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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 six. 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.

Robert Hunter
Robert Hunter Consultants
August 2019
Chapter 1

ARGENTINA

Pedro Serrano Espelta and Mariana Gutiérrez

I OVERVIEW

The Argentine legal system does not contain specific provisions regarding asset tracing and recovery. Thus, legal actions must be brought based on generic remedies provided in general and specific statutes, according to the case.

With some exceptions, the focus of criminal actions has traditionally been the prosecution of individuals but not necessarily the recovery of the assets. This is changing. Argentina has been gradually implementing new mechanisms to ensure the seizure and forfeiture of assets obtained illegally.

In relation to criminal remedies to recover assets, the following can be highlighted: the criminalisation of legal entities for their participation in money laundering and corruption-related offences; tools to confiscate assets strongly presumed to be linked with crimes; and the requirement that companies return the ‘undue benefits’ obtained by means of bribery and corruption as a precondition to engage in settlements in a criminal case.

In this regard, a good example is the civil procedure set forth this year by Decree 62/2019 to confiscate, in favour of the state, assets presumed to be linked to certain crimes such as drug crimes, bribery of public officials, kidnapping and terrorism. The purpose of this regime is to terminate the legal title or property rights that defendants may have over disputed assets.

In addition, a bill submitted to the Senate in March 2019 to reform the Criminal Code, introduces relevant changes in forfeiture – expanding the situations in which non-conviction forfeiture applies and incorporates corporate liability – at the moment defined only for corruption and bribery offences.

II LEGAL RIGHTS AND REMEDIES

Civil and criminal remedies

Civil remedies

Under civil law there are two basic spheres of liability: contracts and torts. The last amendment of the Argentine Civil and Commercial Code (CCCN), which entered into force in August 2015, brought both regimes of liability closer by imposing the obligation to repair damage caused either by breaching the general duty not to cause harm or by breaching an obligation.² Although some differences still remain, plaintiffs seeking to claim liability under any of these

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1 Pedro Serrano Espelta is a partner and Mariana Gutiérrez is an associate at Marval, O’Farrell & Mairal.
2 Article 1,716 CCCN.
two regimes must prove: (1) an illicit act or omission; (2) damage; (3) an adequate causation link between the illicit act or omission and the damage; and (4) an attribution factor, which is a sufficient cause to hold the defendant liable for the illicit act that resulted in the damage suffered (e.g., wilful intention, negligence, etc.).

If a fraudulent or any other dishonest act is identified prior to its commencement or when it is taking place, any person or legal entity holding a legitimate interest can file a preventive motion to obtain a court order to prevent or stop the harmful act or omission.

However, when the fraudulent act has already taken place, victims can pursue a civil claim to obtain restitution of property or compensation for damages. Additionally, the CCCN contemplates other remedies through which victims of deceit can obtain a court order to deprive the harmful act – or part of it – of its legal effects or remedy an unjust enrichment.

Restitution

Persons who have property rights over assets can file an *in rem* motion for restitution against the person in possession of the assets. The restitution can be granted in whole or in part and may order the rectification of public registries. The motion does not proceed against immaterial objects, fungible or undetermined assets, accessories (when the main object is not claimed) or future objects. Thus, while not appropriate to request stolen money back, recovery motions are suitable to recover real estate property, registered movable assets and some other non-registered but identifiable movable assets.

Regarding third parties, different rules apply depending on whether third parties in possession of the concerned assets acted in good or bad faith and the type of assets claimed (e.g. automobiles). Broadly speaking, plaintiffs can obtain restitution from third parties that entered into possession in good faith, unless the latter obtained property rights against payment. In these cases, plaintiffs can claim the full price of the disputed assets. Notwithstanding, restitution will still be granted for real estate property and registered assets if third parties obtained them without the intervention of the rightful owner.

Compensation for damages

A motion for compensation will be the generic action for asset recovery. The general principle is that of full reparation, which means that injured parties are entitled to be placed in the same situation they had before the damage was caused. Plaintiffs may choose between payment in cash or in kind and may request restitution of specific assets when legally and materially possible – otherwise judges will order monetary compensation.

Compensation will be granted for damages that have a sufficient connection with the relevant illicit conduct. As a general rule, plaintiffs are entitled to claim compensation for damages that are the immediate consequence or ‘foreseeable mediate consequence’ of an

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3 Article 1,737 CCCN broadly defines damage.
4 Article 1,711 CCCN.
5 Articles 2,252–2,261 CCCN.
6 Article 2,260 CCCN.
7 Article 1,740 CCCN.
illicit act or omission.\textsuperscript{8} Immediate consequences are those that normally occur in the natural and ordinary course of events, while immediate consequences are connected with a different event.

Moreover, under contract law, parties must respond for the consequences they foresaw or could have foreseen when they entered into the contract. In the event of wilful misconduct, compensation will be granted for the consequences foreseeable at the time the contract was breached. It should be noted that limitation of liability clauses are in principle valid and enforceable, and some limitations apply when they affect certain non-disposable rights, are abusive or are against the good faith, good customs or the law.\textsuperscript{9}

A lawsuit for compensation of damage can be brought against all persons that participated in the act that breached an obligation or caused an illicit harm.\textsuperscript{10} Only in some cases does the law attribute liability for the conduct of third parties. Moreover, legal entities are liable for the harm caused by their directors and administrator while performing their duties.\textsuperscript{11} Perpetrators and accomplices will be jointly liable as long as the cause of harm is the same.\textsuperscript{12} However, accomplices after the fact will only respond for damage resulting from their own contribution.\textsuperscript{13}

Plaintiffs have the burden of proof of all the elements of their claim, unless they can resort to a legal presumption.\textsuperscript{14} As to the extent of the compensation, they will be able to claim direct loss or diminution of their assets, loss of future – and objectively foreseeable– profits and loss of chance.\textsuperscript{15}

\textit{Fraud and simulation}

Third parties that are victims of fraud and dishonesty can seek the nullity of simulated acts – including simulated clauses in contracts– when they are illicit or affect their interests (e.g. untrue date of transactions, an apparent transfer of property, etc.). If the simulated act concealed a different and licit act, the latter will be valid and enforceable. The law allows the injured third parties to prove the simulation by any means of proof.\textsuperscript{16} However, the judgment granting the relief cannot be enforced against individuals that acquired rights in good faith and against payment. In such a case, the perpetrator and all those who participated in the scheme in bad faith will respond for the damage caused to the victims.

Likewise, creditors can bring a civil action of fraud against debtors who disposed of their assets and waived patrimonial rights to produce or aggravate their insolvency.\textsuperscript{17} Plaintiffs will have to demonstrate that the individuals that took part in the action knew or should have known that the debtor was causing or aggravating their insolvency. If they succeed in their claim, the acts that reduced the patrimony of the debtor will be declared unenforceable only to the plaintiffs in the action and both the debtor and all those who wilfully participated in the fraud will be jointly liable for the damages caused. Notwithstanding, as in the previous

\begin{itemize}
  \item Article 1,726 CCCN.\textsuperscript{8}
  \item Article 1,743 CCCN.\textsuperscript{9}
  \item Article 1,749 CCCN.\textsuperscript{10}
  \item Article 1,763 CCCN.\textsuperscript{11}
  \item Article 1751 CCCN.\textsuperscript{12}
  \item Article 1,752 CCCN.\textsuperscript{13}
  \item Article 1,744 CCCN.\textsuperscript{14}
  \item Article 1,738 CCCN.\textsuperscript{15}
  \item Article 336 CCCN.\textsuperscript{16}
  \item Article 338 CCCN.\textsuperscript{17}
\end{itemize}
case, the judgment granting the plaintiff’s request cannot be enforced against individuals that acquired rights in good faith and against payment. Those who acquired rights in good faith but without payment will be affected by the judgment up to the amount of their enrichment.18

Other civil remedies
The CCCN also provides victims of fraud with other remedies such as an action to declare an act void and deprive it of all its legal effects when one of the parties of such act took advantage of the lack of experience or the necessity of the other party, obtaining a disproportional gain in return.19

Finally, the CCCN also stipulates a subsidiary civil action against the person that, without a licit cause, increased his or her wealth at the expense of others.20 This action seeks to remEDIATE an imbalance by imposing the obligation to indemnify the injured party up to the amount of the detriment caused. It can also be employed to obtain restitution of specific assets.

Civil action for confiscation of illegally obtained assets
In January 2019, President Macri created, by means of an Executive Decree,21 a civil procedure to confiscate, in favour of the state, assets presumed to be linked with certain crimes, such as drug crimes, bribery to public officials, kidnapping, terrorism, etc. The purpose of this regime is to terminate legal title or property rights that defendants may have over the disputed assets.

Public prosecutors can pursue this civil action against any person or legal entity – not necessarily the criminal defendant – that obtained property rights or the possession of assets after the alleged date of the commission of the crime. The civil judge will grant the request when the assets do not correspond with the defendant’s income or represent an unjustified and disproportional patrimonial increase that merits the suspicion that the assets come directly or indirectly from one of the crimes set forth in the law. The concrete effects of this new procedure are still to be seen, as the first civil action for confiscation was recently filed in June 2019.22

Corporate remedies
Argentine law imposes a duty on directors to act loyally towards the corporation and its shareholders and to perform their responsibilities with the diligence of a good businessperson. This duty prohibits any director from competing with the company in the furtherance of the director’s own interest when that interest conflicts with the interest of the company. For public companies, the Capital Markets Law23 establishes further prohibitions and obligations, for instance, the prohibition on using the company’s assets or any confidential information for private purposes. It also provides that, if there is any doubt, the directors will have the burden of proving that they have acted in compliance with the duty of loyalty.

18 Article 340 CCCN.
19 Article 332 CCCN.
20 Article 1,794 CCCN.
22 The civil action was filed in connection with a drugs case. https://www.fiscales.gob.ar/criminalidad-economica/el-mpf-demanda-la-extincion-de-dominio-de-bienes-y-dinero-de-una-organizacion-narcocriminal-que-operaba-en-peru-espana-italia-y-argentina/
23 Law 26,831.
Any failure of the directors to loyally and diligently perform their duties would result in their unlimited, joint and several liability vis-à-vis the company, the shareholders and eventually third parties, for damages arising therefrom. In addition, directors are unlimitedly and jointly and severally liable for violation of the law, the by-laws and regulations, and for fraud, abuse of power and gross negligence.

A derivative action may be initiated by the company or by the shareholders on behalf of the corporation, with the aim of seeking indemnification for damage sustained by the corporation. If the derivative action is not initiated within three months as of the relevant shareholders’ meeting, any shareholder may initiate it.

Shareholders and creditors may choose to pursue an individual action against directors. In this case, courts have ruled that the plaintiff has to prove that they have suffered a ‘direct’ damage deriving from the activities of the directors, and not merely the breach of the directors’ duties. The claim would pursue the indemnification of these damages suffered by the plaintiff directly, as opposed to damages suffered by the corporation.

**Criminal Remedies**

As a civil law country with an inquisitive criminal law tradition, criminal investigations in Argentina have traditionally been conducted by an investigative judge and only exceptionally by public prosecutors. Although this is still the case in most jurisdictions – including federal courts – some provinces have recently reformed their Code of Criminal Procedure and adopted an adversarial system of criminal justice. In these jurisdictions, public prosecutors lead the investigations and press charges against defendants.

The identification of the different Codes of Procedure in Argentina becomes relevant as fraud cases are prosecuted according to the rules applicable to the jurisdiction in which they take place (provincial, national or federal).

The Argentine Congress recently enacted a new Federal Criminal Procedure Code that adopts an adversarial model of criminal procedure. In June 2019 the new Code came into force in the northern provinces of Jujuy and Salta, and it will gradually be implemented in the rest of the country in the coming years.

Currently, the National Criminal Procedure Code (NCPC) still governs the procedure in both federal and national courts. Since most fraud cases will fall under the competence of these two jurisdictions, for the purpose of this article, we will refer to the provisions set forth thereof.

**Victim’s legal standing and role in criminal cases**

When the conduct that gives rise to civil liability also constitutes a crime, Argentine law allows both civil and criminal actions to be pursued simultaneously. Despite the independence of both proceedings, the civil judge is foreclosed from reaching a decision until a judgment is passed on the criminal case. As a result, plaintiffs are unlikely to incur in litigation efforts and expenses until a decision on the existence of the crime and the defendant’s participation is reached by the criminal court.

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24 National Courts have jurisdiction over felony cases committed in the Autonomous City of Buenos Aires.

25 Article 1,774 CCCN.
Victims of fraud crimes can present themselves as private prosecutors and bring criminal charges against defendants\textsuperscript{26} even when the public prosecutor decides to drop the charges.\textsuperscript{27} Alternatively, they can choose to file a request in the criminal case to act as a ‘civil petitioner’ in order to claim compensation, restitution and other civil remedies against the defendant and the ‘civil respondent’.\textsuperscript{28}

\textit{Fraud crimes}

The Argentine Criminal Code (ACC) covers a wide spectrum of fraud and abuse of trust conduct. Fraud offences’ most common elements are: (1) an intentional artifice or scheme to defraud the victim; and (2) a patrimonial harm caused by an artifice or scheme. A fraud conviction can incur up to six years’ imprisonment. Among the special types of fraud, the ACC sanctions individuals who refuse to return assets when they are under the obligation to do so (e.g., deposit, administration) as well as individuals who wilfully breach their fiduciary duties to obtain dishonest profits for themselves or third parties (e.g., company defrauded by its directors and executives).

The ACC also covers bankruptcy fraud by sanctioning members of a company’s management, directors and statutory supervisors for having committed fraud in connection with the company’s bankruptcy.\textsuperscript{29}

\textit{Criminal remedies to recover assets}

Although criminal remedies to recover assets and allow victims to get economic compensation already existed in the ACC, it was not until recently that tracing and recovering the instruments and proceeds of crimes became a pressing concern.

Mostly as a result of its international commitments to fight against certain crimes (e.g., money laundering, corruption, drug trafficking), Argentina has been gradually implementing mechanisms to ensure seizure and forfeiture of assets obtained illegally. Among them, we can mention: (1) the creation of new investigative tools in complex investigations; (2) the criminalisation of legal entities for their participation in money laundering and corruption-related offences; (3) tools to confiscate assets strongly presumed to be linked with crimes; and (4) the requirement that companies return the ‘undue benefits’ obtained by means of bribery and corruption as a precondition to engage in settlements in a criminal case.

\textit{Forfeiture}

Overall, courts can order the forfeiture of assets following a conviction in a criminal case.\textsuperscript{30} The order can cover the instruments used to commit the crime, the proceeds of the crime (profits) as well as assets that were obtained by means of the instruments or proceeds of the crime (e.g., replacement, transformation). Also a defendant facing probation must forfeit all assets that would be subject to forfeiture in the event of conviction.\textsuperscript{31}

\textsuperscript{26} Articles 82–86 NCPC.
\textsuperscript{27} Argentine Supreme Court, Santillan, 1998.
\textsuperscript{28} Articles 87–96 NCPC.
\textsuperscript{29} Articles 176–180 ACC.
\textsuperscript{30} Article 23 ACC.
\textsuperscript{31} Article 76 \emph{bis} ACC.
The destiny and administration of the assets will be decided by the court and noted in the National Registry of Forfeited and Seized Assets. The law establishes that forfeited assets will be transferred to the state; however, due regard must be given to victims and third parties’ rights to compensation and restitution.

Forfeiture can be ordered against third parties in the following circumstances: (1) when the defendant acted on behalf of another person or legal entity (e.g., executives or directors) who profited from the proceeds of the crime; and (2) when third parties benefited from the proceeds of the crime gratuitously.

As part of the new measures adopted to ensure the recovery of assets, since 2011 it has been possible to order a ‘non-conviction based forfeiture’ in money laundering, terrorism financing and other economic and market-based crimes. In this case, forfeiture is permitted when the criminal action cannot be pursued against the defendant by reason of death, flight, statutes of limitations or any other cause of suspension or termination of the criminal action, or when the defendant has recognised the asset’s illicit origin or use. This last circumstance has allowed for the recovery of assets in corruption cases when defendants entered into ‘leniency agreements’ with the prosecutor and acknowledged the illicit origin of funds and property. The affected assets will be used to repair the damage caused to the victims of the crime and the state. Any dispute regarding the nature or ownership of the concerned assets must be brought before civil or administrative courts.

**Restitution and compensation**

The criminal sentence can order the reparation of the consequences of the crime, meaning that the court may order the restitution of assets and monetary compensations to victims and third parties. All individuals responsible for the commission of the crime will be held jointly liable, and the obligation will prevail over any fine, forfeiture or legal expense ordered by the court.

**ii Defences to fraud claims**

Defence to fraud claims will depend on the remedy chosen and the particular facts of the case. In general, lack of jurisdiction and limitation periods are potential viable preliminary defences against both criminal and civil actions. The statute of limitation for fraud offences is six years, a period that can be interrupted on any of the grounds established in Article 67 ACC (e.g., issuance of an indictment). On the other hand, overall civil claims are time-barred between two to five years after the harm was caused or the injured party knew about the deceit (exceptionally, restitution claims prescribe when the law grants the possessor the ownership of the asset over time, in 10 to 20 years).

As to the merits of the claim, defendants may argue that one or more of the elements of the crime or those prescribed for civil liability to emerge are not met. In addition, defendants can claim that they obtained title to the disputed objects. In this respect, it should be noted that both civil and criminal law protects the rights and interest of third parties that

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33 Article 305 ACC.
34 Article 5, Law 26,683.
35 Article 29 ACC.
acquired property in good faith. When fraud is based on an omission to act or concealment of information, defendants may argue that they were not under the obligation to act or to disclose the relevant information.

III SEIZURE AND EVIDENCE

In both civil and criminal cases, the procedure for securing assets and obtaining evidence is governed by the code of procedure of the jurisdiction where the action is brought. We will refer to the National Code of Civil and Commercial Procedure (NCCCP) and the NCCP, both applicable before federal and national courts.

i Securing assets and proceeds

Under civil law, plaintiffs can resort to interim measures such as attachments and preliminary injunctions to preserve assets held by defendants and third parties, even before the civil claims are brought. An interim measure request must be filed before the same judge that hears the principal claim – an order granted by an incompetent judge will still be valid if it fulfils all other legal requirements. The measures will be decided and executed ex parte. The affected party may challenge the decision, but this will not suspend its immediate enforcement. Interim measures are provisional, meaning that they can be set aside or modified after showing a change in the circumstances that justified their order.

To be admissible, plaintiffs must have a reliable claim and prove that there is a risk that the enforcement of the relief sought will be frustrated if the measure is not granted. The court will ask plaintiffs to pay court fees and offer a bond to respond for any harm caused to the defendant or any other expense. Judges will assess the reliability of the plaintiff’s claim and the circumstances of the case when deciding the nature and amount of the bond. In practice, this may be the most burdensome requirement to meet, as judges will calculate the bond based on the amount of the relief sought in the main claim (it can amount to a 30 to 40 per cent of the credit claimed). Moreover, all interim measures will be granted under the condition that the plaintiff initiates the main civil action within a certain period (generally 10 days).

Some of the most common interim measures to secure assets are: (1) prejudgment attachment of assets, where defendants are foreclosed from disposing of specific property, which will remain under their administration unless sequestration or administration by a third party is ordered; (2) seizure of mobile assets and administration by a third party; (3) judicial intervention or administration of productive assets (such as a company); (4) general restraining order to sell or transfer property rights; (5) registration of the claim with any public registry; and (6) restraining notices, preventing defendants from selling or transferring rights in connection with certain assets. Additionally, apart from the remedies set forth in the law, judges are allowed to order other measures to safeguard plaintiffs’ interests as they see fit (e.g., freezing of assets in bank accounts).

In criminal cases, the investigating judge may order at any stage of the investigation, ex officio or at the request of the public or private prosecutor, the attachment or seizure of any goods that can be the subject to forfeiture upon a possible conviction. If these measures are

36 Article 195 NCCCP
37 Article 198 NCCCP
38 Article 199 NCCCP
proven insufficient, the judge may issue a general restraining order to sell or transfer property rights. Additionally, judges can resort to the interim measures set forth in the codes of civil procedure; however this option is not very commonly used.

Despite the availability of legal resources to secure assets, tracing and discovering hidden property is usually the major challenge in asset recovery efforts. Overall, court orders requesting information from relevant entities—such as public registries and financial institutions—must follow formal proceedings that hinder any chance of obtaining rapid results. Furthermore, since public registries are held by provinces, requests must be addressed to each of them separately.

Consequently, the General Prosecutor’s Office started taking concrete measures to tackle these problems. Since 2009 all public prosecutors acting in national and federal courts are instructed to conduct a patrimonial investigation of individuals suspected of participating in, among others, money laundering, corruption and some white collar crimes.\(^{39}\) To ensure the recovery, they were also instructed to request the seizure of assets as soon as the requirements for such measure are met.\(^{40}\) In this line, a special unit for asset recovery was created within the General Prosecutor’s Office in 2015.

### ii Obtaining evidence

There is no specific action available under Argentine law to obtain evidence in cases of ‘fraud’. Thus, plaintiffs have to rely on generic means to obtain information to support their claim. As a general principle of evidence, in civil claims each party has the burden of proof regarding the facts on which they base their claim or defence.

As in most civil law jurisdictions, the concept of document discovery is alien to the Argentine civil procedure. Courts have the power to order the defendant and third parties to submit material documentation in their possession and parties may ask the court to issue such orders on their behalf. If granted, the party that requested the order will be responsible for the necessary arrangements and notifications that the request entails.

Evidence must be submitted by means expressly provided by law (documentary evidence, expert witnesses, witness testimonies, reports) but the court may request other measures *ex officio* or at a party request.

In criminal cases, as explained above, evidence rules depend on the kind of procedure (adversarial versus inquisitorial) and the specific regulations set forth in each jurisdiction’s code of procedure. Overall, victims acting as private prosecutors are entitled to offer and control evidence collected during the investigation and can resort to the investigating judge or public prosecutor to obtain evidence on their behalf. Civil parties’ rights, on the other hand, are restricted to these investigative measures that are needed to uphold their claim.

If the fraud is investigated by national and federal courts, the criminal investigation dossier will contain all the information relevant to the criminal investigation and the criminal charges against the defendant. The NCPC recognises victims’ right to offer and control evidence.\(^{41}\) It prescribes that the dossier is public to the parties, which includes the private prosecutor\(^{42}\) but not the civil petitioner. Despite this general principle, in practice, judges

\(^{39}\) Resolution 134/2009.

\(^{40}\) Resolution 129/2009.

\(^{41}\) Article 80 NCCP.

\(^{42}\) Article 204 NCCP.
may be reluctant to grant private prosecutors full access to some confidential information (witnesses’ identity, telephone tapping or interception records, information normally protected by banking secrecy) based on security or privacy reasons.

Some recent developments are worthy of notice. Driven by the need to boost efficiency in the fight against serious crimes, Congress has enacted a series of statutes that contribute to obtain relevant information in criminal investigations. For certain crimes, Law 27,304 allows prosecutors to conclude leniency agreements with defendants willing to provide material information to the case, including the destiny of any assets, property, profits or benefits of the crime. This norm has been used quite effectively in recent corruption cases, such as the Notebooks case. In addition, Law 27,319 brought about relevant changes in the set of tools available to obtain evidence in complex investigations, such as the possibility to use cover agents and offer monetary rewards to whistleblowers. Likewise, a permanent rewards fund for whistleblowers created in 2009 was used to offer monetary rewards in exchange for useful information to trace and recover assets in a high-profile corruption case.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Over the last years, Argentina has modified its anti-money laundering system in accordance with international standards. Law 25,246 defines money laundering as an autonomous offence and imposes certain financial and non-financial institutions (obliged subjects) the duty to perform risk assessments of their clients and products and implement measures to mitigate them.

General obligations common to all obliged subjects are: (1) to obtain certain information and documentation from their clients; (2) to report to the Financial Information Unit (UIF) any transaction suspected of money laundering or terrorism financing; and (3) to abstain from disclosing the activities performed in compliance with AML regulations.

The information and documents requested by the UIF in the context of its suspicious activities investigations cannot be denied based on bank secrecy or any legal or contractual commitment. As a member of the Egmond Group, the UIF shares information with other financial intelligence units across the world. Lately, the UIF has been admitted as a private prosecutor in corruption and money-laundering cases.

An important feature of AML law for the recovery of assets is that it permits the forfeiture of the presumed instruments or proceeds of the crime when the criminal action cannot be pursued by the reasons described above. In addition, if money laundering offences are committed in the name, with the intervention or in benefit of legal entities, the former will be subject to sanctions such as a fine ranging between two and 10 times of the value of the amounts involved.

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43 Article 1 Law 27,304.
44 Court Docket 9,608/2018, 'Fernandez, Cristina Elisabet y Otros s/ Asociación Ilícita'.
46 Article 14, Law 25,246.
47 See https://egmontgroup.org/en.
48 Article 304 ACC.
ii Insolvency

Under the Argentine Bankruptcy Law (ABL) there are three proceedings under which the insolvency of a debtor may be treated and solved: (1) the reorganisation proceeding; (2) the out-of-court reorganisation agreement; and (3) the bankruptcy proceeding.

The aim of the reorganisation proceeding is to maintain and continue the debtor's business and restructure the outstanding debts by negotiating with creditors. The debtor must conclude a restructuring plan with a certain majority of creditors and submit it to the approval of the court. During this proceeding, the debtor maintains the administration of their assets under the supervision of a court-appointed receiver. However, acts exceeding the debtor's ordinary business must be authorised by the court.

By reaching an out-of-court reorganisation agreement, the debtor negotiates a payment plan with their unsecured creditors without following, in principle, the legal process of the reorganisation proceeding. If the debtor obtains the consent of the number of creditors that hold the majorities prescribed by law, the agreement can be submitted for court approval, and this will be binding to all unsecured creditors that did not give their approval.

The purpose of bankruptcy proceedings, on the other hand, is to identify and sell all the debtor's assets to distribute the proceeds among creditors. The court will adjudicate the bankruptcy when the debtor fails to comply with the restructuring plan or at the debtor or creditors' request or the debtor requests their own bankruptcy because they are unable to pay their debts when due. In the event that the debtor is adjudicated bankruptcy their assets will be subject to liquidation—some exceptions apply—and the proceeds distributed to the creditors. Bankruptcy adjudicated in a foreign court constitutes grounds to start insolvency proceedings in Argentina over assets located in the country. However, it cannot be used to challenge local creditor's rights over the assets located in Argentina.49

The ABL prescribes that a control committee, consisting of the holders of the most substantial credits and a representative of the debtor's employees, will supervise diverse acts during the bankruptcy.

According to the ABL, the receiver has the power to challenge transactions that have been entered into within the clawback period and are detrimental to the debtor's estate. Another aspect with regard to asset recovery in the context of insolvency is the possibility of extending the bankruptcy to third parties in cases explicitly set forth in Articles 160–171 ABL. Likewise, representatives, managers and directors of a bankrupt company who have intentionally produced, facilitated, allowed or aggravated the company's economic and financial situation or its insolvency will be liable before creditors and subject to liability proceedings against them.50

If the assets available in the debtor's estate are insufficient to cover the expenses of the bankruptcy proceeding, the judge will terminate it under presumption of fraud and will request a criminal investigation in accordance to Article 233 ABL. It is unusual that these cases be prosecuted.

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49 Article 4 ABL.
50 Article 173 ABL.
Arbitration

Argentine law regulates both domestic and international commercial arbitration. While domestic arbitration is ruled by the CCCN and the Argentine Civil and Commercial Procedural Code, international commercial arbitration is governed by the International Commercial Arbitration Law passed in 2018, which is mostly based on the UNCITRAL Model Law.

Overall, parties may only opt to resolve their controversy through arbitration when the dispute relates to pecuniary rights. Although most arbitrations deal with contractual liability, nothing prevents an arbitral tribunal from deciding on claims arising out of tortious liability.

Argentine law also recognises arbitrators’ authority to order interim measures, including those aimed at preserving assets (enforcement has to be requested to judicial courts though).

Foreign awards may be easier to enforce than foreign judgments as Argentine courts will recognise them in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

Fraud’s effect on evidentiary rules and legal privilege

Under Argentine law, there are no specific rules regarding the effect of fraud on legal privilege. Attorney–client privilege is associated with fundamental rights provided in the Constitution, such as due process and the right to have a fair trial. Thus, courts protect the secrecy of communications between defendants and their lawyers.

Similarly, there are no specific rules regarding fraud effects on evidence matters. In both civil and criminal litigation, parties have the right to control the evidence submitted to and ordered by the court. Parties may challenge evidence, for instance, on the basis that it is forged or it was illegally obtained. If they succeed, the court will strike the piece of evidence from the record.

INTERNATIONAL ASPECTS

Conflict of law and choice of law in fraud claims

Conflicts of law will be dealt with according to the applicable treaties between Argentina and the relevant foreign state. In the absence of an applicable treaty, courts will resort to local norms.

When directed to consider foreign law, local courts will apply it as the courts from the foreign state would do. In this case, if the foreign law establishes the renvoi to Argentine law, the latter applies. Exceptionally, local courts may decide to disregard the foreign law that would apply in accordance with conflict of law rules when the facts of the case are barely connected to that forum. Moreover, foreign law does not apply when it would result in situations incompatible with Argentine principles of public order.
As a general rule, Argentine law permits parties to an international contract to select the laws that will govern their agreement except in the case of consumer contracts and non-disposable rights. However, the choice of foreign law will only be valid to the extent that it is not agreed to evade the application of mandatory rules of Argentine Law and must not contravene Argentine public order and internationally mandatory rules of those states that may have a strong connection with the case.

In the absence of choice, contracts are governed by the law of the place of performance of the main obligation of the contract. Alternatively, the law of the debtor’s domicile applies. As to civil liability, the applicable law is the one of the defendant’s domicile or of the place where the harmful act was caused or is having effects.57

ii Collection of evidence in support of proceedings abroad

Cooperation with foreign authorities regarding evidence collection and transfer are ruled by specific bilateral treaties and conventions applicable to the relation with the relevant state. Argentina is party to several multilateral treaties such as The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters,58 the Inter-American Convention on the Taking on Evidence Abroad59 and the Montevideo Treaties of International Procedural Law of 1889 and 1940. Moreover, additional cooperation commitments stem from specific treaties, such as the UN Convention for the Suppression of the Financing of Terrorism.60

Besides international agreements, Argentine law establishes that local courts must cooperate with foreign authorities in civil, labour and commercial matters. Article 261 ACC establishes that local courts must grant foreign evidence requests as long as they do not affect the national public order. Requests must be made through letters rogatory but, if needed, direct communications are allowed as long as due process is respected.61

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

In the absence of applicable treaties, local courts have jurisdiction to order interim measures when deciding on the principal case, even if the assets are located outside Argentine jurisdiction. Local courts can grant foreign interim measures: (1) from a court with jurisdiction over the principal matter or, in the event of urgency, when the persons or assets subject to the request are or could be in the country; and (2) when the foreign decision must be enforced in Argentina. The Argentine Supreme Court held that due process and the right of defence constitute principles or public order that must be respected in order for a foreign decision to be executed in Argentina.62

57 Article 2,656 CCCN.
58 Approved by Law 23,480.
59 Approved by Law 23,506.
60 See Article 12.
61 Articles 2,611 and 2,612.
62 Argentine Supreme Court, Aguinda Salazar, Maria v. Chevron Corporation s/ medidas precautorias.
iv Enforcement of judgments granted abroad in relation to fraud claims

Recognition and enforcement of foreign judgments will be governed by applicable treaties. Argentina has signed treaties on this matter with the MERCOSUR countries, China, Russia, Italy and France, among others. In the absence of an international treaty, the enforcement of foreign judgments is governed by the local procedural rules.

Article 517 NCCCP – which will apply before Federal Courts or if the defendant is domiciled in Buenos Aires – establishes that local courts must enforce them when: (1) the judgment is a final sentence issued by a court with jurisdiction according to domestic law; (2) notification to the defendant and due process was respected; (3) the judgment complies with the authenticity requirements of the country of origin and domestic law; (4) the judgment does not affect national principles of public order; and (5) it does not overlap with a domestic judgment.

v Fraud as a defence to enforcement of judgments granted abroad

Based on Article 517 NCCCP cited above, conclusions can be drawn that local courts will not allow recognition or enforcement of a foreign judgment if the result of that recognition or enforcement is manifestly incompatible with Argentine principles of public order.

VI CURRENT DEVELOPMENTS

As part of its efforts to improve the efficiency of the criminal justice system, in 2017 the government created a Commission for the Reform of the Criminal Code. The bill submitted to the Senate in March 2019 brings about relevant changes in forfeiture, such as the possibility of expanding the situations in which non-conviction forfeiture applies. The project also incorporates corporate liability – at the moment defined only for corruption and bribery offences– and increases the penalties of crimes such as bribery, terrorism, and drug trafficking.
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 preexisting 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

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1 Christopher Prestwich is a partner at Allens. This chapter was written with assistance from Maria Mellos, a lawyer 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

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).
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.\textsuperscript{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.\textsuperscript{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, being 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.\textsuperscript{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 accessorital liability – statute**

The Corporations Act and the Australian Consumer Law (ACL)\textsuperscript{13} both contain accessorital liability provisions:

\textit{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’.\textsuperscript{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.\textsuperscript{15}

\textit{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).\textsuperscript{16}

\textsuperscript{10} See, for example, *Perpetual Trustees Australia Ltd v. Heperu Pty Ltd* [2009] NSWCA 84.
\textsuperscript{11} *Pioneer Mortgage Services Pty Ltd v. Columbus Capital Pty Ltd* [2016] FCAFC 78.
\textsuperscript{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.
\textsuperscript{13} Formerly known as the Trade Practices Act 1974 (Cth).
\textsuperscript{14} Section 236 of the Australian Consumer Law.
\textsuperscript{15} Australian Consumer Law definition of ‘involved’ (Section 2).
\textsuperscript{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 accessory liability claim arising out of a misrepresentation inducing the sale of a business at an inflated price include:

- the quality of the accessory’s knowledge: Actual rather than constructive knowledge of the falsity of the representation is required to found an accessory liability claim. In cases of wilful blindness, an inference could be made of actual knowledge;
- 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; and
- 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).

However, the following factors are advantageous to a person making a claim against an accessory:

- 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; and
- 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.

Civil accessorial liability – equity

In equity, the two main heads of accessorial liability are the two limbs of *Barnes v. Addy*, being 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

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19 Section 729 of the Corporations Act 2001 (Cth).
20 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.
22 *Barnes v. Addy* (1874) LR 9 Ch App 244.
Australian law has three elements: a ‘dishonest and fraudulent’ breach of 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, ‘the plaintiffs must prove that the defendants’ 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

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25 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).
28 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.
29 The precise terms used for the conduct of the accessory varies among different states and territories.
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.

**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. 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. 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;

- **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;

- **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;
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,\(^{35}\) with the third party having the onus to prove his or her contribution;\(^ {36}\) 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;\(^ {37}\) and

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 as the money has ‘no identifiable existence after the payment’.\(^ {38}\) It may be possible to trace into an account that is in credit, although occasionally overdrawn;\(^ {39}\) however, this approach has been criticised.\(^ {40}\)

If a plaintiff establishes a proprietary entitlement to certain assets via tracing, the court has no discretion to deny a remedy,\(^ {41}\) 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*.\(^ {42}\) 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.\(^ {43}\)

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:

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\(^{35}\) *In re Diplock; Diplock v. Wintle* [1948] Ch 465 at 539, 541; [1948] 2 All ER 318.

\(^{36}\) See *Sze Tu v. Lowe* [2014] NSWCA 462.

\(^{37}\) *In re Diplock; Diplock v. Wintle* [1948] Ch 465 at 546–8; [1948] 2 All ER 318.

\(^{38}\) *Russell Gould Pty Ltd v. Ramangkura* [2014] NSWCA 310.


\(^{41}\) *Alesco Corporation Limited ACN 008 666 064 v. Te Maari* [2015] NSWSC 469 at [151].

\(^{42}\) (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.

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; and
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
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.

44 Westpac Banking Corporation v. Bell Group Ltd (in liq) (No. 3) (2012) 270 FLR 1; (2012) 89 ACSR 1 at
[2132]–[2136] (Drummond AJA, Lee AJA agreeing); Consul Development Pty Ltd v. DPC Estates Pty Ltd
(1975) 132 CLR 373 at 396–7; 5 ALR 231; Farah Constructions Pty Ltd v. Say-Dee Pty Ltd (2007) 230
CLR 89; (2007) 236 ALR 209 at 245; Grimaldi v. Chameleon Mining NL (No. 2); Chameleon Mining NL
NSWL 75 at 107.
1 WLR 509.
47 Westpac Banking Corporation v. Bell Group Ltd (in liq) (No. 3) (2012) 270 FLR 1; (2012) 89 ACSR 1 at
[2127]–[2130] (Drummond AJA, Lee AJA agreeing); Grimaldi v. Chameleon Mining NL (No. 2); Chameleon Mining NL
Pty Ltd (in liq) [2015] NSWSC 1754.
48 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).
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 in order 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:

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

\*b\* 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.\(^{49}\) The applicant does not need to provide demonstrable proof that, absent 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.\(^{50}\) 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 *ex parte* freezing order is made by the court, it operates only until the first 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.

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.


\(^{50}\) *Downer EDI Engineering v. Taralga Wind Farm Nominees* No. 2 [2014] NSWSC 971.
ii Obtaining evidence

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 *ex parte*. To obtain a search order, the applicant must show:

- a strong prima facie case on an accrued cause of action;
- that if a search order is not made, the potential or actual loss to the applicant will be serious; and
- 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.

Some practical matters that arise in the context of a search order are:

- 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;
- 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;
- 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;
- 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
- 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. Subject to some limited exceptions, the record of that examination is admissible as evidence in a subsequent proceeding against the wrongdoer.

**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. 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).

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, 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.
Money laundering

The Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)\(^{57}\) and its related Rules\(^{58}\) 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,\(^{59}\) but may no longer be able to.\(^{60}\)

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.\(^{61}\)

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’.\(^{62}\)

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

\(^{57}\) See Sections 32, 36, 41, 43, 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.

\(^{58}\) See Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (Cth), Chapter 4.

\(^{59}\) See *Port of Brisbane v. ANZ Securities Ltd (No. 2)* [2003] 2 Qd R 661; [2002] QCA 158.


\(^{61}\) Section 120 of the Bankruptcy Act 1966 (Cth).

\(^{62}\) Section 8(7A)(a) of the International Arbitration Act 1974 (Cth).
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 Limited*63 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.64

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.65

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;66 the exception is not limited to the actual crime or fraud itself and includes communications made to further an illegal purpose;67 and a mere allegation of fraud will not be sufficient, rather a prima facie case of fraud must be established by evidence.68

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, being 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.69 It may also provide a basis on which an Australian court may decline to exercise its jurisdiction to hear the claim.

63 [2013] FCA 882.
64 *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).
65 (1996–7) 188 CLR 501 at 556, per McHugh J.

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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.\textsuperscript{70}

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.

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.\textsuperscript{71}

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.

\textit{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.\textsuperscript{72} 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.

\textit{The common law scheme}

At common law, there are four well-established requirements for the recognition and enforcement of foreign judgments \textit{in personam}:

\begin{itemize}
  \item[a] the foreign court must have exercised jurisdiction over the judgment debtor that Australian courts will recognise;
  \item[b] the foreign judgment must be final and conclusive;
  \item[c] there must be an identity of parties; and
  \item[d] the foreign judgment must be for a certain sum.
\end{itemize}

\textsuperscript{70} Voth v. Manildra Flour Mills Pty Ltd (1990) 171 CLR 538.


\textsuperscript{72} As specified in the Foreign Judgments Regulations 1992 (Cth).
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.

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:73

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';74

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;75 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.76

VI CURRENT DEVELOPMENTS

i. Money laundering

In Australia, there is currently a particular focus on the obligations of banks in relation to their compliance with the Anti-Money Laundering and Counter Terrorism Financing Act 2006. In 2017, AUSTRAC (Australia’s financial intelligence and regulatory agency) commenced proceedings in the Federal Court of Australia against a domestic bank alleging serious and systemic non-compliance with that legislation. That proceeding arose out of the

73 See Wentworth v. Rogers (No. 5) (1986) 6 NSWLR 534.
74 Reffek v. McElroy (1965) 112 CLR 517.
76 See M Davies, AS Bell and PLG Brereton, Nygh’s Conflict of Laws in Australia (2013) at [40.65].
use of ‘intelligent’ ATMs that accept cash deposits, with the funds deposited then being immediately available for transfer. AUSTRAC highlighted the higher money laundering and financing of terrorism risks associated with that product. The proceeding focused on:

a. the adequacy of the money laundering and financing of terrorism procedures put in place by the bank;

b. the assessments the bank undertook and whether appropriate risk-based systems were put in place to mitigate the risks; and

c. allegations of non-reporting and late reporting.

In June 2018, the Federal Court of Australia ordered the largest civil penalty in Australia’s corporate history against the bank, being a penalty order of A$700 million.77

I OVERVIEW

As new and innovative ways to channel illegally obtained assets constantly develop, asset tracing and recovery becomes an increasingly difficult task. The Austrian legal system already provides for helpful and effective remedies to this regard. Nevertheless, new laws and regulations have been established in the past years to prevent fraudulent acts and connected money laundering in an even more efficient way.

At present, Austrian criminal law broadly penalises, inter alia, criminal fraud, breach of trust, fraudulent insolvency and untenable representation of fundamental information concerning certain corporations, often accompanied by money laundering. It must be noted that one is criminally liable for fraud if he attempts to enrich himself or a third party by deception of facts, thereby creating a mistaken impression in the mind of the deceived party which leads that party to undertake an act, permit an act to be taken or fail to take an act, resulting in financial losses to him or a third party. Under Austrian civil law, one can base legal claims either on criminal offences or on civil fraud.

Moreover, in order to successfully retrieve assets which have been obtained through these fraudulent acts, the Austrian Criminal Procedure Code, Austrian Civil Procedure Code and the Austrian Enforcement Code provide for preliminary measures warranting, for example, an asset freeze and correctives in order to obtain sufficient evidence for criminal and civil claims. As the Austrian criminal law provides for faster and more efficient measures with respect to the securing of assets and collection of evidence, it provides for the factual and circumstantial basis for subsequent civil proceedings to claim for compensation.

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1 Valerie Hohenberg is a partner and Claudia Brewi is an associate at Wolf Theiss.
2 The Austrian legal system is based on codified principles of civil law. Judicial precedents are not binding but are strongly taken into consideration by courts and the parties in dispute.
3 Sections 146 and 147 Austrian Criminal Code.
4 Section 153 Austrian Criminal Code.
5 Section 156 Austrian Criminal Code.
6 Section 163a Austrian Criminal Code.
7 Section 165 Austrian Criminal Code.
8 Kirchbacher/Sadoghi in Hopf/Ratz, Vienna Commentary Austrian Criminal Code Section 146, Rn 15.
9 Section 870 Austrian Civil Code.
II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Civil remedies

Introduction to Austrian civil proceedings

In general, minor cases (valued up to €15,000) are heard before the District Courts in the first instance, with the Regional Courts acting as the appellate courts. Major cases (valued higher than €15,000) are heard before the Regional Courts in the first instance, and appeals are decided by the Courts of Appeal in second instance. Civil proceedings can consist of a maximum of three stages with a Court of Appeal or the Austrian Supreme Court acting as the third instance. In addition, there is a special District Court for Commercial Matters and the Commercial Court of Vienna on the regional level. Both dealing with all upcoming commercial matters (e.g., shareholder disputes, business acquisitions and disputes between businesses).

With respect to the duration of civil proceedings in Austria, it can be said that, as in most jurisdictions, the complexity of the case is the decisive factor. In Austria there is no general time limitation with respect to the closing of civil proceedings and obtaining of an enforceable decision. However, in the international context, Austria holds a good rank regarding the overall duration of civil disputes. As a rule, courts of first instance require one year to decide on a facile case and up to three years in complex cases. Appellate proceedings may take between six months and one year. The Supreme Court usually renders its judgment within one year.

When initiating civil proceedings, the claimant must pay a court fee depending on the amount in dispute, falling due at the time of filing the claim. In principle, the parties must bear their own legal costs during the ongoing proceedings, however, the losing party must reimburse the costs of the winning party in the end. It is important to note that the winning party is only entitled to reimbursement of attorneys’ fees on the basis of the Austrian Act on Attorneys’ Tariffs.

In Austria, contingency fees that entitle an attorney to a certain percentage of the amount obtained by the claimant and the quota litis (an agreement by which the creditor of a sum difficult to recover, promises part of it to the person who undertakes to recover it) are prohibited.

Damages

In general, if a person suffered financial damage due to fraudulent behaviour, a damages claim can be filed with the competent civil court against the damaging party or damaging parties. Under Austrian procedural law, it is possible to initiate civil proceedings concerning the same subject matter against different persons based on different legal grounds at the same or different venues or time. Consequently, the damaged party might only start proceedings against one person at the beginning. It is possible that individual claims may be decided differently in the judgment (given jointly) in respect of all persons involved.

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10 Sections 2-3 and 49-50 Austrian Law on Court Jurisdiction.
11 Section 2-4 Austrian Law on Court Jurisdiction.
12 Section 51 Austrian Law on Court Jurisdiction.
13 The respective limitation periods have to be considered in this context.
14 Rechberger in Rechberger/Simotta, Overview of the Austrian Civil Procedure Law, Rn 384.
To initiate civil proceedings, the basic prerequisites of a damage claim have to be established, which are (1) damage, (2) unlawful conduct, (3) causal link and (4) fault.\(^\text{15}\) The claim can be based on a contractual or non-contractual tortious misconduct, or both. The damaged party generally bears the burden of proof with respect to damages claims.

Moreover, the Austrian Civil Code provides for a rule which allows basing damages claims on criminal offences.\(^\text{16}\) Against this background, a damages claim may not only be filed against the direct perpetrator, but also against the assisting or directing perpetrator. Furthermore, if the damages result from a criminal act, the burden of proof with respect to the causal link and fault is put on the damaging party.\(^\text{17}\)

The amount of awarded damages generally depends on the degree of guilt, thus, whether the damaging party acted with slight negligence, gross negligence or intentionally. In general, the damage must be compensated \textit{in natura}: placing the claimant in the same position as if no damage occurred.\(^\text{18}\) Therefore, Austrian courts compare the (financial) situation of the damaged party with the hypothetical (financial) situation which excludes the damaging act. In case of gross negligence and intention, the claimant is entitled to receive additional compensation for lost profits.\(^\text{19}\) With respect to acts of fraud and money laundering, lost profits will always be reimbursed due to the fact that intentional behaviour is provided. It should be noted that a legal remedy of punitive damages does not exist in Austria.

In order to preserve one’s right to claim damages which result from the damaging act on which the claim is based, a declaration case can be filed if the damages have not yet occurred, but are likely to occur in the future, or in case the amount of damages is still unclear, as not all facts and circumstances are yet revealed.\(^\text{20}\)

\textbf{Annulment}

In cases of civil fraud in which a contract has been concluded, the damaged party is also entitled to file for an annulment of the contract.\(^\text{21}\) The claim must outline (1) the unlawful and intentional misleading of the fraudulent party and that the fraudulent party was acting intentionally, at least with \textit{dolus eventualis}, regarding the causation of a misrepresentation to the other party, (2) that the damaged party believed in the misrepresentation and (3) the causal link between the misrepresentation and the conclusion of the contract.\(^\text{22}\)

\textbf{Restitution of benefits and physical objects}

Austrian civil law provides for remedies of restitution of benefits and physical objects. In case the damaged party transferred an object to the fraudulent party, it can claim the restitution of the object as original owner from anyone who is currently in possession of it and lacks

\textsuperscript{15} Section 1295 et seq. Austrian Civil Code.

\textsuperscript{16} Section 1311 Austrian Civil Code in connection with Section 146 (Fraud) Austrian Criminal Code or Section 165 Austrian Criminal Code.

\textsuperscript{17} Reichsauer in Rummel, Commentary on the Austrian Civil Code, Section 1311 Austrian Civil Code, Rn 8, 17; Austrian Supreme Court of 2 September 1999, 2 Ob 76/97h.

\textsuperscript{18} Section 1323 Austrian Civil Code.

\textsuperscript{19} Section 1324 Austrian Civil Code.

\textsuperscript{20} Section 228 Austrian Civil Procedure Code.

\textsuperscript{21} Section 870 Austrian Civil Code.

\textsuperscript{22} Rummel in Rummel/Lukas, Commentary on the Austrian Civil Code, Section 870 Austrian Civil Code, Rn 3 et seq.
a proper chain of ownership. Another option would be to file an actio publicana, which requires the damaged party to prove a stronger/more legitimate possession than the current possessor. However, if the possessor obtained the object based on a valid title and/or in good faith, the damaged party may not succeed with his claim but rather has to claim damages from the fraudulent person.

In addition, the damaged party can also base its claims on the provision of unjust enrichment. This again would entitle the damaged party to receive back its loss *in natura*. Should that not be possible or feasible, the damaged party again has the right to receive a monetary substitute.

**Criminal remedies**

*Introduction to Austrian criminal proceedings*

Criminal proceedings, in contrast to civil proceedings, do not consist of two civilian opponents, but rather generally take place between the state represented by the public prosecutor and the accused. The public prosecutor is responsible for leading the investigation proceedings and giving orders to the investigating police department. Investigations can be initiated when the criminal investigation department or the public prosecutor's office becomes aware that a crime has presumably been committed or based on a private/anonymous presentation of facts and circumstances. Notably, public prosecutors are bound to investigate all potential criminal offence that come to their knowledge *ex officio*. Therefore, it lies within the sole discretion of the public prosecutor whether investigations shall be continued or dismissed or if an indictment is being filed with the criminal courts in order to initiate criminal proceedings.

Whereas minor cases with a maximum punishment of one year of imprisonment or a monetary fine are decided by the districts courts, major cases are decided by the regional courts in first instance. The composition of the tribunal at the regional courts depends on the seriousness of the crime. In criminal proceedings, there is only one stage of appeal in front of a Higher Regional Court or the Austrian Supreme Court.

The duration of criminal proceedings again depends on the complexity of the case, especially with respect to possible witnesses and expert opinions. The latest statistic available states that investigations together with criminal proceedings in front of the district courts as first instance may take 18 days on average. For regional courts that figure increases to an average of 33 days. However, in practice, cross border white-collar crimes connected to money laundering will lead to longer investigation proceedings in order to collect all the necessary evidence (also through mutual judicial assistance) for the main proceedings.

The costs for criminal proceedings are advanced by the state. However, with respect to attorneys’ fees, the accused must pay for his or her costs upfront. If the accused is being

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23 Section 366 Austrian Civil Code.
24 Section 372 Austrian Civil Code.
25 In particular, Section 1431 and 877, 879 Austrian Civil Code.
26 With respect to major white-collar crimes and corruption, a special unit at the public prosecutor's office has been established already in 2011 – the Central Public Prosecutor's Office for the Prosecution of Business Crimes and Corruption (German acronym: WKStA).
27 Sections 31 and 32 Austrian Criminal Procedure Code.
acquitted, attorneys’ fees will be partially reimbursed. If the criminal proceeding ends with a conviction, the convicted must bear, as a rule, the costs of the trial in form of a lump sum, the costs of an expert, as well as the attorneys’ fee of the private party and his or her own costs.29

Victims’ rights

The rights of victims of a criminal offence in the investigation and subsequent criminal proceedings are of high importance in Austria. Therefore, the Austrian Criminal Procedure Code sets forth numerous provisions to protect and strengthen the position of a victim of crime. These victim’s rights consist in general of (1) the right for inspection and copy of the criminal file, (2) being informed on the procedural progress, (3) taking part in the criminal proceedings and having the right to question the accused and witnesses, and (4) requesting continuance of proceedings closed by the public prosecutor.30

It should be noted that any person directing or contributing to a crime is as criminally liable as the immediate perpetrator,31 and thus, the victim’s rights are also granted against these persons.

Private party joinder / damages

Victims of a criminal defence can further join the proceedings as a private party claiming damages against the accused.32 The private party joinder must be filed at court before closing of the criminal proceeding. By this time, the exact amount claimed must also be stated. As the private party is not responsible for paying fees associated with the proceedings (experts, court fee, evidence taking), the cost exposure for the damaged party decreases essentially. Notably, a private party joinder leads to the interruption of the limitation period with respect to civil proceedings.

A private party is entitled to request (1) the taking of evidence,33 (2) perpetuation of the criminal charges, in case the public prosecutor steps down,34 (3) following the criminal proceedings and presenting an opening and closing speech and (4) appeal against the decision of the court on the private party joinder.35

In case of a conviction, the court is obliged to decide on the civil claims of the private party as well. The damages can be awarded or declined; if the court is of the opinion that the claim is not sufficiently proven, based on the results of the criminal proceedings, it can also relegate the claim to the competence of a civil court. In case of an acquittal the court must always relegate the claim to the competence of a civil court. In this context, it should be noted that civil courts are not bound to the verdicts of criminal courts by law; however, the Austrian Supreme Court set forth that civil courts have to acknowledge the findings of the criminal courts regarding the verdict itself and the findings of the necessary facts and circumstances resulting in the verdict of the specific crime.36

29 Sections 389 and 381 Austrian Criminal Procedure Code.
30 Section 66 et seq. Austrian Criminal Procedure Code.
31 Section 12 Austrian Criminal Code.
32 Section 67 Austrian Criminal Procedure Code.
33 Section 55 Austrian Criminal Procedure Code.
34 Section 72 Austrian Criminal Procedure Code.
35 Section 366 Austrian Criminal Procedure Code.
36 Legal Opinion of the Austrian Supreme Court No. RS0074219; Klicka in Fasching/Konecny 3 III/2 Commentary on Austrian Criminal Procedure Law, Section 411 Austrian Civil Procedure Code, Rn 29.
Criminal liability of companies

On 1 January 2006, the Austrian Corporate Liability Act went into force (VbVG). It applies to public and private law entities (limited liability companies, stock companies) and business partnerships and penalises any acts against the Austrian Criminal Code. Corporate groups do not fall under the scope of the VbVG, but the parent companies can be held indirectly liable for acts of their subsidiaries due to their possible influence through principal decisions, their monitoring duty and corporate policies.

The liability requirements are, in general, that a decision maker or ordinary employee committed a criminal offence, and that it was either committed to the benefit of the company or by a breach of corporate duties. The law provides for financial penalties (with a maximum fine of €1.8 million in total), but also alternative measures by giving orders, for example, an order to compensate damages, being put on probation or charitable activities.

Against this background it has to be noted that both individuals and corporations can be criminally liable for the same misconduct. A corporation can only be liable for criminal acts of an individual. However, the corporate liability for a criminal act and the individual liability of a person for the same act do not exclude each other.

ii Defences to fraud claims

Statute of limitation

In general, the statute of limitation is 30 years in civil matters. The following limitation periods should be considered in particular:

- damages: only three years from knowledge of the damage and the damaging party;
- damages or annulment connected to civil fraud: 30 years from concluding the contract; and
- unjust enrichment: 30 years from performance.

Moreover, the liability for criminal offences is subject to a statute of limitation. The time limitation commences with completion of the offence or with cessation of the criminalised conduct. The statute of limitation depends on the possible punishment for a certain crime and can be between one year and 20 years (there is no statute of limitation for offences punishable by imprisonment between ten and twenty years or by imprisonment for life).

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37 Section 1 Austrian Corporate Liability Act.
38 Section 2 Austrian Corporate Liability Act.
39 Section 3 Austrian Corporate Liability Act.
40 Section 1 Austrian Corporate Liability Act.
41 Section 3 paragraph 4 Austrian Corporate Liability Act.
42 Section 1478 Austrian Civil Code.
43 Section 1489 Austrian Civil Code.
44 Rummel in Rummel/Lukas, Commentary on the Austrian Civil Code, Section 870 Austrian Civil Code, Rn 12.
45 Lurger in Kletečka/Schauer, Commentary on the Austrian Civil Code -ON1.05, Sections 1431–1437, Rn 18.
46 Section 57 Austrian Criminal Code.
Lack of competence or proof of unjustified allegations

Lack of competence in the addressed jurisdiction is another common defence argument, as the provisions in the Austrian Civil Procedure Code as well as the Austrian Criminal Procedure Code provide for various, however non-uniform, points of connection regarding the jurisdiction and competence of a court or public prosecution, for example, citizenship, location of assets and place of the criminal act.

Moreover, every defendant and accused has the right to proof that certain prerequisites of a claim or criminal offence are not met. As already set out, in civil law the general rule applies that every party has the burden of proof with respect to their raised allegations and arguments. In criminal law the general rule of in dubio pro reo applies.

III SEIZURE AND EVIDENCE

It should be noted that asset tracing is neither a claim nor a remedy. However, it is a tool to identify assets, collect evidence and subsequently be able to assess possible legal measures and their chances of success. The overall goal is the recovery of deprived assets and consequently the denial of these assets to the persons who obtained them through fraudulent acts.

i Securing assets and proceeds

Preliminary injunctions (civil proceedings)

To secure monetary claims, one can request the issuance of a preliminary injunction at the civil courts. This can either take place in the course of pending civil proceedings in the respective matter or before filing a claim. The subjective endangerment must be successfully argued. If the damaged party already holds an enforceable decision, a request to secure these monetary claims can be filed without proving the subjective endangerment.

Following the Austrian courts, a subjective endangerment is established in cases where it is obvious that without a preliminary injunction the damaging party will damage, destroy, hide or move away assets in order to hinder the claimant from pursuing its claim. In general, the latest behaviour of the defendant, as well as the specific circumstances of the case, are decisive.

The court can order the following preliminary measures with respect to the object at stake: (1) movable assets and money: judicial custody and administration; judicial prohibition of sale or pledging; judicial order to refrain third parties from moving assets, (2) immovable assets: judicial custody and administration; judicial prohibition of sale or pledging; judicial order prohibiting any registrations in the land registry, and (3) receivables: issuance of a garnishment order.

