specified business field, to promptly report this fact to the appropriate administrative agencies.\(^{49}\) Furthermore, amendments to the Transfer Proceeds Act came into effect on 1 April 2013, which include the addition of further classes of business operators to the definition of ‘specified business operator’, the addition of further identifying information to be obtained from a customer and the establishment of stricter regulations for certain transactions that are at particularly high risk of being used for money laundering.\(^{50}\)

The Japanese financial intelligence unit is JAFIC, a bureau of the National Police Agency that provides comprehensive information about the regulations found under the Transfer Proceeds Act on its website.\(^{51}\)

**ii Insolvency**

A ‘claim on the estate’, defined in Article 2(7) of the Bankruptcy Act,\(^{52}\) is clearly different from a ‘bankruptcy claim’, defined in Article 2(5). A claim on the estate is given preferential treatment with respect to payment from the bankruptcy estate, defined in Article 2(14), as payment can take place at any time without having to go through bankruptcy proceedings. A bankruptcy claim, on the other hand, which is a claim on property arising against the debtor from a cause that arose before the commencement of bankruptcy proceedings, does not fall within the scope of claims on the estate. Typically, most bankruptcy claims end up not being paid in full by the bankruptcy estate.

\(^{46}\) Ibid., p. 123.  
\(^{47}\) Tokyo District Court Case 2003 (Toku-wa), No. 5100 et al.  
\(^{48}\) Article 4(1) of the Transfer Proceeds Act.  
\(^{49}\) Article 8(1) of Transfer Proceeds Act.  
\(^{50}\) Additional amendments to the Transfer Proceeds Act came into effect on 1 October 2016. The amendments, in accordance with the recommendations of the Financial Action Task Force, stipulate that certain transactions be subject to strict examination, such as transactions conducted by foreign politically exposed persons, and also mandate that measures be implemented to better identify customers. In addition, the amendments provide for additional regulations such as, but not limited to, an obligation to confirm that a foreign bank’s management system complies with the requirements of Japanese law and regulations when entering into a correspondent arrangement with any such foreign bank.  
\(^{51}\) www.npa.go.jp/sosikihanzen/ijafic/index_e.htm.  
\(^{52}\) Act No. 75 of 2 June 2004.
When a wrongdoer goes into bankruptcy following a fraudulent action, a fraud victim usually is only entitled to assert a bankruptcy claim.\(^{53}\) In a nutshell, a victim will not be granted any special protections for his or her claim, such as a priority right.

Additionally, where a fraud victim does not have a compensation claim but does have a right to have the wrongdoer return a specific asset, the victim may exercise that right regardless of whether the bankruptcy proceedings are active.\(^{54}\)

Any and all property that the debtor holds at the time of the commencement of bankruptcy proceedings (irrespective of whether the property is located in Japan) constitutes the bankruptcy estate, which is then used in bankruptcy proceedings to satisfy claims owed by the debtor.\(^{55}\) However, a debtor may sometimes engage in behavior that diminishes the debtor’s total assets (acts prejudicial to bankruptcy creditors) or may allocate assets to satisfy debts owed to a limited number of creditors (acts benefiting specific creditors). As a result, the bankruptcy estate and the resulting liquidating distribution are reduced. The Bankruptcy Act grants the bankruptcy trustee the authority to void or invalidate any transactions by the debtor affecting the bankruptcy estate, provided certain requirements are met.\(^{56}\)

With respect to acts prejudicial to bankruptcy creditors, the bankruptcy trustee has the power to void:
a. acts performed by the debtor with the knowledge that performing the acts would prejudice bankruptcy creditors and, where the beneficiary of any such act knew, at the time of the act, the fact that it would prejudice bankruptcy creditors;\(^{57}\) or
b. acts by the debtor that would prejudice bankruptcy creditors, carried out by the debtor after the suspension of payments or the filing of a petition for the commencement of bankruptcy proceedings, and where the beneficiary of any such act knew, at the time of the act, the fact that a suspension of payments had taken place and that the act would prejudice bankruptcy creditors.\(^{58}\)

Furthermore, there are special provisions for a return of assets upon the asset holder receiving reasonable compensation.\(^{59}\)

With respect to acts benefiting specific creditors, the bankruptcy trustee has the power to void:
a. acts performed by the debtor after he or she became unable to pay debts or after a petition for the commencement of bankruptcy proceedings was filed, where:
  • the acts were performed after the debtor became unable to pay debts and the creditor, at the time of the acts, was aware of the fact that the debtor was unable to pay his or her debts or had suspended payments; or

\(^{53}\) Article 148(1) of the Bankruptcy Act.
\(^{54}\) Article 62 of the Bankruptcy Act.
\(^{55}\) Article 34(1) of the Bankruptcy Act.
\(^{56}\) A bill revising the Civil Code, whereby provisions similar to Article 161(1) and (a part of) 162(1) of the Bankruptcy Act will be added to the Civil Code, is currently being discussed in the Diet.
\(^{57}\) Article 160(1)(i) of the Bankruptcy Act.
\(^{58}\) Article 160(1)(ii) of the Bankruptcy Act.
\(^{59}\) Article 160(3) and Article 161 of the Bankruptcy Act.
the acts were performed after a petition for the commencement of bankruptcy proceedings was filed and the creditor, at the time of the act, was aware of the fact that a petition for the commencement of bankruptcy proceedings had been filed;\(^\text{60}\) and

b acts that were not within the scope of the debtor's obligations, whether in terms of an act itself or the time of its performance, where an act was performed within the 30 days before the point the debtor became unable to pay his or her debts, and where a creditor who benefited from the act was aware, at the time of the act, that it would be prejudicial to other bankruptcy creditors.\(^\text{61}\)

Such rights of avoidance may not be exercised if two years have elapsed since the date of commencement of the bankruptcy proceedings or if 20 years have elapsed since the date of the act to be voided.\(^\text{62}\)

### iii Arbitration

An arbitral tribunal may, unless otherwise agreed among the parties, at the request of a party, order any party to take a provisional preservative measure as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.\(^\text{63}\) Moreover, provisional seizures and provisional dispositions found under the Civil Provisional Remedies Act can be utilised to ensure that the arbitral award can be enforced in future.\(^\text{64}\)

An arbitral tribunal may request that a court implement a compulsory examination of evidence or an examination affecting third parties’ interests under the Code of Civil Procedure, if necessary.\(^\text{65}\)

Additionally, an application for arbitration also has the effect of tolling the applicable statute of limitations for filing a complaint with a court.\(^\text{66}\)

### iv Effect of fraud on evidentiary rules and legal privilege

Article 248 of the Code of Civil Procedure grants courts the authority to determine a reasonable amount of damages ‘where it is found that any damage has occurred, if it is extremely difficult, from the nature of the damage, to prove the amount thereof’. In the event this provision is found to apply, a fraud victim has a reduced burden of proof with respect to the level of damage required to be demonstrated. One case that has addressed this provision involved a plaintiff filing a complaint in court against the government for the failure of a Japan Patent Office officer to properly register the plaintiff’s patent, with the court ruling that the provision was applicable and that a reasonable amount of damages was to be determined on the basis of the value of the patent at the time of the occurrence of the

\(^{60}\) Article 162(1)(i) of the Bankruptcy Act.

\(^{61}\) Article 162(1)(ii) of the Bankruptcy Act.

\(^{62}\) Article 176 of the Bankruptcy Act. Note that the 2017 amendment of Article 176 of the Bankruptcy Act amends the period from 20 years to 10 years. This amendment will take effect from 1 June 2020 at the latest.

\(^{63}\) Article 24 of the Arbitration Act (Act No. 138 of 1 August 2003).

\(^{64}\) Article 37(5) of the Civil Provisional Remedies Act.

\(^{65}\) Article 35 of the Arbitration Act.

\(^{66}\) Article 29(2) of the Arbitration Act.
damage, even if the patent was not at that point commercialised. Another case involved a plaintiff filing suit against a defendant for the infringement of the plaintiff’s mining rights, with the court again applying Article 248 to rule that a reasonable amount of damages was to be determined, even if the amount illicitly mined by the defendant could not definitively be determined. In addition, certain laws (especially relating to intellectual property rights) have similar provisions to clarify the specific circumstances in which they would be applicable.

In addition, although a fraud victim generally is required to prove the elements of his or her claim, certain statutes, examples of which follow, allow for the transfer of particular elements of the burden of proof to the wrongdoer, who is required to provide proof to rebut certain presumptions written into the statutes:

a. Article 423(2) of the Companies Act states that, in an unfair competition action, the amount of damage suffered by a plaintiff is presumed to be the amount of profits obtained by the directors or executive officers, or both, as a result of the unfair competitive transaction engaged in;

b. Article 423(3) of the Companies Act states that if a stock company incurs damage as a result of a conflict-of-interest transaction, the directors or executive officers of the company (or both) will be presumed to have neglected their duties;

c. Articles 102 and 103 of the Patent Act, Articles 38 and 39 of the Trademark Act, Article 114 of the Copyright Act and Article 5 of the Unfair Competition Prevention Act stipulate that the existence of a breach of due care and the resulting amount of damage may be presumed when an infringer of certain types of intellectual property is found to be responsible for damage to the plaintiff; and

d. Articles 17 and 18 of the Financial Instruments and Exchange Act shifts the burden of proof to a wrongdoer in requiring that the wrongdoer prove that a breach of due care did not occur where a prospectus or a securities registration statement as defined in the Financial Instruments and Exchange Act contains any false or omitted information with regard to material matters.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

International jurisdiction

Prior to exercising judicial rights to hear a specific case, a Japanese court must ensure that it does indeed have jurisdiction for that case, as judicial rights are an exercise of sovereignty and procedural principles demand that a court, in deciding its jurisdiction, balance the burden on the parties and the need to ensure a fair and proper trial. A 2011 revision to the Code of Civil Procedure states that an action relating to a tort may be filed with a Japanese court if the place where the tort took place is located in Japan (excluding cases where a wrongful act committed in a foreign country had an effect within Japan where that effect was ordinarily unforeseeable). For cases other than those listed above, an action related to a property right

67 Supreme Court Case 2005 (Ju) No. 541.
68 Supreme Court Case 2006 (Ju) No. 265.
69 Article 105-3 of the Patent Act (Act No. 121 of 13 April 1959), Article 39 of the Trademark Act (Act No. 127 of 13 April 1959) and Article 114-5 of the Copyright Act (Act No. 48 of 6 May 1970).
70 Act No. 47 of 19 May 1993.
71 Article 3-3(viii) of the Code of Civil Procedure.
may be filed with a Japanese court if the property at issue is located in Japan or, where the action is for monetary damages, any property of the defendant is located in Japan and is seizable (excluding instances where the value of the property is extremely low). These aforementioned clauses are the primary bases for litigants to exercise fraud claims in Japan by filing suit in Japanese court.

However, note that even in the event that a Japanese court determines it has jurisdiction over an action, the court may dismiss without prejudice the whole or part of the action if it determines that there are special circumstances in a particular case whereby, were the Japanese court to exercise jurisdiction, one party would be unfairly affected or the action would impede the well-organised progress of court proceedings. Any such decision to accept or reject jurisdiction over a case would also take into consideration the nature of the case, the degree of the defendant’s burden in making an appearance, the location of evidence and other circumstances.

**Applicable law**

The Act on General Rules for Application of Laws (Application Act) governs the applicable law. Fraud claims arising from a breach of a contract will be governed by the law applicable to the contracts. In contrast, a fraud claim that meets the definition of ‘a claim arising from a tort’ would have the law applicable to it determined pursuant to Articles 17 to 21 of the Application Act. Generally, the formation and effect of a claim arising from a tort is governed by the laws of the place of the impact of the wrongful act. Note, however, that where a fraud claim meets the definition of ‘a claim arising from a tort’ and is governed by foreign law:

a. if the facts to which the foreign law should be applied do not constitute a tort under Japanese law, no claim under the foreign law may be allowed in Japanese court, whether for damages or any other remedies;

b. if the facts to which the foreign law should be applied constitute a tort both under the foreign law and Japanese law, the fraud victim may make a claim only for the damages

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72 Article 3-3 (iii) of the Code of Civil Procedure.
73 Article 3-9 of the Code of Civil Procedure.
74 Act No. 78 of 21 June 2006.
75 Article 17 of the Application Act.
76 Article 17 of the Application Act. ‘The place where the impact of the wrongful act occurred’ means the place where interests protected by law are infringed and where the nature of the attack complies with requirements necessary to be classified a tort. (Yoshiaki Sakurada and Masato Dougauchi (ed.) Annotations of the conflict of laws, 1st volume, Yuhikaku, 2011).
77 Supreme Court Case 2000 (Ju) No. 580. In this case, the defendant (a Japanese company) manufactured and exported card readers that were subject to an American patent held by the plaintiff (a Japanese individual), where the defendant’s American subsidiary imported and distributed the card readers. The plaintiff in the case made a damages claim against the defendant on the theory that the defendant induced infringement of a patent (35 USC 271(b) stipulates that ‘[w]hoever actively induces infringement of a patent shall be liable as an infringer’). Given these facts, while acknowledging the claim would be acceptable under the applicable law (US patent law), the Japanese court disallowed the claim, stating that the reach of a patent right in Japan does not extend outside the country, such that a person actively inducing infringement of a patent outside the range of the patent’s effectiveness does not constitute a tort under the Japanese Civil Code.
or other remedies permitted under Japanese law (which is particularly noteworthy because, as described hereinafter, generally, punitive damages are not permitted in Japan).\(^\text{78}\)

Moreover, if a fraud claim falls under the category of an ownership right to movable or immovable property, the fraud claim is governed by the law of the place where the subject property is situated.\(^\text{79}\)

\[\text{ii} \quad \text{Collection of evidence in support of proceedings abroad}\]

Sources of law for foreign courts seeking to commission an examination of evidence in Japan include the Convention of 1 March 1954 on civil procedure, bilateral treaties\(^\text{80}\) and bilateral mutual assistance agreements, and the Act on Assistance Based on Commission by Foreign Courts.\(^\text{81}\) According to these sources of law, an examination of evidence at the behest of a foreign court in support of a proceeding occurring abroad involves a request being made through a country-specified authority (in Japan’s case, the Minister for Foreign Affairs), examination of evidence by the Japanese court and examination of evidence by a consul who resides in Japan.

\[\text{iii} \quad \text{Seizure of assets or proceeds of fraud in support of fraud victims}\]

\textit{International jurisdiction on a petition for a TRO}

Provisional seizures and provisional dispositions can be given through TROs to preserve property for fraud victims. As mentioned above, in the event that a Japanese court issues a TRO, the Japanese court is first required to ensure that it has jurisdiction to hear the case, as the issuance of a TRO is part of a court’s discretionary judicial power.

Under the Civil Provisional Remedies Act, a petition for an order for a provisional remedy may be filed only if an action on the merits can be filed with a Japanese court, or if either the property to be provisionally seized or the subject matter of the dispute is located in Japan.\(^\text{82}\) However, note that even where a Japanese court has jurisdiction over a petition, the court may dismiss without prejudice the whole of or any part of the petition if it finds that there are special circumstances that would warrant this action, much like in the case of a standard civil action.\(^\text{83}\)

\textit{Various problems arising from cross-border temporary restraining orders}

To issue a temporary restraining order, a \textit{prima facie} case must be made to show the right to the property in question and the necessity of preserving the property.\(^\text{84}\) Furthermore, in the event that the property to be provisionally seized or the subject of a dispute is located in Japan, but a foreign court decision on the merits would not be enforced in Japan by the

\(^{78}\) Article 22 of the Application Act.

\(^{79}\) Article 13 of the Application Act.

\(^{80}\) For example, Consular Convention Between Japan and the United States of America, Consular Convention Between Japan and the United Kingdom of Great Britain and Northern Ireland.

\(^{81}\) Act No. 17 of 22 March 1938.

\(^{82}\) Article 11 of the Civil Provisional Remedies Act.

\(^{83}\) See Section V.i. Although this power is not specifically prescribed in the Civil Provisional Remedies Act, in contrast to the Code of Civil Procedure.

\(^{84}\) Article 13(2) of the Civil Provisional Remedies Act.
relevant authorities, and where there is a possibility that a TRO issued by a Japanese court would not be enforced in a foreign country (indeed, the authorities of many countries are reluctant to enforce TROs issued by the courts of other countries), it is highly likely that a Japanese court will not find the elements of need required to issue an order to preserve those rights. This is due to the fact that a court will generally look to the purpose of the Civil Provisional Remedies Act, which is to protect civil rights and other related rights on a provisional basis, and are thus likely to find that the situation described above would not fit into the Act’s purpose, and likely to decline the petition for a TRO.

iv Enforcement of judgments granted abroad in relation to fraud claims

To enforce a judgment of a foreign court, it is necessary to go through a confirmation proceeding and an enforcement proceeding. The confirmation proceeding is to determine the effect of the foreign judgment in Japan. If the foreign judgment satisfies the requirements specified in Article 118 of the Code of Civil Procedure (the Requirements), the foreign judgment would be recognised in Japan without any proceedings being required. Otherwise, to enforce a foreign judgment, an execution judgment that acknowledges that the foreign judgment satisfies the Requirements must be made by a Japanese execution court, as the foreign judgment would immediately be enforced once a decision in favour of its validity is made by a Japanese court. The Requirements are:

- that the jurisdiction of the foreign court is recognised under law, regulation, convention or treaty;
- that the defeated defendant has received service (excluding service by publication or any other service similar thereto) of the summons or order necessary for the commencement of the suit;
- that the contents of the judgment and the court proceedings are not contrary to public policy in Japan; and
- that a mutual guarantee (reciprocity) exists.

Furthermore, punitive damages in a foreign judgment are not enforceable in Japan since they are viewed as being contrary to public policy and are not usually awarded in domestic judgments, punitive award amounts being viewed as inordinate with respect to appropriate compensation. Therefore, a foreign judgment containing punitive damages will only be confirmed and enforced in part, excluding the punitive damages.

v Fraud as a defence to enforcement of judgments granted abroad

In evaluating whether a foreign judgment meets the Requirements, a Japanese court would examine the underlying grounds for the judgment as well as the text of the judgment. In such an instance, a Japanese court is prohibited from examining the foreign court’s application of the law or the foreign court’s determination of facts (the principle of révision au fond or the conclusiveness of foreign judgments). In the event, however, that a defendant has not been given due process or the right to present a defence in the foreign civil proceeding, a Japanese court

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85 Article 24(2) of the Civil Execution Act.
86 Supreme Court Case 1993 (Ju) No. 1762.
would decline to enforce the foreign judgment on due process grounds because enforcement would be contrary to procedural public policy. A Japanese court has likewise refused, on the basis of public policy, to enforce a foreign judgment obtained by fraudulent means.

VI CURRENT DEVELOPMENTS

In a recent landmark case, a plaintiff seeking to expand the means by which a plaintiff may obtain damages for a case involving fraud was successfully represented. In this case, the court expanded the range of persons who may be held responsible to a plaintiff under Article 17 of the Securities and Exchange Act. The case, which became known worldwide as the ‘Imperial Consolidated fraud’, involved a cross-border financial fraud scheme organised and executed by a British investment group, affecting 740 people in 43 countries, with total losses amounting to US$200 million. In Japan, 280 investors were defrauded of a total of ¥12 billion.

The facts in this case involved a director of a company affiliated with the investment group (the defendant corporation) soliciting investments in certain securities using a prospectus containing false statements, resulting in the plaintiff making investments in those securities worth a total of ¥3 billion. As it turned out, however, the investment process diverted more than half of any newly acquired investment towards reimbursing other investors for prior investments, as well as engaging in a high-risk investment venture in Argentinian and South African mines, resulting in the plaintiffs not being able to obtain reimbursement when they attempted to redeem securities that were eligible for redemption.

One of the arguments made at the time was that both the defendant corporation and its director were liable for damages pursuant to Article 17 of the Securities and Exchange Act. At the time, Article 17 of the Securities and Exchange Act stipulated that a person who induces another person to acquire securities using a prospectus containing any false statements concerning any material matter or omits information concerning a material matter will be held liable to compensate a person who is damaged after acquiring the securities without knowledge of the falsity or omission of any such statement. However, since the Securities and Exchange Act did not clearly define what is meant by ‘a person who induces another person to acquire securities’, it was left to the Supreme Court of Japan to decide whether the director of the defendant corporation fell under this definition. At trial, the Tokyo High Court ruled that the definition of ‘a person who induces another person to acquire securities’ was limited to issuers of securities, companies that dealt in securities and other similar entities, the case was appealed to the Supreme Court under the following arguments: considering that prospectuses must be submitted to investors and hold great influence on investment decisions, it is crucial that investors who acquire securities in reliance on a prospectus containing false material statements or that has omitted material information be indemnified; and that there are no limitations on recoverability expressed in the Securities and Exchange Act.

87 Article 118(iii) of the Code of Civil Procedure.
88 Tokyo High Court Case 1989 (Ne) No. 1146.
89 Tokyo District Court 2011 (Chuu) No. 6 held that an arbitral award that wrongfully regarded as settled certain disputed facts that greatly impacted the decision was to be set aside because of a violation of the due process right to present a defence, in accordance with Article 44(1)(viii) of the Arbitration Act.
90 Supreme Court Case 2006 (Ju) No. 2084. Representation by Hashidate Law Office.
91 Act No. 25 of 13 April 1948, recently revised as the Financial Instruments and Exchange Act.
In hearing the case, the Supreme Court looked favourably upon the arguments and decided that the ‘persons’ who can be held liable under Article 17 of the Securities and Exchange Act can include any person who has induced another to acquire securities using a prospectus containing material false statements or omissions, and is not limited to issuers of securities and companies dealing in securities.

While the Securities and Exchange Act was revised and renamed the Financial Instruments and Exchange Act in 2007, the phrase ‘a person who induces another person to acquire securities’ is still used in Article 17, so this case still has precedential value.
I OVERVIEW

Korea was the sixth-highest-exporting country in terms of the dollar value of exports as of 2015. This is in part due to Korea’s deliberate economic policy of encouraging exports. For example, the government has provided banking services to local and foreign businesspeople who are engaged in trade. Korean companies commonly use letters of credit or refund guarantees in international trade that are backed by government-sponsored import–export insurance programmes.

Since joining the Organisation for Economic Co-operation and Development in 1996, Korea has opened its financial market and many foreign investors have made significant investments in the Korean stock market. Foreign investors have also been doing business in Korea via joint ventures or by establishing operations in Korea.

To strengthen the stability and transparency of the Korean financial system, special statutes address money laundering and forfeiture of assets or profits obtained by crimes such as fraud and human trafficking. Increasingly, the Korean government is becoming more active in international investigative or judicial cooperation with regard to money laundering and asset forfeitures.

The Financial Supervisory Service, which oversees Korea’s financial system, provides a public electronic disclosure system called the Data Analysis, Retrieval and Transfer System, which allows any listed company, or any corporation issuing securities in the public market, to submit disclosures online. Like the US Securities and Exchange Commission’s EDGAR system, these disclosures become immediately available to investors and other users.

After the Asian currency crisis in 1997, Korea implemented far-reaching reforms for heightening accounting transparency. The Supreme Court of Korea has firmly held that borrowing money from banks by submitting false balance sheets constitutes criminal fraud, even if an independent accounting firm prepared the balance sheet.2 In addition, the Supreme Court held that stock investors have remedial rights against a corporation’s accounting firm that prepares a false balance sheet to the extent that the accounting firm aided the corporation’s ‘window dressing’.3

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1 Michael S Kim is co-founder, Robin J Baik is a principal and S Nathan Park is of counsel at Kobre & Kim, and Chiyong Rim is an attorney at Kim & Chang. This chapter was written as a collaborative project between Kim & Chang and Kobre & Kim LLP. Kim & Chang contributed summaries of Korean law. Kobre & Kim LLP contributed thoughts on strategy in judgment enforcement and asset recovery matters. The information in this chapter was current as of September 2017.

2 The Supreme Court 2015. 4. 29. 2002 DO 7262.

3 The Supreme Court 2007. 9. 12. 96 DA 41991.
As Korea has a civil law system, civil litigation does not feature pretrial discovery of the kind available in the common law system. However, parties may ask during the trial for a court order to produce documents and witnesses. Failure to comply with the court order may result in sanctions, such as a fine or up to seven days’ imprisonment.4

In addition to civil litigation, a victim of a fraud may file a criminal complaint with the police or the Prosecutor’s Office. The prosecutor indicts a suspect with charges responding to the amount obtained by fraud. Depending on the alleged size of the proceeds from the fraud, the prosecutor may ask the court to apply a special statute that provides for harsher punishments for serious financial crimes.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Under Korean law, a fraud victim may file a suit under at least two legal theories: breach of contract or tort under the Civil Act. The choice between the two would be dictated by the particulars of a case and other considerations, such as the statute of limitations. The amount of damages from either action is the same and punitive damages are not available under Korean law.

If a debtor or a third party who knew of the fraud received a victim’s property and held it in possession, the victim, as the rightful proprietary interest holder, may demand its return. If the debtor already disposed of the properties, the victim may recover damages.

Under Article 406 of the Civil Code, a creditor may apply to the court for cancellation and restitution of any entry of contract, transfer, or release of property rights and claims as a fraudulent conveyance if the act is detrimental to creditors and both the debtor and the counterparty of the act had knowledge that the act would be detrimental to creditors. A transaction is deemed ‘detrimental to creditors’ if the debtor becomes insolvent as a result of the transaction or if the debtor was already insolvent at the time of the relevant transaction.

Registered directors have a fiduciary duty to their company under the Civil Code. Directors are jointly and severally liable if they violate the law, regulations or the company’s articles of incorporation, or if they neglect to perform their duties. The Supreme Court has held that a chief executive director has a duty to supervise the enforcement of other directors. In other words, if a chief executive director neglects the wrongful activity of other directors, he or she may be liable for the damages of the corporation.5 The business judgement rule is generally recognised, but if directors did not weigh the balance of cost and benefit to the corporation based on a concrete assessment of interests of the corporation, the relevant ‘judgement’ is not given deference under the rule. Therefore, decisions based only on the general and abstract expectation that it would be beneficial to the corporation to lend money

4 Article 311 of the Civil Procedure Act.
to, or to provide a guarantee for, an affiliate corporation, may not be defensible under the business judgement rule. A breach of fiduciary duty can also potentially lead to personal civil liability for directors and officers under Korean law.

Although directors of a corporation are primarily liable for damage to the corporation, they may be also liable to the corporation's creditors and shareholders if the directors are wilfully or grossly negligent in their breach of their fiduciary duties of care and loyalty to the corporation.

Potential liabilities of directors often become an issue upon insolvency or near insolvency, as the management authority transfers to the court-appointed trustee. After rendering a commencement order, the bankruptcy court can inquire about the existence or scope, or both, of the directors' liabilities with speedy and simple proceedings under the bankruptcy procedure.

Commencement of a reorganisation or liquidation proceeding suspends any action filed by creditors pursuant to Articles 404 or 406 of the Civil Act pending in the court at the time, until the trustee takes over the litigation or until the reorganisation or liquidation proceedings are completed.

The Supreme Court of Korea has held that the trustee has an exclusive power to file suit against directors who violated their fiduciary duty. In other words, shareholders may not file a derivative suit against directors and auditors upon bankruptcy.

ii Defences to fraud claims
A tortfeasor may raise the defence of fault or negligence on the part of the victim. The court may limit the amount of damages claimed if the victim's fault contributes to the damage. However, the Supreme Court has held that if a tortfeasor intentionally abuses a victim's negligence, the doctrine of fairness and equity does not permit this defence.

III SEIZURE AND EVIDENCE
i Securing assets and proceeds
Provisional relief from the court
To maintain the status quo regarding tortfeasor or debtor assets, a claimant can apply for one or all the following provisional reliefs: a provisional attachment order, a provisional prohibition order from disposing of assets or a provisional injunction. The creditor may apply for these

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6 The Supreme Court 2007. 10. 11. 2006 DA 33333.
7 For example, under Article 97 of the Civil Act, if a company is financially distressed but continues the business without obtaining court bankruptcy protection, such that the continued operation only increases the company's losses, the directors' fiduciary duty is to take protective measures for the company; such as filing a petition with the court for a bankruptcy or rehabilitation proceeding. Directors who do not file such a petition for bankruptcy proceedings after a corporation becomes unable to pay its debt may be sanctioned under the Civil Act. There is, however, no case precedent to date in which directors' failure to apply for a bankruptcy or rehabilitation proceeding has actually been deemed to be a breach of their fiduciary duty to the company and led to personal civil liability.
8 For rehabilitation proceedings, Article 114 of the Debtors Rehabilitation and Bankruptcy Act is applied; for straight bankruptcy proceedings, Article 351 is applied.
10 The Supreme Court 2016. 4. 12. 2013 DA 31137.
reliefs *ex parte*. A provisional attachment order is invoked by creditors that have monetary claims against the debtor, and it covers personal property as well as real property.\(^{11}\) Provisional attachments are effective even if the assets are disposed to third parties. The creditor must identify in its application specific assets owned or possessed by the debtor. After the claimant wins the lawsuit, he or she can enforce his or her right under the court’s auction.

A creditor who has a claim other than a monetary claim may apply for a provisional prohibition order from disposing of assets to obtain delivery of personal property, transfer of accounts receivable or bank accounts, or registration of real property.\(^{12}\) The order prevents the owner or holder of the property from delivering possession, or assigning or granting encumbrance of the property to a third party. Like a provisional attachment order, a provisional prohibition order from disposing of assets is effective against third parties.

A creditor seeking to prohibit specific actions may seek a provisional injunction.\(^{13}\) The court usually reviews the petition and supporting evidence without witness testimony, and has discretion as to the issuance of the order and the size of the undertaking necessary to protect the interests of the defendant.

In an involuntary bankruptcy context, creditors may seek a comprehensive injunction prohibiting the debtor from transferring any assets of the debtor or payment to any creditors. This is to prevent the debtor from dissipating assets between the time the involuntary bankruptcy petition is filed by the creditors and the time the court officially commences the proceeding. Once the bankruptcy proceeding commences, the right to dispose of the debtor’s assets belongs to the court-appointed trustee, and the trustee’s disposition of assets is subject to court approval or a creditor’s supervision, or both.

**Provisional relief from an arbitral tribunal**

Generally, courts may not interfere with matters subject to arbitration.\(^{14}\) However, after an arbitral tribunal has been constituted, parties may file a petition for provisional relief with the tribunal or directly with the court.\(^{15}\) If there is an arbitration agreement but the arbitral tribunal is not yet constituted, parties may request provisional relief from the court.

An arbitral tribunal cannot issue provisional relief with respect to a third party that is not participating in the arbitration proceedings. Unlike provisional orders of the court, the application for provisional relief under the arbitration proceedings cannot be made *ex parte*.\(^{16}\)

### ii Obtaining evidence

The Korean Civil Procedure Act does not provide for the broad discovery that can be found in certain common law jurisdictions, such as the United States. A party in civil litigation may only obtain evidence from the other party through the court. The court may, by request of parties, examine evidence prior to the commencement of civil proceedings (i.e., the service of the complaint upon the defendant). The court may grant the party’s request for pretrial evidence.

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\(^{11}\) Article 276 of the Civil Execution Act.

\(^{12}\) Article 300 of the Civil Execution Act.

\(^{13}\) Article 304 of the Civil Execution Act.

\(^{14}\) Article 6 of the Arbitration Act.

\(^{15}\) Article 18 of the Arbitration Act.

\(^{16}\) Article 19 of the Arbitration Act.
examination of evidence if the court finds that there may be undue hardship in examining evidence later in the trial. The pretrial examination in such a case may be witness testimony, production of documents or inspection of the actual site of controversy.\textsuperscript{17}

The Criminal Procedure Act provides for similar proceedings to obtain evidence prior to indictment. The prosecutor or the accused may ask the court to seize, search or inspect evidence; interrogate witnesses; or appraise the asset value if there is undue hardship in examining evidence in the future trial.\textsuperscript{18}

Once the trial begins, a party may ask for a court order mandating the production of documents held by the opposing party or third party. If the party fails to obey the production order, the court may deem that the contents of the requested documents are as asserted in the party’s petition for production.\textsuperscript{19}

Korean law treats a judgment creditor as an unsecured creditor whose priority is lower than that of secured interest holders in civil execution proceedings as well as in insolvency proceedings.

A judgment creditor has the right to request that a debtor disclose his or her assets. The court may order the debtor to submit a schedule of assets.\textsuperscript{20} If the debtor fails to do so, the court may sanction the debtor with up to 20 days of imprisonment. The court, by request of the creditors, may also enlist the debtor into the register of delinquent debtors. The register is delivered into the county office and would be disclosed to the public, copied by anybody and used by financial institutions.\textsuperscript{21} The judgment creditor facing an evasive debtor may also obtain a court order to investigate the debtor’s finances through financial institutions or other third parties.\textsuperscript{22}

IV FRAUD IN SPECIFIC CONTEXTS

i Banking, securities and money laundering

Under Korean law, a party must use his, her or its own name in conducting financial transactions. This rule is designed to prevent corporations and individuals from using nominee arrangements to conceal illicit property, money laundering or financing of terrorism, or evading compulsory execution or otherwise evading law enforcement. Violation of the rule may result in criminal sanctions, including imprisonment and fines.

Directors of an issuing company, public accountants, appraisers or credit rating specialists can also be held liable for damage inflicted upon any person as a result of acquiring securities by including a false description or representation of any material fact in documents such as a registration statement and an investment prospectus, or omitting a material fact from such documents.\textsuperscript{23}

In a securities case, the burden of proof is significantly shifted to the defendants so as to protect the investors. The Supreme Court has held that victims need not prove the existence of a causal relation between damage and false representation. A defendant must prove that

\begin{itemize}
\item Article 375 of the Civil Procedure Act.
\item Article 184 of the Criminal Procedure Act.
\item Article 349 of the Civil Procedure Act.
\item Article 61 of the Civil Execution Act.
\item Article 72 of the Civil Execution Act.
\item Article 74 of the Civil Execution Act.
\item Article 125 of the Financial Investment Services and Capital Markets Act.
\end{itemize}
the purchaser was aware of the material fact in question when the purchaser made the offer to acquire the securities, or that the defendant would not have been able to discover the inclusion or omission of material facts even if he or she exercised reasonable care.

Korean law does not generally recognise class actions. However, investors who suffer damage from certain types of securities transactions listed in the Securities Related Class Action Act may file a class action.\(^{24}\) To file a class action, there must be more than 50 plaintiffs and the plaintiffs must collectively hold more than 1/10,000 of the issued shares.\(^{25}\) Investors who wish to file a class action under the Securities-Related Class Action Act must first obtain permission from the court allowing the action.\(^{26}\) Recently, a district court for the first time granted permission for a class action pursuant to the Supreme Court decision allowing it.\(^{27}\)

ii Insolvency

An unsecured creditor who is a victim of a fraud may file an involuntary bankruptcy petition against an insolvent debtor if the debtor cannot duly repay the debt. Upon commencement of bankruptcy proceedings, the court must appoint a trustee who has the power to manage business and dispose of the bankruptcy estate.

The Debtor Rehabilitation and Bankruptcy Act (DRBA) provides the trustee with a powerful measure to locate the debtor’s assets by inquiring about these with the government, financial institution or other third parties that deal with the debtor’s assets. The court, by request of the trustee, may inquire about the location and amount of the debtor’s assets.\(^{28}\)

Under the DRBA, certain transactions entered into by a debtor may be challenged after the debtor enters into a formal insolvency proceeding on the grounds of preferential treatment of certain creditors. The DRBA allows a trustee (both in bankruptcy and in rehabilitation) of the insolvent debtor to avoid certain otherwise-lawful transfers undertaken by the insolvent debtor before commencement of the insolvency proceedings.\(^{29}\) Such avoidable transfers include:

- transfers that would harm other creditors at the time of the transfer, provided that the recipient was aware that the acts would harm other creditors. Fraudulent conveyance is a typical example;
- transfers that repay any debt or provide collateral after insolvency, provided that the payee or the secured party was aware that the insolvency event had occurred. Preferential repayment after filing for insolvency proceedings is a typical example;
- transfers that repay debt or provide collateral in the 60 days prior to an insolvency event when the insolvent debtor was not obliged to do so at that time, provided that the payee or secured party was aware that the acts would prejudice the equal treatment of the insolvent party’s creditors. Preferential repayment, such as paying debt in advance of the due date or granting security interests for unsecured creditors without a precedent contract, is a typical example; and

\(^{24}\) Article 3 of the Securities-Related Class Action Act lists the damages claims for which victims may file.

\(^{25}\) Article 12 of the Securities-Related Class Action Act.

\(^{26}\) Article 15 of the Securities-Related Class Action Act.

\(^{27}\) The Supreme Court 2015. 4. 9. 2013 MA 1052, 1053.

\(^{28}\) Article 29 of the DRBA. This clause is also invoked by interested parties including creditors who filed proofs of claim with the bankruptcy court.

\(^{29}\) Articles 100 and 391 of the DRBA.
transfers that take place after or within six months of the occurrence of an insolvency event and that conferred benefits on the beneficiary in exchange for no or nominal compensation. Guaranteeing the debtor's principal debt for creditors without receiving any consideration is a typical example.

iii  Arbitration
A party may challenge an arbitral award on the ground that recognition or enforcement of the award would be contrary to public policy. A party may also challenge an award on the basis that the award has been obtained fraudulently. However, the recognising court may not review the propriety or impropriety of the award itself.30

iv  Fraud's effect on evidentiary rules and legal privilege
Korean rules of evidence do not recognise an attorney–client privilege or an attorney–work product doctrine that protects legal communications from evidence examination. For example, a legal opinion written by an attorney may be admissible evidence in civil and criminal proceedings as long as the attorney recognises the document's authenticity. However, the legal opinion can become inadmissible in criminal proceedings under separate grounds, such as protection of trade secrets.31

V  INTERNATIONAL ASPECTS
i  Conflict of law and choice of law in fraud claims
For a Korean court to exert a judicial right to hear a case having some foreign elements, the court must have personal jurisdiction over the defendant and have subject-matter jurisdiction. The Act on Private International Law provides that the Korean court will have international jurisdiction if a party or the subject in dispute is substantially related to Korea.32

The Supreme Court has held that the courts must pay due regard not just to the parties' interests, such as fairness, convenience and predictability, but also the court's interests, such as propriety or the speediness of the civil proceedings and effectiveness of a judgment.33

Korean courts have held that they may assert personal jurisdiction over a foreign defendant if the defendant has a domicile, operates an establishment or commits a tort in Korea. In addition, certain contractual actions against foreign defendants are also permitted. If the plaintiff is a consumer domiciled in Korea, he or she may file a suit in Korea against the foreign defendant based on a consumer contract.34 Employees may also file a suit in Korea against a foreign defendant based on an employment contract if the employee has continuously provided service to the defendant employer in Korea.

The Act on Private International Law also provides a choice of law for the victim, who may choose between the law of the place where the tort occurred or the law of the place

30 The Supreme Court 2009. 5. 28. 2006 DA 20209.
31 The Supreme Court 2012. 5. 17. 2009 DO 6788.
32 Article 2 of the Act on Private International Law.
33 The Supreme Court 2005. 1. 27. 2002 DA 59788.
34 Article 27 of the Act on Private International Law.
where he or she suffered the damage from the tort. In addition, if the debtor entered into a fraudulent contract through misrepresenting facts, the victim may enforce the choice of law clause in the contract.

ii Collection of evidence in support of proceedings abroad
In 2009, Korea joined the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention); accordingly, a foreign court may request examination of evidence by the Korean court. However, under Korean law, private examination of a witness (such as a deposition) is not allowed. A party in a legal proceeding must examine witnesses before the court, upon the court’s approval. In addition to the Hague procedures, the Korean courts have cooperated with foreign courts based on the Act on International Judicial Mutual Assistance in Civil Matters.

iii Seizure of assets or proceeds of fraud in support of the victim of fraud
In an insolvency proceeding, the court-appointed trustee has the authority to dispose assets located abroad if the assets belong to the bankruptcy estate. However, before exercising the trustee power abroad, the trustee must first file an appropriate petition to obtain recognition of the Korean insolvency proceeding in the foreign country. For example, the trustee has to file a Chapter 15 petition in the US Bankruptcy Court to exert his or her management power in the United States.

The reverse is true as well. After bankruptcy proceedings are commenced abroad and foreign creditors find that the debtor has assets in Korea, the representative of the foreign insolvency proceedings may file a petition for a recognition order with the Central District Court of Seoul. After giving recognition, the Central District Court of Seoul may appoint a trustee, who may locate a debtor’s assets in accordance with the DRBA.

iv Enforcement of judgments and awards granted abroad in relation to fraud claims
Recognition of foreign arbitral awards
Korean courts have generally recognised foreign arbitral awards. Korea ratified the United Nations’ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) on 8 February 1973. On the same day, it also ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. A foreign arbitration is recognised in Korea according to these treaties. As to the United States, Korea entered into a bilateral treaty with the United States: the Treaty of Friendship, Commerce and Navigation between the Republic of Korea and the United States of America. Section 5 of the Treaty states that both countries guarantee the validity of arbitration clauses in agreements and in the execution of arbitration awards. The issue of revocability of an arbitration award rendered abroad is determined by the laws of the place of arbitration, not the laws of the enforcing forum.

v Fraud as a defence to enforcement of judgments granted abroad
Korean courts recognise foreign judgments based on comity and reciprocity. If there is no reciprocity between Korea and a foreign country, a foreign judgment may not be recognised.

For a foreign judgment to be recognised, the foreign court must have had personal jurisdiction against the defendant and subject-matter jurisdiction. If the Korean court deems
that the complaint was not served to the defendant or that the defendant was not granted due process, or both, the court may not recognise the foreign judgment. The Korean court may also refuse to give recognition if the foreign judgment was obtained fraudulently.

VI CURRENT DEVELOPMENTS

Korean courts have been cooperative regarding the recognition of foreign insolvency proceedings. Since 2006, Dutch, US, Hong Kong and Japanese bankruptcy proceedings have been recognised and the Korean courts have issued relief orders, such as cancelling a preliminary attachment at the request of a representative of foreign insolvency proceedings.35

Korean courts have seen an increasing number of cross-border disputes and ensuing asset tracing and recovery efforts made in Korea. The judges are more knowledgeable and flexible in dealing with cross-border cases. Upon counsel's proper explanation and provision of relevant support, some judges have made rulings on certain procedural issues or described certain procedural steps that they would not in pure domestic litigation contexts, mainly to alleviate the party’s burden to fight collateral attacks on the procedural points that may occur down the road in a foreign court unfamiliar with Korean procedural rules. For example, service of process is rarely an issue in Korean domestic litigation because it is completed through the court and postal office. In some instances, however, judges make an affirmative finding that the service was completed in accordance with the applicable rules – mainly to ensure that its judgment will not be subject to a collateral attack in a foreign court. This trend will likely continue to develop and ultimately further accommodate cross-border litigants in a more efficient and effective way.

Korea’s regulatory authorities are more actively taking their investigations abroad and seeking cooperation from their counterparts in other countries. Korea Deposit Insurance Corporation, for example, recently established its first-ever international outpost in Phnom Penh, Cambodia, to trace and seize assets of certain Korean debtors known to hide assets there. In July 2017, Korea’s Public Prosecutor’s Office successfully traced and repatriated Ponzi scheme proceeds that were diverted to China, marking the first time Korea’s law enforcement repatriated criminal proceeds from China. With the new Moon Jae-in administration prioritising anti-corruption efforts, we expect Korea’s regulatory authorities to become even more active in conducting international investigation and making repatriation efforts for crimes and transactions with a nexus in Korea.

35 Seoul District Court 2007. 10. 18. 2007 KUKSEUNG 1.
I OVERVIEW

Although the principality of Liechtenstein is one of the smallest countries in the world, the financial sector of Liechtenstein has gained a respectable international reputation in recent decades. Therefore, it comes as no surprise that funds from other countries are often channelled through Liechtenstein and that some of these funds have criminal origins.

Liechtenstein is not a common law country. Case law does exist, but it does not create binding precedent. Therefore, it does not play as important a role as it does in Anglo-American jurisdictions.\(^2\)

As a result, fraud obligations in Liechtenstein arise from legislation. Liechtenstein law does not distinguish between civil and criminal fraud. Fraud is a crime pursuant to Section 146 of Liechtenstein’s Penal Code (STGB), dated 24 June 1987. In addition, persons who have suffered damage as a result of fraud in accordance with Section 146 of the STGB are entitled to claim damages from the perpetrator under Liechtenstein’s Civil Code (ABGB), dated 1 June 1811.

Liechtenstein’s civil law does, however, set out special provisions regarding fraud. By way of example, the ABGB provides special terms to protect persons who have agreed to enter into a contract as a result of the fraudulent behaviour of the other party.\(^3\)

II LEGAL RIGHTS AND REMEDIES

Before outlining the legal rights and remedies in Liechtenstein, a short introduction should be given to the definition of fraud according to Liechtenstein’s Penal Code. Fraud, pursuant to Liechtenstein law, requires the deliberate deception of a person in relation to facts.\(^4\) Deception can be committed in relation to certain circumstances, legal situations and relationships, and even concerning the true intentions of the deceiving person.

The deception can take place by an act of deception as well as by leading the victim to a false conclusion. The perpetrator has to have the intent to enrich him- or herself by inducing the victim to act, to acquiesce to or to fail to do something. As a result of the inducement, the victim suffers pecuniary damage while the fraudster enriches him or herself. The cause of action is completed by pecuniary damage to the victim.

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1 Thomas Nigg is a senior partner at Gasser Partner Attorneys at Law.
3 Section 870, Paragraph 1 of the ABGB.
4 Section 146 of the STGB.
Deception can be committed through false assertions; fraudulent documents, such as false attestations, or forged or falsified deeds; or other fraudulent behaviour. The deception must misled the deceived person either by causing the misapprehension; or exploiting or supporting an already existing misapprehension. Deception can also be committed by a breach of one’s duty to resolve an existing misapprehension.

A contract is not binding on a party that has been induced to enter it by trick or by established fear. The cause of action based on civil fraud is similar to the cause of action based on criminal fraud.

‘By trick’ means that the defrauded contracting party has to be induced to enter a contract by the deception of the other party. Contrary to the cause of action in the Criminal Code, the defrauding party is not required to have the intent to enrich him or herself according to the Civil Code. The trick can be initiated by fraudulent representation or wilful misrepresentation of the facts. As a result, the trick must influence a party’s legal will. A party can also trick another by deliberately reinforcing the existing misapprehension of the other party.

There is no distinct cause of action in relation to conspiracy to defraud in Liechtenstein civil law, but conspiracy to defraud can be qualified as a distinctive form of inducing a party to enter into contract by trick.

Whether fear was ‘established’ has to be determined by the extent of fear, the possibility of imminent danger, as well as by the physical and psychological condition of the induced person.

i Civil and criminal remedies

Civil remedies

Generally, persons who have suffered damage as a result of fraud are entitled to claim damages, restitution and compensation for resulting loss of profit from the perpetrator, or from persons who assisted him or her to commit the fraud.

In addition, it is possible for someone who has entered into a contract because of another party’s deliberate deception to contest the contract by applying for declaratory relief as to the status of the contract. It is also possible for the deceived person to apply to the court to specifically amend the contract. The amendment, however, also requires that the other party initially had entered into the amended contract.

The calculation of damages resulting from unlawful acts depends on whether the wrongdoer acted deliberately, with gross negligence or merely with negligence. If the wrongdoer acts deliberately or with gross negligence, causing harm to a person, he or she must compensate the victim for the damage caused. Such damage is called positive damage and includes real damage incurred as well as any expenses incurred to redress the harm caused. In addition to compensating for positive damage, the wrongdoer must further compensate the harmed person for any loss of profit caused by the unlawful behaviour. If the wrongdoer acts merely negligently, he or she must compensate the harmed person only for the positive damage incurred.

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5 Sections 874 and 1295ff of the ABGB.
6 Section 1301 of the ABGB.
7 Section 870, Paragraph 1 of the ABGB.
8 Petzer in Kletečka/Schauer, ABGB-ON 1.01, Section 870, Rz 28 (www.rdb.at).
9 Section 1293 et seq. of the ABGB.
The calculation of damages for (civil) fraud corresponds to the above basic calculation of damages in cases of unlawful behaviour. The deceiver must always act deliberately in fraud cases and, therefore, damages are calculated including positive damage and loss of profit.

In cases under Section 870, Paragraph 1 of the ABGB, the person fraudulently causing someone to enter into a contract must put the deceived person back in the position as if the harm had not occurred. As Section 870, Paragraph 1 of the ABGB requires that the deceiver acts deliberately, the deceiver must compensate the harmed person for both the positive damage incurred as well as for any loss of profit.\(^{10}\)

Compared with trials in other jurisdictions, Liechtenstein justice is fairly swift. There is no rule requiring criminal cases to be granted priority. Once the relevant briefs are filed, a trial is scheduled within weeks. The average time from commencement of a lawsuit to judgment is 12 months, but it may be longer if the case is complex and international. The paperwork involved, and the time taken to prepare the initiation of proceedings or the application for an injunctive or interim relief, depends on the complexity of the case.

Proceedings must be filed with the Court of Justice of the Principality of Liechtenstein. There are no particular procedural rules for civil fraud obligations. The general rules for civil proceedings that are stated in the Liechtenstein Civil Procedure Law are applicable.

Pleading fraud can pierce the corporate veil. Piercing the corporate veil in relation to civil claims for damages in cases of fraud is possible if the perpetrator has established and used a company with the intention of committing fraudulent acts and to deceive other persons.\(^{11}\)

The perpetrator can also be a company. If the company is insolvent, the victims still have the opportunity to file a claim against the organs of a company since the corporate veil can be pierced.

**Criminal remedies**

The Liechtenstein Code of Criminal Procedure dated 18 October 1988 (STPO) does not contain special provisions concerning criminal remedies in fraud matters. Instead, the general remedies to retrieve the victim's property in criminal matters apply.

According to Section 32, Paragraph 1 of the STPO, anyone whose rights are violated by a criminal act has the right to join the criminal investigations and proceedings initiated by the public prosecutor as a private participant. Instead of being the initiator of a lawsuit, as in civil matters, the investigating judge and the public prosecutor prepare the criminal proceeding and the private person only has to specify the extent of the damage. If, however, the damage to the private person is not obvious, it has to be demonstrated by the private person.

Moreover, private participants in criminal proceedings have many effective rights during the investigations of the public prosecutor: they have the right of access to the court files if there are no conflicts of interests, and the right to deliver anything that could help convict the accused person and verify the enumerated damage to the public prosecutor. At the court proceeding, private participants are also allowed to ask questions.\(^{12}\)

Finally, in the event of the dismissal of an investigation by the investigating judge and the public prosecutor without conviction against the accused person, a private participant is

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10 Section 874 of the ABGB.
11 See, for example, the decision of the Liechtenstein Supreme Court, 3 November 2005, 11 UR 2005.48 (LES 2006, 373).
12 Section 32, Paragraph 2 of the STPO.
able to bring a public accusation against the accused person in lieu of the public prosecutor. If an accused person was not found guilty or the private participant does not retrieve the (entirety of the) victim’s property by the court’s decision, the private participant always has the opportunity to bring a lawsuit against the fraudster in a civil proceeding (see above).

ii Defences to fraud claims

Limitation is a bar to relief for fraud. The limitation period for damage claims in civil proceedings because of unlawful acts causing harm to a person (such as fraud) is generally three years. This limitation period starts as soon as the injured party has knowledge of the damage incurred as well as of the perpetrator’s identity. This limitation period also applies for damage claims based on fraud under Section 870 of the ABGB. The limitation period can only be extended beyond three years in cases of serious criminal fraud causing particularly severe damage, in which case the limitation period is 30 years.

However, the limitation period to contest a contract (or to apply for the amendment of a contract) entered into because of the other party’s deception is 30 years from the date of conclusion of the contract.

Moreover, a harmed person cannot claim relief for fraud if he or she has not acted in good faith. The deception must make the harmed person act under a misapprehension of the actual situation. If the injured party knows of the deception, then no fraud exists. In addition, in relation to calculating damages incurred by fraud, the amount of damages to which the harmed person is entitled is reduced relative to the degree to which the damages caused arise through the harmed person’s own fault.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Civil proceedings

There are no special provisions concerning securing assets in cases of civil fraud. Instead, the general provisions for securing assets apply. Before the start of a lawsuit and during litigation, it is possible to apply for interim injunctions in the form of either a security restraining order, which aims to secure pecuniary claims, or an official order, which deals with any claims other than those of a pecuniary nature.

The option chosen depends on the nature of the claim. Primarily, both injunctions temporarily maintain the state of affairs prevailing at that time (e.g., to freeze the assets that are subject to litigation). In this context, the enforcement measures are limited to the custody and administration of chattels; the prohibition of alienation and pledging; and in the case of claims, the prohibition of payment and collection. These interim injunctions provided by the Liechtenstein Enforcement Act are usually issued and enforced at the expense of the

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13 Section 32, Paragraph 4 of the STPO.
14 Section 1489 of the ABGB.
15 Pletzer in Kletečka/Schauer (eds), ABGB-ON 1.01, Section 870, Rz 31 (www.rdb.at).
16 Articles 270 ff. of Liechtenstein’s Enforcement Act (EO) dated 24 November 1971.
applicant. Upon service of the injunction, the applicant can be required to pay in advance to the court the amount of money required for the enforcement of the issued injunction. The enforcement of the injunction may not be effected until that amount has been paid.17

**Criminal proceedings**

According to Section 97a of the STPO, there are several ways in which to seize or secure assets on request by the public prosecutor. The court can, for example, order the seizure, administration and depositing of movable assets, including cash, or prohibit the seizure or the disposal of movable assets.18 The most important instrument in securing assets, however, is the freezing of bank accounts.19 If a bank account is frozen, the potential fraudster has no way to drain the assets of the bank account. The problem is often that the bank account has to be known to the public prosecutor or to the private participant in the investigation. In this regard, due diligence reporting obligations play an important role, as bank accounts may be brought to the public prosecutor’s attention in this way.