Preservation order (criminal proceedings)

To secure potential civil claims of a private party, the public prosecutor can order the securing of assets, including monies on bank accounts. The public prosecutor is entitled to order an asset freeze in order to (1) secure evidence, (2) secure civil claims, and (3) secure a proprietary

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order that might be issued by the court at the end of the proceedings (e.g., confiscation or forfeiture). With regard to money on a bank account, the public prosecutor orders the prohibition to issue, pledge or dispose the assets.

Following the securing of assets, the public prosecutor will file an application to the court to seize these assets, as the order of the public prosecutor shall usually only be of provisional nature. The public prosecutor is not bound to any explicit deadline until such an application must be made. Both the public prosecutor and the criminal court will lift the order to secure or seize assets when there is no more reasonable suspicion regarding the alleged criminal offences or if the prerequisites for the order ceased to exist.

In case of a conviction, and granting of the civil claims or parts thereof, the claim will be settled from the seized assets. In such a scenario, a forfeiture of the assets is not permissible in the amount granted to the private party. However, if the court comes to a conviction but is of the opinion that the private joinder claims are not sufficiently proven and the private party is relegated to the civil courts, the private party can apply for an interim injunction in case of a lift of the asset freeze by the criminal court. As soon as the private party holds a decision granting its claims, the criminal court must cancel the forfeiture retroactively and the private party is entitled to request that the civil claim shall be settled from the assets which were first seized and then forfeited. If the accused has been acquitted, the court will most likely decide that the prerequisites for a seizure ceased to exist and will order its cancellation. In that case the private party can again apply for a subsequent interim injunction.

ii Obtaining evidence

Investigators

To trace, locate and identify assets to be seized, the involvement of professional investigators is often helpful. This does not only refer to private investigators gathering evidence and private experts to understand certain money flows, but also to attorneys. In Austria, lawyers have access to a range of registers (WIEREG, FB, GB, ZMR) and open source data. Lawyers who specialise in asset tracing and recovery can easily connect information and decide on the necessary measures to collect crucial evidence to build a case.

Production of evidence in civil proceedings

In Austrian civil proceedings of first instance evidence must be provided by the parties. To this regard, the parties may present documents or request the questioning of witnesses strengthening their arguments and argue against evidence requests by the opposing party. The court is then entitled to decide if certain evidence is admissible or inadmissible (e.g., not submitted in due time, not required). It should be noted that the use of unlawfully obtained evidence is not generally prohibited in civil proceedings.

The production of evidence is in the sole discretion of the parties. If only one party is in the sole possession of decisive evidence, the court can order its disclosure. However, these

50 Section 110 Austrian Criminal Procedure Code.
51 Section 115 Austrian Criminal Procedure Code.
52 Legal Opinion of the Austrian Supreme Court No. RS0129916.
53 In appellate proceedings, evidence is generally not re-examined and new evidence or new allegations are not admitted during the appellate proceedings.
orders are not enforceable; the refusal of disclosure may only be considered by court in its free assessment of evidence.\textsuperscript{54} As a result, criminal proceedings are often used as a tool to obtain the necessary evidence for civil proceeding.

\textit{Obtaining evidence in criminal proceedings}

A private party joinder or presentation of facts and circumstances is a good tool to present the victim’s perspective of the case to the public prosecutor (judge) and to provide additional evidence to the state or encourage the public prosecutor to produce further evidence. Especially in complex white-collar crime matters, private parties are often in the position to assess the case in greater detail and provide the public prosecutor with the background information needed to order additional evidence measures. Contrary to civil proceedings, means such as house searches or confiscation of data can be ordered to obtain evidence.\textsuperscript{55} In cases of money laundering, the inclusion of the competent authorities should also be suggested. Against this background, a strong collaboration with the competent authorities in criminal proceedings is vital with respect to evidence production.

\textbf{IV \hspace{1em} FRAUD IN SPECIFIC CONTEXTS}

\textbf{i \hspace{1em} Banking and money laundering}

Section 165, paragraph 1 of the Austrian Criminal Code determines that any person who hides or conceals the origin of any assets obtained through certain criminal acts – especially by making false statements in the context of legal transactions about the origin or true nature of these assets, property or other rights attached to them, the permission to control them, their transfers, or about their whereabouts – is criminally liable for money laundering. According to paragraph 2, the same applies to any person who knowingly takes possession of, stores, invests, administers, transforms, utilises, or transfers these assets to a third person.

In order to prevent acts of money laundering in the first place, credit institutions, as well as attorneys, are obliged to follow the KYC-principal. KYC stands for ‘know your customer’. It requires banks, in particular, to gather information on the identity of their client/customer and the processed transaction before entering into a business relationship (e.g., information on the ultimate beneficial owner, origin of the funds). Throughout the course of the business relationship, the bank must continually check for suspicious behaviour. In cases of suspicion of money laundering, the credit institution must render a notification of suspicion to the Austrian Financial Intelligence Unit. In 2017, 2,976 of a total 3,058 of these notifications were filed by credit institutions.\textsuperscript{56} Moreover, one part of the collaboration with the Austrian Financial Intelligence Unit also obliges credit institutions to provide information upon request irrespective of a notification of suspicion.\textsuperscript{57}

\textbf{ii \hspace{1em} Insolvency}

The Austrian Criminal Code further sets forth that any person who intentionally conceals, hides, sells or damages a part of the person’s assets, pretends the existence or honours a

\textsuperscript{54} Section 303 et seq. Austrian Civil Procedure Code.
\textsuperscript{55} Part 8 of the Austrian Criminal Procedure Code.
\textsuperscript{57} Section 41 Banking Act.
non-existing liability, or who otherwise reduces his or her assets in a bogus manner thus thwarting or discounting the satisfaction of one or more of the person’s creditor as well as any person whose gross negligence brings about that person’s own insolvency can be held criminally liable. Furthermore, preferential treatment of creditors after entering into insolvency is prohibited. All of these provisions also apply to executives of legal persons or an unincorporated entity if the person acts without the consent of the debtor.

In Austria, managing directors are obliged to file for insolvency if the requirements under the Austrian Insolvency Act are met. The law provides for 60 days from the occurrence of insolvency. If the managing director does not act within this period, creditors can claim the damages they have suffered as a result of the culpable delay of the insolvency application from him directly. Furthermore, any creditor of the insolvent person or entity may lodge its claims in the insolvency proceedings. However, legal disputes which are intended to enforce or secure claims against the debtor cannot be initiated nor continued after the opening of insolvency proceedings. Only secured creditors and creditors with rights to assets which are in the possession of the debtor enjoy special provisions.

iii Arbitration

In the event of certain criminal acts by one of the parties, the Austrian civil procedure law allows to contest an arbitral award after it was rendered. An arbitral award can be set aside if the requirements for an action to reopen proceedings are met. Civil proceedings might be reopened upon application by a party if:

a a document on which the judgment was based was forged or falsified;
b a witness, an expert or the opposing party has given false testimony during his or her examination, and the judgment is based on this testimony; or
c the judgment was given as a result of an act that is punishable under one of the following criminal offences: wilful deception, embezzlement, fraud, forgery of documents, forgery of especially protected documents, forgery of public seals, indirect false certification, suppression of documents, displacement of boundary marks.

iv Fraud’s effect on evidentiary rules and legal privilege

As outlined in Section II.i, in cases of criminal fraud the burden of proof with respect to fault and casual link is reversed. However, the effect on evidentiary rules in civil proceedings is limited to that. The evidentiary rules in criminal law are not affected; the principle of in dubio pro reo applies consequently.

58 Section 156 Austrian Criminal Code.
59 Section 159 Austrian Criminal Code.
60 Section 158 Austrian Criminal Code.
61 Section 161 Austrian Criminal Code.
62 Section 69 Insolvency Act.
63 Section 6 Insolvency Act.
64 Section 611, paragraph 2(6) Austrian Civil Procedure Act.
65 Section 530 Austrian Civil Procedure Act
66 Article 6, paragraph 2 European Convention on Human Rights; Section 259(3) Austrian Criminal Procedure Code.
With respect to legal privilege, an Austrian lawyer is generally bound by professional secrecy obligations in all matters that have been confided to him or her and all facts that have otherwise become known in his or her capacity as a lawyer. This professional secrecy is safeguarded by various statutory provisions.67

Under criminal procedure law an attorney-at-law is entitled to refuse to give evidence. This right may not be circumvented by the confiscation of any documents or data medium or by the examination of the attorney’s employees or subcontractors. In criminal proceedings legal privilege extends to documents handed over by the client to the attorney. A verdict based on such evidence is null and void.68 Also civil procedure law provides for the right to refuse to give evidence in civil proceedings. However, any evidence gained by violating this right can be used in these proceedings without any further consequences.69 Nevertheless, an attorney’s secrecy may be pierced by certain reporting obligations to the Federal Criminal Police Office regarding potential cases of money laundering or terrorist financing.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

With regard to civil remedies, a distinction must be made between the jurisdiction of Austrian courts and Austrian law as applicable substantive law in proceedings. The international jurisdiction of Austrian courts within the EU is regulated by the European Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).70 As a rule, the courts of a Member State have jurisdiction for all claims against individuals or companies which are domiciled in that Member State.71 In addition, as for damages claims, the courts of the place where the harmful event occurred or may occur, have jurisdiction.72

Furthermore – according to Austrian national law – a pecuniary claim may be brought before the court of the place where assets of the defendant or the claimed object is located, if Austrian courts do not have jurisdiction in any other way.73 If proceedings with an international dimension are pending before Austrian courts, the Austrian International Private Law – including EU Regulations, most notably the Regulations on the law applicable to (non-)contractual obligations74 – is applied to determine the applicable substantive law. Initially, the parties can choose the applicable substantive law.75 If there is no choice of law, e.g. the law applicable for an obligation arising out of damages claims, generally it is the law of the country in which the damage occurred.76

67 For example, Section 321, paragraph 1(4) Austrian Civil Procedure Code; Section 157, paragraph 1(2) Austrian Criminal Procedure Code; Section 171, paragraph 2 Austrian Federal Fiscal Code.
68 Section 157 Austrian Criminal Procedure Code.
69 Section 321, paragraph 1(4) Austrian Civil Procedure Code.
70 Regulation (EU) 1215/2012 of 12 December 2012.
71 Article 4 Regulation (EU) 1215/2012 of 12 December 2012; Section 65 Austrian Law on Court Jurisdiction.
72 Article 7(2) EU Regulation 1215/2012.
73 Article 99 Austrian Law on Court Jurisdiction.
74 Regulation (EU) 593/2008 (Rome I) and Regulation (EU) 864/2007 (Rome II).
75 Article 3 Rome I; Article 14 Rome II.
76 Article 4 Rome II.
Austrian criminal law applies to all offences committed in Austria.\textsuperscript{77} An offence is committed at any place where the perpetrator acted or should have acted or where success occurred or should have occurred, according to the perpetrator’s imagination.\textsuperscript{78} In the case of fraud, domestic jurisdiction is even given if the perpetrator acted abroad, but only if the effective loss of assets, which affects a third party, occurred in Austria.\textsuperscript{79}

\section*{ii Collection of evidence in support of proceedings abroad}

Austrian courts and authorities grant judicial assistance in support of civil as well as criminal proceedings abroad. Regarding civil proceedings, the EU Evidence Regulation\textsuperscript{80} and the Hague Evidence Convention\textsuperscript{81} determine the judicial assistance by Austrian civil courts. Within the EU,\textsuperscript{82} requests regarding the taking of evidence in another Member State or by a court of another Member State shall be transmitted by the requesting court directly to the court addressed.\textsuperscript{83} The requested court shall execute the request without delay and, at the latest, within 90 days of receipt of the request.\textsuperscript{84} Outside of the scope of the EU Evidence Regulation, judicial assistance is also generally granted upon request and in accordance with the Austrian Law on the taking of evidence.\textsuperscript{85} Nevertheless, a request for judicial assistance has to be declined if the remedy would be prohibited by Austrian law.\textsuperscript{86}

The judicial assistance by Austrian authorities and courts in criminal proceedings is governed by various bilateral and multilateral treaties as well as the Austrian Act on International Cooperation in Criminal Matters. Austria is a signatory, inter alia, of the European Convention on Mutual Assistance in Criminal Matters, which provides for intensive cooperation in the field of investigation of crimes, prosecution of criminal suspects and procuring evidence and other multilateral treaties which aim to enhance international cooperation in criminal matters, including asset tracing and recovery, such as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

\section*{iii Seizure of assets or proceeds of fraud in support of the victim of fraud}

As fraudulently obtained assets are often funnelled or even laundered into other jurisdictions, often several, it is also vital to always bear in mind which jurisdictions allow for seizure of assets or proceeds and under which circumstances. In some jurisdictions it is necessary to link the assets directly to a crime. However, in other jurisdictions it is enough to link assets only to the person who committed a crime.

In 2017, the European Regulation to facilitate cross-border debt recovery in civil and commercial matters went into force.\textsuperscript{87} A European Account Preservation Order (EAPO) prevents the transfer and withdrawal of funds that are held by the debtor or on his or her account.
behalf in a bank account maintained in a Member State of the European Union (except the UK and Denmark). It is designed for creditors, but also for companies or consumer, domiciled in a Member State, and who hold money claims against a debtor in another Member State.

The application for an EAPO can be filed at any procedural stage. The debtor is not included in the proceedings to guarantee the surprise effect (ex parte procedure). The application shall be filed with the court competent for the proceedings on the substance of the matter or at the court which a decision on the subject matter has already been obtained from. In case the creditor has not yet obtained a judgment in the main proceedings, the court shall issue its decision on an EAPO within ten working days, otherwise five. The obtained EAPO can serve for further account preservations in other Member States. Thus, the creditor must only prove once that the requirements for an order are met.

Another feature of the EAPO is that it assists creditors in tracing bank accounts. In case a creditor has reason to believe that the debtor holds accounts with a bank in a specific Member State, but without having any further details, he may file a request to obtain account information. This application requires an existing enforceable title or a risk that the enforcement would be jeopardised otherwise.

iv Enforcement of judgments granted abroad in relation to fraud claims

Enforcement proceedings in Austria are governed by the Austrian Enforcement Act. By virtue of Austria’s membership in the EU, it needs to be distinguished between judgments filed by EU Member States and non-EU judgments when assessing the enforceability.

The procedure for the enforcement of EU judgments in Austria is governed by Brussels I Regulation. Within this ‘Brussels Regime’, a judgment rendered in a Member State of the EU is recognised in any other Member State without any special procedure. Notwithstanding, there are a number of limited grounds on which recognition can be denied (e.g., judgments contrary to the ordre public of Austria). Preliminary injunctions, which are of particular importance regarding asset tracing, are also classified as judgments in the sense of these provisions.

The enforcement of foreign or non-EU judgments requires a declaration of enforceability by the competent Austrian court prior to the actual enforcement. The declaration of enforceability is issued if that judgment is enforceable in the state of origin and the reciprocity with the state of origin is established by bilateral treaties or other instruments. However, even if these requirements are met, the declaration of enforceability may still be refused for several reasons (e.g., if the judgment or its enforcement violates basic principles of Austrian law (ordre public)). Once the declaration of enforceability has become effective, the foreign judgment may be considered equal to domestic enforceable titles.

91 Section 424 Austrian Enforcement Act; Article 14.
93 Article 45 Regulation (EU) 1215/2012 of 12 December 2012.
94 Section 403 Austrian Enforcement Act.
95 Section 406 Austrian Enforcement Act.
96 Section 408 Austrian Enforcement Act.
v  Fraud as a defence to enforcement of judgments granted abroad

As discussed in Section V.iv., Austrian courts may refuse recognition or enforcement of a foreign judgment upon request of the opposing party if it is not in accordance with the Austrian *ordre public*. Consequently, Brussels I Regulation provides that the enforcement of a judgment granted abroad due to fraudulent behaviour (e.g., falsification of documents) may be refused.

On national level, the person against whom enforcement is sought can also apply for the refusal of the declaration of enforceability or the enforcement contrary to the Austrian *ordre public*. In case of judgments rendered in other EU Member States, the opposing party may raise arguments against the enforcement with an application for discontinuation of the enforcement. Regarding judgments of third States, it should be noted that the opposing party is not included in the proceedings on the declaration of enforceability, but can file an appeal against such subsequently.

VI  CURRENT DEVELOPMENTS

On 15 January 2018, the Law on Registration and Disclosure of Ultimate Beneficial Owners (WiEReG) came into force. Its main purpose is the registration of beneficial owners in a registry, established especially for this purpose, to prevent assets obtained through criminal activities from being transferred unobtrusively into economic life. The WiEReG sets forth that legal entities domiciled in Austria and trusts administered in Austria must identify their beneficial owners, carry out appropriate and regular checks and report these to the registry. The establishment of the registry is part of the implementation of the Fourth European Directive on the prevention of the use of the financial system for purposes of money laundering or terrorist financing, which obliges all European Member States to keep such a registry. Furthermore, the Fifth European Directive on the prevention of the use of the financial system for purposes of money laundering or terrorist financing is currently being implemented into Austrian law, covering the supervision of virtual currencies for the first time as well as enhancing the international collaboration between the competent authorities. As the established cryptocurrency market is likely to be misused to convert fraudulently obtained assets into a different form, the consideration of virtual currencies in money laundering matters in particular is of great significance.

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97 Article 45, paragraph 1a (EU) 1215/2012 of 12 December 2012.
98 Sections 410 and 411 Austrian Enforcement Act.
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 compensation for damage incurred as a result of fraud or dishonest behaviour.

For starters, victims can choose to pursue a civil claim for damages. However, Belgian civil law has no separate provisions dealing specifically with asset tracing and recovery, or with the gathering of evidence to support claims arising specifically out of fraud or dishonesty. These victims must, therefore, rely on the general actions available under Belgian civil law. Depending on the case, this will likely be either a claim for tortious liability or contractual liability.

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 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 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.

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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 (i.e., ‘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 (i) the place where the damage occurred, or (ii) 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, and whether Belgium is the place where the relevant obligation was performed (or had to be performed).

In both contractual and tortious cases, a claimant can always sue in Belgium if the defendant is domiciled in Belgium. Subject to certain restrictions, parties may also agree on a choice-of-forum clause.

Standing

A claimant has standing before the civil courts to sue a defendant if the former has a 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 the required standing (by way of principle), unless their claim relates to some personal harm suffered by each of their members individually. The Federal Act of 28 March 2014 introducing a class action in consumer-to-business relations has nonetheless created a general exception to this personal harm requirement. This Act

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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.
10 Article 17 of the Belgian Civil Code.
11 economie.fgov.be/nl/consument/rechtsvordering_collectief_herstel/#.VbD5up1CSUk.
allows a class representative (i.e., one of the associations described in the Act) to initiate court proceedings for violation by a company of its contractual obligations or a limited number of statutory provisions (i.e., provisions on e-commerce, privacy, financial services, healthcare, product safety, insurance, competition). The court may subsequently choose either an opt-in or an opt-out class representation. The latter will allow the class representative to act on behalf of an unknown number of legal subjects who gave no contractual mandate to the representative but who will nevertheless be bound by the legal outcome of these proceedings. The representative may, therefore, be claiming damages for harm suffered by legal subjects that are entirely foreign to him or her (i.e., non-personal harm).

If a fraud victim requests an investigating judge to criminally investigate his or her claim, or if he or she introduces his or her claim before a criminal court in a pending criminal investigation, recent case law from the highest Belgian court (Court of Cassation) would appear to have laid down a stricter threshold for the victim’s standing, requiring him or her to prove it plausible that he or she had indeed suffered any personal harm.¹²

**Compensation**

Compensation for fraud or dishonesty can be in the form of a specific performance, restitution and damages, or a combination of these remedies. In any event, the compensation must restore the victim to the hypothetical situation as if the criminal offence had not occurred, and instead its lawful alternative occurred. 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. Thus, a fraud victim can claim compensation from any convicted person if the victim can prove that the accused’s 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.¹³

**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 or breach of contract, 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.¹⁴ Civil claims based on tortious liability (including claims on the grounds of fraudulent impoverishment to the detriment of one’s creditors) have a double time-bar. They are time-barred when five years have passed since the claimant found out (1) the damage, or the increase thereof, and (2) the

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¹² 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.

¹³ Article 1384 of the Belgian Civil Code.

¹⁴ Article 2262 bis, Section 1, Paragraph 1 of the Belgian Civil Code.
identity of the liable person. This claim in tort is furthermore in any event time-barred 20 years after the liable person committed the fraudulent act, regardless of the knowledge of the claimant about the aforementioned (1) and (2).\(^\text{15}\)

Time bars for damages 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). One may also get an extension by sending a written notice drawn up by an attorney (if the notice conforms to certain requirements).\(^\text{16}\) 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. However, the ‘natural obligation’ remains in effect indefinitely, meaning that spontaneous payment of the corresponding damages afterwards 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.\(^\text{17}\) 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

A creditor may secure assets and proceeds by applying a ‘conservatory’ attachment, whereby the assets of his debtor are essentially ‘frozen’. 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.\(^\text{18}\)

A creditor seeking conservatory attachment must in principle request permission from the competent court 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 or herself. The documents must in that event constitute proof of the claim.\(^\text{19}\)

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 or possessory rights to these 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).\(^\text{20}\)

A conservatory attachment can be made on the debtor’s movable and immovable property. The creditor may also attach goods held by a third party, for example, (most

\(^\text{15}\) Article 2262 bis, Section 1, Paragraph 2-3 of the Belgian Civil Code.
\(^\text{16}\) Article 2244 of the Belgian Civil Code.
\(^\text{17}\) Article 21 of the introductory chapter to the BCC.
\(^\text{18}\) 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)).
\(^\text{19}\) Article 1445 Belgian Code of Civil Procedure.
commonly) a bank. Such an attachment affects all of 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.\(^{21}\)

### 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,\(^{22}\) 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.\(^{23}\) 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.\(^{24}\) The court can also order the confiscation of assets located outside Belgium.\(^{25}\)

### ii 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 to support their claim in court.

A full-fledged document discovery or disclosure (as known under US or UK law) is not available in Belgian civil procedure. However, upon request by any party to the proceedings, a Belgian court may order the production of specific documents that are in the possession of either another party to the proceedings, or a third party.\(^{26}\) The documents must contain the evidence 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

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\(^{21}\) Articles 28 bis Section 3, 35, 35 bis, 35 ter and 89 of the BCCP.

\(^{22}\) Article 1 of the BCC.

\(^{23}\) 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.

\(^{24}\) Article 43 bis of the BCC.

\(^{25}\) Article 43 ter of the BCC.

\(^{26}\) Article 877 of the Belgian Code of Civil Procedure.
describe the requested documents as well as the relevant facts for which the documents may provide supporting evidence. A party may request the production of documents during the proceedings on the merits, but it may also do so in separate proceedings (e.g., preliminary relief). The party may also request that the relevant court additionally orders the payment of a periodic penalty for any breach of the order, as an additional 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.

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27 Article 326 of the Belgian Code of Criminal Procedure (BCCP).
28 Article 154 of the BCCP.
29 Article 32 of the BCCP.
30 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.\(^\text{32}\)

**ii Insolvency**

As explained earlier, Article 489, 489 *bis* and 489 *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 the creditors (e.g., wilful impoverishment).

**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 is of a ‘patrimonial’ nature. Although most arbitrations deal with contractual liability, nothing prevents an arbitral tribunal from deciding on claims arising out of tortious liability.

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 domestic or foreign arbitration proceedings.

**V INTERNATIONAL ASPECTS**

**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 (*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 (*lex loci damni*), irrespective of where the event giving rise to the damage occurred (*locus acti*) and irrespective of where the indirect consequences of that event occurred.\(^\text{33}\) However, if both claimant and defendant had their habitual residence in the same country when the damage occurred, the substantive law of

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\(^{\text{32}}\) 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).

\(^{\text{33}}\) Article 4(1) of the Rome II Regulation.
that country will apply.\textsuperscript{34} Furthermore, if it follows from all circumstances of the case that it is manifestly more closely connected to another country,\textsuperscript{35} or in the event of a choice-of-law clause,\textsuperscript{36} the \textit{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 such a clause, the type of contract will be the relevant criterion to determine the applicable law (e.g., the law of the country of residence of the seller will apply to a sales contract). Some exceptions do apply, however, as well as specific rules for all contracts that the Rome II Regulation does not expressly deal with.

Both aforementioned 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).\textsuperscript{37} A Belgian court will, therefore, only rarely apply the (subsidiarily applicable) Belgian Code of Private International Law (which moreover provides for some comparable criteria).

Finally, under Belgian private international law rules,\textsuperscript{38} Belgian courts must apply the applicable foreign law in accordance with the interpretation given to it in the relevant foreign country.

\textbf{ii \hspace{1cm} Collection of evidence in support of proceedings abroad}

The answer to a request for the collection of evidence to support foreign civil or criminal proceedings depends on which state (EU or non-EU) requested the international assistance.

\textit{Collection of evidence in support of foreign civil proceedings}

Within the EU, the gathering of evidence in civil and commercial matters is 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).\textsuperscript{39} 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.

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.\textsuperscript{40} Belgium is not a party to the 1970 Hague Convention.

\begin{itemize}
\item \textsuperscript{34} Article 4(2) of the Rome II Regulation.
\item \textsuperscript{35} Article 4(3) of the Rome II Regulation.
\item \textsuperscript{36} Article 14 of the Rome II Regulation.
\item \textsuperscript{37} Article 3 of the Rome II Regulation.
\item \textsuperscript{38} Article 15(1) of the Belgian Code of Private International Law.
\item \textsuperscript{39} Denmark is not a party to the Evidence Regulation.
\item \textsuperscript{40} The ECJ has endorsed such taking of evidence without recourse to the Evidence Regulation (ECJ C-170/11, \textit{Lippens} and ECJ C-332/11, \textit{ProRail}).
\end{itemize}
**Collection of evidence in support of foreign criminal investigations**

Belgium has implemented the EU Directive regarding the European Investigation order in criminal matters. Consequently, requests to and from another EU Member State that has also adopted this Directive, must, in principle, be recognised and executed. The Directive 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 telecommunication. An authority may only refuse the execution of a European Investigation Order on the grounds mentioned in Article 11 of the Directive (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.

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

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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42 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.

43 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:

- the requesting state has entered into a bilateral or international agreement with Belgium;
- the requesting party is a judicial authority;
- the facts of the case or similar facts would also constitute a criminal offence in Belgium;
- the suspect has not been convicted in Belgium for the same facts; and
- 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 judgments in civil matters**

The enforcement of foreign civil 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 Recast Brussels I Regulation.

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46 Article 15 of the Law of 5 August 2006 and Article 61 quarter of the BCCP.
50 Article 66.2 of the Recast Brussels I Regulation.
Belgium

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.\(^{51}\) Recognition and enforcement will only be refused if the party that wishes to avoid recognition or enforcement actively applies for a refusal (see also Section V.v).

If no convention or EU regulation applies (and subject to the application of a \textit{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.\(^{52}\) 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, \textit{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,\(^{53}\) 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).

v Fraud as a defence to enforcement of judgments granted abroad

Fraud may be a defence to enforcement if brought under the umbrella of (international) public policy.

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

\(^{51}\) Articles 36 and 39 of the Recast Brussels I Regulation.

\(^{52}\) Article 23, Section 3 of the Belgian Code of Private International Law.

\(^{53}\) This ground for refusal does not apply to money laundering.
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 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 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.54

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 or ones where the creditor files the EAPO application 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 both Belgian judicial law and Belgian (substantive) civil law are currently subject to a wave of ongoing reforms, but the topics discussed in this chapter do not seem likely to be affected.

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

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.\(^1\) 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 preexisting 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:

- they appear to confer or transmit rights to people different from those to which they are actually conferred or transmitted;
- they contain untrue statements, confessions, conditions or clauses; or
- 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:

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

\(^1\) Articles 158–165, BCC.
the evidence to be produced is likely to lead to plea negotiation or a suitable method of dispute resolution; or 

cprevious 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

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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). 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. 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. 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.

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.

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.

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:

- the court’s final decision is unfavourable;
- the claimant does not provide the necessary means for summoning the defendant within five days;
- the urgency request ceases to be effective; and
- 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.

\section*{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.

Chapter 6

BRITISH VIRGIN ISLANDS

Peter Tyers-Smith, Timothy P de Swardt, and Merrick Ricardo Watson

I OVERVIEW

Legal system in the BVI

The British Virgin Islands (BVI) is a British overseas territory in the Caribbean which has a common law system, deriving from English law. The English common law was extended to the BVI by the Common Law (Declaration of Application) Act, Cap 13. 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. Normally, a case is suitable for determination in the Commercial Court if it is one arising out of a 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.

The BVI is a member of the Eastern Caribbean Supreme Court (ECSC), and the ECSC Civil Procedure Rules (CPR) are the binding procedural rules used in the Supreme Court. The CPR is based on the original Civil Procedure Rules of England and Wales, with certain critical differences. Under the latest rules, all new Commercial Court matters as at 12 November 2018 have to be initiated in accordance with the Electronic Filing and Service Procedure. The new E-Litigation system facilitates Electronic Filing, Electronic Payments and Electronic Case Management. 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.

Civil asset recovery litigation above a value of US$500,000 will usually proceed in the Commercial Court whereas cases of this kind not reaching that threshold will be heard by the civil division of the Supreme Court. If criminal proceedings are brought, these will usually be commenced in the Magistrate Court initially and, in the case of indictable offences, then be remitted to criminal division of the Supreme Court by way of paper committal.

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1 Peter Tyers-Smith, Timothy P de Swardt and Merrick Ricardo Watson are lawyers at Kobre & Kim.
2 The common law of England was extended to the BVI pursuant to the Common Law (Declaration of Application) Act 1705.
4 Rule 3(3) of the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Statutory Instrument No. 87
BVI statutes of potential relevance include the BVI Business Companies Act 2004 (the BCA), the BVI Insolvency Act 2003 (the Insolvency Act), the Proceeds of Crime Act 1997 (as amended), and the BVI Evidence Act 2006 (the Evidence Act). 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 BOSS 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 the 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:

- name; 7
- residential address; 8
- date of birth; 9 and
- nationality. 10

The only authorities entitled to request that a search of the RA Database be carried out are:

- the BVI Financial Investigation Agency (FIA); 11
- the BVI Financial Services Commission; 12
- the BVI International Tax Authority; 13 and
- the BVI Attorney General’s Chambers. 14

Information held by registered agents will be retained for five years following the dissolution, or other cessation, of the corporate and legal entity. 15

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);
- a list of entities regulated by the BVI Financial Services Commission;
- court documents and judgments;
- Land Registry information – the Land Registry can provide certain details, including confirmation of the owner of BVI land or real estate upon application;
- BVI Ship Registry information – the BVI Ship Registry can provide certain information regarding vessels registered under a BVI flag; and
- a list of disqualified directors.

7 The Act, Section 10(3)(b)(i).
8 The Act, Section 10(3)(b)(ii).
9 The Act, Section 10(3)(b)(iii).
10 The Act, Section 10(3)(b)(iv).
11 The Act, Section 13(6)(a).
12 The Act, Section 13(6)(b).
13 The Act, Section 13(6)(c).
14 The Act, Section 13(6)(d).
15 The Act, Section 11.
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:

a Financial Investigation Agency Act 2003 (as amended) (the FIA Act). The FIA Act establishes the Financial Investigations Agency (FIA) as an autonomous law enforcement institution with a mandate to receive, obtain, investigate, analyse and disseminate information that may relate to criminal offences, financial offences and requests for legal assistance from the appropriate authorities in a foreign jurisdiction. As part of its mandate, the FIA also shares information with the Commissioner of Police relating to the commission of criminal and financial offences.

b Criminal Justice (International Cooperation) Act 1993 (as amended) (the CJIC Act) and the Criminal Justice (International Cooperation) (Enforcement of Overseas Forfeiture Orders) Order 2017 (the CJIC Order).16 The CJIC Act creates a comprehensive regime that enables the BVI to cooperate with other countries in matters pertaining to criminal investigations and proceedings. The CJIC Order compliments the Act and outlines the process for obtaining assistance in matters concerning the enforcement of confiscation orders as well as applications for restraint and charging orders. A country or territory is no longer required to be designated by a statutory instrument before an order made by the courts of that country or territory can be enforced in the BVI.

c Drug Trafficking Offences Act 1992 (as amended) (the DTO Act). The DTO Act gives effect to the provisions of the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. It establishes a legal framework for the recovery of the proceeds of drug trafficking and creates a regime of international cooperation on drug trafficking. The DTO Act establishes a machinery for the registration by the Supreme Court of external confiscation orders made by the courts of a requesting country.

d Proceeds of Criminal Conduct Act 1997 (as amended) (the POCCA). The POCCA provides for the recovery of the proceeds of crime and provides for the registration and enforcement of external confiscation orders made by the courts in a requesting country. It allows the Supreme Court to make a restraint or charging order to protect specified assets being dissipated.

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 2017,17 giving greater discretion and an enhanced role. The FIA has a number of statutory

17 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.’
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.

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.20

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.23

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c The repeal of Section 4(9) – which previously meant the FCA had no further role in investigations.
19 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: Ross River Ltd v. Waverley Commercial Ltd, [2013] EWCA Civ 910.
20 Business Companies Act 2004 (BCA 2004), Sections 120–121.
21 BCA 2004, Section 184C(1)(a).
22 Microsoft Corporation v. Vadem Ltd BVIHCVAP 2013/0007 at [14].
23 ibid. at [13].
**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 would be deemed dishonest by objective ordinary standards. 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).

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).

**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. 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.

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24 *Akai Holdings (in liquidation) v. Brimlow Investments* BVIHCV 2006/0134.
25 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.
26 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*, BVIHCMAP2013/0008.
27 Section 81 of the *Conveyancing and Law of Property Act* 1961.
28 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

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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.\textsuperscript{29} 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.\textsuperscript{30}

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.\textsuperscript{31}
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.\textsuperscript{32}

Other types of third party claims
Conspiracy to injure by unlawful means
Third parties who have conspired with a defendant to dissipate assets in breach of a freezing
order can be liable for damages for conspiracy to injure by unlawful means. The claimant may
claim damages from a third party who conspired with the defendant to put assets available to
satisfy the debt out of the claimant’s reach. It will need to be shown that the asset dissipation
was committed by the defendant in contempt of court, with the assistance and common
intention of the third party, and was intended to put the defendant’s assets beyond the reach
is likely to be highly persuasive in the BVI.

Assisting asset stripping
A creditor may also able to claim damages against third parties who procure non-payment of
a judgment debt by assisting the defendant with asset stripping. The English court recently
rejected a motion to dismiss such a claim: \textit{Marex Financial Limited v. Carlos Sevilleja Garcia}
[2017] EWHC 918 (Comm). The claim is based on the principle that a third party should
not procure or induce nonpayment of a contractual debt, but extends it to cases concerning
non-payment of judgment debts.

\begin{footnotes}
\footnotetext[29]{BCA 2004, Section 58.}
\footnotetext[30]{BCA 2004, Section 58(2).}
\footnotetext[31]{Insolvency Act 2003, Section 245.}
\footnotetext[32]{Insolvency Act 2003, Section 246.}
\end{footnotes}
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 CPR restrict the use of documents disclosed in civil proceedings being used by the parties outside those civil proceedings. However, it is likely that the BVI courts would follow the position in England33 where defendants facing concurrent civil and criminal proceedings (the civil proceedings taking place in England) are given the protection of the civil proceedings being ring-fenced, such that nothing in those civil proceedings can be used against the defendants in the criminal context.

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. A 12 year limitation period applies for the enforcement of a judgment 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 preexists 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 sounded in tort or contract, 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 defences such as laches (unjustified delay causing prejudice to the defendant in defence of the claim) may still be applicable in the adjudication of a claim. When fraud is involved, the limitation period will not begin to run until the plaintiff has discovered the fraud or could have with reasonable diligence have discovered it.34

iv Criminal remedies
While the BVI has a well-developed criminal asset forfeiture regime, primarily through the POCCA, in practice there are few criminal asset forfeiture cases. There have been no large-scale or widely publicised criminal prosecutions for offences under the POCCA, nor have there been any significant recoveries of assets through criminal proceedings, in recent

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34 Limitation Ordinance 1961, Section 25.
times. This could possibly change in the future since the definition of a requesting country in the POCCA has recently been expanded from a closed list to include any country or territory outside of the BVI.35

The POCCA allows the BVI court to compensate a victim of a crime out of the tainted funds the state recovered as proceeds of crime.36

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.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Freezing orders

The BVI court may grant a freezing order on a domestic or, in suitable cases, a worldwide basis.

These are granted if:

a the applicant has a good, arguable case;

b there is a risk of the defendant dissipating his assets so that the judgment or award in favour of the claimant would go unsatisfied; and

c it is just and convenient for the injunction to be granted.

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 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 unless there is sufficient safeguards provided for by way of undertakings.37 Jurisdiction of the courts in the BVI is based on Section 24(l) of the Eastern Caribbean Supreme Court (Virgin Islands) Act 1968 and is ordinarily ancillary to the court’s substantive jurisdiction. Typically, the freezing order is

35 Schedule 2, Proceeds of Criminal Conduct (Enforcement of External Confiscation Orders) Order, 2017 S.I. No. 3.
36 Proceeds of Criminal Conduct Act 1997, Section 6(4).
made personally against the respondent, rather than against specific assets.\textsuperscript{38} 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.\textsuperscript{39}

Freezing orders against third parties are available in the BVI (and are known as ‘Chabra’ injunctions), and the Court follows established English and Cayman Islands jurisprudence in this area.\textsuperscript{40} One of the most important cases in this area was \textit{Black Swan Investment}.\textsuperscript{41} 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.\textsuperscript{42}

\textbf{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.\textsuperscript{43}

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.

\textbf{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.\textsuperscript{44}

There are four requirements for appointment:

\begin{enumerate}
\item there must be sufficient evidence to show a good, arguable case;
\item there must be peril to the property to be preserved and court must be satisfied that the applicant will be in a worse situation if the appointment of a receiver is delayed;
\item the claim or the application not be frivolous or vexatious and the claimant must show that the appointment is appropriate because other less invasive remedies would be inadequate\textsuperscript{45}; and
\item It must be just and convenient.
\end{enumerate}

\textsuperscript{38} 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.

\textsuperscript{39} CPR 17.1(1)(b)(ii).

\textsuperscript{40} See \textit{Gilfanov & ors v. Polyakov & ors}, BVIHCMAP 2016/0009; and \textit{Algosaibi v. Saad} [2011 (1) CILR 178].

\textsuperscript{41} See footnote 4.

\textsuperscript{42} See footnote 12.

\textsuperscript{43} \textit{In the Matter of Global Convertible Megatrend Ltd and FE Global Undervalued Investments Ltd} BVIHC 2006/246, [2006] 12 JBVIC 0501.

\textsuperscript{44} \textit{Yukos CIS Investments Limited & Ors v. Yukos Hydrocarbons Investments Ltd & Ors} HCVAP 2010/028.

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.

**ii Obtaining evidence**

Evidence and information 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 – is wider than third-party discovery; indeed, the CPR does not contain any provisions for third-party discovery similar to those 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’.46

**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.47

**Pre-action disclosure**

There is no pre-action disclosure in the BVI.48 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.49

**Disclosure in the course of proceedings**

The BVI follows English procedure and practice in respect of first-party disclosure.50 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

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46 Section 63 of the Evidence Act 2006.
47 CPR 17.1(1)(l). This is also known as an *Anton Piller* order.
48 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 preexisting jurisdiction for that procedural law to govern (*Veda Doyle v. Agnes Deane* HCVAP2011/20). In the case of pre-action disclosure, there is not.
50 CPR Part 28.
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 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.

**Third-party disclosure**

There is no statutory basis for third-party disclosure or pre-action disclosure as is possible under English procedural law. The remnant of the old equitable bill of discovery, the *Norwich Pharmacal* order, is possible in the BVI. This is discussed further below.

Disclosure orders can also be made ancillary to a regular freezing order in the BVI (as in England and Wales). The High Court has ruled that this is not, however, available in support of a *Black Swan* freezing order (i.e. a freezing order made in support of foreign proceedings against a non-cause of action defendant in the BVI). If the freezing order is made in support of arbitral proceedings, the BVI Court is able to order disclosure.

**Evidence at trial**

Evidence for use at trial is governed by the Evidence Act 2006 (the Evidence Act). 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 prepared and circulated in advance of trial. Parties do not normally take depositions of an adverse party’s witnesses before trial.

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

- hearsay documentary evidence;
- the statement of an unavailable witness who previously made an out-of-court statement;
- the out-of-court statement of an available witness while testifying;
- expert reports; and
- oral opinion evidence.

**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. It is 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, 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

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51 *Bascunan v. Elata* BVIHC (Com) 2015/0128.
53 So named after the House of Lords case *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1973] UKHL 6.
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.\(^{55}\) As an equitable remedy, the grant of *Norwich Pharmacal* relief is subject to the exercise of discretion.

The BVI court has also granted *Norwich Pharmacal* relief against registered agents of BVI companies in aid of post judgment enforcement, but it appears that the relief will not be granted unless the applicant is able to show that the relevant BVI companies have been used in some way to evade enforcement of the judgment debt.\(^ {56}\)

**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 promotion, formation, business, dealings, accounts, assets, liabilities or affairs of a company. These powers, however, do not extend to obtaining information from third parties that simply received funds from the company. Further, the liquidators of a BVI company may apply to the Court for an order requiring any person holding documents belonging to the company to deliver them forthwith to the liquidators.

**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 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.


\(^{56}\) *UVW v. XYZ*, Claim No. BVI HC (COM) 108 of 2016.
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 they were 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. The BOSS Act also sets out specific obligations on registered agents. Under the Act, registered agents are required to take reasonable steps to identify and collect information about beneficial owners of each entity for which they act as registered agent.\[57\] The BOSS Act provides that a registered agent who take steps to identify and verify the identity of beneficial owners in accordance with its obligations under the Anti-Money Laundering legislation shall be deemed to have taken all reasonable steps in accordance with the Act, and it expressly states that nothing in the Act affects the separate obligation on each registered agent to obtain and verify beneficial ownership information under applicable Anti-Money Laundering legislation.\[58\] The BOSS Act places an obligation on registered agents to establish and maintain an RA database containing the particulars of each corporate entity for which they act as registered agent and the particulars of beneficial owners of those corporate entities.\[59\]

ii Insolvency

The Insolvency Act 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.\[60\] This can save a significant degree of time and money.

Part XVIII of the Insolvency Act 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.\[61\] Orders under Part XIX can only be made on a case-by-case basis; there is no ‘general’ recognition.\[62\] Currently only office holders from the following designated countries can seek Part XIX assistance: Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the UK and the US.\[63\]

iii Arbitration

The BVI has enacted the Arbitration Act 2013 (the Arbitration Act) which represents a modern arbitration legislation based largely on the UNCITRAL Model Law, to which the BVI is a signatory.\[64\] The Arbitration Act creates a simplified process for the registration of arbitral

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57 Section 9(1) of the BOSS Act.
58 Section 9(4) and (5) of the BOSS Act.
59 Section 10 of the BOSS Act.
60 BCA 2004, Section 199.
61 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.
63 See also In Re C (A Bankrupt), Claim No. BVIHC (Com) 0880 of 2013.
64 Arbitration Act 2013.
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.\(^{65}\)

In addition, the BVI has sought to promote itself as a centre for domestic arbitration with the creation of the BVI International Arbitration Centre. The Board of the Arbitration Centre was appointed on 7 September 2015 under Section 95 of the Arbitration Act. Immediately following its establishment, the Arbitration Centre applied the UNCITRAL Model Rules, but has since created its own rules of arbitration which came into force on 16 November 2016.

V INTERNATIONAL ASPECTS

i 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 lex causae and procedural matters governed by the 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. Where no expert evidence on foreign law is pleaded and proved, as a general rule the BVI court is entitled to treat the law of the foreign jurisdiction as being the same as BVI law.\(^{66}\)

ii 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 under its procedural rules. The Evidence (Proceedings in Foreign Jurisdictions) Ordinance\(^{67}\) applies the Hague Evidence Convention in the BVI. Letters of request can, therefore, be made to the High Court by overseas courts to request assistance in the collection of evidence. As discussed above, Norwich Pharmacal orders can also be made in aid of foreign proceedings.

Additionally, the BVI court is expected to follow the Privy Council ruling in *Singularis Holdings Limited v. PricewaterhouseCoopers* [2014] UKPC 36 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.\(^{68}\)

iii 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 *Black Swan* order.\(^{69}\) The *Black Swan* jurisdiction has been expanded further, with the BVI court


\(^{66}\) *Buzzmaker LLC v. Lindsay Fitz-Patrick Grant*, Claim No. SKBHCV 2015/0280.

\(^{67}\) CAP 24.

\(^{68}\) *Singularis*, see footnote, at [24].

\(^{69}\) See footnote 4.
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.70

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.71 Non-money judgments are not directly enforceable under either route.

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

a it violates public policy;72
b it was obtained by fraud;
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);
d the foreign court lacked personal jurisdiction over the defendant (as determined by BVI rules);
e it is not for a liquidated sum; or
f the judgment is not final and conclusive.

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.73 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.74 There is a one-year time period to register a foreign judgment under statute and a 12-year limitation period for a common law action on a judgment.

A foreign judgment can also be indirectly enforced through the initiation of insolvency proceedings in the same manner as an unsatisfied arbitral award.75 This route is not used regularly, but has real advantages:

a Assuming there is no defence to enforcement, the debtor has to pay to avoid insolvency, even if it not actually insolvent.
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.

70 Natali Osetinskaya v. Usilett Properties Inc BVIHCV 2013/037.
71 Reciprocal Enforcement of Judgments Act 1922.
72 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 BVIHCAP2014/0004.
73 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.

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v Fraud as a defence to enforcement of judgments granted abroad

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 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.76

VI CURRENT DEVELOPMENTS

On 1 January 2019, the Economic Substance (Companies and Limited Partnerships) Act 2018 came into force in the BVI (the ESA). The ESA is supplemented by the draft International Tax Authority Economic Substance Code issued on 22 April 2019. The ESA addresses the concerns of the EU Code of Conduct Group for Business Taxation concerning the economic substance of entities in the BVI and similar jurisdictions with low or no corporate taxation. In passing the ESA, the BVI has demonstrated its commitment to meeting international best practice. The ESA introduces certain reporting and economic substance requirements for ‘legal entities’ conducting ‘relevant activities’. Legal entities mean companies and limited partnerships (as defined under the ESA). Relevant activities are activities related to: (1) banking; (2) insurance; (3) shipping; (4) fund management; (5) financing and leasing; (6) headquarters; (7) distribution and service centres; (8) holding company; and (9) intellectual property. Under the ESA economic substance will be measured by reference to reporting periods which are not longer than one year. The ESA mandates legal entities carrying out relevant activities (other than pure equity holding entities) to manage and direct the relevant activity in the BVI and conduct core income-generating activity. They must also show that they have an adequate level of employees and expenditure in the BVI and appropriate physical offices or premises for the core income generating activity.

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.2

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 of the provinces have legal systems based on English common law.3

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)4 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.5 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.
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\(^6\) or with wilful blindness,\(^7\) and reliance on the truth of the statement by the person to whom it is made;\(^8\)

- **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.\(^9\) 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*,\(^10\) 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.\textsuperscript{11}

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.\textsuperscript{12}

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.

\textit{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'.\textsuperscript{13} In the context of fraud by a corporation, directors and officers may be liable for personal tortious conduct.\textsuperscript{14}

In addition, where corporate directors or officers act improperly, claims may also be brought under the statutory remedy of an oppression claim.\textsuperscript{15} 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.

\textit{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.

\textit{Claims against third parties who may receive or help transmit the proceeds of fraud}

\textbf{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;\textsuperscript{16}

\textsuperscript{11} \textit{Harris v. Lekin Group Inc,} 2011 ONCA 790.

\textsuperscript{12} M&L Travel Ltd, footnote 10 (see \textit{Barnes v. Addy} (1874), LR 9 Ch App 244 (LC & LJ)). For example, see \textit{Dynasty Furniture Manufacturing Ltd v. Toronto Dominion Bank,} 2010 ONSC 436, affd 2010 ONCA 514.

\textsuperscript{13} See, for example, \textit{Canada Business Corporations Act,} RSC 1985, c C-44, Section 122.


\textsuperscript{15} See, for example, \textit{Canada Business Corporations Act,} RSC 1985, c C-44, Section 241, and the (Ontario) \textit{Business Corporations Act,} RSO 1990, c B.16, Section 248.

\textsuperscript{16} Criminal Code, Section 354.
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}

**Civil remedies**

*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}

*Statutory remedies*

Pursuant to Section 437(2) of the *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}

*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: a the wrongdoer was under an equitable obligation;

\textsuperscript{17} ibid., Section 355.2.

\textsuperscript{18} ibid., Section 355.4.

\textsuperscript{19} *R v. L'Heureux*, [1985] 2 SCR 159.


\textsuperscript{21} SC 1991, c 46.

\textsuperscript{22} In *Royal Bank v. Rastogi*, 2011 ONCA 47, 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.

\textsuperscript{23} *O'Brien v. Royal Bank*, 2008 CarswellOnt 910 (Ont Sup Ct).

\textsuperscript{24} *Peter v. Beblow*, [1993] 1 SCR 980.
b 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.  

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,’ 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. 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.

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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 of 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. As with any ex parte relief, it is crucial that full, frank and fair disclosure be made to the ex parte

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29 Sibley & Associates LP v. Ross, 2011 ONSC 2951 (SCJ) at paragraph 63.
30 ibid., at paragraph 64.
32 Aetna, footnote 25, 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 current 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).
34 Silver Standard Resources Inc v. Joint Stock Co Geolog (1998), 59 BCLR (3d) 196 at paragraph 19. See also Tracy v. Instalano Financial Solutions Centres (BC) Ltd, 2007 BCCA 481. This test was first articulated in the 1994 decision of the BC Supreme Court, Mooney v. Orr (1994), 100 BCLR (2d) 335.
35 Silver Standard, ibid., at paragraph 20; see also Tracy, ibid., at paragraph 41.
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 \textit{ex parte} judge to determine the correct value of the underlying claim and, accordingly, of the assets to be frozen.

Model \textit{Mareva} orders\footnote{For example, Ontario’s model order can be found at www.ontariocourts.ca/scj/files/forms/com/mareva-order-EN.doc.} 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 \textit{ex parte} order has a specific shelf life (10 days)\footnote{Ontario Rules of Civil Procedure, RRO 1990, Regulation 194, Rule 40.02(1) (the Ontario Rules).} within which it must be renewed on an \textit{inter partes} basis. \textit{Mareva} injunctions can be framed so as to freeze assets solely in a particular jurisdiction within Canada or on a broader, even worldwide, basis.\footnote{Innovative Marketing, footnote 34.} In Ontario, a recent decision provided for a worldwide \textit{Mareva} injunction where the defendant had no assets in the jurisdiction.\footnote{SFC Litigation Trust (Trustee of) v. Chan, 2017 ONSC 1815. This decision may signal a step towards a more flexible approach to granting \textit{Mareva} orders in Ontario.} 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 \textit{Mareva} injunctions are typically sought pre-judgment, there is authority for granting a post-judgment \textit{Mareva},\footnote{First Majestic Silver Corp v. Davila, 2013 BCSC 1209.} 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.

\textbf{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 \textit{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., 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 \textit{Mareva} injunction.

\textbf{ii Obtaining evidence}

\textbf{Anton Piller orders}

The other of ‘the law’s two nuclear weapons’ is the \textit{Anton Piller} order (the AP order).\footnote{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.} While \textit{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.

**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.

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46 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).
47 Derived from the UK case *Norwich Pharmacal Co v. Customs And Excise Commissioners*, [1974] AC 133 (HL); adopted in *GEA Group AG v. Ventra Group Co*, 2009 CarswellOnt 4854 at paragraph 85 (CA); additional reasons at 2009 CarswellOnt 7755 (CA).
48 *GEA Group*, ibid., at paragraph 51.
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.49

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.50

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 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.51

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.52

50 See, for example, the trial decisions in Turbo Logistics Canada Inc v. HSBC Bank Canada, 2013 ONSC 7128, aff’d 2016 ONCA 222, and HSBC Bank Canada v. Dillon Holdings Ltd et al, 2005 CarswellOnt 2322 (ONSC).
51 Fiorillo v. Krispy Kreme Doughnuts Inc (2009), 98 OR (3d) 103 (ONSC).
Money laundering

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

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’ 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:

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

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.

Receivership 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.

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.

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. 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.

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. 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’. 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. 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. Arm’s-length transactions can be attacked under the BIA if they occurred within three months of bankruptcy. 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.

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.

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. 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.

60 See, for example, Section 164(1)–(3) of the BIA, RSC 1985, c B-3.
61 ibid., Section 163(1).
62 ibid., Section 163(2).
63 ibid., Section 95(1)(b).
64 ibid., Section 95(1)(a).
65 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.
66 BIA, Section 178(1)(d)–(f).
68 In Ontario, for example, see Section 46(1)(9) of the Arbitration Act, SO 1991, c 17.
Internationally, all Canadian provinces have adopted the UNCITRAL Model Law on International Commercial Arbitration\(^6\) (the Model Law) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards\(^7\) through their respective provincial statutes.\(^71\) 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.\(^72\)

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.\(^73\)

iv Fraud’s effect 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.\(^74\) 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

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\(^72\) 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, [2001] 1 SCR xi, 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 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.

\(^73\) Sociedade-de-Fomento Industrial Private Ltd v. Pakistan Steel Mills Corp (Private) Ltd, 2014 CarswellBC 1499 (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.

\(^74\) R v. Campbell, [1999] 1 SCR 565 at paragraph 55 [Campbell].
being carried out with the knowledge and advice of counsel. 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 matters that stipulate that the residence of a personal defendant in the forum is considered a sufficient basis for a court’s finding of jurisdiction. However, an assertion of jurisdiction may face challenges where it is based solely on the plaintiff’s residence.

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 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

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75 ibid., at paragraph 58.
76 For example, British Columbia Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c 28 (CJPTA BC).
78 Iskander and Sons, Inc v. Haghighat et al, 2007 BCSC 753.
79 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).
80 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.
‘strong cause for not doing so is shown’. 81 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. 82

**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 doing so, the Court identified a set of non-exhaustive presumptive factors to be considered in determining whether the assumption of jurisdiction is appropriate 83 for tort claims:

- **a** the defendant is domiciled or resident in the province;
- **b** the defendant carries on business in the province;
- **c** the tort was committed in the province; and
- **d** a contract connected with the dispute was made in the province. 84

Where the plaintiff successfully establishes the presence of any of these connecting factors, a rebuttable presumption of jurisdiction arises.

**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 order and fairness. 85 That is, at a second stage of analysis, Canadian courts also consider whether they should exercise jurisdiction – forum conveniens. 86

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. 87

**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

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82 CJPTA BC, Section 3; CJPTA NS, Section 4; CJPTA SK, Section 4.
83 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.
84 Club Resorts Ltd v. Van Breda, [2012] 1 SCR 572 at paragraph 90.
86 Oakley v. Barry, [1998] 158 DLR (4th) 679 (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.
87 Amchem Products Incorporated v. British Columbia (Workers’ Compensation Board), [1993]. 1 SCR 897.
conventions that provide for the taking of evidence on a reciprocal basis in connection with civil and commercial matters, the more common practice is to seek enforcement by way of federal or provincial evidence legislation.

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.

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), 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:

- 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;
- the request includes a copy of the restraint or seizure order issued by a court of criminal jurisdiction in the requesting state;
- the person to whom the property relates is charged with a criminal offence in the requesting state; and
- 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

88 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.
89 Canada Evidence Act, RSC 1985, c C-5.
90 For example, in Ontario, the Evidence Act, RSO 1990, c E.23.
92 RSC 1985, c 30 (4th Supp), Section 9.3.
93 ibid., Section 9.4.
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 respective province’s Attorney General. Proceedings are initiated 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.

Further, 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 litigate 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.’

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94 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.
95 *Four Embarcadero Center Venture v. Mr Greenjeans Corp* (HCJ) (1988), 64 OR (2d) 746 (ON SC), aff’d (1988), 65 OR (2d) 160 (ONCA).
97 *Dslangdale Two LLC v. Daisytek (Canada) Inc*, 2004 CanLII 48686 (ON SC).
98 See, for example, Canada–United Kingdom Civil and Commercial Judgments Convention Act, RSC 1985, c C-30.
99 [2003] 3 SCR 416 at paragraph 51.
VI CURRENT DEVELOPMENTS

On 14 May 2019, the Supreme Court of Canada overturned a lower court decision that had found a lower threshold for establishing whether a corporation had participated in a fraudulent scheme by virtue of the actions of a directing mind. The Court affirmed that in order for such a determination to be made the action taken by the directing mind must be (1) within the field of operation assigned to that person; (2) not totally in fraud of the corporation; and (3) by design or result, partly for the benefit of the corporation.100

In another decision on 29 February 2019, the Supreme Court agreed with the appellate court ruling that a lawyer had failed in his duty to advise his client by continuing to encourage investment in an investment firm that turned out to be a fraud. The Supreme Court stated that lawyers must act competently, prudently and diligently in referring clients to other professionals or advisers. While a referral is not a guarantee of the services rendered by a professional or adviser, it is also not a shield against liability for wrongful acts committed by a referring lawyer.101

On 19 September 2018, amendments to the Criminal Code came into force establishing for the first time a deferred prosecution agreement (DPA) regime for corporate wrongdoing in Canada. The new regime uses the term ‘remediation agreements’ under the legislation provides compliance remedies available in the US and UK for many years. Going forward, the DPA regime will be an important tool both for enforcement authorities as well as for companies aware of corporate wrongdoing who are considering self-reporting.

The Ontario Divisional Court allowed a unique appeal of a judge’s refusal to grant ex parte Mareva relief. In 2092280 Ontario Inc v. Voralto Group Inc, 2018 ONSC 2305, the Court granted leave to appeal the motion judge’s decision without notice to the defendant and overturned the denial of the plaintiff’s request for an interlocutory Mareva order. The appellate decision is an important affirmation of the original spirit of the Mareva injunction, especially in fraud matters, and serves as a step towards better protection for victims of fraud.