The freezing of bank accounts also plays a very important role in international matters. In cases of applications of mutual assistance from abroad, the public prosecutor or the foreign authority often requests that the Liechtenstein court freeze bank accounts according to Section 97a of the STPO.

**ii Obtaining evidence**

**Civil proceedings**

A Liechtenstein judge is confined to appraising the facts pleaded by the parties. There are five different types of evidence mentioned in the Liechtenstein Civil Procedure Act (ZPO), dated 10 December 1912: documentary evidence, hearing of witnesses, evidence by experts, evidence by inspection of the court and evidence by party interrogation.20 None of these means has greater weight than the others. Under Liechtenstein civil procedure law, a judge is free to weigh and consider the evidence submitted by the parties according to the conviction he or she has acquired during the proceedings. The court has the power to draw its conclusions from witness statements, regardless of the number of witnesses presented by one side, relying on the credibility, clarity and sureness of a witness statement, as well as any correspondence between different pieces of evidence and witness statements.21

For persons familiar with US litigation, it may be difficult to accept that there is no comparable provision for compulsory pretrial discovery under Liechtenstein law. In the course of a civil procedure, it is, however, possible to obtain an order that forces the defendant to produce certain types of documents. Notably, the same may also be obtained from the plaintiff or other parties to a trial.

The order will be limited to cases where the documents are in the possession of a party who refers to it previously before the court, or where the party under the burden of proof is entitled by law to inspect the document. The order also applies where the document has

17 Article 286, Paragraphs 1 and 3 of the EO.
18 Section 97a, Paragraph 1, Subparagraphs 1 and 2 of the STPO.
19 Section 97a, Paragraph 1, Subparagraph 3 of the STPO.
20 Section 292 et seq. of the ZPO.
been prepared for the benefit of the moving party, or where the document sought will serve as evidence for the legal relationship between the parties or serves to demonstrate factors underlying that relationship.\textsuperscript{22}

If a party fears that the evidence in question may be difficult to obtain in the future, an order for the preservation of evidence is possible (inspection of perishable goods, deposition of a witness who is about to die, etc.). A party may at any time file a petition for preliminary proceedings to take evidence on facts that the party intends to bring into evidence in pending or future court proceedings.\textsuperscript{23}

**Criminal proceedings**

In criminal investigations and proceedings, the investigating judge has the duty to obtain evidence on request by the public prosecutor and subsequently to hand over the results to the public prosecutor.\textsuperscript{24} The investigating judge has several options by which to obtain evidence.

In matters of fraud, house searches and the seizure of documents and other objects are very important.\textsuperscript{25} In the case of bank documents, Liechtenstein has always had very robust banking secrecy laws (as in Switzerland), but in criminal investigations banking secrecy is no longer protected by law and so bank documents can be seized. Certain legally privileged documents, such as correspondence between a lawyer and an accused party, cannot, however, be sequestrated.\textsuperscript{26}

**IV FRAUD IN SPECIFIC CONTEXTS**

**i Banking and money laundering**

There are no special features of law, regulation and practice in Liechtenstein relating to the recovery of assets and to pursuing claims in banking and money laundering matters. Therefore, the general rules of law for recovery and pursuing claims apply.

**ii Insolvency**

The Liechtenstein Criminal Code contains special provisions for the criminal prosecution of persons who have committed frauds in insolvency matters.\textsuperscript{27} An example of a fraud in insolvency matters is the unfair disadvantage of creditors.

According to the Liechtenstein Code of Securing Legal Rights (RSO), dated 9 February 1923, it is possible to revoke certain acts of the insolvent party. According to Article 64 et seq. of the RSO, legal actions made by the debtor for the purpose of harming creditors of the debtor can be appealed. With this feature of law, it is possible to submit certain assets to the debt collection proceeding.

\textsuperscript{22} Section 304 of the ZPO.
\textsuperscript{23} Section 384 et seq. of the ZPO.
\textsuperscript{24} Section 41 of the STPO.
\textsuperscript{25} Section 91a et seq. of the STPO.
\textsuperscript{26} See, for example, the decision of the Constitutional Court of Liechtenstein, 28 February 2000, STGH 1999/23 (LES 2003, 1).
\textsuperscript{27} Section 156 et seq. of the STGB.
Furthermore, pleading fraud can pierce the corporate veil. Piercing the corporate veil in relation to civil claims for damages in cases of insolvency is possible if the perpetrator has established and used a company with the intention of committing fraudulent acts and deceiving other persons.28

iii Arbitration
The rules for arbitral proceedings in Liechtenstein are regulated in the ZPO.29 In addition, there are the Liechtenstein Rules, which apply whenever parties agree on them. According to Section 598 of the ZPO, contractual and non-contractual proprietary matters are arbitral. Therefore, arbitral tribunals can preside over disputes in fraud matters as in civil proceedings if the parties concluded an arbitration agreement regarding the matter involving the fraud.

iv Fraud’s effect on evidentiary rules and legal privilege
As stated in Section III.ii, correspondence between a lawyer and an accused person is legally privileged and cannot be sequestrated. Therefore, correspondence between a lawyer and an accused person in fraud matters cannot be used as evidence in criminal proceedings.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims
In Liechtenstein, the Private International Law Act (IPRG), dated 19 September 1996, deals with legal issues involving foreign countries.

The IPRG does not contain any special provisions for fraud matters. Therefore, the general conflict rules of the general law of obligations apply, as fraud in civil proceedings is an issue of law of obligations according to the Civil Code.30 In matters of the law of obligations, the parties may expressly or coherently determine their choice of law and, consequently, parties in fraud matters can do so as well.31

If no choice of law exists in matters of the law of obligations by the parties involved, Article 52 of the IPRG applies. In this case, the proceeding on matters of the law of obligations, and in consequence also fraud proceedings, would be judged according to the law of the country in which the fraud has been committed. If, however, the parties involved both bear a stronger relation to another country than the country in which the fraud has been committed, the law of this other country will be applicable.

ii Collection of evidence in support of proceedings abroad

Civil proceedings
Liechtenstein is a signatory to the Convention of Taking Evidence Abroad in Civil or Commercial matters, dated 18 March 1970 (Hague Evidence Convention). Therefore,
Liechtenstein assists in the service of judicial documents, as well as in the obtaining of evidence, such as through local inspections, taking statements from witnesses and parties, production of documents and providing expert opinions.

Liechtenstein does, however, also provide jurisdictions that are not party to the Hague Evidence Convention with mutual assistance, but the extent of the assistance has to be evaluated in each case by the responsible judge.

**Criminal proceedings**

Liechtenstein is a signatory to the European Convention on Mutual Assistance in Criminal Matters (ECMA) of 20 April 1959. Therefore, Liechtenstein will assist with collecting evidence according the ECMA if the request for assistance comes from a signatory of the ECMA.

For other countries, the rules of the Liechtenstein Mutual Legal Assistance Act (RHG), dated 15 September 2000 apply. The purpose of the RHG is to assist foreign authorities to detect and investigate crime and criminal activities, and so Liechtenstein provides foreign authorities with possible evidence such as documents or witness statements. In the context of fraud and other crimes in financial matters, the confiscation of bank documents is also very important (see Section III.ii).

The freezing of bank accounts plays another important role in cases of mutual legal assistance (see Section III.i).

**iii Seizure of assets or proceeds of fraud in support of the victim of fraud**

To seize the assets of a victim of fraud, it would be necessary to initiate legal proceedings in Liechtenstein regarding interim injunctions. As Liechtenstein is not a party to the Lugano Convention and, as in relation to the treaties regarding the enforcement of judgments with Austria and Switzerland, the enforcement of interim injunctions is explicitly excluded, and the ordering of a foreign court to seize assets in Liechtenstein is not possible.

**Criminal proceedings**

According to the STPO, the public prosecutor may request freezing orders on bank accounts. In cases of mutual assistance, the public prosecutor often requests freezing orders to avoid the drain of money and, in consequence, the victim of fraud can be supported in recovering his or her assets (see Section III.i).

During investigation proceedings, the seizure of assets is ordered by the court upon request of the public prosecutor, as mentioned above. In general, the measures are the seizure of assets, search warrants and observations, as well as arrest and custody measures. The court may also order the seizure and administration or depositing of movable assets or prohibit the disposal of such assets, including cash. Moreover, the criminal court may declare assets to be ‘forfeited’.

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33 Agreement on the acknowledgement and enforcement of judgments in civil-law matters between Liechtenstein and Switzerland, dated 25 April 1968; Agreement on the acknowledgement and enforcement of judgments in civil-law matters between Liechtenstein and Austria, dated 5 July 1973 (together, the Agreements).
34 Section 20 et seq. of the STGB.
iv Enforcement of judgments granted abroad in relation to fraud claims

Liechtenstein is not subject to European regulations on mutual acknowledgment of foreign jurisdiction; nor is Liechtenstein party to the Lugano Convention or other multilateral or international conventions on the acknowledgment and enforcement of foreign judgments. The only countries with which Liechtenstein has bilateral treaties on the acknowledgment and enforcement of foreign judgments are Austria and Switzerland.

Apart from the aforementioned exceptions, foreign judgments are not enforceable in Liechtenstein. Trying to enforce a foreign judgment regularly leads to a special procedure in which an entirely new proceeding on the claim will be initiated in Liechtenstein. The Liechtenstein court will newly opine on the facts, the Liechtenstein judge will take evidence him or herself, whereby the foreign judgment, including any and all results of the foreign procedure, will regularly be entirely ignored.35

Further exceptions are arbitral awards, as Liechtenstein recently signed the New York Convention, which entered into force on 5 November 2011. Liechtenstein thus recognises and enforces the awards of arbitral tribunals with domicile in another of the signatory states.36

v Fraud as a defence to enforcement of judgments granted abroad

As stated in Section V.iv, Liechtenstein is not subject to the Lugano Convention and therefore foreign judgments are generally not enforceable in Liechtenstein.37 Concerning the enforcement of judgments from Switzerland and Austria, however, judgments can only be enforced in Liechtenstein if their recognition does not contravene public policy.38 In these circumstances, it is conceivable that a judge would refuse to recognise and enforce a judgment from Switzerland or Austria if it is obvious that this judgment was obtained fraudulently.

VI CURRENT DEVELOPMENTS

With regard to relevant innovations and developments, reference should be made to the new forfeiture provisions, which have been in force since 1 June 2016. The core elements of the amendments were the replacement of the net principle by the gross principle, a new very broad understanding of the term ‘assets’, the extension of the forfeiture to include uses and replacement values, and the explicit inclusion of assets saved by committing a criminal offence in the decline of value. The first case law39 on these new provisions shows that the objective of the amendment (‘crime must not be worthwhile’) has been achieved.

35 Batliner/Gasser (eds), Litigation and Arbitration in Liechtenstein, second edition, Berne/Vienna 2013, p. 85 et seq.
37 See the Agreements, footnote 33.
38 Article 1, Paragraph 1, Subparagraph 1 of the Agreement on the acknowledgement and enforcement of judgments in civil-law matters between Liechtenstein and Switzerland dated 25 April 1968 and the Agreement on the acknowledgement and enforcement of judgments in civil-law matters between Liechtenstein and Austria dated 5 July 1973.
39 See, for example, the decisions of the Supreme Court of Liechtenstein, 6 October 2017 OGH 12 RS.2013.200; 1 December 2017 OGH 13 UR.2016.112; and the decisions of the Court of Appeal, 10 April 2018 OG 13 UR.2018.73; 24 April 2018 OG 09 KG.2014.1; 24 April 2018 OG 11 UR.2017.176.
I OVERVIEW

Luxembourg is a civil law jurisdiction and has experience in fraud cases. Its entities are often involved in international groups of companies, making Luxembourg vulnerable to company fraud and other fraudulent schemes that make use of complex legal set-ups. Its mature banking and funds industry also attracts white-collar crime. Some major international frauds, such as the Madoff scandal, have hit the Grand Duchy, and many fraud cases have been tried before the courts in Luxembourg.

II LEGAL RIGHTS AND REMEDIES

Claimants will have to rely on a wide range of criminal and civil remedies to conduct successful proceedings for recovery or compensation. Although the Criminal Code (CrimC) and other statutes regulate certain peculiar cases of fraud, there is, strictly speaking, no specific compensation for fraud victims other than restitution of the victims’ defrauded property and the common civil liability rules to recover damages.

i Civil and criminal remedies

Civil remedies

A fraud victim will usually pursue compensation through a liability suit for the recovery of damages that have been caused by an act of wrongdoing. A claimant will be required to establish an act of wrongdoing (or fault), damages and causality.

Fraud victims can use contractual liability and tort\(^2\) to allege, *inter alia*, breaches of contract, contractual fraud\(^3\) and serious misconduct. In some cases, an abuse of right\(^4\) may also support a fraud claim.

If the fraud was carried out by directors of a company in which the victim is a shareholder, the claimant may choose to base its liability suit on the provisions for directors’ liability of the amended Law of 10 August 1915 on commercial companies (LCC) if it can show corporate mismanagement or a violation of the LCC, accounting rules or the company’s articles of

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1 François Kremer is a partner and Ariel Devillers is a senior associate at Arendt & Medernach.
2 Article 1134 or 1382 and 1183 of the Civil Code (CC). A fraud victim cannot bring both a claim for tort and a claim for breach of contract simultaneously. It can, however, make a primary and a separate secondary claim (conditional upon the first claim being dismissed).
3 Article 1116 CC.
4 Article 6-1 CC.
incorporation. In most cases, the company will have to file suit. In a société anonyme, a société européenne, a société en commandite par actions and a société par actions simplifiées, it is possible for a shareholder or a group of shareholders holding at least 10 per cent of the voting rights to bring shareholder derivative suits against company directors.

A claimant is only entitled to lawful, certain, direct and personal damages. Punitive and symbolic damages are generally excluded. If the suit is based on a breach of contract, the alleged damages should also have been foreseeable at the time of conclusion of the contract.

Other civil-law remedies can be used to recover fraud amounts. A victim can, for example, initiate a de in rem verso action (unjust enrichment) to claim restitution and compensation. It will have to demonstrate, inter alia, that it cannot rely upon any other remedy to recover the amounts sought.5

Another option is to claim recovery of undue payments6 if the fraud involved any form of payment.7 Interest and other amounts yielded in this respect may also be claimed back if the payee acted in bad faith.

One final remedy is to have a contract voided based on contractual fraud or on the legal maxim fraus omnia corrumpit, in which case restitution may be claimed.

**Criminal liability**

Under Luxembourg law, both natural persons and legal entities can be held criminally accountable, and there are a number of fraud schemes that are considered offences according to the CrimC and other statutes.

Abuse of trust and swindle are commonly employed. Abuse of trust8 can serve to establish a fraud claim if the fraud was performed by dissipating or misappropriating certain things that were given through the abusing of trust. If the fraudster cheated someone out of his or her property while employing fraudulent means, he or she may be accused of swindle.9

As concerns corporate finance, Article 1500-3 LCC considers that anyone who caused payments, subscriptions, share acquisitions, bonds subscriptions or acquisitions of any other kind of corporate title through fraudulent means is guilty of swindle.

The offence of misuse of corporate assets, which is the act of directors misusing the corporate estate in their personal interest, is a specific form of abuse of trust.10 According to Luxembourg case law, it should be established, inter alia, that the directors knowingly used the assets or the credit of the company for personal gain contrary to the corporate interest.11

Directors can also be criminally liable for committing an abuse of power or a misuse of their votes where they used their influence to the detriment of the corporate interest for personal profit.12

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6 Article 1376 CC.
7 ‘Undue’ means that no prior claim was mature, or if a prior claim did exist, the payer paid anyone but his or her creditor, or that the payee received a payment from anyone but his or her own debtor.
8 Article 491 CrimC.
9 Article 496 et seq. CrimC.
10 Article 1500-11 LCC.
12 Article 1500-11 LCC.
Fraud victims might also wish to direct their claims against the persons who were directly or indirectly involved in the fraud by filing a complaint for aiding and abetting.\textsuperscript{13} Concealing things obtained through a criminal offence is also considered a fraud,\textsuperscript{14} and victims can rely on this offence to claim compensation from the persons who aided the fraudster by concealing the product of the fraud.

Compensation for victims will occur through the standard rules on civil liability (i.e., a claim for damages). The wrongdoing will be shown by demonstrating the criminal offence. Compensation can either be sought before the criminal courts by becoming a civil party to criminal proceedings, or by requesting damages from the civil courts through civil proceedings. In the latter case, the claimant’s civil action can only progress once the criminal proceedings are concluded. A victim can always fall back on the civil courts for compensation if it began by filing a claim for damages with the criminal courts, but once the victim has initiated proceedings to claim damages before the civil courts, it can no longer become a civil party to the criminal proceedings.\textsuperscript{15}

**Defences to fraud claims**

A number of defences can serve to resist fraud claims in court. It will generally be argued that the conditions required for a successful fraud claim have not been established.

The fraudster will usually try to have the suit dismissed on allegations that certain formal requirements for bringing a lawsuit have not been met or are defective. Often, defendants will try to argue that the claimant has no standing or authority to sue. In this particular context:

\begin{itemize}
  \item[a] case law considers that shareholders are not creditors of a company and that they cannot therefore resort to creditor remedies (such as the derivative claim or the actio pauliana);
  \item[b] defrauded shareholders are only allowed to act individually against directors if they can show that they suffered strictly personal damages that have not been sustained by the company as a whole (i.e., by all the shareholders);
  \item[c] directors that have been discharged for the financial year during which the alleged misconduct occurred are usually immune to liability claims from the company;
  \item[d] a mutual fund (an investment fund organised as a contractual vehicle) has no legal personality, meaning that proceedings can only be brought by (and against) its management company acting in that capacity; and
  \item[e] according to current case law, a claimant cannot bring a contractual claim against a defendant with whom it has no direct contractual relationship, unless it can show that it is indirectly linked to the defendant via a group of contracts through which property is transferred.\textsuperscript{16}
\end{itemize}

\textsuperscript{13} Article 66 CrimC.
\textsuperscript{14} Article 505 CrimC.
\textsuperscript{16} Pascal Ancel, *Contrats et obligations conventionnelles en droit luxembourgeois*, e-pub, No. 1049 et seq.
A defendant to a fraud claim can make the suit disappear entirely by arguing that the limitation period has expired. Liability claims are normally covered by the common 30-year statute of limitation, but the commercial 10-year limitation period may apply where the relevant acts are commercial in nature or hybrid commercial–civil acts.

A five-year statute of limitation applies to liability suits against directors. The Court of Appeal has, however, held that the common limitation period of 30 years applies to a compensation claim where fraud or a criminal offence was committed by the directors.

Under Luxembourg criminal law, offences are categorised according to their sentencing tariffs and frauds are either crimes or felonies. Where the fraud is a crime, it can no longer be prosecuted if 10 years have passed since the fraud was committed. If the fraud is a felony, it should be prosecuted within five years.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Third-party attachments
A fraud victim can resort to a third-party attachment to attach or secure the assets owed by a third party to the fraudster.

Third-party attachment proceedings are a two-stage process:

During the first phase (which is often referred to as the conservatory phase), a creditor attaches the assets of his or her debtor that are held or owed by a third party (often a bank).

During the second (or enforcement) stage, the creditor gets the attachment validated in court so that it can obtain payment on the attached assets from the third-party debtor in lieu of his or her own debtor.

Attachment proceedings are ancillary in nature and are merely a conservatory action during the first phase that aims to put the attachment in place. The first phase is completed by having three separate notices served by a bailiff on the debtor and the third-party debtor.

The claimant might, however, have to go through the process of applying for an attachment leave from the President of the District Court (on an ex parte basis) before initiating the attachment if no judgment or title has been obtained against the fraudster. It is worth noting in this respect that case law considers that an alleged claim for damages is not sufficient to obtain such an authorisation.

Once the deed of attachment is served on the third-party debtor, the attached assets are frozen, meaning that the third party is prohibited (under the penalty of personal civil liability) to remit any funds or assets to the fraudster.

The objective of the enforcement phase is to get the attachment validated in court so that the claimant is able to be paid on the attached assets. To succeed, the claimant must show

17 Article 2262 CC.
18 Article 189 ComC.
19 Article 1400-6(4) LCC.
21 Article 637 of the Code of Criminal Procedure (CCP).
22 Article 638 CCP.
that it has an enforceable money judgment against the defendant. If the claimant did not have an enforceable money judgment during the conservatory phase, it should endeavour to obtain one. This means, in practice and depending on the case:

a. that the claimant should ask for a money judgment against the defendant during the validation proceedings if the district court before which the validation proceedings are being conducted has jurisdiction over the claim;

b. that the claimant should sue its defendant before any other competent jurisdiction in Luxembourg or abroad (if Luxembourg has no international jurisdiction); or

c. that if the claimant already has a foreign judgment, that it should make sure that the judgment is recognised and rendered enforceable in Luxembourg (see below).

**European Account Preservation Order**

In cross-border situations within the European Union (other than the United Kingdom and Denmark), it is possible to apply for a European Account Preservation Order (EAPO) in accordance with Regulation (EU) No. 655/2014.

The procedure and effects are broadly similar to the third-party attachment procedure described above, with the exception that:

a. only cash may be preserved through an EAPO;

b. leave from the court (the EAPO itself) is required to attach, which, if sought in Luxembourg, would have to be delivered by the justice of the peace or the president of the district court, depending on whether the claim exceeds €10,000 – according to Article 685-5 NCCP;

c. a creditor must show urgency to obtain an EAPO; 24

d. where no judgment has yet been obtained, a creditor will normally have to provide security to obtain an EAPO unless specifically exempted; 25

e. an EAPO can freeze an account only up to the claimed amount;

f. banks are very swiftly required to make a declaration concerning the preservation of funds; and

g. the debtor will be informed of the preservation measure at a later stage only once the concerned judicial authority, having rendered the EAPO, has received the declaration concerning the preservation of funds by the bank or banks.

An EAPO does not allow a claimant to obtain payment on the preserved bank account. The latter is subject to national proceedings, meaning that if preservation is effected in Luxembourg, a claimant will have to convert its EAPO into an enforceable bank account attachment according to Article 718-1 NCCP.

An EAPO may, however, be useful where the creditor has no information about its debtor’s bank account, as it can make a request for the obtaining of account information under certain circumstances. 26

24 Article 7(1) of Regulation (EU) No. 655/2014, in a way very similar to the risk of the dissipation criterion applicable in some jurisdictions.


**Seizure**

An examining magistrate is empowered in the context of a criminal investigation to seize the instrumentalities of a fraud as well as the proceeds of a fraud.\(^{27}\) This includes the authority to order a third party to grant access to an automated data processing system.\(^{28}\)

**Confiscation**

The general system of confiscation under Luxembourg law is conviction-based.\(^ {29}\) Article 32 CrimC specifies that confiscation always applies to crimes, but that its application to felonies is optional.

Under the general system, courts can resort to extended confiscation, meaning that the proceeds and the instrumentalities of the offence, as well as their respective products, can be forfeited.

Confiscated property belonging to a fraud victim (including substituted property) can be restituted.\(^ {30}\) The victim can also claim restitution of substituted property.

A more extensive confiscation regime applies to certain offences such as money laundering,\(^ {31}\) which also authorises third-party confiscation, value confiscation and non-conviction based confiscation.

ii **Obtaining evidence**

**Civil**

The process of obtaining evidence to support legal proceedings in Luxembourg differs to a great extent with most common law jurisdictions. There is, for example, no discovery procedure.

The general *ratione legis* behind the Luxembourg rules on obtaining evidence is that fishing expeditions are prohibited, and parties should normally refrain from bringing lawsuits if they do not have enough evidence to support them. The law\(^ {32}\) requires parties to prove their allegations, and judges will not be allowed to order certain investigative measures where they are intended to make up for parties’ lack of evidence.\(^ {33}\)

**Pretrial remedies**

Article 350 NCCP allows an applicant to request pretrial investigative measures to obtain evidence regarding facts on which the outcome of a lawsuit could depend, either through summary *inter partes* proceedings or by issuing an *ex parte* application (in cases of exceptional circumstances).\(^ {34}\)

Article 350 can only be relied upon if no proceedings have been commenced on the merits. An applicant will be allowed to request lawful investigative measures or the

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\(^{27}\) Article 66(1) CCP.

\(^{28}\) Article 66(4) CCP.

\(^{29}\) Article 31 CrimC.

\(^{30}\) Article 32(1) CrimC.

\(^{31}\) Article 31(3) CrimC.

\(^{32}\) Article 55 of the New Code of Civil Procedure (NCCP) and Article 1315 CC.

\(^{33}\) Article 351 NCCP.

production of evidence if it has legitimate cause, and the applicant will have to show that the outcome of the lawsuit is influenced by the facts at issue. There is, however, no requirement to show urgency.

To avoid fishing expeditions, case law has also added that where an applicant is seeking to obtain evidence from its adversary or a third party, it should establish that the requested documents do (or are likely to) exist, and should include a detailed description of those documents in its application. The Court of Appeal recently confirmed that Article 350 NCCP cannot serve to obtain documents located outside Luxembourg.

Article 933(1) NCCP can also support a request for pretrial evidence, but is rarely used in practice since it requires showing an imminent loss of evidence.

If the management is suspected of fraud, Article 1400-3 LCC allows any shareholder or a group of shareholders holding at least 10 per cent of the share capital or the voting rights to address written questions to company management on specific operations. Under certain conditions, these questions may extend to operations carried out at the level of a subsidiary.

If no answer or an unsatisfactory answer is received within a month, a request can be made in summary court for the appointment of a management expert tasked with enquiring into the litigious operations.

Obtaining evidence during trial

Parties can also request to obtain evidence while proceedings are ongoing.

Article 284 to 288 NCCP are the basis for requesting a court order during trial against parties or third parties to communicate evidence that is in their possession. To succeed, four requirements need to be satisfied according to case law. The required evidence:

- needs to be identified with precision;
- should be likely to exist;
- should presumably be in possession of the identified party; and
- should be relevant to the outcome of the lawsuit.

In addition, a party can request any legally admissible civil investigative measure such as witness statements, witness hearings and appraisals.

Criminal

If a fraud scheme is prosecuted, an examining magistrate will be appointed to investigate and gather all the evidence of the fraud. The examining magistrate endeavours to reveal the truth, meaning that he or she examines both in favour of and against the accused.

An examining magistrate is able to resort to a very large panel of investigative measures that are not available under civil law such as seizures, hearings, confrontations, surveillance and infiltrations.

36 Court of Appeal, 10 May 2017, No. 81/17 – VII – REF.
38 Article 348 NCCP.
39 Article 51 CCP.
The examining magistrate will usually try to trace the proceeds and instrumentalities of the fraud. To mitigate the effect of bank secrecy in this respect, the law allows an examining magistrate, under certain specific circumstances, to order the following bank disclosures: information as to whether the accused holds or held an account, controls or controlled an account, or if he or she has or held a proxy over an account; and all banking operations that have been or will be performed on the bank account of the accused during a specified time frame. Financial institutions can be fined if they fail to comply in this respect.

Article 66-4 CCP also authorises an examining magistrate to generally request information and documents regarding a specific bank account or operation, but a bank could in principle choose to uphold bank secrecy and remain silent, since failure to comply is not sanctioned by a penalty.

IV  FRAUD IN SPECIFIC CONTEXTS

i  Banking and money laundering

Fraud can include acts of money laundering, and money laundering can have been carried out to conceal the proceeds of a fraud.

The offence of money laundering is in essence the act of knowingly facilitating deceit as to the nature, origin, location, disposal, movement or ownership of any kind of asset obtained criminally.

The offence of money laundering needs to be based on a predicate offence that served to generate the illegal proceeds.

In Luxembourg, a person can be sentenced for money laundering rather easily. According to current case law, the predicate offence needs not to have been prosecuted or dealt with in court. A judge can find a person guilty of money laundering where he or she has been convinced by the evidence filed in court that a predicate offence took place.

Money laundering can also be based on a predicate offence committed abroad. A fraudster does not necessarily need to have been sentenced abroad, because a Luxembourg judge is allowed to determine whether the predicate offence was committed according to the laws of the foreign jurisdiction at stake.

The CrimC further incriminates accomplices to money laundering offences as well as attempts to commit money laundering.

ii  Insolvency

Luxembourg law supplies remedies to fraud victims in cases of insolvency. Some remedies can be utilised when there is strictly speaking, a case for insolvency (i.e., higher assets over

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40 Article 66-2 and 66-3 CCP.
41 Article 66-5(3) CCP
42 Idem.
43 Article 506-1 CrimC.
44 The list of predicate offences is contained in Article 506-1 CrimC and includes offences such as market manipulation, fraud, trafficking, insider dealing and, since the law of 23 December 2016, also tax evasion or tax fraud.
liabilities), while other more tailored remedies can only be applied once bankruptcy has been declared by a court (meaning that the fraudster’s payments have come to a halt and that it is no longer creditworthy).

These remedies are not intended to provide direct compensation to fraud victims, but are generally designed to reinforce the victim’s position through clawback possibilities and bankruptcy extensions.

**Insolvency**

There are essentially two remedies available according to the CC if a debtor is insolvent: the derivative action and the *actio pauliana* (fraudulent conveyance). To have the appropriate standing to sue, the victim will have to show with both actions that its debtor is insolvent.

A derivative action\(^{47}\) aims to recover assets from third parties on behalf of the insolvent debtor to increase its estate where that debtor is (wilfully) refraining from action. A derivative claim is, however, subject to stringent requirements.

If a fraudulent conveyance was performed by its debtor, the victim will be allowed to have the transfer annulled by initiating an *actio pauliana*.\(^{48}\) The victim should prove, *inter alia*, that the transaction was performed with intent to defraud the creditors by enabling the debtor to become insolvent or aggravating its insolvency. If the transfer was performed against consideration, it must be shown that the third party with whom the debtor transacted was an accomplice to the fraud.

**Bankruptcy**

A fraud victim has better options once the fraudster has been declared bankrupt. The downturn is that the victim will have little control over the proceedings, since only a court-appointed bankruptcy receiver is empowered in most cases to pursue claims on behalf of the bankruptcy.

Certain transactions can be declared null and void if they are challenged by the bankruptcy receiver in court and have been performed during the hardening period (or 10 days prior to that period).\(^{49}\) Payment of an undue debt and transfers in lieu of payment of mature liabilities during the hardening period will be voided in this context.\(^{50}\)

Any other transaction may be voided if the party with which the bankrupt entity transacted had knowledge of its cessation of payments.\(^{51}\)

Fraudulent transactions (i.e., transactions that are detrimental to the bankrupt entity’s creditors) can be challenged even where they occurred before the hardening period.\(^{52}\) This is an application of the *actio pauliana* to bankruptcy.

A fraud victim could benefit from a personal bankruptcy order against the fraudulent directors of a company because it will expand the estate that will be available for compensation. The bankruptcy of a company may be extended to the directors\(^{53}\) of a bankrupt company if they used the corporate veil to act in their personal interest, used the company’s assets as if

\(^{47}\) Article 1166 CC.

\(^{48}\) Article 1167 CC.

\(^{49}\) Article 445 of the Commercial Code (ComC).


\(^{51}\) Article 446 ComC.

\(^{52}\) Article 448 ComC.

\(^{53}\) Statutory directors as well as *de facto* directors (including immediate or ultimate shareholders).
they were their own, or carried on, for personal gain, an unprofitable business that could only lead the company into bankruptcy. The sanctions provided by Article 495 ComC are not applied automatically and will depend on a case-by-case appreciation of the facts in court.

Upon application of the bankruptcy receiver, directors of an insolvent company can be held personally liable for the outstanding debts of the company if the bankruptcy was caused by their serious misconduct, including management errors or criminal acts (fraud). In this case, directors can incur full or partial, individual or joint and several liability for the outstanding amounts. The alleged misconduct must have caused the bankruptcy estate not to be able to fully cover the amounts owed to the creditors. However, an order for personal liability remains optional, even where the criteria under Article 495-1 ComC have been met, meaning that a judge will only issue an order for personal liability if it is convinced that such a sanction is equitable in the given set of circumstances.

Certain behaviours are also considered offences under the bankruptcy rules (fraudulent bankruptcy), and may serve to bring a subsequent liability claim against the fraudster. The drawback is that any order for damages arising from such a lawsuit will rank pari passu with unsecured creditors.

### iii Arbitration

It would not be possible under Luxembourg law to have an arbitral tribunal find someone guilty of a criminal offence to sentence that person accordingly, because public prosecution is allocated to the judiciary.

While Article 1225 NCCP excludes the possibility of submitting certain matters to arbitration, case law considers that a dispute is not in itself arbitrable just because an arbitrator would have to apply rules of public policy to resolve the dispute. Applying this legal precedent may theoretically mean that arbitrators would have jurisdiction to determine whether someone committed a criminal fraud to allocate civil damages to the victim.

There should not be any hurdle to arbitration for civil compensation if the fraud is a purely civil type of wrongdoing that does not involve any kind of criminal offence or if the fraud is already recognised in a criminal judgment.

The law does not, however, grant arbitrators the express authority to order interim measures, and the rules of arbitration of the Luxembourg Chamber of Commerce are also silent on this issue, so it is unclear whether interim measures ordered in a Luxembourg award would have any effect.

### iv Fraud’s effect on evidentiary rules and legal privilege

A party can make a plea for forgery during a civil suit if it considers that a certain document filed with the court as evidence is forged. The procedure is quite cumbersome and to some extent adversarial. The party making the plea should indicate why it believes the document is

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54 Article 495 ComC.
55 Article 495-1 ComC.
57 Article 573 to 578 ComC.
58 Article 1 CCP.
60 Article 310 et seq. NCC.
forged and, if the court considers that there is reason to believe that the document is forged, it will allow the applicant to prove its allegations and will order an appraisal by three experts. If the procedure is successful, the court will strike the document of the record.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

Both the Rome I Regulation\(^{61}\) and the Rome II Regulation\(^{62}\) are universally applicable. Therefore, if a fraud claim has an international aspect and is brought before the courts in Luxembourg, the courts will usually resort to these Regulations to determine the applicable law (unless the claim is not caught or is specifically excluded from the scope of these Regulations).

The law applicable to contractual fraud would be determined according to the Rome I Regulation.\(^{63}\)

In general, however, the law applicable to a claim for damages resulting from a fraud is determined by the Rome II Regulation, which could be:

- the law chosen by the parties (if any);
- the law of the jurisdiction where the damage occurred (\textit{lex loci delicti});
- the law of the jurisdiction where the fraudster and the victim habitually resided when the damage occurred; or
- the law of the jurisdiction with which the circumstances of the fraud are closely connected.

If foreign law applies to a claim brought in Luxembourg, case law considers that the applicant bears the burden to prove the substance of the foreign law. Parties will usually rely on legal opinions issued by foreign practitioners to that effect that are filed with court. Luxembourg courts would also be able to make a request for information on foreign law in accordance with the European Convention on Information on Foreign Law of 7 June 1968.

ii Collection of evidence in support of proceedings abroad

There are many laws, regulations, conventions and bilateral treaties that apply in this respect. Their application depends largely on the jurisdiction issuing a request to Luxembourg and the nature of the dispute at stake. Below is a brief description of the instruments most commonly applied.

In civil and commercial matters, if a request originates in a Member State of the European Union, foreign jurisdictions can request the taking of evidence in Luxembourg according to Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (the Evidence Regulation).

Luxembourg is also a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 (the Hague Evidence Convention), which would regulate requests from non-EU jurisdictions that are a party to the Hague Evidence Convention.

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\(^{63}\) Articles 10 and 12(e) Rome I Regulation.
Both the Hague Evidence Convention and the Evidence Regulation operate in a similar manner. Luxembourg's central body that has the authority to receive letters of request under these two instruments is the Public Prosecutor's Office with the Superior Court of Justice.

Luxembourg has declared that it will not execute letters rogatory for a common law pretrial discovery of documents.64 In criminal matters, letters rogatory for both the taking of evidence and criminal seizures are governed by the amended law dated 8 August 2000 on international mutual legal assistance in criminal matters (the Mutual Assistance Law). The Mutual Assistance Law governs requests from both jurisdictions that are a party to an international agreement with Luxembourg regarding such mutual assistance65 as those originating in non-contracting states and from international judicial authorities recognised by Luxembourg.66

Letters rogatory, and their supporting documents, should be drafted in, or translated into, French or German and must comply with a number of formal requirements.67 They normally need to be approved by the Public Prosecutor's Office, which will transmit the request to the competent authority. There is no remedy against an order of refusal from the State's Public Prosecutor.68 If the request is urgent, it can be addressed directly to the competent authority for immediate performance.

Transfer of the seized evidence or objects is subject to approval from the judges' chamber.69 Such approval includes a decision on lawfulness.

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

International criminal seizures are also regulated by the Mutual Assistance Law, but assets or proceeds cannot be transferred to the requesting state and will remain frozen until a confiscation or restitution request is rendered enforceable.70

International confiscation and restitution requests are performed once they have been rendered enforceable by the Criminal Court.71 If confiscation is recognised, the ownership of the confiscated assets is normally transferred to the state. Assets that are subject to an enforceable restitution request are transferred back to the fraud victim. The procedure is subject to the usual safeguards such as public policy, due process and third-party interests.72

Confiscation and restitution requests made in conjunction with a political offence cannot be rendered enforceable according to Article 663 of the CCP.

In civil matters, a fraud victim can also opt for third-party attachments as outlined above.

iv Enforcement of judgments granted abroad in relation to fraud claims

If a fraud is recognised in an enforceable civil or commercial decision originating in a Member State of the European Union, it can be directly enforced in Luxembourg if caught

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64 Luxembourg's declaration to the Hague Evidence Convention.
65 Inter alia, the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.
66 Article 1 Mutual Assistance Law.
67 Articles 4 and 5 Mutual Assistance Law.
68 Article 3 Mutual Assistance Law.
69 Article 9(2) Mutual Assistance Law.
70 Frédéric Lugentz, Jacques Rayroud and Michel Turk, L'entreaide pénale internationale en Suisse, en Belgique et au Grand-Duché de Luxembourg, p. 823.
71 Article 659 et seq. CCP.
72 Articles 663 and 664 CCP.
by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation 1215/2012), including decisions rendered in the context of insolvency proceedings in one of the Member States.\(^{73}\)

Other civil or commercial judgments that are subject to an international agreement\(^{74}\) will have to be declared enforceable by an order of the President of the District Court upon \textit{ex parte} application.\(^{75}\)

Such an enforcement order must be served on the party against which it has been issued to permit the defendant to appeal within one month of service, if a Luxembourg resident.

Any other civil or commercial judgment issued by a jurisdiction that has no international agreement with Luxembourg in this respect will have to be declared enforceable by the district court.\(^{76}\) Common civil procedure applies in this case, meaning that the defendant is put on notice.

Criminal judgments rendered in a Member State of the European Union that include a custodial sentence are rendered enforceable by the State Public Prosecutor in accordance with the law, dated 28 February 2011, concerning the recognition of criminal judgments ordering a custodial sentence or measure to be enforced in another Member State of the European Union (the Criminal Enforcement Law). Fraud judgments are rendered enforceable without a double incrimination assessment.\(^{77}\)

\section*{v Fraud as a defence to enforcement of judgments granted abroad}

Fraud, as such, is not specifically recognised as a means to resist the enforcement in Luxembourg of a foreign judgment. In many cases, however, courts are bound to examine the aspect of due process\(^{78}\) to detect whether there is a fraud against the defendant.\(^{79}\)

A defendant could also argue against the enforcement of a foreign judgment by appealing to the notion of public policy in the context of a fraud, or try to invoke the maxim \textit{fraus omnia corrumpit}.

\section*{VI CURRENT DEVELOPMENTS}


\begin{flushleft}
\footnotesize
\begin{enumerate}
\item Article 32 of Regulation (EU) No. 2015/848 on insolvency proceedings.
\item Such as the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the Hague Enforcement Convention).
\item Article 679 et seq. NCCP.
\item Article 5(3)(8) of the Criminal Enforcement Law.
\item For example, in compliance with Article 6(2)4 of the Criminal Enforcement Law, Article 45(1)(b) of Regulation 1215/2012 and Article 5(1) and (2) of the Hague Enforcement Convention.
\item Article 5(3)(8) of the Criminal Enforcement Law.
\item \footnotesize For example, in compliance with Article 6(2)4 of the Criminal Enforcement Law, Article 45(1)(b) of Regulation 1215/2012 and Article 5(1) and (2) of the Hague Enforcement Convention.
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In recent years, investor rights in relation to fraud by company management have also been strengthened by the introduction of a minority shareholder derivative suit against company directors, and by reinforcing the management expert procedure (both described above).
Chapter 23

MEXICO

Juan Francisco Torres-Landa Ruffo, Luis Omar Guerrero Rodríguez, Jorge Francisco Valdés King, Jacobo Enrique Rueda Fernández and Eduardo Lobatón Guzmán

I  OVERVIEW

The design of the Mexican legal framework makes asset tracking and recovery a feasible yet elaborate and tricky affair. Article 16 of the Mexican Constitution provides that no one may be asked to disclose information about their belongings without an order from an authority empowered to do so. Article 14 of the Mexican Constitution forbids being deprived of one’s possessions or belongings without an express legal order. Both of these articles provide that possessions belong to the finder until a legal statement proves otherwise. While the primary intention of these provisions is to safeguard the human right to property, unfortunately, they also provide a segue to this ‘finders-keepers’ rule that is so often abused to hide misappropriated assets.

This chapter concerns the intricacies of tracking and recovering an asset. First, it delves into tracking assets and how to legally find the location or the person currently holding an asset of interest. Then, once the asset has been detected, the chapter explains the process to recover it. Succeeding in these activities will most certainly take some time and require tackling some challenges. However, unlike other countries, Mexico has no recognition or regulation of private investigators. Thus, certain services offered in the market could trigger a risk as to how the information was actually obtained.

Tracking an asset is mostly done through public registries in Mexico. Finding an asset may be a challenging enterprise as not all assets are recorded in a registry. Likewise, public registries are local and, therefore, the search may involve a Herculean task of dozens of filings or more, in just one state, to try to find an asset in that location. Often, zeroing in on an asset through a registry is more a stroke of luck. Tracking misappropriated money is also a testing quest. Banking secrecy is applicable in Mexico and, therefore, that secrecy can only be pierced by means of a court ruling or – in the case of criminal investigations – an order from the district attorney.

Once the asset is located, the path is clearer. Whoever is the rightful owner or possessor of an asset must file a judicial petition to secure a court order to recover the asset. A court order is the only way that a person or a company may be legally deprived of an asset currently in its possession, even if the means of possession of the asset was originally unlawful. Otherwise, ironically, repossession without a court order would be unlawful. The Mexican Constitution grants the right to a hearing before repossession definitively takes place.

1 Juan Francisco Torres-Landa Ruffo and Luis Omar Guerrero Rodríguez and Jorge Francisco Valdés King are partners and Jacobo Enrique Rueda Fernández and Eduardo Lobatón Guzmán are associates at Hogan Lovells.
Tracking and recovering a rogue asset is as difficult as the person holding it wants it to be. Naturally, if the unlawful holder is skilful enough to hide the asset through several movements, dispersion or simulations, the process to find and recover it will then be more difficult. However, the Mexican legal framework is robust enough that, if used properly, it may ultimately guarantee a successful ending.

II LEGAL RIGHTS AND REMEDIES

i Finding an asset
The method of finding an asset depends on the type of asset that is being looked for. Money, goods or real estate (finding out who holds it) all call for different procedures.

Money
Tracking money is difficult. Credit and financial institutions in Mexico are bound by banking secrecy in accordance with applicable constitutional protections. This means that they are subject to a non-disclosure obligation with respect to their clients’ information. Thus, not even a formal request evidencing the misappropriation will suffice for a financial institution to be required to reveal the location or proceeds of funds.

The only way to ask for the location and tracing of money is through a civil or criminal procedure. In this procedure, the relief sought would be an order calling for a financial institution or the Mexican Banking and Securities and Exchange Commission to inform the court of the location of the funds. A court order (in the case of a criminal investigation at the request of the district attorney) is the only mechanism to pierce banking secrecy.

Therefore, a preliminary matter would be to determine the person responsible for the misappropriation. That person or company would then become the defendant in whichever proceeding was chosen. These proceedings are described in detail in Section II.ii; however, it is relevant here to point out that the order requesting the credit and financial institutions to disclose the location of money will only be issued if the defendant fails in its case against the petitioner.2

Assets different from money
For other assets, it may not be necessary to exhaust a legal proceeding to locate them. Finding assets may be as simple as filing an application before the public registries where records of rights and properties might be available. For example, requests for information of any type of asset (including rights) under the name of a determined individual or company might be filed before the following:

a property public registries, to track real-estate property and title holders;
b the Mexican Industrial Property Institute, to track industrial property rights;
c the Merchant Navy Registry, to track ships and other types of navy equipment;
d Indeval (the Institute for the Deposit of Securities), to track securities;
e the Registry of Secured Moveable Guarantees, to find goods subject to guarantees;

among others.

2 Actually, the petitioner – although not necessarily – would also normally include seizure of the money as part of the relief to actually recover. Otherwise, a separate proceeding would have to be exhausted to have the money recovered.
The above are not only useful to find assets, but also to gather information about other assets that the individual or company in question may own or possess. Of course, a successful search in any of these registries depends on the assets, individuals or companies registered in any of those public databases. Notwithstanding this, real estate presents a further hurdle as it is administered locally and there is no national registry. Thus conducting research can prove burdensome, timely and expensive, unless you have an idea of, at minimum, the possible specific location of the asset. In addition, each search request entails a filing fee, which varies according to the specific municipality.

The information obtained via public records will only be useful once a competent court has ruled in a court proceeding that the asset must be returned to its rightful owner or possessor.

**ii Recovering assets**

There are two main avenues through which an asset may be recovered: a criminal or civil proceeding. Each of these implies radically distinct procedures. Yet, both are clearly associated with the concept of ‘damage restitution’ for the victim.

In Mexico, the damage restitution principle implies that the person liable for harming someone must restore the status quo of the victim as if the damaging conduct never existed, if possible. Otherwise, the obligation is to pay monetary relief equivalent to the damage suffered.

**Criminal proceedings**

*The evolution of victims’ restitution in Mexico*

The history of restitution of the victim’s damage in Mexican criminal law represents a long and arduous path. For a long time, this procedural institution remained ignored by the Mexican legal community.

It was not until 1993 that the victims’ restitution was recognised at a constitutional level. Nevertheless, since that moment, as if it has just awakened from extended sleep and wanted to pay an old and overdue debt, the victims’ rights in criminal procedure have acquired an unexpected interest in the field.\(^3\)

Driven by this interest in victim’s restitution, among many other issues, on 18 June 2008 the Mexican Constitution was reformed, in one of the most relevant criminal legal reforms in Mexican history. As a consequence of that reform, it was recognised at a constitutional level that:

\( \begin{align*} 
& a \quad \text{criminal procedure has the victim’s redress as one of its objectives; and} \\
& b \quad \text{the victim has a right to damage restitution.} 
\end{align*} \)

In fact, the Constitution imposes on public prosecutors the obligation to request that the judge decide on the victim’s damage repair upon exercising a criminal action.\(^4\)

Based on this constitutional amendment, a new National Code of Criminal Procedure (CNPP) was enacted in 2014. This Code, in line with the new constitutional principles,

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\(^4\) Article 20 of the Mexican Constitution.
expressly recognises the victim’s right to be compensated for damage resulting from a criminal offence. Thus, based on this amendment, a convicted felon could be not only imprisoned, but also ordered to pay for the damage caused by the criminal action.

These legal reforms have completely changed the victim’s role in criminal proceedings. While they used to be absolutely prevented from participating in the criminal process, the new tendency is to ensure their active participation to affirm their legal rights.

Victims’ redress in the CNPP

Pursuant to the CNPP, repairing the damage is twofold. It can take the form of a public punishment, or it can be considered as civil liability (even in the criminal law context). It is the former when the public prosecutor is the one who requests restitution from the defendant. It is the latter when restitution needs to be requested from a third party different than the defendant. This second civil liability action can be exercised in the same criminal proceeding, or in the civil arena (see Section II.ii, on civil proceedings, below).

This section will only address the victims’ restitution as a public punishment, as the civil liability action is not part of the main criminal proceeding but an accessory matter addressed in the following section.

The public prosecutor or district attorney has the constitutional mandate to request restitution for damage, and the judge cannot discharge the defendant from making restitution if he or she has been convicted for the crime. Under this rationale, when the restorative action is filed by the public prosecutor along with the criminal action, it forms part of the main proceeding and, under the congruence principle, it must be decided in the final judgment.

Thus, under this new model of justice, restitution takes the form of a public punishment effectively shifting the state’s aim from punishment to the overarching welfare of its citizens.

Mexico is driven by the ‘principle of full compensation’. This has even been considered a fundamental human right. Restitution aims to annul the consequences of the illegal act (in this case, the criminal offence) and re-establish the condition of the offended party as if no

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5 Article 109, Section XXIV of the CNPP.
6 Under the argument that a ‘private vengeance’ was not desirable.
7 Julio Antonio Hernández Pliego, La Reparación del Daño en el CNPP. Instituto de Investigaciones Jurídicas de la UNAM. Mexico: 2015, pp. 342–343.
8 Article 34 of the Federal Criminal Code.
9 Public prosecutors may even be fined for not exercising this option.
10 Article 20 of the Mexican Constitution.
11 Article 403 of the CNPP provides that the final judgment has to include the decisions regarding the damage restitution and the amount of compensation. Additionally, Article 406 of the CNPP provides that if a conviction is reached, the trial court will also convict to the damage restitution.
illegality had been committed. Under this logic, the Federal Criminal Code (FCC) provides that the compensation must be ‘full’, adequate, efficient, effective and proportional, covering, at least:

- restitution of the object obtained by the crime, or an equal compensation;
- compensation for the material and moral harm;
- lost profits;
- lost opportunity costs;
- an official declaration restoring the victim’s dignity and reputation; and
- a public apology.

The obligation of the public prosecutor to file a restorative action, the judge’s obligation to award the damage restitution and the principle of full compensation create a legal atmosphere where the victims’ redress is attainable. When the compensation is sought from a person other than the defendant (e.g., ascendants, legal guardians, among others), the possibility of filing a civil liability action to obtain redress also exists (see Section II.ii, on civil proceedings, below).

**Alternative outcomes: redress agreements**

Another innovative aspect of the aforementioned legal reforms is that they bolstered alternate outcomes to criminal proceedings. One of the most salient alternatives is the ‘redress agreement’. A redress agreement is an arrangement between the defendant and the victim to compensate the latter for the harmful consequences of the crime. The effect of such an agreement is the conclusion of the procedure once the agreement has been fulfilled.

Redress is not the sole objective of the Mexican legal system. Deterrence and rehabilitation are also much desired goals. Therefore, redressing agreements are not applicable to every criminal offence, but rather only to:

- offences prosecuted through private criminal complaint or allowing the victim’s pardon;
- negligent or reckless offences; and
- property offences committed without violence.

Only if the assets were obtained through theft, fraud, or any other property offence without any violent intervention, can a redressing agreement be reached with the offender. In terms of recovering assets, redressing agreements are unquestionably a readily available opportunity to recover assets swiftly.

**Alternative outcomes: conditional tolling of the procedure**

The CNPP provides for another alternative in the criminal arena whenever redressing agreements are not available: the conditional tolling of the procedure. The underlying principle of this remedy is that the public prosecutor or the defendant may file a damage restitution plan and comply with a number of requirements aimed at securing the victim’s rights, having the criminal action concluded as a consequence.

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12 Fundamental Right to a Full or Fair Compensation. Its Concept and Scope. Period: Tenth Period; Registry Number: 2014098; Authority: First Chamber; Type of Thesis: Jurisprudence; Source: Weekly Federal Judiciary Official Gazette; Fields: (Constitutional); Thesis: 1a./J. 31/2017 (10a.).

13 Article 30 of the Federal Criminal Code.

14 For the purposes of this chapter, the traced asset.
Just as with redressing agreements, conditional tolling is not an option that is available in every scenario. It can only be considered when:

a. the arithmetic average of the punishment is equal to or less than five years;\(^{15}\) and

b. there is no well-founded objection from the victim to said tolling.

Through this mechanism, the defendant undertakes the obligation to comply with the full reparation of the damage.\(^{16}\) Once the defendant fulfils all the conditions and obligations in the damage restitution plan, the criminal action is concluded. However, if any of the obligations are breached, the suspension is lifted and the criminal procedure is resumed.

Note that this is more a defendant’s right than a victim’s right, because the former can apply for this alternative if the legal conditions are met, and the latter has only a limited right to object. Even though this is primarily a defendant’s right, it offers a plausible alternative way for the victim to obtain redress, if the court approves a proper restitution plan.

**Civil proceedings**

Each of the Mexican states’ Civil Procedure Codes govern the proceedings to recover assets. Not all procedural codes follow the Federal Code of Civil Procedure (FCCP), although they share the same principles applicable to all proceedings. To depict how a civil proceeding looks, this chapter will use the example of the FCCP.

In general, the civil procedure starts by filing the claim memorial before the competent civil court. In this memorial the claimant must state all the facts and file all the documents that support its claim, as new facts, documents or claims will not be admitted.\(^{17}\) The court can admit the claim memorial, request a clarification or dismiss it.\(^{18}\) If the claim memorial is admitted, the defendant will be served to answer the claim within nine days.\(^{19}\) It is important to answer the claim, otherwise it will imply acknowledgment from the defendant.\(^{20}\) Once the response to the claim is filed within the legally determined period, the court will open the evidentiary stage for 30 days.\(^{21}\) During the evidentiary stage, the evidentiary material shall be prepared and rendered, such as witness statements, witness expert’s reports and interrogatories to the parties. Once the evidentiary stage ends, the parties will have the opportunity to orally render their final pleadings\(^{22}\) (depending on the Civil Procedure Code, the pleadings can be rendered in written form). Afterwards, the court will have a 10-day period to issue a judgment.\(^{23}\) No amended complaints, extension of legal terms, discovery as in the United States or trial by jury are permitted. Mexican proceedings under the FCCP are formalistic and quite rigid, although the court has certain leeway to attenuate certain formalities.

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15 The arithmetic average is the sum of the minimum imprisonment time set for a specific crime, plus the maximum imprisonment time (both in years), divided by two. For example, imprisonment for major fraud ranges between three and 12 years under the Federal Criminal Code. Therefore, the average is seven and a half years.

16 Established in Article 195 of the CNPP.

17 Articles 322, 323 and 324 FCCP.

18 Article 325 FCCP.

19 Article 327 FCCP.

20 Article 332 FCCP.

21 Article 337 FCCP. The procedural terms may vary depending on the type of proceeding and the applicable legislation.

22 Articles 342 and 344 FCCP.

23 Article 347 FCCP.
The parties will have the right to lodge an appeal to a superior court within five days of the court’s judgment, and the favoured party will have the right to express its position towards the appeal. The parties will have the right to make pleas in the corresponding hearing. When the hearing finishes, the superior court will have five days to issue a resolution on the appeal. Against the resolution issued in the appeal procedure, the parties can file a constitutional challenge within 15 days, which will be decided by a federal collegiate court: this decision cannot be challenged. Under exceptional circumstances, there is a chance to file a federal appeal before the Supreme Court of Justice when issues about constitutionality are still at stake.

In principle, the remedies described here would be filed in a civil proceeding. However, if the parties are merchants and the misappropriated asset has a commercial nature, there is an option to file it in a commercial proceeding. In this regard, Mexico is going through the implementation of a legal reform to introduce oral commercial proceedings in all types of claims.

Compensation action

A compensation action could be deemed the generic action for asset recovery. The premise is simple: if a person, acting against law or morality, causes damage or harm to another person, the injuring party must repair the damage. For example, if the director of a company takes the company’s funds for personal purposes, the company has suffered a detriment or loss in its wealth; therefore, the company can sue the director to obtain the damage reparation.

Through this action, the affected person seeks reparation of the damage from the liable person; reparation consists of:

a. re-establishing the situation as it was before the damage was done; or
b. payment of damages and lost profits (monetary relief).

Based on these provisions, Mexican courts and scholars have interpreted that the monetary relief shall be equal in amount to the damage caused, plus the loss of profit – or in other words, ‘full compensation’. This means that only restitution damages will be granted by courts – no punitive, indirect or injunctive damages will be awarded.

One of the most important principles of this action is that the damage and lost profits must be a direct and immediate consequence of the illegal conduct of a person. Therefore, the liability will be limited to the direct and immediate damage caused, and no more. Limitation of liability clauses are normally valid and enforceable.

While the damage may be caused intentionally (dolo) or by a lack of diligence (culpa), for civil liability there is no distinction. The only requirement for the claim to succeed is to prove that illegal conduct caused the damage.

The time limit to oppose this action as an extra-contractual liability is two years from when the misappropriation occurred; otherwise the action will be barred.
Restitution action

This action is not established in the FCC or in the FCCP; therefore, we must resort to the local procedural codes. For the purposes of this section, the Code of Civil Procedures for Mexico City (CPC) will be used.

While the other remedies described in this article are personal actions (since they are directed against a possibly liable person), the restitution action is an *in rem* action. This means that it does not matter who the liable person is *per se*, because the action will be pursued against the person that has the possession over the right *in rem* (i.e., property).

The restitution action will be filed by the rightful owner – without possession – of a specific asset, against the person that has possession over the specific asset. The sought remedy will be a judgment declaring that the plaintiff is the legal owner of the asset and ordering the restitution of the asset along with its by-products and accessories.31

The action must be filed against the person that has possession of the specific asset, irrespective of whether that person possesses the asset in good or bad faith. In other words, the action can be filed against the possessor, regardless of the circumstances of that possession, whether the specific asset was misappropriated or acquired from the person who misappropriated it.

As mentioned above, because this is an *in rem* action, it will be used to recover the possession over specific assets such as goods or real estate (i.e., land, cars, furniture, etc.).32

For example, if the general director of a company sells, without authorisation, some land of the company to a third party (who might have knowledge of the misappropriation or not). In that case, the company can start a restitution action against the third party, possessor of the lands to get the lands back. Moreover, if the possessor of the land built any construction on the land, the company will benefit from it. Or even if the third party leased the land, the company will have the right over any payment made for rent.

The statute of limitations for such an action is 10 years.

Motion for nullity in cases of malice or fraud

Other cases of misappropriation could occur when a person – through certain illegal conduct – obtains the consent of another party to enter into a contract and that party relies on the illegal conduct or representations. In such cases, the affected party can request a court to declare the agreement null and void.

Article 1812 of the FCC provides that the consent will not be valid if it is obtained because of an error. Therefore, if the consent is obtained by such means, the consent would be deemed not to have been granted, thereby invalidating the agreement.33

The invalidity of the consent might result from two possible causes: fraud or malice. Fraud is any positive action to mislead a person into an erroneous understanding of the terms of an agreement or to keep the contracting party from realising the misunderstanding. Malice is a passive conduct involving the lack of action of one party to keep the other party from realising the misunderstanding.34 Malice or fraud will be found when the misunderstanding is about the essential elements of the agreement in question or over one of the motives determinant of a party’s will.

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31 Articles 4 and 9 of the CPC.
32 Article 8 of the CPC.
33 Article 1795 of the FCC.
34 Article 1815 of the FCC.
Since the immediate objective of this action is to void the agreement, its ultimate consequence is to recover any payments made or any assets surrendered. For instance, if a person wants to buy land from a company and the company will not sell the land unless it is used for social purposes, the person might lie and state that the land will be used for a hospital, to motivate the company to sell the land. The company can claim the nullity of the purchase agreement, as it was fraudulently induced into executing it.

The statute of limitations for such an action is 60 days from when the party that suffered the fraud or malice becomes aware of it.

**Defences to fraud claims**
The most common defences to fraud claims are (civil and criminal):

- The elapsing of the statute of limitations established for the relevant criminal or civil action.
- A good-faith purchase by an innocent third party. In this case, the compensation for the damage caused would still be applicable, but recovery of the specific asset becomes extremely complicated, given that a superior right has to be evidenced.
- Absence of proof of intent. In accordance with Mexican criminal law, offences against property require intent (dolo) and cannot be committed negligently or recklessly (culpa). Thus, if the intent requirement is not fulfilled, a conviction might not be obtained.

**III SEIZURE AND EVIDENCE**

i **Securing assets and proceeds**

Once an asset has been located, it is critical to have that asset secured. On the criminal law side, it should be considered how to ensure that the asset can be recovered from the defendant once a conviction is reached. On the civil law side, it should be considered how to avoid the liable person hiding the funds once they have been found and an order has been issued to return those assets.

**Criminal cases**

In criminal proceedings, provisional measures may be the answer. These have a dual objective. On the one hand they intend to ensure the presence of the defendant during the trial and, on the other, they aim to guarantee redress for the victim. Provisional measures may become essential towards assuring the asset recovery or, at least, an equivalent damage repair.

The CNPP provides, in Article 138, the provisional measures that can be ordered by the judge to guarantee the victim’s damage repair. In this sense, the victim or offended party, or the public prosecutor may request the seizure of goods, or the freezing of bank accounts and other securities in the financial system.

Note that, under the CNPP, these provisional measures will only be granted if the evidence provided demonstrates that repair of the damage is possible and there is a strong possibility that the defendant is responsible for repairing the damage.

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These provisional measures can also be cancelled (hence, lifting the seizure or unfreezing of bank accounts) if the defendant provides counter-security for or pays the reparation of the damage. The measures will also be cancelled if a conviction is not reached, or if the final judgment exonerates the defendant from the damage repair.

The flip side is that, if a conviction is reached and the defendant is sentenced to repair the damage caused, the provisional measure will become effective in favour of the victim or the offended party. This means that the seized or frozen assets will be used to pay the victim for their damage. Interestingly, the CNPP provides that the seizure will be governed by the rules established in the FCCP.

Civil cases

In civil cases, there are also provisional measures that facilitate the recovery of assets at the end of the proceeding. All the procedural codes, whether civil or commercial, provide for interim relief to safeguard the assets that will be subject to the aforementioned civil actions (see Section II.ii, on civil proceedings, above). Under the FCCP, interim relief consist of the seizure of assets to guarantee the result of the trial, or the seizure and deposit of the assets encompassing the subject matter of the proceeding.36

For example, if a company that suffered misappropriation of funds has already identified the person who misappropriated the funds and knows in which bank accounts the person might have the money, the company can request the money in those bank accounts to be frozen, either before or during the trial.

Interim relief can be requested from the court during the trial or before it begins.37 For the court to grant interim relief, the plaintiff must prove urgency, namely that there is a real possibility that the assets might be hidden or used by the defendant. The interim relief may be granted ex parte, without hearing the affected party, who will also not be able to challenge the seizure order. However, if the relief it is not granted, the plaintiff has the right to challenge the decision.38

Note that the plaintiff must provide a guarantee against the damage and lost profits that the person affected by the interim relief might suffer. On the other hand, just as in the criminal proceedings, the affected party (defendant) can offer counter-security to lift the seizure order.39

The downside of requesting the interim reliefs in a pretrial stage is the obligation imposed to the claimant of filing its claim within five days. Otherwise, the injunctive relief will be revoked.40

ii Obtaining evidence

There are no specific rules to obtain evidence in fraud proceedings. Parties must offer all evidence they deem necessary to back their claim or defence. All evidence is admissible when

36 Article 389 of the FCCP.
37 Article 384 of the FCCP.
38 Idem.
39 Article 391 of the FCCP.
40 Article 397 of the FCCP.
it is aimed at supporting claims or defences. Parties are free to submit and produce any type of evidence – documents, examination of witnesses, expert witnesses, visits to a certain site, among others – insofar as the piece of evidence is not illegal or against public morality.\footnote{Articles 79 and 93 FCCP.}

Regarding the documents, in Mexico the claims are required to include all supporting documents from the beginning of the proceedings. As a general rule, a document that has not been submitted with the parties’ claim or reply to it will not be accepted considered unless said documents were unknown or did not exist at the moment of filing the claim or answer.

When a document is requested as evidence, the request must be specific enough with the document or documents requested; otherwise the court will not grant it deeming it as a prohibited inquiry according to Article 16 of the Mexican Constitution. Under Mexican law, there is very little discovery and there is no mechanism for party-directed document production or depositions.

\section*{IV FRAUD IN SPECIFIC CONTEXTS}

\subsection*{i Banking and money laundering}

In 2012, a new Anti-Money Laundering Act was enacted in Mexico.\footnote{Official name: Federal Law for the Prevention and Identification of Operations with Illegally Acquired Funds (\textit{Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita}).} This is a major step forward in Mexican legislation, given the prevalent practice in the country. One of the objectives of this new regulation is the prevention of crime associated with and funded through money laundering.

While there are certain offences regulated in this Act, the offence of money laundering is governed by the FCC and is considered a serious offence. It warrants imprisonment ranging from five to 15 years and a fine of at least 1,000 and up to 5,000 times the Unit of Measurement and Update.\footnote{The Unit of Measurement and Update is an economic reference value or benchmark used by the Mexican state to determine the amounts payable derived from payment obligations established in Mexican statutes. Until recently, fines and other economic sanctions were established and determined based on the minimum wage. However, the reference was modified at a federal level to incorporate as a replacement the ‘Unit of Measurement and Update for the quantification of the economic sanctions imposed by the Mexican State’. Therefore, although the Federal Criminal Code still bases fines on the minimum wage, these fines are set in terms of Units of Measurement and Update.}

These penalties are aggravated if the offending party is comprised of directors, managers, officials, employees, attorneys-in-fact or services providers of any person or company subject to the regime to prevent operations with unlawful resources. In general, persons subject to this regime are financial entities and people who perform ‘vulnerable activities’.\footnote{Examples of vulnerable activities are: gambling activities, issuance of credit cards and commercialisation of precious metals, among others.}

\subsection*{ii Insolvency}

In the civil insolvency concept – and not a bankruptcy scenario – arguably the most common legal action is that taken against creditor fraud. When a debtor purposefully engages in conduct to become insolvent (e.g., sells or gives away its assets), the debtor’s creditors can only claim the nullity of that conduct before a civil court if the credit existed prior to the
conduct. Insolvency will occur when the debts are bigger than the assets, and the debtor will be committing fraud only when it knows it will be insolvent following the execution of the conduct in question.

To take legal action in such a case, the following conditions must be met:

- the existence of an act that resulted in the debtor’s insolvency;
- the act was made after the debt was acquired; and
- the act was committed in bad faith (if the act that results in the debtor’s insolvency was an act of giving freely (e.g., a donation or gift), bad faith is not a necessary component to pursue the action).

The effect of the nullity will be to return the assets to the original debtor. These do not return for the benefit of the debtor, but only to be seized by the creditors, as if they had never left the debtor’s estate.

### iii Anti-corruption

In 2015, the Mexican constitution was amended to introduce a major change in anti-corruption matters, with the creation of the National Anti-Corruption System (NAS). The NAS is a system of cooperation between citizens and the authorities to prevent corrupt practices. As part of the changes, secondary legislation was enacted and amended. One of the newly enacted laws is the General Administrative Liabilities Act (GALA).

The GALA sets out the regime of responsibility applicable to public officers, former public officers, and private parties (companies or individuals). The law deems fraud and embezzlement of public funds, among other activities, to constitute corruption.

As public funds may be diverted as a result of corrupt acts, this money must be tracked and recovered. The GALA solves the problem of tracking and recovering public funds by imposing fines on the liable individuals, companies or public officers. Such fines can amount to up to twice the monetary benefit obtained through the corrupt acts.

### iv Arbitration

Criminal matters such as fraud are not arbitrable under Mexican law. However, civil claims could be solved through arbitration should an arbitration agreement exist.

Mexican arbitration law per se, does not provide for any special procedure or relief when the claim is related to fraud or misappropriation. As for the merits of the claim, the same remedies outlined above could be brought to arbitration. The merits will remain the same and the only change would be the venue.

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45 Article 2163 FCC.
46 Article 2167 FCC.
47 Articles 2164 and 2165 FCC.
48 Article 2168.
49 Articles 49 to 73 GALA.
50 Articles 78 and 81 GALA.
Fraud's effect on evidentiary rules and legal privilege

In certain areas of Mexican law, attorney–client privilege is regulated. In criminal matters, the CNPP foresees that a defendant’s communications may be legally intercepted; nevertheless, interception of communications between the defendant and his or her attorney is forbidden.51

In the same vein, Mexican courts have established in both a binding and a non-binding precedent that client–attorney communications cannot be seized by an antitrust authority during a dawn raid when those communications come from an external attorney for legal advice purposes. On the basis of these precedents, and considering due process and privacy human rights, it can be deemed that client–attorney communications in all matters are privileged.52

INTERNATIONAL ASPECTS

Collection of evidence of proceedings abroad

There are no special rules for collecting evidence in Mexico for fraud proceedings abroad. The procedure shall be conducted according to international treaties Mexico is part of – specifically, the HCCH Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 (the Hague Evidence Convention) and its regional equivalent, the OAS Inter-American Convention on the Taking of Evidence Abroad 1975.

When relying on the Hague Evidence Convention, the central authority to which the letter of request must be sent is the Directorate-General of Legal Affairs of the Ministry of Foreign Affairs. The request can be sent either through diplomatic or consular channels or directly to the competent judicial authority. The request must be in Spanish and meet all the requirements in the Hague Evidence Convention.

One important thing to note is that Mexico made a reservation to Article 23 of the Hague Evidence Convention. Through this reservation, Mexico:

[S]hall only be able to comply with letters of request issued for the purpose of obtaining the production and transcription of documents when the following requirements are met:
(a) that the judicial proceeding has been commenced;
(b) that the documents are reasonably identifiable as to date, subject and other relevant information and that the request specifies those facts and circumstances that lead the requesting party to reasonably believe that the requested documents are known to the person from whom they are requested, or that they are in his or her possession or under his or her control or custody; and
(c) that the direct relationship between the evidence or information sought and the pending proceeding be identified.

51 Article 294 of the CNPP.
52 Client–attorney communications during an antitrust investigation. Effects of the stay order during an amparo proceeding when authorities did not exclude certain information from the investigation materials. Period: Tenth Period; Registry: 2016913; Authority: Collegiate Courts; Type of Thesis: Non-binding precedent; Source: Weekly Federal Judiciary Official Gazette; Fields: Common; Thesis: I.10o.A.E.228 A (10a) and Antitrust. An amparo procedure is admissible against the seizure of client–attorney communications during a dawn raid. Period: Tenth Period; Registry: 2016180; Authority: Collegiate Circuit Courts; Type of Thesis: Jurisprudence; Source: Weekly Federal Judiciary Official Gazette; Fields: Common; PC.XXXIII.CRT J/12 A (10a).
Enforcement of judgments granted abroad in relation to fraud claims

As with collecting evidence, there are no special rules for executing in Mexico a foreign judgment related to a fraud claim. The applicable rules are contained in the Federal Civil Code, in the Code of Commerce and in the State Civil Codes where the judgment will be enforced. Additionally, Mexico is part of many international conventions for enforcement of foreign judgments, which will apply when the judgment was issued in a country that is a signatory to the following conventions:

a. the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Montevideo, Uruguay, 8 May 1979; and

b. the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, La Paz, Bolivia, 24 May 1984.

Mexico's enforcement procedure is divided in two steps: homologation and enforcement.

Homologation is the process whereby a Mexican court assesses whether a foreign judgment should be recognised and enforced according to Mexican law. The court conducting the homologation procedure cannot look into the merits of the case, because the homologation procedure only recognises rights already acquired in a foreign proceeding.

Once the homologation has been granted, the judgment will be considered a Mexican judgment and therefore will be executed in accordance with domestic procedure. In general terms, the claimant requests the court to enforce the judgment and the court requests the defendant to fulfil the obligation. If the obligation is not fulfilled, the court can order the attachment of assets to be sold in public auction.

The defendant has many ways of defending himself or herself against the homologation and enforcement procedure, given that the burden to prove that the foreign award is enforceable in Mexico and is on the applicant and not on the party subject to the enforcing action.

VI CURRENT DEVELOPMENTS

In criminal matters, the new CNPP, in the context of the larger constitutional reform on the subject, represents an important breakthrough in Mexican legislation, aiming to create a more effective and faster procedure. Along with the new and unexpected interest in providing redress for victims, it creates a beneficial atmosphere for asset recovery or, at least, damage repair when assets are misappropriated through fraudulent activities.

The new Anti-Money Laundering law also improved the regime for the prevention, prosecution and sanctioning of these kinds of operation. If this law is realised as intended, it will become a significant addition to the asset tracking and recovery toolkit.

Mexico is making big effort to eradicate corruption. The 2015 constitutional amendment and the creation of the NAS are proof of this determination. The enforcement of these legal changes has resulted in the investigation of many corruption cases (e.g., Odebrecht), with 21 former state governors being investigated for corrupt acts and action being taken to recover public funds.
I OVERVIEW

Often unfairly portrayed as a place of opaque financial dealings, the principality of Monaco’s civil law system provides a number of well-defined and codified ways in which victims of dishonesty can seek to identify and recover ill-gotten gains from wrongdoers, both through the civil courts and the criminal courts. The courts and the prosecutor’s office are responsive to requests to freeze assets, and the prosecutor’s office and investigative magistrates in particular have wide discretion to investigate and obtain information directly from banks and financial services companies, corporate service providers and professionals, as well as from the individuals or companies concerned.

Monaco has been particularly responsive to requests from foreign governments through international commissions rogatory to identify and freeze assets, under the applicable international agreements.

While, as will be explained below, the means of obtaining evidence in civil matters are restricted as compared to common law jurisdictions, foreign practitioners and victims should not be dissuaded from considering proceedings in Monaco to obtain satisfaction and compensation.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Monaco’s Code of Criminal Procedure provides that victims of criminal wrongdoing are entitled to be parties in criminal investigations and prosecution. As such, they are represented by counsel during the investigation who have access to the files and can request that the investigating magistrate take actions they consider useful, including confrontation with the...
alleged wrongdoers, seizure of assets, nominations of experts, international commissions rogatory, etc. The costs for the criminal investigations and the measures proposed by the victim’s counsel are borne by the state (although a deposit against costs will be requested).

Criminal investigations begin either by initiative of the prosecutor (upon a notification by the police or a third party, a bank, for example, or the financial intelligence unit (SICCFIN)) or by the initiative of the victim. In the victim’s case, they can file a complaint at the police or the prosecutor’s office, or directly with an investigating magistrate. The complaint can be filed against a person or company and is often filed against ‘persons unknown’ or ‘X’ even where the wrongdoer is known to avoid liability for ‘calumnious denunciation’.

There are two stages of the investigation, which are known as the ‘information’ stage, where the alleged perpetrator has not yet been formally accused, and the ‘instruction’ stage, where the person has been formally accused, has access to the investigative file and can defend against the accusation.

When satisfied that the instruction is complete, the investigative judge will remit the file to the prosecutor, and make it available to counsel for all sides, requesting comments and any additional investigative acts. The prosecutor returns with a ‘requisition’ or requests. The investigative magistrate then determines whether to hold the accused over for trial, and on which charges, or whether to dismiss the case.

It is not necessary for a victim to have been represented in the instruction to be represented as a civil party victim at the criminal trial. In financial matters, the criminal trial is normally held before the Correctional Court and the infraction qualified as a délit (offence) although certain financial infractions are qualified as ‘crimes’. An offence carries a sentence of up to five years’ imprisonment (greater in certain specified cases) and is tried before the Correctional Court, and without a jury. A crime is tried before the Criminal Court, before a mixed panel of judges and jurors, and carries a sentence of five to 20 years. The victim can be a party in both cases and will demand reparation in terms of monetary damages against all the accused:

a) the person who committed the fraud; and
b) all accomplices, including persons who may have ‘received the proceeds of crime’ by receiving in Monaco proceeds of an activity determined to be illicit in a foreign country.

There may be an award for material, corporal or ‘moral damages’ but there are no punitive damages awarded.4

The time frame for a criminal prosecution can vary, but these are not under the control of the civil party victims or lawyers. Criminal prosecutions have been known to be pending for many years before resolution.

Under the Code of Criminal Procedure, to have standing, the victims of crime must show that they are seeking to repair the damage directly caused by a fact that is judged to be an infraction and from which they have personally suffered.5

3 Criminal Code, Articles 91 and 92 – false statements in a public document or acte authentique are treated as crimes and carry five- to 10-year sentences, as do many money laundering offences (Criminal Code, Article 218 et seq.).
4 Code of Criminal Procedure, Article 2.
5 Code of Criminal Procedure, Article 2.
The Criminal Code infractions that are most often applied to sanction fraud are escroquerie (fraud) and abus de confiance (breach of trust) and related offences, such as receiving the proceeds of either.

The elements of fraud are the ‘use of a false name or a false quality or the use of fraudulent manoeuvres to convince another of the existence of false enterprises, a false power or imaginary credit, or to create the hope or the fear of a success or an accident or any other ‘chimeric’ event to obtain’ to remit anything of value to defraud that person of a part of their fortune.

If the fraud has involved a public offering of shares, bonds of a company or commercial enterprise, the maximum sentence is 10 years.

With breach of trust the elements are the voluntary remittance of things of value to the accused, with an obligation to return them, which have then been misappropriated or dissipated. While this is normally an offence punishable with up to five years’ imprisonment, it becomes a crime if committed by a public or ministerial officer (a notary, for example). A loan granted under false pretences has, however, been judged not to constitute the crime of breach of trust.

The victim can therefore file a criminal complaint to trigger action in Monaco, or may choose to file a civil lawsuit, or both, in parallel proceedings, although there is a maxim that ‘penal proceedings hold civil proceedings in abeyance’. Independent civil proceedings will be required to validate freezing orders granted to the victim in the civil action.

The investigating magistrate has wide discretion to seize assets of the accused both during the information stage and the instruction stage both for the preservation of evidence and the preservation of assets.

The basis of a civil action in fraud can be that consent was obtained by manoeuvres without which the other party would not have contracted (the definition of dol) and thus led to rescission and restitution, or it can be based on civil responsibility under Article 1229 of the Civil Code, which states, ‘any act of man that causes damage to another obliges the one who is at fault to repair’, which is the basis for an action in tort.

Bars to a criminal claim will be the death of the alleged perpetrator, the statute of limitations (three years for an offence and 10 years for a crime), res judicata and amnesty. However, if the criminal complaint was filed before the death of the perpetrator, the criminal court retains jurisdiction to award damages, where there has been a judgment on the merits, even if that judgment is not final. Where an infraction is covered by amnesty, the civil claim remains valid.

ii Defences to a civil or criminal fraud action

The defences to a criminal action, apart from those relating to the bars to a claim described above, are defences relating to whether the acts complained of constitute a criminal offence or not, and whether the accused acted in good faith or with intent to defraud. In international financial transactions, the accused often seeks to allege that cultural differences and differences

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6 Criminal Code, Article 330.
7 Criminal Code, Article 335.
8 Unpublished Order.
9 Code of Civil Procedure, Article 100 et seq.
10 Code of Civil Procedure, Articles 964 and 971.
11 Code of Criminal Procedure, Article 11.
in ‘good practices’ in one country are misinterpreted in the country where the accusation is brought to qualify as criminal acts as practices that in other places are considered current and acceptable and where moreover the victim voluntarily and with full knowledge invested accepting the risk of loss.

In civil actions, the statute of limitations has recently been reduced to five years for most actions, from the time the plaintiff knew or could have known the facts that gave rise to the action.

Defences will include waiver or ‘assumption of risk’ based on contractual documentations that the plaintiff-victim will have signed at the onset of the transaction.

III SEIZURE AND EVIDENCE

A party in a civil action may, prior to the commencement of the action, seek to freeze assets in Monaco. The Code of Civil Procedure prescribes that when a freezing order is not based on an enforceable definitive judicial decision its notification (known as an ‘exploit’) must also serve as notice of the underlying lawsuit brought in Monaco to validate the seizure.12

The request to be authorised to seize assets is an *ex parte* request filed with the president of the Court of First Instance (TPI).13 It can be preceded by a request that assets be temporarily declared as ‘indisposable’.14 The request must be justified by the existence of a ‘certainty of the existence of a claim’ and a showing that a demand for payment has been made and not satisfied. Though a showing that there is urgency and a risk of the removal or dispersion of assets will serve to buttress the request, this is not one of the elements of the code requirements to obtain a freezing order.

The ‘existence of the certainty of a claim’ can be shown by producing a foreign court decision awarding money damages to the requesting party, or the existence of a foreign arbitral award, even if neither have yet been recognised as enforceable in Monaco through the procedure for the recognition of foreign judgments15 or on the basis of the New York Convention on the Enforcement of Arbitral Awards to which Monaco has adhered.16 Defences are often raised that, to respect the sovereignty of the principality, Monaco courts should not take into account decisions of foreign courts in deciding whether to issue freezing orders, unless the foreign decisions are recognised in Monaco. In a recent lower court decision, the court ignored a worldwide freezing order in a corruption case and lifted the Monaco freezing order on the basis that the plaintiff, the employer of the person whose assets were frozen, could not show that it had a claim on the secret commissions received by the employee. The unpublished case is on appeal.

The action on the merits will then either be an action to recognise the foreign judgment or arbitral award, or it will be an action *de novo* on the merits. Under the new Code of Private International Law, Monaco now recognises international *lis pendens*, although suspension of the Monaco action in the face of the existence of a prior pending action between the same parties in a foreign jurisdiction is discretionary with the judges, and will not preclude the filing of the civil action on the merits on the same issues in Monaco.

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12 Code of Civil Procedure, Article 50-1 et seq.
13 Code of Civil Procedure, Articles 490 and 491.
14 Code of Civil Procedure, Article 487.
15 Code of Civil Procedure, Article 472 et seq.
The *ex parte* request can be acted on very quickly (within days) and may result in an order to authorise seizure on specific assets. The request must specify the assets to be frozen and the amount. It cannot be a general request freezing ‘all assets’. If the asset is real property, then the plaintiff must request authorisation to register a judicial mortgage for a specific sum on a described asset. If the assets are personal property (paintings, for example) their location must be specifically described, but the items need not be specifically listed, although it is helpful to do so. If the assets are bank accounts, then the name of one or more banks must be listed. No justification need be given as to why it is thought that assets are held by the bank. The authorisation will then specify that ‘all sums due by the listed banks’ to the debtor are frozen up to a specified sum.

The assets remain frozen and can not be attributed to the creditor or sold at a public auction (in the case of real property or personal property other than cash) until there is a ‘title to execute’ (a final decision enforceable in Monaco).

Once the freezing order is granted, a bailiff will serve it on the banks named, and on the debtor, together with the notification of the first hearing to validate the seizure.

The debtor has time until the date of the first hearing to file an action to release the freezing order. 17 This is an emergency action known as a *référé* (interim proceeding), in which the debtor must show that on its face there is no serious opposition to his claim for release, either on the entire claim or on the specified sum authorised to be seized.

Interim proceedings can be quickly decided, but may run in parallel with the underlying civil actions on the merits. The estimated time for an action on the merits is between 12 and 18 months.

Recently, where it could be shown that the debtor was the beneficial owner of a corporate bank account, the Monaco Court of Appeals has ‘pierced the corporate veil’ and ordered seizure. However, the evidence of beneficial ownership was explicit rather than inferred.

French bank secrecy regulations apply in Monaco under a treaty dating back to 1945 making Monaco subject to French banking rules in most areas. A request seeking to identify which banks hold funds for a client or company will not be granted. 18 However, seizure of specific assets for specific amounts at one or several banks will be ordered if the request specifies the names of the banks. If no funds are held, the bank will reply to the bailiff that it does not have funds. If funds are held they will be frozen and the bank will reply with the amount frozen (up to the amount authorised to be seized).

It is otherwise possible, prior to initiating the civil action, to request from the TPI an order to obtain information helpful to determine or confirm the whereabouts of persons or assets. The court has been known to order the compulsory production of records from corporate service providers (which might administer assets held in Monaco banks) or banks, where a beneficial owner of an account whose rights were contested requested to have copies of the account opening documents; the Monaco administrative services for records such as employment records, confirmation of Monaco rights to residence, statutes of Monaco civil companies and the names and addresses of the administrators – which are otherwise not on the public record; and records relating to wills and estates, from the clerk of the court, where they are otherwise not accessible to the public. In one instance, the court ordered that

17 Code of Civil Procedure, Article 492.
18 French Monetary and Financial Code, Article L511-33, modified by Ordinance No. 2010-76, of 21 January 2010, applicable in Monaco under the provisions of the Franco-Monégasque Treaty of 14 April 1945 on Exchange Controls.
the entire data records of a financial services company be copied and remitted to a potential plaintiff, but the order was quashed in a subsequent interim proceeding on the grounds that it violated the confidentiality protected by Article 308 of the Criminal Code.\(^\text{19}\)

The order can therefore be set aside, before or after execution, by the urgent interim procedure. Refusal to comply with an order will not result in contempt charges, but may be a ground for an action by the plaintiff that the order be observed, failing which a daily fine will be imposed.

The order must be requested before the action on the merits is begun, after which only the judges of the TPI who are sitting on the case can enjoin a party to produce a document. Failure to produce does not result in contempt charges, which are unknown in Monaco, but the judge may hold the unjustified refusal to produce evidence against the party refusing.

It is otherwise not possible to compel evidence in a Monaco civil case. Monaco has adhered to the Hague Convention on the Taking of Evidence in Civil and Commercial Cases of 18 March 1970, with the reservation that pretrial depositions and discovery are excluded and refusal by a witness to participate may not result in criminal prosecution in the requesting country.\(^\text{20}\)

Monaco civil cases are judged on the written evidence and accompanying documentation, which must be in the French language or translated by a sworn translator. Oral testimony is not ordinarily taken in civil proceedings. There is no pretrial discovery and pretrial depositions of the opposition are unknown.

An independent expert may be named at the request of one of the parties (either by summary procedure or as part of the procedure on the merits), or by the judge of his or her own initiative in an interlocutory judgment.\(^\text{21}\) The independent expert will be given a specific mission and will convocate the parties to obtain information in a series of meetings. However, the expert will not have the power to compel evidence. The expertise is adversarial, in that parties are represented by counsel who are expected to produce commentaries on the subject matter during the process and when the pre-report is distributed. The expert will then produce a final report with conclusions, which may not be but usually is confirmed by the court. If the expert is named in an interim proceeding then a new action will be required on the merits to validate the report. In a civil fraud action, an expert could, for example, evaluate the movements on bank accounts over many years to determine whether the use of funds was in compliance with undertakings given or whether it was fraudulent.

In civil and criminal proceedings, parties do not produce affidavits on their own behalf. Third-party evidence in civil proceedings must be in the form of an attestation, in handwriting, setting out the identity of the affiant, the relationship between the affiant and the party for whom they are testifying, and the fact that the deponent knows the attestation will be produced as evidence and that a false statement can give rise to criminal prosecution under Article 103 of the Criminal Code.\(^\text{22}\) The attestation may be in a foreign language. It should not be drafted by counsel but is expected to be a spontaneous declaration by the declarant.

\(^{19}\) Only approximately 1 per cent of all Monaco court decisions are published. A law awaiting enactment disposes that all court decisions be published, without the names of the parties. In the instance cited above, and in other instances reported in this chapter, the decision was not published, and therefore no citation can be provided.


\(^{21}\) Code of Criminal Procedure, Article 344 et seq.

\(^{22}\) Code of Civil Procedure, Article 324.
It is therefore practically difficult to attest to complicated and lengthy financial transactions. Foreign form affidavits have been known to be used, particularly where they have been admitted as evidence in foreign proceedings. Legal and other expert opinions are not expected to be handwritten.

Objections to the introduction of evidence may, and most often do, contest the validity of the evidence in its form. Thus an attestation that is not handwritten or that does not clearly set out one of the identifying characteristics of the deponent, or that is not accompanied by a copy of an identifying document, may be excluded. Evidence may also be requested to be excluded because its production is ‘disloyal’, meaning that it has been obtained unfairly, or in contravention of criminal statutes preventing secret registration of telephone conversations,23 or preventing the public reproduction of the arguments in divorce matters.24 Evidence produced solely for the purpose of presenting a party in a bad light may be requested to be excluded, but rarely is. Hearsay and even clearly irrelevant evidence are admissible, and the weight given will be at the discretion of the judge.

It is illegal to produce documents obtained from a criminal investigation in a related civil matter until the trial is concluded (because of the confidentiality covering criminal investigations). Authorisation may be requested either from the prosecutor’s office or the court hearing the civil matter.25

IV FRAUD IN SPECIFIC CONTEXTS
i Banking and money laundering

In a 2015 unpublished decision, validated in the Court of Appeals, the foreign judicial administrator of an insolvent group of companies appointed by two foreign courts was not granted the status of civil party victim in the Monaco money laundering investigation, resulting from the presence in Monaco of funds in the failed companies’ names. The reasoning in the investigating magistrate’s decision was that as regards money laundering, a judicial administrator cannot show that they have personally suffered as a result of the money laundering infraction itself, even though they are acting on behalf of creditors and therefore can not fulfil the requirements of Article 2 of the Criminal Code.

Civil party victims of financial crime may have difficulty being granted standing in criminal investigations if the sole Monaco infraction is money laundering.

Confiscation of the proceeds of crime can be pronounced for all criminal infractions and specifically in money laundering cases. However, the Criminal Code provides that confiscation should not prejudice the rights of third parties.26 Thus the courts may determine at their discretion, but upon the request of the civil party victims, that confiscated funds be attributed to the victims.

23 Criminal Code, Article 308-2.
24 Civil Code, Article 202-6.
26 Criminal Code Articles 12, 32 and 219.
ii Insolvency

The Commercial Code sanctions bankruptcy both with criminal sanctions and with the extension of the insolvency from the business enterprise to the individual involved.

The Commercial Code provides that the Monaco court may make a person who is a merchant personally insolvent (in practice any de facto or de jure director of an enterprise) where:

- there has been misappropriation of assets of a company;
- there has been acknowledgment of inexistent debt;
- the books of account have disappeared;
- a commercial activity has been carried on through a front man or company;
- an administrator ‘used as his own’ the assets of a company undergoing insolvency proceedings; or
- acts of bad faith or inexcusable imprudence have been committed in respect of the above.

There is a presumption of bad faith or imprudence where:

- the person has acted in a commercial capacity while being forbidden by law from doing so;
- accounts were not kept in generally accepted form;
- sales were made below cost to prevent the determination of insolvency;
- the person has engaged in excessive personal or domestic expenses;
- the person has used excessive sums in purely speculative operations;
- the person has made undertakings with third parties without sufficient consideration in respect of the situation of the indebted business; or
- where an indebted business continued to be run abusively in a situation that could only lead to insolvency.

In these situations, the assets of the insolvent ‘merchant’ can be used to satisfy the creditors. Individuals who are not merchants cannot otherwise declare insolvency and be discharged in bankruptcy.

A recent unpublished ex parte order held that a foreign judicial administrator’s status as judicial administrator did not require recognition by the Monaco courts to have full effect.

iii Arbitration

As mentioned above, Monaco has adhered to the New York Convention on the Enforcement of Arbitral Awards. This means that a foreign arbitral award can be enforced in Monaco on the basis of an ex parte order issued following a request filed with the Monaco judge that its validity be recognised. The party against whom enforcement is sought may oppose enforcement, and contest the validity of the order once it is served, through an interim proceeding.

iv Fraud’s effect on evidentiary rules and legal privilege

Legal privilege and confidentiality are protected by Article 308 of the Criminal Code, which makes it an offence for any person having received confidential information because of

27 Commercial Code, Articles 600–606.
28 Commercial Code, Article 574.
29 Commercial Code, Article 566.
their status or profession to reveal it, other than when the law requires them to do so. At Article 308-1 the professional secrecy also extends to members of boards or commissions (official or private), who may not reveal information to any third party.

In addition, Article 135-2 of the Code of Criminal Procedure provides that ministers of the church, lawyers, doctors, pharmacists, midwives and any other persons who have received confidential information because of their status or profession must maintain its confidentiality unless the law requires them to reveal the information or the person who has told them the information authorises them to do so.

The AML Law provides, on the other hand, an obligation on practically everyone engaged in a profession, commercial or industrial activity, including banks, Monaco lawyers and legal advisers, bailiffs and notaries, to report to SICCFIN any suspicions of any operations that might be connected to money laundering, financing of terrorism or corruption.30

Notaries, bailiffs, chartered accountants and Monaco avocats (members of the Monaco Bar)31 are required to make declarations of suspicion when they assist their clients in preparing or completing transactions concerning the purchase or sale of real property, or businesses, or the incorporation of companies.32

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

The new Code of Private International Law codifies jurisdiction in civil matters. Monaco will have jurisdiction over any defendant domiciled in the principality and in the following cases:

a in contract matters where delivery of goods or services takes place in the principality;
b in tort, where the event giving rise to damage took place here;
c in inheritance, when the succession is opened in Monaco or when a building in the estate is situated in the principality;
d in company law, when the company has its seat in Monaco;
e in insolvency, when the commercial activity is exercised in the principality;
f as regards the execution of the validity or the removal of freezing orders formed in the principality and generally in all questions regarding provisional or conservatory measures formed in the principality even where the Monaco courts have no jurisdiction in the action on the merits; and
g in all questions of the execution of foreign judgments.33

In criminal matters, the principality retains jurisdiction for all infractions committed on its territory and this includes any one element that characterises the infraction.34 Any person

30 Law No. 1,362 of 3 August 2009 relating to the fight against money laundering the financing of terrorism and corruption (the AML Law), Article 3.
31 Only Monaco nationals may be members of the Monaco Bar. Foreign lawyers may be authorised to practise in Monaco but may not use the word avocat or any translation of the word to describe their activity. The author, for example, is not a member of the Monaco Bar but has been authorised to practise in Monaco as a counsellor in international juridical, fiscal and commercial matters.
32 AML Law op cit at Article 2.
33 Code of Private International Law, Article 6.
34 Code of Criminal Procedure, Article 21.
who on Monaco territory was an accomplice to a crime committed elsewhere can be judged in the principality provided that the infraction is considered a crime both in Monaco and in the foreign country.\textsuperscript{35}

Under certain circumstances the Monaco courts must of their own initiative determine whether they have jurisdictions, even where the parties have not done so.\textsuperscript{36}

Questions as to the applicable law under the new Code of Private International Law must be raised by the court even where they are not raised by a party, and it is preferable to do this at the onset of the litigation. Proof of the applicable conflict of law rule and of the foreign law sought to be applied will be provided by legal opinions given by each party. An expert may be named to determine applicable law, but this is seldom done.

\section*{ii Collection of evidence in support of proceedings abroad}

Apart from the Hague Convention measures discussed above, the compulsory order described in Section III may produce evidence that can be freely produced in proceedings abroad, whether or not there is ensuing litigation in Monaco. Evidence produced in civil proceedings by any party may be used in foreign proceedings. The use in unrelated cases of written pleadings in Monaco divorce cases is, however, not allowed.\textsuperscript{37}

Evidence obtained by the civil party in criminal investigations or instructions may not be produced until the trial and all appeals are exhausted. However, authorisation may be obtained from the prosecutor to use the information to support, for example, a \textit{Norwich Pharmacal} motion.

Monaco judges may seek information abroad, by commissions rogatory\textsuperscript{38} but requests from foreign judges will only be executed if they are transmitted through diplomatic channels (unless the Sovereign Prince authorises otherwise).\textsuperscript{39}

\section*{iii Seizure of assets or proceeds of fraud in support of the victim of fraud}

As described above, in civil matters assets may be seized prior to the commencement of proceedings upon an \textit{ex parte} request of the victim. The victim may also be a civil party in the criminal action and may request the investigating magistrate to seize assets as part of the investigation or instruction, either to assist in establishing proof (the ‘manifestation of truth’) or to prevent illicit funds and their fruits from disappearing.

\section*{iv Enforcement of judgments granted abroad in relation to fraud claims}

Monaco has not entered into conventions for the recognition of its judgments with any country other than France. Foreign judgments and orders (\textit{Mareva} injunctions, for example) have no effect in the principality.

The enforcement of foreign judgments (\textit{exequatur}) will, however, be granted unless it is shown that:

\begin{itemize}
  \item [a] the judgment has been issued by a court not having competent jurisdiction (or whose assertion of jurisdiction is contrary to Monaco rules on jurisdiction); and the new Code

\end{itemize}
adopts a concept of ‘nexus’ of the matter adjudicated with the country of the court issuing the judgment. This will have to be clarified through case law and is expected to engender considerable litigation;

b it is shown that all parties have not been served and have not had an opportunity to appear – that is, the right to defend has not been respected;

c the judgment is not definitive and can not be executed in the country that issued it; and

d it is manifestly contrary to Monaco’s public order or policy.

Injunctions would not generally be susceptible to recognition in Monaco, but the fact that they have been rendered can assist the Monaco judge to decide to order similar measures (for example, freezing orders) in Monaco. Permanent injunctions could be enforced.

v Fraud as a defence to enforcement of judgments granted abroad

The requirement that a foreign judgment respect Monaco’s public policy would provide a defence to the enforcement of judgment obtained by fraud in a foreign country.

VI CURRENT DEVELOPMENTS

A number of legislative proposals have been presented to modernise Monaco’s legislation and would facilitate recovery of assets in fraud cases.

A law has been voted on, but not enacted, that would require the publication of all the decisions rendered by Monaco courts (at present only 1 per cent of all decisions are published). Names of the parties will in most cases (and in all criminal cases) not be published.\(^ \text{40} \)

The new Law has been freshly adopted and took effect on 7 July 2017.\(^ \text{41} \)

The Code of Civil Procedure has been modified to eliminate a frequently used procedural tactic that resulted in lawsuits being dismissed for failing to properly identify the person or entity in a foreign company that has authority to bring an action. The saying *pas de nullité sans grief* (no nullity without prejudice) now applies in Monaco.

\(^ {40} \) Proposal for a Law relating to the access to decisions of the Courts and Tribunals of Monaco of 17 March 2015.

I  OVERVIEW

For a number of years now, the government has been stepping up its game in the fight against fraud and has implemented a multitude of measures that will deal with fraud both with public funds and against citizens and the business sector. Therefore, it has become increasingly important for Dutch companies to implement a sophisticated compliance programme to prevent fraud from occurring.

In those cases where victims of fraud or dishonesty in the Netherlands want to take action to recover their assets, they have to rely on general actions to privately trace and recover any assets or the proceeds of fraud. No specific civil legislation has been enacted in relation to asset tracing and recovery, including the gathering of evidence to support claims arising out of fraud or dishonesty.

A current trend in asset tracing and recovery is for victims to hire private investigative companies to gather evidence and attempt to trace their funds. The Public Prosecution Service has developed certain initiatives, including the establishment of an Asset Recovery Office, to further enhance its asset tracing and recovery capabilities. At the same time, law firms in the Netherlands have developed sophisticated ‘investigation’ practices to help fraud victims with their asset tracing efforts. Because of the increasing cooperation between the Public Prosecution Service and private entities such as the investigation practices of law firms, victims of fraud in the Netherlands have an increasing number of options available to effectively trace and recover their assets or the proceeds of fraud.

II  LEGAL RIGHTS AND REMEDIES

Unlike certain other jurisdictions, there is no civil legislation enacted in the Netherlands that specifically deals with asset tracing and asset recovery. Therefore, a victim of fraud must rely on general actions to trace and recover any assets or the proceeds of fraud. This gives rise to a number of issues, which will be discussed below.

The difference between the Netherlands and most common law jurisdictions is that any legal dispute about funds is resolved through the law of obligations instead of property law. This further affects the remedies available in relation to asset tracing and recovery. A victim of fraud in the Netherlands only has recourse to – at best – a personal action (action in

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1  Neyah van der Aa is a senior associate and Thijs Geesink and Jaantje Kramer are associates at Allen & Overy LLP.
personam), and not a real action (action in rem). This means that, for example, he or she cannot act as a secured creditor in the event of bankruptcy. Furthermore, a victim cannot trace money into the hands of another person or entity, as ‘money’ under Dutch law is a fungible item and as such cannot be individualised.

An action of a victim of fraud, theft or misappropriation of funds can be based on an unlawful act. In addition, a victim of fraud can base a claim on undue payment, as usually there is no (proper) legal basis for, for example, an unlawful transfer of money. The doctrine of unjust enrichment offers another cause of action.

Apart from these civil actions, a victim can join any criminal proceedings against the fraudster as a third-party applicant for a compensation order for damages.

i Civil and criminal remedies

A victim of fraud can base its claim on the following actions against the person who committed the fraud:

a Unlawful act: the basic conditions for liability on the basis of an unlawful act are an unlawful act, attribution of the unlawful act to the wrongdoer, damage and causality between the unlawful act and the damage. A fifth condition is the relativity requirement: the damage suffered by the claimant must be of the type envisaged by the standard or norm that was violated and that the law intended to protect. A successful action on the basis of an unlawful act will result in compensation of the victim for damage suffered.

b Undue payment: a victim can demand the restitution of an asset from the recipient if that asset has been provided to the recipient without any legal basis. In the case of a transfer of money, the payer has a claim against the recipient for restitution of that sum of money. As such, the action for an undue payment is concerned with restoration and not with a claim for damages.

c Unjust enrichment: the elements necessary for the constitution of a valid enrichment claim are:
- enrichment of the defendant;
- impoverishment of the claimant;
- a connection between the enrichment and the impoverishment; and
- an absence of justification or cause for retention of the enrichment.

While a claim fitting the requirements of undue payment could also be raised as an enrichment claim (i.e., there is no legal basis), usually it will be raised as an undue payment claim, as this obviates the need to prove any enrichment in the hands of the recipient. A successful action on the basis of unjust enrichment will result in compensation of the victim for damage suffered, up to the amount of the enrichment of the defendant.

The average length of contentious proceedings in the district court is about 14 months, and much less for small claims dealt with by the cantonal division of the district court.

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3 Article 6:162 of the Dutch Civil Code (DCC).
4 Article 6:203 of the DCC.
5 Article 6:212 of the DCC.
6 Article 51f of the Code of Criminal Procedure (CCRP).
7 Article 6:163 of the DCC.
However, large or complex cases in the district court may take significantly longer, not least because of the ability of courts to give interim judgments (e.g., ordering additional evidence after the parties have argued their case).\(^9\) Appeals proceedings before the Dutch courts may take longer than in other jurisdictions, as they consist of a full review on the merits (as regards both facts and law) of a case, and the Court of Appeal may order new evidence through witness hearings or expert reports, rather than restrict itself to the evidence forwarded in the proceedings at first instance.

A victim of fraud can, alongside his or her own asset-tracing activities, involve the police. The police may investigate a fraud case under the responsibility of the Public Prosecution Service. The main advantage of involving the police is that a victim, as a ‘victim of fraud’, becomes part of the police investigation. This means that the victim is entitled to certain rights, including the right to gain access to any documents that are part of the criminal investigation file (see Section III) and the right to join the criminal proceedings as the aggrieved party. However, because of the principle of discretionary prosecution, the victim cannot force the Public Prosecution Service to expend resources on prosecuting or investigating a crime.\(^10\)

Joining the criminal proceedings as the aggrieved party and claiming damages is a relatively easy way to obtain compensation for a victim, but a claim for damages will only be reviewed summarily during the criminal proceedings. In view of this, only claims for damages that do not result in a disproportionate burden on the criminal proceedings and that are directly related to the indictment are admissible in criminal proceedings.\(^11\) If a criminal court rules that the claim for damages results in a disproportionate burden on the criminal proceedings, the claim will be dismissed and the victim will have to make his or her claim for damages before a civil court. This is often the case when victims of, for instance, sophisticated fraud schemes claim extensive or complex damages in criminal proceedings.

A judgment of the High Court of Amsterdam illustrates how victims can obtain compensation by joining a criminal proceeding. The High Court not only convicted the suspect for fraud, but also required him to pay damages of more than €385,000 to the victim of the fraud.\(^12\) Another recent judgment of the Dutch Supreme Court confirms that the requirement of the victim or aggrieved party having suffered damage or losses ‘as a direct consequence of the criminal act’ is being applied less stringently than before.\(^13\) This shows that this procedure can be an alternative to civil remedies, even in cases involving larger amounts. However, despite fraud being an area of focus of criminal authorities, these authorities are regularly not inclined to investigate allegations of fraud, particularly if they regard the allegations as part of a commercial dispute (e.g., alleged accounting fraud in the context of an M&A transaction) and deem the victim to be able to investigate the fraud itself and claim damages through civil proceedings.\(^14\)

Pursuant to EU Council Decision 2007/845/JBZ, EU countries were to establish special contact points for the recovery of criminal assets, in particular to exchange police

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\(^9\) Ibid.

\(^10\) However, anyone with a direct interest in the prosecution of a crime can file a complaint against a decision of the Public Prosecution Service not to prosecute or investigate a case further (Article 12 of the CCRP).

\(^11\) Article 361(3) of the CCRP.

\(^12\) Court of Appeal Amsterdam, 16 June 2015, ECLI:NL:GHAMS:2015:2280.

\(^13\) See the informative conclusion of the advocate general under Supreme Court 22 November 2016, ECLI:NL:HR:2016:265.

information and best practice more effectively. In the Netherlands, the Criminal Assets Deprivation Bureau has been designated as a contact point, and an Asset Recovery Office (ARO) was established for the purpose of asset tracing and the execution of freezing and confiscation orders. Police requests for mutual legal assistance can be submitted to the ARO, and advice can be given on international aspects of cases. The ARO also executes incoming requests for the confiscation and recovery of criminal proceeds.

ii  Defense to fraud claims

Civil claims, such as those above (see Section II.i), are subject to time limitations. Time limitation periods for civil claims can be extended rather easily. This can be achieved by either initiating proceedings or sending a written notice in which the claimant unequivocally reserves the right to pursue the claim. The effect of an extension is that the time limitation period starts anew. If an expiration date passes, the option to pursue the claim expires.

The limitation period for bringing a damages claim based on an unlawful act or unjust enrichment in the civil courts is five years from the day following that on which the claimant becomes aware of the claim and the identity of the person liable for it.

A claim on the basis of undue payment is also barred after five years. The limitation period for bringing a claim based on undue payment starts the day following that on which the claimant becomes aware of the claim and the identity of the recipient of the assets.

The limitation period for all these claims is capped at 20 years from the date of the event that caused the damage or, in the case of undue payment, on which the claim arose.