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100 Christine DeJong Medicine Professional Corp. v. DBDC Spadina Ltd, 2019 SCC 30.

I OVERVIEW

In Chile there is no comprehensive legislation dealing specifically with asset recovery. However, victims of fraud may use the general tools that are available according to Chilean law for victims of crime that seek restoration. As in the majority of countries around the world, Chilean legislation allow both civil and criminal remedies in order to achieve the recovery of assets. Moreover, it is common to file both criminal and civil actions, with the possibility to file civil actions within a criminal proceeding or after a criminal conviction has been obtained. Insolvency proceedings, particularly after the revamping of its regulatory framework in 2014, play also an important role, especially in cases with multiplicity of victims and with cross-border components.

The possibility to initiate precautionary measures are available in criminal and civil proceedings, although criminal courts tend to focus on the determination of criminal liability rather than the economic restoration of the victim or a third party. The burden of proof relies on the party that states the occurrence of the act that caused him or her harm.

Over the last few years, asset tracing and recovery have acquired a new dimension in the Chilean judicial and political agenda. Major financial scandals, particularly a series of Ponzi schemes that were unveiled in 2016, have put legislation and the action of the Public Prosecutor’s Office under the spotlight, as the compensation of a multiplicity of victims and the recovery of assets that were hidden abroad required putting all available tools to the test, including cooperation in cases of cross-border insolvency.

The current development of affairs in the financial system – especially those related to fintech companies – will most likely force a much needed institutional modernisation in order to effectively investigate and prosecute a thriving range of crimes that are most often executed from one jurisdiction, but have effects on another, and where assets have to be recovered in a multiplicity of jurisdictions.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

As already mentioned, under Chilean law victims of fraud may use civil or criminal proceedings, or both, to seek recovery of the defrauded assets.

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1 Jorge Bofill and Daniel Praetorius are founding partners of Bofill Escobar Silva Abogados.
Criminal proceedings

As it is the case of victims of crimes in general, persons who have been offended by fraud may initiate a criminal proceeding, by filing a criminal action. In Chile, the prosecution of crimes is dealt by the Public Prosecutor's Office, an autonomous entity that handles investigation and prosecution before criminal courts. As claimant, the victim has the right to act as an active party in the criminal proceeding, being able to propose investigative measures to the Public Prosecutor's Office, make some type of petitions during the proceedings and to attend all hearings that are held before courts. As public prosecutors are more focused in pursuing the criminal liability of the fraudster rather than the economic restoration of the victim, in practice it is important to be very active as a claimant in order to suggest measures to effectively lead to the recovery of assets within a criminal proceeding.

There are different ways to recover assets through this type of proceeding. In connection with objects that were taken from the victim through fraud and were seized during the criminal investigation, it is possible to request the restoration of these assets through a simple application to the court. Objects are immediately restored, once their value and ownership has been established. When the victim solely seeks the restoration of the object, and does not jointly interpose a civil liability action, it can be exclusively filed during the investigation phase of the criminal procedure. However, this simple restoration action can be problematic in cases where it is not possible to establish that the asset clearly belongs to the victim or where the asset has been transformed by the fraudster into another asset. Also in cases of multiplicity of victims this may be problematic, as there are no rules for criminal courts as to the order and proportion in which victims should be compensated.

The other possibility to obtain restoration within a criminal proceeding is by filing a civil action against the defendant for damages (tort liability). Civil action seeking compensation for the civil damages of criminal conduct can be filed in the same criminal proceeding or before the competent civil court. Nevertheless, once the action has been exercised before the criminal court, this precludes the right to do so in a civil court. On the other hand, if the action is brought by a third party, or directed against a person other than the accused, it must be brought before the competent civil court.

During the course of the criminal proceeding, it is possible that civil compensation is obtained through a settlement with the defendant. The public prosecutor cannot oppose this agreement, except in certain cases where there is a public interest involved in the criminal prosecution of the case. The defendant may also reach a deferred prosecution agreement (DPA) with the public prosecutor, to which the victim has no veto right. However, public prosecutors tend to only agree to these DPAs if a complete, or at least reasonable, compensation to the victim is offered by the defendant.

Civil proceedings

Chilean law states that victims of acts of dishonesty have to be restored to the state prior to the commission of the act or to obtain the corresponding compensation. As stated above, if a criminal proceeding exists, the action to solely seek the recovery of the object lost by fraud can only by filed within the criminal proceeding. Other civil liability, particularly a civil action asking for full compensation of damage, can be filed in the criminal proceeding or directly before a civil court. Thus, it is possible to have parallel criminal and civil proceedings.

It is necessary to point out that civil liability is independent of the criminal liability. Therefore, once the right to bring a civil action is extinguished, the right to file criminal action persists. In the same sense, the circumstance of issuing an acquittal in a criminal
matter does not automatically prevent the civil action from arising, if legally appropriate. On the other hand, criminal convictions produce *res judicata* in civil courts, and the plaintiff cannot adduce evidence or allegations that are incompatible with the decision in a criminal sentence or with the decisive considerations of that judgment.

The Chilean Civil Code expressly states that if the offence is committed by two or more persons, each of them will be jointly liable for any damages arising from that conduct. Chilean law states that victims of acts of dishonesty have to be restored to the state prior to the commission of the act or to obtain the corresponding compensation.

Moreover, the Civil Code contemplates an action that allows an innocent third party to be sued for profits made as a result of a fraudulent act committed by another person. Third parties, who benefit from someone else’s misconduct, respond only up to the amount with which they were benefited.

Complex civil trials can easily last more than five years. Criminal procedures, as well as arbitration, are, in general, more agile, due to laws that prevent excessive appeals.

### ii Defences to fraud claims

Faced with this type of actions, defences will normally question the necessary elements for the configuration of the crime in question. It is common that they contest the existence of a scam and argue that damage caused to the victims obeys to bad commercial decisions or the risks of every business rather than to a fraud. Defendants also use to challenge damage, arguing that there are enough assets to cover all debts, which usually responds only to a dilatory tactic.

Additionally, the statute of limitations may be a defence against criminal or civil actions mentioned above. Criminal liability in common fraud cases has a statute of limitation of five years, which can go up to 10 years in some cases. According to the Civil Code, civil liability for a crime is statute-barred for four years counted from the commission of the act.

### III SEIZURE AND EVIDENCE

#### i Securing assets and proceeds

Chilean law considers precautionary measures to seize the assets of the accused.

Despite being regulated in the Chilean Code of Civil Procedure, precautionary measures may be requested both in civil and criminal proceedings in order to protect the economic interests of the victim.

Precautionary measures extend to any act that ensures or protects the claim deduced or the favourable sentence that could be pronounced. The code regulates four measures in particular:

- **a** the sequestration of the good that is the subject of the lawsuit. This measure consists in the deposit of the property in the hands of a third party, which is obliged to keep it to prevent its loss or deterioration and to return it at the termination of the trial to the person determined by the judge;

- **b** the appointment of one or more auditors. This is the appointment of a person by the court who will ensure the legality of the administration of the assets that are the subject of the lawsuit, keeping track of the entries and expenditures of the objects intervened and giving notice of any embezzlement or abuse noted in the acts of the accused;
the retention of certain goods. This measure seeks to ensure effective enforcement of the judgment by seizing property and preventing its sale. The seizure can be of a legal or material nature (in this case the goods pass to the claimant or a third party); and

freezing of assets: The prohibition on carrying out actions or contracts over certain assets. This is court-ordered in order to prevent the defendant from validly doing any legal act in relation to movable or immovable property owned by him.

Broadly speaking, petitioners must fulfil two requirements for a judge to enact these measures. First, the plaintiff must present proof that constitutes at least a serious presumption of the claimed right. Additionally, he or she must provide the evidence of the existence of a danger in delay, which could result in the impossibility of enforcing the judgment. Courts are very strict in the appreciation of these requirements.

All of these measures may be requested to a judge at any stage of the trial even before the plaint is filed.

In criminal proceedings, it is possible to request these measures, but only once the prosecutor has pressed formal charges against the defendant, which can be too late. This is why in cases where there is no expectation that the public prosecutor will present formal charges in a short period, it may be advisable to request the pertinent precautionary preliminary measure in a civil court in the first place.

In criminal proceedings it is also possible that the public prosecutor seizes assets with a judge's order. These objects may be subject to the penalty of confiscation in the final ruling. As mentioned above, the interveners or third parties may file claims to obtain the restitution of objects collected or seized. As a general rule, they will not be returned until the procedure has been finalised. The exception to this rule is the seized goods that come from fraud, which will be delivered to the owner at any stage of the procedure, once the ownership of the good has been proven by any means.

ii Obtaining evidence

Chilean law does not contemplate a general discovery system as known in common law systems. In connection with civil actions, the facts of the claim must be introduced and proved by the party that alleges them. The burden of proof is generally in charge of the person who claims the positive act, as the judge in this system is limited to issuing orders to proceed.

However, the Civil Procedure Code establishes certain limited measures that can be ordered by the court upon request, by means of which certain evidence can be obtained from another party, in some cases even prior to filing a civil action and as a way to be able to prepare the action. In this context, a court can order the exhibition of accountancy books of the defendant or any specific document that might be of interest in the matter. The exhibition of documents that are held by the counterpart or by third parties can be also be ordered during the trial, to the extent they have a direct relationship with the matter under discussion and that they are not confidential.

In criminal proceedings, the public prosecutor has more tools at his or her disposal to gather evidence, which is another good reason to file in cases of fraud not only a civil action, but also a criminal action in order to have access to evidence to proof the fraud.
IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Regarding fraud in the banking field, the General Law of Banks establishes a specific fraud with respect to those who obtain loans from credit institutions, providing false or incomplete data regarding their identity, activities or patrimonial situation, causing damage to the financial institution. But nowadays the most relevant fraud cases in the banking system are those related to cybercriminality. Over the last year, there have been many cases that have shown the weakness of banks in Chile to protect the client’s sensible credit card and bank accounts information, which has lead to fraud cases against clients. There is a trend in court precedents, which in such cases have made the banks liable for the damage causes by frauds suffered by their clients.

On the other hand, Law No. 19,913, in force since 2003, contains the main anti-money laundering regulations in Chile. This Law regulates the Chilean anti-money laundering prevention system. The purpose of these regulations is to prevent the laundering of assets derived from unlawful acts, avoiding the use of the financial system and other actors of the financial system for money laundering. For this purpose, Law No. 19,913 created the Financial Analysis Unit (UAF).

To this end, the UAF has the power to request, verify, examine and record information on suspicious activities and request all the files that appear relevant in the context of the report of a suspicious transaction. In addition, it can exchange information with similar agencies abroad, and access the databases of public agencies if more information is required to complete the analysis of the suspicious transaction. In cases where the information is covered by secrecy duties or is in the hands of a person that is not among the entities that have a reporting duty according to the Law, this request of information has to be approved by a judge of the Court of Appeals of Santiago.

Moreover, if the UAF considers that from the gathered information, there are indications of a crime, it has the obligation to inform the Prosecutor’s Office immediately. The Prosecutor’s Office, which is the entity in charge of investigating and prosecuting money laundry offences, has, on its turn, additional powers to investigate such illegal conduct, including the possibility of requesting the lifting of bank secrecy, wiretapping of communications and seizure of documents, among others.

According to Chilean law, money laundering is committed by anyone who in any way hides or conceals the illicit source of certain assets, knowing that they proceed, directly or indirectly, from the perpetration of conduct that constitutes any of the predicate crimes listed by the law, or who knowing the origin of these assets, hide or disguise them.

Law No. 19,913 also punishes whoever acquires, possesses, has or uses the aforementioned goods for profit, when at the time of receiving them he or she knew of their illegal origin.

Before the enactment of Law No. 19,913 back in 2003, the only predicate offence that served as basis for money laundering was drug trafficking. Law No. 19,913 included a broader scope of offences, which may give rise to money laundering as a criminal offence. This list has experienced an ongoing expansion over the last years. Even though fraud in some specific contexts was considered a predicate offence since 2003, such as banking fraud and certain securities fraud offences, it was only in 2015 when common fraud was included as predicate offence of money laundering. This is why many fraud investigations also include
the prosecution of money laundering. This has been an important improvement for the chances of success of victims of fraud to find assets, as anti money laundering provisions provide public prosecutors with additional and enhanced investigation powers.

Criminal infringements of laws committed in other jurisdictions may also serve as predicate offences of money laundering activities carried out in Chile, to the extent that those acts would also constitute one of the predicate offences according to Chilean law.

Both natural and legal entities can be prosecuted and sanctioned for committing money laundering. In the case of individuals, penalties include imprisonment of up to 15 years, fines of up to approximately US$80,000 and the confiscation of the laundered assets. Even though the law expressly permits the separate imposition of a penalty for the predicate crime and the associated money laundering, the imprisonment penalty imposed for the latter can in no case exceed the highest penalty that is established by law for the predicate offence.

In those cases in which, as a result of criminal acts or omissions of the indicted person, the seizure or some other precautionary measure could not be imposed on the goods that are the object or product of the criminal activities, the court will be able to impose, at the request of the prosecutor, the seizure or some precautionary measure on other assets that are owned by the person for a value equivalent to that related to the crimes. these assets may also be subject to forfeiture in the event of a conviction.

All assets subject to forfeiture in these cases are for the benefit of the state, which may constitute a conflict between the interests of the state and the victims, as there are no special provisions dealing with indemnities or compensation to potential victims in connection with money laundering.

ii Insolvency

Chilean insolvency law was subject to a profound amendment in 2014. On that occasion, the statute applicable to insolvency offences was also improved. Currently anyone who, within the two years prior to the date on which the court declares the liquidation, executes acts or contracts that diminish their assets or increase their liabilities without any other economic or legal justification than harming their creditors, is punishable under law.

Under this law, debtors are criminally responsible if they partially or totally hide their assets; receive or use assets that must be subject to a liquidation process; perform real or simulated acts of disposition of assets or to constitute a lien on the assets once the settlement resolution has been issued; provide false or incomplete information during the liquidation or reorganisation process; and provide undue advantages to a creditor, the debtor or a third party, among others.

This law at the same time regulates the issue of cross-border insolvency, based on the UNCITRAL model law established by the United Nations Commission on International Trade Law. It determines cooperation between Chilean courts and other agencies involved and the foreign States that intervene in cases of insolvency, in order to give greater protection to national or foreign creditors and the assets of the debtor.

In that sense, it established important proceedings in order to regulate the cross-border effects of insolvency. For instance, it states the way to request that a foreign proceeding be recognised in Chile, the way assets of the debtor located in Chile may be protected and the manner in which a creditor or other person abroad that is interested in requesting the procedure or participating in one may do it, among others.
It has become common that in criminal fraud investigations with a large number of victims (particularly on Ponzi scheme cases), a parallel insolvency proceeding is carried out. Even though insolvency law establishes certain provisions in order to avoid conflicts between liquidators and public prosecutors, particularly in connection with seizure of assets and distribution of proceeds among victims, there are still some grey areas, which lead to uncertainties in this field.

iii Arbitration
Criminal cases cannot be subject to arbitration, although the civil liability derived from the crime may be submitted to the competence of arbitration tribunals. Naturally, arbitration means faster proceedings than in ordinary courts, but at a higher cost. In any case, it is not uncommon that parties in arbitration argue that breaches of the other parties are due to fraud and also start parallel criminal proceedings.

In Chile’s legal system, the arbitral tribunals lack the power to execute resolutions. In cases where force is required to comply with the judgment of an arbitral tribunal, the arbitrator must issue an order to the ordinary courts to execute the ruling. Ordinary courts will not be able to review the merit or the opportunity of the resolution, thus being exclusively responsible for supervising the compulsory compliance of the sentence.

Finally, the Law on International Commercial Arbitration, in force in Chile since 2004, authorises the arbitral tribunal to order provisional precautionary measures at the request of one of the parties if they deem it necessary, unless the parties agreed otherwise beforehand. In this way, a foreign arbitral tribunal could decree precautionary measures on assets located in Chile. This provision, however, has not been applied by the Chilean courts, and the Supreme Court has ruled that such a request must be filed directly before Chilean ordinary courts.

iv Fraud’s effect on evidentiary rules and legal privilege
There are no special rules on the matter. Evidentiary rules and privilege fully apply in fraud cases.

V INTERNATIONAL ASPECTS
i Conflict of law and choice of law in fraud claims
The principle of territoriality applies in Chile, under which a sovereign state can prosecute criminal offences that are committed within its borders. In the event that the crime is committed in more than one country, the general opinion is that both countries are competent to prosecute the felony.

Exceptionally, Chilean criminal law seeks to receive extraterritorial application, based on other principles, in some cases. For example, Chilean law claims jurisdiction to prosecute and judge crimes committed by Chileans against Chileans if the guilty party returns to Chile without having been tried by the authority of the country where he or she committed the crime. Also, the crimes perpetrated outside the territory by a diplomatic or consular agent who is in exercise of his or her functions are subject to national jurisdiction.
Chile

ii Collection of evidence in support of proceedings abroad

The Chilean Criminal Procedure Code establishes that requests to execute measures in Chile ordered by competent authorities of a foreign country will be sent directly to the Prosecutor’s Office, which will request the intervention of the competent judge when the nature of the measure makes it necessary.

The requests to carry out proceedings in Chile are centralised by the UCIEX, which is a specialist unit that is part of the Prosecutor’s Office. This unit analyses the requirements and forwards the requests and its background to the competent regional prosecutor.

Chile is a member of a series of international treaties, both bilateral and multilateral, in order to facilitate and expedite the process with the members of these treaties. Among others, Chile is part of the following treaties: the Code of Private International Law; the Inter-American Convention on Mutual Assistance in Criminal Matters; the Agreement of Mutual Legal Assistance in Criminal Matters between the States Parties of MERCOSUR and the Republic of Bolivia and the Republic of Chile; the United Nations Convention against Transnational Organized Crime and its two Additional Protocols; and the European Convention on Mutual Assistance in Criminal Matters.

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

In order to be able to execute a precautionary measure on assets located in Chile of a person who committed a crime abroad, either the foreign judgment must be enforceable or the Chilean court must have jurisdiction over the matter.

Therefore, in most cases it is not possible to establish precautionary measures in assets that are located in Chile to ensure the outcome of a trial abroad.

iv Enforcement of judgments granted abroad in relation to fraud claims

The Chilean Code of Civil Procedure has established a system to allow the recognition of foreign judgments (exequátur) comprising three alternative criteria, applicable in the order established by law. First, if an international treaty regarding recognition of foreign judgments exists with the country of origin of the foreign judgment, the analysis of recognition will be done according to that treaty. Second, in the absence of any treaty, it is necessary to establish whether the country of origin of the judgment whose recognition is sought recognises Chilean rulings. Third, when that criteria cannot be applied, the Code of Civil Procedure lists four minimum requirements that a foreign judgment must meet to be recognised and ultimately enforced in Chile. These requirements are that:

- a the judgment contains nothing contrary to Chilean laws (with the exception of the procedural laws under which the judgment would have been issued in Chile);
- b the judgment does not oppose Chilean national jurisdiction;
- c the party against whom the judgment is invoked has been duly served with the action. However, this party could prove that, for other reasons, it was prevented from presenting a defence; and
- d it is final and irrevocable in accordance with the laws of the country in which it was rendered.

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2 **Unidad de Cooperación Internacional y Extradiciones** (International Cooperation and Extraditions Unit).
The first and second requirements are aimed directly at the protection of Chilean public policy and the rule of law. The first requires that the foreign judgment is issued pursuant to the procedural laws of the foreign country (following the principle of *lex locus regit actum*) and, at the same time, that it does not violate Chilean substantive laws. The second means that the foreign judgment cannot decide on matters over which, according to Chilean law, Chilean courts have exclusive jurisdiction. The third criterion intends to ensure that the underlying judicial proceeding respects the principle of due process of law, especially the right to a defence. This requisite goes beyond the formality of having served the defendant; it allows the party against whom the foreign judgment is invoked to demonstrate that, despite being served, it was unable to exercise a meaningful defence. The fourth requisite, that the foreign judgment has to be final and irrevocable in the country of origin, responds to the need for legal certainty. This requisite is met when the foreign judgment is not subject to any additional appeal or recourse in the country of origin.

In practice, even if there is a treaty or reciprocity with the country of origin, the Chilean Supreme Court might not recognise the foreign judgment if the sentence, or the proceeding from which it resulted, goes against Chilean public policy or the rule of law according to the next criteria.

Fraud as a defence to enforcement of judgments granted abroad

In the exequatur process, once the application is submitted, the Supreme Court will give the affected a term to present arguments for the rejection of the request. If the court deems it necessary, it may open an evidentiary term before deciding. Therefore, in the event that an attempt is made to execute a judgment that was obtained through fraud, there is an opportunity to oppose.

Regarding foreign criminal sentences, the Chilean Criminal Procedure Code recognises their value in Chile. However, the accused may oppose if the respective process has not been implemented in accordance with the guarantees of due process, or if it revealed a lack of intention to judge the accused seriously.

CURRENT DEVELOPMENTS

In 2016 a series of Ponzi scheme cases came into light and gave rise to several criminal fraud investigations involving thousands of victims and the concealing of assets in different jurisdictions. These cases put asset recovery tools available to public prosecutors in the spotlight. After three years, most of the proceedings have come to an end or are reaching final stages. From a criminal liability perspective, cases ended in different manners: some of them with plea convictions that allow the accused not to effectively serve time in jail or with DPAs, and only one of them with a conviction after a trial. But in all these cases, only a fraction of the assets could be recovered.

But of all these cases, at least from an asset recovery perspective, the most interesting one was the one concerning a pyramid scheme of a company that amounted to around US$100 million. The company offered high annual returns, ranging from 10 per cent to 19 per cent. The scam used false information regarding investment and profits. Hundreds of persons invested money and received, in exchange, monthly deposits from the company, which were funded by the successive contributions of third parties, and not by the returns on the supposed investments. The principal accused was prosecuted for money laundering, fraud and offences against the Chilean Securities Law.
The case generated interest of foreign agencies, such as the US Securities and Exchange Commission (SEC), which filed for fraud and proceeded to freeze the defendants assets in the US.

The criminal case as well as the insolvency procedure started in 2016. The forced liquidation of assets requires tracing them in several jurisdictions around the world. The Chilean liquidator in charge of the case has been recognised internationally and allowed to request information from banking institutions and to summon witnesses to testify in order to collect relevant information. This has permitted the recovery of assets in the US, Australia, England and other jurisdictions to a value of more than US$10 million. The extradition of the defendant from Malta, where he fled in 2016, was denied by the Maltese Court of Appeals in 2018.
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

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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.
generally not enforceable in China. Also, China adopts foreign currency control policies, 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. These losses, however, are typically difficult to prove in practice.

5 Contract Law, Article 58.
6 Contract Law, Article 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 these 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, Article 148.
10 Company Law, Article 20.
11 Company Law, Article 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. Under these 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 reinitiate 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.

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If the perpetrator’s property is insufficient to satisfy all civil and criminal liabilities ordered by effective civil and criminal judgments, criminal judgment orders for the return and recovery of assets to victims will receive priority over ordinary civil judgment liabilities.14

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.15 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.16 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.17

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.18 Courts do not recognise the advance waiver by parties of the statute of limitations.19

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.20 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.21 Moreover, courts normally will not require the

16 id., Article 152.
17 id., Article 188.
18 id., Articles 188, 194, 195 and 199.
19 id., Article 197.
21 id.
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.

**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 guarantees provided by designated security companies. In recent years, it has become more and more common for the courts to accept guarantees 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

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22 Civil Procedure Law, Article 100.
23 Civil Procedure Law, Article 101.
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.

**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

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24 id.
26 Civil Procedure Law, Article 81.
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.

**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.

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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 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. 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.

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, 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. 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.

33 Criminal Law, Article 191.
34 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).
36 id., Article 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.\(^{37}\)

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.\(^{38}\) Furthermore, the persons directly responsible for the fraudulent transactions may be sentenced to incarceration or subject to a fine, or both.\(^{39}\)

iii Arbitration

The Contract Law recognises the doctrine of separability of dispute resolution clauses,\(^ {40}\) 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 proceedings\(^ {41}\) or be ruled as unenforceable in the enforcement proceedings.\(^ {42}\) 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.\(^ {43}\)

iv Fraud’s effect 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.\(^ {44}\) 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.

\(^{37}\) id., Article 32.

\(^{38}\) id., Article 33.

\(^{39}\) Criminal Law, Article 162.

\(^{40}\) Contract Law, Article 57.


\(^{42}\) Civil Procedure Law, Article 237.

\(^{43}\) Civil Procedure Law, Article 274; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V.1.(a), 10 June 1959, 330 U.N.T.S. 3.

\(^{44}\) Civil Evidence Provisions, Article 68.
into evidence. In criminal proceedings, collecting evidence through deception is generally prohibited,\textsuperscript{45} 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.\textsuperscript{46}

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.\textsuperscript{47} There are no special rules regarding lawyers’ duty of confidentiality in the context of fraud.

\textbf{V \hspace{0.5em} INTERNATIONAL ASPECTS}

\textbf{i \hspace{0.5em} 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:

- \textit{a} at least one party involved is foreign;
- \textit{b} at least one party's habitual residence is located outside China;
- \textit{c} the object in dispute is located outside China;
- \textit{d} the legal facts that establish, change or terminate the civil relationship take place outside China; or
- \textit{e} other circumstances that can be deemed as a foreign-related civil relationship.\textsuperscript{48}

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 \textit{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.\textsuperscript{49}

\textsuperscript{45} Criminal Procedure Law, Article 50.
\textsuperscript{46} id., Article 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, except where the provisions of relevant international treaties apply.

### 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; 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, 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. 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

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50 id., Article 41.
52 Civil Procedure Law, Article 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.

The Law on International Judicial Assistance in Criminal Matters, which came into force on 26 October 2018, provides for evidence collection assistance in cross-border criminal cases. A foreign country may request China to render assistance in investigations and evidence collection in cases as prescribed in Article 27, Paragraph 1 of the law, which includes inquiring into and verifying the property involved and financial account information. Where a foreign country requests China to investigate and obtain this information, the letter of request and the attached materials should specify ownership, location, characteristics, form, quantity and other specific information about the relevant property and financial account information.

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. A foreign country may request China assists in sealing, seizing or freezing the property involved within China according to the Law on International Judicial Assistance in Criminal Matters. The letter of request and the attached materials should specify the matters listed in Article 40 as required.

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.

56 Civil Procedure Law, Article 281.
57 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.
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 judgments granted abroad

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.

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 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 China’s establishment of international commercial courts

On 29 June 2018, the First International Commercial Court and the Second International Commercial Court were unveiled in Shenzhen and Xi’an, respectively. In order to ensure the rule-based establishment of the China International Commercial Courts (CICC), on the same day, the Supreme People’s Court promulgated the Provisions of the Supreme People’s Court on Several Issues concerning the Establishment of International Commercial Courts (the CICC Provisions), which came into effect on 1 July 2018. CICC is designed to serve the construction of the Belt and Road Initiative and aims to be a widely accepted international commercial dispute resolution institution to impartially, efficiently, transparently and conveniently resolve cross-border disputes arising from economic integration of countries participating in the Belt and Road Initiative. Correspondingly, the CICC Provisions have mainly created the following two unique mechanisms for CICC: (1) establishment of an experts’ committee consisting of Chinese and foreign legal experts who have substantial practical experience and international reputations, the members of which are commissioned to provide professional advice on specific legal matters, such as ascertaining the foreign laws involved in foreign-related commercial cases; and (2) establishment of a ‘one-stop’ diversified

58 Civil Procedure Law, Article 282.
dispute resolution centre integrating litigation, arbitration and mediation. Through the practical operation of these mechanisms, it is reasonable to expect more foreign parties will be drawn to choose CICC to settle their international commercial disputes.

ii  China–Singapore memo on recognition and enforcement of monetary judgments in commercial cases
On 31 August 2018, the Chief Justice of the Supreme People's Court and his Singapore counterpart signed the Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases (the Memorandum) during the second China–Singapore Legal and Judicial Roundtable held in Singapore. While not legally binding, the Memorandum is of great significance for China in the context of the Belt and Road Initiative since it symbolises a strengthening of judicial cooperation with countries along the Belt and Road with respect to the mutual recognition and enforcement of civil and commercial judgments. The Memorandum will aid the normalisation and institutionalisation of judicial assistance between China and Singapore and will meaningfully increase the predictability of the recognition and enforcement of court judgments between the two countries, although the Memorandum will still need to be tested in practice because of the differences in the respective legal systems and the limitations inherent in its form. Nevertheless, the Memorandum has rightfully brought a great deal of optimism to the business community and legal professionals alike.

iii  China's new criminal judicial assistance law
The Standing Committee of the National People's Congress promulgated the Law of the People's Republic of China on International Judicial Assistance in Criminal Matters on 26 October 2018. This has been widely recognised as a piece of landmark national legislation because it for the first time establishes the general principle of equality and reciprocity for criminal judicial assistance between China and foreign countries, far beyond the geography covered by existing treaties.

International criminal judicial assistance defined in the Law mainly includes 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 so on. Besides the detailed procedures and documentation requirements for applying for criminal judicial assistance, the central part of the law focuses on the requirement of obtaining prior approval from the competent Chinese authorities before any foreign authority, entity or individual may carry out activities related to a criminal proceeding within China or before any Chinese authority, entity or individual may render criminal judicial assistance to foreign parties.59 These provisions of the law are a response to long-arm jurisdiction and extraterritoriality as practiced by courts and governments of certain foreign countries relating to criminal cases being prosecuted in foreign countries, as stated in the official press release accompanying promulgation of the law.

iv The new Mainland–HK Judgment Recognition Arrangement

The Supreme People’s Court and the Department of Justice of the Hong Kong Special Administrative Region (HKSAR) signed the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the New Arrangement) on 18 January 2019. The New Arrangement will come into force in both the Mainland and HKSAR following the promulgation of a judicial interpretation by the Supreme People’s Court and the completion of the relevant procedures in the HKSAR. Under the New Arrangement, all legally effective judgments in civil and commercial matters as defined under both Mainland law and Hong Kong law, including effective judgments on civil compensation in criminal cases, are eligible for reciprocal recognition and enforcement between the Mainland and HKSAR. So far, reciprocal recognition and enforcement has only applied in cases where a ‘people’s court of the Mainland or any court of the HKSAR has made an enforceable final judgment requiring payment of money in a civil and commercial case pursuant to a choice of court agreement’, according to the 1 August 2008 effective version of the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned.

v Parties to institutional arbitral proceedings in Hong Kong may apply to Mainland Courts for interim measures

On 2 April 2019, the Supreme People’s Court and the HKSAR signed the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the Arrangement), which will come into force in both the Mainland and HKSAR following the promulgation of a judicial interpretation by the Supreme People’s Court and the completion of the relevant procedures in the HKSAR. It is believed that the Arrangement is a breakthrough in the history of mutual judicial assistance between the courts of the mainland and of the HKSAR because it will allow the mainland courts to provide interim measures in aid of institutional arbitral proceedings administered in HKSAR. So far, due to the non-existence of this legal instrument, the mainland courts have no legal basis to issue preservation orders (including property preservation, evidence preservation and conduct preservation) for parties to institutional arbitral proceedings in HKSAR, except in maritime cases.
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 of 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 immoveable 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 in order 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.
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 from when 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 these 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 Law and Section 9 of the Civil Procedure Law. Essentially, for a court
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.10 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),11 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 Others12 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.13

Injunctions freezing assets until the conclusion of proceedings filed or to be filed abroad can also be issued on the basis of the following:

a The International Arbitrations Law: on the basis of this Law,14 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; and

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.

10 (2007) 1 CLR 162.
11 (No. 2) [1989] 1 All ER 1002.
12 See footnote 9.
14 Law 101/87.
In the now-leading case of Commerzbank Auslandsbanken Holding AG and another v. Adeona Holdings Limited,\(^{15}\) 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.

The Supreme Court of Cyprus examined the conditions for the issuance of interim injunctions on the basis of this EU Regulation in a recent judgment in the case of Trafalgar Developments Limited and others v. Uralchem Holdings PLC and others. The case concerned an application for freezing injunctions and disclosure orders in support of a civil action pending in the High Court of Ireland.

The above-mentioned provisions of the International Arbitrations Law and of Regulation EU No. 1215/2012 are both 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.\(^{16}\) 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 in order 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 that:

- there is a reasonable ground to suspect that a specified person has committed or has benefited from the commission of a prescribed offence;
- the information is likely of itself or together with other information to be of substantial value to the investigation;
- the information is not privileged; and
- it is in the public interest for the information to be disclosed.


\(^{16}\) 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.
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 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.

**Preserving evidence**

This can be achieved through the issuance, in the context of a civil case, of an *Anton Piller* order, which can be issued on an *ex parte* basis.

In its judgment in the *Stepanek* case, 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:

- the plaintiff must be able to demonstrate that it has a strong prima facie case;
- the activities of the defendant are causing very serious damage to the plaintiff;
- there is reliable evidence that the defendant does possess incriminating documents or other evidence; and
- 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. This 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.

ii Arbitration

As noted above, Cyprus courts, on the basis of the International Arbitrations Law,\textsuperscript{21} can issue injunctions in aid of international arbitration proceedings that have been filed or are to be filed abroad.

iii Fraud’s effect 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\textsuperscript{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:

\begin{quote}
[a] 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.
\end{quote}

V INTERNATIONAL ASPECTS

i 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.

\textsuperscript{21} Law 101/87.
\textsuperscript{22} Law 66(I)/97.
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 these boundaries.

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*, 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 5(3) and (4) are relevant, providing that a person domiciled in a Member State may, in another Member State, be sued:

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.

(4) as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seized 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). 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

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23 [1975] 1 CLR 144.
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.

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 of 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 such a 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.

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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 anti-money laundering regime. The report 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.28

27 Special Assessment of the Effectiveness of Customer Due Diligence Measures in the Banking Sector in Cyprus, published on 24 April 2013.
Chapter 11

DENMARK

Anders Hauge Gløde

I OVERVIEW

There is no Danish statutory law or body of rules that specifically deals with asset tracing and recovery. A victim of fraud can pursue a claim through the civil court system or through criminal proceedings handled by the Danish Prosecution Service. The following is a non-exhaustive and general overview of the rules and regulation on fraud cases from both a civil and criminal perspective.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Danish legal system

The Danish court system is a three-tiered judicial system consisting of 24 district courts, the two High Courts (of Eastern and Western Denmark) and the Supreme Court. All courts handle both criminal and civil cases. Additionally, the Maritime and Commercial High Court is a court aligned with the district courts that specialises in and deals only with commercial disputes.2

Usually, the court of first instance will be the competent district court. However, at the request of either party a case can be referred to either the Eastern or Western High Court if the dispute in question is of fundamental legal importance and of general importance to the application and interpretation of the relevant law or has significant societal implications in general.3

Criminal remedies

The Danish Prosecution Service works together with the police to prosecute crime.4 The police are responsible for investigating crime, while the Danish Prosecution Service is responsible for bringing charges and prosecuting the cases before the courts.

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1 Anders Hauge Gløde is a partner at Bech-Bruun Advokatpartnerselskab.
2 Section 225 of the Danish Administration of Justice Act.
3 Section 226(1) of the Danish Administration of Justice Act.
4 Section 96 of the Danish Administration of Justice Act.
Different types of economic crime are some of the most common criminal offences in Denmark. Economic crime includes offences such as fraud, embezzlement, breach of trust and fraudulent preference. These offences are punishable by up to one and a half years’ imprisonment or, in particularly aggravating circumstances, up to eight years’ imprisonment.

Criminal offences must be reported to the police. The offence may be reported by the victim or any other person. For certain offences, criminal prosecution can only be initiated by the victim (private prosecution) or at the victim’s request (conditional public prosecution). In all other cases, the police can act without the offence first being reported to it, and the police can thus decide to initiate or continue investigations, even if the reporting party withdraws the report.

In most cases where the criminal offence is an offence against others, eg. fraud, the offence will be reported to the police by the victim, and the police will most often not initiate investigations, unless the offence is reported. In other criminal cases involving the Danish Criminal Code or specific statutes, investigations are initiated by the police, sometimes at the request of the relevant regulatory authority (eg. in the area of taxation and money laundering).

On completion of investigations, the police chief will decide whether to bring charges. Under section 685 of the Danish Administration of Justice Act, the victim’s claim for damages may be heard by the court together with the criminal case subject to certain conditions. At the request of the police, the court may also decide to seize assets, among other things as security for the victim’s claim for recovery or damages.

**Civil remedies**

**Action for damages**

A victim who has suffered a financial loss due to fraud can pursue his claim in a civil case pursuant to Danish tort law. According to Danish tort law, damages may be awarded if the following cumulative criteria are met:

- a there is a legal basis for liability;
- b the victim has suffered a financial loss; and
- c the loss is a foreseeable consequence of the act or omission constituting the legal basis for liability.

The legal basis for liability includes negligence, wilful misconduct and (in certain instances) strict liability. A violation of statutory provisions, standard business practices or terms of a contract will usually be deemed a negligent act.

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6 Sections 278, 279, 280 and 283 of the Danish Criminal Code.
7 Section 286(1) and (2) of the Danish Criminal Code.
8 Section 742 of the Danish Administration of Justice Act.
9 Cases involving, for example, violations of the Danish Marketing Practices Act and certain instances of industrial espionage are subject to private prosecution, while criminal offences under Sections 291(1) and (3), 293(2), 298 and 299 of the Danish Criminal Code are subject to conditional public prosecution, see Section 305(5) of the Danish Criminal Code.
12 Section 719 of the Danish Administration of Justice Act.
13 Section 801(1)(iii) of the Danish Administration of Justice Act; see also Section 806(2).
14 Bo Von Eyben and Helle Isager: Lærebog i erstatningsret, 8th edition, 2015, chapter 4.3.
**Liability of board of directors and executive board of a limited liability company**

The liability of members of the board of directors and the executive board of a limited liability company is codified in Section 361 of the Danish Companies Act,\(^\text{15}\) which provides that promoters and members of management are liable for damage caused by intentional or negligent acts. Members of management will usually not be held liable for informed decisions made in good faith (a somewhat similar standard as the ‘business judgement rule’).

There are numerous examples of case law on management liability. This includes cases in which the board of directors or the executive board, or both, sold company assets at less than market price, thus inflicting a loss on the company’s creditors, granted funds, issued loans or provided security to shareholders or management itself without complying with Sections 206–212 of the Danish Companies Act or failed to take necessary measures in the event of loss of share capital.\(^\text{16}\) Members of the management can be held liable by the shareholders, the company, suppliers and creditors and also by the appointed trustee on behalf of the estate (in case of insolvency proceedings).\(^\text{17}\)

**Actions for declaratory judgment**

A victim having lost an asset as a result of fraud may institute a declaratory action for the defendant to be ordered to acknowledge the victim’s ownership of the asset. If the plaintiff prevails in the declaratory action, the asset may be recovered with the assistance of the enforcement court via summary enforcement proceedings.\(^\text{18}\)

**Issuance of bankruptcy order**

If the victim can be considered a creditor as a result of the fraud, the victim also has the option of petitioning for the debtor’s (the offender’s) bankruptcy, and the debtor will then lose control of the assets.\(^\text{19}\) Subject only to a few exceptions, all of the debtor’s assets as at the date of bankruptcy will be held by the bankruptcy estate for distribution in accordance with the hierarchy of creditors set out in the Danish Bankruptcy Act.\(^\text{20}\) However, any assets belonging to third parties (e.g., the victim) must be returned to the relevant party and will not be subject to the bankruptcy distribution rules.\(^\text{21}\)

One advantage of petitioning for the debtor’s (the offender’s) bankruptcy is that a trustee of the bankruptcy estate will examine the debtor’s situation and transactions made prior to bankruptcy. If these investigations show that fraudulent transactions have taken place, the bankruptcy estate may also raise claims against the other parties which have benefited from such transactions.

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\(^{15}\) Act no. 1089 of 14 September 2015 – the Danish Companies Act.

\(^{16}\) See the Supreme Court judgments as reported in the Danish weekly law reports: UfR 2018.1435 H, UfR 2011.963 H and UfR 2007.497 H.

\(^{17}\) See the Supreme Court judgment as reported in the Danish weekly law reports for 2015: UfR 2015.2219 H: The transfer of FC Nordsjælland Holding A/S was effected at undervalue and was voidable. The members of the board of directors were ordered to pay DKK 10 million in damages.


\(^{19}\) Section 29 of the Danish Bankruptcy Act.

\(^{20}\) Part 10 of the Danish Bankruptcy Act.

\(^{21}\) Section 82 of the Danish Bankruptcy Act.
The primary condition for filing a bankruptcy petition against a debtor is that the debtor must be insolvent, that is, unable to pay his debts as and when due, unless the inability to pay is only temporary. The creditor’s claim does not have to be established by judgment, but must have such clarity as for some degree of likelihood to exist that the claim is legitimate.

ii Defences to fraud claims

Criminal limitation period

A criminal offence is no longer punishable once it is barred by limitation. The duration of the limitation period depends on the maximum penalty prescribed for the offence. A claim regarding fraud, embezzlement, breach of trust and fraudulent preference is barred after five years. In particularly aggravating circumstances, the limitation period is 10 years.

The limitation period is usually reckoned from the date when the criminal act or omission ceased. However, where criminality depends on or is influenced by a current consequence or other subsequent event, the limitation period is reckoned from the date when that consequence or event occurred.

Civil limitation period

Civil claims are subject to the Danish Limitation Act. The general limitation period is three years, unless otherwise specified in other statutory provisions. If the claim is in consequence of a breach of contract, the period is reckoned from time of the breach. If the claim is in tort, the period is reckoned from the date when the damage occurred. The limitation can be suspended if the victim did not know and should not have known about the claim or the (rightful) debtor.

Waiver of claims by reason of inaction

In some cases, a civil claim may be waived by reason of the claimant’s inaction. If the debtor has reasonable cause to doubt the existence of the claim or the claimant’s intention to assert it, the claimant must clarify to his debtor that he intends to assert his claim. Otherwise, he risks waiving his right to do so at a later time.

Release from liability under company law

In limited liability companies, the general meeting may resolve by a simple majority to release management from liability. This would normally mean that the company will have no claim.

22 Section 17(2) of the Danish Bankruptcy Act.
24 Section 92 of the Danish Criminal Code.
25 Section 93(1) of the Danish Criminal Code.
26 Section 93(2) of the Danish Criminal Code.
27 Section 94(1) of the Danish Criminal Code.
28 Section 94(2) of the Danish Criminal Code.
30 Section 2(3) of the Danish Limitation Act.
31 Section 2(4) of the Danish Limitation Act.
32 Section 3(2) of the Danish Limitation Act.
against them for matters which are known to the general meeting. However, this does not apply if the release from liability was granted on a false or inadequate basis.\textsuperscript{34} A release from liability will not relieve management of liability to parties other than the company itself.

\textbf{The money rule}

Danish law operates with a general property law principle that a monetary amount that has been paid cannot be recovered from the payee, even if the payor was not authorised to pay the money (the money rule). The historical application of the rule is to cash payments and the extent of the application of the rule to electronic wire transfers is unclear. It is also a condition for the application of the rule that the payment is a genuine transaction and that the payee acts in good faith with regard to the payor not being entitled to the money. Accordingly, a victim of fraud cannot recover money from a third party if the third party received the money in good faith.

\section*{III SEIZURE AND EVIDENCE}

\textit{Securing assets and proceeds}

\textbf{Criminal remedies}

At the investigation stage and also during the trial, the courts may decide to seize an asset for the purpose of preserving evidence or as security for the victim’s claim for recovery of the asset or damages.\textsuperscript{35} The rule applies to assets, chattels and property controlled by the suspect of a crime and even – although to a lesser extent – assets in the possession of a non-suspect.

A decision to seize will be made by court order, and the order may be sought by the police as well as the victim.\textsuperscript{36} In some cases, however, the police may bypass the courts and make a summary decision to seize if the purpose would otherwise be lost.

The seizure order will be lifted or terminate, depending on its terms and the outcome of the investigations and any subsequent criminal prosecution. The court’s decision-making powers are subject to certain restrictions – for one thing, no decision can be made by the court during the criminal proceedings as to who owns the seized assets.\textsuperscript{37}

\textbf{Civil remedies}

\textit{Attachment orders}

Generally, enforcement of a claim can be sought in accordance with Section 478 of the Danish Administration of Justice Act. Court judgments, out-of-court settlements, arbitral awards, debt instruments and mortgages and pledges may serve as the basis for enforcement.

However, a victim of fraud will usually have no basis for enforcement, and if the victim must wait for a court to decide on the matter, there is a risk that the offender will have disposed of his profits and assets.

\textsuperscript{34} Section 364(2) of the Danish Companies Act.
\textsuperscript{35} Section 801 of the Danish Administration of Justice Act.
\textsuperscript{36} Section 806 of the Danish Administration of Justice Act.
\textsuperscript{37} Section 807d of the Danish Administration of Justice Act.
Certain interim remedies are available in order to accommodate this risk. A victim of fraud can seek an attachment order against assets belonging to the offender.\(^\text{38}\) When an attachment order is issued, the owner loses control of the asset affected by the attachment order.

An attachment order does not grant security over the asset. Instead, the purpose of the order is to ensure that the owner does not dispose of the assets so creditors can levy execution. Any creditor can, however, levy execution on the asset and not just the person seeking the order.

An attachment order may be issued if the following cumulative criteria\(^\text{39}\) are met:
\begin{enumerate}[a]
\item there is no basis for enforcement of the victims claim under Section 478 of the Danish Administration of Justice Act;
\item the prospect of the victim obtaining coverage for his claim will materially deteriorate in the absence of an attachment order against the defendant’s assets. The victim bears the burden of proof. The criteria will usually be met if the victim can prove that the defendant’s transactions are unusual;\(^\text{40}\) and
\item the defendant cannot prove that the victim’s claim most likely does not exist. Usually, the party alleging to have a claim bears the burden of proving its existence. Under this rule, however, the defendant must prove that the claim (most likely) does not exist in order to prevent the attachment order being granted.
\end{enumerate}

An application for an attachment order must be filed in writing to the relevant enforcement court, and must include the necessary information about the circumstances supporting the claim.\(^\text{41}\) The enforcement court may request the person seeking the attachment order to provide security for damages in respect of the defendant if the order turns out to be unjustified.\(^\text{42}\)

The enforcement court can also decide to physically remove the assets affected by the order from the defendant to make sure that the defendant is not able to dispose of them.\(^\text{43}\)

Having obtained an attachment order, the victim must then file a civil suit against the defendant within seven days of the attachment hearing.\(^\text{44}\) The court must confirm that the claim on which the order was granted is justified, and confirm the attachment order (this is known as a ‘confirmatory action’).

**Dispossession of assets prior to bankruptcy order**

When a bankruptcy order is issued, the debtor loses control of the assets.\(^\text{45}\) Before issuing a bankruptcy order, however, the probate court may decide at the request of a creditor to dispossess the debtor of his or her assets if there is a risk that the debtor may dispose of the assets to the detriment of the creditors.\(^\text{46}\)

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\(^\text{38}\) Section 627 of the Danish Administration of Justice Act.

\(^\text{39}\) Section 627(1)(i) of the Danish Administration of Justice Act.


\(^\text{41}\) Section 631(1) of the Danish Administration of Justice Act.

\(^\text{42}\) Section 629(1) of the Danish Administration of Justice Act.

\(^\text{43}\) Section 633 of the Danish Administration of Justice Act.

\(^\text{44}\) Section 634(1) of the Danish Administration of Justice Act.

\(^\text{45}\) Section 29 of the Danish Bankruptcy Act.

\(^\text{46}\) Section 26(1)-(4) of the Danish Bankruptcy Act.
ii Obtaining evidence

The rules on obtaining of evidence are found in the Danish Administration of Justice Act. The common ways of obtaining evidence are through examination of parties, disclosure and expert evidence.

Any person summoned by a party to a current civil case will be under an obligation to appear and give evidence before the relevant court. The person summoned may request to be excused either in part (on certain subjects) or in full – for example, if giving evidence would expose the person or any of his or her connected persons to the penalty of the law or would be detrimental to his or her, or their, safety or welfare.47

A victim of fraud can seek a disclosure order with respect to documents in the defendant’s or a third party’s possession.48 If so, the victim must specify which documents are requested, which facts the victim seeks to prove with the documents and why the documents are relevant to those facts. The victim must also provide the reasons why the documents are (thought to be) in the other party’s possession.49

If the defendant does not comply with the order, the court may conclude in its ruling on the substance that the evidence assumed to be contained in the requested documents prejudices the defendant’s case.50 While the court cannot force the disclosure of any documents in the defendant’s possession, it does have certain measures to compel a third party to comply with the order of disclosure.51

Expert evidence is mostly used to explain any complicated factual circumstances of a case. The rules governing expert evidence are found in Part 19 of the Danish Administration of Justice Act.

A party may request the court’s permission for the taking of evidence even before the issue of proceedings.52 The purpose of taking evidence before a trial is to enable a party to obtain evidence for the purpose of the trial, and it is thus a precondition to the taking of evidence that the claim in question is capable of serving as the basis of a trial.53

In the case of bankruptcy proceedings, the debtor is required to provide the trustee of the bankruptcy estate with all information which is necessary for the administration of the estate.54 The trustee may summon the debtor or others to give evidence before the probate court. In this case, too, the debtor and others may request to be excused.55 With the assistance of the enforcement court, if relevant, the trustee of a bankruptcy estate may seek to recover any documents as well as assets that may be assumed to belong to the bankruptcy estate.

47 Section 171 of the Danish Administration of Justice Act.
48 Sections 298 and 299 of the Danish Administration of Justice Act.
49 Sections 300 and 341 of the Danish Administration of Justice Act.
50 Section 298(2) of the Danish Administration of Justice Act; see Section 344(2).
51 Section 299(2) of the Danish Administration of Justice Act; see Section 178.
52 Section 343(1) of the Danish Administration of Justice Act.
54 Section 100 of the Danish Bankruptcy Act.
55 See the Supreme Court judgment as reported in the Danish weekly law reports for 2000 (UfR 2000.1201 H).
IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Act on Measures to Prevent Money Laundering and Financing of Terrorism

The Danish Act on Measures to Prevent Money Laundering and Financing of Terrorism (the AML Act) implements parts of the EU Fourth Anti-Money Laundering Directive.\(^\text{56}\) The AML Act reflects a shift from rule-based towards increasingly risk-based regulation, with an increased anti-money laundering effort in high-risk areas.

The AML Act imposes a number of obligations on financial institutions and other liable parties (including lawyers in some cases). In particular, financial institutions must identify and assess the risk of being misused for money-laundering or terrorist financing purposes, they must perform know-your-customer (KYC) procedures and they must investigate and report any unusual transactions that give rise to suspicions of money laundering or terrorist financing.

The AML Act is intended to safeguard the interests of society in general with regard to ensuring the stability of and confidence in the financial system. It has, therefore, been an important element in Danish AML regulation that effective sanctions are available under the AML Act.\(^\text{57}\)

The Danish Financial Supervisory Authority has been given the central supervisory role.\(^\text{58}\) Any non-compliance is punishable by a fine or, in particularly aggravating circumstances or in case of intentional non-compliance with specified provisions, up to six months’ imprisonment.\(^\text{59}\) In determining the amount of the fine, weight will be given to the financial situation of the person in question and, for businesses, weight will be given to its net turnover when the non-compliance occurred.\(^\text{60}\)

Denmark has seen an increase in the number of AML reports to the authorities.\(^\text{61}\) In 2010, a Danish bank was issued with a 12.5 million kroner fine for non-compliance by its Gibraltar branch with Spanish AML regulation. In 2015, a minor exchange bureau in Copenhagen was issued with a 92 million kroner fine, and two persons were sentenced to six months’ imprisonment for money laundering worth 184 million kroner from the exchange bureau’s basement room without any records being kept of the transactions or notification being made to the authorities.\(^\text{62}\) Also in 2015, a Swedish (now Finnish) bank was issued with a 50 million kronor fine by the Swedish FSA for non-compliance with its statutory obligations.

\(^{56}\) Act No. 651 of 8 June 2017 on Measures to Prevent Money Laundering and Financing of Terrorism – the Danish AML Act.

\(^{57}\) Political agreement of 21 June 2017 on further initiatives to strengthen efforts to combat money laundering and terrorist financing.

\(^{58}\) Section 47 of the Danish AML Act.

\(^{59}\) Sections 78–80 of the Danish AML Act.

\(^{60}\) Section 78(3) of the Danish AML Act.

\(^{61}\) In 2010, the State Prosecutor for Serious Economic and International Crime received fewer than 2,000 reports. In 2015, the number had increased to some 15,000 reports, and the number had further increased to 36,000 in 2018.

\(^{62}\) See also the High Court judgment as reported in the Journal of Criminal Law for 2015 (TfK 2015.1110 Ø), where the company was issued with a 1 million kroner fine and the CEO a 100,000 kroner fine for non-compliance with a number of provisions of the AML Act in connection with currency exchange.
Liability of banks

Before the turn of the century, there were several instances in Denmark of ‘profit-making companies’ that had ceased all operations and only held cash or cash equivalents as well as a current or deferred tax burden being sold. The companies were transferred to the buyers, who in connection with the acquisition (or immediately after) stripped the company of its cash or cash equivalents without paying the relevant taxes, and then the company was declared bankrupt. A number of banks were ordered to pay damages for their assistance in connection with this, as the banks knew or ought to have known that this constituted unlawful self-dealings and that the Danish tax authorities would suffer a loss as a result of the transactions.63

ii Insolvency

A bankruptcy estate may avoid transactions and payments made in a limited time period leading up to the beginning of an insolvency procedure if the transaction has inflicted a loss on the creditors of the estate.64 The time period will usually be limited to transactions made later than three or six months prior to the reference date (the date when the court received the bankruptcy petition).65 There is, however, one rule on avoidance which is not limited to any specific time frame, but conditioned upon other facts and circumstances.66 Avoidance can take place in respect of any unusual payments to specific creditors, charges or other security granted in favour of specific creditors covering already established debt towards the same parties, unusual gifts granted or other fraudulent transactions that have inflicted a loss on the creditors.67

iii Arbitration

The Danish Arbitration Act68 is based on the UNCITRAL Model Law on International Commercial Arbitration. Disputes concerning legal relationships in respect of which the parties have an unrestricted right of disposition may be submitted to arbitration.69 Accordingly, a criminal case cannot be settled by arbitration.

The parties can agree to submit to arbitration a dispute which has arisen or may arise between them in respect of a defined legal relationship.70 Due to the doctrine of separability, the invalidity of the main contract does not necessarily also render invalid the arbitration clause contained in the contract, and the party can still be bound by the arbitration clause. However, with regard to consumer contracts an arbitration agreement concluded prior to the occurrence of the dispute will not be binding.71

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63 Several examples can be found, eg. the two Supreme Court judgments as reported in the Danish weekly law reports: UfR 2000.365/2 H, UfR 2011.1064 H.
64 All rules are contained in Part 8 of the Danish Bankruptcy Act.
65 Section 1 of the Danish Bankruptcy Act.
66 Section 74 of the Danish Bankruptcy Act.
67 Sections 64, 67, 70 and 74 of the Danish Bankruptcy Act.
69 Section 6 of the Danish Arbitration Act.
70 Section 7(1) of the Danish Arbitration Act.
71 Section 7(2) of the Danish Arbitration Act.
When a valid arbitration agreement is entered into by the parties, the courts do not have jurisdiction to decide the dispute. However, a party can seek an order for an interim measure of protection from the courts, even if the parties have agreed to arbitration.\(^{72}\)

iv Fraud’s effect on evidentiary rules and legal privilege

Fraud has no express effect on evidentiary rules according to the wording of the law, but the presence and scope of fraud may affect how a court will exercise its free evidentiary discretion in connection with the issues put before the court.

In Denmark, lawyers are subject to a duty of confidentiality.\(^{73}\) For this reason, lawyers are generally excluded from giving evidence on matters that have come to their knowledge in the course of their professional activities.\(^{74}\) Nor are lawyers generally required to produce any documents that have come into their possession in the course of their professional activities.\(^{75}\)

The court may order a lawyer to give evidence or produce documents in his or her possession if this is deemed to be of crucial importance to the outcome of the case and if justified by the nature of the case and its significance to the party in question or society as such.\(^{76}\)

Lawyers’ duty of confidentiality may also be subject to specific statutory basis.\(^{77}\) By way of example, lawyers are required under the provisions of the AML Act to report any suspicions of money laundering.\(^{78}\) The duty to report does not apply to information received in the course of or in connection with a lawsuit.\(^{79}\)

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

In disputes concerning contractual obligations, Denmark is bound by the 1980 Rome Convention on the law applicable to contractual obligations,\(^{80}\) which generally applies to all contracts. Denmark is not bound by the Rome I Regulation or the Rome II Regulation (on non-contractual obligations) due to the Danish EU opt-out with respect to the area of justice and home affairs.


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\(^{72}\) Section 9 of the Danish Arbitration Act.

\(^{73}\) Section 129 of the Danish Administration of Justice Act.

\(^{74}\) Section 170(1) of the Danish Administration of Justice Act.

\(^{75}\) Section 299 of the Danish Administration of Justice Act; see Section 169.

\(^{76}\) Section 170(2) of Danish Administration of Justice Act.

\(^{77}\) See the Supreme Court judgment as reported in the Danish weekly law reports for 2002 (U 2002.1531 H), which held that Section 152e of the Danish Criminal Code also applies to lawyers’ disclosure of information.

\(^{78}\) Sections 25-26 of the Danish AML Act.

\(^{79}\) Section 27 of the Danish AML Act.

\(^{80}\) Implemented in Danish law by Act No. 188 of 9 May 1984.
Choice of law in tort is based on jurisprudence. Generally, the Danish courts follow the principle of *lex loci delicti* (place of injury), but may derogate from this principle when deciding upon which rules apply to the merits of the dispute.\(^{81}\)

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

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 does not apply in Denmark due to the Danish opt-out with respect to the area of justice and home affairs. However, Denmark has ratified the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, which is similar to the Regulation.

Under the Convention, a contracting state may request another contracting state in writing to procure and secure evidence in accordance with the national procedural rules of the latter state.

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

The provisions of the Danish Administration of Justice Act on attachment orders apply irrespective of the nationality and residence of the party seeking the attachment order. However, a plaintiff who does not reside in an EU or EEA country may be required to provide security for the payment of legal costs to the defendant.\(^{82}\)

**iv  Enforcement of judgments granted abroad in relation to fraud claims**

Denmark is bound by the Brussels Regulation indirectly through a parallel agreement with the EU due to Denmark’s opt-out with respect to the area of justice and home affairs.\(^{83}\)

Furthermore, Denmark is bound by the Lugano Convention.\(^{84}\) The Convention is only relevant in matters where the international authority of the court must be decided and the case at hand has connection to both Denmark and an EEA country which is not also a member of the EU.

Regarding enforcement and recognition of foreign arbitral awards, Denmark is bound by the New York Convention.\(^{85}\) The recognition of foreign arbitral awards in Denmark extends beyond arbitral awards from other countries which have ratified the New York Convention.\(^{86}\)

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82 Section 321(1) of the Danish Administration of Justice Act.
84 Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (the ‘Lugano Convention’).
85 The New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’).
86 Section 38 of the Danish Arbitration Act.
Fraud as a defence to enforcement of judgments granted abroad

In accordance with the Brussels Regulation, Denmark is directly required to recognise and enforce judgments granted in other member states. Recognition and enforcement of a judgment may be refused if this would conflict with fundamental principles of law (public policy).

Any fraud committed by a party during the legal proceedings (e.g., by forgery or misrepresentation) will probably only rarely constitute sufficient grounds to refuse recognition and enforcement, particularly if the objection was submitted to the court and rejected by it or if the objection could have been made during the proceedings but was not.

In addition, recognition and enforcement may be refused if the judgment in question is a default judgment and the defendant did not have sufficient opportunity to safeguard his interests during the proceedings or if the judgment is in conflict with a decision made in Denmark or another EU member state on the same issue and between the same parties.

Similar rules apply in part to recognition of arbitral awards and derogations therefrom.

VI CURRENT DEVELOPMENTS

i Implementation of Fourth and Fifth AML Directives

The Fourth Anti-Money Laundering Directive is implemented into Danish law, and the provisions entered into force on 26 June 2017. As a result of the implementation, companies were required to sharpen their customer risk assessment procedures. At the same time, the rules on registration of beneficial owners of companies were tightened.

The Fifth Anti-Money Laundering Directive is also implemented into Danish law, and the provisions will enter into force on 10 January 2020. As a result of the amendments, the scope of the AML Act will be extended to also include virtual currencies and participants in the virtual currency market. Furthermore, a duty to notify will be introduced with regard to inconsistencies in the information on beneficial owners, and stricter requirements will apply in relation to KYC procedures for customers from high-risk countries.

In Denmark, the legislature has elected to over-implement the Directive, which means that in Danish law a specific rule has been adopted which imposes a requirement of notification to the ultimate governing body with regard to whistleblowing disclosures and the like. In addition, the circulation of €500 notes will be banned in Denmark.

ii Money-laundering liability of banks

Recently, there has been an increase in focus in Denmark on banks’ AML compliance because of several instances of non-compliance that have been seen; see also above.

A major Danish bank had a customer portfolio in a foreign branch, which for many years received payments from external parties, and the customers also made payments to recipients who were not a part of the portfolio. In 2014, the bank received reports that

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87 Sections 36 and 39 of the Brussels I Regulation.
88 Section 52 of the Brussels I Regulation.
89 Sections 45 and 46 of the Brussels I Regulation.
90 Section 39 of the Danish Arbitration Act
91 Act No. 651 of 8 June 2017 on Measures to Prevent Money Laundering and Financing of Terrorism – the Danish AML Act.
92 Act No. 553 of 7 May 2019, which will enter into force on 10 January 2020.
the branch’s measures to prevent money laundering were deficient. Initiatives were then implemented to address the deficiencies, but even so, administrative sanctions were imposed on the bank by the authorities in 2015.

In the autumn of 2017, the bank initiated its own investigations of the branch’s practices. The report showed that the branch generally had inadequate focus on the risk of money laundering and that, at group level, the bank had not taken adequate measures to redress the deficiencies.

In the period since the report was issued, the authorities have reopened their investigations into the matter, and a number of shareholders have issued or are in the process of issuing legal proceedings. So far, there are no publicly known instances of a bank’s management having been held liable for AML non-compliance.
Chapter 12

DOMINICAN REPUBLIC

Aimee Prieto

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 laundering. As stated by Robert Hunter in the Preface to this of this Law 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 to which 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, the Anti-Money Laundering and Terrorist Financing Law No. 155-17 (the Money Laundering Law) was enacted. This Law and its implementing regulations2 include provisions for transparency and sharing of available information among economic agents, and for asset forfeiture.

The Dominican Criminal Code3 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

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1 Aimee Prieto is a partner at Prieto Cabrera & Asociados SRL.
2 (1) Regulation No. 407 for preventive freezing of assets or assets related to terrorism and its financing and the proliferation of weapons of mass destruction, dated 16 November 2017; (2) Regulation No. 408 for the application of Law 155-17, dated 16 November 2017; (3) Rule issued by the Tax Administration (DGII) No. 01-2018 regarding lawyers, notaries, accountants and factoring companies; (4) Rule issued by the Tax Administration (DGII) No. 02-2018 regarding natural or legal persons who engage regularly to the purchase and sale of vehicles, boats and planes; (5) Rule issued by the Tax Administration (DGII) No. 03-2018 regarding real estate agents, non-financial construction and fiduciary companies or public offering companies; (6) Rule issued by the Tax Administration (DGII) No. 04-2018 regarding jewellers, armoury and pawnshops; and (7) Rule issued by the Tax Administration (DGII) No. 05-2018 regarding the sanctioning regime.
3 Articles 401–409.
the transfer of company assets while in a liquidation process.


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 in order 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. In order 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, 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 in order 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, in order 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\(^4\) considers as victim:

(i) the person directly offended by the punishable act; (ii) 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; (iii) 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 and named them as obligors whether they are from the financial or non-financial sector (financial and non-banking financial institutions, lawyers, accountants and public notaries, etc.) intended to prevent, deter and detect money laundering. This includes reporting suspicious activities, such as certain cash transactions and unusual or suspicious transactions,

\(^4\) Article 83.
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, in order 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 last act. The infractions are described in the Money Laundering Law.5

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, among others: defendant’s death; the statute of limitation has elapsed; amnesty; and abandonment of the legal action (for civil proceedings).

### 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 in order 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

5 Articles 69–71.
related to the offence be seized and allocated as established under this 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, in order 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.

ii 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. Also, the Dominican Civil Code, the Dominican Civil Procedure Code and the Dominican Criminal Procedure Code establish the general provisions concerning evidence, including the types of admissible evidence.

Pursuant to the Criminal Procedure Code, ‘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 legally obtained and in accordance with the applicable formalities and procedures. Punishable offences and their circumstances may be proven by any means of evidence allowed, except express prohibition. 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:

- written evidence;
- testimony;
- presumptions;
- confession; and
- oath.

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6 Article 68.
7 Articles 1315 et seq.
8 Book IV, Titles I–V.
9 Article 22.
10 Article 166.
11 Article 171.
For criminal procedures, the Criminal Procedure Code also establishes the freedom of evidence and indicates the following, among others, as means of evidence:

- inspections (of public places, residences and other private spaces);
- testimony;
- expert witnesses;
- seizure of documents and articles; and
- interception of communication.

In order 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 No. 72-02 of 7 June 2002, banks and other financial entities are currently reviewing their procedures to prevent and detect money laundering, in order to adhere to the new requirements.

**ii Insolvency**

The Restructuring and Liquidation of Companies and Business Entities Law No. 141-15\(^\text{12}\) 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.

\(^{12}\) Article 213.
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. 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.

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.

INTERNATIONAL ASPECTS

Conflict of law 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:

- jurisdiction of local courts;
- applicable law; and
- recognition and enforcement of foreign decisions in the Dominican Republic.

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ii Collection of evidence in support of proceedings abroad

The Dominican Republic provides legal assistance and requests based on 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, 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:

- the United Nations Convention Against Transnational Organized Crime;
- the Inter-American Convention on the Taking of Evidence Abroad, executed on 19 July 1977 by the Members of the Organisation of American States;
- the Model Treaty on Mutual Assistance in Criminal Matters;
- the Inter-American Convention Against Corruption;
- the Inter-American Convention Against Terrorism; and

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

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14 The Dominican Constitution, Article 26; the Criminal Procedure Code, Article 155; the Money Laundering Law, Articles 17–21.
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 13

ENGLAND AND WALES

Robert Hunter, Jack Walsh and Ekaterina Pakerova

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.

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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:

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.4

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.5 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.

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3 A number of English civil wrongs are classified as ‘torts’ for reasons that it is not necessary to explore here. Another name for this remedy is ‘common law fraud’.
5 The need to identify a ‘representation’ is critical; see The Kriti Palm [2006] EWCA Civ 1601.
(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.

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8 Hallows v. Fernie (1867-68) LR 3 Ch App 467.
10 Derry v. Peek [1889] 14 App Cas 337.
11 The falsity or otherwise of the statement is judged in the light of how the defendant understood it, not how the claimant or court understood it; Akerhielm v. de Mare [1959] AC 759 (PC).
12 AIC Ltd v. ITS Testing Services (UK) Ltd [2005] EWHC 2122 (Comm).
**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 induced the victim to enter into a contract with the fraudster (see below). The court will 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. If the statement is ‘material’, it will be assumed that it did unless the defendant proves otherwise. 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. The victim does not need to prove that they believed the lie to be true, just that it influenced them.

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. 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.

**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’. The victim has the right to monetary damages and has an option to rescind the contract.

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

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returned to their original owners and future obligations are no longer binding. 21 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. 22

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 misrepresenter 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. 23

**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. 24 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*, 25 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

21 *Adam v. Newbigging* (1886) 34 Ch D 582, at p. 149.
22 *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.26

**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.27 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 own interests with regard to the money conflict with those of the beneficiary unless, again, this has been explicitly agreed to.28 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

27 Imperial Mercantile Credit Association v. Coleman (1873) LR 6 HL 189 at 198.
fund whatever has been taken out. If restitution is not possible or appropriate, the victim may entitled to monetary compensation from the trustee, to put the victim in the position that would have obtained had the breach not occurred.29

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*,30 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 owed31 and not to permit a position in which the fiduciary’s interests might come into conflict with those of the principal.32 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.33 The taking of the commission will therefore be regarded as a breach of fiduciary duty.

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31 *Bristol & West Building Society v. Matheu* [1998] Ch 1 at 18.
32 *Bray v. Ford* [1896] AC 44 at 51.
33 *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.34 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*:

> 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.35

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. Khrapunov*,36 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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34 *FHR European Ventures LLP and others (Respondents) v. Cedar Capital Partners LLC (Appellant)* [2014] UKSC 45.
35 [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) 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. For these purposes, it will not matter that the precise terms of the contract are not known to the defendant. 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.

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.

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.

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.

39 Stratford & Son Ltd v. Lindley [1965] AC 269 HL.
40 Emerald Construction Co Ltd v. Lowbrian [1966] 1 WLR 691.
41 R (Emblin) v. Revenue and Customs Commissioners [2018] EWHC 626.
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*.43 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.44

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,45 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.46

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.47

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47 *HSBC Bank plc v. 5th Avenue Partners Ltd* [2009] EWCA Civ 296.
c 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.48

d 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.49

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, transmitters of the proceeds of fraud and other accessories

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 (or ‘unconscionable’) 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 himself 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


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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, following the decision of the Supreme Court in *Ivey v. Genting Casinos*, the test of dishonesty no longer involves 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.\(^5^0\) 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.\(^5^1\)

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.\(^5^2\) 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.\(^5^3\) 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.\(^5^4\) In this context, ‘should

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\(^{50}\) *Ivey v. Genting Casinos* [2017] UKSC 67; *Barlow Clowes v. Eurotrust* [2005] UKPC 37; *Royal Brunei Airlines v. Tan* [1995] 2 AC 378; *Group Seven Ltd & Ors v. Notable Services LLP & Ors* [2009] EWCA Civ 614. The dishonesty of the defendant’s conduct is judged in the light of what he or she actually understood and believed about the situation in which he or she acted. For this purpose, however, he or she can have ‘blind eye’ knowledge if he or she suspects that certain facts exist but consciously decides not to make any enquiry to confirm their existence; see *Manifest Shipping Co Ltd v. Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469.

\(^{51}\) *Abou-Rahmah v. Abacha* [2006] EWCA Civ 1492.

\(^{52}\) *Novoship (UK) Ltd and others v. Nikitin and others* [2014] EWCA Civ 908.

\(^{53}\) Limitation Act 1980, Section 2.

\(^{54}\) Limitation Act 1980, Section 31(a).
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.\(^5^5\)

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.

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.\(^5^6\) The limitation defence will, however,
be available to dishonest assistors and knowing receivers of trust funds.\(^5^7\)

This also applies to what is referred to as a breach of ‘constructive trust’.\(^5^8\) 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.\(^5^9\) 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.\(^6^0\) 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*

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55 Paragon Finance v. DB Thakerar & Co (1999) 1 All ER 400.
56 Limitation Act 1980, Section 21(1)(a).
58 Limitation Act, Section 38.
59 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.
60 Fraud Act 2006, Sections 1, 2 and 3.
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. The magistrates’ court or jury now has to consider only whether the defendant’s conduct was dishonest by the standards in the light of what he or she knew or believed about the situation in which he or she acted. This test removes the previous so-called ‘second limb’ of the test 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, 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. 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. Such an offence can carry a term of up to 10 years’ imprisonment. Other commonly seen offences include the common law – and self-explanatory – offence of conspiracy to defraud and the offence of fraudulent trading, 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.

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. 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. 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.

62 The ‘second limb’ had been set out in R v. Ghosh [1982] Q.B. 1053.
63 Fraud Act 2006, Section 4.
65 Forgery and Counterfeiting Act, Section 6.
66 Companies Act 2006, Section 993.
67 Theft Act 1968, Section 1.
68 Bribery Act 2010, Sections 1, 3–5.
69 Bribery Act 2010, Section 2.
70 Bribery Act 2010, Section 7.
More recently, the Criminal Finances Act 2017 amended the Proceeds of Crime Act 2002.71 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.72

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 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.73 Confiscation proceedings arise upon conviction.74 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.75 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.76

The Criminal Finances Act 2017 introduces Unexplained Wealth Orders (UWOs).77 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.78 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.79 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. The procedure adopted for the making of a compensation order is a summary one, inapt for detailed enquiry, and an order will only be made where the loss is readily ascertainable. Any award made should not exceed the sum that would be awarded by a court in civil proceedings. 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. Separately, where property has 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

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83 R v. Flinton [2008] 1 Cr App R (S) 96.
86 See R v. Ferguson 54 Cr App R 410; R v. Calcutt and Varty 7 Cr App R (S) 385.
88 [2017] EWCA Crim 741. See also R (Virgin Media) v. Zinga, referred to at footnote 2.
89 See the line of cases including Mote v. Secretary of State for Work and Pensions [2007] EWCA Civ 1324.
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.

Freezing orders can be granted to freeze assets inside or outside England and anywhere in the world, in support of English proceedings or proceedings in other countries anywhere in the world, and in support of arbitration proceedings wherever they are taking place. They are not, however, available against foreign states unless that state has given written consent.

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 that:

a 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;

b there are assets that the injunction would catch; and

c there is a real risk that the judgment will not be satisfied in view of what the defendant is likely to do.

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’ 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.

ii Obtaining evidence

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{96} 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{97} To obtain a search order, there must be a very strong 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 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.\textsuperscript{98} 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{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}\textsuperscript{99} 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.\textsuperscript{100} 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

\begin{itemize}
\item \textsuperscript{96} \textit{Anton Piller KG v. Manufacturing Processes Ltd} [1976] Ch 55.
\item \textsuperscript{97} \textit{Abela v. Fakik} [2017] EWHC 269.
\item \textsuperscript{98} ibid.
\item \textsuperscript{99} [1980] 1 WLR 1274.
\item \textsuperscript{100} \textit{Norwich Pharmacal Co v. Customs and Excise Commissioners} [1974] AC 133.
\end{itemize}
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.

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.101

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 own case; that adversely affect another party’s case; and that support another party’s case.102 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.103

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:

a legal advice privilege: communications by which a client seeks or receives legal advice from a lawyer are privileged;104

b litigation privilege: communications made or received by a party that have the predominant purpose of relating to the litigation are privileged;105 and

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.106

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,107 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 party108 or a third party,109 and there is EU legislation governing the obtaining of evidence from other countries in the EU.110

102 Civil Procedure, Rules 31.6.
103 Civil Procedure Rules 31.5.
105 Wheeler v. Le Marchant (1881) 17 Ch D 675.
106 Lamb v. Munster [1882–83] LR 10 QBD 110, but see Fraud Act 2006, Section 13, for an important exception to this rule.
107 Civil Procedure, Rules 31.16.
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.

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.

112 Ruben v. Great Fingall Consolidated Ltd [1906] AC 549.
113 [1918] AC 777.
114 Tai Hing Cotton Mill v. Liu Chong Hing Bank Ltd [1986] AC 80, PC.
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.\footnote{115} 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.\footnote{116}

\textbf{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 by criminal activity\footnote{117} such as criminal fraud or if they fail to disclose suspicious transactions to nominated officers or the authorities.\footnote{118} 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.\footnote{119}

\section*{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.\footnote{120} 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.\footnote{121} 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.\footnote{122} 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,
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. There are also further wide-reaching provisions allowing office holders to apply for private examinations of directors and secretaries of the company.

### 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. Separability is a matter for the law governing the contract. 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. 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.

### 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; and the evidence or action was material and causative.

Materiality should be measured by assessing the impact of a party’s fraud on the evidence that supported the original decision.

In criminal proceedings, the guilt of the defendant must be proved ‘beyond reasonable doubt’, and this applies in cases of criminal fraud.

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. 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.

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123 Insolvency Act 1986, Section 235(2).
124 Insolvency Act 1986, Section 236.
125 *Premium Nafta Products Ltd v. Fili Shipping Co Ltd* [2007] UKHL 40.
129 *Amphill Peerage case* [1977] AC 547.
134 *H (Minors), Re* [1996] AC 563.
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.135

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.136 In Kuwait Airways Corporation v. Iraqi Airways 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 laws137

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.138 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;139 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

135 D & G Cars Ltd v. Essex Police Authority [2013] EWCA Civ 514.
137 The rules relating to choice of law in connection with fraud claims cannot be summarised usefully within the space available here.
138 Article 2 Brussels Regulation.
139 Article 5(3) Brussels Regulation.
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.

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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140 This doctrine is known as *forum non conveniens*.
142 ibid.
144 See, for example, *Administration of Justice Act 1920*, Section 9(2)(d) and *Foreign Judgments (Reciprocal Enforcement) Act 1933*, Section 4(1)(a)(iv).
Chapter 14

GERMANY

Florian Wettner

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 and although a criminal law reform in 2017 enhanced the possibilities for aggrieved persons to recover assets or obtain compensation through criminal proceedings, recovery and compensation can still mainly 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 provides support to the state police forces (e.g., by delegating investigators to them). In addition, the Central Office for Financial Transaction Investigations (FIU) is responsible for the collection and analysis of information on cross-border offences and providing central databases.

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 2017 annual report of the FIU, which is the addressee of notifications under the MLA, in 2017 the number of reported cases of suspected money laundering increased to 59,845 – an enormous 31 per cent compared with 2016, resulting in a new peak since the introduction of the MLA in 1993.

1 Florian Wettner is a partner at METIS Rechtsanwälte LLP.
2 By the German Law of June 2017 implementing the Fourth EU Directive on Money Laundering (see Section IV.i), the FIU was renamed as the Central Office for Financial Transaction Investigations and reorganised. As a consequence, it is no longer under the authority of the BKA but of the General Directorate of Customs.
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 specialist 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.3 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.4 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.5

If the victim is able to make out the claim, generally speaking the defendant is obliged to put the victim in the position he or she would have been in had the circumstance obliging

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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.
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 have 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.6 In the present context, such claims aim at siphoning off benefits
gained by the defendant in connection with the fraud and actually belonging 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.7 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, the victim of criminal activity has to pursue the final recovery of assets
or (financial) compensation mainly through civil proceedings. However, a criminal law
reform in 2017 enhanced the possibilities for aggrieved persons to recover assets or obtain
compensation through criminal proceedings. Pursuant to previous German law, the
confiscation of proceeds of a crime was not ordered by the criminal courts if potential civil

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6 Section 812 et seq. of the Civil Code.
7 Section 985 et seq. of the Civil Code.
claims by injured persons existed. Thus, the criminal law measures for tracing and securing assets (see Section III.i) primarily served to secure these civil claims. The current legal situation provides that investigative authorities can also confiscate the proceeds of a crime or the equivalent compensation for the benefit of the injured person even if the latter has civil claims that it could (also) pursue in the civil courts. However, the new regime of criminal asset recovery has still not sufficiently been tested in practice yet.

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 does not play a significant role in fraud and especially white-collar crime cases, and recovery is 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. Where the victim, however, agrees to an object being given away – even if the consent is based on incorrect assumptions due to 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.

Statute of limitations

As a standard defence, a defendant may invoke the statute of limitations. The standard limitation period of three years 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.

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8 Section 73(1) of the Criminal Code (old version).
9 Section 403 et seq. of the Code of Criminal Procedure.
10 Section 195 of the Civil Code.
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 due to 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 *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.

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.\footnote{11 \textit{Section 111b} of the Criminal Procedure Code.} 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.12

### 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.

**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.13 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 respective facts may even shift.

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12 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 Wettner/Mann, DStR 2014, p. 655 et seq.

13 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.
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:

- the claimant may have contractual claims for disclosure of information (e.g., a harmed company against its employees);
- irrespective of a contractual relationship, the claimant may be entitled to ask the possessor of an object for an inspection of the object.\(^{14}\) 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
- the claimant may also be entitled to claim inspection of a document against its possessor.\(^ {15}\) 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.

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.

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\(^{14}\) Section 809 of the Civil Code.

\(^{15}\) Section 810 of the Civil Code.
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,16 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 2017 annual report of the FIU (see Section I.i), in 2017 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 Laundering17 came into force, and was implemented by Germany in June 2017. Again, along with other laws, the MLA was 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 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.18

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

16 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.
18 Section 15a(4) of the Insolvency Act.
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 within four years of the filing for insolvency.\(^{19}\)

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.\(^{20}\) 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 such a 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).\(^{21}\)

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.\(^{22}\) 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.\(^{23}\)

### 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).\(^{24}\)

If the arbitral award conflicts with public policy, the aggrieved party may request the setting aside of the award before the local court.\(^{25}\) 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.\(^{26}\)

### 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).

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19 Section 134 (1) of the Insolvency Act.
20 Section 133(1) of the Insolvency Act.
21 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.
22 Sections 97, 101 of the Insolvency Act.
23 See Federal Court of Justice, Decision of 5 March 2015 (Docket No. IX ZB 62/14), ZIP, 2015, p. 791 et seq.
24 Sections 1033 and 1041 of the Civil Procedure Code.
25 Section 1059(2) No. 2(b) of the Civil Procedure Code.
26 See Higher Regional Court Cologne, Decision of 7 August 2015 (Docket No. 1 U 76/14), 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.
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, or even by the alleviation of the burden of proof altogether. The 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.

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.28

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.29 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.

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27 Section 287 of the Civil Procedure Code.
28 Section 32 of the Civil Procedure Code.
29 Section 23 of the Civil Procedure Code.
However, in tort matters the conflict-of-law rules also allow the parties to choose the applicable law.\(^{30}\) 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 the European Convention on Legal Assistance in Criminal Matters, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and the United Nations Convention against Corruption of 2003.

**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

\(^{30}\) Article 14 of Rome II.
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.\(^31\)

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,\(^32\) 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.\(^33\) 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 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.\(^34\) 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.\(^35\)

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.\(^36\) Therefore, the defendant cannot in principle prevent the enforcement of a foreign judgment in Germany on the grounds that the factual basis of such a 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

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31 Sections 722 et seq. and 328 of the Civil Procedure Code.
32 Section 328(1) Civil Procedure Code.
35 See Federal Court of Justice, Decision of 22 June 2017 (Docket No. IX ZB 61/16), Wertpapiermitteilungen 2017, p. 1428 et seq. The court held the enforcement of an Italian decision that awarded the defendant lump-sum damages (possibly exceeding its actually proven cost of proceedings) due to vexatious litigation of the claimant as 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.
36 Section 723(1) of the Civil Procedure Code.
against the enforcement of the foreign judgment. 37 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 respective country against the foreign judgment to be enforced in Germany. 38

VI CURRENT DEVELOPMENTS

Even though it was put on the political agenda by the governmental coalition agreement in 2013, a corporate criminal law for multinational corporations has not yet been implemented. A legislative proposal regarding the German federal state North Rhine-Westphalia, also of 2013, fizzled out. ‘Dieselgate’ (the Volkswagen emissions scandal that began in September 2015) revived the subject again. The coalition agreement of March 2018 lists some aspects that should be the key principles of a corporate criminal liability regime; in February 2019 some representatives called on the federal government to submit a draft law addressing certain issues of a corporate criminal law.

Successful developments have been initiated on an EU level. Germany has recently implemented the Fourth EU Directive on Money Laundering (see Section IV.i). Meanwhile, the Fifth EU Directive on Money Laundering came into force in July 2018 39 and has to be transposed into national law by January 2020. Once more it extends the reporting duties and provides further amendments regarding virtual currencies and beneficial ownership registers.

37 Federal Court of Justice, Decision of 29 April 1999 (Docket No. IX ZR 263/97), Bundesgerichtshofentscheidungen, Vol. 141, p. 286 et seq. (Prozessbetrug).
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., parent of a minor). Legislation relevant to fraud-related criminal asset recovery includes the

1 Randall Arthur is a partner, Joyce Xiang is an associate and Calvin Koo is a principal at Kobre & Kim.
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.

Conversion

Conversion, whereby a fraudster has effectively misappropriated the victim's property. 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.

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3 Grand Field Group Holdings Ltd v. Chu King Fai and Ors [2014] HKCU 1470.
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 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

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.
12 id. at Section 30.

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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:

1. where the agreement itself is the crime; and
2. 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

**ii 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 had taken place.18 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).19

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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 Kak 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.
18 id. at Section 26.
III  SEIZURE AND EVIDENCE

i  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:

- a good arguable case on the underlying merits of the action;
- that the defendant has assets within the jurisdiction;
- that there is a real risk that defendant will dissipate the assets; and
- that the balance of convenience is in favour of granting the application.  

Mareva injunction applications may initially be made ex parte, but ultimately the defendant will have an opportunity to challenge and set aside the order. 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. A failure to make full and frank disclosure may result in the injunction being discharged. 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. The court may also require the plaintiff to fortify this undertaking by making a payment into court or providing some other type of security.

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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.


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.
Hong Kong

(such as a bank guarantee). 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.

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:

a. there is a strong prima facie case for a cause of action;
b. the potential or actual damage to the plaintiff must be very serious;
c. there must be clear evidence that the defendant possesses the items at issue; and
d. there is a real likelihood (more than a mere possibility) that a defendant might destroy the material.

As with the Mareva injunction, the application may be made ex parte with a full and frank disclosure, but is subject to the defendant’s later opportunity to move to set aside the order.

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 jurisdiction. 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

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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.
30 Rules of High Court, Cap 4A (O44A, Rule 2).
31 id.
32 id.
33 id. at Rule 7.

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the defendant to provide security sufficient to satisfy any judgment that may be rendered against him or her in the action.\textsuperscript{34} Failing provision of such security, the court may direct any property of the defendant to be attached as security.\textsuperscript{35}

**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.\textsuperscript{36} The receiver may then realise and distribute the assets among victims of the fraud.\textsuperscript{37} 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.\textsuperscript{38}

**ii 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.\textsuperscript{39} Parties are to serve lists of such documents within 14 days of the close of pleadings in the action.\textsuperscript{40} Outside these statutory rules, the court may also, upon application, make 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:

\[a \quad \text{there is a prima facie case against the unknown alleged wrongdoer;}\]
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.  

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.  

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. 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.

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.

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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.
44 Police Force Ordinance, Cap 232.
45 Organized and Serious Crimes Ordinance, Cap 455, Section 15.
46 id.
47 id.
**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.\(^\text{48}\) Such an application may be made *ex parte* but is subject to those affected by it applying for its discharge.\(^\text{49}\)

**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.\(^\text{50}\) 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.\(^\text{51}\)

Separately, Hong Kong’s Banking Ordinance addresses fraudulent activity by making fraudulent inducement to make a deposit a basis for a claim of fraud.\(^\text{52}\)

**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.\(^\text{53}\) 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.\(^\text{54}\) 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.\(^\text{55}\) These powers seek to prevent fraudsters from finding a way to funnel money to themselves or associates.

\(^{48}\) 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.

\(^{53}\) Conveyancing and Property Ordinance, Cap 219, Section 60.

\(^{54}\) Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32, Section 266B.

\(^{55}\) id.
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 Kong jurisdiction.59 Second, Hong Kong courts review whether a defendant was effectively served with the originating process in Hong Kong.60 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.61 Fourth, Hong Kong courts evaluate the appropriateness of exercising jurisdiction in a given circumstance (e.g., issues of forum conveniens).62

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.63 In fraud cases, this may require an evaluation of where particular misrepresentations or actions at issue occurred.

56 Bankruptcy Ordinance, Cap 6, Section 129.
57 Arbitration Ordinance, Cap 509, Sections 99–102 and Schedule 2.
60 id.
61 id.
62 id.
63 id. at 2.008.
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. 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. 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. 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 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.

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. 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.\(^ {72}\)

### 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

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\(^{69}\) Mainland Judgments (Reciprocal Enforcement) Ordinance, Cap 597.

\(^{70}\) id. at Section 5.

\(^{71}\) id.

\(^{72}\) id. at Section 18.

\(^{73}\) *Compania Sud Americana de Vapores SA v. Hin-Pro International Logistics Limited* [2016] HKCFA 79; (FACV 1/2016).
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 is also notable that the scope of assistance provided by the two jurisdictions are not identical (with the PRC courts having the ability to request a wider scope of assistance from the Hong Kong courts).76 The Arrangement is generally welcomed in the legal industry, but how this Arrangement would affect practice is yet to be seen.

**iii 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.77

**iv Amended anti-money laundering ordinances**

In March 2018, amendments to the Anti-Money Laundering and Anti-Terrorist Financing (Financial Institutions) Ordinance (Cap 615) came into effect, applying statutory customer due diligence and record-keeping requirements to designated non-financial businesses and professions when they engage in specified transactions, and introducing a licensing regime for trust or company service providers.78 The Companies Ordinance (Cap 622) was also

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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.
76 Article 6 of the Arrangement.
77 Guide to Asset Recovery in the Hong Kong Special Administration Region.
78 Anti-Money Laundering and Counter-Terrorist Financing (Amendment) Ordnance 2018.
amended to require Hong Kong incorporated companies to maintain beneficial ownership information by way of keeping a ‘significant controllers register’ for inspection upon demand by law enforcement officers.79

v Reciprocal recognition and enforcement of judgments in civil and commercial matters between mainland China and Hong Kong

In January 2019, mainland China and Hong Kong signed the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the mainland and Hong Kong Special Administrative Region. This arrangement furthers continuing efforts by mainland Chinese and Hong Kong courts to strengthen mechanisms to recognize and enforce judgments in civil and commercial matters. Under this arrangement, the matters considered to be civil and commercial have expanded, but continue to exclude non-judicial, administrative, and regulatory matters. The relief at issue can be monetary or non-monetary. This arrangement will take effect when both mainland China and Hong Kong complete the necessary implementing procedures.80

79 Companies (Amendment) Ordinance 2018.
80 Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters between the Courts of the Mainland and of the Hong Kong Special Administrative 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 on the subject is surprising given India’s robust judiciary. Additionally, India is ranked poorly on global transparency indices.

Indian law recognises the supervening claim of a bona fide purchaser for value without notice. However, the conflicting demands of a claimant who has suffered fraud against the rights of such a 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 in criminal law and not in civil actions.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Civil remedies

Tracing is the most sought remedy in respect of fraud under civil law. Recourse is generally available under contract law, company law, tort and trust law.

Law of tort

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:

- fraud: The act of wilfully making a false statement with the intent that the plaintiff acts in reliance on it, and where the plaintiff suffers harm in consequence, is a fraud in tort;²
- fraudulent representation: For a representation to be fraudulent, the fraudster 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

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¹ Justin Bharucha and Sonam Gupta are partners at Bharucha & Partners, and were assisted by Mita Sood, an associate at Bharucha & Partners.
conversion: This 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.

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, counsel, 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 void a contract where consent to the contract was caused by coercion, fraud or misrepresentation. Should a party choose not to void a contract for fraud, 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 had the representations been true.

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 in 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, in all likelihood, necessitate an action to trace a specific asset.

**Corporate law**

**Fraud under the Companies Act 2013 (the Companies Act)**

Section 447 of the Companies Act defines fraud to include an act, omission, concealment of any fact and abuse of position 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 also 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.

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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 against one another.

4 Section 64 of the Contract Act.

5 The Indian Contract and Specific Relief Acts, Pollock and Mulla, 13th edition.
Penalties for fraud under the Companies Act include imprisonment and fine. The Companies Act also allows for a company or any of its members, creditors or contributories to complain to the courts about the wrongful possession of any of the company's property by an officer or employee. While not strictly tracing, we believe that it is possible that this will 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 National Company Law Tribunal and the Serious Fraud Investigation Office (SFIO) are the authorities that investigate economic offences in India, including those of fraud. In the year ending on 31 March 2017, the SFIO had completed 87 investigations, including investigations for fraudulent matters. This number is more than double the number of investigations completed in the year ending on 31 March 2015. We believe that over time the SFIO 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, 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 to declare that the property in question is actually a part of 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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6 Section 452 of the Companies Act.
7 Section 271 of the Companies Act.
8 Data beyond 2017 has not been published on the SFIO’s website.
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 23 of the Indian Trusts Act 1882.
11 Section 63 of the Indian Trusts Act 1882.
Remedies under criminal law

Offences and penalties under the Indian Penal Code 1860 (the 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

'Fraud' per se is not defined under the Penal Code and is not a specific offence under the Penal Code. The Penal Code, however, provides a specific definition of the term ‘fraudulently’, which in turn is an essential ingredient for commission of various offences under the Penal Code.

A person is said to do a thing fraudulently if he or she does that thing with the intent to defraud, but not otherwise. To constitute fraud under the Penal Code, there must be deceit or an intention to deceive; and injury, actual or possible, or the intention to cause actual or possible injury. The emphasis is thus on the ‘intent to defraud’ as against ‘intent to deceive’ and acting ‘dishonestly’ where the essence lies in the intention to cause wrongful gain to one person or wrongful loss to another person. Intent to defraud is established only when the deception has as its aim some advantage or the likelihood of advantage to the person who causes the deceit or some kind of injury or the possibility of injury to another. Fraud thus operates on the mind and produces results that the perpetrator of the fraud has contemplated. The expression defraud thus must be understood in its legal sense and not popular sense. It consists of two elements, namely deceit and injury to the person so deceived. The idea of deceit is a necessary ingredient of fraud, but it does not exhaust it, there being an additional element implicit in the expression.

The act of deceiving a person, fraudulently or dishonestly, and thereby inducing him or her to deliver any property to any person, grant consent for that property to 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 under the Penal Code, 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,

12 Section 25 of the Penal Code.
13 The Indian Penal Code, Ratanlal and Dhirajlal, 32nd edition, p. 106.
14 Section 24 IPC and Constitution Bench Judgement in Dr S Dutt v. State of UP reported at AIR 1966 SC 523.
15 Injury may be a non-economic or a non-pecuniary loss; see Dr Vimla v. Delhi Administration; AIR 1963 SC 1572.
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.\textsuperscript{16}

Receipt\textsuperscript{17} and retention\textsuperscript{18} 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\textsuperscript{19} 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.\textsuperscript{20}

Property identified as stolen is forfeited to the government free from all encumbrances.\textsuperscript{21} Where certain properties are commingled, the court will identify and specify to the best of its knowledge those properties that it believes are proceeds of crimes.\textsuperscript{22} When 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,\textsuperscript{23} upon payment of which the order of forfeiture shall be revoked.\textsuperscript{24}

\textit{Abetment}

Unless expressly provided for, an abettor of an offence and any act committed by that abettor in relation to the offence in question, are both punishable with the same punishment as provided for the offence.\textsuperscript{25} 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.\textsuperscript{26}

\textit{Procedural laws}

Offences associated with fraud are cognisable, and the law permits police officers to investigate any cognisable offence without the order of a magistrate. Hence, the police have the power to arrest persons in connection with fraudulent offences\textsuperscript{27} without a magistrate’s order,\textsuperscript{28} and thereafter record the relevant information and produce the detainees before a magistrate.\textsuperscript{29}
ii Defences to fraud claims

Defences under civil law

The Sale of Goods Act\(^\text{30}\) and the Transfer of Property Act\(^\text{31}\) 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 the 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, for actions that are considered 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 fraudulently induced the trustee to commit the breach; or that the beneficiary, being competent to contract, willingly concurred with the breach, or subsequently acquiesced therein;\(^\text{32}\) and

\(\text{d}\) the Limitation Act 1963 prescribes the limitation period within which any claim may be filed, outside of which time the claim will be dismissed by the courts irrespective of whether limitation is set up as a defence.\(^\text{33}\) 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.\(^\text{34}\) In the case of a continuing tort, the limitation period continues to run at every moment during which the tort persists.\(^\text{35}\)

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.\(^\text{36}\) However, limitation is prescribed only for those offences punishable with imprisonment of up to three years and irrespective of this bar, the courts may take cognisance of an offence after the expiry of the limitation period in the interests of justice and upon a sufficient cause being shown for the delay.

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\(^{30}\) Which applies to property not being immovable property subject to the Transfer of Property Act.

\(^{31}\) Which principally applies to immovable property.

\(^{32}\) Section 23 of the Indian Trusts Act 1882.

\(^{33}\) Section 3 of the Limitation Act 1963.

\(^{34}\) Section 17 of the Limitation Act 1963.

\(^{35}\) Section 22 of the Limitation Act 1963.

\(^{36}\) Sections 467–468 of the Code of Criminal Procedure.
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 (the Code of Civil Procedure) sets out the procedural requirements for civil actions in India and also provides options to the claimant for attachment before the judgment\(^{37}\) and appointment of a receiver.\(^{38}\)

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 a part of the property in question 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.

\(^{37}\) Section 60 and Order XXXVIII of the Code of Civil Procedure.

\(^{38}\) Order XL of the Code of Civil Procedure.
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 for fraud are likely to be more effective than civil proceedings as courts, the police and enforcement agencies have broader powers with respect to the seizure and confiscation 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 an 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, take into possession any property that is reasonably suspected to be stolen and seize any property that he or she, of his or her own accord, suspects to be stolen or that creates suspicion of an offence.

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 any person for the same who, after the issuance of the summons, has 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, 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, although statements recorded in investigations by the police are of limited evidentiary value, the case being different where the statements are recorded by the Directorate of Enforcement.
IV  FRAUD IN SPECIFIC CONTEXTS

i  Banking and money laundering

Banking

Central bank regulations
The Reserve Bank of India (RBI) regulates the banking sector in India. The RBI issued the Master Direction on Frauds on 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 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 RBI has also recently released regulations limiting customer liability in unauthorised or fraudulent electronic banking transactions. These regulations require banks and PPI issuers 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, by money laundering 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.

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49 Entities issuing Pre-paid Payment Instruments (PPI).
50 Section 58 of the Negotiable Instruments Act 1881.
51 The bona fide purchaser would also be protected in respect of property discussed earlier.
ii Insolvency

Pursuant to extant law, an ‘act of insolvency’ includes transfer of property that would otherwise be void due to fraudulent preference were the debtor adjudged an insolvent. The property of the insolvent vests in the official assignee, and remedy against an insolvent is available to creditors only as prescribed under law.\textsuperscript{52}

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 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 committing fraud prior to the insolvency commencement date.\textsuperscript{53}

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 the refusal of absolute discharge.

iii Arbitration

In 2009, a division bench of the Supreme Court of India held that an issue of fraud requires adducing and elaborate examination of evidence, and is, therefore, beyond the competence of an arbitrator.\textsuperscript{54} However, in 2014,\textsuperscript{55} 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\textsuperscript{56} 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:

\begin{enumerate}
  \item the allegations of fraud are so serious that they may constitute a criminal offence;
  \item 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
  \item fraud is alleged against the arbitration provision itself or the parent contract.
\end{enumerate}

iv Fraud’s effect on evidentiary rules and legal privilege

In certain cases, fraud has the effect of relaxing strict evidentiary rules. Illustratively, ordinarily, in order 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.\textsuperscript{57}

\textsuperscript{52} 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.

\textsuperscript{53} Sections 66 and 73 of the Insolvency Code.

\textsuperscript{54} \textit{N Radhakrishnan v. Maestro Engineers & Ors}, 2009 (13) SCALE 403.


\textsuperscript{56} \textit{A. Ayyasamy v. A. Paramasivam & Ors}, AIR 2016 SC 4675.

\textsuperscript{57} Section 92 of the Indian Evidence Act 1872.
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.\textsuperscript{58}

\section*{V INTERNATIONAL ASPECTS}

\begin{enumerate}
  \item \textbf{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’.\textsuperscript{59} 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.

  \item \textbf{Collection of evidence in support of proceedings abroad}
  
  In criminal proceedings, the Code of Criminal Procedure provides 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.

  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.

  \item \textbf{Seizure of assets or proceeds of fraud in support of the victim of fraud}
  
  The Code of Criminal Procedure provides enabling provisions to secure seizure of property with respect to contracting states.

  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 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.

\end{enumerate}

\begin{footnotes}
  \item Section 126 of the Indian Evidence Act 1872.
  \item \textit{British India Steam Navigation Co Ltd. v. Shanmughavilas Cashew Industries and Ors} (1990) 3 SCC 481.
\end{footnotes}
iv 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) 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.

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.

v 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.

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. 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.

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

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60 Illustratively, the United Kingdom, Aden, Fiji, Singapore, Malaysia, 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.

61 Section 44A of the Code of Civil Procedure.


63 Section 13 of the Code of Civil Procedure.


surcharge and a penalty with respect to the income and assets disclosed. By midnight on 30 September 2016 (the last date for disclosure), a total of 64,271 declarations were filed and an aggregate amount of 652,500 million rupees of income and assets were disclosed.\(^{66}\)

Following this, on 8 November 2016, the Indian government demonetised all 500 rupee and 1,000 rupee banknotes to target black money held in cash. New currency was issued in banknotes of 2,000 rupees and 500 rupees. The efficacy of the demonetisation is questionable, however, as media reports indicate that as much as 1,100 million rupees of the 6,100 million rupees seized by the authorities in their post-demonetisation raids was in new currency.\(^{67}\)

The law relating to ‘benami’ transactions was also amended in 2016.\(^ {68}\) Benami transactions are transactions where, inter alia, property is held by one person for the benefit of another (or where consideration is paid by another person), transactions with respect to property made in a fictitious name or with fictitious or untraceable consideration. These transactions are commonly used in India to evade taxation. The term ‘property’ is defined broadly and includes property in its converted form and also proceeds from the property. Property that is the subject of a benami transaction may be provisionally attached and is liable to be confiscated by the central government.

In 2018, the Fugitive Economic Offenders Act was enacted to ‘deter fugitive economic offenders from evading the process of law in India by staying outside the jurisdiction of Indian courts, to preserve the sanctity of the rule of law in India’.

The Fugitive Economic Offenders Act defines a fugitive economic offender as an individual against whom a warrant of arrest has been issued in relation to a scheduled offence\(^ {69}\) and who has either left India to avoid criminal prosecution, or being abroad, refuses to return to India to face criminal prosecution, and it further stipulates the process for declaration of an individual as a fugitive economic offender. Upon this declaration, the courts may confiscate the properties of the fugitive both in India and abroad; the confiscation necessarily preceding trial and conviction, or acquittal, of the person declared as a fugitive. All properties constituting the proceeds of crimes, whether owned by the fugitive or not, are the subject matter of confiscation under the Fugitive Economic Offenders Act;\(^ {70}\) the only exemption being a property where any other person has an interest, acquired bona fide and without knowledge that the property constitutes proceeds of crime.\(^ {71}\) In cases where proceeds of crime cannot be identified, the authorities are empowered to confiscate assets of equivalent value. The right, title and interest in all confiscated properties vest with the central government. The Fugitive Economic Offenders Act, however, is applicable only in relation to offences where the proceeds for crimes involved are 1 billion rupees and above.\(^ {72}\)

Another necessary consequence of being declared a fugitive is that the fugitive is barred from raising and defending any civil claims; this bar extends to all juristic entities in which the fugitive holds a key managerial position or a controlling interest.\(^ {73}\)

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67 See ‘17% of cash seized in raids during demonetization were in new notes’, The Times of India, 9 July 2017.
68 The Benami Transactions (Prohibition) Amendment Act 2016.
69 Section 2(m) of the Act defines scheduled offences as the offences contained in the Schedule to the Ordinance. The Schedule lists a number of offences under different statutes such as the IPC, Companies Act, Black Money Act and Prevention of Corruption Act, etc, which are essentially economic offences.
70 Section 12(2) of the Act.
71 Section 12(7) of the Act.
72 Section 2(m) of the Act.
73 Section 14 of the Act.
While the Fugitive Economic Offenders Act is well intended and recent, its efficacy is yet to be seen. To date, numerous applications have been filed in competent courts by the Directorate of Enforcement under the Fugitive Economic Offenders Act for declaration of offenders as fugitives. In early January 2019, industrialist and erstwhile liquor baron Vijay Mallya, accused of and charged with various scheduled offences including that of money laundering, was the first individual to be declared a fugitive economic offender and have his assets, in India and abroad, confiscated subsequent to the declaration. Proceedings under the Fugitive Economic Offenders Act against Nirav Modi, a trader in diamonds accused of fraudulently embezzling funds in excess of 135 billion rupees using his businesses, are also ongoing. Although both Mallya and Modi have been charged as fugitive economic offenders, neither has yet returned to India to face prosecutions and extradition. It would be trite to say that this is a long drawn-out process with there being provisions of appeal to the higher authorities and courts available against the extradition order.

Although some measures have been taken to curb fraud in India, asset tracing in India is still a developing area, both legislatively and in practice. It is essential that tracing develops and is recognised as an appropriate remedy under Indian law. However, it is unclear whether this proposed development will happen under civil law or evolve from judgments of courts addressing criminal matters. In the absence of rapid developments on the subject, the Indian government’s objective of improving transparency will remain, in large measure, unfulfilled.

Chapter 17

ITALY

Roberto Pisano, Valeria Acca and Chiara Cimino

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 that obliges the author to pay damages. 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, 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. 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. 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. 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. 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’, 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 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.

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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 633 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 such 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 such unlawful proceeds. 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, due to a lack of vigilance or other causes attributable to negligence – with the commission of the crime.\footnote{Court of Cassation, No. 16,405 of 21 April 2008.}

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.\footnote{Article 320, Paragraph 1.} 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.\footnote{Article 320, Paragraph 2.}

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:

\paragraph{a} lack of jurisdiction (see Section V.i);

\paragraph{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

\paragraph{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).
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 moveable 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.
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:

a on moveable goods and assets, according to the civil procedure for garnishment;
b on real estate and registered moveable goods, through the entry of the seizure in the relevant registers;
c 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
d on shares and quotas of companies, through the entry of the seizure in the company’s books and in the register of enterprises. 18

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, 19 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. 20

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. 21

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

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.
by Article 111 of the Constitution, according to which the trial must establish parity between 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 laundering 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, 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. 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.
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 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.

The role of arbitration in connection with fraud and asset recovery is very limited in the Italian context.

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 such 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).
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 (now replaced by the EU Regulation No. 1215/2012).

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.26 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 EU 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 such 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 EU 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 EU 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, EU 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 EU Regulation No. 805/2004, such a procedure offers ‘significant advantages’ as compared with the exequatur procedure provided for by EU 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 EU 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):

- the judgment was issued by a judge who had jurisdiction according to the principles on jurisdiction of the Italian legal system;
- 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;
- the parties had regular standing in trial according to the *lex fori*, or ‘default of appearance’ was declared in accordance with that law;
- the judgment has become *res judicata* according to the *lex fori*;
- 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.
I ОVERVIEW

Korea was the sixth-highest-exporting country in terms of the dollar value of exports as of 2018. 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 businesses that 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, a great amount of legislative efforts have been extended in the areas of 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 (DART), 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 financial 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. In addition, the Supreme Court held that stock investors have remedial rights against a corporation’s external accounting firm that prepares a false balance sheet to the extent that the accounting firm aided the corporation’s ‘window dressing’.

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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 cross-border strategy in judgment enforcement and asset recovery matters.

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.

In addition to civil litigation, a victim of a fraud may file a criminal complaint with the police or the Public Prosecutor’s Office. The prosecutor indicts a suspect with different charges based on not only the nature but also the size of the fraud, with aggravated offences. 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 determined 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. 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 of this implication. 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 to the company and third parties 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. 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 to, or to provide a guarantee for, an affiliate

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4 Article 311 of the Civil Procedure Act.
Korea

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 during the pendency of bankruptcy proceedings, 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

In addition to procedural defences such as those based on statute of limitations, 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 contributed 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.

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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.
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 either or both of the following: (1) a provisional attachment order, and (2) a provisional prohibition order from disposing of assets or a provisional injunction. The creditor may apply for these 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. 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 on merit, 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. The order prevents the owner or holder of the property from transferring legal title, 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. 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. However, after an arbitral tribunal has been constituted, parties may file a petition for provisional relief with the tribunal or directly with the court. Parties may request provisional relief from the court even before the arbitral tribunal is constituted pursuant to the arbitration agreement.

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.

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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.
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 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.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 undue hardship is expected in examining evidence later in the trial.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 comply with the production order, the court may deem that the contents of the requested documents are as asserted in the party’s petition for production.19

Korean law treats a judgment creditor as an unsecured creditor whose priority is lower than that of security 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.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 and oftentimes used by financial institutions.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.22

IV FRAUD IN SPECIFIC CONTEXTS

i Banking 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

17 Article 375 of the Civil Procedure Act.
18 Article 184 of the Criminal Procedure Act.
19 Article 349 of the Civil Procedure Act.
20 Article 61 of the Civil Execution Act.
21 Article 72 of the Civil Execution Act.
22 Article 74 of the Civil Execution Act.
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 these 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 of security fraud cases need not prove the existence of a causal relation between damage and false representation. A defendant must prove that 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{26} Recently, a district court for the first time granted permission for a class action pursuant to the Supreme Court decision allowing it.\textsuperscript{27}

\section*{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.\textsuperscript{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.\textsuperscript{29} Such avoidable transfers include:

\begin{itemize}
\item 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;
\end{itemize}

\begin{itemize}
\item Article 125 of the Financial Investment Services and Capital Markets Act.
\item Article 3 of the Securities-Related Class Action Act lists the damages claims for which victims may file.
\item Article 12 of the Securities-Related Class Action Act.
\item Article 15 of the Securities-Related Class Action Act.
\item The Supreme Court 2015. 4. 9. 2013 MA 1052, 1053.
\item Article 29 of the DRBA. This clause is also invoked by interested parties including creditors who filed proofs of claim with the bankruptcy court.
\item Articles 100 and 391 of the DRBA.
\end{itemize}
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; 

c transfers that repay debt or provide collateral within 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 

d 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 generally do not recognise an attorney–client privilege or an attorney work product doctrine that protects legal communications from evidence examination. Accordingly, a legal opinion written by an attorney is generally admissible in civil and criminal proceedings as long as the attorney recognises the document’s authenticity, unless it falls under a separate exception such as those related to the protection of trade secrets. There is one narrow exception that the legal opinion is inadmissible in criminal proceedings under certain limited circumstances.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 a Korean court with ‘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 only 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 exercised personal jurisdiction over a foreign defendant if the defendant has a domicile, operates an establishment or commits a tort in Korea. In addition,

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.
certain actions based on contracts against foreign defendants are also permitted. If the plaintiff is a consumer domiciled in Korea, he or she may file a suit in a Korean court against foreign defendants based on a consumer contract. 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 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. Once recognition is granted, the Central District Court of Seoul may appoint a trustee, who may locate a debtor's assets in Korea in accordance with the DRBA.

iv Enforcement of judgments 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 (the 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

34 Article 27 of the Act on Private International Law.
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 grant 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 granting or 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. Judges are becoming more knowledgeable and experienced 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 and, therefore, not discussed in written decisions. In some instances, however, judges have made 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.
Chapter 19

LIECHTENSTEIN

Thomas Nigg

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 such 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.

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. This 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

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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 Pletzer in Kletečka/Schauer, ABGB-ON 1.01, Section 870, Rz 28 (www.rdb.at).
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.\footnote{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.\footnote{Section 874 of the ABGB.}

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.\footnote{See, for example, the decision of the Liechtenstein Supreme Court, 3 November 2005, 11 UR 2005.48 (LES 2006, 373).}

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 damages to the public prosecutor. At the court proceeding, private participants are also allowed to ask questions.\textsuperscript{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 able to bring a public accusation against the accused person in lieu of the public prosecutor.\textsuperscript{13} 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).

\textbf{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.\textsuperscript{14}

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, however, is 30 years from the date of conclusion of the contract.\textsuperscript{15}

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 damage caused arises through the harmed person’s own fault.

\textbf{III} SEIZURE AND EVIDENCE

\textbf{i} Securing assets and proceeds

\textit{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.\textsuperscript{16}

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

\begin{itemize}
  \item \textsuperscript{12} Section 32, Paragraph 2 of the STPO.
  \item \textsuperscript{13} Section 32, Paragraph 4 of the STPO.
  \item \textsuperscript{14} Section 1489 of the ABGB.
  \item \textsuperscript{15} Pletzer in Kletečka/Schauer (eds), \textit{ABGB-ON 1.01}, Section 870, Rz 31 (www.rdb.at).
  \item \textsuperscript{16} Article 270 ff of Liechtenstein’s Law on Execution dated 24 November 1971.
\end{itemize}
are subject to litigation). In this context, the execution 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.

**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 moveable assets, including cash, or prohibit the seizure or the disposal of moveable assets.\(^{17}\) The most important instrument in securing assets, however, is the freezing of bank accounts.\(^{18}\) 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 of the investigation.

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.

**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.\(^{19}\) 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.\(^{20}\)

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 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.\(^{21}\)

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17 Section 97a, Paragraph 1, Subparagraphs 1 and 2 of the STPO.
18 Section 97a, Paragraph 1, Subparagraph 3 of the STPO.
19 Section 292 et seq. of the ZPO.
21 Section 304 of the ZPO.
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.22

**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.23 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.24 In the case of bank documents, Liechtenstein has always had very robust banking secrecy laws (similar to 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.25

### 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.

However, Liechtenstein has been a member of MONEYVAL for many years. Therefore, the fight against money laundering has been given the highest priority, and a zero tolerance policy has been pursued in this area.

As an EEA member, Liechtenstein has implemented the Fourth EU Money Laundering Directive (EU) 2015/849 as well as the Regulation (EU) 2015/847 on the transmission of information in connection with money transfers. The corresponding implementing provisions can be found in particular in the Act on Professional Due Diligence to Combat Money Laundering and in the Ordinance.

Banks and other financial service providers are obliged to obtain information about their customers. If irregularities should arise, the banks and financial service providers are obliged to report this to the Financial Intelligence Unit responsible for this.

**ii Insolvency**

The Liechtenstein Criminal Code contains special provisions for the criminal prosecution of persons who have committed frauds in insolvency matters.26 An example of a fraud in insolvency matters is the unfair disadvantage of creditors.

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22 Section 384 et seq. of the ZPO.
23 Section 41 of the STPO.
24 Section 91a et seq. of the STPO.
25 See, for example, the decision of the Constitutional Court of Liechtenstein, 28 February 2000, STGH 1999/23 (LES 2003, 1).
26 Section 156 et seq. of the STGB.
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.

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.27

iii Arbitration

The rules for arbitral proceedings in Liechtenstein are regulated in the ZPO.28 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.29 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.30

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.

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27 See, for example, the decision of the Liechtenstein Supreme Court, 3 November 2005, 11 UR 2005.48 (LES 2006, 373).
28 Sections 594 to 635 of the ZPO.
29 See Section II.
30 Article 39, Paragraph 1 of the IPRG.
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 (the Hague Evidence Convention). Therefore, Liechtenstein assists in the service of judicial documents, as well as in obtaining 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 to 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 recollecting his or her assets (see Section III.i).

32 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, Agreements).
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 or arbitral awards. The only bilateral treaties on the acknowledgment and enforcement of foreign judgments exist with Austria and Switzerland.

Apart from 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.33

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.34

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.35 Concerning the enforcement of judgments from Switzerland and Austria, however, judgments can only be enforced in Liechtenstein if such recognition does not contravene public policy.36 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

In the implementation of the Fourth European Money Laundering Directive, the government has issued a draft law on the introduction of a register of beneficial owners of domestic entities. This register will contain the beneficial owners of domestic entities.

Accordingly, a beneficial owner of a legal entity is any natural person who directly or indirectly holds or controls more than 25 per cent of the voting rights, capital or profits of a legal entity. Similar provisions apply to the beneficial owners of trusts or foundations. Third parties may, if they can demonstrate a legitimate interest, request the disclosure of information about the entity. A commission then decides on such an application after weighing the interests of the persons involved.

33 Batliner/Gasser (eds), Litigation and Arbitration in Liechtenstein, second edition, Berne/Vienna 2013, p. 85 et seq.
35 See the Agreements, footnote 32.
36 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.
Chapter 20

LUXEMBOURG

François Kremer and Ariel Devillers

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 to allege, inter alia, breaches of contract, contractual fraud and serious misconduct. In some cases, an abuse of right 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’

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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.
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 incorporation. In most cases, the company will have to file suit.