III  SEIZURE AND EVIDENCE

i  Securing assets and proceeds

In the Netherlands, it is possible to provisionally attach any assets or the proceeds of fraud pending the outcome of a damages claim against a fraudster. A full overview of the possibilities and requirements to provisionally attach all different types of assets can be found in the Attachment Syllabus. A distinction can be made between a provisional attachment of specific goods (not including funds) for the purpose of surrender or delivery of the goods, and a (third-party) provisional attachment for the purpose of recovery of a financial claim through sale of the goods or collection of the receivables. The latter form of provisional attachment is the most common one and is frequently used in the asset-tracing process to attach the proceeds of fraud. With a third-party attachment, the creditor attaches all amounts and goods due by the third party (often a bank) to the debtor (such as the fraudster). A common third-party attachment is that by which funds in the bank accounts of the debtor are attached. The amount attached is equal to the funds in the bank account on the date of the attachment, irrespective of the amount of the creditor’s claim. Credit facilities of the debtor are, however, not subject to attachment. Amounts credited to the bank account after the attachment are not covered. To freeze these amounts, a new attachment will be necessary.

15  Articles 3:316 and 3:317 of the DCC.
16  Article 3:310 of the DCC.
17  Article 3:309 of the DCC.
19  Van Hooijdonk and Eijsvoogel, footnote 8, at p. 113.
20  Article 718 et seq. of the Code of Civil Procedure (CCP).
Third-party attachments under banks are a relatively easy way to secure the proceeds of fraud (provided the proceeds are still in the fraudster’s bank account at the time of attachment and were not used to set off the fraudster’s debt).

To effect a provisional attachment, the claimant must file a petition with the president of the district court (the preliminary relief judge). An attachment can only be made with this permission. The petition should (inter alia) indicate the grounds for the claim, and should also identify the assets on which the claimant wishes to effect an attachment. If the claim is monetary, the claimant must estimate the claim. For specific kinds of attachment the claimant must prove ‘fear of embezzlement’ of the assets. In past years, the practice in the Netherlands regarding provisional attachment has increasingly been criticised, especially when compared with the practice in neighbouring countries. Recent case law shows that, following this criticism, judges may be more reluctant than previously to grant leave to the requesting party to provisionally attach certain assets.21

A petition for attachment usually relates to assets that are located in the Netherlands (and, in cases of third-party attachment, the third party (often a bank) is usually domiciled in the Netherlands, or has its offices or at least a branch in the Netherlands), although there are scenarios in which a Dutch court is competent to grant leave for an attachment abroad.22

On 18 January 2017, the regulation establishing a European Account Preservation Order (EAPO) entered into force in the Netherlands and other EU Member States (excluding the United Kingdom and Denmark). In international fraud cases, this may prove an important tool for victims of fraud, as it grants the power to request information on the bank details of the debtor and to levy attachments on the debtor’s bank account or accounts in other EU Member States. The petition in the majority of cases is decided ex parte, usually within one or two days of the filing of the petition. If the judge has ‘reasonable doubts’ as to whether the claim is founded, he or she may decide to grant a preliminary leave for attachment, and only give a final decision once he or she has heard both parties. A current trend is that judges tend to hear the debtors more often.23 The judge can also grant leave for attachment on the condition that collateral is provided for potential damage caused by the attachment.24

In the case of a third-party attachment, the third party must declare within four weeks of the attachment what he or she owes to the debtor. In practice, this requirement is detrimental to the asset-tracing process. During this period, the victim will not know whether the third-party attachment did attach any assets. This means that a victim will have to wait a month before it becomes clear whether the trace has been successful (i.e., the assets were attached), or whether he or she needs to continue the asset-tracing process.

Unless main proceedings are already pending at the time of the order granting the permission for provisional attachment, the approval for the pre-judgment attachment is given under the condition that the main proceedings relating to the underlying claim are instituted within a certain period. This time period cannot be less than eight days25 and is usually set at 14 days. Generally, the fact that the proceedings will be started abroad is a sound reason

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24 Article 701 of the CCP.
25 Article 700(3) of the CCP.
to obtain a longer term, for example 30 days. Following a legitimate request, and depending on the reason for the request, the time period can be extended. Previously, courts frequently extended the time period for initiating main proceedings pending any fraud investigations. In view of the recent changes of the docket rules, courts may be stricter in their approach to extension requests. However, in practice, courts still tend to grant extension requests easily, provided that there is a legitimate reason for the request. If the main proceedings are not instituted within the period set by the court, the attachment automatically lapses.26

An attachment will be lifted upon request of the debtor if it was made without taking formal requirements into account, if the claim for which the attachment was made is prima facie without merit or if the attachment is considered disproportionate. The attachment must also be lifted if the debtor provides sufficient collateral (e.g., a bank guarantee) for the underlying claim.27 In practice, it is not easy to convince the courts that the claim is prima facie without merit, and therefore it is difficult to oppose the attachment, even if the attachment debtor is a bona fide company with good reasons to contest the alleged claim.28 The Netherlands is, therefore, in comparison with many other countries, an attachment-friendly country, which is certainly useful during the asset-tracing process.

If the underlying claim in the main proceedings is fully denied, the party that made the provisional attachment is strictly liable to the party against which the attachment was made for all damage resulting from the attachment.

ii Obtaining evidence

There is no specific action available under Dutch law that can be used to obtain evidence in cases of ‘fraud’. As such, victims of fraud will have to rely on general actions to obtain information to support their claim during proceedings (or, in some cases, before initiating proceedings).

The concept of document discovery or disclosure as it exists under US or UK law does not exist under Dutch law. The court may always order parties to submit documents relevant to the proceedings.29 Furthermore, on the basis of the CCP, parties can submit a request for document disclosure (including data such as computer files).30

Pursuant to Article 843a of the CCP, the requesting party must meet the following conditions:31

a it should have a ‘legitimate interest’ in disclosure. The requesting party must make clear that the documents constitute relevant evidence for it, while its interests will have to be balanced against all the other interests at stake;

b the requesting party must specify the relevant documents. This condition is designed to prevent fishing expeditions. As a rule of thumb it can be said that documents requested should be described in as much detail as possible. In any event, the description of the documents must be concrete enough to be able to determine which documents are meant and whether or not the requesting party has a legitimate interest in obtaining them; and

26 Article 700(3) of the CCP
27 Article 705(2) of the CCP
28 Van Hooijdonk and Eijsvoogel, footnote 8, at p. 118.
29 Article 22 of the CCP. If a party fails to comply with an order, the court may draw the conclusion it sees fit.
30 Article 843a of the CCP.
31 Van Hooijdonk and Eijsvoogel, footnote 8, at p. 31.
the documents must ‘relate to’ a legal relationship to which it is a party or to which its legal predecessor was a party. A legal relationship can be of a contractual or non-contractual nature (including, among other things, an unlawful act). In general, this condition is interpreted broadly, meaning that documents must be of significance to the legal relationship. For example, a due diligence report made by the financial adviser to the buyer of a company has been held to ‘relate to’ the legal relationship between the buyer and the seller laid down in the share purchase agreement, and a copy of such a report could thus successfully be claimed by the seller from the buyer or from his or her adviser.

Previously, it proved difficult – and often impossible – in practice to obtain copies of documents or data that were in the possession of parties unwilling to submit them. In recent years, however, lower courts have increasingly accepted the possibility of ex parte relief for the attachment of evidence on the basis of Article 843a of the CCP. This possibility had already been introduced in the CCP in relation to potential infringements of intellectual property rights pursuant to Article 7 of the IPR Enforcement Directive. In September 2013, the Supreme Court confirmed this practice by the lower courts and ruled that granting ex parte relief for the attachment of evidence is also possible in cases not relating to intellectual property, provided that the requirements for disclosure on the basis of Article 843a are fulfilled; the requesting party does not have less intrusive alternatives for gathering the evidence, given the circumstances of the case and the interests of both parties; it is clear that the attachment only preserves the evidence for a future court procedure and the requesting party does not gain access to the evidence through the attachment (e.g., because it is sealed and placed in storage with a third party); and adequate safeguards are in place to preserve the confidentiality of any data gathered. An example of such safeguards is that the judge granting the relief is present when the evidence is being gathered.

If the conditions for application of Article 843a of the CCP are fulfilled and none of the grounds for refusal apply, the party to whom the request is directed will have to submit all the requested documents and data it has at its disposal.

A request for submission of documents can be made by a motion during the proceedings on the merits or in separate (e.g., preliminary relief) proceedings, if necessary on pain of forfeiture of a penalty. A request for submission of documents can also be made against third parties (such as banks not involved in the proceedings). A claimant may also file a request for documents that he or she would like to use for proceedings pending outside the Netherlands, provided there is jurisdiction for the request.

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35 Supreme Court 13 September 2013, JOR 2013, 330.
iii Criminal proceedings

As briefly set out above (see Section II.i), a victim of fraud, as the aggrieved party in criminal proceedings, is entitled to copies of documents that are added to the criminal investigation file, insofar as the victim has a legitimate interest in receiving the copies. The criminal investigation file contains all the information relevant to the criminal investigation and the criminal charges against the fraudster. In a fraud investigation, this file usually includes financial records, bank statements and reports of any searches (i.e., documents that are relevant to the asset-tracing and recovery process).

The victim is often refused access to this information until the criminal investigation, or an important part thereof, has been concluded. If the victim requires this information on short notice to continue the asset-tracing efforts, he or she can try to base a request for this information on the Instruction for Confiscation of the Proceeds of Crime. This instruction provides that, if a victim of fraud claims damages in civil proceedings, the Public Prosecution Service should share the information obtained during the criminal investigation to support the victim's civil damages claim.

Victims of offences increasingly hire private investigators to conduct an investigation to gather evidence to substantiate their claims. When conducting research, private investigation agencies must respect the principles of proportionality and subsidiarity, they must adhere to the privacy code that applies to their sector and must comply with the Data Protection Regulation (GDPR). The Dutch Data Protection Authority checks whether private detective agencies process personal data correctly.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

The Dutch Anti-Money and Anti-Terrorist Financing Act (Wwft) regulates institutions that are subject to anti-money laundering legislation, such as banks, attorneys admitted to the Dutch bar and external auditors. The Wwft has recently been amended to (partly) implement the Fourth EU Anti-Money Laundering Directive in Dutch national law, and also contains various Netherlands-specific requirements. The provisions in the Fourth EU Anti-Money Laundering Directive particularly impact the registration of ultimate beneficial owners, for which a separate Act is being prepared in the Netherlands (see Section VI.ii, below). However, this process has been delayed (see Section VI.i, below).

The Wwft adopts a risk-based approach; this means that institutions must perform their own appraisal of the risks posed by clients or products, so that they adapt their compliance efforts to those risks. In accordance with the Wwft, institutions must notify any unusual

37 Article 51b of the CCRP.
38 Stcrt 2013, 35782 (2013A021).
39 Stb 2018, 144.

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transactions of their clients to the Financial Intelligence Unit (FIU). Additionally, a bank can have a duty of care in relation to third parties (i.e., potential victims) if one of its clients commits fraud, although the duty of care only applies under exceptional circumstances and successful claims against banks on this basis are very rare.

ii Insolvency

The fight against bankruptcy fraud is a priority for the government as it seeks to maintain a safe business climate for national and international enterprises in the Netherlands. Fraudsters in the Netherlands often get off relatively unharmed if the court-appointed receiver uncovers an estate with no worth. In such cases, the business assets have usually been siphoned off in advance of the bankruptcy, and an accurate administration has not been maintained. This makes asset tracing and recovery incredibly difficult. Nevertheless, in December 2017, the Bankruptcy Act was amended to strengthen the position of the receiver. Article 68(2) of the Bankruptcy Act now obliges the receiver to assess if there have been any irregularities that have caused or contributed to the bankruptcy, hampered the liquidation of assets or increased the shortfall in assets. If the receiver discovers such irregularities, the supervisory judge must be informed (on a confidential basis) and, if necessary, the irregularities must be notified or reported to the relevant governmental authorities.

On 1 July 2016, a new act entered into force that expands the criminal law options that can be used in the case of a fraudulent bankruptcy. The new Act is part of the Bankruptcy Act review legislative programme that aims to modernise Dutch bankruptcy law. Furthermore, on 23 December 2017, an act entered into force that brought the Bankruptcy Act in line with the EU Regulation on Insolvency Proceedings (2015/848).

Criminal enforcement of the obligation to provide information and the requirement to keep records are an important part of the act. In the event of a bankruptcy, the court-appointed receiver needs to be able to receive full cooperation from the bankrupt party. In addition, the Act also introduces the possibility of criminal prosecution in the event that a director or supervisory director acts objectionably and exacerbates the company’s problems. The downfall of the company and prejudice to creditors are not requirements for criminal liability; therefore, criminal enforcement can also take place when the company has not (yet) been declared bankrupt.

iii Arbitration

Because of its contractual nature, a fraud claim can only become the subject of arbitration when arising out of, or made in connection with, an agreement between two or more parties. Case examples in the Netherlands are claims made in arbitration proceedings arising out of share purchase agreements where the sellers committed accounting fraud and sold the company at an inflated price. Other examples are claims made before the Court of Arbitration for the Building Industry relating to fraudulent conduct regarding additional work in construction projects.

43 A list of indicators of unusual transactions is included in a schedule to the Decree to implement the Anti-Money and Anti-Terrorist Financing Act, 15 July 2008.
45 Stb 2016, 205.
46 Stb 2017, 497
The main differences between fraud cases before a court and an arbitral tribunal relate to the rules regarding evidence and document disclosure. An arbitral tribunal is free to determine the rules regarding evidence, including its admissibility and its weight, unless the parties agree otherwise.\footnote{Article 1039(1) of the CCP. For instance, the parties can agree to the application of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, published at www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.} In principle, the rules of evidence as laid down in the CCP, which are applicable to any civil proceedings before a Dutch court, are not applicable.

An arbitral tribunal has the power to order the parties to disclose documents, unless the parties have agreed otherwise.\footnote{Article 1040(2) of the CCP.} It may do so on its own initiative or at the request of one of the parties. An order by the arbitral tribunal requiring the disclosure of certain documents cannot be enforced by a court. If a party refuses to disclose certain documents, the arbitral tribunal can in principle do no more than draw its own conclusions from such a refusal (e.g., that the relevant documents sustain the other party’s position). The disclosure of documents in the hands of third parties can only be ordered by a court (see Section III.ii).

\subsection*{iv Effect of fraud on evidentiary rules and legal privilege}

In the Netherlands, legal privilege may not apply to documents or communications between a client and a lawyer that facilitate fraud. A recent judgment of the Dutch Supreme Court in relation to this topic shows that documents such as emails and minutes relating to the devising of, or consultations regarding, criminal acts, or drafts of (false) agreements, can qualify as ‘\textit{corpora or instrumenta delicta}’ that have facilitated the fraud, if the fraud has been committed with the help of or by means of those documents.\footnote{Supreme Court 26 January 2016, ECLI:NL:HR:2016:110.} In that case, the documents are not protected by legal privilege.

When performing certain services, a lawyer can furthermore be required to report an unusual transaction of its client to the FIU pursuant to the Wwft (see Section IV.i). However, a general exception to this obligation applies for lawyers who act and advise in the context of legal proceedings. If filing such a report is mandatory, this cannot result in any disciplinary actions against the lawyer for breaching client confidentiality.

In past years, there has been much debate in the Netherlands regarding the scope of legal privilege.\footnote{See, \textit{inter alia}, ‘Het verschoningsrecht van de advocaat is er zowel voor David als voor Goliath’, 30 May 2013, ‘OM: beperk verschoningsrecht advocaat en notaris’, 19 June 2015 and ‘Minister perkt beroepsgeheim advocaat in’, 2 December 2015: www.fd.nl, and Tatania Scheltema, ‘Het gevecht om verschoningsrecht’, Advocatenblad 2017/4, pp. 33–36.} To combat financial crimes more effectively, in particular fraud and money laundering, a procedure for courts to decide whether a claim regarding legal privilege has merit was enacted in November 2014.\footnote{Article 98 and Article 218 CCRP; TK, 2012–2013, 33685, No. 3.} However, this procedure only has a limited scope and applicability, and does not solve many of the issues connected to the judicial review of a claim for privilege in a criminal investigation. Furthermore, the Dutch Minister of Security and Justice has announced that he will propose further changes in the future.\footnote{TK, 2015–2016, 29 279, No. 289.}

\begin{footnotesize}
\footnote{Article 1039(1) of the CCP. For instance, the parties can agree to the application of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, published at www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.}
\footnote{Article 1040(2) of the CCP.}
\footnote{Supreme Court 26 January 2016, ECLI:NL:HR:2016:110.}
\footnote{Article 98 and Article 218 CCRP; TK, 2012–2013, 33685, No. 3.}
\footnote{TK, 2015–2016, 29 279, No. 289.}
\end{footnotesize}
Dutch law does not provide any specific rules on evidence in relation to fraud. Evidence obtained by way of fraud is still admissible in civil proceedings, but a judge is free to weigh the evidence and consider the method by which it was obtained as part of the circumstances of the case.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in civil fraud claims

If a civil dispute is international, including an international fraud claim, a Dutch court will apply Dutch conflict-of-law rules on its own initiative. All procedural issues are governed by Dutch law as lex fori. For issues regarding the merits of the case, this will be different. If the conflict-of-law rules lead to the applicability of extraterritorial law, the parties must 'prove' the contents and implications of that law and may use all evidentiary means to do this, including the submission of written legal opinions (by foreign scholars). In principle, the court also has a duty to investigate the contents of the foreign law on its own initiative, and it is not bound by the parties' explanation. Pursuant to the European Convention on Information on Foreign Law of 1968, which applies to almost all Member States of the Council of Europe, a court can request information on applicable foreign law directly from the competent authority in the country concerned.

ii Collection of evidence in support of civil proceedings abroad

The Netherlands is a party to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention). On the basis of the Hague Evidence Convention, the Dutch authorities may be requested to take evidence for the purpose of non-domestic proceedings. Witness hearings pursuant to a letter of request are held in accordance with Dutch procedural law, and the only documents and data a claimant can request to be produced are specific documents and data that fall under the disclosure duty of the CCP (see Section III). The Netherlands, like many other countries, will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents as would be the case in some common law countries such as the United States, which may limit the scope for obtaining evidence in relation to fraud claims in these jurisdictions.

53 Article 10:3 of the DCC.
54 Van Hooijdonk and Eijsvoogel, footnote 8, at p. 36.
55 Article 10:2 of the DCC.
57 Article 67 of the CCP.
59 Van Hooijdonk and Eijsvoogel, footnote 8, at p. 34.
60 Article 23 of the Hague Evidence Convention: ‘A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.’ In their subsequent declaration, the Netherlands have stated: ‘For the purposes of Article 23 of the Convention, “Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries”, which the Netherlands will not execute, are defined by the Government of the Kingdom of the Netherlands.'
Within the EU, the taking of evidence in international situations is governed by the EC Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (EC Evidence Regulation). The EC Evidence Regulation applies to all EU Member States, with the exception of Denmark. The content of the EC Evidence Regulation is very similar to that of the Hague Evidence Convention, with some clarifications and amendments to simplify and expedite the procedure for the taking of evidence.

For the purposes of obtaining documentary evidence in the Netherlands in support of proceedings abroad, the Dutch Supreme Court has held that a document-production request pursuant to Article 843a of the CCP cannot be dismissed on the grounds that the requested documents are (only) relevant in relation to foreign proceedings. As such, it is possible for a victim of fraud to collect documentary evidence in the Netherlands in support of foreign proceedings pursuant to Article 843a of the CCP.

Seizure of assets or proceeds of fraud in support of the victim of fraud

In principle, the attachment of assets in the Netherlands (see Section III) does not give jurisdiction to the Dutch courts to hear the claim on its merits. The competent court in the main proceedings should be established in accordance with the applicable jurisdiction rules, and could therefore be a non-Dutch court, or an arbitral tribunal.

However, an attachment does give jurisdiction to the court that granted the attachment if the following conditions are met: the debtor is domiciled outside the Netherlands, the plaintiff cannot obtain a judgment in another country that is directly enforceable in the Netherlands and no other rule of law confers jurisdiction on a Dutch court.

In a criminal investigation, if the Dutch police locate any assets in other jurisdictions, they can submit a request for legal assistance to their counterpart in that jurisdiction, usually on the basis of a convention on mutual assistance between the two jurisdictions. On the basis of this request, the assets can be attached by the local police. An advantage of involving the police in this way is that any assets can be attached, while the victim can decide how and when to submit his or her claim. An additional advantage is that through this ‘police attachment’, assets can be attached in jurisdictions where it is generally not possible or very difficult to attach assets in civil proceedings. A disadvantage is that this procedure can be bureaucratic and therefore take a long time (which increases the risk that there are no assets left to attach).

Netherlands


63 Van Hooijdonk and Eijsvoogel, footnote 8, at p. 117.

64 Article 767 of the CCP.

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Recognition and enforcement of judgments granted abroad in relation to fraud claims

In practice, foreign judgments will be recognised by a Dutch court if the following four conditions are met:

- the judgment must be a result of proceedings compatible with Dutch concepts of due process;
- the judgment should not contravene public policy;
- the non-domestic court must have assumed jurisdiction on grounds that are internationally accepted (an example of which is a forum chosen by the parties); and
- the judgment should not be incompatible with a judgment in proceedings between the same parties rendered by a Dutch court or an earlier judgment of a non-domestic court in proceedings between the same parties that regarded the same subject matter, insofar as the non-domestic judgment is recognisable in the Netherlands.65

There are no separate criteria for recognition in respect of fraud claims.

With respect to enforcement, judgments delivered outside the Netherlands can only be directly enforced within the Netherlands on the basis of an enforcement treaty or EU directive.66 Foreign judgments to which no such treaties apply must in principle be enforced by commencing new cause proceedings before the Dutch courts, but if the above-mentioned criteria for recognition are met, no litigation on the merits will be required.

VI CURRENT DEVELOPMENTS

i The Fifth EU Anti-Money Laundering Directive

On 19 June 2018, the European Union published the Fifth EU Anti-Money Laundering Directive.67 The main changes to the Fourth EU Anti-Money Laundering Directive are:

- clarification of politically exposed persons (PEPs);
- tighter controls relating to high-risk third countries;
- increasing transparency of beneficial ownership of corporates; and
- beneficial ownership of trusts.68

The Fifth EU Anti-Money Laundering Directive must be implemented by 10 January 2020 by EU Member States.

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66 Article 431 of the CCP. Under Article 40 of the Act on the Kingdom of the Netherlands, as revised, Stb. 2010, 775, judgments of Curacao, St Maarten, Aruba and the Netherlands can be directly enforced in the Kingdom of the Netherlands as a whole.
ii Central UBO Register and Central Shareholders’ Register

Pursuant to the Fourth European Anti-Money Laundering Directive, the Dutch government was obliged to introduce a central register containing adequate, accurate and current information on the ultimate beneficial ownership (UBO) of Dutch legal entities by 26 June 2017. A draft bill was presented for public consultation on 31 March 2017. However, the presentation of a draft bill has been postponed until the beginning of 2019, with the enactment of the Fifth EU Anti-Money Laundering Directive cited as a reason for the postponement (see Section VI.i).

The delay in implementation of the Central UBO Register did not deter the presentation, on 19 January 2017, of a draft bill for the introduction of a Central Shareholders’ Register. According to the draft bill, the Central Shareholders’ Register would include details on the shares, shareholders and pledgees of shares or holders of a right of usufruct on shares in Dutch private and public limited liability companies (except for listed companies). As such, this register would provide more detailed information than the Central UBO Register. Access to the Central Shareholders’ Register would be available to certain governmental authorities (such as the Public Prosecution Service or the tax authority), the institutions mentioned in the Wwft and civil-law notaries, each to the extent necessary for exercising its public duties.


I OVERVIEW

Since Portugal has effective legislation against money laundering and economic and financial criminality in general, the jurisdiction does not often serve as a gateway for unlawful funds originating from other parts of the world. Nevertheless, Portuguese civil and criminal law provides fraud victims with several remedies to ensure their compensation for damage suffered as a result of fraudulent acts.

Regardless of any criminal investigation into fraud cases, every victim of a fraudulent act is free to take action under civil law by asserting claims for recovery or damages before the civil courts, but with regard to civil proceedings, victims must rely on general actions to privately trace and recover any assets or proceeds of fraud. There is no specific legislation related to asset tracing and recovery under civil law, including the collection of evidence to support the claims made.

Criminal proceedings may present some advantages over civil proceedings from the standpoint of a victim of fraud, most notably:

a. there is a time limit for the conclusion of a criminal investigation;
b. in the task of investigating a crime, the public prosecutor (and police resources) and the examining magistrate (a judge specially appointed to intervene during the investigative phase in a criminal procedure) can enable a vast array of procedures for gathering information and proof, such as wiretaps, interception of correspondence and searches; and
c. to prevent the dissipation of the defendant’s assets or to secure the future payment of legal compensation (or the payment of other amounts regarding the criminal procedure), the examining magistrate can have the defendants’ assets seized and order that he or she settle bail.

However, from a victim’s standpoint, some of the main principles of the Portuguese criminal system may also present some difficulties: in the face of the principle of in dubio pro reo, a suspect of a crime can only be convicted if proof of its responsibility is made beyond any reasonable doubt; the burden of proof lies on the public prosecutor; and suspects (and in limited cases even witnesses) have the right to not respond to questions that can result in self-incrimination (the inalienable right to remain silent).

1 Rogério Alves is the managing partner at Rogério Alves & Associados – Sociedade de Advogados RL. The author would like to thank André Matos Faria and Manuel Valente for their assistance with this chapter.
II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Civil remedies

The main remedies in a civil recovery action are restitution, obtained by means of the action (where possible), or compensatory damages obtained through action in contract.

As a general rule, each party has the burden of submitting and proving the facts upon which his or her claim or defence is based. Everything that remains uncontested by the other party is considered proven, and the assessment of evidence is only undertaken in relation to contested facts. If a fact is contested by the counterparty, the presenting party must describe the evidence that it intends to rely upon to prove that fact. If necessary, the court will then render an order for the taking of the evidence and freely evaluate the outcome of the collected actions.

Pursuant to the approval of the new Civil Procedure Code (in force as of September 2013), all evidence must be presented by the parties with their written petitions and must be presented before the trial hearing. In principle, after that, the proper moment to present any other means of evidence or to modify any of those previously presented will be at a pretrial hearing, typically held between the judge and the opposing parties to establish the main facts under dispute and to organise (and, if possible, schedule) the next steps of the proceedings.

Exceptionally, up to 20 days before the trial, the parties can file additional documents that were not presented along with the written statement at the risk of penalty (except when they prove the reason they were not able to present them initially).

In addition, during trial, the parties can only present documents that could not have been presented earlier and that have become necessary only because of a recent and subsequent event. This was already possible under the previous Civil Procedure Code, but the rule was seldom used, as the courts freely admitted the presentation of documents at any time upon payment of a fine.

Before the trial and even during its course in court, at the request of the interested party (plaintiff), the court can order a third party (including law enforcement and regulatory agencies) to produce or disclose documents or other information deemed relevant to assess the claim’s merit if there is no way for the plaintiff to obtain it directly.

With regard to civil remedies that can be sought against people who assisted the author of the fraud (e.g., by receiving its proceeds), the victim may also have to claim for restitution of particular assets (either fixed or movable) against any person who is currently in possession of those assets, even if the person acted as a bona fide party. Furthermore, restitution of profits arising out of the disposal of the victim’s assets may be achieved by siphoning off the profits if the person who assisted in committing the fraud disposes of the assets while knowing that they did not belong to him or her and that he or she was not entitled to do so. In either case, the victim has to prove that the defendant benefited from the action taken by a third person involved and the extent of that benefit; however, under certain circumstances, ascertained on a case-by-case basis, the defendant may be obliged to disclose information if the victim does not know the relevant facts through no fault of his or her own.

The average period between the initiation and conclusion of the civil proceedings is around six to 12 months at trial level before the civil court and between four and eight months before the court of appeals in the event the defendant lodges a competent appeal; however, complex fraud litigation proceedings may take longer.
Criminal remedies

Civil action for restitution and compensatory damages may be filed simultaneously with criminal proceedings. The civil action may be brought before a civil court but also within the scope of a criminal proceeding if the claimant requires its appointment as a ‘civil party’. In this latter case, since the claim for restitution and compensatory damages is based on a criminal offence, the claim must be filed before the criminal court in charge of the relevant criminal proceedings unless:

a charges are not brought within eight months of the criminal inquiry;
b the criminal proceedings are closed or temporarily restricted;
c the criminal proceedings are dependent on a previous criminal complaint or private prosecution; and
d if there is no known damage at the time of the public prosecution or its full extent is not known.

In all these cases, civil action will progress in parallel with criminal proceedings concerning the same subject matter.

As previously mentioned (see Section I), there are several advantages to bringing a civil action for restitution or damages within criminal proceedings. The main positive effect is the fact that the victim will be able to benefit from the action of the public prosecutor in relation to obtaining documental and witness evidence, tracing assets and proceeds of the criminal offence, etc. Furthermore, the victim may obtain a court order granting the freezing of the defendant’s assets to prevent their dissipation (being entitled to have its credit satisfied with precedence in the case of conviction and subsequent confiscation). If the committed fraud falls under the statute of money laundering, the law provides for compulsory confiscation of the relevant proceeds of the criminal offence (even secondary proceeds – i.e., proceeds that have been converted into other property) in the event of conviction (and the possibility of freezing the proceeds at a pretrial stage). In addition, as explained hereunder, the fact that the police (through its financial intelligence unit) can impose a suspension of suspicious transactions directly or indirectly related to the possible commission of the criminal offence renders a relevant assistance to the victim’s efforts of asset-tracing proceeds to prevent their dissipation.

In principle, with regard to the possibility of confiscating property acquired by a third party, confiscation cannot take place when the asset is in the ownership of a person extraneous to the crime (e.g., a bona fide third party). Nevertheless, confiscation will be ordered if the third party knows of its origin, or has concurred through his or her conduct in making the undertaking of the crime easier or has taken advantage of the fact.

According to Portuguese case law, the only subject who may be considered extraneous to a criminal offence is one who had no direct or indirect (e.g., lack of vigilance) negligent link to the undertaking of the offence. Therefore, even property held by close relatives of the defendant can be subject to confiscation.

A special form of mandatory confiscation was introduced by Law 5/2002 (and its subsequent amendments) in respect of a list of certain crimes (drug trafficking, money laundering, passive and active corruption, embezzlement, trading in influence, etc.). Under this Law, and for the purposes of a confiscation order, in the event of conviction any

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2 Article 368 of the Portuguese Criminal Code.
difference between the value of the convicted person's property and the value proportionate to his or her lawful income is construed as an advantage arising from criminal activity (value-based confiscation).

In the event that the victim of the criminal offence has not elected to be appointed as a 'civil party' within the scope of a criminal proceeding, the victim may in any case (as a bona fide third party) claim ownership of the property subject to confiscation before the court competent to execute the confiscation. If a dispute arises over the ownership of the property, the court must refer the case to the competent civil court to determine legitimate ownership.

ii Defences to fraud claims
The most common defences to fraud claims that may be raised by a defendant are the lack of jurisdiction of the civil or criminal court in charge of the proceedings (see Section V), the acquisition of property by a bona fide third party (although a recent trend in Portuguese case law has been to use 'piercing the corporate veil' as grounds for rejecting this defence), and the expiry of the statute of limitations.

In general, the statute of limitations is 20 years, including contract liability claims. Nevertheless, there are several exceptions to this general rule, including the following:

a non-contractual liability and strict liability: the general limitation period is three years starting from the date when the unlawful act becomes known to the claimant; however, this period may be extended according to a longer criminal statute of limitations if the act may, in theory, be considered to have occurred simultaneously with a criminal offence; and

b the statute of limitations is five years, starting from the date when the right could have been exercised, in the event the claim is based on rents due by lessees, interest, dividends from companies, alimonies and any periodically renewable benefits.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Civil remedies
To prevent the dissipation of assets by suspects of involvement in fraud (or where there is a material risk of dissipation of assets), Portuguese law provides for protective attachments, which consist of a request for the court to issue an order regarding a debtor's property or rights (e.g., bank accounts, real estate property, shares, credits over a third party). The effect of the court order depends on the nature of the assets in question. The attachment of real property is registered at the competent land registry office as a charge in favour of the claimant; the attachment of personal assets is done by seizing the assets and placing them in the custody of an enforcement agent appointed by the court on behalf of the claimant; and the attachment of defendant's rights is achieved by notification to the third-party debtor, which must place the credit at the disposal of the enforcement agent.

The substantive requirements of protective attachments described above are represented by fumus boni juris and periculum in mora. The first is the presentation of preliminary evidence of the existence of the right that the requested attachment is aimed at protecting; the second is evidence of a serious and concrete risk that the lack of attachment could compromise the asset recovery in a main lawsuit.
Even if instrumental to a full trial, protective attachments may also be granted at trial stage and even after a merit judgment on the cause, provided that both substantive requirements are met.

In terms of proceedings, the attachment order can be issued *ex parte* if the defendant’s prior knowledge could compromise the successful execution of the order; in which case, the defendant is entitled to raise his or her defence 10 days after the attachment order, and the order will therefore be subject to confirmation, amendment or revocation by the court, otherwise the court may decide on the application for protective attachment after a hearing in which all parties are entitled to present their allegations.

In terms of interim relief for obtaining information, the Portuguese Civil Procedure Code provides that, upon request by a party, the court can order pretrial depositions (and even, under certain circumstances, prior to filing the lawsuit) in the event there is a serious risk that their deposition during trial will be impossible or extremely difficult.

**Criminal remedies**

The Portuguese Criminal Procedure Code (CPC) foresees two kinds of provisional measures dubbed as ‘patrimonial guarantee measures’: the ‘precautionary attachment’ and the ‘economic surety’.

Precautionary attachment is an interim measure aimed at freezing the proceeds of a crime (and of the means used for the practice of the crime) in view of a future confiscation; or protecting and satisfying the credits of the state or the victim of a crime, by freezing or seizing the defendant’s assets (or those of third parties liable for compensation arising out of a convicting sentence) to prevent their dissipation (analogous with the protective attachment provided for civil purposes). This measure can only be ordered by the court upon request of the public prosecutor and is immediately revoked if the defendant posts ‘economic surety’. Precautionary attachment orders suspend or prohibit any civil recovery proceedings related to the assets subject to attachment.

‘Economic surety’ is aimed at guaranteeing the enforcement of any confiscation penalty imposed by the court, or payment of compensation due to a victim of a crime. This surety may be posted by any form of a patrimonial guarantee (deposit, pledge, mortgage or bank guarantee).

Pursuant to Article 178 of the CPC, provisional seizure, carried out by the Asset Recovery Office (ARO)³ on behalf of the public prosecutor, is also available in respect of legal persons suspected of committing a criminal offence of ‘objects’ used or intended to be used in the undertaking of a crime or representing the proceeds, profit or prior compensation; all ‘objects’ left by the offender at the scene of the crime; and any other ‘object’ that might serve as a proof.

Seizure of assets must be authorised, ordered and validated by judicial authorities.

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³ A unit of the criminal police whose mission consists of identifying, tracing and seizing property or proceeds related to crimes, both at internal and international level.
ii Obtaining evidence

Civil proceedings

The collection of evidence (interrogatories, testimonies, expert evidence, etc.) is carried out within the trial and is conducted by the court mainly at request of the parties. With regard to documentary evidence (see Section II.i), the parties may produce all documents that, in their view, may prove the grounds of their respective claims or defences.

With some exceptions (e.g., ‘authentic acts’ such as extracts from the commercial or land registry offices or public deeds), the court is free to assess any produced evidence at its discretion, but has to substantiate the reasons for its assessment in its final decision.

If the defendant does not respond to a lawsuit, the court must verify whether the service has been made in accordance with all applicable legal procedures, and if it finds any irregularity, it must order the repetition of the service. If, having been correctly served, the defendant still does not respond, the facts presented by the plaintiff in his or her initial claim are considered proven with some exceptions (e.g., facts challenged by one of the defendants in a lawsuit with several defendants).

If defendants fail to respond when duly summoned, the file is made available for examination for 10 days, first to the plaintiff’s lawyer and then to the defendant’s (if the defendant has appointed a lawyer, despite not having presented a response). Both lawyers are given the opportunity to present written allegations within that period and the court must subsequently issue a ruling.

Criminal proceedings

In accordance with Portuguese constitutional principles (the presumption of innocence, which provides that a defendant cannot be considered guilty until finally convicted), the burden of proof lies with the public prosecutor, either to prove beyond reasonable doubt the defendant’s guilt in relation to certain criminal offences, or to prove that specific assets are the proceeds of the criminal offence and, as such, must be confiscated.

In a criminal trial, the relevance of oral evidence given before the court by both prosecution and defence witnesses should be highlighted. The main principle applicable to the taking of testimonies is that of a fair trial, whereby the court must ensure during the trial the equal footing of the prosecution and defence and, as such, the defendant must be able to directly present his or her defence and examine the prosecution witnesses who have testified against him or her.

With regard to documentary evidence, it should be noted that in criminal proceedings related to organised crime and economic and financial criminality, the public prosecutor has the power to lift bank secrecy and to issue a reasoned order to banks and other financial institutions that, in turn, must comply and send the requested information within a specified time frame.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Banking and money laundering offences are punishable with a prison sentence of up to 12 years by Article 368-A of the Portuguese Criminal Code.

Law No. 25/2008 (and its subsequent amendments) established measures of prevention and law enforcement to combat money laundering and terrorist financing, transposing to

This Law has now been revoked by the new Law 83/2017, which transposes to the Portuguese jurisdiction Directives 2015/849/UE and 2016/2258/UE of the European Parliament and the Council for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

Since the approval of these laws, financial institutions and a large number of non-financial institutions, such as casinos, real estate agents, auditors, notaries and lawyers, are bound not to participate in any suspicious or criminal activities related to money laundering and to report such activities to the public prosecutor or the Unit of Financial Information. In particular, these entities must:

a. identify and verify customers and beneficial owners;
b. carry out risk assessments and due diligence measures, including gathering information regarding the purpose and intended nature of the business relationship;
c. refuse to carry out a transaction whenever the above-mentioned identification and due diligence duties are not fulfilled;
d. keep, for a minimum period, documents, evidence and relevant data referring to the compliance of customer due diligence and to business transactions;
e. examine and pay special attention to any activity that they regard as particularly likely, by its nature, to be related to money laundering or terrorist financing;
f. inform (on their own initiative) the competent authorities of any facts suspected of being related to money laundering or terrorist financing;
g. refuse to carry out a transaction whenever the transaction is known or suspected of being related to money laundering or terrorist financing;
h. promptly collaborate with the competent authorities (the supervisory authorities responsible for the prudential and market conduct supervision);
i. not reveal to the customer or any third party the disclosure of information to the competent authorities;
j. adopt appropriate policies and procedures to comply with the legal duties regarding internal control, risk assessment, risk management and internal due diligence; and
k. adopt appropriate measures to keep staff well informed of all the legal duties applicable.

ii Insolvency

Civil liability may arise as a consequence of criminal insolvency offences. In fact, the intentional breach of certain duties (e.g., destruction or dissipation of assets, artificial reduction of profits or assets and fictitious increase of debts) and gross misconduct (e.g., exaggerated expenses or failing to file for a restructuring procedure while knowing of the company’s economic and financial difficulties) are punishable under the Criminal Code.

The Portuguese Insolvency Act sets out the main rules and procedures regarding insolvency and restructuring for companies in Portugal. Several amendments to this Act, in force since 2004, have continually aggravated the penalties of crimes related to insolvency and implemented a formal procedure of insolvency (simpler than the previous procedure), as well as procedures aimed at recovering assets by employees and third parties directly affected.
by the insolvency (e.g., persons whose own assets have been unduly considered as property of the debtor); they have also implemented a considerable number of duties that the debtor and the directors of companies in financial difficulties must comply with.

iii  Arbitration
Despite the fact that arbitral courts have the necessary powers to order interim measures under Portuguese arbitration law, there is no record of victims of fraud resorting to arbitration in connection with fraud and asset recovery.

iv  Effect of fraud on evidentiary rules and legal privilege
As far as legal privilege is concerned, in theory, public prosecutors do not have the power to seize or request the production of documents subject to legal professional privilege (e.g., correspondence between the suspect and the defence lawyer) unless those documents are deemed ‘elements’ of a criminal offence.

Notwithstanding this, the scope of protection granted under Portuguese law differs according to the professional’s particular practice. Lawyers, for instance, benefit from broad and strict protection, whereas employees and directors of financial institutions do not (see Section III.ii).

Privilege at trial is not considered an absolute right and, in most cases, it is possible to lift it, albeit through a complex procedure. The main rule on this issue is set out in Article 135 of the Portuguese Criminal Procedure Code, which stipulates that only superior courts may decide whether privilege should be lifted and thus consequently force the disclosure of protected facts. The superior court’s decision must always be taken according to the principle of the prevailing interest, which binds the court to, inter alia, considering the gravity of the criminal offence and the interests pursued through the criminal procedure.

V  INTERNATIONAL ASPECTS
i  Conflict of law and choice of law in fraud claims
Under Portuguese law, the international jurisdiction of the Portuguese courts is determined by the following criteria:

\[ a \] according to Portuguese territorial jurisdiction rules (e.g., forum rei sitae, when the defendant is resident in Portugal), the lawsuit may be filed in a Portuguese court;

\[ b \] the facts determining the cause of action took place in Portugal; and

\[ c \] the rights of the plaintiff may only be made effective through a lawsuit filed in Portuguese courts or when bringing legal action in a foreign country may present relevant difficulties for the plaintiff and, simultaneously, there is a relevant connection between the lawsuit and the Portuguese jurisdiction.

Furthermore, EU Regulation 44/2001 on jurisdiction is fully applicable in Portugal.

It should be noted that, whenever a situation occurs in which Portuguese courts are internationally competent, pursuant to domestic law or EU Regulation 44/2001, they will be, as such, internationally competent for the lawsuit. In fact, the rule of forum non conveniens, as followed in some common law jurisdictions, does not apply in the Portuguese legal system.
ii  Collection of evidence in support of proceedings abroad
Judicial cooperation is mainly governed by EC regulations (with respect to EU countries) and the international conventions ratified by Portugal.

With respect to all EU countries, requests by Member States for the taking of evidence in Portugal are governed by Council Regulation (EC) No 1206/2001. The main provisions of the Regulation state that:

- the taking of evidence should be executed expeditiously (ordinarily within 90 days), and refusal should be confined to exceptional situations; if a special procedure is requested in accordance with the law of the requesting state, the competent foreign court should comply with the requirement unless this procedure is incompatible with the applicable law;
- requests should be transmitted directly from the requesting court to the competent court of the foreign state;
- the presence and participation in the foreign state of the relevant parties and of the representatives of the requesting court can be allowed; and
- the direct taking of evidence by the requesting court can take place under certain conditions (e.g., if videoconferencing is available to take testimonies).

As far as non-EU countries are concerned, the most relevant international convention is the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. In accordance, requests to obtain evidence must be made in writing and sent to the central authority of the foreign state appointed for that purpose. The main terms and conditions are in line with those set out in EC regulations referred to above.

In the absence of any treaty, Portuguese law provides that letters rogatory of foreign authorities be assessed by the public prosecutor for public-interest reasons prior to execution. If granted, the competent court will be responsible for ensuring compliance with the letters rogatory, unless their execution does not require the intervention of a Portuguese court.

iii  Seizure of assets or proceeds of fraud in support of the victim of fraud
Two legal frameworks may be applied: a general legal framework under ordinary law, and the specific and simplified legal framework applicable within the EU.

As for the general framework, unless international conventions provide otherwise, requests for assistance issued by foreign judicial authorities are sent to the Portuguese judicial authorities through diplomatic channels, and the enforcement documents are returned through the same route. In urgent cases, requests for assistance can be sent directly to the Portuguese authorities with jurisdiction to act on them. In a case of assistance concerning provisional measures – notably attachments – foreign authorities can request from the Portuguese authorities assistance with the freezing of assets that appear to be the proceeds of a criminal offence (and of any asset the value of which is equivalent to the proceeds of the offence) with a view to future confiscation. This request may be refused if, for example, the underlying facts do not constitute an offence under Portuguese law or if the assets concerned cannot be confiscated under Portuguese law.

With regard to the legal framework applicable within the EU, applications for freezing orders and subsequent enforcement are decided by the public prosecutor with territorial jurisdiction and, following examination of the regularity of the application, immediately enforced (through ARO); however, ARO may refuse to enforce the freezing order under
certain circumstances, or may defer the order in certain other situations. If the public prosecutor decides to defer the enforcement, he or she must inform the judicial authority of the issuing state of the reasons for the deferral and, if possible, the foreseeable duration.

Following the entry into force of Law No. 30/2017 by transposition of the EU, Directive 2014/42/UE, several amendments have been made in the Portuguese criminal and complementary criminal laws setting measures for the control of organised crime and economic or financial crime.

iv Enforcement of judgments granted abroad in relation to fraud claims

Within the EU, Directive EC 44/2001 (with its subsequent amendments) sets out the conditions under which a judgment (concerning civil and commercial matters) issued in a Member State can be enforceable in another. Therefore, pursuant to this Regulation, a judgment issued in a Member State and enforceable in that Member State may be enforceable in Portugal when, upon application by the interested party, it has been declared enforceable. The application of enforceability is filed with the competent superior court.

Without prejudice to any international conventions and treaties in force (e.g., the Lugano Convention), under Portuguese law, it is generally possible to enforce foreign court civil judgments provided that these are subject to a prior confirmation procedure before a Portuguese court. Said confirmation will be granted whenever:

- there are no well-grounded doubts concerning either the authenticity of the submitted documents or the judiciousness of the decision;
- the decision is final according to the law of the country in which the judgment was rendered;
- the object of the decision does not fall within the exclusive international jurisdiction of Portuguese courts and the jurisdiction of the foreign court has not been determined fraudulently;
- there are no other proceedings between the same parties, based on the same facts and having the same purpose, and no ruling on the same case has been issued by a Portuguese court;
- the defendant was duly notified of all the proceedings according to the law of the country where the judgment was rendered;
- the foreign court proceedings complied with the procedural law requirements and each party received an adequate opportunity to present their case fairly; and
- the acknowledgement of the decision is not patently incompatible with the international public policy of the state.

v Fraud as a defence to enforcement of judgments granted abroad

Under Portuguese law, the general rule is that both parties can appeal any decision or order of the Court of Appeals during the confirmation procedure. Confirmation of the foreign judgment may be challenged if any of the confirmation requirements outlined above (see Section V.iv) are not fulfilled according to the defendant’s perspective.

4 For example, if the underlying facts do not constitute an offence under Portuguese law or if the enforcement infringes the double jeopardy rule.

5 For example, when there is a risk that such a decision may undermine a criminal investigation in progress in Portugal, or when the assets or items of evidence have already been attached or frozen in the context of a domestic criminal proceeding.
VI CURRENT DEVELOPMENTS

In civil proceedings, the Portuguese Constitutional Court, in its recent judgment No. 847/14, declared unconstitutional the suppression of the enforceability (introduced by the Portuguese Civil Procedure Code) of private documents signed by the debtor that establish or acknowledge pecuniary obligations, dated prior to 1 September 2013 (the date of entry into force of the new Portuguese Civil Procedure Code), since it violates the principle of legitimate expectations. In fact, with the entry into force of the new Civil Procedure Code, such private documents ceased to be enforceable even with legally certified signatures (registered or authenticated by a notary or other entity with the power to certify). This change means that creditors holding this kind of document must file a (declaratory) action – and support all burdens arising thereof – to obtain a judicial title enabling them to enforce their credit rights.

As for criminal proceedings, a cutting-edge update has been the recent enactment of Law 30/2015 aiming to comply with the recommendations addressed to Portugal on corruption by GRECO, the UN and the OECD, which introduced several amendments to the Portuguese Criminal Code, the law relating to crimes committed by political-office holders and high public officials (Law 34/87), the law on corruption in international trade and in the private sector (Law 20/2008) and the legal framework for whistle-blowing on corruption related matters (Law 19/2008). The most significant amendments introduced by said Law are:

 a the criminal liability of legal persons governed by public law (e.g., state-owned companies);
 b the increase of the statute of limitations to 15 years for influence-peddling offences;
 c the punishment of bribery attempts as criminal offences;
 d penalty discharge on corruption offences (which was mandatory in certain situations of repentance) has become a discretionary legal power of the judgment court;
 e for a ‘repentant’ to benefit from a penalty discharge, he or she must voluntarily turn any unlawful advantages obtained from the corruptor; and
 f the scope of incrimination for embezzlement offences has been expanded to the appropriation and use of fixed assets.

Another important update was the approval of Law 36/2015, adopting the Council’s Framework Decision 2009/829/JHA of 23 October 2009 on the application between EU Member States of the principle of mutual recognition of decisions on coercive measures (such as the obligation to remain in the territory of the executing state, to report at specified times to a specific authority or to avoid contact with specific persons related to the offences allegedly committed) as an alternative to pretrial custody.

Finally, in another relevant development, the Portuguese Constitutional Court, in its judgment No. 377/2015, ruled that the criminalisation of unlawful enrichment proposed by the Portuguese Parliament Bill No. 369/XII is unconstitutional on the grounds of breach of the constitutional principles of proportionality, mandatory prosecution and presumption of innocence. The Bill proposed the introduction of a new article to the Portuguese Criminal Code establishing a penalty of up to three years’ imprisonment for any person who directly or through a third party acquires or owns property the value of which is inconsistent with his or her income.

While already provided for in the CCP, e-auctioning within enforcement proceedings only became fully operational in 2016 upon the approval of Ministerial Order 12624/2015, which appointed the Solicitors and Enforcement Agents Chamber to manage the
corresponding platform. The most relevant changes implemented have been the elimination of sale through an expression of interest submitted in a sealed letter as well as the waiver of a court order to schedule the auction date.

Following the enactment of Law 13/2016, tax enforcement proceedings may not target the attachment of the debtor’s family home unless its rateable value falls within the maximum property transfer tax rate applicable to the acquisition of urban property destined to be a permanent dwelling. In such cases, proceedings aimed at selling the property through auction may only take place at least one year after the expiry of the payment period for the earliest tax debt.
I  OVERVIEW

Serbia is a country of transition in every sense of the word: its economic, social, political and judicial systems are all experiencing reform. The legislation is constantly changing with the aim of improving it and harmonising it with international legal standards and EU regulations. In these changes, unfortunately, concessions are often made to tailor to the current aims and interests of the political parties in power. Regardless of the imperfections and political concessions during changes to the existing legislation and the enactment of new legal regulations, Serbia nevertheless adheres to a civilised and recognised civil-law legal system, combined with common law legal standards in the newly enacted legal regulations.

Serbia is a jurisdiction where assets come in the form of cash primarily because of investments in various projects, privatisation processes, real estate investment, etc., which means that money that would eventually be subject to asset tracking in Serbia changes its form and becomes a different asset: for example, real estate, shares in a company, or equipment or similar. On the other hand, money constantly goes to offshore centres or centres with preferential tax regimes, in particular the Netherlands, Switzerland and Cyprus, and known offshore centres such as Monaco, Delaware, the Netherlands Antilles, the British Virgin Islands and Hong Kong. The money is mainly transferred in a legal manner as acquired dividends, capital gains, the return of loans and credits and similar. The financial system, despite its imperfections, is transparent to a reasonable extent and there are corresponding provisions to prevent money laundering. The courts, police, prosecution and other state authorities generally wish to cooperate in asset recovery cases, except where doing so is in contradiction with the legal system or interferes with investigations and criminal proceedings.

Victims of fraud, dishonesty or criminal offences can be confident in the Serbian jurisdiction and authorities, and can initiate proceedings and submit various requests, including requests for compensation and damages. In civil proceedings, victims can have standing and an active role and void legal affairs through a lawsuit *actio pauliana* to initiate court disputes for restitution of property (asset recovery claims). There are advantages to the system in the sense that each legal entity has its own tax number (PIB), and that, through their PIB, account numbers can be checked, as well as the names of the banks where these accounts are held. Victims of fraud can obtain other evidence and information from public registries or before the court in a special proceeding.

In criminal proceedings, victims of fraud have a passive role, because the public prosecutor has the active role and standing. However, in a criminal proceeding, victims have

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1 Tomislav Šunjka is the founder of ŠunjkaLaw.
the right to question witnesses and defendants, put objections and present evidence. In some cases, if and when the public prosecutor withdraws the prosecution of the defendants, victims have the right to assume the prosecution of those indicted by the public prosecutor and to directly press charges.\(^2\) Victims have the right and obligation to make their property claims in a criminal proceeding (i.e., request for asset recovery, compensation or both). The criminal court shall render a decision on the request by itself, or shall instruct the victim to file his or her request directly in the civil proceeding.

The laws and their parts and provisions that can be applied in asset-recovery cases are as follows:

- the Law on Civil Procedure;
- the Law of Contracts and Torts;
- the Criminal Procedure Code;
- the Law on Seizure and Confiscation of the Proceeds from Crime;
- the Criminal Code;
- the Law on the Liability of Legal Persons for Criminal Offences;
- the Law on Mutual Legal Assistance in Criminal Matters;
- the Law on Enforcement and Security;
- the Law on Business Companies;
- the Law on the Serbian Business Registers Agency;
- regulations on tax identification numbers;
- the Law on Banks;
- the Legal Profession Act;
- the Law on Free Access to Information of Public Importance;
- the Law on the Prevention of Money Laundering and the Financing of Terrorism;
- the Law on Resolving Conflict of Laws with Regulations of Other Countries;
- the Law on Insolvency;
- the Law on Foreigners; and
- the Law on Whistleblower Protection.