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 last 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 164 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

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.13

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6 Article 1376 CC.
7 ‘Undue’ means that no prior claim was mature, or that, 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 171-1 LCC.
12 Article 171-1 LCC.
13 Article 66 CrimC.
Concealing things obtained through a criminal offence is also considered a fraud, 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., recovery of 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 for the recovery of damages before the civil courts, it can no longer become a civil party to the criminal proceedings.

ii 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:

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);

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);

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;

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 such capacity; and

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.

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.

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14 Article 505 CrimC.
16 Pascal Ancel, Contrats et obligations conventionnelles en droit luxembourgeois, e-pub, No. 1049 et seq.
17 Article 2262 CC.
18 Article 189 ComC.
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 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, that:

a 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 the claimant should sue its defendant before any other competent jurisdiction in Luxembourg or abroad (if Luxembourg has no international jurisdiction); or

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19 Article 157 LCC.
21 Article 637 of the Code of Criminal Procedure (CCP).
22 Article 638 CCP.
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 (EAPO)**

As of 18 January 2017, it is possible in cross-border situations within the European Union (other than the United Kingdom and Denmark) to apply for an 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 put in place a national third-party attachment on the same bank account or accounts to enforce on the monies.

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

**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

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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.


27 Article 66(1) CCP.

28 Article 66(4) CCP.
Confiscation

The general system of confiscation under Luxembourg law is conviction-based. 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 is automatically restituted. The victim can also claim restitution of substituted property.

A more extensive confiscation regime applies to certain offences such as money laundering, which also authorises third-party confiscation, value confiscation and non-conviction based confiscation.

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 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.

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).

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 production of evidence if it has legitimate cause, and the applicant will have to show that the outcome of the lawsuit depends on 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

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29 Article 31 CrimC.
30 Article 31(4) CrimC.
31 Article 31(3) CrimC.
32 Court of Appeal, 21 June 2017, No. 111/17 - VII - REF.
33 Article 55 of the New Code of Civil Procedure (NCCP) and Article 1315 CC.
34 Article 351 NCCP.
documents do (or are likely to) exist, and should include a detailed description of those documents in its application.\textsuperscript{36} The Court of Appeal\textsuperscript{37} recently confirmed that Article 350 NCCP cannot serve to obtain documents located outside of 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.

**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.\textsuperscript{38} The required evidence:

\begin{itemize}
  \item[a] needs to be identified with precision;
  \item[b] should be likely to exist;
  \item[c] should presumably be in possession of the identified party; and
  \item[d] should be relevant to the outcome of the lawsuit.
\end{itemize}

In addition, a party can request any legally admissible civil investigative measure such as witness statements, witness hearings and appraisals.\textsuperscript{39}

**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.\textsuperscript{40}

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, surveillances and infiltrations.

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\textsuperscript{41} 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.\textsuperscript{42}

\begin{itemize}
  \item[37] Court of Appeal, 10 May 2017, No. 81/17 – VII – REF.
  \item[38] DC Lux, 8 May 1992, Judgment No. 204/92; DC Lux, 7 July 2005, BIJ 9/2005, p. 176.
  \item[39] Article 348 NCCP.
  \item[40] Article 51 CCP.
  \item[41] Article 66-2 and 66-3 CCP.
  \item[42] Article 66-5(3) CCP.
\end{itemize}
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.43

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 laundering44 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.45

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.46 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.47

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.48

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 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.

43 idem.
44 Article 506-1 CrimC.
45 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.
47 Court of Appeal, 3 June 2009, No. 279/09 X.
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\(^{49}\) aims to recover assets from third parties on behalf of the insolvent debtor in order 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*.\(^{50}\) 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).\(^{51}\) Payment of an undue debt and transfers in lieu of payment of mature liabilities during the hardening period will be voided in this context.\(^{52}\)

Any other transaction may be voided if the party with which the bankrupt entity transacted had knowledge of its cessation of payments.\(^{53}\)

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.\(^{54}\) 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\(^{55}\) of a bankrupt company if they used the corporate veil to act in their personal interest, used the company’s assets as if they were their own, or carried on, for personal gain, an unprofitable business that could only lead the company into bankruptcy.\(^{56}\) 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).\(^{57}\)

\(^{49}\) Article 1166 CC.

\(^{50}\) Article 1167 CC.

\(^{51}\) Article 445 of the Commercial Code (ComC).


\(^{53}\) Article 446 ComC.

\(^{54}\) Article 448 ComC.

\(^{55}\) Statutory directors as well as de facto directors (including immediate or ultimate shareholders).

\(^{56}\) Article 495 ComC.

\(^{57}\) Article 495-1 ComC.
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.58

Certain behaviours are also considered offences under the bankruptcy rules (fraudulent bankruptcy), 59 and may serve to bring a subsequent liability claim against the fraudster. The drawback is that any order for damages arising from such 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 in order to sentence that person accordingly, because public prosecution is allocated to the judiciary. 60

While Article 1225 NCCP excludes the possibility of submitting certain matters to arbitration, case law considers that a dispute is not in itself inarbitrable just because an arbitrator would have to apply rules of public policy to resolve the dispute. 61 Applying this legal precedent may theoretically mean that arbitrators would have jurisdiction to determine whether someone committed a criminal fraud in order 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. 62 The procedure is quite cumbersome and to some extent adversarial. The party making the plea should indicate why it believes the document is forged by providing evidence of specific, detailed facts that are incompatible with its content, 63 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.

59 Article 573 to 578 ComC.
60 Article 1 CCP.
62 Article 310 et seq. NCC.
63 Court of Appeal, 22 June 2005, Pas. 33, p. 104.
V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

Both the Rome I Regulation\(^64\) and the Rome II Regulation\(^65\) 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.\(^66\)

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
- that 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 (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 (Hague Evidence Convention), which would regulate requests from non-EU jurisdictions that are a party to the Hague Evidence Convention.

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.


\(^{66}\) Articles 10 and 12(e) Rome I Regulation.
Luxembourg has declared that it will not execute letters rogatory for a common law pretrial discovery of documents. 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 (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 assistance as those originating in non-contracting states and from international judicial authorities recognised by Luxembourg.

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. 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. 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. This approval includes a decision on lawfulness.

### 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.

International confiscation and restitution requests are performed once they have been rendered enforceable by the Criminal Court. 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. 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.

### 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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67 Luxembourg’s declaration to the Hague Evidence Convention.
69 Article 1 Mutual Assistance Law.
70 Articles 4 and 5 Mutual Assistance Law.
71 Article 3 Mutual Assistance Law.
72 Article 9(2) Mutual Assistance Law.
74 Article 659 et seq. CCP.
75 Article 663 and 664 CCP.

Other civil or commercial judgments that are subject to an international agreement, including decisions entered in the context of insolvency proceedings in one of the Member States, will have to be declared enforceable by an order of the President of the District Court upon *ex parte* application.

Such an enforcement order must be served on the party against which it has been issued in order 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. 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’s Public Prosecutor in accordance with the law, dated 28 February 2011, concerning the recognition of criminal judgments ordering a custodial sentence or measure in order to be enforced in another Member State of the European Union (Criminal Enforcement Law). Fraud judgments are rendered enforceable without a double incrimination assessment.

v Fraud as a defence to enforcement of judgments granted abroad

Fraud is not specifically recognised as such 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 to detect whether there is a fraud against the defendant.

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 *fraus omnia corrumpit*.
VI CURRENT DEVELOPMENTS


The Directive aims to amend and expand the existing provisions of Framework Decisions 2001/500/JHA and 2005/212/JHA. The Directive was implemented into Luxembourg Law on 1 August 2018. The transposition did not substantially alter the already existing set of rules contained in the CrimC and the CCP, since they already generally comply with these.
I OVERVIEW

Malaysia is a growing financial hub and is on track to becoming the world’s leading global Islamic financial hub.\(^2\) There is, therefore, a huge range of assets, including cash and securities that are commonly held or channelled through its jurisdiction. In recent times, Malaysia has also amended and updated its legislation to better reflect the changing times and adapt to current needs.

Malaysia has a well-functioning legal system to support the country’s financial system and to address any legal disputes, including those arising from frauds and financial scams. Malaysia’s common law legal system and courts are positioned to determine these disputes and facilitate asset tracing, investigations and recovery efforts. Being a common law system country, the Malaysian courts have a wide discretion to consider and accept any English common law principle or rule of equity. Reference to other common law jurisdictions’ cases are also often made as they have persuasive authority in the Malaysian courts. Under the Malaysian court system, victims of fraud and financial scams may obtain redress and compensation through civil remedies that include damages, injunctive relief, tracing orders and restitution. Victims of criminal activity may also receive redress where there is a conviction through statutorily provided restitution such as re-vesting or restoring of property to its original owner.


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1 Jack Yow and Daphne Koo are partners and Kwong Chiew Ee is a principal at Rahmat Lim & Partners.
2 According to Thomson Reuters’ Islamic Financial Development Report in 2018, Malaysia remains the leader among 56 countries for Islamic financial institutions.
II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Civil remedies

The remedies that a successful party can obtain in a civil court are damages, injunctive relief, tracing orders, accounts, restitution and equitable compensation. In certain cases, for example, fraud pertaining to land, the court could declare the land transaction as being defeasible, or null and void, and set it aside.3

In order to determine the relevant cause of action to be raised in a civil claim, one has to consider firstly the relationship of the claimant to the fraudster and secondly the subject matter of the claim. For example, if there is a contractual relationship, the innocent party may file a suit to rescind a contract procured by fraudulent misrepresentation.4 However, if the relationship between the fraudster and the claimant is of a fiduciary nature, a claim for breach of fiduciary duty and in constructive trust may be brought by the innocent party. Finally, the subject matter of the claim will require consideration of different aspects of laws for example if it is land, the National Land Code 1965 will need to be considered and if it is just movable goods, the Sale of Goods Act 1957 (Revised 1989).

Contract Law

Contract law is codified in Malaysia under the Contracts Act 1950 (Act 136) (Revised 1974). A contract procured by fraud has the effect of vitiating consent to the contract.5 Section 17 of the Contracts Act 1950 defined ‘fraud’ to include any of the following acts committed by a party to a contract, or with his or her connivance, or by his or her agent, with intent to deceive another party thereto or his or her agent, or to induce him or her to enter into the contract:

- the suggestion, as to 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;
- any other act fitted to deceive; and
- any such act or omission as the law specially declares to be fraudulent.

A contract procured by fraud is voidable at the election of the innocent party. The innocent party however can elect to sue and claim to be put in the position in which he would have been if the representations made had been true.6

A claim for rescission of the contract procured by fraud will result in party being put into the original position before they entered into the contract. This includes the rescinding party returning benefits enjoyed under the contract which has become void.7 A plaintiff

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3 Section 340(2) of the National Land Code 1965 (Act 56). In Al Rashidy Kasim & Ors v. Rosman Rolan [2007] 3 CLJ 361, following the successful claim by the beneficiaries of the estate of a deceased, the Federal Court ordered for the memorial in favour of the fraudster in the Issue Document of Title and the Register Document of Title be deleted and a memorial in favour of the deceased be reinstated therein.
5 Section 14(c) of the Contracts Act 1950 (Act 136) (Revised 1974).
6 Section 19(2) of the Contracts Act 1950 (Act 136) (Revised 1974).
7 Section 66 of the Contracts Act (Act 136) (Revised 1974).
may also bring a civil suit for damages. Damages for fraud are awarded on the basis that the innocent party is put in the position it would have occupied had there been no reliance on the fraudulent inducement. The assessment of damages would, therefore, include all expenditure incurred reasonably and properly in consequence of and flowing directly from the deceit, whether before or after the date of the rescission. It may, where appropriate, include exemplary and aggravated damages.\(^8\)

**Law of tort**

**Common law fraud (tort of deceit) and equitable fraud**

The term ‘common law fraud’ is often used to describe the tort of deceit, or the making of fraudulent misrepresentations. To succeed, a plaintiff must prove that a false representation has been made (1) knowingly; (2) without belief in its truth; or (3) recklessly, carelessly whether it be true or false. There must be a lack of an honest belief in the truth of the representation. There must be proof of an actual intention to deceive.\(^9\) A plea of fraud at common law will not succeed absent proof of an intention to deceive. However, such an intention is not an ingredient of equitable fraud, which is, essentially speaking, unconscionable conduct in circumstances where there exists or is implied or imposed a relationship of trust or confidence. If the fraud is committed together with some other party, it is usual for all the participants to be sued jointly in the tort of conspiracy.\(^10\)

The object of damages for the tort of deceit is to put the injured party into as good a position financially as it would have been in if the tort had not been committed. In the assessment of damages, the court can take into account the value of a property which is the subject matter of the claim as at the date of judgment.\(^11\)

**Conversion & claim for money had and received**

A plaintiff must prove the following elements in a claim under tort of conversion: (1) that the defendant’s conduct was inconsistent with the rights of the owner (or other person entitled to possession); (2) that the defendant’s conduct was deliberate, not accidental; and (3) that the defendant’s conduct was so extensive an encroachment on the rights of the owner as to exclude him or her from the use and possession of the goods.\(^12\) Alternatively, there can also be a claim for money had and received. An action for money had and received is an action, based on goods wrongfully converted by another person, to sue for the proceeds.

Quite often a bank that has made payment on a forged cheque will be sued in the tort of conversion. In such a case, by reason of the forgery the bank has no authority to debit the account of the customer.\(^13\) The bank's only defence is to rely on Section 73A of the Bills of Exchange Act 1949 and argue that a forged signature on a cheque is deemed to be that of the person it purports to be if that person had knowingly or negligently contributed to the forgery.\(^14\)

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9 Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381.
10 Kontron Asia Pacific Sdn Bhd v. Quah Sinn Chye & Ors [2018] 8 CLJ 490.
The principal remedy in a tortious claim is an action for damages. At times, the plaintiff can apply for an injunction restraining any dealing in or with the property obtained by fraud in addition to damages as an interim remedy and with a final remedy of declaration of rights or mandatory injunction for the return of the property.

**Trust law and breach of fiduciary duties**

A trustee owes a fiduciary duty to the beneficiary. A trustee will be liable under the **Trustee Act 1949 (Revised 1978)** so long as there is wilful default on the part of the trustee. The existence of fiduciary or ‘trustee-like’ duty is not limited to instances where there is an express trust. A fiduciary relationship exists in employer–employee, company–director and even solicitor–client kinds of arrangements. Normally, a claim by the plaintiff against the fraudster where there is a fiduciary relationship will be a claim under constructive trust. The plaintiff may institute a suit for a declaration that the property is comprised in the trust that belongs to him.

Where a trustee or fiduciary has transferred or sold the trust property or the money to some other third parties, the process of tracing will be employed to identify its proceeds and the claim against these third parties is under the accessory liability principle. For third parties who had knowingly assisted in the breach of trust or fiduciary duties, the claim is a claim for knowing assistance. For third parties who had received the trust property or proceeds, the claim is for knowing receipt.

Typically, in such a proprietary claim, the plaintiff in addition to applying for a freezing injunction restraining further transfer of the trust asset, the plaintiff will also apply for tracing or disclosure orders against third parties such as banks so as to assist in the tracing of funds.

**Company law**

**Misfeasance of officers of a company**

A director, secretary, officer or liquidator of a company who misapplies, retains or becomes liable or accountable for any money or property of the company may be guilty of misfeasance or breach of trust or duty in relation to the company. The liquidator, creditor or contributory of the company may apply to the court to compel him or her to repay, restore or account for the money or property or any part of it with interest at such rate as the court thinks just; or contribute such sum to the company’s assets by way of compensation for the misapplication, retainer, misfeasance or breach of trust or duty as the court thinks just.
**Insolvency**

In an insolvency situation, it is possible for claims to be brought against directors of the insolvent company for fraudulent and wrongful trading.

**Criminal remedies**

**Offences under the Malaysian Penal Code**

The Penal Code (Act 574) is the principal legislation describing criminal offences relating to fraud. A fraudulent act may give rise to offences of theft, criminal misappropriation of property, criminal breach of trust, cheating, fraudulent deeds and dispositions of property, and forgery under the Penal Code.

**Fraud criminal breach of trust and conversion**

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.\(^{20}\) The Penal Code also defines 'dishonesty' as doing anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain.\(^{21}\) As such, penal code offences involving element of dishonesty conviction is possible without proof of actual wrongful loss or gain.

It is an offence under the Penal Code if a person dishonestly misappropriates, or converts to his or her own use or causes any other person to dispose of any property.\(^{22}\) For criminal misappropriation or criminal breach of trust, it is immaterial whether there was an intention to defraud or to deceive any person.\(^{23}\)

The offence of criminal breach of trust is committed by a person who is entrusted with a property, or with any dominion over a property and he dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract.\(^{24}\)

A fraudster could be guilty of the offence of cheating if he or she fraudulently or dishonestly induces another to deliver any property to any person, or to consent that any person shall retain any property. He or she could also be guilty of cheating if he or she intentionally induces the person so deceived to do or omit to do anything that he or she would not do or omit to do if not so deceived and that the or omission causes or is likely to cause damage to the body, mind, reputation or property.\(^{25}\)

**Offences relating to property procured by fraud**

Property that has been transferred by theft, criminally misappropriated or in respect of which criminal breach of trust or cheating is committed is regarded as 'stolen property', whether the transfer has been made or the misappropriation or breach of trust or cheating has been

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\(^{20}\) Section 25 of the Penal Code (Act 574).

\(^{21}\) Section 24 of the Penal Code (Act 574).

\(^{22}\) Section 403 of the Penal Code (Act 574).

\(^{23}\) Explanation to Section 24 of the Penal Code (Act 574).

\(^{24}\) Section 405 of the Penal Code (Act 574).

\(^{25}\) Section 415 of the Penal Code (Act 574).
committed within or outside of Malaysia. 26 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. 27 A person who dishonestly receives or retains such stolen property, knowing or having reason to believe the same to be stolen property shall be punished with imprisonment for a term that may extend to five years or with a fine, or both.

The court also has the power to order for the re-vesting or restoring of stolen property. The court can also make such order as to the restitution or delivery of property to the owner and as to the payment of money upon or in connection with the restitution or delivery, which have the like effect as a conviction for an offence committed in respect of such property. 28

**Abetment**

A person who instigates the doing of the thing or conspired in the commission of the thing or intentionally aids any illegal acts or omissions is an abettor within the meaning of the Penal Code. 29 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. 30 The term ‘abetment’ under the Penal Code includes the abetment of an act in Malaysia that is committed outside Malaysia and that would constitute an offence if committed in Malaysia.

**ii Defences to fraud claims**

**National Land Code 1965**

A title to land which has been registered with the land registry is indefeasible. 31 If it can be shown that the transfer or registration is procured by fraud, the title is defeasible. 32 When a transfer or registration is challenged on the basis of fraud, it must be shown that the person receiving the title had acted dishonestly or in collusion with the fraudster. 33 A title to a land may be challenged even if it was subsequently transferred by the fraudster to a third party. 34 However, the subsequent purchaser has defence to a claim by the original owner, if the subsequent purchaser can show that he or she had acted in good faith and had paid valuable consideration. 35

**Sale of Goods Act 1957**

The Sale of Goods Act 1957 36 protects a buyer who, in good faith and without notice of defect in title, purchases an asset without notice of the seller’s defect in title to that asset.
There are other defences available to a buyer depending on the circumstances, these include sale by: one of the joint owners, a seller under a voidable contract that has not been terminated at the time of sale, a seller in possession and a buyer in possession.

**Limitation Act 1953**

Under Malaysian law, a claim in contract and tort must be brought within a period of six years from the date of accrual of the cause of action. However, if the action is based upon the fraud of the defendant or his agent or there is concealment by reason of fraud, the time starts to run from the date of discovery of the fraud or from the date it could with reasonable diligence have been discovered.

There is no limitation period in respect of an action brought by a beneficiary under a trust in respect of fraudulent breach of trust by a trustee, to recover trust property from the trustee or property in the possession of the trustee, or previously received by the trustee and converted to his or her use.

**III SEIZURE AND EVIDENCE**

i Securing assets and proceeds

In relation to civil proceedings, there are several forms of interim relief available in Malaysia to prevent the dissipation of assets and to secure the same from those alleged to be involved in the fraud complained of.

**Mareva injunction**

A *Mareva* injunction is a court order preventing a defendant from dealing with, moving or disposing his assets. Essentially, it means that the defendant’s assets are ‘frozen’ such that any attempt to transfer or to move his assets would be a breach of the court’s order and would be subjected to contempt of court proceedings. The ‘freezing’ order would also be binding on a third party in so far as the third party is served with the order and subsequently assists the defendant in transferring or moving his assets. A breach of the order by the third party would also open up the third party to a contempt of court proceeding. In practice therefore, *Mareva* injunctions are routinely served on banks, which would result in the banks taking immediate steps to freeze the accounts which the defendant may have with the banks.

In Malaysia, a *Mareva* injunction would also require the defendant to make disclosure of all assets owned, whether within or outside of Malaysia, and may also, in certain circumstances, require third parties to disclose information relating to the defendant’s assets held by them.

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41 Section 6(1) of the Limitation Act 1953 (Act 254) (Revised 1981).
42 Section 29(1)(a) and (b) of the Limitation Act 1953 (Act 254) (Revised 1981).
44 Khidmas Capital v. NRB Building [2006] 3 CLJ 63, CA at p. 66, where the Court of Appeal upheld a world-wide ‘freezing’ order that was granted against a foreign company because the defendant could ‘dissipate its assets across the globe’.
Because of the far-reaching consequences of a *Mareva* injunction, the plaintiff must satisfy the following requirements before the court would grant such order:

- the plaintiff must have a good arguable case;
- the defendant must have assets within jurisdiction;
- there is evidence of a real risk of dissipation or removal of the defendant’s assets before judgment;\(^{45}\) and
- the balance of convenience leans in favour of the plaintiff and the granting of a *Mareva* injunction.\(^ {46}\)

It is to be noted that the Malaysian courts have accepted that the risk of dissipation of assets is always there where it can be shown that the defendant had acted in want of good faith, maintains foreign accounts and there has been evidence of movement of funds into foreign accounts.\(^ {47}\)

A *Mareva* injunction application may be made *ex parte* but will only be valid for 21 days from the date the order was granted and an *inter partes* hearing of the application must be scheduled within 14 days from the granting of the *ex parte* order.\(^ {48}\) Where the application is made *ex parte*, the plaintiff has an obligation to make full and frank disclosure of all relevant material facts, including those that are not in the plaintiff’s favour.\(^ {49}\) A failure to do so may result in the order being discharged and set aside. A plaintiff seeking for a *Mareva* injunction must also give an undertaking to pay to the defendant any damages that the defendant may suffer as a result of the order if it later transpires that the order ought not to have been granted.\(^ {50}\)

**Proprietary injunction**

A plaintiff may also seek to preserve a specific or particular asset of the defendant in which the plaintiff is claiming a proprietary interest.\(^ {51}\) To apply for and obtain a proprietary injunction, a plaintiff will have to satisfy the relevant test in the case of *American Cyanamid v. Ethicon Limited*\(^ {52}\) as adopted by the Malaysian courts in the case of *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah*\(^ {53}\) which requires the plaintiff to establish the following:

- there is a bona fide serious issue to be tried;
- the balance of convenience leans in favour of granting the injunction; and
- that damages would not be an adequate remedy.

\(^ {45}\) *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 1 CLJ (Rep) 22, SC.

\(^ {46}\) *Toyota Tsusho (Malaysia) Sdn Bhd v. Lau Kam Foon & Ors* [2019] 4 CLJ 110, HC.

\(^ {47}\) *Securities Commission v. Lee Kee Sien, Albert & Ors* [2009] 8 CLJ 70, HC. See also the case of *Jasa Keramat Sdn Bhd v. Monatech (Malaysia) Sdn Bhd* [1999] 4 CLJ 430 at p. 38 h-i where the Court held that ‘On the risk of dissipation of the defendant’s assets, the probity and conduct of the defendant are relevant.’

\(^ {48}\) Order 29 rules 2B and 2BA of the Rules of Court 2012.


\(^ {50}\) *Metrowangsa Asset Management Sdn Bhd & Anor v. Ahmad B Hj Hassan & Ors* [2005] 1 MLJ 654, HC; *Tsoi Ping Kuan v. Lab Lai Ngoh & Anor* [1997] 3 MLJ 165, HC.

\(^ {51}\) *Commercial Injunctions*, Steven Gee, (6th edition, Sweet & Maxwell) at 7-012.

\(^ {52}\) [1975] AC 396. See also the case of *Yossiof v. Donnerstein* [2015] All ER (D) 213 (Nov) at paragraphs 29 and 42 and *Polly Peck International plc v. Nadir and others* (No. 2) [1992] 4 All ER 769 at p. 784.

It is not uncommon for a proprietary injunction to be granted to preserve the assets of a victim of a fraudulent scam that had fallen into the hands of a third party, and such an injunction would be granted even though the assets sought to be preserved are monetary in nature.54

ii Obtaining evidence

Anton Piller order

Where a plaintiff is concerned that a defendant may hide or destroy evidence that is relevant to the plaintiff’s claim, the plaintiff may seek for an injunction requiring the defendant to permit the plaintiff to enter into the defendant’s premises to enable an inspection, seizure and removal of documents relating to the plaintiff’s claim. This type of injunction is more commonly known as an ‘Anton Piller’ order.

In order to obtain an Anton Piller order, the plaintiff must establish that:

a there is an extremely strong prima facie case;
b the damage, potential or actual, must be very serious for the plaintiff; and
c there must be clear evidence that the defendants has in its possession incriminating documents and that there is a real possibility that the defendant may destroy such material before any inter partes applications can be made.55

As with the Mareva injunction, the application is to be made with a full and frank disclosure and an undertaking as to damages is to be given. The granting of an Anton Piller order ex parte is subjected to the defendant’s subsequent application to set aside the order and claim for damages.

Bankers Trust order

In Malaysia, a plaintiff may also apply for a disclosure order against a third party bank for information pertaining to a defendant’s bank account known as a Bankers Trust order, named after the English case that established the jurisdiction and power of a court to make such a disclosure order.56 This disclosure would also be a permitted disclosure pursuant to Section 134 of and Schedule 11 to the Financial Services Act 2013 and Section 7 of the Bankers’ Book (Evidence) Act 1949. This disclosure order is most commonly applied by the plaintiff in aid of the plaintiff’s tracing exercise to discover the whereabouts of monies claimed by the plaintiff as forming part of its claim against the defendant.57

**Norwich Pharmacal order**

Before commencing an action in court, a proposed plaintiff may apply for what is commonly called a *Norwich Pharmacal order*\(^{58}\) from the court to obtain documents from a third party with the aim of identifying the wrongdoer if the plaintiff was uncertain as to the parties that may be involved in the wrongdoing committed against the plaintiff.

Strict conditions must be satisfied to ensure that such disclosure application do not become a 'fishing expedition'. In *Infoline Sdn Bhd v. Benjamin Lim Kheng Hoe*,\(^{59}\) the Court of Appeal had elaborated and held that:

\[\text{The respondent must show that the discovery is necessarily required even before an action is initiated as it is precisely to enable the respondent to decide whether he can even commence action against the appellant in particular, to start with. And if the information revealed from that discovery can determine or assist in reaching an answer to that predicament, then the order ought to be made.}\]\(^{60}\)

The procedures and documents that are required for such application have now been embodied into the Rules of Court 2012 and are as set out in Order 24 Rule 7A of the Rules of Court 2012. To obtain such an order, the proposed plaintiff must satisfy the requirement under Order 24 Rule 7A(3) of the Rules of Court 2012 and must essentially state the following in the proposed plaintiff’s affidavit in support of the application:

\[\begin{align*}
a &\quad \text{the documents sought for discovery;} \\
b &\quad \text{sufficient and material facts to show that the defendant is in possession, power and/or custody of the documents concerned or is likely to have the documents;} \\
c &\quad \text{sufficient facts to show the likelihood of the defendant being a party named in the subsequent legal action; and} \\
d &\quad \text{the relevance of the documents sought for discovery.}\end{align*}\] \(^{61}\)

Order 24 Rule 7A (9) of the Rules of Court 2012 further provides that where the order is made by the court, the person against whom the order was made shall be entitled to his or costs of the application and of complying with any order made on an indemnity basis unless the court orders otherwise.

**IV  FRAUD IN SPECIFIC CONTEXTS**

**i  Banking and money laundering**

The Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA) is the primary legislation dealing with anti-money laundering activities in Malaysia. The offences relating to fraud such as theft, criminal misappropriation of property, criminal breach of trust, cheating, fraudulent deeds and dispositions of property, and forgery under the Penal Code would all come within the meaning of money laundering, unlawful activity or serious

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\(^{58}\) Which takes its name from the English case of *Norwich Pharmacal Co v. Commissioners of Customs and Excise* [1974] AC 133.

\(^{59}\) [2017] 6 MLJ 363, CA.

\(^{60}\) *ibid.* at p. 380.

offences within the meaning of AMLATFA. In the bid to prevent money laundering, measures such as imposition of reporting obligations on reporting institutions as described in the First Schedule to the AMLAFTA for reporting of transactions exceeding a specified threshold, and suspicious transactions, as well as customer due diligence are mandated.

In any prosecution for a money laundering offence, the court has the power to order for the forfeiture of any property which is proved to be the subject matter or evidence relating to the commission of such offence, terrorist property, proceeds of an unlawful activity or the instrumentalities of the offence.

The enforcement agency will usually issue a freezing order to freeze further dealings with the property and followed by a seizure order. The Public Prosecutor, upon the information given to him or her by an investigating officer of an enforcement agency may, after consultation with Bank Negara Malaysia, Securities Commission or the Labuan Offshore Financial Services Authority, order a party not to part with, deal in, or otherwise dispose of any movable property (including money instrument or any accretion to it) which is the subject matter of an offence under Section 4(1) of the AMLATFA or a terrorism financing offence.

An order for seizure of an immovable property may be made by a notice of seizure issued by the Public Prosecutor. Section 54(1) of the AMLATFA provides any ‘dealing’ with the property after seizure shall be null and void. Section 56(3) of the Act provides that where any property has been seized, and no application for forfeiture of the property has been made, the property shall be released to the person from whom it was seized.

ii Insolvency

Fraudulent trading
If in the course of winding up a company, it appears that any business of the company has been carried on with the intent to defraud the company’s or other person’s creditors or for any fraudulent purpose the liquidator, any creditor or contributory of the company may apply to the court for an order that the persons who were knowingly parties to the carrying on of the business in that manner be personally responsible for all or any of the debts or other liabilities of the company. Not only the company’s directors are liable under this section but all persons, including other companies who were knowingly parties to the fraud can be held liable to make contributions.

Fraudulent trading requires proof of dishonesty. This may be inferred where the directors continue to trade the company despite knowing there is no reasonable prospect of the company’s debts being paid. The dishonest conduct must involve real moral blame according to current notions of fair trading among commercial people.

Fraudulent trading is also a criminal offence punishable by a term of imprisonment of up to 10 years or fine of 1 million ringgits, or both.

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64 Section 50(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001.
66 Section 540(1) of the Companies Act 2016 (Act 777).
67 Section 540(5) of the Companies Act 2016 (Act 777).
Wrongful trading

In the course of winding up, the liquidator, creditor or contributor of the company may apply to court for an order that the director of the company be personally responsible without any limitation of liability for the payment of the whole or part of a debt if:

a. it appears that before the commencement of the winding up, the officer of the company (including a director or shadow director) was knowingly a party to the contracting of the debt;

b. that officer of the company knew at the time the debt was contracted that there would be no reasonable or probable ground of expectation of the company being able to pay the debt (after taking into consideration all other liabilities of the company at that time); and

c. upon the person being convicted of an offence of wrongful trading. 68

Proof of the ability of the company to pay its debt is not necessarily limited to showing that the company’s liabilities exceeded its assets. The ability to pay must be determined by taking into account the extent and nature of the assets and liabilities of the business, cash available, whether it can be expected to pay by borrowing or realising assets and any promises of new finance.

The test to assess the knowledge of the director that the company cannot pay its debt is an objective one. It does not require proof of fraud or dishonesty. Therefore, it is easier to find a director liable for breach of wrongful trading as compared to fraudulent trading.

Where an order is made against more than one director, the directors will usually be held jointly and severally liable for the whole sum.

iii  Arbitration

Under the Arbitration Act 2005, the making of an award which is induced or affected by fraud or corruption is contrary to public policy and is a valid ground to set aside the award. 69

iv  Fraud’s effect on evidentiary rules and legal privilege

In a criminal proceeding, the standard of proof for offences relating to fraud is that of ‘beyond reasonable doubt’. In a civil case, previously, there were some distinctions made between ‘civil fraud’ and ‘criminal fraud’ and its bearing on the standard of proof of fraud for civil proceedings. 70 This confusion has now been resolved by the Federal Court 71 which declared that the standard of proof for fraud in civil proceedings is ‘on a balance of probability’. The Federal Court was of the view that the seriousness of the allegation or consequences should not make any difference to the standard of proof to be applied. This position of law is now in line with authorities in Commonwealth jurisdictions like UK and Singapore.

Privilege applies to communication between a solicitor and the client when legal advice is rendered (legal advice privilege) and also communication in contemplation of litigation or during litigation (litigation privilege).

68  Section 539(3) and 540(2) of the Companies Act 2016 (Act 777).
69  Section 37(2)(a) of the Arbitration Act 2005 (Act 646).
70  Ang Huok Seng @ Ang Yeok Seng v. Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45.
However, there is always an exception to the application of the legal professional privilege and that is the fraud exception or ‘communication made in furtherance of any illegal purpose’. As such, legal professional privilege does not extend to communications that are part of a criminal enterprise or a fraudulent proceeding. It also does not extend to a case where the solicitor is a prime suspect of a kidnapping case of his or her client when he or she had refused to divulge the whereabouts of the client.

The court will not simply lift the protection of professional privilege on a bare assertion of the prosecution or police of a solicitor being involved in a commission of a crime or fraud. Strong evidence is required to do so, and the court is entitled to look at the sworn information or evidence by way of admission or affidavit and the allegation of facts in deciding this issue.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

High Courts have jurisdiction to try all civil proceedings where (1) the cause of action arose within its local jurisdiction; (2) the defendant or one of several defendants resides or has his place of business in its local jurisdiction; (3) the facts on which the proceedings are based exist or are alleged to have occurred in its local jurisdiction; or (4) any land, the ownership of which is disputed, is situated within its local jurisdiction. The two subordinate courts, namely sessions courts and magistrates’ courts have the jurisdiction to hear and determine any civil matter arising within the local limits of jurisdiction assigned to it. Malaysian courts may also assume jurisdiction where the court has jurisdiction to grant leave for service of originating process outside of Malaysia.

ii Collection of evidence in support of proceedings abroad

A plaintiff may apply to the High for an order for the examination or attendance of a witness, or both, and for the production of documents in relation to a matter pending before a court or tribunal in a place outside the jurisdiction. The application is to be filed on an ex parte basis by a person duly authorised to make the application on behalf of the foreign court or tribunal in question and shall be supported by affidavit. The affidavit in support shall

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72 Section 126(1) proviso (a) of the Evidence Act 1950.
73 The Attorney General of Hong Kong v. Lorrain Esme Osman & Ors [1993] 2 MLJ 347.
75 Prof Dr Mohd Abram Shair Mohamad & Zulfikar Ramlee, ‘Displacement of Legal Professional Privilege; Faciliation of Crime or Fraud Exception’ [2015] 8 CLJ(A)ii.
76 Section 23(1) of the Courts of Judicature Act 1964.
77 Section 3 of the Courts of Judicature Act defines ‘local jurisdiction’ as (1) in the case of the High Court in Malaya, the territory comprised in the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Trengganu and the Federal Territory of Kuala Lumpur; and (2) in the case of the High Court in Sabah and Sarawak, the territory comprised in the States of Sabah, Sarawak and the Federal Territory of Labuan.
78 Section 65 of the Subordinate Courts Act 1948.
79 Section 76 of the Subordinate Courts Act 1948.
80 Order 11 rule 1 of the Rules of Court 2012.
81 Order 66 rule 1 of the Rules of Court 2012.
82 Order 66 rule 2(1) of the Rules of Court 2012.
exhibit the letter of request, certificate or other document evidencing the desire of the foreign court or tribunal to obtain for the purpose of a matter pending before it the evidence of the witness to whom the application relates to the production of any documents. 83

The Attorney General may also apply for an order for the examination or attendance of a witness, or both, and for the production of documents in relation to a matter pending before a court or tribunal in a place outside the jurisdiction. The application by the Attorney General may be made where a letter of request, certificate or other document requesting that the evidence of a witness within the jurisdiction in relation to a matter pending before a foreign court or tribunal be obtained is received by the Minister and sent by him or her to the High Court Registrar or that this letter of request, certificate or other document is received by the High Court Registrar in pursuance of a Civil Procedure Convention, which provides for the taking of the evidence of any person in Malaysia for the assistance of a court or tribunal in the foreign country.

In granting the application for obtaining evidence in support of a matter pending before a foreign Court or tribunal, the High Court may order the examination to be taken before any fit and proper person nominated by the person applying for the order or before the Registrar or before such other qualified person that the High Court seems fit. 84 The evidence of the witness would be recorded by way of deposition. 85

In relation criminal matters, the Mutual Assistance in Criminal Matters Act 2002 sets out the legal procedures involved in mutual assistance in criminal matters between Malaysia and other countries. A prescribed foreign state 86 may make a request to the Attorney General for assistance in a criminal matter. 87 The request for assistance may be made for the taking of evidence 88 or the production of any particular thing for the purpose of any criminal matter in that prescribed foreign state. 89

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

The interim relief mechanisms as described in Section III are generally available to victims of fraud, provided that the requisites are satisfied. Victims of fraud may pursue a worldwide Mareva injunction to freeze a defendant’s assets globally.

With respect to criminal offences, the Mutual Assistance in Criminal Matters Act 2002 provides for cross-border seizure and forfeiture of property in Malaysia in connection with a criminal offence that has been committed outside Malaysia. The request is to be made to Malaysia’s Attorney General for assistance in the enforcement and satisfaction of a foreign forfeiture order against property that is reasonably believed to be located in Malaysia. 90

83 Order 66 rule 2(2) of the Rules of Court 2012; note that the document is to be translated if it is not in English language.
84 Order 66 rule 4(1) of the Rules of Court 2012.
85 Order 66 rule 5(1) of the Rules of Court 2012.
86 Under Section 17(1) of the Mutual Assistance in Criminal Matters Act 2002, the Minister may by order declare a foreign State to be a prescribed foreign State if there is in force a treaty or other agreement between Malaysia and that foreign State under which that foreign State has agreed to provide assistance in criminal matters to Malaysia.
87 Section 19(1) of the Mutual Assistance in Criminal Matters Act 2002.
88 Section 22(1) of the Mutual Assistance in Criminal Matters Act 2002.
89 Section 23(1) of the Mutual Assistance in Criminal Matters Act 2002.
90 Section 31(1) of the Mutual Assistance in Criminal Matters Act 2002.
Similarly, the Attorney General may also make a request to the authorities of a foreign state to enforce and satisfy a forfeiture order or to restrain the dealing in any property against which the forfeiture order may be enforced or made available to satisfy the forfeiture order made in a criminal proceedings in Malaysia.91

iv Enforcement of judgments granted abroad in relation to fraud claims

Foreign judgments can be enforced in Malaysia through either the Recognition or Enforcement of Judgments Act 195892 (REJA) or common law.

A foreign judgment is capable of recognition and enforcement under REJA if the judgment is: (1) a monetary judgment; (2) a judgment of a superior court from a reciprocating country under REJA; and (3) is final and conclusive.

A foreign judgment is capable of recognition and enforcement under common law through the initiation of a fresh suit in the court to obtain a summary judgment on the basis of such foreign judgment. The requirements for an action based on a foreign judgment at common law are similar to those under REJA, with the only difference being that the judgment need not be a judgment of a superior court from a reciprocating country under REJA.

v Fraud as a defence to enforcement of judgments granted abroad

The registration of a foreign judgment under REJA may be set aside if the foreign judgment was obtained by fraud. Fraud is also a defence for common law recognition of foreign judgment.

VI CURRENT DEVELOPMENTS

i Standard of proof for civil fraud

The Federal Court in a recent case has held that the standard of proof for civil fraud should be on a balance of probabilities. This is a departure from its previous cases that have held that the standard of proof for civil fraud is beyond reasonable doubt.

ii Liability of commercial organisations for corruption

The Malaysian Anti-Corruption Commission (Amendment) Act 2018 introduced a new Section 17A to the Malaysian Anti-Corruption Commission Act 2009 (the MACC Act), which provides for the liability of a ‘commercial organisation’93 for an offence under the MACC Act if a person connected with the commercial organisation corruptly gives, agrees to give, promises or offers to any person any gratification whether for the benefit of that person

91 Section 13(1) of the Mutual Assistance in Criminal Matters Act 2002.
92 Applicable only if the foreign judgment is from a superior court of a reciprocating country under First Schedule of REJA. The list of reciprocating countries is United Kingdom, Hong Kong Special Administrative Region of the People’s Republic of China, Singapore, New Zealand, Republic of Sri Lanka, India (excluding the State of Jammu and Kashmir, State of Manipur, Tribal areas of State of Assam, Scheduled areas of the States of Madras and Andhra) and Brunei Darussalam).
93 Section 17A(8) of the MACC Act defines a ‘commercial organisation’ as (1) a company incorporated under the Companies Act 2016 and carries on a business in Malaysia or elsewhere; (2) a company wherever incorporated and carries on a business or part of a business in Malaysia; (3) a partnership under the Partnership Act 1961 and carries on a business in Malaysia or elsewhere or which is a limited liability
or another person with intent to obtain or retain business for the commercial organisation, or to obtain or retain an advantage in the conduct of business for the commercial organisation. The new Section 17A will come into force in 2020.

Under the new provision, where an offence is committed by a commercial organisation, a person who is its director, controller, officer or partner, or who is concerned in the management of its affairs, at the time of the commission of the offence, is deemed to have committed that offence, unless that person proves that the offence was committed without his consent or connivance and that he exercised due diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his function in that capacity and to the circumstances. If a commercial organisation is charged for an offence under Section 17A of the MACC Act, it is a defence for the commercial organisation if it could provide that it had in place adequate procedures to prevent persons associated with the commercial organisation from undertaking such conduct.
Chapter 22

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 in order 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 of them are recorded in one of these registries. Likewise, public registries are local and, therefore, the search may involve a Herculean task of dozens of filings or more, just in one state, to try to find an asset in such 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, only through a court ruling or an order from the district attorney – in the case of criminal investigations – can that secrecy be pierced.

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 from an asset currently under its possession, even if such possession is unlawful in its origin. Otherwise, ironically, repossession without such an order would be unlawful. The Mexican Constitution grants the right to a hearing before repossession definitively takes place.

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1 Juan Francisco Torres-Landa Ruffo, 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. The authors also thank Erick Emmanuel Clavel Benítez for his collaboration in the first edition of this chapter.
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 Civil and criminal remedies

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 who the person responsible for the misappropriation might be. Such person or company will then become the defendant in whichever proceeding is chosen. These proceedings are described in detail in Section II.ii; however, for the purposes of this section it should be mentioned that only if the defendant fails in its case against the petitioner will the order requesting the credit and financial institutions to disclose the location of money be issued.\(^2\)

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;

\(^2\) 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 Registry of Secured Moveable Guarantees, to find goods subject to guarantees; among others.

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 that are registered in any of those public databases. Notwithstanding, real estate poses a hurdle – there is no national registry as real estate is administered locally. Thus, making such research proves sometimes burdensome, timely and expensive, unless you have an idea of, at minimum, the specific location where the asset could be. In addition, each request for search involves a filing fee that varies according to the specific municipality.

The information obtained via public records will only be useful once a competent court has ruled that such asset must be returned to its rightful owner or possessor in a court proceeding.

**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:

a. criminal procedure has the victim's redress as one of its objectives; and

b. the victim has a right to damage restitution.

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

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⁴ Article 20 of the Mexican Constitution.
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, expressly recognises the victim’s right to be compensated for damages caused as a consequence of a criminal offence. Based on this amendment, a convicted felon could not only be imprisoned but also ordered to pay for the damages its criminal action caused.

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, as further explained 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 the damage restitution, and the judge cannot discharge the defendant of such 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 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:

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5 Article 109, Section XXIV of the National Code of Criminal Procedure.
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 such action.
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.
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; Field(s); (Constitutional); Thesis: 1a./J. 31/2017 (10a.).
13 Article 30 of the Federal Criminal Code.
a restitution of the object obtained by the crime,\textsuperscript{14} or an equal compensation; 
b compensation for the material and moral harm; 
c lost profits; 
d opportunity costs; 
e declaration for the restoration of the victim’s dignity and reputation; and 
f 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 different than the defendant (e.g., ascendants, legal guardians, among others), the possibility to file a civil liability action to obtain redress also exists.

\textit{Alternative outcomes: redressing 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 ‘redressing agreement’.

A redressing agreement is an arrangement between the defendant and the victim to compensate the latter for the harmful consequences of the crime. The effect of this agreement is the conclusion of the procedure once the agreement is 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:
a offences prosecuted through private criminal complaint or allowing the victim’s pardon; 
b negligent or reckless offences; and 
c 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.

\textit{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.

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;\textsuperscript{15} and

\textsuperscript{14} For the purposes of this chapter, the traced asset.

\textsuperscript{15} The arithmetic average is the sum of the minimum imprisonment time set forth for a specific crime, plus the maximum imprisonment time (both in years), divided by two. For example, imprisonment for hefty frauds ranges between three and 12 years under the Federal Criminal Code. Therefore, the average is seven and a half years.
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 restoration of the damage. 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.

It is important to 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 being a defendant’s right, it is a plausible alternative 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 statement of claim before the competent civil court. In this statement 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. The court can admit the statement of claim, request a clarification or dismiss it. If the claim is admitted, the defendant will be served in order to answer the claim within nine days. It is important to answer the claim, otherwise it will imply acknowledgment from the defendant. Once the response to the claim is filed within the legally determined period, the court will open the evidentiary stage for 30 days. 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 (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. No amended complaints, extension of legal terms, discovery as in the US 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.

The parties will have the right to appeal the judgment before a superior court within five days before the court that issued the judgment, and the favoured party will have the

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16 Established in Article 195 of the CNPP.
17 In 2017 there was a Constitutional Reform that authorised the Federal Congress to issue a national and unique Federal Code of Civil and Family Proceedings. However, this legislation has not been created to date.
18 Articles 322, 323 and 324 FCCP.
19 Article 325 FCCP.
20 Article 327 FCCP.
21 Article 332 FCCP.
22 Article 337 FCCP.
23 Articles 342 and 344 FCCP.
24 Article 347 FCCP.
25 Article 241 FCCP.
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 herein described would be filed in a civil proceeding. However, if the parties are merchants and the misappropriated asset has a commercial nature, there is a possibility 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 as the generic action for asset recovery. The premise is simple: if a person, acting against law or morality, damages 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 the reparation of the damage from the liable person. The reparation consists of:

\[ a \] re-establishing the situation before the damage was made; or
\[ b \] payment of damages and lost profits (monetary relief).

Based on these provisions, the Mexican courts and scholars have interpreted that the monetary relief shall be the equal in amount to the caused damages, plus the loss of profit – or in other words, a ‘full compensation’. This means that only restitution damages will be granted by courts – no punitive, indirect, consequential or injunctive damages will be awarded.

One of the most important principles of this action is that the damages 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 damages caused, and no more. Limitation of liability clauses are normally valid and enforceable.

While the damages 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 prosper is to prove that illegal conduct caused damage.

The time limit to oppose this action as an extra-contractual liability is two years since the misappropriation occurred; otherwise the action will be barred.

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26 Article 252 FCCP.
27 The reform was published on 25 January 2017. It will be in full force in 2020.
28 The concept in Spanish is ‘buenas costumbres’.
29 Article 1910 of the FCC.
30 Article 1915 of the FCC.
31 Article 1934 of the FCC.
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.\(^{32}\)

The action must be filed against the person that has the possession over the specific asset, independently if he or she has good or bad faith possession. In other words, the action can be filed against the possessor, no matter how such possession was obtained, whether he or she misappropriated the specific asset, or acquired the possession 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 state (i.e., land, cars, furniture, etc.).\(^{33}\)

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 case 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 this party relied on the conduct or representations. In this case, the affected party can request a court to declare the nullity of the agreement.

Article 1812 of the FCC provides that the consent will not be valid if it is obtained due to an error (mistake). Therefore, if the consent is obtained by these means, the agreement would be invalid.\(^ {34}\)

The invalidity of the consent might be caused by two reasons: 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 such contracting party from realising such misunderstanding. Malice is a passive conduct involving the lack of action of one party to keep the other party from realising the misunderstanding.\(^ {35}\) 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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32 Articles 4 and 9 of the CPC.
33 Article 8 of the CPC.
34 Article 1795 of the FCC.
35 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 since the party that suffered the fraud or malice, becomes aware of it.

ii Defences to fraud claims

The most common defences to fraud claims are (civil and criminal):

a the elapsing of the statute of limitations established for the relevant criminal or civil action;

b a good faith purchase by an innocent third party. In this case, the compensation for the damages caused would still be applicable, but the recovery of the specific asset turns extremely complicated, given that a better right has to be evidenced; and

c 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 intentional requirement is not fulfilled, a conviction might not be reached.

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 hand they aim to guarantee the victim’s redress. 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.

It is important to keep in mind that, under the CNPP, these provisional measures will only be granted if the evidence provided demonstrates that the damage repair is possible and that there is a strong possibility that the defendant is responsible for repairing such damage.

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. 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.37

For example, if a company that suffered misappropriation of funds already tracked the person who misappropriated such funds and knows the bank accounts where the person might have the money, the company can request freezing the money in these bank accounts, either before trial or during the trial.

The interim relief can be requested to court during the trial or before it begins.38 In order for the court to grant them, the plaintiff must evidence 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.39

It is important to note that the plaintiff must guarantee the damages 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.40

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.41

### 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 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 morality.42

37 Article 389 of the FCCP.
38 Article 384 of the FCCP.
39 idem.
40 Article 391 of the FCCP.
41 Article 397 of the FCCP.
42 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.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

In 2012, a new Anti-Money Laundering Act was enacted in Mexico. 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 money laundering offence is governed by the FCC and is considered a serious offence. It warrants imprisonment ranging from five to 15 years and a fine tantamount to at least 1,000 and up to 5,000 times the Unit of Measurement and Update.45

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’.

ii Insolvency

In the insolvency civil concept – and not a bankruptcy scenario – arguably, the most traditional legal action is the action against creditors’ fraud. When a debtor purposefully engages in conduct to become insolvent (e.g., sells or gives away his or her assets), its creditors can claim, before a civil court, the nullity of such conducts, only if the credit is previous to such acts. Insolvency will occur when the debts are bigger than the assets, and the debtor will commit fraud only when it knows it will be insolvent after the execution of such acts.

The requirements to exercise this action are:

43 Official name: Federal Act for the Prevention and Identification of Operation with Unlawful Resources (Ley Federal para la Prevención e Identificación de Operaciones con Recursos de ProcedenciaIlícita).
44 The Federal Criminal Code still sets forth that fines are established in terms of the minimum wage. However, this was changed at a federal level.
45 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’.
46 Examples of vulnerable activities are: gambling activities, issuance of credit cards and commercialisation of precious metals, among others.
47 Article 2163 FCC.
48 Article 2167 FCC.
a. existence of an act that provokes the debtor’s insolvency;
b. the act is made after the debt is acquired; and
c. the act was committed in bad faith (if the act that places the debtor in insolvency is a gratuitous act (e.g., donation), bad faith is not a necessary component for pursuing 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. 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.

iv. Fraud’s effect on evidentiary rules and legal privilege

There is no Mexican statute that regulates legal privilege. Hence, there are no specific provisions or rules within the Mexican system regarding evidentiary rules or legal privilege when dealing with misappropriation or other fraudulent conduct.

V. INTERNATIONAL ASPECTS

i. Collection of evidence in support 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;

49 Articles 2164 and 2165 FCC.
50 Article 2168.
(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.

ii 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 signatory of 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 in which a Mexican court analyses if 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 as a Mexican judgment, and, therefore, will be executed in accordance to the 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, within the larger constitutional reform on the subject matter, represents an important breakthrough in Mexican legislation that aims to create a more effective and fast procedure. Along with the new and unexpected interest in victims’ redress, it creates a beneficial atmosphere for asset recovery or, at least, damage repair when assets are misappropriated through fraudulent activities.

In 2019, Mexico City’s local congress issued a controversial law: the Constitutional Law of Human Rights and its Guarantees. Among other things, this Law imposed limitations on recovery and repossession of real estate. The original version of Article 60 of the Human Rights Law established several restrictions for eviction that made it practically impossible; for example, it required legitimate owners to use eviction as the last option, and even compensate
the evicted persons if they ‘suffered’ any damage due to eviction. This provision was applicable for landlords that tried to evict tenants, for foreclosure procedures, or to repossess from unlawful possessors, among other cases.

Nevertheless, due to large protests against the law, it was amended in order to rule out the limitations for eviction, and make it possible only after a fair trial is followed against persons to be evicted.
I OVERVIEW

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 in order 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 the investigative judge is satisfied that the instruction is complete, he or she 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 his or her ‘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 in order to be represented as a civil party victim at the criminal trial. In financial matters the criminal trial is normally held before a correctional tribunal and the infraction qualified as a délit although certain financial infractions are qualified as ‘crimes’. An offence qualified as a délit 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

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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)\(^6\) 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 in order 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.\(^8\)

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\(^9\) 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\(^{10}\)*) 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.\(^{11}\) 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 fraud claims

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

#### i Securing assets and proceeds

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 in order 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. The Court of Appeals recently overturned a lower court order that in releasing funds blocked as a result of a Monaco *ex parte* freezing order, had ignored a UK worldwide freezing order in a corruption case. The Court of Appeals took notice that in the interval, judgment in favour of the plaintiff was rendered by the High Court in London, even where the English judgment was not yet recognised in Monaco.

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

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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 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.

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. This is an emergency action known as a *référé*, 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. Similarly, the Court of Appeals authorised the seizure of the proceeds of a forced sale, even where the creditor was not a creditor of the entity owning the asset sold, on the basis that the debtor was alleged to be the ultimate beneficial owner.

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. 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).

### ii Obtaining evidence

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

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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.
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 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

\(^{19}\) 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 no citation can, therefore, be provided.


\(^{21}\) Code of Criminal Procedure, Article 344 et seq.
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.\(^{22}\) 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.

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.

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\(^{22}\) Code of Civil Procedure, Article 324.
\(^{23}\) Criminal Code, Article 308-2.
\(^{24}\) Civil Code, Article 202-6.
\(^{25}\) Code of Criminal Procedure, Article 31.
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. Thus the courts may determine at their discretion, but upon the request of the civil party victims, confiscated funds be attributed to the victims.

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 in order to have full effect.

26 Criminal Code Articles 12, 32 and 219.
27 Commercial Code, Articles 600–606.
28 Commercial Code, Article 574.
29 Commercial Code, Article 566.
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 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;

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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.
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

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 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. 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. 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.

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. 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 Norwich Pharmacal motion.

Monaco judges may seek information abroad, by commissions rogatory 38 but requests from foreign judges will only be executed if they are transmitted through diplomatic channels (unless the Sovereign Prince authorises otherwise). 39

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 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.
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 (Mareva injunctions, for example) have no effect in the principality.

The enforcement of foreign judgments (exequatur) will, however, be granted unless it is shown that:

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 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 cannot 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.40

The Code of Private International Law, which took effect on 7 July 2017, is generating developing jurisprudence in all areas, including the jurisdiction of the Monaco courts, lis pendens, and the recognition of foreign judgments.41

40 Proposal for a Law relating to the access to decisions of the Courts and Tribunals of Monaco of 17 March 2015.
Chapter 24

NETHERLANDS

Neyah van der Aa, Thijs Geesink and Jaantje Kramer

I  OVERVIEW

Over the last couple of years, the Dutch government has been stepping up its game in the fight against fraud. In doing so, it has implemented various measures and regulations that deal with fraud committed with public funds and with fraud committed against citizens and the business sector. Therefore, it has become increasingly important for Dutch companies to implement a sophisticated compliance programme to adequately prevent fraud from occurring.

In the Netherlands, if victims of fraud or dishonesty 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 to hire private investigative companies to gather evidence and attempt to trace 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

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victim of fraud in the Netherlands only has recourse to – at best – a personal action (action in 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.\(^3\) In addition, a victim of fraud can base a claim on undue payment,\(^4\) 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.\(^5\)

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.\(^6\)

### 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.\(^7\) 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.

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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.
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.\(^8\) 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

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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:2016:2659.
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.\textsuperscript{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 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.

\textbf{i} \hspace{1cm} \textbf{Defences 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.\textsuperscript{15} 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.\textsuperscript{16} A claim on the basis of undue payment is also barred after five years.\textsuperscript{17} 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.

\textbf{III} \hspace{1cm} \textbf{SEIZURE AND EVIDENCE}

\textbf{i} \hspace{1cm} \textbf{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.\textsuperscript{18} 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.\textsuperscript{19} The latter form of provisional attachment is the most common one and is frequently used in the asset-tracing process.

\textsuperscript{14} See also the ‘Security Agenda 2015–2018’, TK 28684, No. 412, particularly pp. 6–7.
\textsuperscript{15} Articles 3:316 and 3:317 of the DCC.
\textsuperscript{16} Article 3:310 of the DCC.
\textsuperscript{17} Article 3:309 of the DCC.
\textsuperscript{19} Van Hooijdonk and Eijsvoogel, footnote 8, at p. 113.
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. 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.

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.

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. The judge can also grant leave for attachment on the condition that collateral is provided for potential damage caused by the attachment.

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

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20 Article 718 et seq. of the Code of Civil Procedure (CCP).
23 Article 701 of the CCP.
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 days24 and is usually set at 14 days. Generally, the fact that the proceedings will be started abroad is a sound reason 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.25

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.26 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.27 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.28 Furthermore, on the basis of the CCP, parties can submit a request for document disclosure (including data such as computer files).29

24 Article 700(3) of the CCP.
25 Article 700(3) of the CCP.
26 Article 705(2) of the CCP.
27 Van Hooijdonk and Eijsvoogel, footnote 8, at p. 118.
28 Article 22 of the CCP. If a party fails to comply with an order, the court may draw the conclusion it sees fit.
29 Article 843a of the CCP.
Pursuant to Article 843a of the CCP, the requesting party must meet the following conditions:

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

c. 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.

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30 Van Hooijdonk and Eijsvoogel, footnote 8, at p. 31.
34 Supreme Court 13 September 2013, JOR 2013, 330.
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.\(^{35}\)

### 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.\(^{36}\) 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.\(^{37}\) 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, must adhere to the privacy code that applies to their sector and must comply with the Data Protection Regulation (GDPR).\(^{38}\) The Dutch Data Protection Authority checks whether private detective agencies process personal data correctly.\(^{39}\)

### IV  FRAUD IN SPECIFIC CONTEXTS

#### i  Banking and money laundering

The Dutch Anti-Money and Anti-Terrorist Financing Act (Wwft) regulates instellingen (obliged entities) 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


\(^{36}\) Article 51b of the CCRP.


\(^{38}\) Sib 2018, 144.

national law, and also contains various Netherlands-specific requirements.\(^{40}\) 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).\(^{41}\)

The Wwft adopts a risk-based approach; this means that obliged entities 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, obliged entities must notify any unusual transactions of their clients to the Financial Intelligence Unit (FIU).\(^{42}\) 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.\(^{43}\)

### 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, an Act entered into force that expands the criminal law options that can be used in the case of a fraudulent bankruptcy.\(^{44}\) This 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).\(^{45}\)

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.

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\(^{40}\) Stb 2018, 239. The implementation period of the Directive had previously expired on 26 June 2017.


\(^{42}\) 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.


\(^{44}\) Stb 2016, 205.

\(^{45}\) Stb 2017, 497
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.

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.46 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.47 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).

iv Fraud’s effect 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 ‘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.48 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.

46 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.
47 Article 1040(2) of the CCP.
In past years, there has been much debate in the Netherlands regarding the scope of legal privilege. 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. 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. In addition, this procedure is criticised as it would delay the criminal investigation. The Dutch Public Prosecutor’s Office pleads for a simplified and more practical procedure of such claims. Furthermore, the Dutch Minister of Justice and Security has announced that he will propose further changes in the future.

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 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.

50 Article 98 and Article 218 CCRP; TK, 2012–2013, 33685, No. 3.
52 TK, 2015–2016, 29 279, No. 289. No new legislation has been enacted yet. However, it is expected that the provisions regarding the Dutch legal privilege will be addressed in the general reform of the Dutch Criminal Code of Procedure (TK 2018-19, 29 279, No. 459).
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.
ii Collection of evidence in support of 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.

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 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.

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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 as being any Letters of Request, which require a person: (a) to state which of the documents which are of relevance to the proceedings to which the Letter of Request relates have been in his possession, custody or power; or (b) to produce any document other than particular documents specified in the Letter of Request as being documents which the court which is conducting the proceedings believes to be in his possession, custody or power.’


iii 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.63

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 claimant 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.64

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 like this 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).

iv 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:

a the judgment must be a result of proceedings compatible with Dutch concepts of due process;
b the judgment should not contravene public policy;
c 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
d 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.

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63 Van Hooijdonk and Eijsvoogel, footnote 8, at p. 117.
64 Article 767 of the CCP.
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 9 July 2018, the Fifth EU Anti-Money Laundering Directive entered into force.67 The main changes to the Fourth EU Anti-Money Laundering Directive are:

a clarification of politically exposed persons (PEPs);

b tighter controls relating to high-risk third countries;

c increasing transparency of beneficial ownership of corporates;

d application of certain obligations with respect to certain crypto service providers; and

e beneficial ownership of trusts.68

EU Member States must have implemented the Fifth EU Anti-Money Laundering Directive by 10 January 2020. On 2 July 2019, the Dutch Minister of Finance presented a legislative proposal for the implementation to Parliament.69

ii Central UBO Register and Central Shareholders’ Register
Pursuant to the Fourth European Anti-Money Laundering Directive,70 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 was 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). On 4 April 2019, a new draft bill was presented for public consultation.71

On 19 January 2017, a draft bill for the introduction of a Central Shareholders’ Register was presented.72 According to the draft bill, the Central Shareholders’ Register would

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.
71 TK, 2018-2019, 35 179, No. 2.
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 obliged entities mentioned in the Wwft and civil-law notaries, each to the extent necessary for exercising its public duties.
Chapter 25

PORTUGAL

Rogério Alves

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 respective claims.

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, and also from a victim’s standpoint, some of the main principles of the Portuguese criminal system may entail 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).

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II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Civil remedies

The main remedies in a civil recovery action are restitution through the respective action (where possible) or 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 only contested facts are subject to the assessing of evidence. 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 gathered 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 only became necessary 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 – 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 a criminal court in charge of the respective criminal proceedings except if:

- charges are not brought within eight months of the criminal inquiry;
- the criminal proceedings are closed or temporarily restricted;
- the criminal proceedings are dependent on a previous criminal complaint or private prosecution; and
- 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 in order to prevent their dissipation.

With regard to the possibility of confiscating property acquired by a third party, in principle, 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 the one who did not have any direct or indirect (e.g., due to 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 confiscation was introduced by Law 5/2002 (and its subsequent amendments) in relation to a list of crimes (drug trafficking, money laundering, passive and active corruption, embezzlement, trading in influence, etc.) according to which, in the event

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2 Article 368 of the Portuguese Criminal Code.
of conviction, and for the purposes of a confiscation order, any difference between the value of the convict’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 claim the ownership of the property subject to confiscation before the court competent to execute it (as a bona fide third party). If a dispute arises over the ownership of the property, the court must refer the case to the competent civil court so as 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 (additionally considering the recent trend in Portuguese case law to use ‘piercing of the corporate veil’ as a ground for rejecting this defence) and the elapsing 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 action is known by the claimant; however, this period may be extended according to a longer criminal statute of limitations if the action 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 this 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 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 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 its final conviction), the burden of proof lies with the public prosecutor, either in proving beyond reasonable doubt the defendant’s guilt in relation to certain criminal offences, or in proving 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 an allocated 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) sets out measures of prevention and law enforcement to combat money laundering and terrorist financing, transposing to

Since the approval of this Law, 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 these activities to the public prosecutor or the Unit of Financial Information. In particular, the entities referred to must:

a. identify and verify customers and beneficial owners;
b. carry out due diligence measures, including gathering information regarding the purpose and intended nature of the business relationship and risk assessment;
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 operation 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 Fraud’s effect 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 its 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 other Member States for the taking of evidence in Portugal are governed by Regulation (EC) No. 1206/2001. The main provisions of the EU Regulation set out that:

a. 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 such a requirement unless this procedure is incompatible with the applicable law;

b. requests should be transmitted directly from the requesting court to the competent court of the foreign state;

c. the presence and participation in the foreign state of the relevant parties and of the representatives of the requesting court can be allowed; and

d. 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 analysed by the public prosecutor for public interest reasons prior to execution. If granted, the competent court will be responsible for ensuring compliance with them, except if the execution of the letters rogatory 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 assistance from the Portuguese authorities 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 respective assets 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 4 or to defer the order in several other situations. 5 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:

a) there are no well-grounded doubts concerning either the authenticity of the submitted documents or the judiciousness of the decision;

b) the decision is final according to the law of the country in which the judgment was rendered;

c) 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;

d) 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;

e) the defendant was duly notified of all the proceedings according to the law of the country where the judgment was rendered;

f) the foreign court proceedings complied with the procedural law requirements and each party received an adequate opportunity to present their case fairly; and

g) 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.

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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 has been the approval of Law 36/2015, which adopted 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, another relevant development has been the Portuguese Constitutional Court decision (in its recent judgment No. 377/2015) ruling 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 the punishment with a penalty of up to three years’ imprisonment of any person who directly or through a third party acquires or owns property inconsistent with his or her respective 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.

Upon enactment of Law 13/2016, tax enforcement proceedings may not target the attachment of the debtor’s family home except if its rateable value falls within the property transfer tax maximum 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 concerning the earliest tax debt.
I OVERVIEW

The Russian legislation governing business only started developing at the beginning of the 1990s, inspired by mass privatisation in Russia and by the creation of numerous private companies. The legislation started its formation without any major legislative base or key institutions, which did not allow for its proper development and subsequent ‘stable’ functioning. Thus the creation of the principal structures was rather ‘reactive’ and reflected particular requirements of the market at that particular time.

Moreover Russia is not a major financial centre, with a developing economy and high economic and political risks; thus it is not a popular destination for proceeds of crime. Instead, due to the high level of corruption, the proceeds of crime tend to be transferred to other jurisdictions outside of Russia.

This led to a situation in which the Russian legislation regulating asset tracing and recovery was sometimes fragmentary and ambiguous; however, in recent years, a vast majority of the problems have been successfully eliminated by legislation. Moreover the Russian government implemented significant measures to counteract corruption and various criminal activities, thus the legislation and court practice in respect of asset recovery and confiscation of illegal proceeds quickly develops in Russia, but this legislation mostly relates to Russian domestic recovery and has limited aspects on international matters.

Regulations governing asset tracing and recovery in Russia consist of international conventions, various legislative acts, governmental and presidential decrees and other ‘sub-legislative’ acts.

As Russia belongs to the continental system of law, court rulings (precedents) are not considered to be an official source of law. However, the legal interpretation provided by higher courts is of great importance to lower courts. Legal doctrine is also not recognised as a source of law.

The Russian civil court system has two branches: the arbitrazh (commercial) courts, which handle commercial disputes involving legal entities and have exclusive jurisdiction over corporate matters, and the courts of common jurisdiction, which handle other types of cases mostly involving individuals and including criminal cases.

The injured party may, to recover the proceeds of crime, either initiate criminal proceedings raising a claim for compensation of damage within the criminal proceedings or initiate a separate civil law claim.
In criminal proceedings the claimant plays quite a passive role as the investigating authorities lead the process and undertake the required steps to prepare the accusation as well as to trace and seize the relevant proceeds of crime.

In civil proceedings, each party bears its burden of proof, and thus the claimant has to play a very active role.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Compensation of damages in civil proceedings is allowed in Russia and may be sought against the alleged wrongdoer (either in contract or in tort). Depending on the nature of the injured party and the wrongdoer, the compensation claim shall be filed either with the arbitrazh (commercial) court (if both parties are legal entities) or with courts of common jurisdiction if individuals are involved.

Legal aspects of such claims are regulated by the Civil Code of the Russian Federation (the Civil Code). Procedural aspects are governed by the Arbitrazh Procedure Code or Civil Procedure Code.

The claim filed with the court shall be fully substantiated and accompanied by available evidence. The claimant should file a written and signed statement of claim, which should contain a mixture of alleged fact and law, coupled with details of the evidence that the claimant proposes to adduce at trial. The judge is responsible for preparing a case for trial, and will question the parties in an attempt to clarify the issues in dispute between them.

There is no pretrial disclosure per se in Russian legislation so asset tracing is within the interest of the claimant. Russian procedural legislation does not provide for any procedure similar to the discovery or disclosure procedure in the United Kingdom or the United States; because of fundamental differences in procedure law, a Russian court has a much more significant role in the court hearing and the examination of evidence. Each party has to prove its case based on the documents available to it. If any evidence is in the possession of other parties (including participants in the case), a party may petition the court to obtain the evidence from the party, and these petitions are normally granted.

Subject to the procedural legislation, evidence is considered as being legally obtained information about the facts constituting the claims and objections of the parties, as well as other circumstances that are important for the correct examination and resolution of the case.

This information may be obtained by the court by means of:

a explanations by the parties or third persons;
b testimony of witnesses;
c written or material evidence;
d audio and video materials; and
e expert examination.

No evidence may have its force established in advance. The court will assess the relevance, admissibility and authenticity of all evidence, as well as its sufficiency and interconnection.

Each party must prove the circumstances it refers to within the claim or objection. However, it is the court that determines which circumstances are relevant to the case and which party successfully proves it. The court may also propose that the parties bring additional evidence.
Explanations by the parties or third persons concerning the circumstances necessary to resolve the case are checked and evaluated like any other evidence. Thus, these explanations do not take precedence over other evidence such as witness or material evidence. In addition, if the party acknowledges any facts constituting the claim of the counterparty, the latter does not have to prove this later on.

Russian arbitration courts rarely rely on witness statements and written witness testimonies, relying mostly on documents and written evidence.

Judgment will be given orally and in writing, normally within a week of the oral decision being announced.

Decisions of the first instance arbitration court become enforceable after one month, and during this time a party has a right of appeal, on fact or law, to the appeals instance. The decision of the court of the appeal instance is further appealable to the court of cassation. The final court of appeal is the Russian Supreme Court, which has a supervisory appellate function (empowering it to revise the decision of any state arbitration court that is illegal or lacking in legal substance).

The costs of litigation include a court fee plus the costs related to the trial of the case. The losing party is usually ordered to pay the successful party's costs. Legal costs of the successful party may also be collected, but at a 'reasonable' level at the discretion of the judge.

Compensation of damage or loss caused by the violation of a right is a general tool of protection under Russian law. A person or entity whose rights were violated may demand full compensation of damage or loss incurred. Both material and 'non-material' damages may be collected (i.e. compensation for pain and suffering for individuals, or 'loss of business reputation' for legal entities). However, 'non-material' damages are usually awarded at the discretion of the courts, and thus they are of nominal value comparing to similar awards in the US or EU countries.

Damages to recover loss of profit can be claimed, but are difficult to prove in court. The Russian courts are reluctant to award large amounts of damages in relation to loss of profits. Other remedies are also available (e.g., performance in kind, orders to perform certain acts or refrain from certain steps, etc.).

Normally the full amount of direct damages shall be collected. To prove the case, the claimant shall essentially substantiate the following elements: (1) legal fault committed by the wrongdoer (either in contract or in tort); (2) damage suffered by the claimant; and (3) causal link between the wrongdoing action (failure to act) and the damage suffered.

It may be difficult to prove legal fault in complex fraud cases involving several transactions.

The claimant shall prove the exact amount of claimed damages by means of relevant documents.

The standard proceedings in the arbitrazh court comprises one or two preparatory hearings (depending on the volume of evidence requested by the parties) and two or three hearings on the merits of the case. Normally it takes around five to six months for the court of the first instance to render its decision.

This initial ruling may be challenged by the appeal instance (where the case is reviewed on its merits once again) and further by the cassation court (which reviews the legal (not factual) aspect of the case). Afterwards, the case may be finally reviewed by the Supreme Court of the Russian Federation. At best, this process may take 12 months.
Legal aspects of criminal claims are regulated by the Criminal Code of the Russian Federation (the Criminal Code). Procedural aspects of criminal complaints are governed by the Criminal Procedure Code.

Under Russian law, only individuals may be criminally liable thus criminal proceedings may be initiated against individuals only. Criminal proceedings may be initiated by the respective state authorities against direct offenders, their accomplices and organisers of the crime.

Claimants may recover the damages caused by the crime in criminal proceedings by raising a special ‘civil law’ claim within the criminal proceedings. Such a claim may be raised either at the stage of investigation until the court of first instance renders its decision on the criminal case. The claim is exempt from state duty. If criminal proceedings are terminated by the state authorities, it does not preclude the civil law claimant from filing a separate civil law claim as discussed above: the investigating authorities specifically stipulate that in the decision on criminal investigation termination.

Similarly if the criminal court case is terminated in court (due to the absence of a criminal offence, a finding that the accused is innocent, etc.) the criminal law claim is terminated by the criminal court but it does not preclude the claimant from filing a separate civil claim.

Following general rules of the civil legislation as indicated above, the civil law claimant is entitled to claim direct damages and ‘moral damages’; lost profit is rarely collectable.

The civil law claimant in criminal proceedings has a limited scope of duties and rights. Most of the procedural acts, collection of evidence and preparation of the case for trial shall be done by the investigation authorities.

The judge on criminal case, upon rendering its decision, shall also render its decision in respect of the civil claim including the awarded amount.

The decision of the court of the first instance on a criminal case may be appealed by the civil claimant within the criminal court proceedings to the appellate court and further to the cassation court. The final instance is the Supreme Court of the Russian Federation.

The length of the criminal case (including investigation) generally depends on the complexity of the case; however in practice it will be at least 12 months (unless the accused pleads guilty).

Russia has developed quite sophisticated anti-fraud criminal legislation specifically covering most fraudulent acts. This includes the following:

- a general fraud: misappropriation of property by deception or abuse of confidence;
- b fraud in the financial and banking sphere: misappropriation of funds by false or erroneous representations to the creditor;
- c fraud in receiving social benefits and assistance;
- d fraud in using the electronic payment means;
- e insurance fraud;

5 Article 159 of the Criminal Code of the Russian Federation.
7 Article 159.2 of the Criminal Code of the Russian Federation.
8 Article 159.3 of the Criminal Code of the Russian Federation.
9 Article 159.5 of the Criminal Code of the Russian Federation.

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fraud by use of computer and information systems\(^{10}\) (misappropriation of funds or property by illegal use of computer systems or databases) (there are also special articles of the Criminal Code covering other data-related offences);

embezzlement of funds or property;\(^{11}\)

breach of trust;\(^{12}\)

fraud on the securities market: market manipulation, insider trading, etc.

\section*{ii Defences to fraud claims}

Applicable defences in civil law claims and criminal fraud cases depend on the particularities of each case.

The general one to consider initially is the statute of limitations. In civil law cases it is generally three years from the date the claimant discovered (or should have discovered) the breach of its rights; in criminal cases, the statute of limitation varies depending on the grievance caused by the alleged crime and varies from two to 15 years from the date of the crime.

In civil law cases in Russia, defendants usually allege the absence of the wrongdoing (especially in complex fraud cases involving numerous parties). Another widely used defence is the absence of causal link between the acts of the wrongdoer and damages incurred by the claimant.

In criminal court cases, available defences vary depending on the circumstances of the case. The most commonly used is the allegation that no crime has been committed because of the absence of certain elements of the particular crime.

\section*{III SEIZURE AND EVIDENCE}

\subsection*{i Securing assets and proceeds}

Seizure of funds and property is possible both in the course of civil law claims (by respective judge order) and in course of criminal proceedings (by respective court order initiated by the investigation authorities).

In civil law trials, interim relief may be sought at any stage of the proceedings or even before the claim filing if the respective motion is accompanied with proper evidence (however, in this case, a deposit with the court is required to cover the damage in the event of an unjustified injunction).

Russian law does not provide for an exhaustive list of interim relief, and usually the requested measure depends on the particularities of the case. The most common ones are arrest of funds or property (or both), injunction to undertake certain legal acts, etc.

In criminal proceedings to ensure the performance of civil law claims, to secure the potential performance of the judgment fines or other monetary obligations as well as in cases with potential confiscation of property, the investigation authorities may petition the court to arrest property of the accused and alleged proceeds of the crime.

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\(^{10}\) Article 159.6 of the Criminal Code of the Russian Federation.

\(^{11}\) Article 160 of the Criminal Code of the Russian Federation.

\(^{12}\) Article 165 of the Criminal Code of the Russian Federation.
ii Obtaining evidence

As noted, in civil law proceedings in Russia there is no pretrial disclosure. Each party shall ensure that its case is supported by evidence and may seek court assistance to obtain the evidence from opponents.

In criminal proceedings, the vast majority of evidence and preparation for the case for trial is done by the investigation authorities within the scope of their competence, which is quite broad in Russia. The claimant may also provide its evidence and explanations in respect of what normally is done along with a criminal case complaint initiating a criminal investigation.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Russia implemented well developed legislation preventing money laundering based on FATF recommendations and guidance.¹³

The cornerstone of the Russian Federation’s anti-money laundering and counter-terrorist financing measures is Federal Law No. 115-FZ on Combating Legalisation (Laundering) of Criminally Gained Income and Financing of Terrorism (Federal Law 115-FZ), which came into force on 1 February 2002.

This law spreads anti-money laundering obligations (including reporting requirements) on all entities performing operations with monetary funds or other assets in the territory of the Russian Federation. This includes banks and other credit institutions, insurance companies, professional participants of the securities markets, leasing companies, pawnshops, federal post organisations (who perform money transfer services), gambling services (such as casinos, bookmakers, lotteries and prize funds), buyers and seller of precious metals and stones, entities managing investment funds and entities managing non-government pension funds, law firms and advocates, auditing organisations, etc.

Russian money laundering legislation provides for a number of measures designated to prevent money laundering. Those measures include:

- mandatory internal control procedures;
- mandatory control of operations; and
- prohibition to inform clients and other persons about the measures undertaken against money laundering, etc.


The Central Bank of Russia also undertakes preventative and enforcement measures in respect of financial institutions and its employees that are involved in transactions that infringe the anti-money laundering legislation. These measures may include: informing the entity of the Central Bank’s concern regarding its activities; suggesting that the entity provide the Central Bank with a programme for improvement; and establishing additional measures to monitor the entity.

¹³ Russian has been a member of FATF since 2003.
In relation to the regulated entity and its employees, enforcement measures may also include the imposition of a penalty and the withdrawal of the regulated entity’s licence. In the case of employees, authorities may withdraw competency certificates and deprive them of right to undertake certain activities or hold particular offices. The Criminal Code of the Russian Federation provides for criminal liability upon breach of the anti-money-laundering legislation, which includes penalties and imprisonment.

**ii Insolvency**

Russian insolvency legislation is governed by the Federal Law on Bankruptcy No. 127-FZ of 26 October 2002 (as mended and supplemented) (the Bankruptcy Law).

The Bankruptcy Law allows the bankruptcy manager to challenge past transactions of the bankrupt entities on numerous grounds, allowing the collection of potentially stripped funds and property into the bankruptcy estate. These include:

- *suspicious transactions*: The bankruptcy manager may challenge transactions made three years prior to declaration of bankruptcy if the other party knew or should have known about financial problems of the bankrupt or the transaction was made between affiliated parties and such transaction caused harm to other creditors in the course of the bankruptcy proceedings;

- *non-equal transactions*: The bankruptcy manager may challenge transactions made one year prior to the declaration of bankruptcy if such transaction did not contemplate fair consideration; and

- *preferential transactions*: The bankruptcy manager may challenge transactions made up to six months prior to the declaration of bankruptcy in case the transactions provide for preferential treatment of certain creditors compareing to other creditors; etc.

Also Russian corporate legislation provides that controlling entities or individuals of another entity causing its bankruptcy shall be liable for the debts of bankrupt entity. Moreover, the managing bodies of a company shall act in good faith in asserting their powers and thus may be sued for any violations that led to bankruptcy or damage to the bankrupt person.

**iii Arbitration**

Arbitration is not widely used for asset recovery in fraud cases in Russia. However the legislation allows the obtaining of interim reliefs through the arbitrazh (commercial) court system for ongoing or pending arbitration either in Russia or abroad subject to the procedures described above. It should be noted that these reliefs are rarely granted in the absence of a special deposit with the court to cover potential damage caused by the requested relief. Also, direct interim relief from foreign arbitration institutions per se are not enforceable in Russia.

Foreign arbitration awards may be recognised and enforced in Russia on the basis of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the Convention). On the basis of the Convention, foreign arbitral awards may be recognised and enforced in Russia through the arbitrazh court system subject to the terms of the convention and similar requirements of the Russian Arbitrazh Procedure Code. The

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14 Russia has been a party to the Convention since 1960.
15 Chapter 31 of the Russian Arbitrazh Procedure Code.
recognition and enforcement process does not involve the review of the case on its merits, but just the assessment of defences provided by the Convention. Normally the recognition and enforcement of a foreign arbitral award in Russia takes around six to eight months.

iv Fraud’s effect on evidentiary rules and legal privilege
There is a limited attorney-client privilege in Russia applicable only to licensed advocates in criminal proceedings. In the absence of the discovery procedure, this privilege has limited application and only in criminal investigations.

V INTERNATIONAL ASPECTS
i Conflict of law and choice of law in fraud claims
In case of a contractual relationship, the law indicated as the governing law for the contract shall apply.

In the absence of such choice of law agreed by the parties to the contract, the ‘personal’ law (either the laws of the place of registration or the laws of the place of major activity) of the party that provides ‘major’ performance under the contract (e.g. seller in case of sale-purchase contract, bank in case of the credit agreement, etc.)\textsuperscript{16} shall apply.

In case of tort, the general rule is that the law of the country where the tort was committed shall apply. However, if there are negative consequences for parties in another country, the law of this state may apply if the wrongdoer expected or might have expected potential negative consequences of the wrongdoing in that country.\textsuperscript{17}

Parties may exclude the application of the above rule in case they select a different set of laws applicable to their relationship in tort (if such choice does not affect the rights and obligations of other parties involved). However such choice of applicable law may not alter the application of mandatory norms of the country where the tort was committed and both parties reside.\textsuperscript{18}

ii Collection of evidence in support of proceedings abroad
Legal assistance in support of judicial proceedings abroad is available in Russia pursuant to the provisions of multilateral or bilateral treaties that the Russian Federation is a party to.

Russia is a party to the Hague Convention on Civil Procedure of 1954\textsuperscript{19} and has a number of bilateral treaties with various countries to provide legal assistance on civil and criminal proceedings. Normally the assistance is available through official channels, and it is quite a lengthy process.

Legal assistance in respect of tax information may be also available through the OECD Convention on Mutual Administrative Assistance on Tax Matters of 1988.\textsuperscript{20}

\textsuperscript{16} Article 1211 of the Civil Code of the Russian Federation.
\textsuperscript{17} Article 1219 of the Civil Code of the Russian Federation.
\textsuperscript{18} Article 1223.1 of the Civil Code of the Russian Federation.
\textsuperscript{19} Russia joined the Convention in 1967.
\textsuperscript{20} ETS No. 127.
Also, Russia is a party to the Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime and on the Financing of Terrorism of 2005, which also provides extensive means of international cooperation for disclosing relevant information and its exchange.

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

As noted, foreign interim reliefs in civil law cases are not directly enforceable in Russia. Similarly, freeze and arrest orders given by foreign courts are not recognised and enforced in Russia. The seizure and arrest of assets may be done either on the basis of a Russian domestic court order as described above or through certain specific mechanisms provided by multilateral or bilateral treaties that Russia is a party to.

Russia is a party to various multilateral treaties providing certain mechanisms for arrest of illegally obtained assets and counterfeiting money laundering. These include:

- the Criminal Law Convention on Corruption of 1999;
- the UN Convention on Corruption of 2003;
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997;
- the Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime and on the Financing of Terrorism of 2005; and
- the OECD Convention on Mutual Administrative Assistance on Tax Matters of 1988, etc.

Further, Russian state authorities cooperate with Interpol, EUROPOL (Camden Assets Recovery Inter-Agency Network, aimed at depriving criminals of their illicit profits), ICAR (the International Centre for Asset Recovery), etc., providing various possible means to ensure international cooperation.

iv Enforcement of judgments granted abroad in relation to fraud claims

A foreign judgment may be recognised and enforced in Russia either on the basis of a relevant international treaty that Russia is a party to. If there is an international treaty, the recognition and enforcement process shall follow the procedures prescribed by the treaty.

Recent court practice established that there is also a possibility to enforce a foreign court award on a reciprocity basis, proving in the Russian court that the country where the judgment was rendered would recognise and enforce a court judgment rendered by a Russian court. If it may be shown that there were precedents with enforcing the Russian judgment in that particular jurisdiction, it will strengthen the case significantly.

If a foreign court award may be recognised and enforced in Russia, there are a limited number of defences available to the defendant:

- the foreign judgment has not come in force;
- the defendant was not properly notified in respect of the foreign proceedings or was not able to present its position in the foreign proceedings;
- the dispute falls within the exclusive jurisdiction of the Russian courts;

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21 CETS No. 198.
22 Article 241 of the Arbitrazh Procedure Code.
Russia


d there is a Russian court decision on the same dispute or there is a pending Russian case filed prior to a foreign case;
e the term for enforcement of the foreign court award lapsed; and
f the enforcement conflicts with Russian public policy.23

If the enforcement is granted by a Russian court, the court will issue a writ of execution and subsequently it may be enforced through the state bailiff service.

On 8 July 2019, Russia adopted the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Though the Convention is pending ratification by the Russian Parliament and execution by the President of Russia to become a part of Russian legislation, we expect it shall happen by the end 2019. The adoption of the Convention as a part of the Russian legal setup shall significantly simplify the process of enforcement of foreign court decisions in Russia.

v Fraud as a defence to enforcement of judgments granted abroad

There is limited court practice and legislative guidance in this respect in Russia. Available defences precluding the enforcement of a foreign court awards are listed in the paragraph above. Most obviously, the best defence would be a conflict with public policy (i.e., a Russian court shall decline the enforcement of a foreign court award if the award was based on fraud or involves fraudulent behaviour, etc.).

VI CURRENT DEVELOPMENTS

The key issue in this sphere in Russia is the absence of effective mechanisms allowing the state authorities to trace and arrest the assets through a civil procedure as contemplated by the UN Convention on Corruption of 2003. Coupled with the lack of cooperation of various Russian law enforcement agencies, it makes the process quite lengthy, bureaucratic and thus ineffective.

However, Russian authorities have undertaken significant efforts to improve and develop anti-corruption legislation and improve the coordination between various state agencies as well as coordination on an international level. Unfortunately, due to high political risks, cooperation at an international level is not always successful, but Russian domestic legalisation should significantly improve with the implementation of the National Plan on Anti-Corruption Measures for 2018–2020 adopted by President Putin on 29 June 2018.

23 Article 244 of the Arbitrazh Procedure Code.
I OVERVIEW

Singapore is a leading financial capital of the world. As a global wealth management centre, international funds flow through the jurisdiction on a daily basis.

Financial institutions have, in recent times, faced increasingly stricter and more rigorous compliance, sanctions, anti-money laundering and counter terrorism financing rules and regulations and have had to allocate significant resources to their financial crimes units. Despite steps taken to prevent fraud, fraud litigation is not uncommon in Singapore, and asset tracing and recovery is an important aspect of fraud proceedings.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Civil remedies

In Singapore, victims of fraud most commonly seek financial recovery or compensation, or both, through civil remedies. This is because by initiating civil proceedings against the perpetrator of the fraud, the victim (as the plaintiff in the proceedings) can pursue its claim through a variety of processes before, at and after trial. In comparison, in criminal proceedings (which are generally instituted and controlled by Singapore’s prosecutorial office, the Attorney-General’s Chambers (the AGC)), the victim would not have any meaningful control over these proceedings.

As against the perpetrator, the common causes of action commenced include:

a tort of deceit or Fraudulent misrepresentation;
b breach of duty (fiduciary or otherwise);
c unjust enrichment; and
d conversion

As against the person or persons who assisted the main perpetrator, who may have received or who helped transmit the proceeds of fraud, the common causes of action that are commenced include:

a conspiracy;
b dishonest assistance; and
c knowing receipt.

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1 Aaron Lee is a partner and Lee May Ling is a senior associate at Allen & Gledhill LLP.
It should be noted that tracing does not exist as a claim or remedy per se. However, it is a process that is commonly relied on in civil claims involving fraud, particularly where the victim’s property has been mixed with other property or funds. Tracing is the process by which the plaintiff identifies the proceeds of his or her property and who they lie with, then justifies his or her claim that the proceeds can be regarded as representing the property (of which he or she has been defrauded).

In Singapore, there is a six-year limitation period on actions founded on a contract or tort. However, where an action is based upon the fraud of the defendant or where the right of action is concealed by the fraud of such a person, the period of limitation does not begin to run until the plaintiff has discovered the fraud or could have with reasonable diligence discovered it.

Where a victim successfully obtains judgment against the perpetrator, the victim will then need to enforce the judgment (usually for money). A detailed discussion of enforcement proceedings are beyond the scope of this chapter. However, it should be noted that there are likely limitations to successfully enforcing a judgment and recovering monies awarded by the court in a situation where the perpetrator has, by then, dissipated all of his or her own assets or the defrauded assets, or both, or mixed them such that legal title to the property is no longer traceable.

Tort of deceit or fraudulent misrepresentation
In order for a victim to succeed in a claim for tort of deceit or fraudulent misrepresentation, the following must be established:

a a representation of fact made by words or conduct;
b the representation must be made with knowledge that it is false;
c the representation must be made with the intention that it should be acted upon by the plaintiff;
d the plaintiff had acted upon the false statement; and
e the plaintiff suffered damage in doing so.

To defend against such a claim, a defendant would need to establish that at least one of the above elements cannot be satisfied. It is not a defence for the defendant to say that the plaintiff failed to take steps to verify the truth of the representations that a prudent person would take. Contributory negligence is also not a defence. The usual damages sought in a claim for tort of deceit or fraudulent misrepresentation are compensatory in nature and will generally be for financial loss flowing from the

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2 Limitation Act (Cap 163, 1996 Rev Ed) Section 6(1)(a).
3 Or his or her agent.
4 Limitation Act (Cap 163) Section 29(1).
5 Panatron Pte Ltd v. Lee Cheow Lee [2001] 2 SLR(R) 435 at [14].
6 Raiffeisen Zentralbank Österreich AG v. Archer Daniels Midland Co [2007] 1 SLR(R) 196 at [40].
7 Or by a class of persons that includes the plaintiff.
8 Panatron Pte Ltd v. Lee Cheow Lee [2001] 2 SLR(R) 435 at [24].
misrepresentation or misrepresentations. It is also possible to make a claim for exemplary damages ‘where the defendant’s deceit was calculated to make a profit beyond the damages payable to the plaintiff as compensation’.

**Breach of duty**

Where fraud has been committed by an employee or fiduciary, this may amount to a breach of duty. In respect of an employee, whether or not a breach has been committed will be dependent on the terms of the employment contract and the implied duties of an employee at law.

As for a fiduciary, he or she has, amongst many other duties, a strict duty not to misuse trust property and not to make an unauthorised profit by reason of his or her position as a fiduciary. In order for a victim to succeed in a claim for breach of fiduciary duty, it would be necessary to first establish that the defendant is a fiduciary. A common defence by a defendant against such a claim would thus be that he or she is not in fact a fiduciary. Recognised categories of fiduciary relationships include that of trustee–beneficiary, agent–principal, solicitor–client, partners and directors. The Singapore courts have also, in fact-specific instances, imposed fiduciary obligations in respect of other relationships such as employer–employee, and collective sales committee to subsidiary proprietors of strata development. The categories of fiduciaries are, therefore, not finite, and each claim (unless falling within the generally accepted fiduciary categories) will need to be analysed on its own facts.

A plaintiff may seek the following equitable or proprietary remedies for a breach of fiduciary duty:

- rescission of a contract that involves a breach of fiduciary duty;
- equitable compensation payable by the fiduciary to the beneficiary;
- an account of the ill-gotten profits payable by the fiduciary to the beneficiary;
- tracing the title of ill-gotten property that has been transferred from the fiduciary to the beneficiary;
- imposing a constructive trust on such a beneficiary; and
- injunctions or specific performance – to stop the fiduciary from committing a breach.

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11 *Ng Eng Ghee and others v. Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 at [137] and [142].
12 *Keech v. Sanford* (1726) 25 ER 223.
13 *ERA Realty Network Pte Ltd v. Puspha Rajaram Lakhiani and another* [1998] 2 SLR(R) 721; *Yuen Chow Hin and another v. ERA Realty Network Pte Ltd* [2009] 2 SLR(R) 786.
15 *Lee Hiok Woon and others v. Lee Hiok Ping and others* [1993] 2 SLR(R) 530.
17 *Smile Inc Dental Surgeons Pte Ltd v. Lui Andrew Stewart* [2012] 4 SLR 308.
18 *Ng Eng Ghee and others v. Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109.
In addition, the Companies Act\textsuperscript{20} (CA) also prescribes certain directors’ duties, and a breach of fiduciary duty can also be a breach of these statutory duties. For example, Section 157(1) CA prescribes that a director shall at all times act honestly and use reasonable diligence in the discharge of the duties of office. A breach of such statutory provisions may result in: (1) liability for any profit made by the officer or damage suffered by the company as a result of the breach; and (2) criminal liability.

Unjust enrichment

Unjust enrichment is another cause of action that can be brought against the perpetrator. It can also be brought against a beneficiary of the fraud who may not be the primary perpetrator. This can be particularly useful in cases where the primary perpetrator no longer has the subject monies in hand and, through tracing, it is discovered that the monies have been handed to other parties.

The following elements\textsuperscript{21} must be established for unjust enrichment to be made out:
\begin{itemize}
\item[a] the defendant must have been enriched;
\item[b] this enrichment was at the expense of the plaintiff;
\item[c] this enrichment was unjust (i.e., the presence of an ‘unjust factor’, such as a mistake induced by fraud);\textsuperscript{22} and
\item[d] the defendant cannot avail himself or herself of any defences.
\end{itemize}

A common defence relied on is that of change of position. However, this defence is not available to a wrongdoer. This defence is made out if: (1) the recipient of the funds has changed his or her position; (2) the change is bona fide; and (3) it would be inequitable to require the recipient of the funds to make restitution or restitution in full.\textsuperscript{23} In addition, there must be a causative link between the receipt of the benefit and his change of position, such that, but for the receipt of the benefit, the defendant’s position would not have changed.\textsuperscript{24}

If a claim of unjust enrichment is successfully made out, the plaintiff will have a personal remedy against the defendant, for example, requiring repayment of the sum that had been received or the value of non-monetary benefit received.\textsuperscript{25} The plaintiff may also make a claim for restitution from the ultimate recipient of the benefit (who may not be the perpetrator).\textsuperscript{26}

\begin{itemize}
\item[20] Cap 50, 2006 Rev Ed.
\item[21] Wee Chiau Sek Anna v. Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another [2013] 3 SLR 801 at [98].
\item[22] Skandinaviska Enskilda Banken AB (PUBL), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit [2009] 4 SLR(R) 788 at [260].
\item[23] Seagate Technology Pte Ltd v. Goh Han Kim [1994] 3 SLR(R) 836.
\item[26] ibid.
\end{itemize}
Conversion

To succeed in a claim for conversion, the victim must establish that there was a positive wrongful act of dealing with the goods and an intention in so doing to deny the owner’s rights or to assert a right inconsistent with them.27 Examples of defences are that the defendant took the goods lawfully under distress, or with the leave and licence of the plaintiff, or that he or she is entitled as against the plaintiff to a lien on the goods.28 Contributory negligence is not a defence.29

The usual remedy sought is either to retake the goods30 or to claim damages.

Conspiracy

Other than against the main perpetrator, claims can also be brought against persons who assisted the main perpetrator.

There are two types of civil conspiracy under Singapore law: (1) conspiracy to injure; and (2) unlawful means conspiracy.

A victim who seeks to establish a conspiracy to injure must establish31 the following:

a. a combination of two or more persons and an agreement between and amongst them to do certain acts;

b. the predominant purpose of the conspirators must be to cause damage or injury to the plaintiff;

c. the acts must actually be performed in furtherance of the agreement; and

d. damage must be suffered by the plaintiff.

A victim who seeks to establish a conspiracy by unlawful means must establish32 the following:

a. there was a combination of two or more persons to do certain acts;

b. the alleged conspirators intended to cause damage or injury to the plaintiff by those acts;

c. the acts were unlawful;

d. the acts were performed in furtherance of the agreement; and

e. the plaintiff suffered loss as a result of the conspiracy.

The usual remedy sought by a successful claimant in a conspiracy claim is that of damages, which is compensatory in nature.

Dishonest assistance and knowing receipt

A person who is not the primary perpetrator can also be held liable if he or she has dishonestly assisted in a breach of fiduciary duty33 or received property known to be transferred in breach of fiduciary duty.34

27 UCO Bank (formerly known as United Commercial Bank) v. Ringler Pte Ltd [1995] 1 SLR(R) 399.
29 Contributory Negligence and Personal Injuries Act (Cap 54, 2002 Rev Ed) Section 3(1).
30 Blades v. Higgs (1861) 10 CBNS 713, 142 E.R. 634.
31 Nagase Singapore Pte Ltd v. Ching Kai Huat and others [2008] 1 SLR(R) 80 at [23].
32 EFT Holdings, Inc v. MarinTeknik Shipbuilders (S) Pte Ltd [2014] 1 SLR 860 at [112].
33 Halsbury’s Laws of Singapore, Volume 9 (Singapore: LexisNexis, 2018 Reissue) at paragraph 110.234.
34 ibid.
To succeed in a claim for dishonest assistance, the victim must establish the following:

a. breach of trust or breach of fiduciary obligation;

b. the ‘third party’ defendant must have procured, induced or assisted the breach of trust or fiduciary duty;

c. the ‘third party’ defendant must have acted dishonestly; and

d. resulting loss to the claimant.

To succeed in a claim for knowing receipt, the victim of the fraud must establish the following:

a. disposal of the plaintiff’s assets in breach of trust (or fiduciary duty);

b. beneficial receipt by the ‘third party’ defendant of assets which are traceable as representing the assets of the plaintiff; and

c. knowledge on the ‘third party’ defendant’s part that the assets received are traceable to a breach of trust or fiduciary duty.

The ‘third party’ defendant may be held personally liable to account as if he or she were a constructive trustee where he or she has assisted in the breach of fiduciary duty. In this regard, the plaintiff can claim against the ‘third party’ defendant the value of the property transferred.

**Criminal remedies**

A victim can file a police report and request that the authorities investigate the perpetrator and/or abettor of a fraud. Fraud offences such as investment fraud, corporate fraud and fraud involving public institutions are usually investigated by the Commercial Affairs Department (CAD), a specialist division of the Singapore Police Force. Where the fraud involves market misconduct, capital markets or financial advisory offences, the Monetary Authority of Singapore is likely to jointly investigate the matter together with the CAD.

Specific corporate fraud offences are set out in the Penal Code, the CA and the Income Tax Act, and there is no limitation or time bar in respect of criminal offences in Singapore.

As mentioned above, the victim will have much less control over criminal proceedings as compared to civil proceedings. At the stage of investigations, the victim (or its representative) is likely to be asked to attend an interview and provide facts and evidence of the alleged fraud. There is no obligation on the part of the investigating authorities to release information gathered from the investigation to the victim, and they usually do not do so. It is, therefore, difficult to obtain evidence from an investigating authority for use in a victim’s separate civil proceedings (if any) unless a timely prosecution is commenced and information made public in trial proceedings.

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35 Caltong (Australia) Pty Ltd (formerly known as Tong Tien See Holding (Australia) Pty Ltd) and another v. Tong Tien See Construction Pte Ltd (in liquidation) [2002] 2 SLR(R) 94 at [33].


37 Halsbury’s Laws of Singapore, Volume 9 (Singapore: LexisNexis, 2018 Reissue) at paragraph 110.234.


40 See, e.g., Companies Act (Cap 50, 2006 Rev Ed) Sections 157, 401, 402 and 406.

41 See, e.g., Income Tax Act (Cap 134, 2014 Rev Ed) Sections 96 and 96A.
Following the conclusion of the investigation, the AGC, with the recommendation of the authority or agency investigating the purported offence, will decide whether to: (1) charge the perpetrator; (2) give the perpetrator a warning; or (3) take no further action. The Singapore authorities take allegations of fraud seriously and if there is evidence that an offence of fraud has been committed, they are likely to take firm action against the perpetrator.

A victim can also choose to file a magistrate’s complaint with the state courts of Singapore, particularly in instances where authorities have declined to investigate or take action. A magistrate’s complaint is generally filed by an individual wishing to commence private prosecution (as opposed to prosecution by the state).

However, a magistrate’s complaint is generally not likely to be accepted for filing if:

- the act complained of is not a criminal offence;
- the offence carries an imprisonment term exceeding three years; or
- the respondent has already been charged or issued a stern warning by the state.

Upon successful filing of a magistrate’s complaint, a magistrate will examine the complainant and thereafter issue further directions as deemed appropriate. The magistrate retains the discretion to make certain orders as necessary, including directing police investigations or dismissing the complaint. In the event the AGC takes over prosecution of the case, the complaint will be closed.

After a charge has been preferred against the perpetrator, he will have two choices – to plead guilty or to proceed to trial if his or her position is that he or she is innocent. If the matter proceeds to trial, the prosecutor will need to establish that the offence was committed beyond reasonable doubt to secure a conviction.

In addition, before an offender is convicted of any offence, the court has to consider whether or not to make a compensation order where it may consider it appropriate to do so. The court has power to order that the convicted perpetrator of fraud pay a sum fixed by the court by way of compensation to the person injured. The court can also order the attachment and sale of movable or immovable property belonging to the perpetrator so that the proceeds of the same can be paid to the victim.

An order for compensation does not affect the right of the victim to a civil remedy for the recovery of any property or for the recovery of damages ‘beyond the amount of compensation paid under the order’. It should be noted that the courts have held that compensation should only be ordered in instances where the fact and extent of damage are either agreed or clearly and easily ascertainable on the evidence.

We would also highlight that an order for the convicted offender to pay compensation does not form part of the sentence imposed on the offender, but is for the purpose of allowing

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42 Tay Wee Kiat and another v. Public Prosecutor [2018] 5 SLR 438 at [6].
43 Criminal Procedure Code (Cap 68, 2012 Rev Ed) Section 359(1).
45 Tay Wee Kiat and another v. Public Prosecutor [2018] 5 SLR 438 at [8].
the victim to recover compensation where a civil suit is impractical or inadequate. Given this, the amount of compensation ordered will generally not exceed what would be reasonably obtainable in civil proceedings.

ii Defences to fraud claims

See the previous Subsection for defences to fraud claims.

III SEIZURE AND EVIDENCE

Where the perpetrator of a fraud is the subject of a criminal investigation, the investigating authorities have wide ranging powers under the Criminal Procedure Code – to search premises and seize evidence, access computers and freeze assets.

It is in the area of civil claims that seizure of assets and obtaining evidence from third parties is more complicated, and we set out below the general procedural mechanisms commonly relied upon by victims of fraud in civil claims.

i Securing assets and proceeds

Mareva injunction

Where civil claims in respect of fraud are concerned, a plaintiff can apply to seize and secure assets or the proceeds of fraud via court proceedings. This is most commonly done by way of a Mareva injunction or freezing order. An application for a Mareva injunction is usually taken out at the same time as commencement of the civil proceedings, so as to ensure that the defendant does not have notice of the proceedings and time to shift assets.

The court can grant a domestic Mareva injunction (i.e., over assets held in Singapore) where the following conditions are met:

a there is a valid cause of action over which the Court has jurisdiction, that the domestic Mareva injunction is collateral to;

b there is a good arguable case on the merits of the plaintiff’s claim;

c the defendant has assets within the court’s jurisdiction. This includes all assets beneficially held by the defendant, but excludes assets which the defendant legally owns but holds on trust for third parties; and

d There is a real risk that the defendant will dissipate their assets to frustrate the enforcement of an anticipated judgement by the court.

As for an extraterritorial Mareva injunction (i.e., over assets held outside of Singapore), this can be granted by the court if the same conditions as a domestic Mareva injunction are present, subject to the following modifications:

a a valid cause of action must accrue in Singapore; and

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46 id, at [7].
47 id, at [10].
48 Singapore Civil Procedure (Singapore: Sweet & Maxwell, 2019) at page 666.
49 id, at page 668, citing STX Corp v. Jason Surjana Tanuwidjaja [2014] 2 SLR 1261 at [22].
50 id, at page 667.
It must be shown that the defendant has assets outside the court's jurisdiction. Furthermore, if the defendant has assets both within and outside the court's jurisdiction, it must then be shown that there are insufficient assets within the court's jurisdiction to satisfy the plaintiff's claim.51

As part of the application for a *Mareva* injunction, the plaintiff will be required to provide an undertaking to comply with any order for damages (sustained by the defendant and third parties as a result of the *Mareva* injunction) that the court may make.52

To support this undertaking, the plaintiff may be required to:

a. make a payment into court;
b. provide a bond by an insurance company that has a place of business in Singapore;
c. provide a written guarantee from a bank that has a place of business in Singapore; or
d. make a payment to the plaintiff's solicitor that is to be held by the solicitor as an officer of the court pending any order for damages.53

An application for a *Mareva* injunction also requires full and frank disclosure, in that the court must be fully informed by the plaintiff of all material facts. Where an application for a *Mareva* injunction does not contain all material facts, and this is brought to the attention of the court by, for example, the defendant, this may thwart the plaintiff's attempts to seize or secure the defendant's assets.

In Singapore, the courts have also held that, in principle, evidence of a collateral or ulterior purpose on the part of the plaintiff could justify the refusal of a *Mareva* injunction, although this would ordinarily be difficult to establish at an early stage of proceedings in which *Mareva* injunction applications are usually brought.54

**ii Obtaining evidence**

**Anton Piller order**

In respect of obtaining evidence in the context of civil claims in respect of fraud, a plaintiff can apply to search premises and seize evidence by way of an *Anton Piller* or a search and seizure order. Similar to a *Mareva* injunction, this is usually done at the same time as commencement of the civil proceedings, so as to ensure that the defendant does not have notice of the proceedings and time to destroy evidence.

An *ex parte*55 *Anton Piller* order may, in general, be granted if the following conditions are met:56

a. there is an extremely strong prima facie case of a civil cause of action;
b. the potential or actual damage to the plaintiff, which the plaintiff faces if the *Anton Piller* order is not granted, is serious;

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51 *id.*, at page 675, citing *Guan Chong Cocoa Manufacturer Sdn Bhd v. Pratiwi Shipping SA* [2003] 1 SLR(R) 157 at [29].
52 *id.*, at pages 656 and 674.
53 *id.*, at page 657.
54 *JTrust Asia Pte Ltd v. Group Lease Holdings Pte Ltd and others* [2018] 2 SLR 159.
55 i.e. where the defendant's solicitors are not given notice of the application for the *Anton Piller* order and only the plaintiff's solicitors attend the application hearing.
there is clear evidence that the defendant has incriminating documents or items in their possession; and

d there is a real risk that the defendant may destroy the above documents or items before an application *inter partes*\(^57\) can be made.

However, it is worth noting that even if the above conditions are met, a court may not necessarily grant an *Anton Piller* order. Rather, a court will only do so after determining that the prospective harm the plaintiff faces (as a result of the *Anton Piller* not being granted), outweighs the prospective harm that the defendant faces (as a result of the order).\(^58\)

As part of the application for an *Anton Piller* order, similar to an application for a *Mareva* injunction, the plaintiff will have to undertake to pay damages sustained by the defendant as a result of the *Anton Piller* order if so ordered by the court. In addition, the plaintiff must also undertake to comply with any order for damages that the court makes in connection with a finding that the actual carrying out of the *Anton Piller* order was: (1) in breach of the terms of the order made; or (2) otherwise inconsistent with the plaintiff’s solicitors’ duties as officers of the court.\(^59\)

To support this undertaking, the plaintiff may be required to take actions similar to those in an application for a *Mareva* injunction.\(^60\) An application for an *Anton Piller* order also requires full and frank disclosure of a similar nature to that required in an application for a *Mareva* injunction.\(^61\)

**Third party discovery or bankers trust order**

Where evidence needed for a civil suit in respect of fraud rests with a third party (rather than the defendant) or where there is a need, Singapore’s civil proceedings provide for certain mechanisms to allow the plaintiff to obtain this evidence.

For example, where the identities of the perpetrators of a fraud have not been identified and there is a need to trace the property that the victim has been defrauded of, a prospective plaintiff may apply for a *Norwich Pharmacal* order (also known as an application for pre-action discovery).

Pre-action discovery, may, in general, be granted if the following conditions\(^62\) are met:

\[ a \] the non-party possessing the relevant information must have been involved in the wrongdoing, though the non-party need not have necessarily caused or known of the wrongdoing;\(^63\)

\[ b \] there is a reasonable prima facie case of wrongdoing by the unidentified perpetrators;\(^64\) and

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\(^57\) i.e. where the application is served on the defendant and both sets of solicitors attend the application hearing.

\(^58\) *Computerland Corp. v. Yew Seng Computers Pte Ltd* [1991] 2 SLR(R) 379; See also *Singapore Civil Procedure* (Singapore: Sweet & Maxwell, 2019) at page 683.

\(^59\) *Singapore Civil Procedure* (Singapore: Sweet & Maxwell, 2019) at page 684.

\(^60\) *ibid*.

\(^61\) *Singapore Civil Procedure* (Singapore: Sweet & Maxwell, 2019) at page 687.

\(^62\) *Dorsey James Michael v. World Sport Group Pte Ltd* [2014] 2 SLR 208.

\(^63\) *id*, at [39].

\(^64\) *id*, at [44].
granting the order is necessary to enable the Plaintiff to bring proceedings, or it is just and convenient in the interests of justice to grant the same.65

Where the third party who has the evidence needed is a bank, a plaintiff may also apply for what is known as a bankers trust order to preserve or trace the proceeds of fraud residing with the bank. Generally speaking, an application for a bankers trust order is granted on similar grounds to a Norwich Pharmacal order66 and, where the court grants such an order, this will override the usual banking secrecy considerations that banks have in releasing information in respect of its customers assets to third parties.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering
Where fraud involving banks or money laundering has been committed, this will usually be an offence under the Penal Code or under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act67 (CDSA).

The CDSA criminalises, among others, acts of money laundering and provides for confiscation of benefits derived from the same. The CDSA also imposes reporting requirements (by way of a suspicious transaction report) on those with reasonable grounds to suspect that property may be connected to, for example, proceeds of criminal misconduct.

There are also various rules and regulations overseen by the Monetary Authority of Singapore (the central bank of Singapore), which focus on anti-money laundering and combating the financing of terrorism and which regulate, among others, financial institutions.

ii Insolvency
Where monies are owed to the victim, the victim can apply to make the perpetrator bankrupt or insolvent as the case may be.

In the instance that the perpetrator is either bankrupt (where the perpetrator is an individual) or insolvent (where the perpetrator is a corporate entity), there are also certain protections for the victim that will allow a clawback of monies or assets, or both, if the bankrupt or insolvent perpetrator has, within a specific time period, entered into transactions at an undervalue68 or given an unfair preference to a person.69

iii Arbitration
Section 24(a) of the International Arbitration Act70 provides that an arbitral award may be set aside by the court where the making of the award was induced or affected by fraud.

65 id., at [45].
66 Singapore Civil Procedure (Singapore: Sweet & Maxwell, 2019) at page 573, citing La Dolce Vita Fine Dining Co Ltd v. Deutsche Bank AG [2016] SGHCR 3 at [59], [70] and [71].
68 Bankruptcy Act (Cap 20, 2009 Rev Ed) Section 98.
69 Bankruptcy Act (Cap 20, 2009 Rev Ed) Section 99.
70 Cap 143A, 2002 Rev Ed.
Fraud’s effect on evidentiary rules and legal privilege

Pursuant to Section 128(1) of the Evidence Act, advocates and solicitors are not permitted, without a client’s express consent, to disclose privileged communication made in the context of the solicitor and client relationship. However, there are two important exceptions to this rule in Section 128(2) which provides that: (1) communication made in furtherance of an illegal purpose; and (2) any fact observed by an advocate and solicitor in the course of his or her employment showing that any crime or fraud has been committed since the commencement of his or her employment are not protected from disclosure.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

In order for a cross-border fraud claim to be heard in the Singapore Courts:

a there must be a legal connection between the case or the defendant and Singapore; and

b the Singapore Court must be satisfied that, bearing in mind the degree of connection of the case with Singapore and other countries, Singapore is the most appropriate forum for the dispute.

In order for a case commenced in the Singapore Courts to be served out of jurisdiction, the merits of the case must also pass a threshold test.

ii Collection of evidence in support of proceedings abroad

Where criminal proceedings in respect of fraud have been instituted abroad, the overseas authorities can make a request to the AGC for mutual legal assistance, which can include the taking of evidence. Singapore has existing mutual legal assistance treaties with a number of countries, and these countries will be rendered assistance in accordance with the terms of the respective treaty and the Mutual Assistance in Criminal Matters Act. Where a country does not have such a treaty with Singapore, it may receive assistance if there is an undertaking of reciprocity.

In respect of civil proceedings, an application for a pre-action discovery or bankers trust order (as discussed above) can be made in support of proceedings abroad.

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

The question as to whether the Singapore courts can grant a Mareva injunction in aid of foreign court proceedings, and in circumstances where the merits of the claim will not be determined in Singapore, has also been considered by the courts. In this regard, the current position is that the Singapore courts can grant a Mareva injunction even in aid of foreign court proceedings, so long as it appears to the court to be just or convenient that such an order should be made.

71 Cap 97, 1997 Rev Ed.
72 Cap 190A, 2001 Rev Ed.
73 China Medical Technologies, Inc (in liquidation) and another v. Wu Xiaodong and another [2018] SGHC 178.
iv Enforcement of judgments granted abroad in relation to fraud claims

Under the Reciprocal Enforcement of Commonwealth Judgments Act (RECJA) and the Reciprocal Enforcement of Foreign Judgments Act (REFJA), when certain requirements are met, judgments made by the superior courts of certain countries may be registered and enforced directly in Singapore. It is generally easier to register a judgment pursuant to the REFJA than the RECJA due to the fact that registration under the former is available as a matter of right rather than a matter of the court’s discretion.

In respect of foreign judgments that do not fall within the RECJA and REFJA, these may generally be enforced under common law if the judgment is:

a. for a definite sum of money;
b. final and conclusive; and
c. the foreign court has jurisdiction in the context of conflicts of law.

v Fraud as a defence to enforcement of judgments granted abroad

If a foreign judgment was obtained by fraud, this would be a basis for the courts in Singapore to deny enforcement of the said foreign judgment in Singapore under the RECJA, REFJA and common law.