## II LEGAL RIGHTS AND REMEDIES

### i Civil and criminal remedies

Compensatory remedies, both in civil and criminal proceedings, can be sought against each of the following: the person who committed the fraud; the persons who assisted the perpetrator to commit the fraud; and third parties who may have received or helped transmit the proceeds of the fraud.

**Civil procedure**

The civil procedure in Serbia is regulated by the Law on Civil Procedure. A civil procedure is initiated by filing a lawsuit before the competent court.\(^3\) The main stages of the proceeding are its initiation by the filing of a lawsuit by the plaintiff; preparation of the main hearing; and the main hearing, in which parties bring their legal opinions before the court, exchange

\(^2\) The Criminal Procedure Code, Article 50.

\(^3\) The Law on Civil Procedure, Article 191.

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and explain arguments, and present and dispute evidence presented by other parties. After the court has considered all evidence proposed by the parties, it shall close the main hearing and render its decision. Civil proceedings last approximately three years.

**Damages in civil proceedings**

The Law of Contracts and Torts prescribes that damage\(^4\) may consist in the diminution of someone’s property (simple loss – *damnum emergens*) or the prevention of its increase (profit lost – *lucrum cessans*).

The provisions of Article 18 of the Law are important to point out considering that, in carrying out their obligations, parties shall be bound to act with the care required in legal transactions of the kind that obligation relations involve (the care of a good businessperson, or the care of a good head of a house).

In carrying out obligations relating to his or her professional activity, a party to obligation relations shall be bound to act with increased care, according to professional rules and usage (the standard of care of a good expert).\(^5\)

Damage arising from a breach of contract and damage that arises from a tort must also be distinguished from one another. The basic difference between these two types of damage liability lies in the presence or the absence of a prior obligation. In the first case, the liability comes from the existence of a certain legal arrangement, and in the second case, the liability comes from a certain tort.

In criminal proceedings, liability may be subjective (on the grounds of fault for damage), and damages in court proceedings may be awarded only if the connection between the action or failure to act by the offender and damage caused by the offender is established. Only in that case shall the court award damages to the injured party.

Once the judgment of the court in a criminal proceeding is rendered, the court in the civil proceeding is obliged to apply the judgment rendered in the criminal proceeding with respect to the liability for the commission of a criminal offence.\(^6\)

The Law on Contract and Torts prescribes that liability in civil court proceedings for damages may be subjective liability on the grounds of fault for damage, and objective liability on the grounds of equity and liability of enterprises and other legal entities.

**Refuting (contesting) a debtor’s legal actions in respect to asset recovery**

The Law of Contracts and Torts prescribes rules for refuting a debtor’s actions by the lawsuit (or claim) (*actio pauliana*), which represents an institute of civil law.

Article 280 of the aforementioned Law provides that any plaintiff or creditor (person who requests asset recovery) whose claim is due for payment, regardless of the date of its taking place, shall be entitled to refute a legal act taken by their debtor that causes harm to them.

The Law prescribes that the debtor’s disposal of property may be refuted in the case of disposal on the debt side, if at the time of effecting the disposal the debtor was aware or could have been aware that the action would do harm to his or her creditors; or a gratuitous

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\(^4\) The Law of Contracts and Torts, Article 155.

\(^5\) Ibid., Article 18, Paragraph 2.

\(^6\) The Law on Civil Procedure, Article 13.
disposal and a legal act equal to it: the debtor shall be considered to have been aware that the disposal undertaken would do harm to creditors, so that in refuting such acts there shall be no requirement that the third person was aware, or was supposed to be aware, of the fact.

Refuting of debtors’ actions can be achieved by submitting a lawsuit before the competent court or by objection.

A lawsuit to refute must be submitted against a third person being a party to the legal act (acquirer of the debtor’s property) or to whose benefit the act to be refuted was undertaken. If a third person has transferred, by a transaction on the debit side, the benefit acquired through the disposal to be refuted, the lawsuit may be initiated against the acquirer only if the latter was aware that the acquisition of his or her predecessor was prone to be refuted, but if the benefit was transferred by a gratuitous transaction, the lawsuit may be initiated against the acquirer even if he or she was not aware of the fact.7

A defendant may avoid the refuting by performing the debtor’s obligation.

A lawsuit to refute a debtor’s actions must be initiated within a year in the case of a disposal on the debit side, while in the case of a gratuitous disposal of the debtor, a lawsuit must be initiated within a three-year-time limit.8

**Rules on enforcement proceedings**

The enforcement procedure is regulated by the Law on Enforcement and Security.

In Serbia, the enforcement procedure is initiated by a motion of enforcement submitted by the enforcement creditor before a competent court (before first-instance courts of general jurisdiction or commercial courts considering parties in the proceeding). The enforcement procedure may be initiated by submitting a motion of enforcement based on executive titles (final and enforceable court judgments, decisions, settlements, etc.) or authentic documents9 (invoices, bills, bills of exchange or cheques, business book excerpts, bank guarantees, etc.).

By submitting a motion of enforcement, an enforcement creditor must propose the means and object on which the enforcement proceeding shall be conducted. Objects of enforcement proceedings are things and rights on which enforcement of the claim may be carried out (e.g., money, funds on bank accounts, shares, movable and immovable property), while means by which enforcement proceedings may be conducted are enforcement actions used to enforce a claim in accordance with law (e.g., sale of chattels, sale of immovable property, transfer of monetary claims).

The court shall decide on a motion of enforcement within eight days of the filing of a motion to the court.

**Criminal procedure**

The Criminal Procedure Code prescribes that criminal proceedings may be initiated by the public prosecutor, a private prosecutor or an injured party (victim of the fraud), but only the public prosecutor has authority. Private prosecutors and injured parties have limited standing in special cases.

The Criminal Procedure Code outlines the stages of a criminal proceeding:10

- preliminary investigation proceeding;

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7 Ibid., Article 283, Paragraph 3.
8 The Law of Contracts and Torts, Article 285, Paragraph 1.
9 The Law on Enforcement and Security, Article 52.
10 The Criminal Procedure Code, Chapters 15–18.
Serbia

The injured party is entitled to take part in criminal proceedings and has the right to submit a claim for damages as well as a request to secure the claim for damages by temporary measures. The injured party is also entitled to, *inter alia*:

- propose evidence in the proceeding;
- be present at the questioning of witnesses and the offender;
- be present at hearings; and
- hire a representative.

The most important right of injured parties is that they are entitled to initiate a criminal proceeding, and that afterwards, if the public prosecutor for any reason stops or withdraws the criminal proceeding against the offender, they themselves can take over the prosecution against the offender.\(^{11}\)

The time frame for criminal proceedings is not strictly prescribed by law; however, it usually takes about three years for the court to render its final and enforceable decision.

**Criminal responsibility of legal entities in criminal proceedings**

The Law on the Liability of Legal Persons for Criminal Offences regulates the liability of legal entities for criminal offences; the criminal sanctions that may be imposed on legal entities and the rules of procedure for deciding on the liability of legal entities; and the imposition of criminal sanctions on legal entities.

Article 25 of the Law prescribes that objects that were used or were intended to be used for the committing of a criminal offence, or objects that arose from a criminal offence, may be confiscated in a criminal proceeding if they are the property of the legal entity. Objects may also be seized, even if they are not owned by legal entities, if it is in the interest of public safety or for moral reasons; however, in that case, this does not affect the rights of third parties regarding damages.

**ii Defences to fraud claims**

In a civil lawsuit for damages, it is necessary to prove:

- the plaintiff’s standing to sue and the defendant’s standing to be sued;
- the legal basis of the claim, which can be contract, tort, a final and enforceable criminal judgment or another legal basis;
- the amount of the claim; and
- most importantly, the causal connection between the tortfeasor and the occurrence of the harmful event.

Damage, as such, must be certain; the likelihood of damage is not sufficient for adjudication.

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\(^{11}\) Ibid., Article 52.
III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Criminal procedure – confiscation of the offender’s assets by state or government authorities

The Law on Seizure and Confiscation of the Proceeds from Crime prescribes that asset recovery is possible in criminal proceedings for the following criminal offences:

a organised crime;
b qualified murder;
c abduction;
d displaying, obtaining and possessing pornographic material and exploiting a minor for pornography;
e crimes against intellectual property;
f crimes against property (such as robbery, fraud, extortion);
g crimes against businesses, such as:
   • counterfeiting of money, credit cards, or securities;
   • creating, obtaining and providing other means for forgery;
   • money laundering;
   • smuggling;
   • abuse of a position of the responsible person;
   • causing false bankruptcy; and
   • causing harm to the creditor;
h unauthorised production, possession and distribution of narcotics;
i crimes against public order;
j crimes against official duty (such as abuse of an official position);
k crimes against humanity; and
l crimes against other goods protected by international law.12

The Law established a new organisational unit responsible for financial investigations. This unit is a specialised organisational unit of the Ministry of Interior of Serbia for detection of assets derived from criminal offences. The unit acts on the order of the court, the Public Prosecutor’s Office or ex officio.13

The Criminal Code and the Criminal Procedure Code

The Criminal Code also prescribes rules on the confiscation of objects and the seizure of property gained through committing a criminal offence.

Article 87 of the Criminal Code regulates security measures for the confiscation of objects and prescribes that objects that were used or that were intended to be used for the committing of a criminal offence, or objects that are proceeds from a criminal offence, may be confiscated in criminal proceedings, as may objects when there is a danger that the object will be reused for the commission of a crime, etc.

Article 92 of the Criminal Code prescribes that property gained through the commission of a criminal offence shall be confiscated from the offender.

12 The Law on Seizure and Confiscation of the Proceeds from Crime, Article 2.
13 Ibid., Article 6.
ii Obtaining evidence

Pursuant to Article 284 of the Law on Civil Procedure, it is possible to seek the securing of evidence before initiating civil proceedings as well as during the conducting of civil proceedings. The reason for securing evidence is if there is a reasonable concern that evidence will disappear, or that its later presentation will not be possible. The court shall render a separate decision and schedule a special hearing for the presentation of evidence.

The court, pursuant to Articles 241 and 242 of the Law on Civil Procedure, may request from the defendant or any third party a document that is in their possession. Such decisions are enforceable. The court may fine any person who does not present the document upon the court decision.

A party may refuse to present a document if, by this documentation, the party has obtained information in confidence as representative of a party; as religious confession; or as a legal counsel, doctor or member of another profession where there is the duty to keep and protect the confidentiality of information obtained through performing a profession or activity.

In addition, a party may refuse to present documentation if, by disclosure of the documentation, they would bring disgrace, significant material damage or a criminal prosecution upon themselves, their lineal relatives to any degree and lateral relatives.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

The Law on the Prevention of Money Laundering and the Financing of Terrorism prescribes actions and measures to be undertaken for the purpose of detection and prevention of money laundering.

Obligors and responsible persons within obligors are required to undertake actions and measures for the detection and prevention of money laundering.

Obligors of undertaking actions and measures for detection and the prevention of money laundering are, inter alia:

a banks;
b exchange offices;
c companies managing investment funds;
d companies managing voluntary pension funds;
e financial leasing companies;
f insurance and insurance brokerage companies;
g persons dealing with postal communications;
h broker-dealers;
i organisers of special games of chance in casinos; and
j auditing companies.14

Obligors are also entrepreneurs and legal entities that carry out or provide the following activities:

a real estate brokerage;
b accounting services;

14 The Law on Prevention of Money Laundering and the Financing of Terrorism, Article 4, Paragraph 1.
tax advice;
d assistance in credit transactions;
e factoring and forfeiting;
f provision of guarantees; and
g attorneys at law and law offices.\textsuperscript{15}

The obligor is bound to establish the identity of the customer, collect data about the customer and the transaction, and other data that are, for the purpose of the Law, relevant for the detection and prevention of money laundering, of which the most important for understanding the fraud are the following:\textsuperscript{16}
a when opening an account or establishing other forms of business cooperation with the customer;
b in the case of any transaction (cash or non-cash) or several interrelated transactions with a total sum amounting to or exceeding €15,000 dinar-counter-value; and
c in the case of any transaction (cash or non-cash) regardless of the value of the transaction if there are reasons to suspect money laundering with regard to a transaction or a customer.

\textbf{Bank secrecy}

In Serbia, bank secrecy rules are regulated by the Law on Banks. The Law on Banks defines ‘bank secret’ in Article 46 and prescribes that the following shall be considered as a bank secret: data that are known to a bank, and that refer to personal data, financial status and transactions, as well as ownership or business relations of the clients of that bank or another bank; and data on the balance and transactions of individual deposit accounts.

The Law on Banks prescribes that the following shall not be considered as a bank secret:
a public data and data accessible from other sources to interested persons with a legitimate interest;
b consolidated data on the basis of which the identity of an individual client is not disclosed;
c data on bank shareholders and the amount of their participation in the bank share capital; or
d data related to the timeliness of a client fulfilling its obligations towards the bank.

The Law on Banks prescribes several exceptions from the obligation to guard bank secrets. The obligation to guard bank secrets shall not apply if the data are disclosed as follows:\textsuperscript{17}
a on the basis of a decision or request of the competent court;
b for the requirements of the Ministry of Internal Affairs, which is responsible for combating organised crime and for preventing money laundering;
c in connection with the property proceeding, and on the basis of the request of the owner of the property or consular offices of foreign states, after the submission of written documents proving the justified interest of these persons;
d in the case of execution by the competent authority regarding property of the bank’s client;

\begin{itemize}
\item \textsuperscript{15} Ibid., Article 4, Paragraph 2.
\item \textsuperscript{16} Ibid., Article 9.
\item \textsuperscript{17} The Law on Banks, Article 48.
\end{itemize}
for regulatory bodies in Serbia for the purpose of carrying out tasks within their jurisdiction;

regarding entities established by banks for the purpose of collecting data on the total amount, type and timeliness in fulfilling obligations of natural and legal persons of clients of banks;

to the competent authority in connection with the execution of control over the performance of payment transactions with legal and natural persons performing activities, in accordance with the regulations governing the payment operations;

to the tax administration, in accordance with the regulations governing the tasks under its jurisdiction;

to the authority competent for the supervision of foreign currency operations;

upon the request of the organisation for deposit insurance; or

to a foreign regulatory authority under the conditions stipulated in the memorandum of understanding concluded between the foreign regulatory authority and the National Bank of Serbia, etc.\textsuperscript{18}

\textbf{ii Insolvency}

The rights of creditors in national and international insolvency proceedings are regulated in the Law on Insolvency.

\textit{Rights of creditors in national insolvency proceedings}

Insolvency proceedings in Serbia have the following phases:

- a preliminary insolvency proceeding;
- the opening of the bankruptcy proceeding;
- the submitting of a claim of all creditors;
- the realisation and distribution of bankruptcy property and the settlement of creditors;
- the conclusion of bankruptcy proceedings; and
- a reorganisation, which can be filed concurrently with the petition for insolvency or after the opening of insolvency proceedings.

\textit{International insolvencies}

International insolvencies are also regulated by the Law on Insolvency.

International insolvency exists if:

- a foreign court or another foreign authority that exercises control over or supervision of the assets or operations of the debtor or a foreign representative requires assistance in connection with a foreign proceeding;
- a court or creditor asks for help in a foreign country in connection with the bankruptcy proceedings that in Serbia are conducted in accordance with the Law on Insolvency; or
- a foreign proceeding is conducted simultaneously with the insolvency procedure in Serbia.

\textsuperscript{18} Ibid., Article 103.
In the case of recognition of foreign proceedings under this Law, the laws of Serbia shall apply to assets subject to excluding rights or secured assets and rights located in the territory of Serbia, while the effects of insolvency on employment contracts are governed by the law that is applicable to the contracts themselves.

A foreign representative is entitled to approach a court directly in Serbia (i.e., the right of direct access, the right to apply to commence an insolvency proceeding if conditions have been met to commence such a proceeding under the Law on Insolvency and the right to participate in a proceeding regarding the debtor).19

**Contesting a debtor’s legal actions in insolvency proceedings (asset recovery in insolvency proceedings in Serbia)**

According to the provisions of the Law on Insolvency, the bankruptcy administrator, on behalf of the debtors or creditors, may contest legal transactions and other actions entered into or taken before opening the bankruptcy proceedings that are interfering with equal settlement of bankruptcy creditors, or damaging the creditors, as well as transactions and actions putting some creditors in a more favourable position over the others.20

In a regular settlement, a legal transaction or another action taken in the six months before filing the petition initiating bankruptcy proceedings, providing security or settlement to a creditor in the manner and at the time in accordance with the substance of his or her right, may be contested if the bankruptcy debtor was insolvent at the time of taking this action, and the creditor knew or had to know of the bankruptcy debtor’s insolvency.21

In an irregular settlement, a legal transaction or action providing security or settlement for one creditor that he or she was not entitled to request, or that he or she was entitled to request but not in the manner and at the time it was provided, may be contested if it was provided in the 12 months prior to submitting the petition or initiating the bankruptcy proceeding.

In the case of intentional damaging of creditors, a legal transaction or action entered into or taken with the intent to damage one or more creditors in the five years prior to submitting the petition for initiating bankruptcy proceedings or after that may be contested if the bankruptcy debtor’s counterpart knew of the bankruptcy debtor’s intent.22

A legal transaction or action of the bankruptcy debtor is contested by filing a claim initiating litigation. If the claim contesting a legal transaction or other legal action is duly adopted by the competent court, the contested legal transaction or action shall have no effect on the bankruptcy estate, and the contestation opponent shall be obliged to return all assets acquired from the contested transaction or other action to the bankruptcy estate.23

**iii Arbitration**

In Serbia, arbitration is not used as a method of dispute resolution in relation to fraud cases.

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19 The Law on Insolvency, Article 184.
20 Ibid., Article 119.
21 Ibid., Article 120.
22 Ibid., Article 123.
23 Ibid., Article 130.
iv  Fraud’s effect on evidentiary rules and legal privilege

Use of information obtained

Serbia’s legal system does not provide provisions regulating the use of information obtained by rules on disclosure.

Indirectly, with regard to the legal profession in Serbia, there are no restrictions on the use of information obtained by rules on disclosure in court proceedings besides those prescribed in Article 20 of the Legal Profession Act, which regulates professional confidentiality and prescribes that lawyers are obliged to keep as a professional secret, and to ensure that persons employed in their law office keep as a professional secret, all information that their clients or representatives have entrusted to them and in respect to the case in which they have provided legal service, and all other information that they have obtained or gathered in preparing for, during and after representation of their clients.24

V  INTERNATIONAL ASPECTS

i  Conflict of law and choice of law in fraud claims

Recognition and enforcement of foreign judgments

Recognition and enforcement of foreign judgments is regulated by the Law on Resolving Conflict of Laws with Regulations of Other Countries.

A foreign court judgment shall be equated to a decision of a Serbian court and have legal effect in Serbia only if it is recognised by a Serbian court.25 The foreign judgment has to be final under the law of that foreign state. A foreign court judgment will not be confirmed by the Serbian court:

a  if the legal matter in question is under the exclusive jurisdiction of the Serbian court;
b  if, in the same case, the court or other authority of Serbia made a final decision;
c  if Serbia already confirmed another foreign court judgment rendered in the same matter;26 or
d  if it is contrary to the Constitution of Serbia.

A foreign court judgment shall not be recognised if there is no reciprocity. Reciprocity exists if the foreign country in question recognises judgments of Serbian courts.

ii  Collection of evidence in support of proceedings abroad

International legal assistance and aid in criminal and civil proceedings (rules of rogatory)

Civil proceedings

Rules of rogatory are the governing rules in respect of international legal assistance and aid. A letter rogatory or letter of request is a formal request from a court to a foreign court for some type of judicial assistance. The most common remedies sought by letters rogatory are service of process and taking of evidence.

24 The Legal Profession Act, Article 20.
25 The Law on Resolving Conflict of Laws with Regulations of Other Countries, Article 86.
26 Ibid., Article 90.
In accordance with the Civil Procedure Code, Serbian courts are obliged to seek and provide legal aid to foreign courts in cases determined by international agreements and if there is reciprocity in providing legal aid.

The courts provide legal aid to foreign courts in compliance with the national laws. An action requested by a foreign court may also be done as the foreign court requires and in accordance with foreign proceeding regulations only if this is not contrary to the laws of Serbia.\(^27\)

Unless otherwise stipulated by an international agreement, requests of a domestic court for legal aid are submitted to foreign courts through diplomatic channels.

**Criminal proceedings**

Rules of rogatory in criminal proceedings in Serbia are set in the Law on Mutual Legal Assistance in Criminal Matters. The Law prescribes that international legal assistance shall include:28

\[
\begin{align*}
a & \quad \text{extradition of the accused or convicted;} \\
b & \quad \text{takeover and transfer of criminal prosecution;} \\
c & \quad \text{execution of the sentence; and} \\
d & \quad \text{other forms of international legal assistance.}
\end{align*}
\]

Other forms of mutual legal assistance include the performance of process activities, the implementation of measures, the exchange of information and delivery of documents and items related to criminal proceedings, and temporary handover of a prisoner for examination.

International legal assistance is also provided at the request of the International Court of Justice, the International Criminal Court, the European Court of Human Rights and other international institutions established by an international treaty ratified by Serbia.

The authorities responsible for providing international legal assistance are domestic courts and public prosecutors’ offices.\(^29\)

iii  Seizure of assets or proceeds of fraud in support of the victim of fraud

**Temporary measures in criminal and civil proceedings**

Temporary measures are regulated in both criminal and civil proceedings by the Law on Enforcement and Security.

There are two types of temporary measures, which are described below.

**Temporary measures for securing a monetary claim**\(^30\)

Temporary measures for securing monetary claims may be ordered if the enforcement creditor shows the probability of the existence of a claim and the risk that, without the temporary measure, the enforcement debtor would prevent or considerably hinder satisfaction of the claim by disposing of, hiding or otherwise making unavailable his or her property or means. It is considered that the risk exists especially:

\[
\begin{align*}
a & \quad \text{if the claim is to be realised abroad;}
\end{align*}
\]

\(^27\) The Law on Civil Procedure, Article 177.
\(^28\) The Law on Mutual Legal Assistance in Criminal Matters, Article 2.
\(^29\) Ibid., Article 4.
\(^30\) The Law on Enforcement and Security, Article 459.

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if there is already an enforcement procedure against the same debtor for due instalment payments;

if the paying obligations exceed the debtor’s earnings; or

d) there already has been an unsuccessful enforcement procedure against the same debtor.

Temporary measures for securing a non-monetary claim

Temporary measures for securing non-monetary claims may be ordered to secure a non-monetary claim if the enforcement creditor has shown the probability of the existence of the claim and a risk that satisfaction of the claim will otherwise be prevented or considerably hindered. Temporary measures may also be ordered when an enforcement creditor shows the probability that the temporary measure is necessary to prevent use of force or infliction of irreparable damage.

A decision of the court by which the temporary measure is determined must specify the duration of the temporary measure. When such a decision is made in civil proceedings before filing a lawsuit or commencing other legal proceedings, the measure must be justified by filing a lawsuit or commencing other legal proceedings within the period set by the court.

Preliminary measures in criminal and civil proceedings

Preliminary measures are regulated in both criminal and civil proceedings by the Law on Enforcement and Security. A preliminary measure shall be imposed on the basis of a decision of a domestic court on a monetary claim that has not become final or enforceable if an enforcement creditor establishes the probability that there is a risk that, without the securing measure, satisfaction of the claim will be impossible or made significantly more difficult.

The court may order the following preliminary measures:

- inventory of chattels and the registration of a lien on the movable property listed in the register of pledge;
- seizure of monetary claims of the enforcement debtor and the acquisition of a lien on it;
- order for the organisation of an enforced payment to order the banks in which the enforcement debtor has accounts that the funds in the amount of the secured claim be transferred to deposit of the public executor;
- prohibition of the disposal of financial instruments and registration of a lien on them in the Central Securities Depository;
- registration of a lien in favour of the enforcement creditor on shares of the enforcement debtor in a limited liability company, a partnership or limited partnership listed in the register of pledge, and registration of the seizure of shares in the company register;
- seizure of the enforcement debtor’s claim to hand over certain immovable or movable property, or for it to be delivered a certain amount of movable property and the acquisition of a lien on the sequestered claim; and
- registration of prior notice: a mortgage on immovable property owned by the enforcement debtor, or on a claim of the enforcement debtor registered on immovable property.

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31 Ibid., Article 460.
32 Ibid., Article 439.
33 Ibid., Article 445.
iv  Enforcement of judgments granted abroad in relation to fraud claims

If the enforcement creditor’s motion to enforce is based on a foreign executive title, he or she must submit the original or a certified copy, translated into the language that is in official use in the court, together with proof of the finality and enforceability under the law of the country of the executive title.34

A foreign executive title previously recognised by the domestic court in accordance with the law shall be enforced in the same manner and procedure applicable to the enforcement of domestic executive titles. An enforcement creditor may also initiate an enforcement procedure before a competent court in Serbia on the basis of a foreign executive title that has not been previously recognised by the domestic court. When the motion to enforce has been filed on the basis of a foreign executive title that has not been recognised, the court shall decide on recognition of the document as a preliminary matter.35

v  Fraud as a defence to enforcement of judgments granted abroad

The usual defence is an objection to recognition of a foreign court decision on the following grounds:

a  a foreign court has not given an equal right to the entity or person from Serbia to exercise their rights and interests;

b  proper delivery of the summons, pleadings and court decisions was not provided, and therefore the right to discuss before the court was denied;

c  there was no adequate translator for the Serbian language; or

d  the foreign court decision is contrary to the constitutional order of Serbia and is not eligible for legal domestic use.

Fraud case

A recent case specifically relates to a fraud involving illegal and unauthorised disposal of funds in accounts at commercial banks.

Company A had opened several bank accounts in Serbia, all in accordance with a decision on the terms and manner of opening, maintaining and closing of a bank account rendered by the Governor of the National Bank of Serbia. The fraud case itself was initiated at the beginning of the week, by two unidentified persons, one of whom falsely represented himself as a representative of company A to bank X by submitting a request to open a bank account. The bank is located outside company A’s seat, and company A did not have an open account with the bank.

The unidentified person who falsely represented himself as a representative of company A submitted to the employees of bank X the following documentation:

a  a request to open a bank account containing the following data:

•  business name of company A: this data is public (in the Business Register Agency (Agency));

•  headquarters of company A: this data is public (in the Agency);

•  business address of company A: this data is public (in the Agency);

34  Ibid., Article 46.
35  Ibid.
Serbia

- phone number of company A: on the list of authorised signatures for the persons authorised to sign transfer orders were entered phone numbers that were not phone numbers of company A;
- identification number of company A: this data is public (in the Agency); and
- company seal and signature of the company representative: data of the representative entitled for representation of the company A is public (in the Agency) while it is possible to make a company seal in any store equipped for that purpose;

- decision on registration before the competent body (the Agency);
- extract of company A from the Agency;
- list of authorised signatures for the persons authorised to sign transfer orders (deposit signature card): completed and signed in the bank by an unidentified person who falsely represented himself as a representative of company A; and
- verification of signatures of authorised persons (signature form): signature on signature form of the unidentified person who falsely represented himself as a representative of company A, which responded to the signature on the list of authorised signatures for the persons authorised to sign transfer orders.

Considering that bank accounts are opened in a short time of no more than 24 hours, the bank opened the account on Thursday in accordance with the request of the unidentified person who falsely represented himself as a representative of company A.

Meanwhile, unidentified persons had, in the same manner, opened a bank account for company B in another bank, bank Y.

On Friday afternoon, in bank X, where an account of company A had been opened, the unidentified person who had falsely represented himself as a representative of company B entered with a counterfeited bill allegedly issued by company A for the purpose of securing company A’s duties towards company B for delivered goods, with the due date of the bill being that Friday. This counterfeited bill had been signed by the unidentified person who had falsely represented himself as a representative of company A and had previously opened an account in the name of company A with bank X as well as sealed by the forged company seal of company A.

At that point, bank X did not doubt the authenticity and validity of the bill, and immediately released the bill in accordance with the procedure for enforced collection. Considering that in Serbia, enforced collection is conducted by the National Bank of Serbia, at the request of the bank that has received the bill and on all the bank accounts of the debtor registered under its tax identification number at the moment when the National Bank of Serbia started enforced collection, all available funds from all the bank accounts of company A were transferred to the account of company B.

Afterwards, all the funds that had been taken from the bank accounts of company A had been transferred to the bank account of company B with bank Y, from which account, in accordance with previously prepared transfer orders, these funds were transferred from the bank account of company B with bank Y to the various individual accounts of natural persons.

Company A found out and registered an irregularity immediately after the release of the bill through the enforced collection by bank X in such a manner that it could not make payment of its obligations because it did not have sufficient funds available in the accounts.
Company A was also informed at that moment that it had been placed under enforcement collection proceedings by the National Bank of Serbia at the request of company B, with whom company A had never had business relations.

The transfer of funds from the accounts of company A was stopped at the time the funds from the accounts of company A amounted to approximately more than half of the value indicated on the bill had been collected through the enforced proceeding.

Once the enforced collection and further transfer of money from the accounts of company A had been stopped, company A addressed to bank X, which had illegally opened these bank accounts, a request for reimbursement of damage and a request to close the illegally opened bank account.

Bank X responded to company A that it considered that it did not bear any material liability to company A for any damage, and refused to close the illegal account at the request of company A.

At that point, company A had the option to wait for the identification and arrest of the offenders of the crime (it had taken two years to identify the offenders) to submit a claim for damages against them in criminal proceedings or to start civil litigation proceedings against them alongside possible criminal proceedings, or to immediately initiate civil litigation proceedings against bank X for reimbursement of damage for providing services while not complying with the decision on the terms and manner of opening, maintaining and closing of a bank account and under the obvious irregularities while opening an account for company A with bank X.

Company A decided to initiate a civil litigation proceeding against bank X for reimbursement of damage on the basis of providing services while not complying with the decision on the terms and manner of opening, maintaining and closing of a bank account and obvious irregularities while opening an account for company A with bank X.

In the civil litigation proceeding, the court determined that the account of company A with bank X had been opened while not complying with the rules of procedure for opening bank accounts.

The acting court, in accordance with the provisions of Article 18 of the Law of Contracts and Torts (duty of all parties to carry out their obligations and duties with due care or, in some cases, with increased care), obliged bank X to reimburse the damage to company A and to close the bank account opened with bank X.

Company A, under this final court decision, initiated proceedings on enforced collection against bank X for the payment of damages and managed to reimburse the damage with interest through enforced collection proceedings.

VI CURRENT DEVELOPMENTS

Even the most developed legal systems have insufficiently regulated areas or a lack of established practice. In Serbia, the practice and legislation must change so that institutional cooperation exists within the regulated legal framework and between, inter alia, the state body, courts, prosecutors, police and victims of fraud, and enables the exchange of data, collection of evidence, etc. An improved institutionalised relationship in all aspects would lead to better results in proceedings aiming to help victims of fraud recover their assets.
Chapter 28

SPAIN

Adriana de Buerba and Laura Ruiz

I OVERVIEW

According to the 2014 Financial Action Task Force (FATF) Mutual Evaluation Report on Anti-Money Laundering and Counter-Terrorist Financing Measures, Spain has up-to-date laws and regulations and sound anti-money laundering (AML) and counter-terrorist financing institutions. However, the report also states that:

Spain remains a logistical hotspot for organised crime groups based in Africa, Latin America and the former Soviet Union. The major sources of criminal proceeds are drug offences, organised crime, tax and customs offences, counterfeiting, and human trafficking.

The recent FATF First Regular Follow-up Report, published in March 2018, states that, ‘overall, Spain has made progress in addressing the technical compliance deficiencies identified’ in the 2014 Mutual Evaluation Report.

Indeed, in the past few years, the Spanish parliament has passed several regulations enhancing the measures applicable to the fight against money laundering, increasing the transparency obligations for financial institutions and empowering the law enforcement and courts with new instruments for this purpose in areas such as freezing of assets or international mutual judicial and enforcement exchange of information and assistance.

Additionally, the fact that Spain is a geographic logistical hotspot for transnational crime has meant that Spanish courts and law enforcement frequently have to use and are very familiar with mutual legal cooperation instruments. For the same reason, Spanish courts and law enforcement are proactive in providing cooperation to other jurisdictions seeking their reciprocal aid.

Under the Spanish system, the victim can appear as a party to the criminal proceedings, not only for the purposes of seeking the corresponding compensation for damage but also to exercise a criminal action. Both actions are dealt with and sentenced within the same proceedings.

For these reasons, the Spanish legal system does not distinguish between civil and criminal fraud, as other legal systems do.

1 Adriana de Buerba is a partner and Laura Ruiz is a senior associate at Pérez-Llorca.
2 The Financial Action Task Force is an independent intergovernmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction.
II LEGAL RIGHTS AND REMEDIES

i Criminal remedies

The Spanish Criminal Code (SCC) defines fraud as obtaining undue profit from the victim using deception. Committing fraud carries a prison sentence of up to three years and a fine, as a general rule. The prison sentence can rise to up to eight years if there have been certain aggravating circumstances. Misappropriation of funds is also considered as a form of fraud when perpetrated by an administrator or depositor of another’s assets. There are other specific provisions in the SCC regarding fraud that are beyond the scope of this article, although some of them are referred to below.

According to the Spanish Criminal Procedural Act (SCrimPA), all criminal offences give rise to a criminal action to impose a penalty on the offender and to a civil action for the compensation of the damage caused to the victim. Both civil and criminal actions may be exercised within the same criminal proceedings.

There are two major phases in Spanish Criminal proceedings: the investigative stage and the trial. One of the main characteristics of the Spanish criminal procedure is that a judge – the investigating judge – is in charge of conducting the pretrial criminal investigation with the cooperation of the judiciary police and the public prosecutor. The trial is held before professional judges (who cannot be the same people who are in charge of the investigation) and, only in some exceptional cases, before a jury. Serious fraud cases are generally tried by a panel of three judges.

Under the Spanish system, the victim can appear as a party to the criminal proceedings, not only to seek the corresponding compensation but also to exercise the criminal action. The victim can exercise either action by filing a criminal complaint before the competent judge to launch the proceedings or by appearing as a party to ongoing criminal proceedings initiated ex officio to investigate the offence. During the investigative stage of all criminal proceedings, the judge must summon the victims and inform them of their right to appear as parties to the criminal proceeding and exercise criminal and civil actions. Even if the victims decide not to appear as parties to the proceedings, this would not lead to the waiver of their right to restitution. In this case, the public prosecutor is empowered by the SCrimPA to exercise the civil action on their behalf and to seek compensation for the damage caused by the criminal offence. The waiver of the civil action must always be explicit and written. The victim can also reserve the civil action to exercise it in civil proceedings before the competent civil courts, as analysed below.

If there are several victims, the waiver of the action by any one of them does not affect the other victims’ rights to seek compensation. All the actions exercised by the victims of the same criminal offence shall be dealt with and decided within the same proceedings. Moreover, to the extent possible, the victims should litigate under the same legal representation. For this purpose, the judge can request that the victims reach an agreement to litigate collectively. It should be noted that the Spanish system does not foresee the possibility of class actions. However, in cases where a criminal offence causes damage for a significant number of individuals, in practice, the victims usually form an association to file a joint lawsuit.

Typically, the victim should exercise the civil action against the criminal offenders. According to the SCC, the civil action can be exercised against the individual who committed the fraud (authors) and the persons who assisted him or her in committing it (accomplices).

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4 Article 249 of the SCC.
When several individuals are held liable for the fraud, the court shall determine, in the judgment, the quota for which each group shall be held accountable. Typically, all the offenders shall be held jointly and severally liable for their respective quotas. The SCC was amended in 2010 to regulate corporate criminal liability. Since then, legal persons can also be held criminally liable for fraud. Should this be the case, the company will also be sentenced to pay compensation to the victims, jointly and severally, with the individuals directly liable for perpetrating the offence.

In addition, a civil action resulting from fraud can also be exercised against the following persons.

**Civil parties**
The SCC foresees the possibility of seeking compensation from persons other than the criminal offenders. Among them, the following groups of persons could be sued within the framework of an investigation for fraud.

**Insurance companies**
According to the SCC, should the criminal event be covered by an insurance policy, the insurance company shall be held directly liable for covering the compensation to the victim within the limits provided in the policy. The action against the insurance company can be exercised in the framework of the same criminal proceedings initiated to judge the fraud. However, the insurance company could, of course, have a right of recourse against the offenders that could be exercised at a later stage.

**Public entities**
Any Spanish public entity will be held civilly liable for the consequences of criminal offences committed by civil servants or public employees acting under their control, provided that the damage was directly caused as a consequence of the malfunctioning of the public service with which they were entrusted. This civil liability will be subsidiary to that of the individuals or companies held criminally liable for the fraud. This means that the public entities shall only be liable for the amounts that the offenders are unable to pay to the victim.

**Companies**
Companies shall be held civilly liable for the damage caused as a result of the criminal offences committed by their representatives, directors or employees while carrying out their professional obligations or acting on behalf of the company. This civil liability shall also be subsidiary to that of the individuals or companies held criminally liable for the fraud.

**Receivers of the proceeds of fraud**
Those persons who benefitted from the effects of the fraud can be ordered to return the assets or to pay the victim compensation up to the amount of their share in the proceeds, provided that the following requirements are met:

1. They did not take part in the fraud;

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they received the proceeds of the fraud without any consideration; and
they acted in good faith; in other words, they were unaware that the assets constituted
the proceeds of a fraud.

Conversely, if these third parties acted in bad faith, namely knowing that the assets were
the proceeds of fraud, they could be charged with the specific criminal offence of receiving
stolen assets or money laundering, depending on the circumstances. Receiving stolen assets
and money laundering are criminal offences that are independent from fraud and, therefore,
they can be investigated in separate criminal proceedings. This might prove helpful for the
purposes of tracing, in Spain, assets stolen abroad, as discussed in further detail below.

Civil action against civil parties and receivers of stolen goods

Civil action against the civil parties and receivers of the stolen goods mentioned above must
also be exercised within the criminal proceedings launched against the perpetrator of the fraud.

For these purposes, the investigative judge, ex officio or in accordance with the prosecution’s
or the civil claimant’s request, shall call them as parties to the criminal proceedings to allow
them to exercise the corresponding defence.

In Spanish case law, civil liability resulting from a criminal offence is considered to be
almost objective, meaning that, once the criminal offence is proven and judicially declared,
the offender shall be sentenced to compensate the victim almost automatically. Therefore, the
only possible means of defence against this type of civil claim pertains to the defence against
the criminal charges. The same is applicable to the civil parties referred to above. For this
reason, their defence is often limited to challenging the relations with the offender that might
give rise to their civil liability, in both cases.

In criminal proceedings in Spain, the burden of proving criminal liability lies with the
prosecution. The standard of proof includes the presumption of innocence and in dubio pro
reo principles according to which, in summary, the defendant cannot be sentenced if there is
reasonable doubt.

The same standard of proof applies to the civil claim, when filed within criminal
proceedings. According to the SCC, the civil claim shall be limited to:

- the restitution of the specific defrauded goods, when possible;
- the restoration of the injury; and
- the compensation of both material and moral damages.

The claimant has the burden of proving the amount of the damages. The Spanish system, in
contrast to those in other jurisdictions, does not foresee punitive damages.

When a civil action is exercised in criminal proceedings, its statute of limitations is the
same as that which is applicable to the criminal offence itself. In the case of fraud, the statute
of limitations may vary from five to 15 years, depending on the seriousness of the case.

Civil remedies

As explained above, according to the SCrimPA, the primary avenue for the victim of fraud to
claim compensation is within criminal proceedings against the offender. Still, the SCrimPA
also foresees the possibility of the victim reserving a civil action to exercise it before a civil
court. However, the victim cannot file a civil lawsuit until a criminal action is concluded in
a final and binding judgment. For this reason, in practice, it is extremely rare for victims to
choose this option.
As a general rule, the statute of limitations corresponding to a civil action, when exercised before civil courts, is five years from the day the criminal judgment became final and binding. In an exception to this, the statute of limitations for tort liability is one year, counted from the day on which the injured party became aware of the damage.

Civil courts are bound by the facts affirmed in the previous criminal judgment and, therefore, the dispute within these civil proceedings shall be limited to the extent of the damage and the amount of compensation.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Criminal remedies

According to the SCrimPA, an investigative judge can adopt a number of protective measures to secure the assets and proceeds of fraud and preserve the victims’ rights to retrieve their property or obtain compensation.

The requirements for the adoption of such measures are as follows:

a *fiumus boni iuris*, or the likelihood of success on the merit of the case. According to this requirement, the judge must evaluate whether, *prima facie*, the evidence supporting the existence of the fraud is sound; and

b *periculum in mora*, or danger in the delay. The judge will evaluate whether there is a significant risk that the effectiveness of a potentially favourable judgment might be in jeopardy.

If the previous requirements are met, the SCrimPA allows any of the preventive measures provided for in civil legislation to be adopted, as described below.

In addition to these civil preventive measures, the SCC allows the investigative judges to adopt specific measures under certain circumstances. Specifically, in criminal proceedings against legal persons, the investigative judge can order the following preventive measures against the company during the investigative stage:

a temporary closure of premises or establishments;

b temporary suspension of corporate activities; or

c judicial intervention, when necessary to protect the rights of the company’s employees or creditors.

In criminal proceedings, these preventive measures can be adopted at any time during the investigative stage, or even later, during the trial, if new circumstances arise that make them necessary. The judge can adopt these measures *ex officio* or following an application from the public prosecutor or the victim. As a general rule, the judge will adopt these measures after hearing both parties’ allegations. However, in exceptional cases, where there is an imminent and significant risk of the assets disappearing, these measures can be adopted without previously hearing the defendant. In any case, the defendant shall be allowed to challenge the preventive measures after the fact.
Civil remedies

The Spanish Civil Procedural Act (SCivPA) does not establish an exhaustive list of precautionary measures but instead allows the judge to adopt any measures deemed necessary and proportionate to secure the plaintiff's rights, provided that:

a. the judge chooses the least burdensome measure for the defendant; and

b. the measure aims to guarantee the effectiveness of a potentially favourable judgment.

The SCivPA specifically refers to the following measures, but only as examples:

a. freezing of the defendant's assets;

b. judicial intervention or administration of productive assets;

c. judicial deposit of the defrauded assets; and

d. the registration of the claim with any public registry (e.g., commercial or real estate registries). This measure is especially useful to prevent the defendant from selling or transferring the asset to bona fide purchasers.

To adopt these measures, in addition to the fumus boni iuris and periculum in mora requirements described above, civil legislation requires that the claimant posts a bond or guarantee that is sufficient to respond, in a fast and effective way, to the damage that the measure might have caused to the defendant in the event that the claim is rejected. The latter is not necessary when the measures are adopted in criminal proceedings.

Under civil jurisdiction, the judge can only adopt these preventive measures at the request of the plaintiff. Typically, the request should be filed together with the principal claim. However, the law allows these measures to be requested and adopted before filing the claim, provided that the plaintiff proves the urgency and need for their immediate enforcement. In this case, the adopted measures will be left without effect if the claim is not filed before the judge within 20 days of their adoption. After filing the claim, during the course of the civil proceedings or the appeal, these measures can only be requested on the basis of new unexpected circumstances.

ii Obtaining evidence

In criminal proceedings

As stated above, in Spanish criminal proceedings, there is a pretrial stage where a judge is in charge of gathering all the information available as regards the facts supporting the case. This means that the judge will investigate not only the potential existence of fraud, but also the grounds for the victim's compensation rights. In accordance with the SCrimPA, the investigative judge must make sure to gather all the relevant information, regardless of whether it is detrimental or beneficial to the defendant. For these purposes, the following measures can be adopted:

a. The judge can call witnesses or experts to give testimony. In accordance with the Spanish Constitution, the defendant will be assisted by a lawyer during these interrogations and cannot be forced to give testimony and has the right not to answer all or some of the questions. However, the witnesses will testify under oath and cannot be assisted by a lawyer.

b. The judge can collect documents from the parties or third persons. Again, the defendant, as part of his or her right to non-self-incrimination, cannot be forced to produce documents that might be detrimental to his or her defence.
The judge, together with the parties, can personally inspect the premises where the offence took place or any other places or objects relevant to the case;

d The judge can order that any premises be searched where there are indications that evidence of the offence might be found or the defendant’s written or oral communications be intercepted. To adopt these measures, the judge must issue a written decision outlining the reasons why they are deemed to be proportionate, necessary and relevant for the case.

The judge can adopt these measures _ex officio_ or at the request of any of the parties, including the civil claimant.

Additionally, the SCrimPA foresees the possibility for the judge to order the defendant to be remanded in custody, if there is enough evidence that they might try to destroy or conceal evidence relevant to the case.

**In civil proceedings**

A significant difference between Spanish – and continental law in general – and common law lies in the ‘discovery’ system. Spanish law does not allow discovery and, as a general rule, parties to a dispute cannot rely on others to provide evidence to support their allegations unless ordered by a judge. In accordance with this rule, Spain made a declaration to the Convention of 18 March 1970 on the taking of Evidence Abroad in Civil or Commercial Matters⁶ (the Hague Evidence Convention) that no letters of request would be executed when issued for the purposes of obtaining pretrial disclosure of documents as known in common law countries.

However, the SCivPA establishes certain mechanisms for the parties to obtain an order of disclosure from the court that is addressed to others or to third parties.

**Preliminary proceedings**

Before initiating civil proceedings, the claimant can initiate preliminary proceedings to collect information needed as a basis for the claim. However, the type of documents or information that the claimant can obtain through these proceedings is limited to the closed list set out in the SCivPA,⁷ namely:

- information regarding the legal standing or representation of the potential defendant;
- exhibition of the assets that constitute the object of the claim;
- exhibition of a will;
- exhibition of a company’s documents or financial records, if the claimant is one of the company’s shareholders;
- exhibition of an insurance policy of the person in possession of it;
- adoption of the appropriate measures for identifying the affected individuals in proceedings affecting the interests of consumers or where there are a significant number of potential claimants; and
- information related to the infringement of intellectual or trade property rights.

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⁶ In force in Spain since 25 August 1987.
⁷ Article 256 of the SCivPA.
Otherwise, the general rule in civil proceedings is that each party shall provide the court with evidence supporting their respective claims.

**Information requests to counterparties or third parties**

Once the civil proceedings are initiated, the SCivPA\(^8\) entitles parties to request the court to order that certain information or documents be gathered from their counterparties or third parties. Specifically, at the parties’ request, the court can order companies and public entities to produce documents or to certify the accuracy of certain information.

**IV  FRAUD IN SPECIFIC CONTEXTS**

i  **Banking and money laundering**

**Fraud**

There are no specific provisions in the SCC as regards fraud affecting banks, although all the general criminal provisions are applicable to them. In recent case law, following the collapse of the Spanish financial system in 2011, there have been a number of criminal cases against the former management of financial institutions, especially affecting savings banks.\(^9\) This case law assessed the liability of savings banks in two types of cases:

- **a** where management at the savings banks deliberately forged the banks’ financial records to conceal their actual financial situation and pretended to meet the regulator’s solvency requirements; and
- **b** where the savings banks commercialised derivative products, with insufficient transparency as to their risks, to the detriment of their clients.

The first group of cases resulted in a number of criminal convictions for accounting fraud in the past few years. As to the second group, although initially the Spanish Public Prosecution Office launched a number of criminal investigations to assess potential criminal liability in the introduction to the market of financial products by savings banks, eventually most of the criminal proceedings were closed as the prosecution did not succeed in proving the existence of a systemic and organised scheme to defraud customers. For this reason, case law eventually determined that savings banks’ liability for irregularities committed when selling derivatives should be assessed by civil courts on a case-by-case basis, depending on the profile of each investor and the information provided to them. This gave rise to a significant number of civil claims.

**Money laundering**

Financial institutions are subject to the Spanish anti-money laundering (AML) legislation. Spanish AML legislation, which is the result of implementing the European Union

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8. Article 381 of the SCivPA.
9. Savings banks have become widespread in Spain in recent decades. As opposed to banks, savings banks do not have the legal form of a commercial company but rather, typically, are foundations or associations with no commercial purpose. For this reason, savings banks have had to dedicate a significant part of their profits to social causes. Another specific characteristic of Spanish savings banks is the lack of shareholders: the principal governing body is an assembly comprised of representatives of the regional government, the savings banks’ employees, the depositors and other stakeholders.
regulations\textsuperscript{10} on the subject, imposes a number of obligations on those subject to it, including banks, for the purposes of preventing money laundering and terrorist financing. A detailed analysis of these obligations exceeds the scope of this book. For these purposes, suffice it to say that both banks and their directors and employees are subject to severe administrative sanctions if these obligations are breached. Moreover, in more serious cases, they could also be subject to criminal liability for recklessly aiding and abetting money laundering.\textsuperscript{11}

\textbf{ii Insolvency}

The SCC specifically regulates several criminal offences to protect creditors from debtors’ actions aiming to fraudulently put their assets beyond their reach. These criminal offences can be classified into two groups: fraudulent conveyance and punishable bankruptcy.

\textit{Fraudulent conveyance of assets}

The SCC considers that a criminal offence has been committed when the debtor:\textsuperscript{12}
\begin{enumerate}[a]
\item fraudulently hides his or her assets to put them beyond his or her creditors’ reach, provided that the conduct results in actual or apparent insolvency; or
\item carries out any other transaction, actual or simulated, for the purposes of fraudulently delaying, hindering or preventing ongoing enforcement proceedings.
\end{enumerate}

\textit{Fraudulent bankruptcy}

These offences are meant to protect creditors from the actions of debtors that have been judicially declared bankrupt.\textsuperscript{13} They can be classified into the following types of misconduct:
\begin{enumerate}[a]
\item actions aimed at putting the debtor’s assets out of reach of the bankruptcy proceedings;
\item actions aimed at forging the debtor’s financial records or any other relevant documents to conceal or delay the declaration of bankruptcy;
\item actions aimed at favouring some creditors to the detriment of the rest; and
\item in general, actions that constitute a serious breach of the diligence duties in managing the insolvency situation prior to the bankruptcy judicial proceedings.
\end{enumerate}

Such misconduct may also have civil consequences in the framework of insolvency proceedings:
\begin{enumerate}[a]
\item any actions entailing a decrease in value of the estate with no consideration are subject to clawback (the effect of clawback actions is that the insolvent company will be entitled to recover the assets); and
\item the above-mentioned misconduct can also give rise to the directors’ liability. The insolvency will be declared fraudulent if any assets have been hidden from the creditors or any potential or actual enforcement action has been purportedly hindered by the insolvent company. Should the insolvency be declared fraudulent, the directors (1) may


\textsuperscript{11} Article 301 et seq. of the SCC.

\textsuperscript{12} Article 257 of the SCC.

\textsuperscript{13} Articles 259 to 261 \textit{bis} of the SCC.
be disqualified (for a period ranging from two to 15 years), (2) may lose their rights as creditors, and (3) may be ordered to pay the outstanding credits that cannot be satisfied after the liquidation process has been completed.

iii The effect of fraud on evidentiary rules and legal privilege

Procedural fraud

Procedural fraud is a criminal offence under the SCC. Procedural fraud is perpetrated when one of the parties to judicial proceedings produces false evidence with the aim of deceiving the court and obtaining a favourable judgment to the detriment of the financial interests of the other party.\(^\text{14}\) Indeed, for procedural fraud to apply, it is specifically required that the deception is carried out for the purposes of obtaining financial gain. Should this requirement not be met, the misconduct would be characterised as forgery or false testimony, depending on the circumstances.

A judicial decision will become null and void if it was rendered as a consequence of fraud (or as a consequence of any other criminal offence), provided the following requirements are met:

\(a\) the fraud had a direct impact on the outcome of the judgment, which would have been different otherwise; and

\(b\) the fraud has been declared in a final and binding criminal judgment, after specific judicial proceedings are carried out to that effect.

Legal privilege

Article 24 of the Spanish Constitution recognises the right to privilege within the context of the criminal defendant’s right to a defence. For this reason, legal privilege is only specifically regulated in connection with procedural rights. In that regard, the Spanish Act on the Judiciary Board\(^\text{15}\) sets out that lawyers are subject to professional secrecy and cannot be forced to provide testimony or information, as regards the facts that the client revealed to them in that condition. This legal privilege is not only viewed as the client’s right but also as the lawyers’ privilege. For this reason, even if the client waives their right, the lawyer would still have to assess whether, in the specific case, it is appropriate to disclose the privileged information and could refuse to do so.

The legal privilege will only apply to cases in which the lawyer acts as such. When it is determined that the lawyer colluded with the client to perpetrate the fraud, the legal privilege is lost and the lawyer would be treated as a co-conspirator.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

Criminal proceedings

In Spanish criminal proceedings, Spanish law shall always be applicable, provided that Spanish criminal courts have jurisdiction to investigate and try the case.

The general rule is that Spanish courts will be competent for trying the case provided that the fraud was perpetrated in Spain. Spanish case law interpreted this requirement

\(^{14}\) Article 250.1.7 of the SCC.

\(^{15}\) Article 542 of the SAJB and Article 416.2 of the SCrimPA, specifically for criminal proceedings.
broadly and recently adopted the ubiquity principle, according to which the Spanish courts will be competent when any of the elements of the fraud, including its effects, took place on Spanish territory.

Exceptionally, the Spanish criminal courts will also be competent for trying fraud perpetrated abroad in the following cases:

- when the perpetrator of the fraud is a Spanish national;\(^{16}\)
- when the fraud affects Spanish public interests (e.g., it involves the forgery of Spanish currency or official documents or the victim is a Spanish public entity); or
- when perpetrated by Spanish public officials based abroad.