VI CURRENT DEVELOPMENTS

In a recent development that took place at the end of 2018, and which signifies the seriousness with which Singapore regards money laundering offences, Parliament passed various amendments to the CDSA, including:

a. an increase in penalties for corporations and professional service providers who are involved with money laundering;
b. an increase in penalties for not reporting suspicious transactions;
c. an increase in penalties for tipping off on investigations or a STR lodged under the CDSA; and
d. the introduction of a new offence that criminalises the possession or use by an accused of property that would be suspected by a reasonable person of being benefits from criminal conduct, if the accused cannot satisfactorily explain how he or she came by the property.

Separately, a new omnibus bill that consolidates both personal and corporate insolvency laws was passed by Parliament at the end of 2018. Once the Insolvency, Restructuring and Dissolution Act 2018 comes into force, undervalue transactions and unfair preferences entered into and made by a bankrupt or insolvent perpetrator will be governed by this new Act.

74 Cap 264, 1985 Rev Ed.
75 Cap 265, 2001 Rev Ed.
Chapter 28

SPAIN

Adriana de Buerba and Ángela Uría

I  OVERVIEW

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 in order 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.

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.

In 2015, the Spanish Criminal Code (SCC) was amended substantially to increase the penalties for a number of financial offences and define new types of wrongdoing. Specifically, the amendment significantly affected the legal provisions on the confiscation of the proceeds of crime. The regulation of fraud, unlawful administration, IP infringements and other offences were also amended. In addition, as a result of the public outcry regarding significant corruption schemes uncovered in previous years, the offences related to private and public corruption were amended significantly and the corresponding penalties were enhanced. Finally, the SCC amendment also establishes the possibility of a company's criminal liability being mitigated or excluded, under certain circumstances, if it had implemented adequate corporate compliance programmes prior to the commission of the offence.

In line with this trend to increase the punishment for financial crime and comply with EU regulations, the SCC was amended again in February 2019, in relation to matters such as stock exchange market abuse and insider trading, EU and Spanish tax fraud and, once again, corruption.

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II  LEGAL RIGHTS AND REMEDIES

i  Criminal remedies

The SCC defines fraud as obtaining undue profit from the victim using deception. Committing fraud generally carries a prison sentence of up to three years and a fine. The prison sentence can be increased 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 in order to exercise the criminal action. The victim can exercise either action by filing a criminal complaint before the competent judge in order 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 proceedings and exercise criminal and civil actions. Even if the victims decide not to appear as parties to the proceedings, their right to restitution will not be waived. 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 in writing. The victim can also reserve the civil action in order 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 are 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 in order to litigate

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3 Article 249 of the SCC.

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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 associations in order 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 (the perpetrator) and the persons who assisted in committing it (accomplices). When several individuals are held liable for the fraud, the court determines, in the judgment, the quota for which each group is to be held accountable. Typically, all the offenders are held jointly and severally liable for their respective quotas. The SCC was amended in 2010 in order 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 ordered to pay compensation to the victims, jointly and severally, with the individuals who were 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 for 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 can 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 a direct consequence of the malfunctioning of the public service they were entrusted to provide. This civil liability is subsidiary to that of the individuals or companies held criminally liable for the fraud. This means that the public entities are only liable for the amounts that the offenders are unable to pay to the victim.

**Companies**

Companies can 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 is also subsidiary to that of the individuals or companies held criminally liable for the fraud.
Receivers of the proceeds of fraud

Those persons who profited for gain from the effects of the fraud can be ordered to return the assets or to pay compensation to the victim up to the amount of their share of the proceeds, provided the following requirements are met:

a) they did not take part in the fraud;
b) they received the proceeds of the fraud without any consideration; and
c) the persons acted in good faith; in other words, they were unaware that the assets were the proceeds of a fraud.4

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 assets stolen abroad in Spain, as is 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 as per the prosecution’s or the civil claimant’s request, shall call them as parties to the criminal proceedings in order to allow them to exercise the corresponding defence.

In Spanish case law, the 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 is ordered 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 reasonable doubt exists.

The same standard of proof applies to the civil claim, when filed within criminal proceedings. According to the SCC, the civil claim is limited to:

a) the restitution of the specific defrauded goods, when possible;
b) the restoration of the injury; and
c) 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 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.

4 Spanish Supreme Court (Criminal Chamber) judgment No. 433/2015 of 2 July 2015.
ii 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 in order to exercise it before a civil court. However, the victim cannot file a civil lawsuit until a criminal action is completed through a final and binding judgment. For this reason, in practice, it is extremely rare for victims to choose this option.

The statute of limitations corresponding to this civil action, when exercised before civil courts, is five years from the day the criminal judgment became final and binding.

Civil courts are bound by the facts affirmed in the previous criminal judgment and, therefore, the dispute within these civil proceedings is 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 in order 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 *fumus 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 evaluates 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 is 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 adopts 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 is 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 is aimed at guaranteeing 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.

In order 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 are 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 investigates 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 is 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 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.

The judge can order any premises where there are indications that evidence of the offence might be found to be searched, or the defendant's written or oral communications to be intercepted. In order 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 Matters⁵ (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 in order 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,⁶ namely:

- a information regarding the legal standing or representation of the potential defendant;
- b exhibition of the assets that constitute the object of the claim;
- c exhibition of a will;
- d exhibition of a company’s documents or financial records, if the claimant is one of the company’s shareholders;
- e exhibition of an insurance policy to the person in possession of it; and
- f in proceedings affecting the interests of consumers or where there are a significant number of potential claimants, adoption of the appropriate measures for identifying the affected individuals.

Otherwise, the general rule in civil proceedings is that each party must provide the court with the evidence supporting its respective claims.

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⁵ In force in Spain since 25 August 1987.
⁶ Article 256 of the SCivPA.
**Information requests to third parties**

Once the civil proceedings are initiated, the SCivPA entitles parties to request the court to order that certain information or documents be gathered from 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. Following the collapse of the Spanish financial system, there were a number of criminal cases against the former management of financial institutions, which especially affected savings banks. This case law assessed the liability of savings banks in three types of cases:

- **where management at the savings banks deliberately forged the banks’ financial records in order to conceal their actual financial situation and pretended to meet the regulator’s solvency requirements;**
- **when management at the savings banks significantly increased their compensation packages in spite of the critical financial situation of the institutions; and**
- **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. In terms of the second group, the first cases sentenced by the Spanish criminal tribunals convicted directors of savings banks of unlawful administration or misappropriation, or both. However, now the most egregious cases have been tried, and recent judgments on the matter have acquitted management when high retributions were deemed reasonable by the Bank of Spain and necessary to retain the management of savings banks in times of crisis. As for the third group, although the Spanish Public Prosecution Office initially launched a number of criminal investigations in order to assess potential criminal liability in the introduction to the market of financial products by savings banks, eventually most of them were closed as the prosecution did not succeed in proving the existence of a systemic and organised scheme to defraud customers. For this reason, eventually, case law 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.

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7 Article 381 of the SCivPA.

8 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.
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 regulations on the subject, imposes a number of obligations on those that are 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.10

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 insolvency.

Fraudulent conveyance of assets
The SCC considers that a criminal offence has been committed when the debtor:

\( a \) fraudulently hides his or her assets in order to put them beyond the reach of his or her creditors, provided that the conduct results in actual or apparent insolvency; or

\( b \) carries out any other transaction, actual or simulated, for the purposes of fraudulently delaying, hindering or preventing ongoing enforcement proceedings.11

Fraudulent insolvency
These offences are meant to protect creditors from the actions of debtors that have been judicially declared insolvent.12 They can be classified into the following types of misconduct:

\( a \) actions aimed at putting the debtor’s assets out of reach of the insolvency proceedings;

\( b \) actions aimed at forging the debtor’s financial records or any other relevant documents in order to conceal or delay the declaration of insolvency;

\( c \) actions aimed at favouring some of the creditors to the detriment of the rest; and

\( d \) in general, actions that constitute a serious breach of the diligence duties in managing the insolvency situation prior to the insolvency judicial proceedings.


10 Article 301 et seq. of the SCC.
11 Article 257 of the SCC.
12 Articles 259 to 261 bis of the SCC.
iii Fraud’s effect 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.\(^{13}\) Indeed, for procedural fraud to apply, it is a specific requirement that the deception be 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\(^ {14} \) 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.

Legal privilege only applies to cases in which the lawyer acts as such. When it is determined that the lawyer colluded with the client in order 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 is always applicable, provided that Spanish criminal courts have jurisdiction to investigate and try the case.

The general rule is that Spanish courts are competent for trying the case provided that the fraud was perpetrated in Spain. Spanish case law interpreted this requirement broadly and recently adopted the ubiquity principle, according to which the Spanish courts are competent when any of the elements of the fraud, including its effects, took place on Spanish territory.

Exceptionally, the Spanish criminal courts are also competent for trying fraud perpetrated abroad in the following cases:

\(^{13}\) Article 250.1.7 of the SCC.

\(^{14}\) Article 542 of the SAJB and Article 416.2 of the ScrimPA, specifically for criminal proceedings.
a when the perpetrator of the fraud is a Spanish national; 

b where 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

c 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:

a claims regarding real estate located in Spain;

b claims regarding the incorporation or winding-up of companies and legal persons domiciled in Spanish territory or regarding the decisions of their corporate bodies;

c claims regarding the validity of registrations made with any Spanish public registry; and

d those 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 are competent when:

a the parties expressly or implicitly agree on submitting the case to their jurisdiction; or

b 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 is decided in accordance with the law of the country where the event producing the damage took place.

Criminal proceedings

Through Act 23/2014 on the Mutual Recognition of Criminal Judicial Decisions in the European Union of 20 November 2014, Spain introduced a comprehensive piece of 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.

This Act regulates the following mutual recognition instruments:

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15 Provided 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 last case, that he or she did not serve the sentence.

Spain

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.

The execution of mutual judicial assistance and mutual recognition requests issued by criminal judicial authorities of third states are 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 would 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 carried out 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.17

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17 Article 722 of the SCivPA.
ii  Enforcement of judgments granted abroad in relation to fraud claims

The enforcement of the criminal aspects of the judgments granted abroad in relation to fraud matters (e.g., the sentence imposed on the offender) is 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), are 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 law also establishes specific proceedings for the recognition and enforcement in Spain of civil judgments rendered abroad, applicable when no EU regulation or treaty exists.

iii  Fraud as a defence to enforcement of judgments granted abroad

Spanish law does not envisage fraud as 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.

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I OVERVIEW

Despite its small size (8 million inhabitants), Switzerland is a leading jurisdiction in asset recovery disputes, as there is rarely a global asset recovery case which does not have at least one Swiss element.

Switzerland has been for decades and remains the main offshore banking centre in the world, with more than one quarter, or US$2.2 trillion, of the world’s foreign assets under management. Furthermore, Switzerland has more recently become the world’s number one commodity trading hub. Its global market share is estimated at 35 per cent for oil, 60 per cent for metals and 50 per cent for sugar and cereals respectively.

It is therefore not surprising that a fair share of cross-border asset recovery disputes involve Swiss banks or financial intermediaries, or commodity trading companies, as assets, claims and evidence lay in Switzerland.

Of particular importance is the commitment of Swiss law enforcement authorities to investigate money laundering and to assist crime victims when they participate as plaintiffs in criminal proceedings.

The situation has recently improved with the adoption of a new cross-border insolvency regime, in force since January 2019, which aims at simplifying the recognition of foreign insolvencies and the work of foreign officeholders.

II LEGAL RIGHTS AND REMEDIES

In Switzerland, as in most civil law jurisdictions, civil remedies need to be supplemented with criminal remedies to achieve a successful asset recovery strategy.

Due to the lack of a proper discovery process under Swiss rules of civil procedure, civil proceeding in fraud-related matters are in most cases preceded with criminal proceedings, so as to obtain evidence and secure assets in support of civil claims.

Rather than opting for the civil route, the institution of criminal proceedings enables the victims of fraud participating as plaintiffs to obtain from law enforcement authorities that they issue broad freezing and disclosure orders from the defendants and third parties holding assets or information. The Swiss criminal system enables the plaintiffs, to a certain extent, to be compensated with their losses.

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Fraud has a narrower meaning under Swiss law than the general meaning it is given by asset recovery practitioners. Pursuant to Article 146(1) of the Swiss Penal Code (SPC), a fraud is committed by ‘any person who with a view to securing an unlawful gain for himself or another wilfully induces an erroneous belief in another person by false pretences or concealment of the truth, or wilfully reinforces an erroneous belief, and thus causes that person to act to the prejudice of his or another’s financial interests’. For the purpose of this article, the terms ‘fraud’ are defined broadly in order to include, in particular but not limitedly, the following felonies, within the meaning of Article 10(1) and (2) SPC: embezzlement, fraud, criminal mismanagement, felonies committed in bankruptcy, forgery and public bribery.

Swiss law provides for two types of criminal corporate liability for Swiss or foreign legal entities:

- a subsidiary criminal liability if it is not possible to attribute to a specific person a felony or misdemeanour committed within the company, due to its inadequate organisation;
- a primary liability in regard to money laundering, organised crime and bribery, independently of the criminal liability of individuals if the company did not take all the reasonable and necessary organisational measures to prevent such offences.

i Civil and criminal remedies

Criminal remedies

The Swiss Code of Penal Procedure (SCPP) provides ample rights to persons harmed by a crime, and Swiss criminal proceedings are in most cases the key to obtain evidence and freeze assets.

Where fraud is committed, in Switzerland or abroad, criminal proceedings may be opened if Swiss jurisdiction is given pursuant to Articles 3–8 SPC to pursue the predicate offence and/or the subsequent money laundering of the proceeds of the felonies committed. Criminal proceedings can be opened ex officio (e.g., after a suspicious activity report is sent by the Money Laundering Reporting Office Switzerland (MROS), the Swiss financial intelligence unit, to the criminal authorities) or upon criminal complaint by a private plaintiff. Criminal proceedings are opened by the office of the attorney general (through a prosecutor) when the reports or the first investigations show that there exists a sufficient suspicion that a criminal offence was committed.

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4 Felonies are distinguished from misdemeanours according to the severity of the penalties that the offence carries. Felonies are offences that carry a custodial sentence of more than three years.
5 Article 138 SPC.
6 Article 146 SPC.
7 Article 158 SPC.
8 Article 163 ff. SCP.
9 Article 251 SPC.
10 Article 322 ter ff. SPC.
11 Article 102 SCP.
12 Article 301 SCPP.
13 Article 309(1)(a) SCPP.
Any individual or legal entity (including a Swiss or a foreign public entity) whose rights, as legally protected by the applicable provision of the Swiss Penal Code, have been directly harmed by a crime subject is deemed to be an aggrieved person. Only persons or entities that have been directly harmed by a crime may be admitted as plaintiffs. Persons who are indirectly aggrieved by a crime, such as the shareholders, the directors, the employees, the creditors or the assignees of the direct victim of the crime are not considered to be aggrieved persons.

An aggrieved person may file a criminal complaint or join existing criminal proceedings by declaring its intention to become a plaintiff supporting the prosecution or suing for damages, or both.

During the criminal investigation, the plaintiff has essentially the same party rights as the suspect, in particular: to require orders from the prosecutor (including freezing, production and search orders); to attend examination of witnesses or suspects and have questions put to them; to receive notification of the decisions of the prosecutor and appeal against those which aggrieve his rights and file observations in respect of other parties’ appeals; and to access the file, with the right to take copy.

The prosecutor has a duty to gather evidence relating to the civil claims of the plaintiff, inasmuch as it does not unduly expand or delay the procedure.

In addition to the right to participate in the criminal investigation, the person aggrieved by the crime, who made the civil plaintiff declaration during the criminal investigation, may, in the context of the criminal trial, request the award of damages against the accused person. The award part of the criminal judgment has the same effect as a judgment issued by a civil court.

Civil remedies

It is only if the Swiss conflict of law rules, governed by the Private International Law Act (SPILA), designate Swiss law as substantive law that it shall apply (see below).

Swiss law of obligations is governed by the Swiss Code of obligations (SCO).

Tort liability is given when the claimant proves that the defendant committed an unlawful act.

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14 When a provision is meant to exclusively protect public or collective interests, its breach, even if it causes damage to a person, does not entitle such person to be considered as injured under the law of criminal procedure.
15 Article 115 SCPP.
16 Article 118 SCPP.
17 Article 119 SCPP.
18 Article 109 SCPP.
19 Article 147 SCPP.
20 Articles 393 and 382 SCPP.
21 Article 390 SCPP.
22 Article 101 SCPP.
23 Article 313 SCPP.
24 Article 119(2)(b) SCPP.
25 Article 122 SCPP.
26 Civil liability for breach of contract is excluded from this chapter.
27 Article 41 SCO.
In addition to civil fraud and infringement to absolute rights such as property rights, tort liability will exist in cases of criminal offences, when such the goal of these offences is to protect the assets or interests that were harmed. Complicity or inducement to commit a criminal offence will entail liability for tort.

Under Article 55(2) SCC, the governing officers bind the legal entity by concluding transactions and by their other actions. Under Article 55(1) SCO, the employer is liable for the damage caused by its employees in the performance of their work unless it proves that it took all due care to avoid a damage of this type or that the loss or damage would have occurred even if all due care had been taken.

The burden of proof lies with the plaintiff. In addition to the unlawful act, the claimant has to prove a loss, causation between the unlawful act and the loss, and a fault.

Most offences against property are intentional offences and thus may only form the basis of an unlawful act in the sense of Article 41 SCO if wilful intention can be established. Likewise, complicity or inducement to commit an offence has to be intentional.

In the case of loss resulting from an unlawful act, the injured party is entitled to compensation of its ‘negative’ interest, that is, to be put back in the situation in which it would have found itself if the loss-causing event had not occurred. Compensation of damage only consists in direct losses, to the exclusion of indirect losses.

Swiss law substantive does not know the concept of constructive trust. However, certain similar results may be achieved through the provisions governing unjust enrichment provision, where restitution is required for what has been received without valid cause, and agency without authority, where the agent who acted against the principal’s interests must compensate the principal for its losses and remit its gains to the principal.

Civil proceedings are governed by the Swiss Code of Civil Procedure (SCCP). The filing of a claim needs in principle to be preceded by an attempt of conciliation. If the conciliation fails, the claimant may file its particulars of claims. Particulars of claim must contain a precise allegation of the facts, with the exhibits supporting them and the additional proof proposed (examination of witnesses, provision of documents held by the defendant or third parties, mutual assistance, expert reports, etc.; affidavits or witness statements are not admissible evidence). There is no discovery process, and the production of documents is usually limited to a few documents, which must be precisely described by the party requesting them.

In principle, evidence is administered only after the parties have exchanged their briefs and rejoinders. It is only under specific condition that a claimant may make new factual allegations or amplify the reliefs sought.

Consequently, in cases where many of the facts are initially unknown to the victim of a fraud, it is advisable to collect evidence and secure assets through criminal proceedings before starting civil proceedings.

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28 Article 28 SCO.
29 Article 25 SPC.
30 Article 8 SCC.
31 Article 62 SCO.
32 Article 419 SCO.
Trials in first instance typically last from one to three years but may last even longer in case of preliminary objections or obtaining evidence abroad. Appeals to the cantonal court of appeal usually last less than a year, as well as those to the Federal Supreme Court.

ii Defences to fraud claims

The main defences to fraud claims are limitations and waivers. Limitations in tort claims are of one year from the moment the injured party became aware of the loss and the person who caused it and, in any case, 10 years from the day on which the loss-causing event occurred. However, if the losses derive from a punishable act subject to a longer limitation period under criminal law, this longer limitation period applies to civil claims. Under Swiss criminal law, limitation is of 15 years for felonies and of 10 years for money laundering. Criminal law limitation only stops running when a criminal judgment is issued in first instance. Actions for illicit enrichment are subject to limitation after one year from the day on which the injured party became aware of its right of recovery and, in any case, after 10 years from the emergence of this right. Civil limitation (whether for contractual, tort or unjust enrichment claims) may be interrupted, launching a new full limitation period, by initiating debt enforcement proceedings, filing an application for conciliation, submission of a statement of claim or defence to a court or arbitral tribunal, or a petition for bankruptcy.

General terms of conditions, notably of Swiss banks, usually contain waivers of liability and transfer of risk clauses. However, such clauses do not apply to gross negligence. The ex turpi causa non oritur actio is not available as such under Swiss law, except under the narrow perspective of abuse of rights and public policy. Under Article 44 SCO, however, the judge may reduce the losses, or even not award them, when the injured party has consented to the injury or when facts for which he is responsible have contributed to creating the loss, increasing it, or aggravating the debtor's situation. Under case law, the injured party may be accused of not having exercised the necessary care to safeguard its own interests, provided, however, that it should have been able to foresee the occurrence of a possible loss and still did not adapt its conduct. The contributory negligence is assessed objectively and the injured party's conduct must be compared with that of a reasonable person in an identical situation.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

There are three ways of securing assets and proceeds in Switzerland:

a criminal freezing orders;
b civil attachment orders;

33 Article 60 SCO.
34 Article 60(2) SCO.
35 Article 97 SPC.
36 Article 97(3).
37 Article 67 SCO.
38 Article 135 SCO.
39 Articles 100 and 101 SCO.
40 Articles 263–268 SCPP.
41 Articles 271–281 SDCBA
insolvency freezing orders. 42

Article 263(1) SCPP provides that items and valuables belonging to an accused or to a third party may be frozen if it is expected that the items or assets will be used as evidence, will be used as security for procedural costs, monetary penalties, fines or costs, will have to be returned to the persons suffering harm or will have to be forfeited.

All assets that are likely to be forfeited at the end of the proceedings based on Article 70 SPC must be seized during the investigation. These assets may be in Switzerland or abroad, in which case they must be seized by rogatory commission. The freeze takes precedence over any other decision obtained by creditors.

Freeze orders also extend to assets that may be seized to guarantee the replacement claim of the state in respect of crime proceeds that are no longer available for confiscation. 43 In respect of those assets, the state has no preferable rights over those of other creditors.

Freeze orders may be issued in view of the restitution of assets to their rightful owner, but not to secure the claim for damages of the aggrieved person. Consequently, the aggrieved person may have to also obtain freezing orders through civil proceedings, namely attachments obtained in the context of debt collection proceedings or enforcement of foreign freezing orders.

The accounts targeted by the freezing order may be described in a generic form, such as ‘any account of which designated persons are holders, beneficial owners, signatories or introducers, as well as any account that may have received transfers from or made transfers to, that account’.

Civil attachment orders have a narrower scope, as those can only affect the assets held at the moment when the order is received. The requirements for obtaining these orders are also stricter. The main difficulty for creditors is to identify assets located in Switzerland as the likelihood of the existence of Swiss assets has to be brought before the civil court. Pre-enforcement discovery is not available.

The cause for a civil attachment by a creditor 44 can be any of the following:
a the debtor has no fixed place of residence or abode anywhere, in Switzerland or abroad;
b the debtor has dissipated assets, fled the jurisdiction or is preparing to flee in order to defeat enforcement of undischarged debts;
c the debtor is in transit or is a person visiting markets or fairs, provided the relevant claim is of a nature that requires immediate payment;
d the debtor has no residence in Switzerland, no other cause for an attachment are fulfilled, but the claim has a sufficient nexus with Switzerland or is based on a written acknowledgment of debt;
e the creditor holds certificates evidencing former unsuccessful attempts at enforcement in respect of undischarged debts of the debtor; and
f the creditor holds a title for final enforcement under the SDCBA, typically a domestic or foreign judgment or arbitral award. 45
The court at the place where assets are located issues a freeze order *ex parte* if the creditor demonstrates, through documentary evidence, the likelihood that: (1) it has a monetary claim; (2) there exists a cause for an attachment order as listed above; and (3) there are assets at hand belonging to the debtor.\(^46\)

The likelihood of the existence of the assets to be attached may be demonstrated by direct or circumstantial evidence.

The attachment order describes specific assets and may target assets in several locations, including outside of the canton of the court.

The debtor may file proceedings of objection to the attachment. In parallel, the creditor must ‘validate’ the attachment by requesting that an order to pay be issued against the debtor, who may object to it.\(^47\) The setting aside of the objection may take place through the enforcement of an existing Swiss or foreign judgment or by filing a civil action on the merits in Switzerland or abroad. The final seizure of the attached assets and the distribution to the creditors cannot occur before the end of the proceedings on the setting aside of the objection to the order to pay.

If a company in bankruptcy is involved in the fraudulent scheme, as a victim or as a tool of the perpetrator, the judgment of bankruptcy, respectively the judgment on recognition of a foreign insolvency decree, triggers the opening of bankruptcy. Upon receipt of the judgment, the local bankruptcy office must immediately take all necessary measures in view of its execution, such as the freezing of bank accounts. These orders are issued *ex officio* and sent to the main Swiss banks. Only the accounts of the debtor can be frozen in the frame of insolvency proceedings. The assets and claims of the bankruptcy estate are listed in the inventory of the estate. If the Swiss liquidator of the bankruptcy does not intend to bring certain claims of the bankruptcy estate, creditors may request the assignment of the right to bring such claims on behalf of the bankruptcy estate at their own cost and risk against the right to be paid in priority over the recovery proceeds.\(^48\) In relation to foreign insolvent companies, Swiss privileged creditors have a priority right on the distribution of the Swiss assets, before the balance can be repatriated to the main foreign bankruptcy estate.\(^49\)

### ii Obtaining evidence

The main obstacle in the obtention of evidence in Switzerland are the bank secrecy,\(^50\) trade and business secrets and data protection. However, these pitfalls can be overcome, in particular in criminal and insolvency proceedings, where bank secrecy cannot be opposed to the state authorities. Recent Swiss case law on mutual assistance in civil matters also shows a trend in favour of the lifting of banking, trade and business secrets in favour of the manifestation of the truth in the foreign civil trial.

It is important to note that Switzerland has a blocking statute, contained in Article 271 SCP, which punishes with up to three years of imprisonment unauthorised activities conducted on Swiss territory on behalf of a foreign authority. The gathering of evidence in support of foreign proceedings is considered a breach of Article 271 SCP.

\(^{46}\) Article 272(1) SDCBA.
\(^{47}\) Article 279 SDCBA.
\(^{48}\) Article 260 SDBCA.
\(^{49}\) Articles 172–174a SPILA.
\(^{50}\) Article 47 of the Swiss Banking Act – SBA.
There are several alternative ways of obtaining evidence in Switzerland: by criminal disclosure\textsuperscript{51} and search\textsuperscript{52} orders, by the civil precautionary taking of evidence\textsuperscript{53} and civil production orders and by orders of disclosure of information by the bankruptcy authorities.\textsuperscript{54}

Together with the right of the parties to request that further evidence be taken (see above), the parties to criminal proceedings have the right to consult the file,\textsuperscript{55} which includes the right to levy copy, and to use them in other proceedings of any kinds, in Switzerland or abroad. In principles, under Swiss law, parties do not have the obligation to keep the investigation secret. Therefore, they can access to and use all the evidence in file, in particular the result of the disclosure orders issued by the prosecutor. Article 108(1) and (3) SCPP provides, however, that restrictions may temporarily apply when there is justified suspicion that a party is abusing its rights or when this is required for the safety of persons or to safeguard public or private interests in preserving confidentiality\textsuperscript{56}. The type of documents that may be obtained include banking statements, KYC documents, visit reports, compliance reports, etc.

Subject to exceptions deriving from the constitutional right to remain silent and not to self-incrimination,\textsuperscript{57} the holder of documents, information and other items is obliged to hand them over to the prosecutor.\textsuperscript{58}

Switzerland being a civil law country, obtaining pretrial evidence is difficult. In that particular context, Article 158 SCCP provides for the possibility of taking evidence located in Switzerland at any time if the applicant shows likelihood that the evidence is at risk or that it has a legitimate interest to obtain the requested evidence. The Swiss Federal Court ruled that a legitimate interest is sufficiently demonstrated if the applicant wants to appraise the chances of success of a contemplated legal action.\textsuperscript{59} Precautionary taking of evidence is even granted if the trial will occur outside of Switzerland. The proceedings are conducted \textit{inter partes}. In principle, gag orders are not available. This domestic tool is an interesting alternative route to requesting international judicial assistance (see below). It can be faster, and the rights of the civil plaintiff are broader than under a request for judicial assistance. However, the grounds for refusing the taking of evidence are much more limited in the context of the execution of a request for judicial assistance than in the independent request on the precautionary taking of evidence.

A civil claimant may also obtain evidence after the institution of a civil action. Production orders issued by the civil judge are, however, very narrow as the claimant has to target specific documents or evidence (see above). As the claimant has to quantify its

\textsuperscript{51} Articles 263–268 SCPP.
\textsuperscript{52} Article 244–250 SCPP.
\textsuperscript{53} Article 158 SCCP.
\textsuperscript{54} Article 222 SDCBA.
\textsuperscript{55} Articles 107(1)(a) and 147 SCPP.
\textsuperscript{56} There exists one important exception to this principle: a State requesting mutual legal assistance in criminal matters is restricted in its right as a plaintiff in the Swiss criminal proceedings to access to the file and to use evidence contained in the file as long as the execution of the letters of request in Switzerland is pending.
\textsuperscript{57} Article 265(2) SCPP.
\textsuperscript{58} Article 265(1) SCPP.
\textsuperscript{59} FCD 5A_295/2016.
damage by detailed prayers of relief and to allege all the facts necessary to prove the damage immediately in its first submissions,\textsuperscript{60} requesting the production of evidence during the civil trial is an inefficient strategy in fraud-related cases.

In bankruptcy proceedings, the debtor is obliged under threat of penal law sanctions to divulge all assets to the bankruptcy office and to hold himself at the office’s disposal.\textsuperscript{61} The debtor must open premises and cupboards at the bankruptcy official's request. If necessary, the official may use police assistance.\textsuperscript{62} Third parties who have custody of assets belonging to the debtor or against whom the debtor has claims have the same duty to divulge and deliver up as the debtor.\textsuperscript{63} Creditors and other interested parties have a right to consult the bankruptcy file\textsuperscript{64} and to use the evidence that it contains.\textsuperscript{65}

\textbf{IV FRAUD IN SPECIFIC CONTEXTS}

\textbf{i Banking and money laundering}

Money laundering usually is a key element of Swiss asset recovery cases, essentially for three reasons:

\begin{itemize}
  \item[a] the presence of a Swiss bank account or Swiss financial intermediary often is the only connection to Switzerland of the asset recovery case;
  \item[b] the willingness of Swiss law enforcement authorities to investigate money laundering will help fraud victims to obtain access to key evidence and assets;
  \item[c] banks or other financial intermediaries may be held liable for the losses caused by money laundering.
\end{itemize}

Article 305 \textit{bis} (1) SPC defines money laundering as ‘an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he knows or must assume originate from a felony’. Only proceeds of felonies, namely crimes liable to a prison term of more than three years\textsuperscript{66} can be laundered.

Money laundering by negligence is not punishable. However, the intention is based on the violation of a due diligence duty. It is enough that the person should have known from the circumstances that the assets were the product of some kind of severe offence, without necessarily knowing exactly which, and that the offender acted by recklessness\textsuperscript{67}. If a person has accepted funds without knowing their criminal origin and only learns it afterwards, any transaction made with respect to these assets after that moment is deemed to be money laundering. Money laundering by abstention is also punishable.\textsuperscript{68}

The purpose of the Federal Law on the Prevention of Money Laundering in the Financial Sector (LML) is to create a precise set of due diligence rules for all financial intermediaries.

\begin{itemize}
  \item[60] Article 321(1) SCCP.
  \item[61] Article 222(1) SDCBA.
  \item[62] Article 222(3) SCDBA.
  \item[63] Article 222(4) SDCBA.
  \item[64] FCD 93 III 4.
  \item[65] The Court of Justice of Geneva recently ruled that a person accused of mismanagement causing the bankruptcy has a legitimate interest to consult the bankruptcy file (DSCO/303/18).
  \item[66] Article 10(1) and (2) SPC.
  \item[67] ATF 119 IV 242.
  \item[68] FCD 6B_908/2009.
\end{itemize}
and to provide for an obligation to report suspicions of money laundering. In practice, this provision is very important for asset recovery, as such reports, made to the MROS, often reveal the existence of assets connected to fraudsters that would otherwise not have been found, notably when media report on large criminal investigations. Upon receiving credible reports, the MROS communicates them to Swiss law enforcement authorities, who initiate criminal investigations, issue freeze orders, and usually send requests for mutual assistance to the authorities of the countries where the alleged predicate offences took place.

Money laundering is an offence that is notably meant to protect the person harmed by the predicate felony, and, consequently, the person, company or bank who wilfully launders such proceeds may be liable to compensate the loss caused by the acts of money laundering. Acts of money laundering in the meaning of Article 305 bis SPC may entail civil liability for tort towards the person aggrieved by the predicate offence, if the acts of money laundering prevented its compensation, notably from assets that could have been forfeited and allocated in its favour. However, the breach of due diligence rules contained in the LML does not entail civil liability, as the objective of those provisions is to safeguard the reputation of the Swiss financial industry and not to protect private interests.

ii Insolvency
Swiss criminal law provides for specific provisions on fraud in an insolvency context, that are a sub-category of the crimes committed against property. There exist three felonies, namely fraudulent bankruptcy and fraud against seizure, reduction of assets to the prejudice of creditors and mismanagement causing bankruptcy. There are also five misdemeanours, namely failure to keep proper accounts, undue preference to creditors, subornation in enforcement proceedings, disposal of seized assets and obtaining a judicial composition agreement by fraud. Where the debtor is a company, its corporate bodies are deemed the perpetrators of these offences. There is little case law on the commission of these specific offences. The general trend is that the threshold to prove that a specific behaviour of a de facto or de jure body triggered the insolvency of the company is high. Criminal law being subsidiary to other legal remedies, a wrong choice of management may more easily trigger civil liability of the corporate bodies than their criminal liability.

Civil legal actions for damages in torts, where the commission of a criminal offence is proved and for damages for breach of their duties in the administration, business management and liquidation are available to the company, the shareholders and the creditors against the
members of the board of directors and all persons engaged in the business management or liquidation of the company. Outside insolvency, the company itself and each shareholder are entitled to sue for any losses caused to the company. The shareholder’s claim is for payment of compensation in favour of the company. In the event of bankruptcy, the creditors are also entitled to request that the company be compensated for the losses suffered. However, in the first instance the administration of the bankruptcy may assert the rights of the shareholders and the company’s creditors. In other words, any legal action of a creditor or a shareholder in an insolvency context is made on behalf of the bankruptcy estate. Where the rights of the estate are assigned to the creditors, the assigned creditors that bring the claim before courts are paid first.

Clawback action is also available where the debtor carried out during the five years prior to the opening of bankruptcy proceedings with the intention, apparent to the other party, of disadvantaged his creditors or of favouring certain creditors to the disadvantage of others.

iii Arbitration

Tort claims are arbitrable under Swiss law.

Consequently, if the tortious acts is in connection with the arbitration clause contained in a contract, the claimant will not be able to bring civil proceedings against a defendant who is party to the arbitration clause, but only arbitration proceedings. This does not apply to non-parties to the arbitration clause, however. This means that the victim of a fraud may have to bring both civil and arbitration proceedings (in addition to criminal proceedings, which are not affected by the existence of an arbitration clause), depending on who the defendants are.

The use of parallel civil and criminal proceedings to gather evidence in support of arbitration proceedings which involve an element of criminality is a powerful tool to supplement the lack of powers of arbitral tribunals to compel third parties to give evidence.

If fraud affects an arbitral award issued in Switzerland, this may be a cause for revision. If the arbitral award was issued outside of Switzerland, the existence of fraud may be an obstacle to its enforcement in Switzerland due to its contrariety to public policy (see below).

iv Fraud’s effect on evidentiary rules and legal privilege

There is no specific legal regime on evidentiary rules and legal privilege in fraud-related cases.

Article 321 SPC on professional secrecy only protects secrets held by ecclesiastics, lawyers, notaries, auditors, medical doctors, dentists, midwives, as well as their auxiliaries.

83 Article 756(1) SCO.
84 Article 157(1) SCO.
85 Article 260 SDCBA.
86 Article 757(2) SCO.
87 Article 288 SDCBA.
88 See FCD 1B_521/2017 – Republic of Guinea.
89 Article 123 Federal Tribunal Act: ‘Revision may be requested if criminal proceedings have established that the decision was influenced by a criminal offense to the detriment of the applicant; sentencing by the criminal court is not required. If the criminal proceedings cannot be carried through, proof may be furnished by other means’. A bill was sent to the Swiss parliament on 24 October 2018 to amend SPILA provisions on arbitration, notably on revision of arbitral awards. We will report in an upcoming edition once the bill is adopted.
Non-typical activities of attorneys, such as investment advice, financial intermediation or management of companies are not covered by professional secrecy.\textsuperscript{90} Banking secrecy is not protected by the Swiss Penal Code but by the SBA.\textsuperscript{91} Lawyers may always refuse to cooperate even if they have been released from duty of secrecy.\textsuperscript{92} Attorney-client privilege cannot be invoked by a lawyer in order to protect itself from legal actions brought by the client.

In civil proceedings, a party may refuse to cooperate if the taking of evidence would expose a close relative to criminal prosecution or liability in torts\textsuperscript{93} or the disclosure of a secret would be an offence under Article 321 SPC. Any third party may refuse to cooperate in establishing facts that would expose it or a close relative to criminal prosecution or civil liability in torts\textsuperscript{94} or to the extent that the revelation of a secret would be punishable by virtue of Article 321 SPC. With the exception of lawyers and clerics, third parties must cooperate if they are subject to a disclosure duty or if they have been released from duty of secrecy, unless they show credibly that the interest in keeping the secret takes precedence over the interest in finding the truth.

In criminal proceedings, the accused may not be compelled to incriminate itself. In particular, the accused is entitled to refuse to make a statement or to cooperate in the criminal proceedings. It must, however, submit to the compulsory measures provided for by the law, such as disclosure or seizure orders.\textsuperscript{95} The victim\textsuperscript{96} and the witness, but not the plaintiff, have the right to remain silent.\textsuperscript{97} Functional secrecy of public officers and attorney–client privilege may be opposed to criminal authorities. The scope of attorney–client privilege in the context of internal investigations conducted within the frame of FINMA enforcement proceedings is currently debated.

\section*{V \hspace{1em} INTERNATIONAL ASPECTS}

i \hspace{1em} Conflict of law and choice of law in fraud claims

Swiss conflict of laws is governed by SPILA.

Regarding tort claims, Article 133 SPILA provides that when the tortfeasor and the injured party have their habitual residence in the same state, claims in tort are governed by the law of that state; when the tortfeasor and the injured party do not have an habitual residence in the same state, these claims are governed by the law of the state in which the tort was committed; however, if the result occurred in another state, the law of that state applies if the tortfeasor should have foreseen that the result would occur there; notwithstanding the above, when a tort breaches a legal relationship existing between the tortfeasor and the injured party, claims based on such tort are governed by the law applicable to such legal relationship.

\begin{itemize}
\item[\textsuperscript{90}] FCD 112 Ib 606; FCD 114 III 105; FCD 115 Ia 197, FCD 131 III 660.
\item[\textsuperscript{91}] Article 47 SBA.
\item[\textsuperscript{92}] Articles 171(3) SCPP and 166(1)(b) SCCP a contrario.
\item[\textsuperscript{93}] Article 163(1)(a) SCCP.
\item[\textsuperscript{94}] Article 166(1)(a) SCCP.
\item[\textsuperscript{95}] Article 113(1) SCPP.
\item[\textsuperscript{96}] A victim within the meaning of Article 116(1) SCCP is a person suffering harm whose physical, sexual or mental integrity has been directly and adversely affected by the offence.
\item[\textsuperscript{97}] Article 117(1)(d) and Article 169(1)-(2) SCPP.
\end{itemize}
Claims for unjust enrichment are governed by the law which governs the legal relationship, either existing or assumed, on the basis on which the enrichment occurred, failing such a relationship, these claims are governed by the law of the state in which the enrichment occurred.98

ii Collection of evidence in support of proceedings abroad

Alternatively to civil letters of requests, parties to the foreign proceedings may consider instituting proceedings on the precautionary taking of evidence in Switzerland pursuant to Article 158 SCCP (see above).


These conventions apply to requests for obtaining evidence or performing some other judicial acts. The extent of the information requested is determined by the requesting judge. The findings that led the requesting judge to send letters of requests cannot be questioned by the requested judge. The sole elements that the requested judge has to check are the likelihood of the reasons given by the third party that holds the requested information not to collaborate100 and the existence of reasons to refuse to grant assistance that the requested state can invoke pursuant to Articles 12 CLaH 1970 and 11 CLaH 1954.101 The prohibition on fishing expeditions is a limitation that applies to the scope of letters of request.

Persons involved in proceedings of international assistance can be affected in their rights to obtain a decision on the execution of the request for assistance (prohibition of denial of justice), to refuse to collaborate (secrets protected by law or by a predominant interest) and to the minimum guarantees of fundamental rights (sovereignty or public policy, or both).

To date, Swiss case law ruled that the party to the foreign proceedings is only entitled to invoke a denial of justice. The reason given by the courts is that a request for assistance is based on the public law relationship that exists between two states. As such, the parties to the main civil proceedings in the requesting state are not involved in the execution of the request for assistance.102 Parties have no legal standing to appeal against the decision to execute the letter of request if they invoke rights that they could have invoked in the civil proceedings pending in the requesting state.103

The beneficiary of the secret is entitled to invoke a violation of its right to be heard. The Swiss Federal Court ruled that both the account holder and the beneficial owner of the targeted account have legal standing to appeal against the decision to execute the letter of request.104 Apart from standing, the Federal Court decided to pierce the corporate veil that separated the account holder from the beneficial owner of the account on the sole ground that the account holder invoked the privacy of the beneficial owner, which is a right to which the sole beneficial owner was entitled to. As long as the beneficial owner and the account holder form a single economic unit, the account holder cannot intervene in the proceedings

98 Article 128 SPILA.
100 FCD 5P423/2006.
101 FCD 4A.340/2015c.
103 FCD 4A.340/2015.
on execution of the request for assistance, provided that it was able to exercise its rights before
the judge of the main civil proceedings in the requesting state.\textsuperscript{105} The Federal Court ruled in
particular that the violation of the minimum guarantees of neither the account holder nor
the beneficial owner can invoke bank secrecy, which is the prerogative of sole banks, as third
parties that hold the requested information.

The third party that holds the requested information is entitled to invoke a predominant
interest in keeping the requested information secret. Spouses and close relatives have an
absolute right to refuse to collaborate.\textsuperscript{106} Any other third party may refuse to cooperate in
establishing facts that would expose itself or a close relative to criminal prosecution or civil
liability, or to the extent that the revelation of a secret would be punishable by virtue of
Article 321 SPC.\textsuperscript{107} Bank and business secrecy are not protected by Article 321 SPC (see
above).

The holders of other legally protected secrets may refuse to cooperate if they show
likelihood that the interest in keeping the secret prevails on the interest in establishing the
truth.\textsuperscript{108} Banks usually invoke this legal provision together with Article 47 SBA (banking
secrecy) to object to orders of production of documents. The Swiss Federal Court stressed
in this regard that banking secrecy is only an exception to the duty to collaborate of the
third party that holds information.\textsuperscript{109} Although the circumstances in which banking secrecy
can be successfully invoked are not clearly defined by case law, it never applies in divorce\textsuperscript{110}
and inheritance\textsuperscript{111} matters, as well as in the context of debt collection proceedings or civil
attachments.\textsuperscript{112}

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

As a participant in Swiss criminal proceedings, a plaintiff may request the prosecutor to
issue freeze orders against assets that are the proceeds of crime or, if these assets are no longer
available, against replacement assets.

All assets that are proceeds of felonies or misdemeanours must be forfeited, even if
the perpetrator is not identified.\textsuperscript{113} If crime proceeds are no longer available for forfeiture,
replacement claims must be issued against assets that are not crime proceeds.\textsuperscript{114} Third parties
are only protected against these measures to the extent that they were in good faith and
provided adequate consideration against the assets.

\begin{itemize}
  \item 105 FCD 4A_340/2015 and 4A_167/2017.
  \item 106 Article 165 SCCP.
  \item 107 Article 166(1)(a) and (b) SCCP. This chapter does not discuss the requirements of Article 166 Paragraph 1
  \hspace{1em}lit. c and d.
  \item 108 Article 166(2) SCCP.
  \item 109 FCD 4A_340/2015. See also Article 47 Para. 5 SBA: ‘The provisions of federal and cantonal legislation on
  \hspace{1em}the obligation to disclose information to the authority and to testify in court are reserved’.
  \item 110 FCD 5P 423/2006 of 12 February 2007.
  \item 111 FCD 5A_284/2013.
  \item 112 FCD 129 III 239 and 125 III 391.
  \item 113 Article 70 SPC.
  \item 114 Article 71 SPC.
\end{itemize}
Under Article 73 SPC, if a crime has caused loss not covered by insurance and if it must be presumed that the offender will not pay compensation for the crime, the aggrieved person is entitled to receive, upon its request, up to the amount of the damages established by a judgment (including foreign) or by agreement with the offender:

- the fines paid by the offender;
- the forfeited assets (or the proceeds of their sale);\(^{115}\)
- the replacement assets (when the direct proceeds of crime are no longer available to be forfeited);\(^{116}\)
- the good behaviour bond.\(^ {117}\)

The rights of persons harmed or third parties expire five years after the date on which official notice is given.\(^{118}\)

iv  **Enforcement of judgments granted abroad in relation to fraud claims**

There are no specific provisions on the enforcement of foreign judgments on fraud claims in Switzerland. Civil foreign judgments on fraud cases are considered as civil judgments pursuant to Article 32 of the Convention of Lugano on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 (CLug) and Article 25 SPILA. They are recognised and enforced following the ordinary rules that apply to any foreign judgment.\(^ {119}\)

Swiss law makes a distinction between the enforcement of money and non-money judgments. This article only discusses the enforcement of money judgments that are enforced pursuant to the SDCBA, with assistance from cantonal debt collection offices. The recognition and enforcement of foreign judgments are governed by the Private International Law Act (SPILA) and, where applicable, by bilateral or multilateral treaties, in particular by the Lugano Convention between the EU and EFTA countries. Enforcement follows the domestic procedures.

Interlocutory measures ordered in *ex parte* proceedings are not capable of being recognised in Switzerland. Under SPILA, instead of seeking (uncertain) enforcement of foreign interim measures, a claimant can file an application for autonomous interim measures under Article 10(b) SPILA. The foreign interim order is not binding but the Swiss judge will generally rely on it. Similarly, with regard to CLug judgments, an application can be made to the Swiss enforcement judge for provisional measures available under the law of that state, even if, under the Convention, the courts of another state have jurisdiction over the substance of the matter (Article 31 CLug). Within the scope of application of the Convention, foreign interlocutory orders can be enforced, provided that the defendant was given the opportunity to be heard.

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\(^{115}\) Article 70 CP.
\(^{116}\) Article 71 CP.
\(^{117}\) Article 66 CP.
\(^{118}\) Article 70(4) SPC.
\(^{119}\) These ordinary rules also apply to domestic and foreign arbitral awards.
Interlocutory injunctions ordering in rem conservatory measures are enforceable pursuant to the provisions of SDCBA. Interlocutory injunctions ordering ad personam conservatory measures, like common law World Freezing Orders, are enforceable pursuant to the provisions of SCCP.120

The enforceability of a foreign money judgment is decided in the context of debt collection proceedings where the judge decides to set aside the objection to the order to pay under Article 80 SDCBA. For CLug judgments, debt collection proceedings commence concurrently with the request for a declaration of enforceability before the court. The decision on the declaration of enforceability is binding throughout Switzerland. For other foreign judgments, there is no declaration of enforcement and a decision on enforcement rendered in one particular debt collection proceeding is not binding on another debt collection proceeding. A review of the merits of foreign judgments is expressly excluded by Article 27 SPILA and Article 36 CLug.

An ex parte civil attachment order can be granted prior to the filing of the request for an order to pay (see above).

Pursuant to Article 25 SPILA, a foreign judgment is recognized if the judicial or administrative authorities of the state where the decision was rendered had jurisdiction under the SPILA, the decision is no longer subject to an ordinary appeal or is final and there is no ground for denial under Article 27 SPILA. Recognition must be denied ex officio if it is manifestly incompatible with Swiss public policy. Recognition must also be denied if a party establishes that (Article 27(2)–(4) SPILA) it did not receive proper notice under the law of its domicile or its habitual residence, unless the party proceeds on the merits without reservation; the decision was rendered in violation of the fundamental principles of Swiss procedural law, including the fact that the party did not have an opportunity to present its defence; a dispute between the same parties and with respect to the same subject matter is the subject of pending proceedings in Switzerland or has already been decided there, or that the dispute has previously been decided in a third state, provided that the latter decision fulfils the prerequisites for recognition.122

Under the New Lugano Convention, judgment given in a state that is party to the Convention must be recognised in the other states without any special procedure being required (Article 33 CLug). The judgment must be declared enforceable immediately and ex parte on completion of the formalities provided for at Article 55 CLug without any review. The decision on the application for a declaration of enforceability can be appealed by either party on the grounds in Articles 34 and 35 CLug. New cross-border insolvency provisions.

The European Court of Justice (ECJ) explained that recourse to a public policy clause can be envisaged only where recognition or enforcement of the judgment delivered in another state is at variance to an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle. Typical examples of Swiss public policy incompatibility are punitive damages entirely disproportionate to the damage caused, usurious interest rates, serious violation of the right to be heard, including lack of proper notice and disproportionate costs of the proceedings, and serious breach of rights of defence.

120 FCD 5A_899/2016.
121 Article 27(1) SPILA.
122 Article 27(2)–(4) SPILA.
123 C-394/07 – Gambazzi, by reference to C-7/98 – Krombach.
v  Fraud as a defence to enforcement of judgments granted abroad

A foreign judgment obtained by fraud is contrary to public policy and will, therefore, not be recognised and enforced in Switzerland (see above).

In a domestic civil or criminal judgment, a party may apply for the revision of a judgment if criminal proceedings have established that the decision was influenced to the detriment of the party concerned by a felony or misdemeanour, even if no one has been convicted by the criminal court; if criminal proceedings are not possible, proof may be provided in some other manner.\(^{124}\)

VI  CURRENT DEVELOPMENTS

i  New cross-border insolvency rules

On 16 March 2018, the Swiss Parliament unanimously adopted the Amendment of the Private International Law Act (Chapter 11: bankruptcy and composition), which entered into force on 1 January 2019.

The provisions of the SPILA in force until 31 December 2018 required, following the recognition of a foreign insolvency on the basis of reciprocity, the opening in Switzerland of an ancillary bankruptcy, the ‘mini-bankruptcy’, in which a Swiss liquidator is appointed for the purpose of liquidating the Swiss assets, with a priority given to the Swiss privileged and secured creditors in the distribution of the proceeds of these assets. The foreign schedule of claims must be recognised in Switzerland before the Swiss assets are remitted to the foreign liquidators. The Swiss mini-bankruptcy is notoriously costly and cumbersome. As a consequence of these shortcomings, between 2010 and 2016, only 60 requests for recognition of foreign insolvencies were presented in Switzerland, 80 per cent of which were from EU countries.

The amended PILA in force since 1 January 2019 brings seven important changes to the Swiss regime on the recognition of foreign insolvency proceedings:

- \(a\) the requirement of reciprocity is abolished;\(^ {125}\)
- \(b\) insolvency decrees rendered at the ‘centre of main interests – COMI’ may now be recognised in Switzerland;\(^ {126}\)
- \(c\) the ordinary (non-secured and non-privileged creditors) of Swiss branches of foreign entities in bankruptcy may be listed in the schedule of claims of the ancillary bankruptcy;\(^ {127}\)
- \(d\) the debtor subject to insolvency measures outside of Switzerland now also has standing to apply for recognition of the insolvency decree;\(^ {128}\)
- \(e\) in the absence of privileged or secured creditors, as well as of creditors of a Swiss branch of the foreign insolvent entity, the court of the recognition may, upon request from the foreign liquidators, waive the ancillary bankruptcy procedure in favour of recognising the powers of the foreign insolvency officeholder;\(^ {129}\)

\(^{124}\) Article 328(1)(b) SCCP and 410(1)(c) SCPP.
\(^{125}\) Article 166 SPILA.
\(^{126}\) Article 166 SPILA.
\(^{127}\) Article 166 SPILA.
\(^{128}\) Article 166 SPILA.
\(^{129}\) Article 174a SPILA.
the list of the ‘protected creditors’ in international insolvencies is extended, and an ancillary bankruptcy must be opened in Switzerland not only where there are privileged and secured creditors, but also where there are creditors of a Swiss branch of the foreign insolvent entity;\textsuperscript{130}

a legal basis has been created so as to allow Swiss authorities and bodies to cooperate with foreign bankruptcy authorities and bodies.\textsuperscript{131}

From a practical point of view, the main change to SPILA is the possibility to waive the ancillary bankruptcy and allow the foreign insolvency officeholder to directly act on the Swiss territory and to dispose of the Swiss assets.\textsuperscript{132}

There is a strong hope that these new provisions allow a better protection of Swiss and foreign creditors’ interests by facilitating the recognition of foreign insolvency proceedings, effective cross-border asset recovery and international cooperation.

Given the efficiency of insolvency tools in international asset recovery, it is expected that the new Swiss cross-border insolvency regime will have a defining effect on asset recovery in Switzerland.

\subsection*{Data protection and access to information}

The question of the scope of the rights and obligations of natural and legal persons with regard to data protection is a hot topic in Switzerland.

In a matter \textit{Democratic Republic of Congo v. Office of the Attorney General of Switzerland} on the plundering of gold mines, the Federal Administrative Court had to decide on the right of the Democratic Republic of Congo (DRC) to access to the criminal file of criminal proceedings that were already terminated and in which the DRC had not participated. For this reason, the DRC requested access to the file on the basis of the Federal Act on Data Protection (ADP), instead of invoking Article 107(1)(a) SCPP (see above). The DRC argued that it needed the documents contained in the criminal file because it intended to institute civil legal actions against the gold refinery company investigated by the Office of the Attorney General of Switzerland (OAGS).

ADP allows the applicant to obtain ‘data’, not evidence or documents. Where personal data of the applicant is concerned, documents can in principle be obtained. In a landmark decision, the Swiss Federal Court ruled that the holder of a bank account can access all its personal data, including the notes and reports of its relationship manager, as well as KYC and profiles, even if the purpose is to assess the chances of success of a civil action against that bank.

In \textit{RDC v. OAGS}, the Federal Court ruled that in principle, the DRC is entitled to access to its own personal data for the purpose of contemplated civil proceedings against the gold refinery as it would also have the right to obtain this information during the evidentiary stage of pending civil proceedings.

However, by requesting the entire criminal file, the DRC also requested access to sensitive personal data of third parties, namely the gold refinery under investigation. Access to this data is subject to Article 19 ADP. To access this data, the DRC should have, however, demonstrated that the gold refinery refused to give access to its personal data in abuse of its

\begin{itemize}
\item \textsuperscript{130} Article 174a SPILA.
\item \textsuperscript{131} Article 174b SPILA.
\item \textsuperscript{132} Article 174a SPILA.
\end{itemize}
rights. Where criminal charges or convictions are concerned, the threshold is very high and the holder of the personal data has to carefully examine if a public or a private interest justifies consultation by the applicant. Arguing, as the DRC did, that the personal data of a third party is sought for the purpose of a civil action against that third party is clearly not sufficient. The reason is that ADP does not aim to facilitate civil proceedings but to protect privacy.

In short, accessing a criminal file through ADP is a difficult path. This being said, the Federal Administrative Court left the issue open of a general right to access to terminated criminal cases by persons with an interest worthy of protection on the basis of the fundamental right to be heard (due process).
Chapter 30

TURKS AND CAICOS ISLANDS

Tim Prudhoe and Alexander Heylin

I OVERVIEW

The Turks and Caicos Islands (TCI) is an international financial 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.

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 has recently undergone the biggest reform to its company law in a generation. The Companies Ordinance 2017 and the Insolvency Ordinance 2017 (in conjunction with the underlying Insolvency Rules 2019) have each respectively been enacted and brought into force. This new companies legislation splits for the first time TCI company and insolvency legislation. The insolvency regime closely follows the British Virgin Islands Insolvency Act 2003 and the BVI Insolvency Rules 2005. For the first time, there is an insolvency practitioner licensing regime.

The new legislation includes the provision of a Register of Beneficial Owners of Companies 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) has implemented the new beneficial ownership register. TCI has, thereby, introduced transparency in its international financial services industry. The Bribery Ordinance 2017 (not yet in force) was enacted in April 2017, based upon the UK Bribery Act

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3 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 due to have come into effect on 20 September 2017. This was delayed, mainly because of hurricane damage around that time, but the remainder of the provisions are now in force. The Trusts Ordinance 2016 came into effect on 23 September 2016.
4 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.
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 consequences of the changes under the new companies legislation that were initially overlooked but since remedied by amendment: for example, the ability to make court application for permission to release information relevant to legal proceedings. This provides a potential a workaround to the Confidential Relationships Ordinance bar (i.e., to the release of information).

i TCI courts

The TCI Supreme Court, which exercises first-instance jurisdiction in civil claims exceeding US$25,000 and more serious criminal matters, is vested with jurisdiction and powers broadly similar to those of the High Court of England and Wales. 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, 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). As noted in The Bay Hotel, due to the freedom allowed under the Arbitration Ordinance, parties to arbitration are reliant upon their chosen procedural law of the arbitration and, if the relevant national law is that of TCI, that procedural law will be derived from the common law position. Arbitration is discussed further at Section IV.iii of this chapter.

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5 This is Section 299A and 299B of the Companies Ordinance 2017 (as amended).
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. 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 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’. 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, 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. 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 register is now in place. This information is not available to the general public but only TCI government bodies who then may receive requests to share that information with other governments. The register is maintained and only searchable by the Financial Services Commission.

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. The register of beneficial ownership legislation is now in operation.

The Companies Ordinance 2017, provides 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

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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
18 A ‘domestic company’ will be defined as ‘a company that is not an international company’ (Section 2 Companies Ordinance 2017).
companies. Existing companies incorporated under previous categories according to the former legislation are to be automatically reregistered 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 may (but this is not compulsory) also provide details of the company’s directors, secretary and shareholders.