**Civil proceedings**

In civil cases, the rules governing the jurisdiction of Spanish courts and the applicable law are complex and beyond the scope of this chapter. In addition to Spanish laws, EU Regulations and International Conventions on matters entered into by Spain must be taken into account.

Spanish courts are exclusively competent for trying the following cases:

- claims regarding real estate located in Spain;
- claims regarding the incorporation or winding-up of companies and legal persons domiciled in Spanish territory or regarding the decisions of their corporate bodies;
- claims regarding the validity of registrations made with any Spanish public registry; and
- claims for the recognition and enforcement in Spain of foreign judicial decisions and arbitration awards.

In other cases, the general rule is that Spanish civil courts shall be competent:

- when the parties expressly or implicitly agree on submitting the case to their jurisdiction; or
- when the defendant or any of the defendants are domiciled in Spain.

As to the applicable law, in fraud cases, the general rule is that the substance of the claim shall be decided in accordance with the law of the country where the event producing the damage took place. The validity and content of foreign law (in the event that Spanish law is not applicable) must be evidenced in the proceedings.

**ii Collection of evidence in support of proceedings abroad and seizure of assets or proceeds of fraud in support of the victim**

**Criminal proceedings**


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\(^{16}\) Provided that the following requirements are met: (1) the fraud is punishable in the country of execution; (2) the victim or the Spanish public prosecutor files a complaint in Spain; and (3) the perpetrator was not acquitted, pardoned or convicted abroad or, in the case of conviction, did not serve his or her sentence.
legislation into its internal legal system implementing all the EU Regulations related to the recognition and enforcement in Spain of judicial decisions rendered in criminal matters by the courts in other EU Member States.17

This Act regulates the following mutual recognition instruments:
a the European arrest warrant;
b judicial decisions imposing a penalty or security measure;
c judicial decisions on probation and supervision of probation measures and alternative sanctions;
d the European protection order;
e judicial decisions on the freezing of assets;
f judicial decisions on the freezing of assets and for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters;
g judicial decisions imposing financial sanctions; and
h the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

Act 23/2014 was amended on 11 June 201818 to transpose into the Spanish legal system the EU Directive regarding the European Investigation Order in criminal matters.19 A European Investigation Order (EIO) is a judicial decision that is issued or validated by a judicial authority of a Member State to have one or several specific investigative measures carried out in another Member State to obtain evidence. An EIO shall cover any investigative measure with the exception of the setting up of a joint investigation team. Act 23/2014 specifically regulates the issuance of an EIO for the following purposes, among others:
a to hear a witness or expert by videoconference or other audiovisual transmission;
b to gather information on bank and other financial accounts;
c to gather information on banking and other financial transactions;
d to gather evidence in real time;


18 The amendment was carried out through Act 3/2018, 11 June 2018 (Spanish Official Gazette 12 July 2018).

to intercept telecommunications; and

to take any measure with a view to provisionally preventing the destruction, transformation, removal, transfer or disposal of an item that may be used as evidence.

The execution of mutual judicial assistance and mutual recognition requests issued by criminal judicial authorities of third states will be carried out in Spain in accordance with the provisions of any multilateral or bilateral treaty entered into with the corresponding state or, subsidiarily, in accordance with the principle of reciprocity.

These mutual judicial assistance mechanisms are aimed at freezing the defendant’s specific assets once it has been determined that they are located in Spain. Conversely, these measures cannot be used to trace the defendant’s assets and, in practice, locating the defendant’s assets might prove difficult. For these purposes, it might prove useful to launch an investigation for money laundering in Spain against the perpetrator of fraud if there are indications that he or she could be hiding all or part of the proceeds in Spanish territory. In that case, the Spanish criminal courts in charge of the money laundering investigation will order every measure deemed necessary to trace, locate and freeze the laundered monies.

Civil proceedings

In accordance with the SCivPA, any party can file a request for protective measures before Spanish civil courts in respect of civil proceedings that are followed abroad, according to the following rules:

a EU Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters if the main proceedings are being heard before the courts of another EU country; or

b if the request is filed in the framework of proceedings concluded in a non-EU country, the measures could be granted in Spain:
  • in accordance with an applicable bilateral treaty; or
  • provided that the Spanish courts do not have exclusive jurisdiction over the substance of the matter.20

iii Enforcement of judgments granted abroad in relation to fraud claims

The enforcement of the criminal aspects of judgments granted abroad in relation to fraud matters (e.g., the sentence imposed on the offender) will be carried out by the Spanish criminal courts in accordance with the EU regulations or international treaties regarding mutual assistance in criminal matters, as described above.

The civil decisions adopted in these judgments by civil or criminal courts (e.g., the compensation of the victims) will be enforced by the Spanish civil courts in accordance with EU Regulation 1215/2012 or the international treaties regarding mutual judicial assistance in civil matters. Spanish law21 also establishes specific proceedings for the recognition and enforcement in Spain of civil judgments rendered abroad, applicable when no EU regulation or treaty exists.

20 Article 722 of the SCivPA.
Fraud as a defence to enforcement of judgments granted abroad

Spanish law does not consider fraud a specific defence against the enforcement of judgments rendered abroad. The general cause for Spanish courts denying the recognition or enforcement of a judgment rendered abroad is that it contravenes Spanish public policy. Therefore, such a defence would only be successful if the fraud was perpetrated in a way that could lead the Spanish courts to consider that the judgment was contrary to Spanish public order.
I OVERVIEW

Switzerland has traditionally held an important position in the worldwide financial sector landscape. Swiss authorities, be they administrative or judicial, have accordingly been frequently called on to intervene in cases of dishonesty (e.g., misappropriation or misuse of company or individual funds). Over the past decade, Swiss law has considerably evolved to meet the international standards in combating white-collar criminality.

The Swiss legislator has developed a number of tools that are intended to compensate victims of dishonesty or of any other crime affecting the assets of the rightful owner. The Swiss law enforcement authorities are generally willing to assist injured parties seeking to recover their assets or obtain compensation.

In substance, the remedies available to the victims of dishonesty are of both civil and criminal nature. Civil remedies often amount to a claim for liability in tort or liability in contract, as the case may be. Criminal remedies are intended either to secure the victim of dishonesty’s civil claims or to provide compensation.

II LEGAL RIGHTS AND REMEDIES

Before outlining the legal rights and remedies available to retrieve the victim’s property or obtain compensation, it is worth mentioning how ‘fraud’ is defined in Swiss law and which other crimes may trigger compensatory claims on the victim’s part.

Article 146 of the Swiss Criminal Code (SCrC) defines the crime of fraud as follows: ‘[w]hoever, with the intent of unlawfully enriching himself or another, maliciously misleads another person by false representation or dissimulation of facts, or maliciously reaffirms the error of another, and thus causes the deceived person to act detrimentally against his or another’s property, shall be punished with imprisonment for up to five years or a monetary penalty’.

In addition to fraud, other punishable acts against property should also be taken into consideration when dealing with fund misappropriation or misuse and other similar situations. Article 137 SCrC (unlawful appropriation) punishes ‘[w]hoever appropriates a movable object belonging to another to unlawfully enrich himself or another party’. Embezzlement is dealt by Article 138 and sanctions ‘[w]hoever appropriates a movable object belonging to another that is entrusted to him, with the unlawful intent to enrich himself or
another’. Further, disloyal management is often invoked by victims of persons who have fraudulently misused funds of which they have control (for instance, traders or directors and officers). Article 158 SCrC punishes ‘[w]hoever is entrusted by law, with an official mandate, or a legal transaction to manage the assets of another or to supervise such asset management and, in violation of his duties, causes or permits that these assets are damaged’.

These criminal offences protect the broad notion of patrimony that is defined as ‘the sum of economic values protected by civil law’. This notion therefore encompasses patrimony as protected by property law as well as its economic value, such as assets held in bank accounts.

The SCrC contains a number of provisions to which a victim may resort to obtain compensation or restitution. Assets that result from a crime will be confiscated unless they are to be handed over to the person injured to restore his or her rights in application of Article 70(1) SCrC. Under Article 73 SCrC, a victim may be awarded damages to be paid out, inter alia, from the monetary penalty paid by the convicted person or the confiscated objects and assets, or the proceeds of their sale. Article 73(1)(c) SCrC provides that the victim may be awarded the ‘claim for compensation’ that is generally awarded to the state (see Section II.i).

Besides these criminal remedies, civil remedies are also available to the victims of dishonesty. The Swiss legal system marks a clear divide between claims in rem relating to objects (such as real estate, works of art or precious stones) and claims pertaining to recovery of a debt sounding in money, such as assets held in a bank account, that are subject to debt enforcement proceedings under the Federal Debt Collection Proceedings Act (DCPA).

According to Article 641(2) of the Swiss Civil Code (SCivC), the owner of an object may claim restitution against whoever unlawfully possesses that object. Further, Article 41 of the Swiss Code of Obligations (SCO) deals with liability in tort; the aggrieved party may rely on this provision in cases in which the parties are not bound by a contract. Swiss law also contains rules on unjust enrichment and negotiorum gestio. Negotiorum gestio is a particular form of agency in which the agent acts for the principal without the consent of the latter; in particular, the principal did not give any mandate to the agent. Conversely, if the parties entered into a contract and misappropriation was committed in relation to such a contract, the victim will rely on Article 97 SCO (liability in contract), or any other provision specifically dealing with the contract in dispute (for instance, Article 398 SCO, which deals with the liability of the agent with regard to the principal).

In cases involving fraud or any other criminal offence, the victim is, under certain circumstances, entitled to bring a civil claim within the criminal proceedings. The same judge will, therefore, make a decision that deals with both the criminal and the civil complaint.

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2 Article 158 of the SCrC.
3 ATF 126 IV 165, c. 3a; 122 IV 179 c. 3b/cc & d; 117 IV 139 c. 3d/aa.
4 BSK SGB II- Niggli/Riedo, In rem Article 137 Nos. 13–14.
6 Article 71 of the SCrC.
7 Article 62 et seq. of the SCO.
8 Article 419 et seq. of the SCO.
9 Article 122(1) of the Swiss Code of Criminal Procedure.
i Civil and criminal remedies

The choice of the remedy, be it civil or criminal, will depend on the specific circumstances of the case.

The person who has proprietary rights on an object may claim restitution under Article 641(2) SCivC. This is a claim in rem, which may be brought against the direct and indirect possessor of the asset. In substance, the claimant must show that he or she is the legitimate owner of the asset. The claim for restitution under Article 641(2) SCivC is not subject to any limitation period.

Obligations sounding in money (including assets held in a bank account) are to be recovered through debt enforcement (Article 38(1) DCPA). Aside from the specific case of insolvency (see Section IV.ii), the DCPA provides for the enforcement of an unsecured claim by a specific creditor leading to seizure and realisation of assets belonging to the debtor to the extent necessary to cover the claim (Article 38(2) DCPA). When the debtor is domiciled abroad, the creditor may first seek a freezing order against the assets located in Switzerland and the enforcement proceedings shall then be instituted at the place where the frozen assets are situated (Article 52 DCPA). Debt enforcements require that the creditor holds either an executed recognition of debt or a judgment or an arbitral award against the debtor. Such a judgment can also be obtained during the course of the debt enforcement proceedings (Article 79(1) DCPA) and could be sought on the basis of one of the following claims.

If no contract exists between the perpetrator and the victim, the latter may claim damages under Article 41 SCO, which deals with liability in tort. For the claim to be successful, the following requirements must be met: (1) a tortious act; (2) damage suffered by the claimant; (3) causation between the tortious act and the damage; and (4) a fault on the respondent’s side. The limitation period for an action brought for liability in tort is one year from the date on which the injured party became aware of the loss or damage and of the identity of the person liable for it, but in any event 10 years after the date on which the loss or damage was caused. However, if the claim for damages is brought as a result of an offence for which criminal law provides a longer limitation period, the longer period also applies to the civil-law claim.

The victim of dishonesty may also seek legal redress by resorting to the rules of unjust enrichment. Accordingly, a person who is enriched without just cause at the expense of another is obliged to make restitution. A claim for restitution for unjust enrichment becomes time-barred one year after the date on which the injured party learned of his or her claim, and in any event 10 years after the date on which the claim first arose. Commentators argue that the rule of Article 60(2) SCO, which prioritises the limitation periods of the SCrC over those of the civil action if the former are longer, should also apply to actions for unjust enrichment.

10 According to Article 641(2) of the SCivC, ‘[the owner] has the right to reclaim [the object] from anyone withholding it from him or her and to protect it against any unwarranted interference’.
11 ATF 48 II 38 c. 2.c.
12 Article 60(1) of the SCO.
13 Article 60(2) of the SCO.
14 Article 62 et seq. of the SCO.
15 Article 62(1) of the SCO.
16 Article 67(1) of the SCO.
17 Chappuis, Article 67 of the SCO, N 7, in Thévenoz/Werro (eds), Commentaire romand, Code des obligations, 2nd ed, Basel 2012, with further references.
The SCO also contains provisions relating to ‘agency without authority’ (negatorum gestio). If such agency is not conducted by the agent in the interest of the principal, the latter may bring an action against the former to recover the gain that the agent obtained.\textsuperscript{18} This provision applies only if the agent acted in bad faith; in particular, if the person knew or ought to have known that he or she was interfering in somebody else's sphere.\textsuperscript{19}

In cases in which the victim and the perpetrator are bound by a contract, the victim may obtain compensation by resorting to Articles 97 ff. SCO, which deal with liability in contract. The requirements to be met are similar to those of liability in tort: (1) a breach of contract; (2) damage suffered by the claimant; (3) causation between the breach of contract and the damage; and (4) a fault on the respondent’s side. In contract liability, the fault is presumed, and it is therefore for the respondent to show that he or she was not at fault. A claim based on liability in contract becomes time-barred after 10 years.\textsuperscript{20}

If the victim and the perpetrator entered into a mandate agreement, Article 398 SCO deals specifically with the agent’s liability. According to this Article: (1) the agent generally has the same duty of care as the employee in an employment relationship; (2) the agent is liable to the principal for the diligent and faithful performance of the business entrusted to him or her; and (3) he or she must conduct the business in person unless authorised or compelled by circumstance to delegate it to a third party or where such delegation is deemed admissible by custom. Article 398(1) SCO refers to Article 321e SCO,\textsuperscript{21} which, in turn, according to the majority view of commentators, refers to the general rule of Article 97 of the SCO described above.\textsuperscript{22}

Criminal law also provides for remedies in cases of fraud, in particular under Articles 70, 71 and 73 SCrC. Article 70 SCrC deals with confiscation and provides in its first subsection that ‘[t]he judge shall order the confiscation of assets that were acquired as the result of a criminal offence or were intended to bring about or reward a criminal offence, provided that they are not handed over to the person injured to restore his rights’.\textsuperscript{23} In principle, the assets that may be confiscated are not only those that result directly from the criminal offence, but also those that have been obtained from or financed by the crime proceeds, provided that there is a sufficient paper trail.\textsuperscript{24}

Confiscation is not an option if the assets are to be handed over to the victim.\textsuperscript{25} It may, however, be ordered if, at the moment such a decision is taken, the victim is not yet known

\textsuperscript{18} Article 423(1) of the SCO.
\textsuperscript{19} Chappuis, Article 62 of the SCO, N 66, in Thévenoz/Werro (eds), Commentaire romand, Code des obligations, 2nd ed, Basel 2012.
\textsuperscript{20} Article 127 of the SCO.
\textsuperscript{21} Article 321e of the SCO reads as follows: ‘(1) The employee is liable for any loss or damage he causes to the employer whether wilfully or by negligence. (2) The extent of the duty of care owed by the employee is determined by the individual employment contract, taking due account of the occupational risk, level of training and technical knowledge associated with the work as well as the employee’s aptitudes and skills of which the employer was or should have been aware.’
\textsuperscript{23} English translation by the Swiss-American Chamber of Commerce, Swiss Penal Code, 2nd edn, Zurich 2008.
\textsuperscript{24} ATF 126 IV 97 c. 3, JdT 2004 IV 3.
\textsuperscript{25} Article 70(1) of the SCrC.
by the authorities or if restitution is temporarily impossible for any other reason. As described below, if the victim’s claim succeeds, he or she will eventually receive the confiscated assets. Confiscation is in principle excluded from use against a *bona fide* third party.  

The right to order confiscation lapses after seven years. In cases in which the prosecution of the criminal offence is subject to a longer statute of limitations, however, the longer period applies to the confiscation as well.  

If the assets to be confiscated are no longer available, the judge may, under Article 71(1) SCrC, order a ‘claim for compensation’ against third parties to the extent to which they did not provide equivalent consideration for the assets or that such a claim for compensation would not represent a disproportionate hardship for them.  

The importance of Article 71 SCrC (claim for compensation) becomes apparent if read in conjunction with Article 73 SCrC:

> If a felony or an offence has caused damage not covered by insurance and if it must be presumed that the offender will not compensate for the damage or pay moral damages, the judge shall award the injured person, upon his request, up to the amount of the damages or the moral damages fixed by the judge or by settlement: (a) the monetary penalty or fine paid by the convicted person; (b) confiscated objects and assets or the proceeds from their sale after deduction of the costs; (c) claims for compensation; (d) the amount of the preventive bond.  

Should this provision be applied by the judge, the victim will benefit from a claim against the state within the criminal proceedings. Of course, the victim cannot make the same claim against the offender, as this would amount to (an unlawful) double compensation.  

The right to claim certain remedies in criminal proceedings is open to whoever qualifies as a ‘private claimant’, namely, a ‘person suffering harm’ who has explicitly declared his or her wish to participate in the criminal proceedings as a (civil or criminal) claimant. Under Article 115(1) of the Swiss Code of Criminal Procedure (SCCrP), a person suffering harm is a person or entity whose rights have been directly violated by the offence. To establish whether a person qualifies as a person suffering harm, the offence must fall within the scope of a provision that aims to protect the right invoked by the person suffering harm. The Swiss Federal Tribunal recently refused to recognise an investment fund shareholder as a person suffering harm through disloyal management of fund assets, considering that the shareholder suffered indirect harm, with the fund alone suffering direct harm.  

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26 Article 70(2) of the SCrC reads as follows: ‘[t]he confiscation shall be precluded if a third party acquired the assets without knowledge of the facts that would justify their confiscation and to the extent he provided equivalent consideration for the assets or the confiscation would represent a disproportionate hardship for him’ (English translation by the Swiss-American Chamber of Commerce, Swiss Penal Code, 2nd edn, Zurich 2008).

27 Article 70(3) of the SCrC.

28 See Articles 71(1) and 70(2) in fine of the SCrC.

29 Article 73(1) of the SCrC (English translation by the Swiss-American Chamber of Commerce, Swiss Penal Code, 2nd edn, Zurich 2008).

30 ATF 118 Ib 263 c. 3.

31 Article 118(1) of the Swiss Code of Criminal Procedure (SCCrP).

32 For instance, Article 138 of the SCrC (embezzlement) and Article 158 of the SCrC (disloyal management) aim at protecting the victim’s assets.

33 ATF 6B_857/2017 of 3 April 2018, c. 3.
Whereas the above-described compensatory remedies may certainly be sought against the person who committed the fraud, the question whether other persons may face claims by the person suffering harm needs further elaboration. As a general rule, an accomplice may also be sued in the criminal proceedings; the same consideration applies to the instigator. In a claim for damages for liability in tort, Article 50(1) SCO provides that ‘[w]here two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the injured party’. Accordingly, compensation may also be sought against the persons who instigated or assisted the perpetrator to commit the fraud.

With regard to third parties who may receive or help transmit the proceeds of fraud, Article 160 SCrC sanctions ‘[w]hoever acquires, receives as a gift or takes in pawn, conceals, or assists in alienating an object of which he knows or should have known that another has obtained it through a criminal offence against property’. Thus the receiver may face criminal as well as civil claims to compensate the victim. The same applies to a person guilty of money laundering within the meaning of Article 305 bis SCrC; in other words, whoever commits an act intended to frustrate the determination of the origin, the discovery or the confiscation of assets that he or she knows or must assume derive from a crime.

ii Defences to fraud claims

In general terms, the persons who are sued for fraud may resist the victim’s claims by arguing that one or more of the requirements described above are not met. If a person claims restitution of an object, the defendant may argue that he or she obtained title to it. This may be the case if a person acquires an object in good faith from a person who was merely entrusted with that object, without having title to it. ‘Entrusted’ means that the person gained possession of the object with the consent of the original owner. If the original owner was dispossessed without his or her consent, the subsequent acquirer may not obtain title even if he or she was in good faith.

Another typical defence to fraud claims is limitation. As mentioned above, different limitation periods will have to be taken into account depending on the specific remedy relied on by the victim. The limitation period may vary from one year (liability in tort) to 10 years (liability in contract). That said, if the civil claim derives from a criminal offence for which the Criminal Code provides for a longer limitation period, the longer limitation period will also apply to the civil claim.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

A victim aiming at securing assets and proceeds of fraud can act either under civil or criminal law. Under civil law, a creditor of an obligation sounding in money may apply for an order freezing the assets of the debtor with respect to an unsecured enforceable claim if, inter alia:

- the debtor lives in Switzerland and is concealing his or her assets or making preparations to abscond so as to evade the fulfilment of his or her obligations; or

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34 Article 25 of the SCrC.
35 Article 24 of the SCrC.
37 Article 60(2) of the SCO.
b the debtor does not live in Switzerland and the claim has a sufficient connection with Switzerland (Article 271 DCPA).

The prior relies on an endangerment of the creditors rights and is fulfilled when objective elements show that the debtor has the intent to avoid its obligations through deduction, concealment, destruction or escape. The latter requires a sufficient connection with Switzerland that is given when, \textit{inter alia}, the creditor is domiciled in Switzerland or Swiss courts would have jurisdiction over the merits of the claim. The mere location of assets in Switzerland is, however, insufficient, although this connection can be appreciated in the light of further elements. Finally, the creditor in possession of a final judgment or arbitral award can also seek the freezing of assets under Article 271 DCPA.

A civil seizure of an object (e.g., works of art or precious stones) could be sought through \textit{ex parte} interim measures provided that the applicant credibly shows the existence of a case of special urgency where there is a risk that the enforcement of the measure will be frustrated (Article 265(1) of the Swiss Civil Procedure Code). However, the creditor must convincingly reverse the legal presumption that the possessor of the object is its owner (Article 930(1) SCivC).

Under criminal law, the relevant provision is Article 263 SCCrP, which deals with ‘sequestration’. Sequestration is a provisional measure that is decided on the basis of a \textit{prima facie} analysis. This measure can be granted only if it is provided for by the law, if there is sufficient suspicion that an offence was committed, if the measure meets the proportionality test and if it is justified in view of the seriousness of the offence. In practice, however, the Federal Criminal Court (FCC) has developed case law relating to the criterion of ‘probability’ that most often results in seizures lasting throughout the (often lengthy) criminal investigations.

Under Article 263(1)(b) SCCrP, sequestration may be ordered against the perpetrator’s assets to guarantee the payment of penalties or indemnities owed to the state. The assets covered by this provision are not necessarily connected with the offence committed. If read in conjunction with Article 71(3) SCrC, resort may then be made to Article 263(1)(b) to award the indemnities to the victim (and not to the state).

According to Article 263(1)(c) SCCrP, ‘[o]bjects and assets belonging to the accused person or to third parties may be seized if it is likely that: . . . they will have to be handed over to the injured person’. This type of sequestration consists in placing certain objects or assets with the authorities with a view to being handed over to the victim to restore his or her rights. The final decision on restitution, which has priority over confiscation if the victim’s claims are not challenged, will in principle take place at the moment of judgment in accordance with Articles 70(1) and 71 SCrC, unless the objects or assets can be handed over before the end of the proceedings under Article 267(2) SCCrP; this article provides that ‘[i]f it is not

\begin{footnotesize}
\begin{enumerate}
\item CR LP- Stoffel/Chabloz, Article 271 No. 56.
\item CR LP- Stoffel/Chabloz, Article 271 No. 78; ATF 124 III 219 c. 3bb.
\item CR LP- Stoffel/Chabloz, Article 271 N. 81.
\item Decision No. 1B_103/2012 of 5 July 2012, c. 2.1.
\item ATF 139 IV 250 c. 2.1.
\item ATK, 1B_390/2013 of 10 January 2014, c. 2.1, 1B_175/2012 of 5 September 2012, c. 4.1 ; 1P405/1993 of 8 November 1993, c. 3.
\end{enumerate}
\end{footnotesize}
disputed that a certain person has been directly deprived of objects or assets by a criminal offence, the criminal authority hands them over to the entitled person before the termination of the proceedings'.

A special type of sequestration is provided for in Article 268 SCCrP. According to this provision, the accused person's assets may be seized to secure, *inter alia*, the legal indemnities to be paid to the victim as may be ordered by the tribunal at the end of the proceedings. The assets that may be seized under Article 268 SCCrP comprise all the assets of the accused person, including those that have no connection with the offence committed. 45 Although the provision under consideration is not intended to secure the victim's civil claims, 46 it remains of particular interest for the purpose of securing the costs relating to the proceedings.

The question of seizure or securing of assets or the proceeds of fraud pending the outcome of a foreign claim will be outlined below (see Section V.iii).

**ii Obtaining evidence**

Article 263 SCCrP also deals with sequestration for evidentiary purposes. According to Article 263(1)(a) SCCrP, 'objects and assets belonging to the accused person or to third parties may be seized if it is likely that: (a) they will have to be used as evidence'. The criminal authorities therefore may, of their own motion or following a successful request by a party, seize any objects or assets that are to be used as evidence.

Certain legally privileged documents cannot be sequestrated, for instance the correspondence between the accused person and his or her lawyer. 47 However, legal privilege does not apply to objects, documents and assets that must be sequestrated with a view to being handed over to the victim or that must be confiscated. 48

The holder of objects or assets that must be sequestrated has a duty to deposit these objects or assets with the criminal authority. 49 This duty is not incumbent, in particular, on the accused person. 50

The public prosecutor may also seek from the 'compulsory measures court' 51 an authorisation to the effect of monitoring the banking transactions between the accused person and a bank, or any other similar institution; such monitoring may only be requested to investigate a felony or a misdemeanour. 52 If the court grants the request, it will inform the bank (1) about the type of documents and information to be provided; and (2) the secrecy measures to be taken. 53

The question of obtaining evidence for the pursuit of foreign fraud proceedings from the parties to the claim and from third parties will be outlined below (see Section V.ii).

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45 Decision No. 1B_274/2012 of 11 July 2012, c. 3.1.
46 FF. 2006 1229.
47 Article 264(1) of the SCCrP.
48 Article 264(2) of the SCCrP.
49 Article 265(1) of the SCCrP.
50 Article 265(2)(a) of the SCCrP.
51 The compulsory measures court is a specific judicial body that deals exclusively with measures affecting the accused persons and third parties, such as secret investigative measures or decisions on custody.
52 Article 284 of the SCCrP.
53 Article 285(1)(a) and (b) of the SCCrP.
IV  FRAUD IN SPECIFIC CONTEXTS

i  Banking and money laundering

The Federal Supreme Court and the FCC have held that Article 305 bis SCCrC (money laundering) not only protects the administration of justice, but also the assets of the person who was injured by the preceding offence, provided that the offence was committed against personal interests. This means that the injured person is considered a person suffering harm within the meaning of Article 115 of the SCCrP and thus may participate in the proceedings as a private claimant (see Section II.i). The injured person is, therefore, entitled to resort not only to civil remedies, but also to criminal remedies in the criminal proceedings.

ii  Insolvency

Articles 285 ff. DCPA provide that certain acts of the insolvent party may be revoked. Revocation will have the effect of submitting certain assets to the debt collection proceedings. In particular, the Swiss legislator enacted a rule that provides for revocation of any and all acts made by the debtor in the five years preceding the attachment of assets or the declaration of insolvency, and that were made with the recognisable intention of the other party to harm the debtor’s creditors, or to advantage certain creditors to the detriment of others.

When Swissair was grounded and initially placed under a provisional debt moratorium, the Swiss Federal Supreme Court held that the payment made by Swissair to Zurich Airport one day before the provisional debt moratorium amounted to a wilful misconduct within the meaning of Article 288 of the DCPA. The federal judges found that the intention to harm other creditors was apparent and that this intention was clearly recognisable by Zurich Airport. The payment made by Swissair was therefore revoked and repaid to Swissair’s estate.

iii Arbitration

Fraud can have a criminal connotation or, in other cases, amount to a ‘mere’ breach of contract. In arbitration having its seat in Switzerland, arbitral tribunals cannot find a person guilty of a criminal offence and punish that person. However, claims for liability in tort are in principle arbitrable as long as the tortious act is in connection with the contract containing the arbitration agreement. Therefore, depending on the circumstances of the specific case, disputes involving claims for liability in tort and in contract may be adjudicated upon by an arbitral tribunal in Switzerland.

54  ATF 129 IV 322; TPF BB.2012.174 c. 3.2.
55  Article 285(1) of the FDCPA.
56  Article 288 of the FDCPA.
57  ATF 135 III 265.
iv  Effect of fraud on evidentiary rules and legal privilege

As stated above (see Section III.ii), certain legally privileged documents cannot be sequestrated. This restriction applies to the correspondence not only between the accused person and his or her Swiss or EU lawyer, but also between any lawyer and his or her client (irrespective of who the accused person is), provided that the lawyer is not under investigation.

However, the restrictions mentioned above do not apply to objects, documents and assets that are to be sequestrated with a view to being handed over to the victim or that must be confiscated.

V  INTERNATIONAL ASPECTS

i  Conflict of law and choice of law in fraud claims

In Switzerland, issues of conflicts of law and choice of law are governed by the Federal Private International Law Act (PILA). In cases of fraud (i.e., a tortious act), the parties may, at any time after the damage occurred, agree to apply the law of the forum. In other words, the parties are allowed to enter into a choice-of-law agreement, provided that the agreement is made after the damage occurred, but they are only entitled to opt in favour of Swiss law.

If the parties did not agree to have their dispute decided according to the law of the forum, the provision to be considered is Article 133 PILA. If the author of the tortious act and the victim have their habitual residence in the same state, claims for liability in tort are governed by the law of that state. If the author of the tortious act and the victim do not have their habitual residence in the same state, the claims will be governed by the law of the state in which the tortious act was committed. However, if the result occurred in another state, the law of that state will apply if the author of the tortious act should have foreseen that the result would occur there.

Article 133(3) PILA specifically deals with cases in which the parties are bound by a legal relationship, for instance a contract. In those scenarios, if the tortious act breaches a legal relationship, the claims based on the tort are governed by the law applicable to the legal relationship under consideration. Claims for liability in tort and in contract often coincide. This provision therefore facilitates the tribunal’s task, as both claims will be governed by one and the same system of law.

ii  Collection of evidence in support of proceedings abroad

When dealing with collection of evidence in support of proceedings abroad, the specific rules that will apply very much depend on the state that requested international assistance. If that state did not conclude a bilateral treaty on mutual assistance, Swiss authorities will apply

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60  Article 264(1) of the SCCrP.
61  Article 264(1)(d) of the SCCrP, which entered into force on 1 May 2013.
62  Article 264(2) of the SCCrP.
64  Article 133(1) of the PILA.
65  Article 133(2) of the PILA.
66  Article 133(2) of the PILA.
the Federal Act on International Mutual Assistance in Criminal Matters (IMAC). Where the request for assistance comes from a European country, Switzerland will resort to the European Convention on Mutual Assistance in Criminal Matters (ECMA) of 20 April 1959.

All the instruments mentioned above contain specific provisions for the purpose of collecting evidence in support of proceedings taking place outside Switzerland. In the case of bona fide third parties, Article 74(2) IMAC provides that the evidence will be handed over to the requesting state only if it gives assurances that it will return the evidence to the third parties at the end of the proceedings and without costs. The ECMA contains a similar rule.

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

Seizure of assets and proceeds was developed at a later stage than mutual assistance for evidentiary purposes. A provision dealing with the seizure of assets and proceeds was included in the Second Additional Protocol to the ECMA. According to Article 12(1) of the protocol, ‘[a]t the request of the requesting Party and without prejudice to the rights of bona fide third parties, the requested Party may place articles obtained by criminal means at the disposal of the requesting Party with a view to their return to their rightful owners’.

For its part, Article 74a IMAC enables Swiss authorities to hand over certain objects and assets, which have been seized, to their international counterpart for the latter to hand them over to the rightful owner. The handover may take place at any stage of the foreign proceedings; in principle, following a final and enforceable decision by the requesting state.

Another question that often arises is whether civil interim measures granted by a foreign court may be recognised and enforced in Switzerland. One must first draw a line between interim measures granted by the tribunals of a signatory state of the Lugano Convention (see Section V.i) and those granted in countries with which Switzerland did not enter into any specific convention on recognition and enforcement. However, ex parte interim measures can not be recognised and enforced in Switzerland.

In the first case, it is well settled that judgments granting interim measures may be recognised and enforced in Switzerland like any other (final) judgment. In the second case, academic writers debate the question whether Article 25(b) of the PILA on recognition of foreign judgments also applies to foreign interim measures. The issue is currently unsettled and the Swiss Federal Supreme Court has to date still not rendered a definitive ruling on this issue.

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67 Article 74 of the IMAC; Articles 3 and 6 of the ECMA.
68 Articles 3 and 6 of the ECMA and Article 12(2) of the Second Additional Protocol to the ECMA.
69 Article 74a(3) of the IMAC.
70 CR LDIP-Bucher, Article 25 No. 31.
72 See, for instance, Bucher on Article 25 of the PILA, in Bucher (ed), Commentaire romand, Loi sur le droit international privé, Convention de Lugano, Basel 2011.
73 ATF, 5P252/2003, c. 3.3; without answering the question, the Swiss Federal Supreme Court mentioned that most legal scholars are opposed to the recognition of interim measures.
If a party seeks recognition and enforcement of interim measures, the party will in principle have to file a separate request before the competent tribunal where enforcement is sought.74

iv Enforcement of judgments granted abroad in relation to fraud claims

Recognition and enforcement of foreign judgments in relation to fraud claims is essentially governed by two instruments: the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 (Lugano Convention) and the PILA.

The Lugano Convention is applicable to the European Union, Norway, Iceland, Denmark and Switzerland. One of the purposes of the Lugano Convention was to facilitate the circulation of judgments. Accordingly, a judgment given in a state bound by the Lugano Convention will be recognised in the other states bound by the Convention without any special procedure being required.75 Enforcement is governed by Articles 38 ff. of the Convention. As with recognition, Switzerland will declare foreign judgments enforceable if the applicant so requests.76 The foreign judgment will not be reviewed as to its substance.77

If no treaty applies to a particular international situation, Swiss tribunals will deal with issues of recognition and enforcement by resorting to the PILA. Under Article 25 PILA, a foreign judgment will be recognised in Switzerland if (1) the judicial or administrative authorities of the state in which the decision was rendered had jurisdiction; (2) if the decision is no longer subject to an ordinary remedy (as opposed to an extraordinary remedy that is available only in limited and exceptional circumstances, for instance if a tribunal decided infra or ultra petita) or if it is final; and (3) if there is no ground to refuse recognition according to Article 27 PILA.78 If the decision was recognised, it may be declared enforceable if the applicant so requests.79

Finally, pursuant to Article 194 PILA, the recognition and enforcement of foreign arbitral awards is governed by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

v Fraud as a defence to enforcement of judgments granted abroad

Articles 27(1) PILA and 34(1) Lugano Convention provide that the judge may refuse recognition of a foreign judgment if the judgment ‘manifestly’ runs counter to public policy. When dealing with cases of public policy under Article 27(1) PILA, the Swiss Federal Supreme Court has held that a decision would breach substantive public policy only if the decision contravenes material mandatory rules of Swiss law.80 As a consequence, recognition

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74 Article 338 of the Swiss Code of Civil Procedure.
75 Article 33(1) of the Lugano Convention.
76 Article 38(1) of the Lugano Convention.
77 Articles 36 and 45(2) of the Lugano Convention.
78 Recognition may be refused under Article 27 of the PILA in the following cases: (1) the decision is manifestly incompatible with Swiss public policy; (2) a party did not receive proper notice; (3) the decision was rendered in violation of fundamental principles pertaining to the Swiss conception of procedural law; and (4) the dispute between the parties is already pending in Switzerland or has already been decided there or in a third state.
79 Article 28 of the PILA.
80 ATF 134 III 661 c. 4.1.
and enforcement are usually to be considered the rule, and the Swiss judge will refuse to recognise a foreign decision only in exceptional cases. However, if the foreign judgment is tainted with fraud and the respondent successfully proves the fraud allegations, Swiss judges do have a tool to refuse recognition and enforcement. In a recent decision involving debt collection proceedings in Switzerland brought to enforce two Swedish arbitral awards, the debtor argued that the awards could not be recognised in Switzerland for reasons of public policy under Article V(2)(b) of the New York Convention. The debtor contended that the arbitration proceedings were tainted with fraud (false testimony). While the debtor’s defence was ultimately not successful for lack of evidence, the Swiss Federal Supreme Court held that an award influenced by a procedural fraud may breach public policy and consequently not be enforceable in Switzerland.81

VI CURRENT DEVELOPMENTS

After about seven years investigating the Gazprom corruption case, the Office of the Attorney General of Switzerland (OAG) was notified in 2016 of the FCC ruling ordering the acquittal of the defendants.

The heart of the case lies in the payments of circa US$7 million by Siemens Industrial Turbomachinery Ltd (SIT), a company acquired by Siemens in 2003, to senior executives of the Russian energy giant Gazprom. The OAG suspected that these payments, which occurred between 2001 and 2006 via bank accounts held by the end recipients in Geneva, were bribes that helped SIT secure contracts to build compressor stations and to supply gas turbines during the construction of a gas pipeline that runs from the gas fields on the Russian Yamal peninsula to Germany.

In November 2013, the OAG agreed to close the criminal proceedings against SIT on the basis of Article 53 SCrC that allows the prosecutor to refrain from prosecuting an offender who has made every reasonable effort to right the wrong he or she has caused. SIT thus admitted basic failures in checking consultancy agreements, turned over its US$10.6 million of unlawful gain to the Swiss State (Article 71(1) SCrC) and paid reparations of 125,000 francs – in the form of a donation to the International Committee of the Red Cross.82 In recent years, the criminal authorities’ recourse to Article 53 SCrC has considerably increased, as shown in Geneva by HSBC paying 40 million francs in June 201583 and Addax Petroleum settling for 31 million francs in July 2017.84 This provision, which is considered by some as a means to favour wealthy offenders who can brush criminal proceedings aside by paying a certain amount, is currently being reviewed by the Swiss parliament.85

Alongside the proceedings against the company, measures were taken against the individuals involved in the bribing scheme. During December 2010, the OAG issued two seizure orders based on Article 263(1)(b) SCCrP over the assets held by a retired manager in two Swiss bank accounts that amounted to about 1,376 million francs. The retired

81 Decision No. 5A_165/2014 of 25 September 2014, c. 6.2.
manager was suspected of having benefited from an amount of US$2.2 million between April 1999 and October 2006: a period that only briefly overlapped with the criminalisation of passive bribery on 1 July 2006. These seizures were maintained by the FCC in its rulings of 12 November 2014 and 12 June 2015.\textsuperscript{86}

In these rulings, the FCC refused to remove the contested payments prior to 1 July 2006 from the scope of the investigation by applying Article 70 SCrC that allows the confiscation of payment for an offence, even if the proceeds are held by third parties. By doing so, the Court actually shifted the focus to the offence of active bribery committed by the author of the payment. Since active bribery was already criminalised as of 1 May 2000, the FCC ruled that the proceeds relating to the payment that were from the seized bank account could, as such, be subject to confiscation.

Further, while most of the amounts were seized from the account into which the alleged bribe was transferred, a share of the assets was seized from an unrelated bank account. However, the FCC upheld the seizure by ruling that, since the alleged bribe was estimated at about US$2.2 million, even assets that were not a direct payment for the offence could be seized as a compensatory measure under Article 71 SCrC.

In 2016, the individuals were finally tried by the FCC on the merits. The FCC ruled that Gazprom was not a public organisation and that its senior executives were therefore not public officials, thereby annihilating the OAG’s indictment based on public bribery. As a consequence, the Court acquitted the accused, ordered the seized assets to be released and the expenses of the proceedings, including the defendants’ costs, to be borne by the OAG.\textsuperscript{87} The new Articles 322 \textit{octies} and 322 \textit{novies} SCrC entered into force on 1 July 2016. These new provisions, that provide for automatic prosecution of individuals engaging in private bribery, would have certainly lead to a different outcome in the Gazprom case.

\textsuperscript{87} FCC, SK.2015.17 of 1 April 2016; SK.2016.17 of 12 July 2016.
I OVERVIEW

The Turks and Caicos Islands (TCI) is an international finance centre in the style of the British overseas territories (akin to Anguilla, Bermuda, the British Virgin Islands and the Cayman Islands). The semi-autonomous government of TCI is a UK-appointed governor with a local legislative assembly and ministers. Its financial services industry amounts to more than 10 per cent of gross domestic product. About 5,800 captive insurance companies call TCI home.1

The TCI government has recently undertaken major steps in introducing statutory reform, putting the jurisdiction into the front line of modern company and trusts legislation, similar to legislation in the British Virgin Islands (BVI). The jurisdiction is currently undergoing the biggest reform to its company law in a generation. The Companies Ordinance 2017 has been enacted with most of its provisions coming into force on 30 September 2017 with some transitional arrangements.2 This new companies legislation refers to the intended new Insolvency Ordinance, which is yet to be enacted at the timing of writing. This is expected to closely follow the British Virgin Islands Insolvency Act 2003 and also implement similar rules to the BVI Insolvency Rules 2005. The accompanying Rules and Regulations to the new Company Ordinance have yet to be published (as of late July 2017).

The new legislation includes the provision of a Register of Beneficial Owners of Companies4 available to law enforcement authorities. This is bringing into effect the Technical Protocol to the tax information exchange agreement (TIEA) between the UK government and TCI, dated 10 April 2016. The TIEA also acknowledges the TCI government’s commitment to implementing OECD Common Reporting Standards. The TCI Financial Services Commission (FSC) is in the process of implementing the new beneficial ownership register. By this innovation, TCI is introducing transparency in its international financial services industry. The Bribery Ordinance 2017 (not yet in force)5 was enacted in April 2017,

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1 Tim Prudhoe and Alexander W Heylin are lawyers at Kobre & Kim, and David Cadman is a partner at Griffiths & Partners. The information in this chapter was current as of September 2017.
3 Schedule 1, Section 1 of the Companies Ordinance 2017.
4 Part IX of the Companies Ordinance 2017 (which creates the Register of Beneficial Ownership) came into effect on 20 June 2017, with the remainder of the Ordinance’s provisions coming into effect on 20 September 2017. The Trusts Ordinance 2016 came into effect on 23 September 2016.
5 Turks and Caicos Islands Government Gazette, Volume 168, No. 18, 7 April 2017: Section 1(1) makes clear that commencement is on further Gazette announcement. The Integrity Commission is yet to prepare guidelines before the Ordinance can be brought into force.
based upon the UK Bribery Act 2010. The Bribery Ordinance 2017 creates the offence of a commercial organisation's failure to prevent bribery subject to the defence of proof as to adequate procedures in place designed to prevent bribery. The Integrity Commission will issue guidance as to what procedures can be put in place to prevent bribery. The commercial organisation should move proactively on this and design procedures along the lines of those required by the UK Bribery Act 2010.

There are some apparent consequences of the changes under the new companies legislation that have been overlooked thus far: in that prior provision (i.e., under the old legislation) for applications in respect of those TCI companies designated 'exempt' for release of information as a workaround to the Confidential Relationships Ordinance bar (to the release of information) will be lost as the transitional provisions take effect.

i  TCI courts

The TCI Supreme Court, which exercises first-instance jurisdiction in civil claims exceeding US$25,000\(^6\) and more serious criminal matters, is vested with jurisdiction and powers broadly similar to those of the High Court of England and Wales.\(^7\) There are three justices of the Supreme Court, including a Chief Justice. Since September 2014, the Chief Justice of the Supreme Court has been Margaret Ramsay-Hale, a former member of the judiciary in the Cayman Islands. Appeals from the Supreme Court are to the Court of Appeal, which ordinarily sits three times each year; appeals are heard by a panel of three judges drawn from the six judges appointed to the Court. The current President of the Court of Appeal is the Honourable Justice Elliott Mottley. Final appeals are to the Judicial Committee of the Privy Council in London.

Arbitration in TCI is governed by the Arbitration Ordinance,\(^8\) legislation that is not fully in line with the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration. The Arbitration Ordinance facilitates a stay of court proceedings in certain limited circumstances (essentially, when there has been a breach of an arbitration agreement) and provides for the court to assist arbitral proceedings (e.g., by compelling witnesses to attend or produce documents, and determine any question of law that may be referred to the court by the arbitral tribunal).\(^9\) As noted in *The Bay Hotel*,\(^10\) because of the freedom allowed under the Arbitration Ordinance, parties to arbitration are reliant upon their chosen procedural law for the arbitration and, if the relevant national law is that of TCI, that procedural law will be derived from the common law position.\(^11\) If the awaited Insolvency Ordinance replicates (as expected) the BVI Insolvency Act 2003 then the UNCITRAL Model Law will be included (though that section is not yet in force in BVI).

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\(^6\) The magistrate's court has jurisdiction in most civil claims up to the value of US$25,000 (Section 132 Magistrate's Court Ordinance (Cap 2.03)) save in relation to tort and contract claims, for which the limit of the magistrate's jurisdiction is US$10,000. Part IX of the Companies Ordinance 2017 (concerned with a register of beneficial ownership) came into effect on 26 June 2017, with the remainder of the Ordinance's provisions coming into effect on 20 September 2017. The Trusts Ordinance 2016 came into effect on 30 September 2016.

\(^7\) Supreme Court Ordinance (Cap 2.02) Section 3.

\(^8\) Cap 4.08.

\(^9\) Arbitration Ordinance Sections 17–18.

\(^10\) *The Bay Hotel and Resort Limited v. Cavalier Construction Co Ltd* [2001] UKPC 34 (*The Bay Hotel*), per Lord Cooke at p. 6.

\(^11\) *The Bay Hotel*, pp. 10–11.
**Law enforcement**

Financial services in TCI are regulated by the FSC, which has a statutory duty to cooperate with foreign competent authorities for the prevention or detection of financial crime.\(^{12}\) Criminal investigations are undertaken by the Royal Turks and Caicos Islands Police Force, which operationally has a non-statutory Financial Crimes Unit. The TCI Financial Intelligence Agency (FIA) is an independent statutory body\(^{13}\) created in 2014 to receive reports of suspicious transactions from financial institutions and other persons; to gather, store, analyse and disseminate information to law enforcement authorities and relevant bodies; and for connected purposes.\(^{14}\) The FIA is governed by a board of directors appointed by the governor. The FIA has significant investigatory statutory powers. The FIA's director is also a member of the TCI Anti-Money Laundering Committee,\(^{15}\) whose function is to advise the governor in relation to various matters, including the detection and prevention of money laundering and terrorist financing. The TCI attorney general, director of public prosecutions and the police commissioner are also among the Anti-Money Laundering Committee members. The FSC has broad powers to issue guidelines, set regulations and conduct supervision over those engaged in the financial services industry.\(^{16}\) To date, the FSC has preferred to issue guidelines rather than exercise its power to issue regulatory codes. Turks and Caicos is a member of the Caribbean Financial Action Task Force (CFATF), an organisation of Caribbean Member States who entered into a 1999 memorandum of understanding for the implementation of common anti-money laundering policy.

**Publicly available information**

Until recently there was no obligation for publicly available company information to detail beneficial (as opposed to merely legal) ownership. A Register of Beneficial Owners of Companies was created by Section 156 of the Companies Ordinance 2017, and the FSC is currently undertaking the task of implementation of the register. Regulations pursuant to the new Companies Ordinance are yet to be published; though it is expected that this information will not be available to the general public but only TCI government bodies who then may receive requests to share that information with other governments. The Regulations would provide more detail and should come into operation by 30 September 2017. The register will be maintained and only searchable by the Financial Services Commission, though this will only be confirmed when the Regulations are published.

A registerable beneficial interest will include any person who holds (directly or indirectly) more than 2 per cent of the issued shares, or controls more than 25 per cent of the voting rights or has the right of appointment or removal of a majority of directors of the company, or has the right to significant control over the company.\(^{17}\) The register of beneficial ownership legislation was brought into force on 26 June 2017 pursuant to Schedule 1 of the

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12 Section 28(1) Financial Services Commission Ordinance Cap 16.01.
13 Created by the Financial Intelligence Agency Ordinance Cap 3.20 as amended by the Financial Intelligence Agency (Amendment) Ordinance 2016.
14 Preamble to the Financial Intelligence Agency Ordinance Cap 3.20.
15 Created under Part IV of the Proceeds of Crime Ordinance Cap 3.15 (as amended).
16 The FSC’s extensive general powers are stated in Section12 of the Financial Services Commission Ordinance Cap 16.01.
17 Section 146 Companies Ordinance 2017.
Companies Ordinance 2017 but its operation in practice is awaited and regulations under the new Companies Ordinance are expected to be published and brought into force by the end of 2017.

The new Companies Ordinance 2017, when fully in force from 30 September 2017, will provide for the incorporation of four simplified categories of company: domestic companies, protected cell companies, international companies and non-profit companies. There is also provision for registration of foreign companies. Existing companies incorporated under previous categories according to the former legislation are to be automatically registered under transitional arrangements. This means, for example, that a former ‘exempted’ or a ‘limited life’ company becomes an international company under the new provisions. The standard vehicle for onshore businesses or for the holding of land within TCI will be a domestic company. A business whose activities will be carried on principally outside TCI will be an international company. Tax exemption certificates in respect of ‘exempted’ companies under the outgoing legislation continue to be valid under the new statutory regime.

The FSC, through its company registration operations, is the custodian of public information filed pursuant to the Companies, Partnership and Limited Partnership Ordinances. Searches may be made of the companies registry for information, including a company’s registration number, status, number of authorised shares, total share capital and the date of the memorandum and articles of association. Searches for an ordinary (but not an exempted) company also provide details of the company’s directors, secretary and shareholders.

Typical information available to the public includes:

1. **Company information, including:**
   - the present and historical status of a TCI company;
   - the identity of the registered agent;
   - the place of its registered office;
   - the date when it was incorporated;
   - certificates of good standing (available to any member of the public for a TCI company);
   - the contents of its memorandum and articles of association; and
   - registered charges (if any);

2. **A list of entities regulated by the TCI Financial Services Commission;**

3. **Court documents and judgments; and**

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18 Companies Ordinance 2017, Schedule 1, Paragraph 1, Part IX came into force on 26 June 2017 (Schedule 2, Paragraph 1(1)) and the remainder of the Ordinance comes into effect on 30 September 2017 (Schedule 2, Paragraph 1(2)) with transitional provisions (Schedule 2, Paragraph 2).

19 A ‘domestic company’ will be defined as ‘a company that is not an international company’ (Section 2 Companies Ordinance 2017).

20 Part XVI of the Companies Ordinance 2017 deals with Foreign Companies.

21 Section 6(1)(f) and (g) Companies Ordinance 2017.

22 An international or foreign company will not be able to hold land in TCI (Section 29(1) Companies Ordinance 2017).

23 Companies Ordinance 2017, Schedule 1, Paragraph 21.

24 Cap 16.08, 16.15 and 16.16.

II LEGAL RIGHTS AND REMEDIES

As a British overseas territory TCI’s legal system is based, in large part, on English law since its annexation as part of the Bahama islands by the British in 1799 (although there was a representative of the British Crown in Grand Turk from 1766). A Bahamian statute of 1799 provided that the common law of England ‘is, and of right ought to be, in full force within these islands, as the same now is in that part of Great Britain called England’, and expressly made the Bahamas – and, later, the separately administered Turks and Caicos Islands – subject to 207 specified English statutes. From 1873 to 1959, the Turks and Caicos Islands were administered as part of Jamaica.

The law of TCI is now derived from a number of sources, including:

\(d\) Orders in Council made by prerogative order of the British Sovereign and made specifically applicable to TCI;

\(a\) the English statutes surviving of the 207 specified in the 1799 statute and any UK statutes that have been expressly extended to apply in TCI;

\(b\) the 2011 TCI Constitution (in force from 15 October 2012);

\(c\) local TCI statutes and ordinances;

\(d\) subordinate legislation, such as regulations, orders and rules, made pursuant to local statutes; and

\(e\) case law.

When no specific statutory provision applies, TCI courts will apply common law and principles of equity as adapted to the circumstances of TCI. TCI courts have settled case law of their own on many issues and look (when applicable) to English and other common-law jurisdictions for persuasive authorities.

Supreme Court procedure in TCI is governed by a simplified version of the Rules of the Supreme Court of England (RSC), as were in force on 1 January 1999 (prior to the English Civil Procedure Rules (CPR)). The TCI rules are known as the Civil Rules 2000. Some English rules were omitted from the Civil Rules 2000 but the sequencing and numbering of the English RSC were retained to permit cross-referencing to English procedural case law. Consequently, the *Supreme Court Practice 1999* (the final pre-CPR edition of the *White Book*) is commonly referenced in TCI proceedings as the relevant procedural textbook. The procedure in the Court of Appeal is governed by the Court of Appeal Ordinance and the Court of Appeal Rules, as adapted from the Court of Appeal Rules of the Bahamas. Historically, on certain occasions (such as when hurricane weather or damage has made it necessary), the TCI Court of Appeal has physically sat outside the jurisdiction. The appellate justices themselves are not based within TCI but elsewhere in the Caribbean.

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26 40 George III Chapter 2: ‘An Act to declare how much of the Laws of England are practicable within the Bahama Islands, and ought to be in force within the same’.

27 Cap 2.01.

28 Pursuant to a decision made in 2009 by the President of the Court of Appeal under Section 21 of the Court of Appeal Ordinance, the Bahamas Court of Appeal Rules apply *mutatis mutandis* to the TCI Court of Appeal.
Civil remedies

The stages of civil proceedings are similar to those in England but without pre-action protocols that are in force in England. Other than summary judgment, there are no expedited trial procedures. As in England, there are a wide range of civil remedies, including interlocutory remedies.

The time frame for cases can vary depending on the complexity of the matter and the availability of court time.

Claims against those that have committed fraud

Many of the remedies and legal rights available to the victims of fraud under the laws of England and Wales are available in TCI. Victims of fraud can bring claims for breach of contract, tort (including deceit and conspiracy), breach of fiduciary duty, fraudulent misrepresentation and breach of trust or conversion. If a third party has received the proceeds of fraud, victims may be able to bring claims for knowing receipt or unjust enrichment, inviting the court to make declaratory orders as to the true ownership of the property.\(^\text{29}\) Causes of action include fraudulent misrepresentation, which is a statement of fact made without belief in its truth, knowingly or recklessly made with the intention that it should be acted upon. Bad faith is not a prerequisite to proof of fraudulent misrepresentation. When a contract has been entered into by reason of fraudulent misrepresentation, the person so induced may rescind the contract, claim damages, or do both.

Breach of trust and fiduciary duties

Breach of trust claims can be brought that are similar to English law principles and, as in England, acting as a trustee brings with responsibilities under the law of equity to the beneficiaries. If those responsibilities have been breached then the beneficiary has a potential cause of action against the trustee. Claims may also be available for breach of fiduciary duty or breach of trust at common law. The Companies Ordinance 2017 imposes a duty for directors to act in good faith and in the best interests of the company.\(^\text{30}\) A claim may be made when a third party receives assets in breach of trust or in breach of fiduciary duty, when that third party knows that the assets in fact belonged to the claimant and were disbursed in breach of trust or fiduciary duty. Remedies may include personal remedies (compensation) or proprietary ones (such as tracing or a constructive trust).

Constructive and resulting trusts

A claimant may seek constructive or resulting trusts over misappropriated assets. The former may arise when it is unconscionable for the owner of property to retain a beneficial interest in the property over that of the claimant. By contrast, resulting trusts arise from an intention by the individual transferring the trust property that he or she should retain his or her beneficial interest in it. The Quistclose (or purpose) trust is a special form of resulting trust that arises where the person transferring the trust property does so with an intention that it be used for a specific purpose.

\(^{30}\) Sections 102–105 Companies Ordinance 2017.
Clawback claims

The Insolvency Ordinance 2017 has not yet been enacted at the time of writing this chapter, but if it follows the BVI Insolvency Act 2003 (which is expected) then there will be statutory clawback provisions against those that have appropriated assets.

Derivative actions

As is the case in England and Wales, when a company has been a victim of wrongdoing the cause of action lies with the company. Shareholders are prevented by the rule in Foss v. Harbottle from bringing claims to recover reflective losses (e.g., damages for a reduction in the value of their shares caused by that wrongdoing). However, shareholders are able to bring claims derivatively, subject to the requirement that they seek the court’s permission to continue an action brought derivatively and in respect of which notice of an intention to defend has been given. Derivative claims arise at common law in circumstances such as when the company is controlled by wrongdoers who may commit a fraud on the company’s minority shareholders or where there have been ultra vires acts that cannot be ratified by the company.

Tracing

Rules of tracing are an important equitable tool, whereby a victim of fraud can identify its asset or the proceeds and those persons who have handled or received them and assert a proprietary claim against that property. To be traced, there must be a distinct equitable title to the property and the claimant can elect to follow the original asset and enforce his or her equitable title or alternatively trace the ‘substituted’ asset in the hands of the fraudster. The claimant can then choose whether to enforce an equitable lien for the value of the original asset or claim the entire beneficial ownership of the substituted asset under a constructive trust. Tracing can take place into a mixed fund to which the fraudster has contributed, although when the fund is mixed, beneficial ownership over the entire substituted asset cannot be asserted. Tracing into a mixed fund that includes funds belonging to an innocent volunteer, the court will use different identification rules that provide parity between the parties and when the mixed fund has been used to buy a further asset, the claimant will be able to trace his or her share in the new asset, which may increase or depreciate in value.

Interim remedies

The TCI Supreme Court has the power to order a range of interim remedies available to the English High Court, including Mareva (or freezing) injunctions. Other similar offshore jurisdictions have ordered Mareva injunctions in support of foreign proceedings. The

31 See, for example, the concession made at Paragraph 82 in Trinidad and Tobago Unit Trust Corporation v. Kinay & Serim (2011) CL 7/10.
32 Foss v. Harbottle (1843) 67 ER 189.
33 Order 15, Rule 12A(2) of the TCI RSC.
34 Trinidad and Tobago Unit Trust Corporation v. Kinay & Serim, Paragraph 52.
35 In the British Virgin Islands, see Black Swan Investments ISA v. Harvest View Limited and Others BVIHCV 2009/399, which was affirmed by the Eastern Caribbean Supreme Court of Appeal in Yukos CIS Investments Limited and Others v. Yukos Hydrocarbons Investments Limited and Others HCVAP 2010/028; and in the Cayman Islands, see VTB v. Universal Telecom Investment Strategies Fund SPC (2013 (2) CILR 94).
TCI courts have not yet confronted that issue. The equitable and common law remedies of tracing are available in TCI. Final remedies that may be sought in fraud claims in TCI are comparable to those available under the laws of England and Wales, including damages, orders for the return of specified property and an account of profits. Interest is at a set rate determined by the court and costs are normally awarded to the successful party.

**Defences to fraud claims**

The defences to the claims above are usually factual, that is to say, some element of the claim has not been made out on the evidence. Often, this element is dishonesty. In addition, there are ‘safe harbour’ defences of good faith, lack of notice of intention to defraud or good consideration to most of the clawback and equitable claims outlined above. Third-party claims may also be defended on the grounds of change of position by the party receiving the misappropriated assets.

**Limitation defences**

Currently, there are no limitation periods (save in relation to fatal accident claims). However, a Limitation Bill that has been circulated in draft form and would bring TCI law in line with the English Limitation Act 1980 has been under consideration for some time. This was debated in the TCI parliament in August 2016, but has yet to be enacted.

**Criminal remedies**

TCI has legislation dealing with money laundering, the proceeds of crime and criminal fraud. The Theft Ordinance creates a number of statutory offences involving fraudulent activity, including obtaining property, services or pecuniary advantage by deception, evading liability by deception and false accounting. These offences carry a maximum sentence of imprisonment of five to 10 years. The Attorney General (as the TCI Civil Recovery Authority) is able to trace in respect of specific assets under proceeds of crime legislation. Various statutory tools are available to the authorities to deal with these offences, including confiscation orders, restraint orders and the appointment of a management receiver.

**Defences to criminal fraud claims**

As with all civil and criminal claims, a defendant may, as a defence, assert that one of the elements of the cause of action has not been established. In the case of fraud, the question will be whether the element of dishonesty has been proved to the requisite standard. An innocent party in receipt of the proceeds of fraudulent conduct (and therefore at risk of an unjust enrichment claim) may be able to rely on the defence of change of position: for example, the recipient would argue that he or she was unaware of the wrongdoing and had changed his or her position upon receipt of the proceeds in question.

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37 Including the Anti-Money Laundering and Prevention of Terrorist Financing Regulations, the Anti-Money Laundering and Prevention of Terrorist Financing Code and the Proceeds of Crime Ordinance (Cap 3.15).
38 S.2 Proceeds of Crime Ordinance Cap 3.15.
39 See, for example, Section 63 of the Proceeds of Crime Ordinance (Cap 3.15).
40 See, for example, *Olint TCI Ltd v. TCI FX Traders Ltd* (2010) CL 12/10.
III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Freezing injunctions

As mentioned above, the TCI courts have the power to order *Mareva* injunctions (freezing orders), *ex parte* injunctions and search orders. Most interim remedies (in particular injunctions to restrain the disposal of assets) can be obtained without notice in urgent cases or where the relief sought would be frustrated if notice were given to the defendant. These are a useful tool in fraud cases for preventing or disrupting the disbursement of disputed assets before the outcome of substantive legislation. For such injunctions to be granted, the court must be satisfied that:

- there is a cause of action;
- the court has jurisdiction over the respondent or defendant;
- there is a good arguable case;
- there are assets within the jurisdiction that are available to satisfy any eventual judgment; and
- there is a risk of dissipation.

The TCI Supreme Court has opined that *Mareva* injunctions are ‘draconian measures’ that ‘should not be regarded as orders the making of which is the norm’ and ‘which must not be granted without careful consideration’. Applications made without notice impose extra burdens on an applicant and their attorneys – in particular, an obligation to make full and frank disclosure to the court. In very urgent cases, the court can hear an application on the same day (or very shortly after) it is filed. Where an order is obtained without notice, the defendant is entitled to challenge the order at a later hearing. Injunctions can be mandatory or prohibitory.

The new Companies Ordinance refers to the Insolvency Ordinance 2017 that (at the date of writing) has not yet been published or enacted but is expected to be closely modelled on the BVI Insolvency Act 2003 (as amended).

Provisional liquidators

This is a more drastic option than a freezing order, and where ultimately the liquidation of a TCI Company is being sought. The court has power pursuant to Section 135 of the outgoing Companies Ordinance to order the appointment of an official liquidator ‘either provisionally or otherwise, as it thinks fit’. The provisional liquidator is appointed for ‘the purpose of conducting the proceedings in winding up a company and assisting the Court therein’.

The new Companies Ordinance 2017 that replaces the existing legislation does not include this provision, as a new Insolvency Ordinance that will include appointment of liquidators is expected to be enacted later in 2017. As already mentioned, this Insolvency Ordinance is expected to closely follow the BVI Insolvency Act 2003. Assuming that the BVI model is followed, the court may appoint a provisional liquidator if:

- the company, in respect of which the application to appoint a liquidator has been made, consents; or


42 Section 170 (4) Insolvency Act 2003.
b the court is satisfied that the appointment of a provisional liquidator:
- is necessary for the purpose of maintaining the value of assets owned or managed by the company, or
- is in the public interest.

Interim receivers

The court can appoint a receiver, whether interlocutory or final, in any case in which it appears to the court that it is just and equitable to do so.\(^{43}\) The role of the interim receiver will be to preserve assets that are liable to dissipation, pending the outcome of a claim. Normally, the court need to be satisfied of three requirements for appointment of a receiver:

- there must be sufficient evidence to show a good, arguable case;
- there must be property to be preserved; and
- the claim must not be frivolous or vexatious.

The appointment of a receiver is often regarded as a remedy of last resort, and they are usually appointed \textit{ex parte} when the court is faced with allegations of fraud and immediate action is needed to prevent the court's orders from being rendered futile.

 Receivers by way of equitable execution

In addition to receivers appointed out of court by mortgagees or debenture holders, the court has the power to order the appointment of a receiver by way of equitable execution, a remedy commonly (but not invariably) sought by a judgment debtor to aid in the execution of a judgment debt.\(^{44}\)

ii Obtaining evidence

Options available

A number of options are available to parties seeking to obtain evidence in TCI. These include:

- \textit{Anton Piller} orders: a form of injunction requiring a respondent to allow an applicant's attorneys to enter its premises, to search for and remove evidence or property and to preserve it as evidence in the action pending trial;
- \textit{Norwich Pharmacal} orders: court orders compelling delivery from those involved in or associated with an alleged wrongdoing who are unlikely to be parties to any contemplated substantive action;
- \textit{Bankers Trust} orders: court orders similar to \textit{Norwich Pharmacal} orders but that require a bank to divulge otherwise confidential information regarding its customer's accounts.\(^{45}\)

The availability of this relief is potentially complicated in TCI by the statutory duties of confidentiality imposed under the Confidential Relationships Ordinance,\(^{46}\) which applies to confidential information with respect to business of a professional nature that arises in or is brought into TCI; and

\(^{43}\) Civil Procedure Ordinance (Cap 4.01), Section 9; see also Order 30 of the TCI RSC.

\(^{44}\) Order 51 of the Rules of the Supreme Court 2000.


\(^{46}\) Confidential Relationships Ordinance (Cap 16.14) Section 3.
letters of request (or letters rogatory): court-directed formal requests for evidence from a foreign court seeking the assistance of TCI courts in procuring evidence in TCI. There are a number of avenues under which this may be achieved, including through bilateral and multilateral treaties that the United Kingdom has entered into with other nations and extended to TCI, and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (in which TCI is included by virtue of the United Kingdom’s ratification).

**Disclosure in the course of proceedings**

TCI follows English procedure and practice prior to the CPR in England in respect of first-party disclosure. Documents may be withheld on the grounds of privilege – either litigation privilege (documents prepared for the dominant purpose of providing professional legal services in relation to actual or contemplated legal proceedings, or documents prepared for the dominant purpose of preparing for or conducting the proceedings) or legal professional privilege generally (documents prepared for the dominant purpose of giving the client legal advice). Privilege may be defeated by fraud if the otherwise privileged document is used in furtherance of the fraud to defeat privilege.

**Evidence at trial**

Evidence for use at trial is governed by the Evidence Ordinance and the Evidence (Special Provisions) Ordinance in relation to hearsay. Evidence is admissible that is ‘relevant’ (which distinguishes the test for admissibility from the test for disclosure). Evidence-in-chief is provided by way of witness statements that are exchanged pretrial. Parties do not normally take depositions of an adverse party’s witnesses before trial.

**IV FRAUD IN SPECIFIC CONTEXTS**

**i Banking and money laundering**

TCI has, in recent years, exerted considerable effort in bolstering its anti-money laundering and counterterrorism financing (AML/CFT) framework. The current AML/CFT framework consists of the Proceeds of Crime Ordinance (POCO), the Anti-Money Laundering and Prevention of Terrorist Financing Regulations 2010 and the Anti-Money Laundering and Prevention of Terrorist Financing Code 2011. The FSC has also issued guidance to various business sectors in respect of the AML/CFT framework.

In September 2015, the International Monetary Fund (IMF) published a Financial System Stability Assessment of TCI with a number of recommendations for the financial sector.

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47 Under the procedure pursuant to Order 70, Civil Rules 2000. A similar provision whereby the TCI Supreme Court may make a request for evidence to be taken by a foreign court is available pursuant to Order 39.

48 Cap 3.15.

49 The FSC has produced handbooks specifically for the sectors of high-value dealers, accountancy, real estate and legal.
services industry, including in relation to corporate governance, the functioning of the FSC and the regulatory framework.\textsuperscript{50} The FSC has confirmed in its plans and priorities for 2016/2017 that it is prioritising the IMF’s recommendations; in particular, that:

\begin{quote}
[O]n the supervisory front, over the next two years, the [FSC] will maintain its overall focus on transitioning to an assertive programme of risk-based supervision to strengthen the existing prudential infrastructure for supervision of banking and domestic insurance licensees, and continue its industry reviews of AML/CFT compliance. The [FSC] will also, in conjunction with other stakeholders, seek to prioritize strengthening of the legislative frameworks governing the insurance, trust and banking sectors.\textsuperscript{51}
\end{quote}

\textbf{Proceeds of crime law}

TCI’s anti-money laundering regime is set out primarily in POCO Part IV, Sections 115–131, which imposes criminal penalties, including imprisonment for up to 14 years on conviction on indictment.\textsuperscript{52} Offences under POCO include concealing, disguising, converting, transferring or removing criminal property from TCI,\textsuperscript{53} entering into, or becoming concerned in, an arrangement that the individual knows or suspects facilitates the acquisition, retention, use or control of criminal property;\textsuperscript{54} and acquiring, using, or having possession of criminal property.\textsuperscript{55}

Criminal conduct is conduct that constitutes an offence in TCI, or would constitute an offence in TCI if it occurred there.\textsuperscript{56} Property is deemed criminal property if it constitutes a person’s benefit from criminal conduct or if it represents such a benefit, in whole or in part and whether directly or indirectly, and the alleged offender knows or suspects that the property constitutes or represents such a benefit.\textsuperscript{57}

POCO also prohibits tainted gifts – namely, gifts made by a defendant of property – within the six years prior to the commencement of the earliest proceedings being instituted against the defendant for the current offence (if he or she is determined to have a criminal lifestyle, or when that determination is yet to be made)\textsuperscript{58} or since the date on which the earliest of the current offences was committed.\textsuperscript{59}

If an authorised disclosure is made to the FIA, this may provide a defence to the offences set out above.\textsuperscript{60}

\textbf{Anti-corruption law}

Offences relating to corruption, bribery and misappropriation of funds are governed by the Integrity Commission Ordinance\textsuperscript{61} and will soon also be covered by the Bribery Ordinance

\begin{thebibliography}{99}
\bibitem{50} International Monetary Fund, Turks and Caicos Islands Financial Sector Assessment Program, October 2015, p. 34.
\bibitem{52} Section 124 POCO.
\bibitem{53} Ibid.
\bibitem{54} Section 125 POCO.
\bibitem{55} Section 126 POCO.
\bibitem{56} Section 5(1) POCO.
\bibitem{57} Section 122 POCO.
\bibitem{58} Section 9(1)–(2) POCO.
\bibitem{59} Section 9(3) POCO.
\bibitem{60} Section 123 POCO.
\bibitem{61} Cap 1.09.
\end{thebibliography}
2017. The TCI Integrity Commission has broad powers to investigate such offences, including the power of arrest and – with the assistance of the courts – entry, search and delivery-up powers.

The Bribery Ordinance, which is intended to replace the common law offence of bribery and various offences contained in the Integrity Commission and the Elections Ordinances, combines these provisions into a single framework. The Ordinance covers bribery in both TCI and abroad, and creates several offences, including for:

a. offering, promising or giving an advantage to induce or reward improper performance;

b. requesting, agreeing to receive or accepting an advantage as an inducement or reward for improper performance;

c. bribery of a foreign public official; and

d. failure by a commercial organisation to prevent bribery.

The maximum penalty for these offences on indictment is a potentially unlimited fine or 10 years’ imprisonment, or both, and disqualification from holding public office for five years from the date of conviction.

ii Insolvency

The outgoing Companies Ordinance provides various statutory causes of action to liquidators of insolvency companies (but not the companies themselves), including claims in respect of:

a. avoidance of preference: any disposition made by an insolvent company in favour of a creditor with a view to giving that creditor a preference over others is invalid if made within three months prior to the commencement of liquidation; and

b. fraudulent trading: the court may declare that any past or present director, secretary, official or other liquidator, or any officer of the company, has been guilty of any misfeasance or breach of trust in relation to the company, and compel that person to contribute to the assets of the company by way of such compensation as the court thinks just.

Dennis Morrison’s report recommended that TCI enact a new insolvency statute based upon the BVI Insolvency Act 2003. A new Insolvency Ordinance is expected later in 2017 that is expected to closely follow the BVI Insolvency Act 2003. If this is the case then a whole range of statutory clawback provisions will be incorporated into TCI law.

Assuming that the Insolvency Ordinance is implemented in the same form as the draft bill and follows the BVI model, this will grant new statutory tools to clawback assets; these include the following.

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62 All comments in this work are based upon the Bribery Ordinance 2017 (not yet in force).
63 Integrity Commission Ordinance (Cap 1.09) Sections 28–30.
64 Cap 1.05.
65 Companies Ordinance Section 197.
66 Companies Ordinance Section 198.
**Misfeasance**

A director commits misfeasance if a company enters insolvent liquidation and the director has misapplied or retained or become accountable for any money or other asset of the company; or is guilty of any misfeasance or a breach of any fiduciary duty or other duty in relation to the company. The Supreme Court may order the director to repay, restore or account for any money or other asset (or any part of it) or pay compensation to the company in the amount, and interest at the rate, the court considers just.

**Insolvent trading**

A director will be liable for insolvent trading if the Supreme Court is satisfied that, at any time before the start of the company’s insolvent liquidation, the director knew, or ought to have concluded, that there was no reasonable prospect that the company would avoid going into insolvent liquidation. If a director engages in insolvent trading, the court may order the director to make a contribution to the company’s assets in any amount the court considers proper. The court cannot make an order if it is satisfied that the director took every step reasonably open to the director to minimise the loss to the company’s creditors. The facts that a director ought to know or determine, the conclusions that the director ought to reach and the steps reasonably open to the director that the director ought to take are those that would be known or determined, or reached or taken, by a reasonably diligent person having both the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as those carried out by that director in relation to the company; and general knowledge, skill and experience possessed by that director.

**Fraudulent trading**

A director will be liable for fraudulent trading if the Supreme Court is satisfied that, at any time before the start of the company’s insolvent liquidation, any business of the company had been carried on with the intention to defraud the company’s creditors or any other person or for any fraudulent purpose.

If a director commits fraudulent trading, the court may order the director to make a contribution to the company’s assets in any amount the court considers proper.

**iii Effect of fraud on evidentiary rules and legal privilege**

TCI law in this area largely mirrors English law. Legal privilege does not generally protect documents created to further a criminal or fraudulent purpose, or communications made in the course of procuring advice for the purpose of carrying out fraud (whether or not the legal practitioner was aware they were being used for that purpose); in such circumstances, legal advice privilege and litigation privilege may be lost. Legal advice obtained to defend a fraud claim would be subject to legal privilege.
V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims
TCI follows the traditional common law rules on conflicts and choice of law. A TCI court’s permission is required to serve civil claims against defendants outside the jurisdiction. The choice-of-law position also follows English common law, with matters of substantive law governed by the *lex causae* and matters of procedural law governed by the *lex fori*.

ii Collection of evidence in support of proceedings abroad

*International cooperation*
A number of international agreements concerning mutual legal assistance have been extended to TCI by virtue of its status as a British overseas territory. Requests for cooperation can be made under the US–UK and Cayman Islands Treaty on Mutual Assistance in Criminal Matters, the Vienna Convention and the UN Convention against Transnational Organised Crime. Various government agencies in TCI – for example, the FSC – have their own, separate bilateral and multilateral agreements with their counterparts in other jurisdictions, to share information and intelligence.

*Letters of request*
The court has jurisdiction to grant relief pursuant to letters of request from overseas courts (see above). This power is available in both civil and criminal proceedings. The court may grant such requests, in whole or in part, including when the request is for direct evidence that can be used in civil or criminal proceedings in the relevant foreign court.

*Norwich Pharmacal orders and Anton Piller orders*
*Norwich Pharmacal* relief is likely to be available in aid of foreign proceedings on the basis of the underlying rationale to this type of relief (i.e., the ascertaining of legal rights and those infringing them). The court may also grant *Anton Piller* orders in aid of foreign proceedings.

iii Seizure of assets or proceeds of fraud in support of the victim of fraud
The Mutual Legal Assistance (USA) Ordinance (MLAO) governs requests for assistance from US agencies. The MLAO provides a framework for handling requests made by the US agency to the central authority in TCI (the magistrate). Available assistance includes taking evidence from witnesses, executing search and seizure requests, and immobilising assets.

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68 Order 11, Rule 1, Civil Rules 2000.
70 The Evidence (Proceedings in Other Jurisdictions) (Turks and Caicos Islands) Order 1987 (UK SI 1266 of 1987).
71 TCI RSC, Order 70.
72 Cap 3.17.
73 Under the Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland in the Form to be Extended to the Turks and Caicos Islands, Relating to Mutual Legal Assistance in Criminal Matters (MLAT).
criminally obtained assets. As stated above, TCI is a member of a number of international conventions that may allow the seizure of property, equipment and other proceeds to support the international fight against organised crime.

iv Enforcement of judgments granted abroad in relation to fraud claims

On paper, the Overseas Judgments (Reciprocal Enforcement) Ordinance allows foreign judgments made in designated countries to be enforced in TCI. This Ordinance would provide parties with the ability to register overseas judgments when the foreign jurisdiction gives reciprocal treatment. However, while the Ordinance is in force, at the time of writing, no reciprocal countries have been designated – with the effect that no overseas judgment may currently be registered under the statutory framework.

Foreign judgments therefore fall to be enforced at common law. The TCI law position closely follows English law in that the court will recognise and enforce an in personam foreign judgment in circumstances in which it can be satisfied that the judgment was rendered by a court of competent jurisdiction; final and conclusive; and of such a nature that the TCI court is required to enforce it on principles of comity. Furthermore, the court must be satisfied that, as a matter of TCI law, the foreign court had personal jurisdiction over the defendant. This will be the case if the defendant:

a was ordinarily resident in the foreign country at the time the foreign proceedings were commenced;
b voluntarily submitted to the proceedings before the foreign court;
c appeared as a party in the proceedings before the foreign court (whether as a plaintiff or counterclaimant); or
d agreed to submit to the jurisdiction of the foreign court by contract or subsequent conduct.

v Fraud as a defence to enforcement of foreign judgments granted abroad

A foreign defendant may challenge an application to enforce the foreign judgment on the grounds that the judgment in question was obtained either by fraud on the part of the claimant, or fraud on the part of the foreign court pronouncing the judgment.

vi Enforcement abroad of judgments granted in the TCI

The UK Administration of Justice Act 1920 was extended in 1985 to cover TCI, thereby enabling enforcement in the United Kingdom of a TCI judgment by registration (i.e., of the TCI judgment) rather than requiring a separate action.

VI CURRENT DEVELOPMENTS

i Reform to Company law

TCI is undergoing the biggest reforms to its company law and associated regulatory regimes in a generation. The new Companies Ordinance 2017 has been passed and some is already in force with more following later in 2017. An Insolvency Ordinance is expected later this year, which is already referenced in the Companies Ordinance. A system to allow the immediate
sharing of beneficial ownership information between the BVI and other governments is expected to be announced later this year, while the relevant sections of the Companies Ordinance are in force.77

ii Beneficial ownership registry
A Register of Beneficial Owners of Companies was created by Section 156 of the Companies Ordinance 2017, and the FSC is currently undertaking the task of implementation of the register. Regulations pursuant to the new Companies Ordinance are yet to be published.

iii CFATF progress
TCI has expended considerable time and energy in improving its AML/CFT regime to meet the standards set by the CFATF. In 2015, the CFATF acknowledged that the TCI was making progress with its AML/CFT regime, but emphasised that there were still steps to be taken to ensure that TCI was wholly compliant.78 By 2016, TCI’s continued efforts had been rewarded by an acknowledgment in the CFATF’s June report that the Islands had ‘addressed the deficiencies noted in the Core and Key Recommendations’ in all areas previously highlighted and that AML/CFT standards had been raised ‘to a level that is comparable to at least [largely compliant]’ with the CFATF’s requirements.79

iv Contemplated changes to the costs regime
Currently, no costs-budgeting or costs-capping regime is in force in the TCI. Costs are ‘at large’ and generally subject to the assessment (taxation) process that occurs after the conclusion of the proceedings. There may, however, be changes ahead: comments on the draft Legal Profession Bill closed on 12 August and the Bill continues to propose that lawyers be allowed to charge on a contingency basis.80

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77 Sections 145–160 Companies Ordinance 2017.
80 Draft Legal Profession Bill 2016, Section 63 (2 April 2016).
Chapter 31

UNITED STATES

Steven K Davidson, Michael J Baratz, Jared R Butcher and Molly Bruder Fox

I OVERVIEW

The United States – and New York in particular – is a major financial centre, generating substantial investment capital. Many of the world’s largest banks, law firms and accounting firms maintain offices in New York and elsewhere in the United States. As a result, a host of international business and financial transactions touch the United States and fall within the jurisdiction of its courts.

The focus of this chapter is on fraud, but most of the transactions conducted in the United States are not fraudulent. Financial transactions – and the banks and others who facilitate them – are highly regulated by United States law and offer a reasonable level of transparency to participants. There are few barriers to transparency such as banking secrecy laws. Nevertheless, the sheer volume of transactions and the ready availability of funding create opportunities to defraud investors and third parties. In these cases, law enforcement authorities and courts are willing to assist victims.

Fraudulent conduct often violates United States laws and leads law enforcement authorities to launch investigations and assist recovery efforts. In particular, United States capital markets are highly regulated to prevent fraud and ensure the safety of investors. Victims, including those abroad, may also be able to bring civil lawsuits if the fraudulent conduct has a sufficient connection to the United States or its citizens.

The United States is a common law jurisdiction with a dual court system. Federal courts have a limited jurisdiction authorised by the Constitution and federal statute. Each of the 50 states, plus the national capital, the District of Columbia, also has its own courts of general jurisdiction. Both state and federal courts offer an independent and skilled judiciary, broad discovery and significant mechanisms for enforcing judgments. The common law governing fraud is generally a matter of state law, although it has been incorporated into many federal fraud statutes. Fraud claims are generally heard in state courts unless a federal law applies or the plaintiff can invoke federal court jurisdiction based on the ‘diverse’ residence of the parties.

United States courts will also assist foreign courts and arbitral tribunals if victims of fraud choose to pursue their claims elsewhere. Claimants in foreign cases will often obtain US discovery and provisional remedies that secure US assets pending the outcome of the foreign proceeding. Once a foreign judgment or arbitral award is rendered, United States’ courts rarely refuse to enforce it. Thus, victims of fraud – whether proceeding in the United States or another jurisdiction – should avail themselves of the remedies offered by the US legal system.

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II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Criminal remedies

The United States has myriad criminal laws against fraud. Law enforcement may investigate and bring civil or criminal actions against the perpetrators. Certain frauds involving areas such as securities, antitrust, banking or organised crime are subject to the jurisdiction of a specialised government agency.

A possible government investigation, however, may not result in a satisfying or timely resolution for fraud victims. Victims of fraud, therefore, should consider whether they have the resources to conduct their own investigation. Especially where a victim cannot effectively pursue a claim, it may be worth asking law enforcement to investigate. Many fraud investigations are commenced as the result of complaints by private citizens or independent investigators. Under appropriate circumstances, the opportunity exists for victims to leverage the considerable powers of the government to investigate wrongdoing and hold the perpetrators accountable.

Civil remedies

Racketeer Influenced and Corrupt Organizations Act (RICO)

RICO provides criminal and civil remedies for victims of organised crime and other criminal schemes. RICO claims must meet stringent technical requirements that are beyond the scope of this chapter. Assuming those requirements are met, however, RICO offers victims a chance to recover treble damages through private lawsuits.

Under RICO, defendants who engage in a pattern of racketeering activity or collection of unlawful debts, and who participate in an ‘enterprise’ that affects interstate or foreign commerce, can be held liable to those who suffer damage to their business or property. Racketeering activity includes a variety of violations of state and federal laws. An ‘enterprise’ includes any individual, partnership, corporation, association or other legal entity, and any group of individuals associated in fact although not a legal entity. To be liable, defendants must have one of four specific relationships to the enterprise:

a investing the proceeds of the pattern of racketeering activity into the enterprise;
b having an interest in, or control over, the enterprise through the pattern of racketeering activity;
c participating in the affairs of the enterprise through the pattern of racketeering activity; or
d conspiring to accomplish one of the first three activities.

Courts have held that RICO does not apply to conduct outside the United States. There is no bright-line test for determining whether a RICO claim is impermissibly extraterritorial, but courts will look for facts such as whether the claim involves US companies or individuals, and whether it involves conduct in the United States or directed at the United States. For example, the Second Circuit Court of Appeals has held that ‘RICO applies extraterritorially if,
and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate, meaning that when a RICO claim depends on violations of a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially, RICO will also apply to extraterritorial conduct. The US Supreme Court, however, reversed this case in *RJR Nabisco Inc v. The European Community*, holding that to bring a RICO civil action, a plaintiff must ‘allege and prove a domestic injury to business or property and [RICO] does not allow recovery for foreign injuries’. This case was brought by the European Community and 26 of its Member States against US tobacco companies alleging money laundering schemes in association with various international organised crime groups. Through the alleged scheme, drug traffickers smuggled narcotics into Europe and sold them for euros that were used to pay for large shipments of RJR cigarettes into Europe. While the Court found that these acts violated RICO, and that RICO’s predicate acts applied extraterritorially, the case had to be dismissed because the injury was not domestic. This is a new development in the law. It may be that, as the case law develops in the lower courts, there will be fact patterns that sufficiently allege domestic injury under circumstances where the foreign plaintiff is located abroad. As of now, foreign entities advancing a RICO theory will have to show they suffered an injury to their business or property in the United States.

**Fiduciary duty claims**

US law often imposes fiduciary duties on those – such as corporate directors, trustees, administrators and executors – who occupy a position of trust because of their power over the financial interests of another. Conduct violating that trust may form the basis of a claim for breach of fiduciary duty. However, fiduciary duties are not ordinarily imposed in typical business disputes, and parties to these disputes generally are not obligated to act in each other’s best interests. There must be special circumstances establishing a fiduciary relationship between the perpetrator and the victim.

A typical example of this type of claim arises in the event a company is defrauded by its executives and directors. Under United States law, corporate executives and directors owe a fiduciary duty that obligates them to act in the best interest of the company. They are subject to liability if they enrich themselves at the expense of shareholders.

**Common law fraud claims**

Fraud victims can resort to a variety of common law and statutory fraud claims. The requirements for these claims vary from state to state and statute to statute, but they generally apply where a victim relies to his or her detriment on another’s intentional misstatement or omission. Fraud claims do not require that the perpetrator have any special relationship with his or her victim, and can entitle a successful plaintiff to both compensatory and punitive damages.

Fraud victims often find that stolen assets have been dissipated by the time they have sufficient information to bring a claim. In such a circumstance, it often makes sense to bring

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7 136 S Ct 2990 (2016).
8 Id. at 27.
9 Restatement (Second) of Torts, Section 525.
claims against those who assist the perpetrators of the fraud. US courts recognise traditional claims for aiding and abetting fraud and conspiracy to commit fraud. Meanwhile, accomplices may be held liable to the same extent as the principal perpetrators.

In some cases, perpetrators will abuse the corporate form to commit fraud in the hope that the limited liability afforded to corporations under US law will defeat any claims against them directly, leaving victims with recourse only against the corporation itself, which may be insolvent. These circumstances call for application of alter ego and veil-piercing theories of liability. Alter ego allows courts to disregard corporate structures and find that separate legal entities should be treated as one and the same for purposes of particular claims. Similarly, veil piercing allows courts to use their equitable powers to hold an entity's owners liable for the obligations of the entity. The specific facts required to support this theory vary from state to state, but courts typically will consider whether ‘those in control of a corporation’ did not ‘treat the corporation as a distinct entity’ and, if they did not, whether the specific facts show fraud or misuse of the corporate form.\(^{10}\) Thus, a parent company or an individual owner who uses a company to commit fraud may be directly liable to the victims under appropriate circumstances.

These principles were applied in *Motorola Credit Corp v. Uzan*.\(^{11}\) A New York federal court found that Libananco Holdings (a Cypriot company) was the alter ego of members of the Uzan family in Turkey. The court ruled that any potential recovery by Libananco in a pending international arbitration against Turkey must be used to pay the victims of a fraud perpetrated by the Uzans. The court concluded that claimants Motorola and Nokia presented sufficient evidence to show that Libananco was a corporate alter ego of the Uzan family, and that Libananco's corporate veil could be pierced so as to permit Motorola and Nokia to enforce their fraud judgment against the Uzans. Thus, the court ordered Libananco to turn over any property to the claimants that could be used to make good on the fraud judgment, including any recovery in the arbitration.

**Fraudulent conveyances**

Where assets have been fraudulently transferred to thwart potential claims, the transfer may be set aside. Many states have enacted fraudulent transfer statutes that allow a creditor to reverse a transfer that was made for less-than-fair consideration or with an intent to thwart creditors.\(^{12}\) A showing of fraudulent transfer requires, among other elements, the presence of ‘badges of fraud’ often found in transactions designed to thwart creditors. Examples include transfers:

\(\begin{align*}
a & \quad \text{between related parties;} \\
b & \quad \text{for less than fair consideration;} \\
c & \quad \text{involving entities with inadequate capitalisation;} \\
d & \quad \text{involving sham entities;} \\
e & \quad \text{that result in the transferor becoming insolvent;} \\
f & \quad \text{where the transferor retains possession or control over the transferred assets; and} \\
g & \quad \text{in response to pending litigation or other claims.}\(^{13}\)
\end{align*}\)

\(^{10}\) *Mobil Oil Corp v. Linear Films Inc*, 718 F Supp 260, 269 (D Del 1989).

\(^{11}\) 739 F Supp 2d 636 (SDNY 2010).

\(^{12}\) NY Debtor & Creditor Law, Section 276.

\(^{13}\) *Silverman v. Actrade Capital Inc (In re Actrade Fin Techs Ltd)*, 337 BR 791, 809 (Bankr SDNY 2005); see also Uniform Fraudulent Transfers Act, Section 4(b).
**Other considerations**

The chances of successful recovery by victims of fraud are difficult to quantify because they depend on a variety of factors. Chances are best if the claims are based on documentary evidence and there are assets available in the United States to satisfy any judgment. US courts will focus heavily on emails and other documents as evidence of fraud. Without a ‘paper trail’ evidencing the fraud, courts may be sceptical of claims and may dismiss them at an early stage. Meanwhile, assets have often been squandered or hidden away such that nothing may be readily available to satisfy a judgment, even if the fraud claim succeeds. Fraud victims should consider whether the potential recovery merits the risks and expense of a lawsuit.

Other procedural considerations include timing and standing. The time frame within which a fraud claim may be commenced is dictated by statute, with the period in New York being six years after discovery of the fraud.¹⁴ Because fraud is often committed in a manner designed to avoid detection, the statutory time period may be extended depending on when the victim was on notice of the fraudulent conduct.¹⁵

Once on notice, any victim of fraud ordinarily has standing to bring a lawsuit, with one notable exception. Shareholders who believe that a company’s officers or directors have engaged in fraud may be required to ask the company to bring a claim. If the company declines to bring a claim against its officers and directors, then shareholders may be able to sue in their own right.¹⁶

Finally, the ‘American rule’ is that a litigant may not collect attorneys’ fees, even if a claim results in a favourable judgment. There may be times when fees are available – for example, because they are provided by an applicable agreement or statute – but these cases are the exception. Victims contemplating litigation in the United States should take into account that they are likely to have to pay their own legal fees and costs.

**Defences to fraud claims**

Defences to fraud claims vary with the facts of each case. Claimants should consider whether the perpetrators are subject to personal jurisdiction in the United States, and whether there is an alternative forum with a greater interest in the matter at issue. Personal jurisdiction in a US court may be established if the defendant has continuous and systematic contacts there – such as doing business in the United States – or if the defendant can be served with legal process while located in the United States.¹⁷ Alternatively, jurisdiction may be established if the fraudulent conduct either occurred in the United States or had a direct effect in the United States. This type of jurisdiction is governed by state ‘long-arm’ statutes, which can vary from state to state.¹⁸

A related defence is the doctrine of *forum non conveniens*, which holds that a court has discretion to dismiss a claim if there is an adequate alternative forum with a greater connection to the underlying misconduct.¹⁹ Courts consider a variety of factors in making this determination, with no single factor being dispositive. Like the issue of personal jurisdiction,

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¹⁴ NY Civ Prac L & R 213.
¹⁵ NY CPLR 203(g).
¹⁸ For example, NY CPLR 302.
Forum non conveniens may be raised at the outset of a lawsuit and, if successful, will result in early dismissal. Unlike personal jurisdiction, the doctrine is discretionary, making it harder to successfully appeal an unfavourable ruling.

Fraud claims also are subject to a heightened pleading standard. For example, federal courts require claimants to ‘state with particularity the circumstances constituting fraud’, including specific misstatements along with the speaker, time and place.20 This requirement may pose a problem for a victim of fraud who is unlikely to be informed of the details of the scheme. Nevertheless, failure to plead sufficient details will result in dismissal.

Of course, avoiding early dismissal is just the first step and does not prevent a defendant from establishing defences to the merits of the fraud claim – for example, that the conduct at issue was not fraudulent or was not the cause of the injury to the claimant, or that the claimant willingly participated in the scheme.

One substantive issue that can pose a significant obstacle to fraud claims is whether the claimant fulfilled the duty to investigate the circumstances alleged to constitute the fraud. If a fraudulent misrepresentation involves facts that are known to the victim, or that are obvious to the victim, courts may conclude that the victim's alleged reliance on the misrepresentation was not justified, thereby precluding recovery. The fraud laws vary across the 50 states on this issue. Some require victims to conduct a reasonable investigation whenever they are aware of facts indicating that the perpetrators’ representations may be false. Others provide that mere suspicious circumstances do not trigger a duty to investigate, and that a victim may claim justifiable reliance on the misrepresentation even if a reasonable investigation would have uncovered the fraud.

A related obstacle arises in the context of fraud claims based on concealment or non-disclosure of information. If a perpetrator intentionally conceals a material fact and prevents the victim from discovering it, then a fraud claim may be pursued. On the other hand, simply failing to disclose a material fact is actionable only if the perpetrator is under a duty to the victim to exercise reasonable care to disclose the fact in question.21

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

State law governs the procedure for securing assets, either before or after a judgment. Even if the litigation occurs in federal court, the federal rules provide that state law governs enforcement remedies.22 State laws are not uniform on these remedies. It is useful, however, to consider the example set by New York law because of New York's status as a financial centre and its robust anti-fraud and pro-judgment enforcement regime.

Pre-judgment restraints of assets

Pre-judgment attachment of assets

A claimant may seek pre-judgment attachment in state or federal court in aid of an impending litigation or arbitration even before any claims are filed. New York law expressly permits

20 Fed R Civ P 9(b).
21 Restatement (Second) of Torts, Section 551.
22 Fed R Civ P 64 & 69.
such an action, and in the federal courts, pre-judgment attachment is available to the extent permissible under state law. The substantive requirements for obtaining pre-judgment attachment are:

a. the existence of a cause of action;
b. a probability that the plaintiff will succeed on the merits;
c. that any award will be rendered ineffectual without relief; and

d. the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.

The additional requirements ordinarily necessary for injunctive relief – irreparable harm and the balance of the equities tipping in the applicant’s favour – are not required to obtain an attachment, if the attachment is sought in aid of a foreign arbitration. If successful, a pre-judgment attachment order can be used to freeze assets belonging to or controlled by the defendant, so long as the assets are within the jurisdictional reach of the court.

**Restraining notices**

A restraining notice, when available, such as under New York law, can be a powerful enforcement tool. In contrast with attachment and garnishment orders – which are directed at specific property – a restraining notice is similar to an injunction and broadly restrains assets or debts belonging to the judgment debtor. Upon service of a restraining notice on a third party, all a defendant’s property in the possession or thereafter coming into possession of the third party, as well as all debts then due or thereafter coming due, are subject to the restraining notice. A claimant can use this remedy in conjunction with either a pre-judgment attachment order or a final judgment for the purpose of restraining any assets held by the defendant or third parties.

**Garnishment**

Garnishment is a mechanism whereby a claimant can enforce the payment of a debt or claim by pursuing assets of the defendant in the possession of third parties. Garnishment is similar to attachment and is used where the assets to be attached are in the possession of someone other than the defendant. The use of garnishment may be particularly effective where a third party owes a debt to the defendant. The debt can be paid to the claimant, with the amount credited toward the outstanding balance of the unpaid claim or debt.

**Replevin**

Replevin is an infrequently used remedy that a claimant may invoke to recover specific property that has been wrongfully taken by the defendant. Unlike the more common remedy of money damages, replevin seeks the return of the property itself. This remedy may be appropriate in situations where a defendant has wrongfully taken unique, high-value property. To obtain

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23 See Fed R Civ P 64.
24 NY CPLR 6212 (a).
26 NY CPLR 5222.
replevin, a claimant must show that the defendant possesses (either actually or constructively) a specific and identifiable item of personal property in which the claimant has a superior right of possession, that right being both immediate and not contingent on a condition precedent.

Sequestration

Sequestration may be available where a corporation fails to satisfy a judgment against it. A claimant may commence an action and obtain a court order sequestering the corporation’s property and providing for distribution thereof. All the corporation’s creditors are entitled to share in the distribution. It should be noted that this remedy is only available to claimants with unsatisfied judgments upon proof that other judgment enforcement remedies have been exhausted.

Preliminary injunctions restraining assets

Injunctive relief in the United States is somewhat limited. Most notably, unlike in the United Kingdom and other jurisdictions, the Mareva injunction – a general, worldwide freezing order – has been expressly prohibited by a five-to-four decision of the United States Supreme Court in *Grupo Mexicano de Desarrollo SA v. Alliance Bond Fund Inc.* The Court held that a US federal court lacks the power to issue pre-judgment injunctions freezing a defendant’s assets to ensure their availability for a future judgment of money damages unless the claimant can demonstrate a legal or equitable interest in particular property. Thus, to obtain a pre-judgment restraint of a particular asset, a claimant must demonstrate some nexus between the subject funds or assets to be attached or otherwise restrained and the claim. Federal courts are without authority to issue any sort of worldwide freezing order restraining a defendant’s assets pending adjudication of a claim. As discussed immediately below, however, post-judgment remedies are far broader and do not require the same level of specificity; a general injunction against the judgment debtor and its assets will suffice.

Post-judgment enforcement

**Writ of execution**

A money judgment is enforced by a writ of execution, unless the court directs otherwise. A writ of execution is the process by which a court aids a judgment creditor by seizing a judgment debtor’s non-exempt property or assets, up to an amount sufficient to satisfy the judgment. The writ of execution orders a duly authorised officer of the state – a US marshal, a sheriff or other agent acting under the colour of law – to seize real or personal property, sell it and transfer the proceeds (fewer costs).

The writ is available against third parties who are in possession of a debtor’s assets. In this circumstance, the debtor must be notified of the creditor’s intent to proceed against the assets. A third party who violates a writ, or otherwise assists the debtor to avoid execution thereof, may be held liable to the creditor for the value of any assets that were dissipated or otherwise made unavailable for execution of the writ.

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28 See Fed R Civ P 69.
**Turnover orders**

Post-judgment, turnover orders are particularly useful tools because they can require a judgment debtor to transfer and turn over to the judgment creditor enough assets to satisfy a judgment regardless of where those assets are located, potentially including assets located outside the United States.\(^{29}\) Turnover orders can also be directed to third parties, such as banks, who possess the defendant’s assets, as long as those third parties are subject to the court’s jurisdiction.\(^{30}\) The New York Court of Appeals has held that a turnover order directed at a third party is effective against specific property, even if that property is located outside New York or the United States.\(^ {31}\) The precise reach of these orders remains an unresolved issue.

**Receivers**

If a judgment is obtained by the claimant and remains unpaid, a receiver may be appointed by the court to take charge of assets in which the defendant has an interest.\(^ {32}\) This remedy may be appropriate in situations where merely seizing and selling the assets is not workable. For example, a receiver may be appointed to manage distressed assets, collect rents due or arrange for liquidation of assets. In certain circumstances, a receiver can also be appointed before trial to preserve the status quo.

**Invoking a court’s equitable powers for post-judgment enforcement**

Even though a writ of execution is the primary means by which money judgments are enforced in the United States, federal courts have equitable powers to enforce judgments under ‘extraordinary circumstances’.\(^ {33}\) Such relief is not common, perhaps because, as one court has observed, the ordinary ‘difficulties in enforcing the judgment due to the location of the assets and the uncooperativeness of the judgment debtor are not the types of extraordinary circumstances that warrant departure from the general rule that money judgments are enforced by means of writs of execution rather than by resort to the contempt powers of the courts’.\(^ {34}\)

**ii Obtaining evidence**

US courts allow broad discovery in litigation. Information that is relevant or that may lead to the discovery of admissible evidence is ordinarily discoverable.\(^ {35}\) Moreover, discovery from third parties is available by subpoena, which can be issued by the claimant’s attorney, although third parties are not expected to provide the same broad discovery required of the parties themselves.

Assuming the claimant obtains a judgment, additional discovery, including third-party discovery, is permitted in aid of judgment enforcement.\(^ {36}\) A claimant may seek discovery from the defendant or third parties such as banks (where the defendant may keep cash and

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29 NY CPLR 5225.
30 NY CPLR 5225(b).
32 NY CPLR 5228.
33 See Motorola Credit Corp v. Uzan, 288 F Supp 2d 558, 561 (SDNY 2003).
34 Cordius Trust v. Kummerfeld, No. 99 Civ 3200 (DLC), 2009 WL 3416235 at *7 n8 (SDNY 23 October 2009) (Cote, J) (issuing a quitclaim deed for real property owned by the judgment debtors).
35 Fed R Civ P 26(b)(1).
36 See Fed R Civ P 69(a)(2); NY CPLR 5223.
other assets). If the defendant is an entity, discovery may include its owners and subsidiaries in an effort to locate assets (or information leading to assets) that could be executed against. Notably, the United States’ Supreme Court has held that sovereign immunity does not restrict the normal post-judgment discovery available in United States courts, meaning that broad discovery should be available to claimants even if their judgments involve foreign sovereigns.37

Objections to discovery include overbreadth, undue burden or expense, and privilege and privacy concerns. Privilege concerns allow the producing party to withhold documents and information entirely, subject to objection by the requesting party, which may be resolved by the court. Other objections can sometimes be resolved through the parties’ negotiation. If not, the requesting party may file a motion to compel production of the documents and information at issue.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Bank fraud and money laundering are crimes in the United States. Depending on the nature of the crime, an investigation could be commenced by federal authorities, state authorities, or both. On occasion, an investigation will result from information provided by a victim or concerned citizen. However, the investigation will be dictated by the law enforcement authorities, who have discretion to decline to file criminal charges. If charges are filed, the authorities may negotiate a plea bargain with the defendant, or they may proceed to a jury trial.

Criminal penalties are provided by statute and may be imposed by a court if the defendant is convicted of the crimes. Penalties may include fines, incarceration, probation and community service. They often do not involve any recovery for victims. If restitution to the victims is an available penalty, it still may not fully compensate the victims for their losses.

As a result, victims of banking fraud or money laundering may wish to consider bringing a civil lawsuit. Civil claims may proceed in conjunction with criminal charges or in the absence of charges. The burden of proof is lower in civil litigation, meaning that a civil claim may succeed even if criminal charges do not result in a conviction.

ii Insolvency

A wrongdoer’s insolvency can pose significant challenges to victims of fraud. An insolvent individual may be judgment-proof; an insolvent entity may enter bankruptcy. The bottom line is that the compensation available to victims may be minimal.

Bankruptcies ordinarily proceed in the US bankruptcy courts. A trustee is appointed and may pursue claims on behalf of creditors, including those with legal claims against the bankrupt party. Transfers of assets made 90 days prior to the bankruptcy filing may be set aside, and the clawback period may extend as far back as one year if the transfer involved an insider.38 Pro rata distributions of proceeds recovered by the trustee will be made according to the priority of the creditors’ claims. Secured creditors are paid first. Unsecured creditors, including judgment creditors, may be left with no recovery at all.

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38 11 USC Section 1147(b).
A special case of fiduciary duty arises where a victim of fraud obtains a judgment against an entity that becomes insolvent while the claim is pending or after the judgment has been obtained. In this circumstance, the law may impose a fiduciary duty in favour of the entity’s creditors, including judgment creditors. This means that the judgment creditor is to be treated with the same care as a shareholder and may have the same rights to recover against the entity’s management for violation of the fiduciary duty. Moreover, a creditor may be able to set aside and recover transfers of assets that either rendered the entity insolvent or occurred after the point of insolvency.

iii Arbitration

United States’ courts strongly favour arbitration. The Federal Arbitration Act (FAA) establishes ‘a liberal federal policy favouring arbitration agreements’. This liberal policy applies to enforcement of not only arbitration agreements, but also awards rendered pursuant to these agreements.

Before an award is even rendered, some jurisdictions – New York, for example – authorise provisional remedies to secure assets for satisfaction of the award. Discovery may also be authorised in aid of arbitration.

After the award is rendered, the FAA provides three avenues for enforcement as a judgment of a US court. For awards rendered in the United States, application for judgment may be made in the United States’ district court for the district where the arbitration was conducted.

For international arbitrations, confirmation of the award may be governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Assuming the Convention’s criteria are satisfied, a judgment may be obtained through a summary proceeding in any district court having jurisdiction over the defendant. This proceeding is not intended to involve complex factual determinations and is concerned only with the seven defences to confirmation under the Convention, as well as personal jurisdiction and venue issues. Recent guidance from the US Supreme Court has focused on the question of personal jurisdiction, and a claimant seeking to confirm an award should consider carefully which US court, if any, may have jurisdiction over the award debtor.

A third option is available if the award falls under the auspices of the Inter-American Convention on International Commercial Arbitration. The Inter-American Convention applies where the ‘majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States’. The arbitration must arise from a commercial

39 See *Geyer v. Ingersoll Publ’ls*, 621 A2d 784, 787 (Del Ch 1992) (‘Under Delaware law, creditors of an insolvent corporation are owed fiduciary duties’).
41 NY CPLR 7502.
42 9 USC, Section 9.
43 9 USC, Section 207.
44 See *Zeiler v. Deitsch*, 500 F3d 157, 169 (2d Cir 2007).
45 See *Sonera Holding BV v. Cukurova Holding AS*, 750 F3d 221, 225 (2d Cir 2014) (discussing *Daimler AG v. Bauman*, 134 S Ct 746 (2014), and reversing a judgment confirming an arbitral award because of lack of personal jurisdiction).
46 9 USC, Section 305.
relationship and must not involve only United States citizens.\textsuperscript{47} The arbitral award must be confirmed by a United States court to become a final and enforceable judgment. Confirmation is mandatory unless the court finds one of the seven grounds for refusal under the Convention.\textsuperscript{48} The court also may vacate or modify the award under the limited circumstances set out by the FAA.\textsuperscript{49}

One final note: arbitral award holders should be aware of a trend in US jurisprudence regarding the requirement of personal jurisdiction to enforce an award in US courts. In \textit{Daimler AG v. Bauman}, the US Supreme Court held that a defendant cannot be subject to general personal jurisdiction in a US court unless the defendant has such continuous contact with the forum that the defendant can be considered ‘at home’ there.\textsuperscript{50} This holding arguably makes it more difficult for a US court to assert personal jurisdiction, because the defendant may have substantial contacts in many places but is unlikely to be deemed ‘at home’ in all of them. Even a ‘substantial, continuous, and systematic course of business’ alone is insufficient to render a defendant at home in a forum.\textsuperscript{51} This principle has been applied by some courts in the context of actions to enforce arbitral awards. In \textit{Sonera Holding BV v. Cukurova Holding AS}, the claimant prevailed in an arbitration in Switzerland and brought an action to enforce the arbitral award in the Southern District of New York. The Second Circuit Court of Appeals dismissed the action, finding a lack of sufficient contacts to support personal jurisdiction.\textsuperscript{52}

The lesson is that a claimant who obtains a favourable arbitral award in a jurisdiction outside the United States should not assume that the award will be enforceable in an action against the defendant in a US court. A claimant should consider whether there is a specific connection between the underlying controversy and the US forum and, if not, whether the defendant has other contacts (or assets) within the preferred forum to provide another basis for jurisdiction. Ordinarily, jurisdiction will be found if the defendant has assets within the jurisdiction of the US court.

\textbf{iv Fraud's effect on evidentiary rules and legal privilege}

US rules of evidence and procedure recognise a powerful attorney–client privilege that shields legal communications from discovery. This privilege can sometimes hamper a claimant’s ability to prove a claim because it prevents discovery of some documents and communications that contain important information.

The privilege is not inviolable, however, and fraud can nullify privilege in some cases. Privilege may be waived where the perpetrator uses counsel’s advice or services to accomplish a crime or fraud. This is true even if counsel does not know of the fraud.

In \textit{United States v. Zolin}, the US Supreme Court set out the process for courts to follow when evaluating the fraud exception to privilege.\textsuperscript{53} The claimant must make a \textit{prima facie} showing of fraud, which the Court described as ‘a factual basis adequate to support a good faith belief by a reasonable person . . . that in camera review of the materials may reveal

\begin{itemize}
  \item \textsuperscript{47} 9 USC Section 202.
  \item \textsuperscript{48} See \textit{Banco de Seguros del Estado v. Mutual Marine Offices Inc}, 257 F Supp 2d 681, 686 (SDNY 2003).
  \item \textsuperscript{49} Id.; see also 9 USC, Section 10(a) (as to \textit{vacatur}) and Section 11 (as to modification).
  \item \textsuperscript{50} 134 S Cr 746 (2014).
  \item \textsuperscript{51} Id. at 761.
  \item \textsuperscript{52} 750 F3d 221 (2d Cir 2014).
  \item \textsuperscript{53} 491 US 554 (1989).
\end{itemize}
evidence to establish the claim that the crime-fraud exception applies'. If this showing is made, the court then has discretion to review in camera the privileged documents and to determine whether the privilege should be nullified and what materials should be produced to the claimant.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

Choice of law in fraud claims can be complicated, especially where the conduct at issue occurred in multiple jurisdictions. In the United States, the issue is governed by state law and the applicable legal principles can vary significantly from state to state.

The first question is whether there is a contract or other document governing the relationship between the parties and, if so, whether it contains a choice-of-law provision. US courts will enforce contractual choice-of-law clauses, and may interpret those clauses to encompass tort claims as well as contract claims. This is often the case when the parties have engaged in a commercial transaction that in turn gives rise to the fraud, and the applicable agreements contain a broad provision controlling all claims arising from or related to the parties’ business dealings. Victims of fraud should consider whether they have entered into any contracts containing choice-of-law clauses.

The particular language is important. A provision stating that a contract is ‘governed by’ a certain state’s law may not be enough to encompass fraud claims and other tort claims. By contrast, in *Turtur v. Rothschild Registry International Inc*, it was held that a fraud claim was subject to a contractual choice-of-law provision because the parties had agreed to apply New York law to ‘any controversy or claim arising out of or relating to’ their contract.

In the absence of a contractual choice of law, a court will identify the jurisdictions that have an interest in the matter at issue. The first question is whether the result will differ depending on which jurisdiction's law applies. In the absence of a different result, if there is no conflict, there will be no need to perform a choice-of-law analysis. If a conflict is found, a court will apply the conflict-of-laws principles of the jurisdiction where the court is located. Several different governing principles have been applied to fraud claims in this situation. Currently, the majority view is that the law to be applied is the law of the jurisdiction with the most significant relationship to the fraud claim, as determined by analysis of all the facts and circumstances surrounding the case. In this analysis, ‘the significant contacts are, almost exclusively, the parties’ domiciles and the locus of the tort’.

ii Collection of evidence in support of proceedings abroad

US federal district courts have the power to order discovery for use in a foreign legal proceeding. The district court must find that the party from whom discovery is sought

54 Id. at 572.
56 26 F3d 304, 309-10 (2d Cir 1994).
57 Restatement (Second) of the Law of Conflicts, Section 148.
59 28 USC Section 1782.
can be found in the district where the application is made; the discovery will be used in a proceeding before a foreign or international tribunal; and the party applying for discovery is an interested person in the foreign proceeding.\textsuperscript{60}

A person is ‘found’ wherever he or she maintains a residence, even if only temporary or part-time; or wherever he or she is personally served with the discovery requests. Entities are ‘found’ wherever they maintain corporate headquarters or conduct continuous activities.\textsuperscript{61}

Proceedings ‘before a foreign or international tribunal’ include proceedings in foreign courts, as well as administrative proceedings and government investigations.\textsuperscript{62} The proceeding must be within reasonable contemplation but is not required to be ‘pending’ or ‘imminent’.\textsuperscript{63} There is some dispute whether a private foreign arbitration qualifies as a proceeding for which discovery may be ordered. Recently, it was settled that Section 1782 authorises discovery for use in a foreign criminal investigation conducted by a foreign investigating magistrate.\textsuperscript{64} The discovery was requested for use in a Swiss criminal investigation, which the court found to be ‘exactly the type of proceeding’ that Section 1782 was intended to reach.\textsuperscript{65}

The final requirement of an ‘interested person’ is a term of art that includes litigants, investigating magistrates, administrative and arbitral tribunals, quasi-judicial agencies, as well as conventional civil, commercial, criminal and administrative courts.\textsuperscript{66}

Discovery under Section 1782 includes both deposition testimony and document production.\textsuperscript{67} It may be obtained by first filing an application and supporting memorandum and affidavit with the federal district court (or courts) where the subjects of the discovery are located. If the application is granted, the applicant may serve requests for documents and depositions. A federal district court may allow broad discovery, and the fact that the discovery may be broader than the discovery authorised by the foreign forum – or may not be admissible evidence in the foreign forum – is typically not relevant. The ultimate decision whether to order discovery is within the discretion of the federal district court.\textsuperscript{68}

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

In contrast to their broad authority to order discovery, United States’ courts have a more limited ability to secure assets or proceeds of fraud in aid of a foreign proceeding. If a defendant is subject to personal jurisdiction, pre-judgment remedies will then be available in support of the litigation. However, it is not always clear whether an attachment may be issued in aid of a foreign lawsuit. Some state attachment statutes can be read to permit this, but the case law on this issue is not well developed.

In the context of arbitration, by contrast, some states explicitly allow attachments in aid of foreign arbitrations, New York being one of them.\textsuperscript{69} In the matter of \textit{Mobil Cerro Negro Ltd v. PDVSA Cerro Negro SA}, for example, the claimant, a subsidiary of ExxonMobil,
successfully obtained a pre-award attachment of more than US$300 million in New York bank accounts, pending resolution of an arbitration before the International Chamber of Commerce seeking compensation from the government of Venezuela and its state-owned oil company for the illegal expropriation of the claimant’s interest in a joint venture to exploit oil reserves in Venezuela’s Orinoco Belt. This is just one example of the willingness of US courts to freeze assets in aid of arbitration.

iv Enforcement of judgments granted abroad in relation to fraud claims

US courts take a liberal approach in recognising and enforcing foreign judgments. The judgment debtor, however, does have some ability to challenge a foreign judgment. Recognition and enforcement of foreign judgments is a matter of comity and is governed by state law. Some states have codified the process, generally following some version of the Uniform Enforcement of Foreign Judgments Act. Others rely on the common law, which is described in *Hilton v. Guyot*,71 and the Restatement of Foreign Relations Law Sections 481 and 482.

Ordinarily, the foreign judgment to be recognised originates from a civil proceeding, but it also may be possible for foreign criminal court judgments to be recognised and enforced to the extent they award compensation for actual damages suffered. In a matter of first impression, one New York appellate court held that ‘the courts of this state must recognize a foreign country judgment issued by a [Czech] criminal court awarding a sum of money as compensation for damages sustained by the victim of a fraudulent scheme’.72 The court reasoned that the judgment was not an unenforceable penalty because the purpose was ‘to compensate the victim for actual damages’.73 Thus, the court allowed the victim to attach the judgment debtor’s bank account funds located in New York.

The recognition process should be distinguished from the enforcement process. Most courts require a separate action to recognise the judgment before it may be enforced. The judgment must be final – it must conclusively resolve the dispute between the parties. The court in which recognition is sought must have jurisdiction either over the judgment debtor’s assets or over the judgment debtor.74 Additional mandatory grounds for refusing to recognise a foreign judgment are where the foreign court did not afford basic due process of law to the defendant; where the foreign court lacked jurisdiction over the defendant or the property at issue; or where the foreign court lacked subject matter jurisdiction over the dispute.

US courts recognise several discretionary reasons to refuse enforcement of foreign judgments. Fraud is one of them. Typically, the fraud must be ‘extrinsic fraud’ such that the judgment debtor was prevented from adequately presenting its case to the foreign court. This could occur, for example, where the judgment creditor withheld evidence from the foreign court or the court was corrupt.

70 See *Order Confirming Attachment, Mobil Cerro Negro Ltd v. PDVSA Cerro Negro SA*, No. 07 Civ 11590 (DAB) (SDNY 3 January 2008). The authors of this chapter were counsel of record for the claimant in this action.
71 159 US 113 (1895).
73 Id. at 243.
74 The precise requirements vary from state to state and some courts may require personal jurisdiction over the judgment debtor as a prerequisite to recognition.
A US court ordinarily will not refuse to enforce a foreign judgment on the basis of ‘intrinsic fraud’, including the veracity of testimony and the authenticity of documents. These matters are dealt with by the foreign court and are not subject to re-examination by US courts.

If successful, a recognised judgment becomes a local judgment enforceable under local law and entitled to full faith and credit in other courts within the United States. As such, the judgment creditor may invoke any enforcement remedies available under local law, assuming that assets are within the jurisdiction of the court. Presumably, if assets or proceeds of fraud are not located within the United States, there would be little reason to undertake the process of recognising the foreign judgment there.

v Hague Convention

The Hague Convention of 30 June 2005 on Choice of Court Agreements (Convention) may make it easier to enforce judgments across multiple jurisdictions. The Convention, which entered into force on 1 October 2015, allows international parties to select a court forum in an agreement (via a forum selection clause or ‘choice of court’) to resolve their dispute, and further provides that the parties’ choice must be respected by all other applicable courts. Moreover, Article 8 of the Convention requires any judgment entered in that chosen court to be recognised and enforced by all other courts in countries that are members of the Convention, with only very limited grounds for objection. Currently, the Convention is only effective between the European Union, Mexico and Singapore; the United States and Ukraine have signed (but not ratified) it and other countries may sign on.

If a significant number of countries join, selecting a court forum for the resolution of commercial disputes could become more appealing in light of some of the benefits the Convention provides – namely, access to more robust interim measures and discovery procedures that courts often offer, while securing a level of certainty that the subsequent judgment will be enforceable across multiple jurisdictions. This is particularly true for the United States, which has not previously been a member of any treaty regarding the enforcement of court judgments. It remains to be seen whether the Convention will achieve success and be ratified by additional countries.

VI CURRENT DEVELOPMENTS

i Enforcement of ICSID Awards in the United States

In Mobil Cerro Negro Ltd v. Venezuela, the Second Circuit reversed an uninterrupted line of Southern District of New York decisions that had allowed investors to obtain prompt ex parte recognition of ICSID awards as judgments.75 The ex parte procedure had made New York a favourable forum for recognising ICSID awards against foreign sovereigns.

The Second Circuit held, however, that the Foreign Sovereign Immunities Act (FSIA), which was passed in 1976, is the only means by which to obtain jurisdiction over a foreign sovereign. According to the Court, notwithstanding the fact that the ICSID Convention (which entered into force on 14 October 1966) requires automatic enforcement of awards,

75 Steptoe & Johnson LLP, led by Steven Davidson (one of the authors of this chapter), represented the Mobil Cerro Negro entities (ExxonMobil) in the Southern District of New York and before the Court of Appeals for the Second Circuit.
any investor who wishes to enforce an ICSID award in a New York court must commence a new action and follow the same procedures required by the FSIA for serving process on the foreign sovereign before a judgment can be entered.

ExxonMobil had argued that the ICSID treaty and the statute Congress enacted to implement it, 22 USC Section 1650a (1966), predated the FSIA and continued independently to provide jurisdiction to enforce ICSID awards. The FSIA contains an express carve-out for ‘existing international agreements’, which ExxonMobil argued applied to the ICSID Convention. Though the Second Circuit stated that ‘the question is not free from doubt’, it ultimately ruled that under *Argentine Republic v. Amerada Hess Shipping Corp*, 488 US 428, 442 (1989), the carve-out only ‘applies when international agreements expressly conflict with the immunity provisions of the FSIA’, and that the ICSID Convention does not raise such an express conflict. ExxonMobil argued that the ICSID treaty contemplates summary, virtually automatic recognition with no substantive defences, a process in express conflict with the ‘plenary proceeding’ required by the Second Circuit under the FSIA, but that argument did not carry the day.

While rejecting the argument that Section 1650a furnishes an independent jurisdictional basis for enforcing ICSID awards against foreign sovereigns, the Second Circuit interpreted Section 1650a to require that ICSID awards be enforced through a plenary action on the award in US district court. The court found this requirement in Section 1650a(a)’s requirement that an ICSID award’s pecuniary obligations ‘shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a [state court]’. The court rejected ExxonMobil’s argument that the ‘as if’ clause’s reference to final state-court judgments simply clarified the statute’s reference to the ‘full faith and credit’ required under Article IV, Section 1 of the Constitution, and instead interpreted the ‘as if’ clause to require that ICSID awards be ‘enforced’ in the same manner as state-court judgments in federal court, namely, through a new action on the judgment as a debt. The court turned away ExxonMobil’s argument, and the district court’s conclusion, that such a rare, cumbersome, and resource-consuming procedure was at odds with the ICSID Convention’s contemplation of summary recognition of awards, and it disallowed the district court’s previously common use of New York state judgment-enforcement law, which allows for *ex parte* recognition of other state court judgments was appropriate.

The United States government filed an amicus brief siding with Venezuela. Ultimately, the Second Circuit agreed with the United States and Venezuela and ruled against the investor-creditor.

The Second Circuit also did not reach the issue of post-award interest. The SDNY had entered a judgment applying the post-award rate set by the ICSID panel rather than applying the federal statutory post-judgment rate. The issue was fully presented to the Second Circuit but the panel demurred. The proper interest rate remains an issue for further litigation. ExxonMobil took the position that interest is a pecuniary obligation of the award and thus must be given full faith and credit in US courts as required by the ICSID statute. Venezuela argued that the federal statutory post-judgment rate applied. On this issue, the United States supported ExxonMobil’s position.

As a practical matter, we believe the Second Circuit’s decision disadvantages investors who, after participating in lengthy arbitration proceedings and, in many cases, years of post-award proceedings, must then commence a plenary action with service of process in the United States to enforce an award. For example, serving process on a foreign state pursuant to the FSIA can often take three to six months or longer. Once service is accomplished, the
foreign state will have 60 days to respond even though it has no substantive defences. In sum, the process for judgment-creditors will take longer—potentially much longer—than what the ICSID treaty contemplated, which is a disadvantage when, as is often the case, there are other creditors competing for priority to execute against a limited pool of assets.

The Second Circuit’s ruling overturns what had been a growing and stable body of Southern District precedent governing enforcement of ICSID awards. In light of the ruling, we believe award-creditors should consider whether New York remains a favourable forum to obtain their judgment. While New York provides robust remedies to creditors and can often be the location of non-immune, sovereign assets, award-creditors may want to proceed in Washington, DC first. Under the FSIA, Washington, DC is a default venue against foreign sovereigns, and proceeding there would be free from any venue challenge. Alternatively, investors may be wise to consider availing themselves of the immediate recognition procedures in the courts of other countries, such as the United Kingdom or France, which offer well-established \textit{ex parte} procedures to ICSID award creditors. In this respect, the Second Circuit’s decision is at odds with the accepted practices of other ICSID Member States, which more closely embody the original intent and understanding of the ICSID Convention.

\textbf{ii} Separate entity rule

The ‘separate entity’ rule is a feature of New York law that operates to prevent foreign branches of banks in New York from being subject to enforcement proceedings and orders in New York courts. Under the rule, each branch of a bank is treated as a separate entity in no way responsible for accounts at other branches of the same bank. The practical impact of the rule is to prevent a claimant from attaching assets held at bank branches outside the United States simply by serving a restraining notice or commencing other enforcement proceedings against the bank’s New York branch.

The continued force of the separate entity doctrine as applied to monetary transfers within banks is somewhat in question after a recent decision in \textit{Koehler v. Bank of Bermuda Ltd.}\textsuperscript{76} In \textit{Koehler}, the New York Court of Appeals ruled that a ‘court sitting in New York that has personal jurisdiction over a garnishee bank can order that bank to produce stock certificates located outside of New York’.\textsuperscript{77} However, the Court’s inquiry in \textit{Koehler} was limited to tangible property, such as stock certificates, and did not consider the separate entity rule or turnover orders directed at cash in a bank account.

Application of \textit{Koehler} resulted in a split among New York state and federal courts, with some reaffirming the separate entity rule and others casting further doubt on its viability. In \textit{Ayyash v. Koleilat},\textsuperscript{78} the claimant won a judgment in a Lebanese court for fraud related to the collapse of a Lebanese bank. After registering the judgment in New York, he sought to discover and freeze the judgment debtor’s assets on deposit with various banks that had branches or subsidiaries in New York. He served subpoenas and restraining notices that purported to apply to any branch or office maintained in a foreign country. After objection by the banks, the state trial court in Manhattan denied the claimant’s request for asset discovery and reaffirmed the separate entity rule. On appeal, however, the appellate division chose to

\textsuperscript{76} 12 NY3d 533, 883 NYS2d 763 (2009).
\textsuperscript{77} Id. at 541.
\textsuperscript{78} 38 Misc 3D 916 (NY Sup Ct 2012).
affirm without invoking the separate entity rule, reasoning that ‘denying the enforcement procedures sought by plaintiff’ was proper because ‘they would likely cause great annoyance and expense’ and because of ‘principles of international comity’.79

By contrast, in Amaprop Ltd v. Indiabulls Financial Services Ltd,80 the federal district court in Manhattan held that a restraining notice served on ICICI Bank was valid and enforceable with respect to all funds and property of the judgment debtor held anywhere in the world, and directed the transfer of the assets to ICICI Bank’s New York branch for turnover to the judgment creditor. The decision was appealed to the Second Circuit Court of Appeals, but the parties settled before an appellate decision was issued. In addition, in Hamid v. Habib Bank Ltd, the Chief Judge of the Southern District of New York held that the separate entity doctrine continues to apply, but certified the matter for interlocutory appeal to the Second Circuit.81 The appeal was dismissed for lack of prosecution.82

The issue was addressed again in the long-running dispute between Motorola and Nokia on the one hand, and the Uzan family on the other. In that case, a New York federal court ruled that the separate entity doctrine prevented a restraining order from being effective against deposits held at a foreign branch of a bank doing business in New York.83 The court ordered release of the restraint but stayed its order to allow the claimants to appeal, which they did, and the Second Circuit Court of Appeals certified the question to the New York Court of Appeals to resolve whether the separate entity rule precludes a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a debtor’s assets held in foreign branches of the bank.

In a five-to-two decision in Motorola Credit Corp v. Standard Chartered Bank, the New York Court of Appeals upheld the ‘separate entity’ rule as a well-established feature of New York common law, noting the benefit to financial institutions and the need to mitigate ‘[t]he risk of competing claims and the possibility of double liability in separate jurisdictions’.84 The dissent offered a markedly different perspective, opining that ‘today’s holding is a deviation from current public policy regarding the responsibilities of banks and a step in the wrong direction’, and calling the decision a boon to recalcitrant debtors who flout New York judgments at the expense of ‘the rights of judgment creditors to enforce their judgments’.85

The Motorola decision presents challenges and opportunities for victims of fraud who obtain judgments against the perpetrators. Those who come to New York for its connections to the international banking system and creditor-friendly remedies will find their efforts to be more complicated, at least to the extent that they pursue assets held by banks. On the other hand, the Court did not overrule the Koehler decision, thus preserving the ability of a judgment creditor to reach assets outside New York, provided that the garnishee is properly subject to jurisdiction in New York.

The Motorola dissent is not the first to criticise the separate entity rule as being out of date. In January 2011, the New York Advisory Committee on Civil Practice recommended

80 No. 10-cv-1853 (SDNY 21 February 2012).
83 See Motorola Credit Corp v. Uzan, No. 02-cv-666 (SDNY 1 August 2013).
84 24 NY3d 149, 162 (NY 2014).
85 Id. at 164.
that the rule be repealed so that service of levies, restraining notices or orders of attachment upon a New York bank branch would apply to any account held by the bank anywhere. The report reasoned that:

[T]he now ubiquitous use of computer networks that give all branch offices of a financial institution instantaneous access to central data banks makes the limitation of the separate entity rule obsolete and its continued existence unnecessarily complicates and limits enforcement of judgments and attachments without any mitigating benefit to concepts of fairness or the functioning of the civil justice system.

Of course, banks are hardly the only entities that do business both in the United States and abroad. Where such an entity is subject to United States jurisdiction (because it does business there) and holds assets or proceeds acquired by fraud, the argument can be made for extending the judicial power to reach those assets, regardless of where they are located.

### iii Correspondent banks

Another recurring issue is financial institutions’ handling of debt service payments made by a debtor that owes unsatisfied judgments. Debt service payments by the judgment debtor are attachable at the originating bank, but the bank may be located in a jurisdiction that lacks robust laws facilitating the enforcement of judgments. Meanwhile, there is a good chance that one of the other banks involved – the correspondent bank or the beneficiary bank – may be located within a more creditor-friendly jurisdiction.

For example, under New York law, funds transferred to a correspondent bank may be attachable. The correspondent bank may elect to either freeze the funds or complete the transaction – either way, the bank is not liable to the judgment creditor or the judgment debtor for any claim relating to its decision to freeze – or not to freeze – the funds. A correspondent bank located in a creditor-friendly jurisdiction may offer an improved opportunity for a claimant to enforce an unsatisfied judgment against a debtor’s funds.

Once the debtor’s funds reach the beneficiary bank, they are unlikely to be attachable. However, one court in the Southern District of New York recently considered issuing an injunction to prevent a beneficiary bank from accepting the funds. The case settled before the issue was resolved. Thus, it remains to be seen how the courts will decide this issue.

### iv Sovereign immunity from post-judgment discovery

On 16 June 2014, the United States’ Supreme Court issued a pivotal ruling that makes it easier for judgment creditors to obtain discovery of assets held by foreign sovereigns. In *Republic of Argentina v. NML Capital Ltd*, the Court held that the Foreign Sovereign Immunities Act (FSIA) does not immunise a foreign sovereign judgment debtor from post-judgment discovery of information concerning its extraterritorial assets. The Court made clear that ‘execution immunity’ does not protect a sovereign from discovery – instead, only after discovery should a district court determine whether any assets are immune. Thus, the judgment creditor was allowed to pursue broad, worldwide discovery in aid of execution.

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86 See *Palestine Monetary Auth v. Strachman*, 62 AD3d 213, 873 NYS2d 281 (1st Dep’t 2009).
The case arose out of efforts by creditors of Argentina to collect on bonds on which Argentina had defaulted in 2001. Although most bondholders agreed to exchange their bonds for restructured debt after Argentina’s 2001 default, several hedge funds bought up defaulted bonds and chose to pursue collection remedies in New York rather than participate in the exchange. The respondent, NML Capital, prevailed in 11 debt-collection actions in the US District Court for the Southern District of New York. It then sought global discovery of Argentina’s assets by serving subpoenas on non-party banks, and the district court granted a motion to compel. The US Court of Appeals for the Second Circuit held that granting the motion to compel did not violate the FSIA. The Supreme Court affirmed, ruling that the FSIA does not immunise a foreign-sovereign judgment debtor from post-judgment discovery of information concerning extraterritorial assets. The Supreme Court reasoned that the FSIA has no ‘provision forbidding or limiting discovery in aid of execution of a foreign sovereign judgment debtor’s assets’.88

In a lone dissent, Justice Ginsburg argued that the majority’s decision was overbroad, essentially authorising US courts to become clearing houses for information about any and all property held by a foreign sovereign abroad.89 The dissent would draw the line of proper discovery at the foreign sovereign’s property used for commercial activities in the United States or abroad. Notably, however, even the dissent’s formulation of the rule would empower a US court to authorise worldwide asset discovery.

At a minimum, the decision clears the path for creditors to seek asset discovery for purposes of collecting on debts owed by foreign sovereigns. However, the Court’s reasoning may have a broader impact on the interpretation of the FSIA. The Court held that the FSIA ‘comprehensive[ly]’ sets out the scope of foreign sovereign immunity and that ‘any sort of immunity defence made by a foreign sovereign in an American court must stand on the Act’s text’.90 Thus, the decision can be understood to reject implied extensions of immunity or interpretations of the FSIA that would expand immunity beyond the strict language of the text. For example, the Court rejected Argentina’s effort to invoke a supposed pre-existing common law immunity because it is ‘obvious that the terms of Section 1609 execution immunity are narrower than the supposed [common-law execution-immunity] rule’.91

Again on 16 June, the Court denied Argentina’s petition for certiorari in a related case, NML Capital Ltd v. Republic of Argentina, where the lower courts had issued pari passu injunctions requiring Argentina to make rateable payments to holders of its defaulted bonds if it also made payments to holders of its restructured bonds. The denial of certiorari leaves in place the pro-judgment creditor decision of the Second Circuit Court of Appeals, which rejected the argument that the FSIA bars injunctive relief under these circumstances. The case arose out of an attempt by Argentina to pay only the bondholders who had agreed to the restructuring of their bonds, thereby ensuring that the bondholders who elected to sue Argentina would continue to receive no payment. The Second Circuit ruled that Argentina had violated a contractual promise to treat all bondholders equally, and that injunctive relief was, therefore, appropriately granted by the district court.

88 Slip Op at 8.
89 Id. at 1 (Ginsburg, J, dissenting).
90 Id. at 6–7.
91 Id. at 9.
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Matt Latella is a veteran in Baker McKenzie’s litigation practice group. A trial lawyer entering his 20th year with the firm, Mr Latella has a wealth of experience recovering assets in fraud matters, regardless of where the funds are located. He has deep expertise with matters involving Mareva injunctions. While on secondment to the firm’s London office, he focused on multi-jurisdictional fraud litigation and ‘trust-busting’ asset tracing proceedings in multiple offshore jurisdictions, including in appeal proceedings before the UK Judicial Committee of the Privy Council. Over the years, he has handled many complex commercial disputes, resulting in the successful recovery of many millions of dollars. In matters where the preservation of evidence held by adverse parties was at risk, he has obtained and overseen the execution of ex parte Anton Piller orders, allowing the evidence to be seized and preserved. Mr Latella has litigated fraud matters at all levels of court, including the Ontario Court of Appeal and the Supreme Court of Canada, representing a wide range of clients from large multinational Fortune 500 companies and global financial institutions to small businesses and individuals.

RONGHUA (ANDY) LIAO
Han Kun Law Offices
Ronghua (Andy) Liao is a partner in the dispute resolution practice of Han Kun Law Offices. He has served in private practice for more than 16 years, with a career path from international law firms to leading Chinese law firms. His practice focuses on domestic and international financial disputes, cross-border investment and international trade disputes and cross-border asset tracing and recovery, including enforcement of foreign court judgments or arbitration awards in China. Through his clear thinking and forward-looking analysis, he is skilled in advising on both overall planning and detail-oriented strategies in commercial dispute resolution matters. He is dedicated to protecting his clients’ interests to the greatest extent, by means of his deep legal knowledge and resourceful connections.
EDUARDO LOBATÓN GUZMÁN

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Eduardo Lobatón Guzmán is an associate at Hogan Lovells. He joined the firm in March 2017 and focuses his practice on commercial arbitration and civil and commercial litigation. He is also involved in antitrust litigation. He has advised clients in the insurance, food, construction and automotive industries.

Eduardo graduated top of his class and with an honourable mention for excellence from Monterrey Institute of Technology and Higher Education (ITESM). He also studied diverse aspects of international law in London and obtained his certificate in transnational law from Georgetown Law at the Center of Transnational Legal Studies London. Eduardo’s academic background includes the captaincy of his university’s international arbitration team for two consecutive years and obtaining an honourable mention for his performance in the competition. He also received the Ceneval Award for Excellence in Performance in the law degree exam.

Finally, Eduardo’s practice also extends to academia. He is currently a professor of civil law at his alma mater, ITESM, he previously served as head coach for the Georgetown Center of Transnational Legal Studies’ team in the most prestigious international arbitration competition, and he currently serves as head coach for ITESM’s team for the same competition. In the past, he also served as head coach for the ITESM team in the domestic arbitration competition, in which it obtained first place.

DONALD MANASSE

Donald Manasse Law Offices

Donald Manasse has more than 25 years of experience representing victims and judicial administrators in international fraud cases with connections in Monaco, France and Italy. He has assisted in planning and implementing international asset tracing and recovery programmes for clients.

He has served as victim’s counsel in many fraud trials in France and Monaco.

Mr Manasse has been authorised as a counsellor at law in Monaco since 1989 and is a member of the Bar in Nice, France, where the practice was founded in 1986.

As a French lawyer, he has access to investigative files during the preliminary and ‘instruction’ procedures and appears as counsel in the criminal trials where his familiarity with international financial customs and practices is put to good use.

He has worked internationally in the pursuit and recovery of millions of dollars for creditors, trustees and receivers. Most recently he has been lead counsel in Monaco actions on behalf of a fund manager for a sovereign fund seeking to recover assets, and for beneficiaries of a trust also seeking to recover assets in Monaco.

Born and raised in Milan, Italy and schooled in the United States and France, Mr Manasse was first admitted to the Bar in New York. His cultural versatility and skills help bridge the challenges associated with international prosecutions.

Mr Manasse and his firm are the Monaco representatives of ICC FraudNet, the world’s leading asset recovery legal network.
TAKAHIRO MIKAMI
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Takahiro Mikami is a partner at Hashidate Law Office. His practice area covers all aspects of commercial litigation, arbitration and dispute resolution, whether at the domestic or international level, and he has substantial experience in managing commercial litigation taking place in China and India, representing arbitration in the Singapore International Arbitration Centre (SIAC) and handling employer-side labour disputes in Japan. Mr Mikami also advises on various commercial transactions for clients, including M&A transactions, whether based in Japan or elsewhere in Asia.

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Sean N C Moree specialises in litigation and dispute resolution matters relating to trusts, and corporate, commercial and insolvency law. His practice also includes estate planning and private client work. Sean regularly appears before both the Bahamian Supreme Court and the Court of Appeal and, with an active arbitration practice, regularly appears before tribunals, both in the Bahamas and abroad. Sean completed his Bachelor of Laws degree at the University of Nottingham, England in 2002 and the Bar Vocational Course at BPP Law School in 2003. He was called to both the English Bar and the Bahamas Bar in 2003, and in 2004 completed a Master of Laws degree at Wake Forest University, specialising in international civil litigation.

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Thomas Nigg is a senior partner at Gasser Partner Attorneys at Law. His main areas are representing clients before courts in civil, criminal and administrative matters, and assisting clients in commercial, corporate and criminal law in both national and international matters. Mr Nigg studied law at the University of St Gallen in Switzerland and is admitted to the Liechtenstein Bar. He is a member of the Liechtenstein Bar Association, the International Bar Association, the Liechtenstein Arbitration Association and the International Association of Young Lawyers. Furthermore, Mr Nigg is an ad hoc judge at the Constitutional Court of Liechtenstein.

MICHAEL NOWINA
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Michael Nowina’s litigation practice focuses on a broad range of commercial disputes, including advising on the recovery from fraudulent investment schemes, mortgage fraud and credit fraud. Mr Nowina’s fraud-related and investigations experience includes representing victims of a Canada-wide investment fraud and ultimately securing recovery of proceeds from the fraud, advising numerous creditors in proceedings commenced to recover fraudulent conveyances and preferential payments, and representing a Canadian financial institution in proceedings to recover funds from a significant fraud by a borrower in an asset-backed lending agreement.
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Jean-René Oettli is a senior associate in the dispute resolution department of Lenz & Staehelin in Geneva. He advises individuals and companies in both international and domestic litigation in commercial matters. He is a member of the Human Rights Commission of the Geneva Bar Association.

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Miguel Oural is the head of the white-collar crime practice of Lenz & Staehelin in Geneva. He advises individuals and companies in both international and domestic criminal proceedings, mostly on the side of the victim. He is one of the authors of the leading book in French on the Swiss Code of Criminal Procedure, Commentaire romand. He is a member of the council of the Geneva Bar Association, as well as of the prestigious Criminal Law Commission of the Geneva Bar.

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S Nathan Park is of counsel at Kobre & Kim, an international disputes and investigations firm, and an adjunct professor of law at Georgetown University Law Center. He practises in the areas of cross-border commercial litigation, asset tracing and recovery and international arbitration, particularly involving US and Asia-based clients. As an academic, Mr Park focuses on cross-border judicial remedies such as international judicial cooperation, domestication of international judgments and injunctions with transnational application.

JOHN PIRIE
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John Pirie leads Baker McKenzie’s Canadian litigation group and is a member of the steering committee for the firm’s North American litigation practice group. He frequently acts for foreign-based parties in complex litigation, arbitration and investigations. Mr Pirie’s practice includes a sizable fraud law and asset recovery component, often involving matters where he acts in coordination with other firm offices globally. He has expertise concerning recovery strategies and emergency relief measures related to fraud, including Mareva injunctions, Anton Piller orders, Norwich Pharmacal orders, global asset tracing and fraudulent conveyance proceedings. Mr Pirie has acted as lead counsel on an array of reported cases, and he has been recognised in Lexpert’s annual Guide to the Leading Canada/US Cross-Border Litigation Lawyers, and in the The Legal 500 for dispute resolution. He appeared in the Supreme Court of Canada on a case ranked by Lexpert Magazine as Canada’s leading business decision in 2007.

ROBERTO PISANO
Studio Legale Pisano
Roberto Pisano obtained a law degree, summa cum laude, from the University of Milan in 1992, and a PhD from the University of Genoa in 1999. Between 1993 and 1997 he was a research associate at Bocconi University, Milan, where he has since worked for many years.
as a contract professor on business and tax crimes. Mr Pisano was co-chair of the business crime committee of the IBA in 2007 and 2008, and vice chair of the ECBA in 2008 and 2009. He is the author of several publications on the subject of business crime and mutual legal assistance, including *Tax Crimes* (Cedam, 2002, co-author); *Criminal Responsibility for Asbestos* (Giuffré, 2003, contributor); ‘The Relations Between Domestic Law, Treaty Law and EC Law’ (Egea, 1995); ‘EU arrest warrant in action’ (in *European Lawyer*, 2005, co-author); and ‘The Illegal Performance of Financial Intermediation’ (Cedam, 2007).

Roberto Pisano is the founder and managing partner of Studio Legale Pisano, an Italian boutique firm that specialises in all areas of white-collar crime, including corporate criminal responsibility, corruption, money laundering, market abuse and false accounting, tax crimes, fraud and recovery of assets, bankruptcy crimes, environmental, and health and safety crimes.

In the course of his practice, Mr Pisano has successfully represented prominent individuals and entities in high-profile Italian criminal proceedings, including various cases of corruption involving international corporations and their top officials (including alleged corruption of foreign officials by major international oil companies, with multiple investigations in the United States, the United Kingdom, France, Italy, etc.); various cases of extradition, including the recent FIFA investigation by the US authorities, and representation of foreign states; three cases alleging international tax fraud involving the former Italian prime minister, in which Mr Pisano represented a well-known US movie producer; a case involving a claim for restitution of antiquities by the Italian Ministry of Culture, in which Mr Pisano represented a prominent US museum; a case alleging a fraudulent bankruptcy of managers and contractual parties of Parmalat SpA, including foreign banks, in which Mr Pisano represents a prominent external counsel of a US bank; a case alleging multiple homicide of employees of a multinational company manufacturing hazardous products, in which Mr Pisano was a member of the defence team; various appeals in foreign jurisdictions (e.g., the United States, Hong Kong, Switzerland and Monaco) against search and seizure and freezing of assets; and internal investigations for foreign multinationals and Italian corporations. Mr Pisano is also an adviser and represents relevant foreign governments on issues of international criminal law and in the frame of extradition proceedings.

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Aitan Canuto Cosenza Portela has been a lawyer in São Paulo since 2005 and has extensive experience in providing legal business counsel and in civil litigation. He holds a law degree (LLB, 2005) from the Pontifical Catholic University of São Paulo (PUC-SP).

**CHRISTOPHER PRESTWICH**

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Christopher Prestwich’s litigation practice involves advising clients in relation to complex commercial disputes, with a particular focus on insolvency litigation. Recent significant matters he has advised on include defending claims for breaches of directors’ duties arising out of the collapse of a corporate group, and bringing claims arising from a takeover transaction. Mr Prestwich has particular experience of advising insolvency practitioners in relation to causes of action available to insolvent companies, including bringing claims against directors and for the recovery of misappropriated property.
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Dr Aimee Prieto is partner at Prieto Cabrera & Asociados, a leading firm in real estate transactions and asset recovery in the Dominican Republic.

Dr Prieto is a certified fraud examiner and an attorney from the Dominican Republic with over 15 years of practice. She specialises in asset recovery, asset investigations, real estate transactions and litigation management and supervision.

Dr Prieto is the Dominican Republic’s only member of FraudNet, the fraud prevention network of the International Chamber of Commerce Commercial Crime Services. FraudNet has been recognised by Chambers Global as the world’s leading asset recovery legal network.

Dr Prieto’s recent representation includes serving as local counsel in the recovery of assets acquired through fraudulent acts committed in the United States, and invested in the Dominican Republic and other countries of Latin America.

As the founder of Prieto Cabrera & Asociados, Dr Aimee Prieto has provided legal assistance on: (1) business organisation and corporate transactions; (2) real estate transactions (including acquisitions, sales, leases, condominiums, fractional ownerships, liens, mortgages, loans, foreclosures, negotiations and closings); (3) foreign investment; (4) intellectual property; (5) contractual documents review, draft and advice; and (6) technology, privacy and data protection.

TIM PRUDHOE

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Tim Prudhoe is a commercial litigator and trial advocate at Kobre & Kim, a global disputes and investigations firm. Mr Prudhoe represents companies and high-net-worth individuals based in the Caribbean and the United States in matters related to international judgment enforcement, asset recovery, fiduciary risk and insolvency. His work across offshore jurisdictions often encompasses their interaction with onshore financial centres and regulatory bodies in the United States as well as worldwide. An English barrister, he has substantial experience in practice in the British Virgin Islands. In addition to England, Mr Prudhoe is admitted to practise in Bermuda, Grenada, St Vincent and the Grenadines, the British Virgin Islands and the Turks and Caicos Islands. In 2009, he appeared at the Turks and Caicos Islands Commission of Inquiry for the then premier’s wife.

CHIYONG RIM

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Chiyong Rim is an attorney at Kim & Chang. He practises in a wide range of insolvency and restructuring areas, with a focus on corporate liquidation, mergers and acquisitions in reorganisation proceedings and cross-border insolvency cases. His most recent position was that of judge for the bankruptcy panel of the Seoul Central District Court.

He has been listed in The Legal 500 as a leading lawyer in insolvency law and has been recognised in Chambers Asia-Pacific as a ‘band 1’ lawyer. Chambers and Partners in 2014 said that ‘he was noted among peers for his many years of experience’ in this field, and cites him as a veteran bankruptcy lawyer.

He has co-authored various publications in English, including The International Insolvency Review (Korea chapter, Law Business Research), Cross-Border Insolvency (Korea
chapter, Globe Law and Business); Collier's International Business Insolvency Guide (Korea chapter, LexisNexis); and ‘Korean Insolvency System’ in the Norton Annual Survey of Bankruptcy Law 2003 (Thomson West). He has also published four volumes of The Study of Bankruptcy Research.

He was placed on a secondment to Addleshaw Goddard LLP in London for three months in 2014, and he is a member of the Insolvency Law Review Committee of the Department of Justice.

KEITH ROBINSON
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Keith Robinson is a partner in the banking and capital markets department of Dillon Eustace in Dublin. Keith practises in finance law with particular emphasis on banking and restructuring matters. He advises financial institutions, private equity funds, hedge funds, investor groups and borrowers on domestic and cross-border financing transactions, including acquisition and property financing and tax-based lending. He also regularly advises on bank asset disposals by both Irish and international banks operating in Ireland, in connection with their deleveraging and liquidation strategies and subsequent management of the books post-acquisition.

JACOBO ENRIQUE RUEDA FERNÁNDEZ
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Jacobo E Rueda is an associate at Hogan Lovells and has always shown great aptitude and talent in handling the tasks with which he has been entrusted. Moreover, he has exhibited great enthusiasm to continue learning and growing as a lawyer.

As part of the commercial arbitration and litigation team, Jacobo focuses on daily courthouse matters in Mexico and preparing motions, appeals and constitutional challenges in favour of the firm’s clients.

Jacobo has participated in various complex arbitration and litigation cases involving construction matters, civil liability, product liability, bankruptcy, and class actions, among others. He also has experience in the annulment, recognition and enforcement of domestic and international arbitration awards and foreign judgments.

He recently obtained his degree summa cum laude from the Panamerican University, for which he defended his thesis on arbitration and class actions. He also has international experience, gained during his studies abroad at Science Po, one of the France’s most prestigious universities.

LAURA RUIZ
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Laura has a specialist diploma in insolvency law from the University of Deusto in Bilbao (2011), and a degree in law and economics from Carlos III University (UC3M) in Madrid (2007). She speaks Spanish, English and basic French.

Laura advises companies in pre-insolvency and insolvency situations. Her clients are mainly companies from the energy, infrastructure and real estate sectors, some which
have subsidiaries all around the world. Laura also defends creditors’ interests in insolvency proceedings of large companies in the construction and food sectors, shipyards and hotels, among others. She has extensive experience in insolvency related to litigation, such as: insolvency directors’ liability, corporate litigation of insolvent companies, and litigation connected with the EU Insolvency Regulation (EC 1346/2000). She has also been involved in negotiations aimed at restructuring the debt of listed Spanish companies, and she works very closely with the firm’s finance lawyers within the framework of refinancing agreements. Laura also regularly works with the corporate team on the analysis of insolvency issues in transactions concerning distressed debt.

Laura advises national and international clients in court proceedings and arbitration regarding civil and commercial matters. She has participated in cases dealing with, among other things, construction, derivatives, syndicated credit facilities, reps and warranties, agency and distribution agreements, franchise agreements, corporate directors’ liability, and civil liability. She is often involved in complex transnational litigation and arbitration applying international principles and European regulations, as well as coordinating with lawyers from other jurisdictions.

MAKOTO SATO
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Makoto Sato is an associate at Hashidate Law Office. His practice areas include commercial litigation, M&A transactions and financial services, with a special focus on cross-border transactions. Mr Sato successfully represented a plaintiff before the Tokyo District Court in an international legal matter that was unique to the Japanese court system, involving a cross-border set-off. In addition, Mr Sato has extensive expertise in multi-jurisdictional commercial litigation and arbitration, including before the National Company Law Tribunal (NCLT), India, and Singapore International Arbitration Centre (SIAC), Singapore, representing large multinational companies.

CHARLES SIMPSON
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Charles was called to the Bar in England and Wales in 1996 and subsequently in Gibraltar in 1997. He qualified as an English solicitor in 2003. Charles is a member of the Middle Temple and ACTAPS and is a member of the dispute resolution team.

Charles has a broad dispute resolution practice that includes extensive experience in civil and commercial litigation, trust litigation, insolvency and private-client disputes.

He contributed to International Trust Disputes (Oxford University Press) and the third edition of The Asset Tracing and Recovery Review.

Charles has considerable experience in a number of complex private-wealth and fraud-related disputes.

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Tomislav Šunjka is founder of the independent ŠunjkaLaw in Serbia. His background is business and transactional law, and everything connected with transactions, M&A and tax planning, privatisations, PPP law, foreign investment, dispute resolution and complex
litigation and other business law throughout the world. Because of this background, he understands very well the nature of transactions, bank transfers and financial arrangements, and he uses that knowledge as a tool in his asset tracking and recovery practice. Mr Šunjka is a regional representative for Europe on the International Bar Association’s Anti-Corruption Committee, as well as an exclusive member for Serbia, the Balkans and the former Yugoslavia in FraudNet (an international network of lawyers that operates under the auspices of the London-based ICC Commercial Crime Services FraudNet Network). Mr Šunjka is certified as an auditor by Ethic Intelligence for the ISO standards 19600, on Compliance Management Systems, and 37001, on Anti-Bribery Management Systems. He has published several works on European Union law, the securities market and the related role of banks, the European Central Bank and the European System of Central Banks, the European Convention on Human Rights and the European Court of Human Rights in Strasbourg. He also lectures on fraud and asset recovery. Mr Šunjka is fluent in English and Russian.

JUAN FRANCISCO TORRES-LANDA RUFFO
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Juan Francisco Torres-Landa Ruffo is a partner in corporate and M&A law and managing partner of the Mexico offices. He has distinct skills gained during more than three decades of practice as a corporate lawyer in Mexico. He has helped many companies to establish a presence in Mexico and grow over the years.

His long-term involvement in corporate deals of all kinds allows him to help clients better navigate complicated projects, joint-venture arrangements and M&A deals in general. His combination of experience and know-how mean he is a lawyer who sees the big picture and paves the way to better results and fewer obstacles.

He serves clients in many industries, with a particular focus on the automotive sector. Companies rely on his insight, which stems from decades of experience and a thorough knowledge of corporate, contractual, foreign investment, environmental, antitrust and tax matters.

He is well known in the legal community for his responsiveness and careful, results-oriented approach, along with his successful track record as a troubleshooter and his commitment to pro bono and citizenship programmes.

JORGE FRANCISCO VALDÉS KING
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Jorge Francisco Valdés King is a partner at Hogan Lovells. Jorge has a keen eye for assessing risks in legal strategies and for keeping surprises to a minimum. He ensures that he knows the ins and outs of a case and handles all dispute matters with perseverance and passion – Jorge leaves no stone unturned.

Having been involved in the area of dispute resolution since the beginning of his career, Jorge has developed robust trial experience, which allows him to remain calm and creative even in the most pressing circumstances.

As well as working on the annulment, recognition and enforcement of domestic and international arbitration awards and foreign judgments, Jorge has represented both creditors and debtors in complex reorganisation and bankruptcy proceedings. He has briefed and argued before federal courts and the Supreme Court, setting precedents on the unconstitutionality of legal provisions.
From a commercial litigation perspective, Jorge has a background in cases dealing with contractual disputes, torts, shareholder controversies, moral damage claims, real estate issues and all kinds of collections.

Jorge’s dispute resolution skills have helped clients in many sectors, including the automotive, banking, construction, entertainment, gambling, insurance, media, mining, transport and IT industries. As part of his diverse practice, Jorge assists clients in both English and Spanish.

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Hans Van Bavel is a member of the Brussels Bar and a partner in Stibbe’s litigation and arbitration practice. He holds an LLM from the University of East Anglia (1991) and a diplôme d’études approfondies from Paris Descartes University (Paris V) (1992), and has been an assistant lecturer in criminal law at the Katholieke Universiteit Leuven. His practice focuses on litigating Belgian corporate crime cases and white-collar crime.

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Neyah van der Aa is a senior associate in Allen & Overy’s litigation practice in the Netherlands. He specialises in financial regulation and criminal law, with an emphasis on corporate crime litigation and compliance advice. Mr Van der Aa regularly provides integrated advice and lectures on international sanctions, corruption and internal investigations to large international corporations and financial institutions.

JACK WALSH
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Jack read PPE at Balliol College, Oxford University before working for a leading retail management recruitment consultancy, gaining commercial experience in a fast-paced and target-driven environment. He was called to the Bar in 2006, having taken a law conversion course where he was top in the year.

Jack has appeared in the Crown Court, tax tribunal, High Court and the Court of Appeal, as well as courts martial in the United Kingdom and Germany. Jack was on the Crown Prosecution Service (CPS) list of advocates, and also prosecuted for local authorities in respect of benefit and other frauds, trading standards and environmental offences. Jack has developed specialisms in prosecuting sex offences in the youth court, and in orders for costs thrown away and wasted costs (Sections 19 and 19A of the Prosecution of Offences Act 1985), regularly advising the CPS on these matters.

Jack has a particular interest in legal research, especially relating to more obscure offences, and in drafting. He has acted for a variety of clients, from trade unions to company directors and well-known individuals. Some cases of note include the following: he was instructed to advise an MP on his alleged involvement in the Parliamentary expenses scandal and to make written submissions to Sir Thomas Legg as to the amount he was to repay. The submissions were successful and the MP was not prosecuted; R v. K – successful application for interim relief in judicial review proceedings where the substantive case concerned a youth charged with rape (Lloyd Jones, J); HMRC v. Harwich GSM Ltd [2012] UKFTT 279 – instructed
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by HMRC (led) in respect of an £11 million MTIC fraud before the Tax Tribunal – HMRC successfully resisted the appeal; D v. CPS – instructed by the CPS against a silk and junior to respond to an application to enforce £13,000 costs – the judge accepted the costs order was ultra vires and unenforceable; R v. M – instructed by the CPS to respond to an application for permission to appeal against conviction on the grounds of jury bias – application refused; R v. A – two-day disclosure hearing in a serious case of child exploitation where there were PII issues, Social Services records and an OIC who was removed because of misconduct; R v. F – represented the ‘director’ of a sophisticated, large-scale conspiracy to steal millions of pounds of copper cable belonging to BT from sites all over the south of England. He was first on an indictment of 10 defendants. The six-week trial featured PII and vast amounts of material, including, most notably, mobile telephone and cell-site analysis and surveillance. He entirely escaped a confiscation order; R v. H [2011] EWCA Crim 1627 – Jack’s arguments were described as ‘very clear and helpful’ by Hickinbottom J; R v. E [2010] EWCA Crim 2265 – Court of Appeal case re: minimum term for possession of a loaded firearm where there was no intent to endanger life – Leveson LJ commented that Jack had ‘put the matter extremely well’ on Mr E’s behalf; and R v. W [2009] EWCA Crim 2300 – successful appeal against sentence for supplying drugs, where Jack’s submissions were described as ‘persuasive’. Jack sits for the Nursing and Midwifery Council as a chair of its Fitness to Practice Panel, hearing cases concerning alleged lack of competence and misconduct.

Jack is a member of the Criminal Bar Association.

FLORIAN WETTNER

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Dr Florian Wettner specialises in domestic and international litigation and arbitration with an emphasis on disputes in capital markets and corporate matters. Furthermore, he focuses on advising companies with regard to compliance issues and internal investigations. He also has extensive experience with respect to the handling of complex claims and liability cases under insurance law (particularly in the area of D&O and other indemnity insurances). Who’s Who Legal: Germany from 2013 to 2016, and again in 2018, acknowledged Dr Wettner as one of four practitioners experienced in asset tracing and recovery in Germany. The 2016 to 2018 ranking lists published by leading German business newspaper Handelsblatt and US publisher Best Lawyers rank Florian Wettner as one of the ‘best lawyers in Germany’ for litigation, and recently for arbitration as well. The Legal 500 Germany 2018 refers to Dr Wettner as an ‘excellent and assertive lawyer and litigation strategist’.

Dr Wettner studied at the universities of Freiburg, Florence and Heidelberg. He was admitted to practise in 2006 and started his career at Gleiss Lutz in Frankfurt. From 2007 to 2008, he worked for Herbert Smith Freehills in London in the area of internal investigations. In 2011, he was seconded to the compliance department of a German DAX-listed company.

Dr Wettner advises his clients in German and English, and also speaks Italian.

JOYCE XIANG

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Joyce Xiang is a Hong Kong-based litigator at Kobre & Kim. She counsels Asia-based clients in enforcing large-scale judgments across borders. She is qualified in Hong Kong and New York.
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