Typical information available to the public includes:

- 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);

- a list of entities regulated by the TCI Financial Services Commission;

- court documents and judgments; and

- certain details upon application from the Land Registry, including confirmation of the owner of TCI land or real estate.

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

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19 Part XVI of the Companies Ordinance 2017 deals with Foreign Companies.
20 Section 6(1)(f) and (g) Companies Ordinance 2017.
21 An international or foreign company will not be able to hold land in TCI (Section 29(1) Companies Ordinance 2017).
22 Companies Ordinance 2017, Schedule 1, Paragraph 21.
23 Cap 16.08, 16.15 and 16.16.
24 www.tcifsc.tc/departments/registries/companies.
made the Bahamas – and, later, the separately administered Turks and Caicos Islands – subject to 207 specified English statutes.\textsuperscript{25} 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:
\begin{itemize}
    \item \textit{a} Orders in Council made by prerogative order of the British Sovereign and made specifically applicable to TCI;
    \item \textit{b} the surviving English statutes of the 207 specified in the 1799 statute and any UK statutes that have been expressly extended to apply in TCI;
    \item \textit{c} the 2011 TCI Constitution (in force from 15 October 2012);
    \item \textit{d} local TCI statutes and ordinances;
    \item \textit{e} subordinate legislation, such as regulations, orders and rules, made pursuant to local statutes; and
    \item \textit{f} case law.
\end{itemize}

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 \textit{Supreme Court Practice 1999} (the last pre-CPR edition of the \textit{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\textsuperscript{26} and the Court of Appeal Rules, as adapted from the Court of Appeal Rules of the Bahamas.\textsuperscript{27} 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.

\section{Civil and criminal remedies}

\subsection{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. Similarly to 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.

\textsuperscript{25} 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’.

\textsuperscript{26} Cap 2.01.

\textsuperscript{27} 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 \textit{mutatis mutandis} to the TCI Court of Appeal.
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.\(^{28}\) 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.\(^{29}\) This is subject to permitted relaxation in respect of wholly owned subsidiaries where the articles of association have express language permitting actions not in the best interests of the subsidiary but instead of the holdco.\(^{30}\) 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.

Clawback claims

The Insolvency Ordinance 2017 follows the BVI Insolvency Act 2003 in creating a statutory clawback provisions against those that have appropriated assets.


\(^{29}\) Sections 102–105 Companies Ordinance 2017.

\(^{30}\) Section 102(2) Companies Ordinance 2017.
**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*[^31] from bringing claims to recover reflective losses (e.g., damages for a reduction in the value of their shares caused by that wrongdoing).[^32] However, shareholders have a statutory basis by which to bring claims derivatively, subject to the requirement that they seek the court's permission to commence an action to be brought derivatively.[^33] Derivative claims arise 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. There is no need for court permission for personal actions of shareholders (i.e., claims against the company in that – shareholder – capacity).

**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. In order 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.[^34] Other similar offshore jurisdictions have ordered *Mareva* injunctions in support of foreign proceedings.[^35] The TCI courts have not yet confronted that issue. The equitable and common law remedies of tracing are available in TCI.[^36] Final remedies that may be sought in fraud claims in TCI

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[^31]: See, for example, the concession made at Paragraph 82 in *Trinidad and Tobago Unit Trust Corporation v. Kinay & Serim* (2011) CL 7/10.


[^33]: Part XIV, the Companies Act 2017, Sections 226–229.

[^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).

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.

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 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 Section 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.

Provisional liquidators under the Insolvency Ordinance 2017

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 171 of the Insolvency Ordinance 2017 to order the appointment of a provisional liquidator or otherwise, as it thinks fit. The provisional liquidator is appointed where the court is satisfied that the appointment is necessary for asset preservation or otherwise to protect the interests of creditors. Such an order can also be made on the basis of 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. 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;

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42 Section 171(3)(b) Insolvency Ordinance 2017.
43 Section 9; see also Order 30 of the TCI RSC.
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 *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:

- *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;
- *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;
- *Bankers Trust* orders: court orders similar to *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

- 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 UK 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 UK’s ratification).47

**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

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46 Confidential Relationships Ordinance (Cap 16.14) Section 3.
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.
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 services industry, including in relation to corporate governance, the functioning of the FSC and the regulatory framework. The FSC has confirmed in its plans and priorities for 2016/2017 that it is prioritising the IMF’s recommendations; in particular, that:

> [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.  

#### 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. Offences under POCO include concealing, disguising, converting, transferring

48 Cap 3.15.
49 The FSC has produced handbooks specifically for the sectors of high-value dealers, accountancy, real estate and legal.
50 International Monetary Fund, Turks and Caicos Islands Financial Sector Assessment Program, October 2015, p. 34.
52 Section 124 POCO.
or removing criminal property from TCI,\(^5\) entering into, or becoming concerned in, an arrangement that the individual knows or suspects facilitates the acquisition, retention, use or control of criminal property;\(^4\) and acquiring, using or having possession of criminal property.\(^5\)

Criminal conduct is conduct that constitutes an offence in TCI, or would constitute an offence in TCI if it occurred there.\(^6\) 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.\(^7\)

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)\(^8\) or since the date on which the earliest of the current offences was committed.\(^9\)

If an authorised disclosure is made to the FIA, this may provide a defence to the offences set out above.\(^10\)

**Anti-corruption law**

Offences relating to corruption, bribery and misappropriation of funds are governed by the Integrity Commission Ordinance\(^6\) and will soon also be covered by the Bribery Ordinance 2017.\(^6\) The TCI Integrity Commission has broad powers to investigate these offences, including the power of arrest and – with the assistance of the courts – entry, search and delivery-up powers.\(^6\)

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,\(^6\) 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.

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53 ibid.
54 Section 125 POCO.
55 Section 126 POCO.
56 Section 5(1) POCO.
57 Section 122 POCO.
58 Section 9(1)–(2) POCO.
59 Section 9(3) POCO.
60 Section 123 POCO.
61 Cap 1.09.
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.
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

Part IX of the Insolvency Ordinance 2017 provides various statutory causes of action for liquidators to utilise in respect of specified voidable transactions, namely:

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 specified periods prior to the commencement of liquidation;65 and

b undervalue transactions.66

There are also the following additional statutory remedies:

a summary remedies against directors, officers and ‘others’ (defined as including a liquidator, administrator, supervisor or receiver of the company) for monies misapplied, misfeasance or breach of duties to the company;67

b in respect of fraudulent trading (as it sounds, the intention to defraud creditors);68 and

c in respect of insolvent trading (with the usual defence that there was no reasonable prospect of the company avoiding going into insolvent liquidation).69

iii Fraud’s effect 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 these 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.70 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.

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65 The Insolvency Ordinance 2017, Sections 258 and 259.
66 ibid., Section 258 and 260.
67 ibid., Section 266.
68 ibid., Section 267.
69 ibid., Section 268.
70 Order 11, Rule 1, Civil Rules 2000.
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, in order 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.

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 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.

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

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72 The Evidence (Proceedings in Other Jurisdictions) (Turks and Caicos Islands) Order 1987 (UK SI 1266 of 1987).
73 TCI RSC, Order 70.
74 Cap 3.17.
75 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).
76 Article 1, Paragraph 2 of the MLAT.
77 Cap 4.07.
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 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\(^78\) 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 Licensed insolvency practitioner regime**

Only since early April 2019 has it been possible to apply for licensed status as a liquidator. The relevant regime underlies the Insolvency Ordinance 2017 and Insolvency Rules 2019\(^79\) and requires levels of relevant and specialist experience that it is unlikely a practitioner with a heavily TCI-focused practice could realistically be expected to have acquired. These licensing standards are laudably high; but it remains to be seen whether any local pressure to reduce them is successfully deflected on the basis of the adverse reputational effect that doing so would have. At the time of writing, there is one licensed insolvency practitioner.

**ii Beneficial ownership registry**

The Register of Beneficial Owners of Companies now exists and is implemented.

\(^78\) See the discussion at 71/1/3, Volume 1 of the 1999 *Supreme Court Practice* at p. 1334.

iii Economic substance legislation

As the result of well-known international initiatives, TCI – like all other International Financial Centres – now faces the issue of demonstrating that companies based in that jurisdiction ‘do something’ there – namely that they fulfil ‘economic substance’ requirements. The introduction of the Companies and Limited Partnerships (Economic Substance) Ordinance 2018 and its underlying legislation (the Companies and Limited Partnerships (Economic Substance) Regulations) seek to address this for the TCI and are likely to be fully in force by the end of 2019 (the current delays being sought in respect of international companies – those formerly ‘exempt’ companies under the prior statutory regime).

This legislation provides the competent authority (as designated under the Tax Information (Exchange and Mutual Administrative Assistance) Ordinance, and expected to be the Exchange of Information Unit) with significant powers – including the initiation of court proceedings against a company found to lack sufficient ‘economic substance’. Subject to the obvious issue of resources (both at the ‘policing’ and then the enforcement levels), the economic substance requirements are expected to generate contested disputes.
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.

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.\(^2\) 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.\(^3\)

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.\(^4\)


\(^3\) See Boyle v. United States, 556 US 938, 944-45 (2009).

\(^4\) See 28 USC Section 1962.
Courts have held that RICO does not apply to conduct outside the United States.\(^5\) 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.\(^6\) The US Supreme Court, however, reversed this case in *RJR Nabisco Inc v. The European Community,\(^7\) 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’.\(^8\) 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 US.

**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

\(^5\) See, for example, *Norex Petroleum Ltd v. Access Industries Inc*, 631 F.3d 29 (2d Cir 2010).


\(^7\) 136 S Cr 2090 (2016).

\(^8\) id. at 27.
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 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. 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. 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. 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:

- between related parties;
- for less than fair consideration;
- involving entities with inadequate capitalisation;

9 Restatement (Second) of Torts, Section 525.
11 739 F Supp 2d 636 (SDNY 2010).
12 NY Debtor & Creditor Law, Section 276.
d involving sham entities;
e that result in the transferor becoming insolvent;
f where the transferor retains possession or control over the transferred assets; and
g in response to pending litigation or other claims.\

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.

ii 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

\(^{13}\) 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).
\(^{14}\) NY Civ Prac L & R 213.
\(^{15}\) NY CPLR 203(g).
\(^{17}\) See Burnham v. Superior Court, 495 US 604, 618 (1990).
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.\textsuperscript{18}

A related defence is the doctrine of \textit{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.\textsuperscript{19} Courts consider a variety of factors in making this determination, with no single factor being dispositive. Like the issue of personal jurisdiction, \textit{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.\textsuperscript{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.\textsuperscript{21}

\section*{III SEIZURE AND EVIDENCE}

\subsection*{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

\textsuperscript{18} For example, NY CPLR 302.


\textsuperscript{20} Fed R Civ P 9(b).

\textsuperscript{21} Restatement (Second) of Torts, Section 551.
enforcement remedies. 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 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 of 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

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22 Fed R Civ P 64 & 69.
23 See Fed R Civ P 64.
24 NY CPLR 6212 (a).
26 NY CPLR 5222.
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 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 of 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.27 The Court held that a US federal court lacks the power to issue pre-judgment injunctions freezing a defendant’s assets in order 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.28 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

28 See Fed R Civ P 69.
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.

**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

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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).
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. 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. A claimant may seek discovery from the defendant or third parties such as banks (where the defendant may keep cash and 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.

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

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.

35 Fed R Civ P 26(b)(1).
36 See Fed R Civ P 69(a)(2); NY CPLR 5223.
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.

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.39 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’.40 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.41 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.42

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.43 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

38 11 USC Section 1147(b).
39 See Geyer v. Ingersoll Publ'ns, 621 A2d 784, 787 (Del Ch 1992) (‘Under Delaware law, creditors of an insolvent corporation are owed fiduciary duties’).
40 Moses H Cone Memorial Hospital v. Mercury Constr Corp, 460 US 1, 24 (1983).
41 NY CPLR 7502.
42 9 USC, Section 9.
43 9 USC, Section 207.
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 relationship and must not involve only United States citizens. The arbitral award must be confirmed by a United States court in order to become a final and enforceable judgment. Confirmation is mandatory unless the court finds one of the seven grounds for refusal under the Convention. The court also may vacate or modify the award under the limited circumstances set out by the FAA.

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 *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. 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. This principle has been applied by some courts in the context of actions to enforce arbitral awards. In *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.

The lesson is that a claimant who obtains a favourable arbitral award in a jurisdiction outside the US 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.

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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 due to lack of personal jurisdiction).
46 9 USC, Section 305.
47 9 USC Section 202.
49 id.; see also 9 USC, Section 10(a) (as to vacatur) and Section 11 (as to modification).
50 134 S Ct 746 (2014).
51 id. at 761.
52 750 F3d 221 (2d Cir 2014).
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 United States v. Zolin, the US Supreme Court set out the process for courts to follow when evaluating the fraud exception to privilege.53 The claimant must make a 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 evidence to establish the claim that the crime-fraud exception applies’.54 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.55 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.56

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

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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.\footnote{Restatement (Second) of the Law of Conflicts, Section 148.} In this analysis, ‘the significant contacts are, almost exclusively, the parties’ domiciles and the locus of the tort’.\footnote{AroChem Intl Inc v. Buirkle, 968 F 2d 266, 270 (2d Cir 1992).}

**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.\footnote{28 USC Section 1782.} The district court must find that the party from whom discovery is sought 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.\footnote{See Intel Corp. v. Advanced Micro Devices Inc, 542 US 241, 258 (2004).}

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.\footnote{See In re Edelman, 295 F 3d 171, 179 (2d Cir 2002); In re Godfrey, 526 F Supp 2d 417, 422 (SDNY 2007).}

Proceedings ‘before a foreign or international tribunal’ include proceedings in foreign courts, as well as administrative proceedings and government investigations.\footnote{Intel Corp v. Advanced Micro Devices Inc, 542 US 241, 258 (2004).} The proceeding must be within reasonable contemplation but is not required to be ‘pending’ or ‘imminent’.\footnote{Intel Corp, 542 US at 259.} 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.\footnote{In re Application for an Order Pursuant to 28 USC § 1782 to Conduct Discovery for Use in Foreign Proceedings, 773 F 3d 456 (2d Cir 2014).}

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.\footnote{id. at 461.}

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.\footnote{id.}

Discovery under Section 1782 includes both deposition testimony and document production.\footnote{See Intel Corp, 542 US at 249.} 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.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.69 In the matter of 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.70 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

68 id. at 265.
69 NY CPLR 7502.
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).
court reasoned that the judgment was not an unenforceable penalty because the purpose was ‘to compensate the victim for actual damages’. 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. 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.

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 (the 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

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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.
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 The Automatic Stay Provision under FRCP 62 extended to 30 Days

Effective 1 December 2018, judgment creditors are stayed from executing judgment for 30 days, an increase from 14 days under the formal rule. The original rule required a 10 business day stay. In 2009, FRCP 62 was amended to extend the automatic stay to 14 calendar days.

In addition to extending the automatic stay, the new rule gives the party seeking a stay more flexibility in the type of security posted. Previously, under FRCP 62(d), a party could only obtain a stay by a supersedeas bond. Under the updated rule, the party seeking a stay may post security in a form acceptable to the court other than a bond. See Advisory Committee Notes.

While the amendment seems to benefit debtors, the rule change is not all bad news for creditors. Under the new rule, the court has explicit discretion to dissolve the automatic stay or replace it with a court ordered stay. The Advisory Committee Notes indicate the court may dissolve a stay if there is a ‘risk the judgment debtor’s assets will be dissipated’ or the judgment does not involve payment of money. Thus, the court could order dissolution of the stay and immediate execution of judgment if the circumstances permit.

This rule change seems motivated by the Committee’s desire to level the playing field for debtors. Extending the automatic stay to 30 days will resolve the gap between the automatic stay – formerly 14 days – and the time to file most appeals – 28 days after entry of judgment. Now, the appellant will have the full 28 days to file an appeal without concern the judgment creditor will enforce the court’s judgment. The Advisory Committee Notes explain that the ‘revised rule eliminates any need to rely on inherent power to issue a stay during this period’.

ii Helms–Burton Act

In 1996, Congress authorised private rights of action to enforce claims for expropriation by Cuba that occurred during 1959 Cuban Revolution in US federal courts pursuant to the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, better known as the Helms–Burton Act. The claims are against those who, in the words of the Act, ‘traffic’ in property confiscated by the Cuban government. However, Congress also authorised the President to suspend those rights for successive six-month periods, and every President has done so since the Act went into effect in August 1996 – until recently. The Trump administration followed suit and continued the suspension until recently, when it shortened the six-month period to 45 days and then later stated it will permit private actions to be brought. The reason for this change in policy is because the current administration views Cuba as supporting the Maduro regime in Venezuela. This is a significant departure from

75 See Trump Nears Key Cuba Sanctions Decision Over Support for Maduro, Bloomberg (Feb. 27, 2019) (Trump administration is using Title III because of Cuba’s support for Maduro); Trump Symbolically Tightens Embargo on Cuba, Associated Press (Mar. 4, 2019) (Title III suspension waiver ‘is being presented as retaliation for Cuba’s support of . . . Maduro’); U.S. to Allow Lawsuits Against Cuban Firms, Foreign Businesses Excluded for Now, CNN (Mar. 4, 2019) (State Department said that this holds Cuba
prior administrations. Private litigants have filed lawsuits against ‘traffickers’ in Florida and Washington, DC, including a case for which authors of this chapter are counsel of record, Exxon Mobil Corp v. Corporación CIMEX SA, et al., No. 19-cv-1277 (DDC).

The Act has long faced opposition from countries that do business with Cuba, including Canada, Mexico and members of the EU. The primary argument made by international opponents of the Act is that Title III provides for extraterritorial reach against companies outside of the US and Cuba in violation of customary international law and provisions of NAFTA, GATT, and GATS. On 3 October 1996, the EU requested the WTO to appoint a dispute resolution panel on the Act. Shortly after passage of the Act, the Inter-American Judicial Committee of the Organization of American States issued a non-binding opinion declaring that Title III violates customary international law.76

In response to the Act, the EU, Canada and Mexico adopted retaliatory legislation.77 The two most important functions of these laws are ‘blocking measures’ and the ‘clawback’ right of action. Blocking measures prohibit persons subject to the jurisdiction of the state from complying with Title III. The clawback provisions give a right of action to persons who have lost Title III lawsuits. The loser of a Title III action will be permitted to recover from the successful party equal to any amount that the successful party recovered under Title III.78

Since – at the time of writing – the cases were just filed, US courts have not yet issued any rulings or opinions in these cases, but decisions construing the meaning of the Helms–Burton Act will be forthcoming.

iii Enforcement of ICSID awards in the United States

Successful claimants in investor–state arbitrations often face hurdles to actual recovery of their awards, and a recent US District Court decision may pose yet another hurdle involving the ability to enforce the interest due on awards. ICSID panels often provide for post-award interest, which are important given the potential for lengthy delays in collections if the award debtors refuse to pay. The benefit to patient claimants is supposed to be automatic recognition of their awards in the more than 160 countries that are ICSID members (including the US), creating a (relatively) straightforward path to judgment and execution to satisfy unpaid awards. But a recent decision from the US District Court for the District of Columbia now calls into question whether a claimant who seeks recognition of an award in the US risks losing the right to enforce the post-award interest granted by the ICSID tribunal and be left with the statutory post-judgment interest rate once an ICSID award is recognised as a US judgment.

In *OI European Group BV v. Bolivarian Republic of Venezuela*, No. 16-cv-1533 (DDC), the court was faced with a fairly typical action to recognise an ICSID award (except for the unusual issue of who was the government: *Maduro v. Guaidó*). The award arose from the expropriation of claimant’s glass factories by the Venezuelan government in 2010. The claimant commenced an ICSID arbitration in 2011, and an award was issued in March 2015 for the amount of US$372.46 million plus costs, expenses, and post-award interest (LIBOR plus 4 per cent).

Venezuela applied for annulment, which consumed another year during which the award was provisionally stayed, though the ICSID tribunal eventually lifted the stay when it became clear that Venezuela was unlikely to comply. The claimant then brought suit in Washington, DC to confirm the award and lost another year attempting to serve process on Venezuela. Even then, after seven years of delay, the claimant was forced to continue to wait when the court granted Venezuela’s request for a stay pending a final decision on Venezuela’s annulment application, which the tribunal denied in December 2018. In other words, the court determined to grant a stay even though the ICSID tribunal charged with presiding over the annulment application had already determined that a stay was no longer appropriate.

Delays continued in the spring of 2019 largely due to a dispute over whether the Guaidó government or the Maduro government was the proper representative of Venezuela’s interests. The court ultimately recognised the Guaidó government (following a DC Circuit decision on the issue), which did not object to recognition of the award but instead argued only that the post-judgment interest rate had to be set at the federal statutory rate for judgments (around 2.3 per cent) instead of the higher award rate (LIBOR plus 4 per cent).

The court agreed with the Guaidó government and entered judgment on the award but replaced the more favourable award rate of interest with the federal post-judgment interest rate dictated by 28 USC Section 1961. Applying the ‘merger doctrine’ – a doctrine holding that arbitral awards merge with the judgments that are entered by courts when confirming the awards – the court reasoned that the federal rate applied once judgment was entered on the award. The court found support in the language of the award, which provided for interest ‘until payment’ without any explicit provision for post-judgment interest. In so doing, the court distinguished a 2015 decision from the Southern District of New York in *Mobil Cerro Negro Ltd v. Bolivarian Republic of Venezuela*, which held that the award rate (not the federal rate) should continue to apply even after judgment has been entered on an ICSID award.

The DC court’s decision is difficult to square with the text and underlying ICSID policy. When Congress passed the enabling legislation implementing the ICSID Convention in the US, it provided that ICSID awards are entitled to special treatment (i.e., ‘[t]he pecuniary obligations imposed by such an award 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, 22 USC Section 1650a). Moreover, ICSID awards are not subject to the Federal Arbitration Act (FAA), which specifically ‘shall not apply to enforcement of [ICSID] awards’, id. It is difficult to see how interest is anything other than a pecuniary obligation – and, therefore, ‘shall be enforced’ and ‘shall be entitled to full faith and credit’. In turn, replacing a pecuniary obligation of an award with a different (and here, lesser) pecuniary obligation does not satisfy the text’s requirements to ‘enforce’ and provide full faith and credit.

The DC court did acknowledge its obligation to afford full faith and credit to the award, but it did not analyse the mandate of the enabling legislation, which explicitly commands that ‘[t]he pecuniary obligations imposed by such an award shall be enforced’, 22 USC Section 1650a(a). The court manifestly did not enforce the interest obligation,
instead analogising to state court judgments where post-judgment interest is often set by state statute, which is trumped by federal law. By contrast, the interest provisions of ICSID awards typically are fully litigated by the parties and resolved by the tribunal, and Congress has commanded that the result ‘shall be enforced’ by the federal courts.

While it may be tempting to look to analogous situations arising under the FAA for precedent when dealing with ICSID awards, this approach is at odds with the enabling statute in which Congress specifically exempted ICSID awards from the scope of the FAA. Reliance on the merger doctrine or other procedural rules of the FAA is, therefore, not appropriate. ICSID awards – unlike other types of arbitral awards – are to be treated as separate judgments entitled to full faith and credit in US courts.

Additional caution should be used when examining the damages language used by ICSID tribunals when issuing awards. The DC court put great emphasis on the language providing for interest ‘until payment’ – though the ongoing litigation indicated the award had not been paid, and thus, it was perhaps the award’s failure to explicitly provide for ‘post-judgment’ interest that the court found most instructive. Regardless, practitioners who represent investors in ICSID proceedings may wish to consider more robust language in their requests for relief, including language that clearly provides for interest as a pecuniary obligation that is not to be supplanted by local law and that accrues until the award (or a judgment entered thereon) is satisfied.

US jurisprudence regarding the enforcement of ICSID awards is relatively undeveloped. Thus, the question of interest remains open and unresolved – as do many other questions – notwithstanding the DC court’s decision. Nevertheless, seeking initial recognition of ICSID awards in the US is becoming less attractive in light of this decision and the 2017 appellate decision in the Mobil Cerro Negro case, in which the Second Circuit Court of Appeals refused to permit expedited recognition procedures (though did not reach the interest issue), 863 F.3d 96 (2d. Cir. 2017). The uncertainty surrounding whether US courts are truly willing to enforce the pecuniary obligations of ICSID awards should be cause for reflection, and successful claimants should consider whether there are realistic enforcement goals to pursue in the US before seeking recognition here.

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.79 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, 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

79 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.
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.

Both of these cases – the DC District Court case and the Second Circuit case – are at odds with the accepted practices of other ICSID Member States, which more closely embody the original intent and understanding of the ICSID Convention. The United Kingdom and France, for instance, offer well-established *ex parte* procedures to ICSID award creditors. Investors may be wise to consider availing themselves of the immediate recognition procedures in the courts of other countries.\(^80\)

### iv 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 *Koehler v. Bank of Bermuda Ltd*\(^81\). In *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’.\(^82\) However, the Court’s inquiry in *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 *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 *Ayyash v. Koleilat*,\(^83\) 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


82 id. at 541.

83 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’.

By contrast, in Amaprop Ltd v. Indiabulls Financial Services Ltd, 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. The appeal was dismissed for lack of prosecution.

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. 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 ‘the risk of competing claims and the possibility of double liability in separate jurisdictions’. 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’.

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

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84 Ayyash v. Koleilat, 981 NYS2d 536 (NY App Div 1st Dep’t 2014).
85 No. 10-cv-1853 (SDNY 21 February 2012).
88 See Motorola Credit Corp v. Uzan, No. 02-cv-666 (SDNY 1 August 2013).
89 24 NY3d 149, 162 (NY 2014).
90 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.

v **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.91 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.

vi **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*,92 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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91 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’.93

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.94 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’.95 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 preexisting 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’.96

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.

93 Slip Op at 8.
94 id. at 1 (Ginsburg, J, dissenting).
95 id. at 6–7.
96 id. at 9.
Appendix 1

ABOUT THE AUTHORS

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Valeria Acca obtained a law degree from the University of Milan with absolute full marks in April 2008, and was admitted to the Bar in 2012. She is an associate at Studio Legale Pisano, where she has worked since 2008. Her practice mainly focuses on criminal law, covering the entire area of white-collar crime (corporate criminal responsibility, corruption, financial crimes, tax crimes, bankruptcy crimes, environmental and labour crimes, and money laundering), with emphasis on transnational investigations and related aspects of mutual legal assistance and extradition. Ms Acca works daily with counsel and expert witnesses in various jurisdictions, in teams representing defendants during criminal and regulatory investigations. Ms Acca is also a member of the IBA, and she regularly attends conferences and seminars in Italy and abroad on the subjects of white-collar crime and mutual legal assistance and extradition.

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Rogério Alves is the managing partner of Rogério Alves & Associados. With over 30 years’ experience, and being a former chairman of the Portuguese Bar Association (from 2005 to 2007), his professional activity includes general litigation, with a particular emphasis on criminal and white-collar criminal law and financial regulation infringements, and commercial and corporate litigation.

Rogério Alves has a law degree, granted in 1984 by the Faculty of Law at the Lisbon Catholic University, and has been a professor in legal discourse and presentation at the University since 2005. He is classed as a ‘Leading Individual’ by Chambers Europe in white-collar criminal law and litigation (Band 1).

RANDALL ARTHUR
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Randall Arthur is a partner in the Hong Kong office of Kobre & Kim, where he concentrates on international judgment enforcement, offshore asset recovery and insolvency litigation and disputes.

Mr Arthur represents clients in Hong Kong and other jurisdictions in complex fraud matters, with a particular emphasis on identifying and freezing assets in Hong Kong and
obtaining other interim relief in aid of local and foreign proceedings. He has considerable experience in tracing, freezing and recovering assets that have been misappropriated as a result of business email compromises and cybersecurity breaches. He also advises on and project manages the global enforcement of large judgment and arbitration awards.

In contentious insolvency and bankruptcy proceedings, Mr Arthur acts on behalf of liquidators, receivers, creditors and trustees in, inter alia, assisting with investigations into companies’ affairs, obtaining discovery orders, conducting examinations and recovering assets, including through clawbacks and third-party claims. In cross-border matters, he often represents multiple stakeholders in debtor–creditor disputes, and advises appointment takers, directors and shareholders on insolvency administrations.

ROBIN J BAIK
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Robin J Baik is an experienced litigator practising out of the Seoul office of Kobre & Kim, an international disputes and investigations firm. He focuses his practice on representing Korean and other Asia-based corporations and individuals in international judgment enforcement and asset recovery matters, including those relating to insolvency proceedings and involving fraudulent schemes to hide and embezzle misappropriated assets. His experience in this area includes representing clients such as sovereign entities, and energy and technology companies, as well as financial institutions.

MICHAEL J BARATZ
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Michael J Baratz is a partner in Steptoe’s Washington, DC office. His practice focuses on all aspects of commercial litigation, arbitration, mediation and judgment enforcement, including many matters with a cross-border emphasis. He frequently represents clients in connection with their efforts to obtain recognition and enforcement of judgments and arbitral awards in courts around the world, and in seeking pre-judgment remedies in these matters. He has litigated numerous matters in federal and state courts around the United States through trial and appeal, as well as proceedings before a variety of arbitral bodies.

JUSTIN BHARUCHA
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Justin is a founding partner at Bharucha & Partners, and his practice focuses on financing and stressed assets. He advises on acquisitions by and from non-residents, especially in sectors where foreign investment is subject to restrictions, such as real estate, defence and retail. He also advises clients on mandates relating to anticorruption and ethics.

JORGE BOFILL
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Jorge Bofill is an experienced dispute resolution attorney in the areas of white-collar crime, corporate investigations, civil litigation, international arbitration and mediation.

Mr Bofill is often requested as an expert by the Chilean Senate’s Committee on Constitution and Legislation. Examples of his involvement in these matters are the complete...
revamping of the Chilean criminal procedure system and the statute on criminal liability of legal entities, among many others. In April 2015, Mr Bofill was selected as a member of the panel of experts appointed by the Secretary General of the United Nations to conduct an assessment of the system of administration of justice of the United Nations.

Jorge Bofill has been ranked in the top tiers in the fields of dispute resolution and white collar by Chambers Latin America since 2009, in 2015 receiving the distinction of ‘Star Individual’ in white-collar litigation.

He received his law degree from Pontifical Catholic University of Valparaíso, summa cum laude, and his doctoral degree from Friedrich-Alexander University Erlangen-Nürnberg, Germany, summa cum laude.

CLAUDIA BREWI
Wolf Theiss Rechtsanwälte GmbH & Co KG

Claudia Brewi joined the disputes team of Wolf Theiss in Vienna in 2016. Her main areas of practice are criminal and commercial litigation. She has been involved in several cross-border disputes concerning the criminal and civil liability of managing directors. Prior to joining Wolf Theiss, Claudia worked in the litigation department of another international law firm. She studied law at the University of Vienna where she specialised in criminal law and justice as well as international legal practice and language (diploma supplement). She also gained international experience during her studies at the University of Oslo, Norway.

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Jared R Butcher is a partner in Steptoe’s Washington, DC office. His practice focuses on complex commercial litigation, with an emphasis on cross-border litigation and arbitration. He represents clients in all phases of civil litigation, arbitration and alternative dispute resolution, and he has expertise in obtaining provisional remedies and judicial recognition and enforcement of judgments and arbitral awards in courts around the world. He also regularly assists with internal corporate investigations, including fraud, whistle-blower claims and suspected corporate espionage and theft of trade secrets and proprietary information.

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Chiara Cimino obtained a law degree from the University of Milan with absolute full marks in June 2007, and was admitted to the Bar in 2011. She is a counsel at Studio Legale Pisano, where she has worked since 2007. Her practice mainly focuses on criminal law, covering the entire area of white-collar crime (corporate criminal responsibility, corruption, financial crimes, tax crimes, bankruptcy crimes, environmental and labour crimes, and money laundering), with emphasis on transnational investigations and related aspects of mutual legal assistance and extradition. Ms Cimino works daily with counsel and expert witnesses of various jurisdictions, in teams representing defendants during criminal and regulatory investigations. Ms Cimino regularly attends conferences and seminars in Italy and abroad on the subject of white-collar crime and mutual legal assistance and extradition.
STEVEN K DAVIDSON  
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Steven K Davidson is a partner in Steptoe’s Washington, DC office. His practice focuses on litigation and arbitration of complex commercial disputes (particularly cross-border disputes). He has handled numerous jury and bench trials in various courts, including the bankruptcy court. He also has an extensive practice in commercial arbitration. He is the former head of the firm’s commercial litigation group, a position he held for over 10 years, and is currently co-head of the firm’s international arbitration group. He has particular experience in seeking the recognition and enforcement of judgments and arbitral awards in courts around the world, and in seeking pre-judgment remedies in these cases. Mr Davidson successfully represented Motorola in its claims against the Uzans for over US$2 billion. The Steptoe team obtained worldwide freezing orders, liquidated assets worldwide, and enforced judgments and arbitral awards in various countries. Additionally, Mr Davidson, along with the other authors of this chapter, represents ExxonMobil in its efforts against Venezuela and the state-owned oil company, PDVSA. Through Steptoe’s efforts, ExxonMobil obtained a pre-award freezing order, attaching over US$300 million in a proceeding in the United States District Court for the Southern District of New York.

ADRIANA DE BUERBA  
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Adriana de Buerba is the head of the white collar crime and investigations practice area at Pérez-Llorca. She joined the firm in 2008, after having worked as a public prosecutor for 10 years.

She acts as defence and private prosecutor, advising clients in criminal cases regarding a wide variety of corporate criminal offences. Adriana has a wealth of experience in transnational criminal cases, assisting both foreign and Spanish companies involved in transnational criminal investigations in Spain and abroad. She regularly works together with foreign law firms in the United Kingdom, the United States, France, Switzerland and other EU countries, in order to provide the appropriate multi-jurisdictional advice to her clients. She is also an expert in extradition, European arrest warrant proceedings and international mutual legal assistance mechanisms.

Adriana is a member of the Madrid Bar Association, the International Bar Association and the Anti-Money Laundering Committee of the National Council of Spanish Bar Associations. Adriana is an officer of the IBAs Criminal Law Committee (www.int-bar.org/Officers/Index.cfm?unit=5_0_0_1_0).

Adriana is also an active member of the European Criminal Bar Association, where she takes part in the sub-association known as the European Fraud and Compliance Lawyers Association (www.efcl.eu) and the Anti-Corruption in Europe working group.

Adriana is also a member of the Spanish Criminal Lawyers Association (UEAP). The UEAP is a non-profit association that aims to promote the improvement of the protection of the rights of individuals before the criminal justice system.
TIMOTHY P DE SWARDT
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Timothy de Swardt is a barrister admitted in England and the BVI who regularly represents high-value clients in enforcing international judgments and recovering offshore assets, often in cases arising from misappropriation, fraud and the proceeds of crime. Mr de Swardt also handles cross-border insolvency cases and trusts and estates disputes.

Mr de Swardt regularly appears in high-stakes matters in the BVI and England, including in misfeasance claims by the liquidators of Barrington Capital Group against its former director, and multiple judgment enforcement actions, including a US$1.2 billion judgment award against Tata Sons Ltd on behalf of NTT DoCoMo Inc, and a US$9 billion arbitration award against the Republic of Nigeria on behalf of Process & Industrial Developments Ltd.

Through his global asset recovery practice, Mr de Swardt has worked extensively with local counsel in foreign jurisdictions such as Australia, Bermuda, Brazil, the Cayman Islands, the Cook Islands, Cyprus, Dubai, Liechtenstein, Nevis, New Zealand, Russia, Switzerland and the United States.

Who's Who Legal has ranked Mr de Swardt as a leading asset recovery lawyer, commenting that he ‘enjoys the praise of peers on the international stage and is known for his proficiency-enforcing foreign judgments and assisting in the recovery of offshore assets’.

Before joining Kobre & Kim in the BVI, Mr de Swardt practiced at the Chambers of William Clegg QC, 2 Bedford Row, in London.

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Ariel Devillers is a senior associate in the dispute resolution practice of Arendt & Medernach. He specialises in civil and commercial law, advising domestic and international clients on corporate, commercial and financial disputes.

He has been a member of the Luxembourg Bar since 2012 and serves on the subcommittee on economic law focusing on class actions.

Ariel Devillers has been a member of the board of directors of the Nederlands Handelsforum Luxemburg (the equivalent of the Dutch Chamber of Commerce in Luxembourg) since 2016, and currently serves as chair.

Ariel holds a master of laws degree (LLM) in law and economics from University College London, as well as a master of laws degree (LLM) in European banking and financial law from the University of Luxembourg.

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Leonardo Adriano Ribeiro Dias has been a lawyer in São Paulo since 2008 and has extensive experience in providing legal business counsel and in civil litigation. He holds an LLM in corporate law (2012) and a PhD in corporate law (2016), both from the University of São Paulo; he also holds a law degree (LLB, 2007) from the same university. He is an associate and CFO of the Brazilian Institute of Corporate Reorganisation (IBR) and an associate of INSOL International and TMA Brazil. He is an assistant professor of commercial law at the
Faculty of Law of the University of São Paulo, where he teaches courses concerning corporate bankruptcy. He is also a guest professor on postgraduate courses, a lecturer at business law conferences and author of the book *Financing in Judicial Recovery and Liquidation*.

**MOLLY BRUDER FOX**

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Molly Bruder Fox is a partner in Steptoe’s Washington, DC office. She is an experienced trial lawyer practising both in court and arbitration. She has extensive experience in all aspects of litigation at the trial court level, including strategic case planning, discovery, dispositive motions practice and trial preparation.

She also focuses on judgment enforcement and recognition of arbitral awards, including matters involving foreign sovereigns. Many of these matters are cross-border in nature.

**DAVID GADSDEN**

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David Gadsden has deep experience in fraud and financial crime matters. He is counsel on multi-jurisdictional fraud investigations, including related civil disputes and regulatory proceedings. Mr Gadsden acted as counsel for a primary defendant in the *Sino-Forest* litigation, the largest securities fraud class action in Canada. He is known for his pragmatic advice on fraud prevention and investigations, and has extensive expertise in ‘Ponzi scheme’ litigation and asset recapture, including cross-border tracing, *Anton Piller* orders and *Mareva* injunctions. David has been honoured by *Lexpert* magazine as a ‘Rising Star’, recognising him as one of Canada’s leading lawyers under 40. He has also been named as a ‘Litigator to Watch’ in *Lexpert’s* annual *Guide to the Leading US/Canada Cross-border Litigation Lawyers* in Canada and has been ranked in *The Legal 500* for dispute resolution.

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**ANDERS HAUDE GLØDE**

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Anders Hauge Gløde is partner at the Danish law firm Bech-Bruun. He is a specialist with long-term experience of rendering advice on insolvency, bankruptcy and restructuring. He is involved in all aspects within this field of expertise. Anders is well known for his profound business understanding within this field of expertise and, accordingly, he renders advice to and represents numerous clients, including banks and financial institutions. Furthermore, Anders has considerable litigation experience conducting legal proceedings before the Danish courts and, in 2016, he was admitted to practise before the Danish High Courts.
LUIS OMAR GUERRERO RODRÍGUEZ
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Luis Omar Guerrero Rodríguez is a partner at Hogan Lovells. Whether practising civil or commercial litigation, arbitration or antitrust, Omar Guerrero is a lawyer who has paid the ‘10,000-hour rule’.

Based in Mexico City, Omar co-heads the arbitration and litigation practice as well as the antitrust practice of Hogan Lovells’ Mexico offices. Omar knows the importance of being a team player, providing bold solutions for clients and the merits of being a fierce competitor.

Since joining the firm, he has advised companies in the pharmaceutical, hospitality, telecoms, food, construction, IT and agro-business industries to advance their business objectives whether in a dispute or antitrust matters.

Omar is a passionate litigator. His storytelling and advocacy has convinced domestic and international arbitral tribunals, judges throughout Mexico and even justices at the Supreme Court to rule in his clients’ favour. He has also acted as arbitrator in domestic and international disputes where he sits – at the other side of the table – deciding cases with which he is entrusted.

Antitrust is Omar’s other passion. He helps companies in mergers, cartel investigations, and other antitrust-related proceedings. He embraces a hands-on approach when tackling his cases. He advises, trains, teaches, and lives antitrust law. Omar tries cases before competition authorities and federal courts, including the Supreme Court.

Omar also enjoys academia. He has written more than 40 leadership think pieces on competition, litigation, and arbitration, and speaks on the topics regularly.

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Sonam is a partner at Bharucha & Partners, and her practice focuses on corporate criminal liability. She advises clients on mandates pertaining to governance, ethics and anticorruption as well as the laws on crime.

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Mariana Gutiérrez joined the compliance, anticorruption and investigations practice at Marval, O’Farrell & Mairal in 2018. She advises international companies on anti-corruption and anti-bribery laws and enforcement. Mariana regularly assists clients, designing compliance programmes and optimising anti-corruption and bribery risk management procedures. She has experience conducting internal investigations as well as anticorruption and bribery due diligence in M&A and other transactions.

Before joining Marval, Mariana specialized in Criminal and Public International Law. She graduated with honours from the University of Buenos Aires in 2015. In 2018, she obtained and LLM from the School of law of the University of Amsterdam and a Certificate in International Criminal Law from Columbia Law School.
ALEXANDER HEYLIN

No5 Chambers

Alexander Heylin is a barrister at No5 Chambers in London. His work includes an emphasis on civil fraud, white collar fraud, company, insolvency and regulatory matters, as well as complex commercial disputes generally. Alexander regularly advises shareholders in joint venture disputes and acts in contentious matters involving trusts and involuntary liquidation. He has been the lead counsel in several long, complex, document-heavy cases. He has been involved in several major offshore insolvency cases, including those involving the collapse of Lehman Brothers and related entities. Mr Heylin has been involved in high-value disputes across the Caribbean, where he is admitted to practise in the British Virgin Islands, the Cayman Islands and the Turks and Caicos Islands.

VALERIE HOHENBERG

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Valerie Hohenberg is a partner and member of the disputes team in the Vienna office of Wolf Theiss, joining the firm in 2008. She specialises in corporate disputes, fraud and cross-border asset tracing and recovery. In particular, she advises national and international clients on the civil and criminal liability of directors and officers, including D&O insurance litigation. Valerie regularly works in teams of international lawyers in cross-border disputes and has extensive experience in the development of global litigation strategies. She is a member of the corporate investigations practice of Wolf Theiss and the international fraud group. In addition to her legal work, Valerie regularly lectures and publishes in her main practice areas. Moreover, she completed a secondment of several months in the internal audit department of an Austrian credit group in 2014.

ROBERT HUNTER

Robert Hunter Consultants

Robert Hunter is the principal of Robert Hunter Consultants and an experienced solicitor-advocate who has specialised in cases involving fraud, asset tracing and breach of trust since the early 1990s. He has particular expertise in applications for emergency injunctive relief such as freezing and proprietary injunctions, search orders and Norwich Pharmacal applications.

Robert has been involved in many of the largest fraud and trust cases to come before the English courts, and has experience of pursuing asset tracing claims and claims for breach of trust in all the major offshore jurisdictions.

He has been ranked as the star fraud practitioner in the Chambers guide since the category was first used, and is rated as the joint star practitioner in contentious trust litigation for the first time in the 2016 Chambers guide to the legal profession.

Previous comments in legal directories include: ‘He is absolutely exceptional. He is the benchmark we all measure ourselves against,’ Chambers (2015); ‘a real leader in his field’, ‘He thinks outside the box,’ Chambers (2014); ‘considerable skill as an advocate’, Chambers (2014); ‘Robert Hunter remains the outstanding practitioner in the field,’ Chambers UK (2012), ‘a legend and a genius’, Chambers UK (2011); ‘thoroughly impressive’, Chambers UK (2011); ‘knows what to do whatever the circumstances, whatever the situation’, Chambers UK (2011); he ‘is at the top of his game’, is ‘like a bloodhound in pursuit of his clients’
interests’ and has ‘an ability to read the fraudster’s mind and anticipate his reactions’, The Legal 500 UK 2010; ‘the sort of solicitor you don’t come across very often, capable of coming up with points of true genius’, Chambers UK (2009); ‘years of deep experience, flexibility and insightful approaches’, Chambers UK (2009); ‘easily one of the most impressive solicitors I have ever come across . . . he is a shrewd and clever tactician, an articulate and brilliant lawyer, and an inspirational team leader and motivator’, Chambers UK (2008); and ‘One of the smartest lawyers in London’ Who’s Who Legal 2017.

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Tobe Inghelbrecht is a member of the Brussels Bar, and a member of Stibbe’s litigation and arbitration practice. He focuses on advising and litigating in matters related to contract law and all aspects of commercial law. Furthermore, he is also a part-time teaching assistant at the Catholic University of Leuven, where he teaches at the Institute for the Law of Obligations.

MICHAEL S KIM

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Michael S Kim is the co-founder of Kobre & Kim, an international disputes and investigations firm. He serves as lead counsel in high-stakes financial disputes, with a particular focus on international enforcement of judgments and arbitration awards. Mr Kim is a highly regarded advocate in complex financial and insolvency disputes, particularly those involving international asset tracing and recovery. He was ranked one of the top 10 judgment enforcement and asset recovery lawyers in the world by the publishers of Global Arbitration Review.

YVES KLEIN

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Admitted to the bars of Geneva and Switzerland since 1995, Yves Klein is an international asset recovery lawyer, partner at Monfrini Bitton Klein. In 2019, he received the Who’s Who Legal Asset Recovery Lawyer of the Year Award.

His main activity is litigating and coordinating transnational asset recovery proceedings before civil, criminal and bankruptcy courts on behalf of victims of economic crimes.

He is also active in anti-corruption investigations and in offshore litigation, such as the enforcement of foreign judgments and arbitral awards, the obtaining of evidence and the freezing of assets concealed in Switzerland and abroad.

He is recognised in asset recovery and business crime by Chambers (Band 1) and Who’s Who Legal (WWL Thought Leader Global Elite).

Yves Klein has published on tracing and recovery of assets and anti-corruption issues since 1996, and regularly speaks at international conferences on these matters. He is the past chair (2016–2017) of the Asset Recovery Subcommittee of the International Bar Association’s Anti-Corruption Committee and is representative for Switzerland of ICC FraudNet, the world’s leading asset recovery network, operating under the auspices of the International Chamber of Commerce.

He is fluent in French, English, Portuguese and Spanish, and speaks some Italian and German.
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Calvin Koo is a US- and Hong Kong-qualified litigator based in the Hong Kong office of Kobre & Kim. Mr Koo focuses his practice on advising clients in large-scale, cross-border judgment enforcement and asset recovery matters, as well as debtor–creditor litigation. He has represented clients across Asia in high-stakes litigation and arbitration.

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Daphne’s experience includes, amongst other things, acting for leading commercial and financial institutions and publicly listed companies on court-sanctioned capital reduction exercises and mergers, representing international shipping companies in shipping and admiralty matters and acting for international and domestic companies on a diverse range of disputes. Daphne also undertakes advisory work and regularly appears at various levels of the Malaysian courts for hearings, trials and appeals. She is listed as a Future Star in Commercial and Transactions and Shipping in *Benchmark Litigation*.

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He has been a member of the Luxembourg Bar since 1988.

He is approved as mediator at the Civil and Commercial Mediation Centre.

François Kremer is the acting chair of the Luxembourg Bar Association until 2020, after serving as vice chair since 2016. He previously served as a chair of the Disciplinary Council of the Luxembourg Bar and also as a member of the Luxembourg Bar Council.

He also serves as Honorary Consul-General of Thailand in Luxembourg.

François Kremer holds a maîtrise en droit des affaires from the Université Paris I Panthéon-Sorbonne (France) as well as a master of laws degree (LLM) from the London School of Economics and Political Science (UK).
In *Chambers Europe* 2018 legal guide, interviewees hold François Kremer in high regard for his litigation skills, with one source saying that he is ‘one of best litigators in Luxembourg’ with a ‘very strong track record and reputation’. He is considered as a ‘superb’ team head by clients in Legal 500 2017 guide.

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Chiew Ee is a Principal at the Litigation Department of Rahmat Lim & Partners. Her areas of practice include corporate and commercial disputes, banking litigation, insolvency and restructuring and international arbitration. She also represents and advises clients in regulatory and internal investigations into bribery, fraud, and conflict of interest matters.

Chiew Ee graduated from the University of London with a bachelor of laws (hons) degree in 2010. She was awarded the Professor Stephen Guest Special Award for Jurisprudence & Legal Theory, Book Prize for Outstanding Performance in Commercial Law and the Tun Hamid Omar Scholarship Award for Top Student in Finals Part II (Year 3). She obtained her certificate in legal practice in 2011.

Chiew Ee is an associate of the Chartered Institute of Arbitrators and also a member of the Young Practitioners Group of the Asian International Arbitration Centre. She is also an accredited tribunal secretary at the Hong Kong International Arbitration Centre.

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*Michael Kyprianou & Co LLC*

Menelaos Kyprianou studied law at the University of Nottingham, where he obtained an LLB (Hons) degree in 1993. As a student at Nottingham University he was awarded two prizes: the JC Smith prize in the law of evidence, awarded to the student who obtains the highest mark in the subject of evidence; and the Law Graduates Association moot prize, awarded to the student who wins the moot competition. Mr Kyprianou was adjudged the winner in the final round of the competition by Sir Igor Judge, former Lord Chief Justice of England and Wales. He then followed the bar vocational course and became a barrister-at-law of the Middle Temple in 1994.

In 1994, he returned to Cyprus and has practised law there ever since, focusing increasingly on dispute resolution cases of a corporate and commercial nature. *The Legal 500: Europe, Middle East & Africa* (2005 edition) described him as ‘a reputable litigator who has handled complex international cases’. Mr Kyprianou has been consistently recommended by the major law directories ever since. The 2014 edition described him as ‘an outstanding lawyer’, while according to the *Chambers Europe* 2014 directory, Mr Kyprianou is ‘relied on by clients for his excellent support in corporate disputes’.

In April 2007, he was appointed by the Council of Ministers as a member of the board of the Cyprus Securities and Exchange Commission, a position that he held until September 2011.

In 2014, Mr Kyprianou was appointed by the President of the Republic of Cyprus as a member of the team advising the negotiator of the Greek Cypriot side in relation to the talks with the Turkish Cypriot community, which have as an aim the reunification of Cyprus. Specifically, he has been appointed to the team that will advise on issues of European Union law.
MATTHEW J LATELLA

Baker McKenzie

Matt Latella is a veteran in Baker McKenzie’s litigation practice group. A trial lawyer with over 20 years of experience, 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 multijurisdictional 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.

AARON LEE

Allen & Gledhill LLP

Aaron is a commercial litigator with a particular expertise on employment, white-collar, regulatory and corporate governance matters.

Aaron is the co-head of the firm’s white collar & investigations practice, and has an active practice in matters involving fraud, insider trading, money laundering, corruption, securities, market misconduct, import/export and mutual legal assistance matters. He also regularly advises on corporate investigations and inquiries relating to employee misconduct, fraud and corporate governance-related issues.

Aaron has acted in major high-profile fraud and corporate governance-related disputes over the past few decades, including: (1) the claim by the National Kidney Foundation against its former chair, chief executive officer and directors for breaches of fiduciary duties and conspiracy; (2) the inquiry into Ren Ci Hospital and Medicare under the Charities Act concerning misconduct on the part of Venerable Shi Ming Yi; and (3) the high-profile prosecution against several members of City Harvest Church.

He also has experience acting for a number of international and local financial institutions.

Aaron has been recognised and ranked in leading publications. In The Legal 500 Asia Pacific, he is noted as a key individual in financial regulatory and employment matters. Chambers Asia-Pacific also notes that he ‘is a very active practitioner who specialises in regulatory matters, as well as white-collar criminal compliance’. He is praised by clients for being ‘incredibly responsive and pragmatic, giving on complex matters that is clear and concise’.

Prior to joining private practice, Aaron was a deputy public prosecutor and state counsel in the Attorney General’s Chambers, where he advised on and prosecuted serious and white-collar crimes.
LEE MAY LING  
*Allen & Gledhill LLP*

May Ling’s key areas of practice are in corporate and commercial disputes and white collar crime and investigations. She has acted in a wide range of matters for multinational corporations, corporate trustees and private and publicly listed entities.

May Ling advises companies on putting in place and managing whistleblowing and dawn raid policies and procedures. She also regularly acts for companies who are conducting internal investigations and who are involved in investigations by enforcement authorities such as the Commercial Affairs Department, Corrupt Practices Investigation Bureau and the Monetary Authority of Singapore. This includes situations where the investigations develop into criminal prosecutions by the Attorney General’s Chambers.

She has experience acting for international banks in 1MDB-related investigations and for the accused in the widely reported City Harvest trial. May Ling also acted for an India-listed conglomerate in one of the longest-running litigation suits in Singapore, which concerned allegations of breach of fiduciary and statutory duties, fraud and sham transactions.

May Ling graduated from King’s College London with an LLB (first class honours) degree in 2009. She pursued an LLM (in commercial law) in King’s College London the following year before returning to Singapore and getting called to the Singapore Bar in 2012.

RONGHUA (ANDY) LIAO  
*Han Kun Law Offices*

Ronghua (Andy) Liao is a partner in Han Kun Law Offices’ dispute resolution practice, based in Shanghai. Before joining Han Kun in 2015, he had practiced as a lawyer and partner in other famous international and PRC law firms for more than 13 years. Andy specialises in commercial litigation and arbitration, cross-border dispute resolution and asset tracing and recovery, and in particular he has accumulated substantial experience in handling corporate disputes as well as investment and financing disputes of private equity funds and assets management institutions. In the area of asset tracing and recovery, Andy is one of the few experts in China recognised by the international legal community. In addition to authoring the China chapter of *The Asset Tracing and Recovery Review*, he was invited to speak at the fifth Fraud, Asset Tracing and Recovery Asia, an international conference held in Hong Kong in June 2019. Based on his distinguished performance in the area of dispute resolution, Andy was rated by *The Legal 500* as a highly recommended dispute resolution lawyer in the Asia-Pacific for 2019.

EDUARDO LOBATÓN GUZMÁN  
*Hogan Lovells*

Eduardo Lobatón focuses on international and domestic arbitration proceedings, civil and commercial litigation proceedings and antitrust matters. Eduardo takes ownership of cases, understanding clients’ business and objectives.

Eduardo graduated top of his class and *summa cum laude* from Instituto Tecnológico y de Estudios Superiores de Monterrey (ITESM). He also studied diverse aspects of international and transnational law in London, obtaining a certificate in transnational legal studies from the Georgetown Center for Transnational Legal Studies. Eduardo’s academic background
includes the captaincy of his university’s international arbitration team for two consecutive years and obtaining an honours mention for his performance in the competition. He also received the CENEVAL Award for Excellence in Performance in the law degree exam.

Since joining Hogan Lovells, Eduardo has represented and advised clients in complex litigations and arbitrations in diverse industries, including insurance, construction, infrastructure, energy, food, automotive and IT. Eduardo lives arbitration and litigation.

Eduardo is also passionate about academia. He is currently a professor of civil law at his alma mater. 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 has also served as head coach for the ITESM team in the domestic arbitration competition, obtaining the first place. He regularly writes on arbitration and litigation topics.

DONALD MANASSE

Donald Manasse Law Offices

Donald Manasse has more than 35 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 has successfully led Monaco actions on behalf of a fund manager for a sovereign fund seeking to recover assets, and represents several banks in multi-jurisdictional asset recovery efforts.

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, and he is a founding member of the International Academy of Financial Crime Litigators. Mr. Manasse was made Chevalier of Monaco’s Ordre de St Charles in 2003.

ANTONIA MOTTIRONI

Monfrini Bitton Klein

Antonia Mottironi is a Swiss international civil, business crime and tax litigator, and a counsel at Monfrini Bitton Klein, Geneva. She was admitted to the Geneva and Swiss Bar in 2013, after graduating in law and economics.

She focuses on civil and criminal litigation, especially in the area of international business crime, international judicial assistance, enforcement of foreign arbitral awards and judgements, and cross-border insolvency.
Over the past years, she has handled a great number of international asset recovery cases which included the laying of civil and criminal attachments and the enforcement of foreign judgements. She also assisted clients in preparing and co-ordinating multijurisdictional disputes, in particular in common law jurisdictions.

In her asset recovery practice, she has developed a strong experience in cross-border insolvency cases involving foreign bankrupt banks and fraud schemes (Ponzi schemes, VAT carousels). She has been involved over the past years in one of the largest art law disputes of the last decade between a Russian oligarch and his Swiss art dealer.

Antonia Mottironi has published on tracing and recovery of assets as well as on cross-border insolvency. She regularly speaks at international conferences on these matters.

She is actively involved in the International Association of Young Lawyers AIJA and in the Swiss Chapter of the Women’s White-Collar Defence Association WWCDA.

THOMAS NIGG

Gasser Partner Attorneys at Law

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

Baker McKenzie

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.

EKATERINA PAKEROVA

Robert Hunter Consultants

Ekaterina is a paralegal and in her career has been responsible for the overall management of documents, administration, court and client liaison and compliance with court deadlines in both civil and criminal litigation. She oversees a number of live matters from the initial point of contact with the client until trial. She has broad experience of cross-border trust litigation, urgent freezing injunction applications and has assisted with the largest corporate private prosecution in the UK. She is fluent in German and Bulgarian.
S NATHAN PARK
Kobre & Kim
S Nathan Park is of counsel at Kobre & Kim, an international disputes and investigations firm. 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 J PIRIE
Baker McKenzie
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 US, the UK, 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 US, Hong Kong, Switzerland, Monaco, etc.) 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.

**AITAN CANUTO COSENZA PORTELA**  
*ASBZ Advogados*

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).

**DANIEL PRAETORIUS**  
*Bofill Escobar Silva Abogados*

Daniel Praetorius focuses on securities, regulatory and white-collar crime litigation. He co-leads the renowned white-collar practice at Bofill Escobar Silva Abogados, which has been consistently ranked as top tier firm by Chambers and Partners over the past years.

He has broad experience representing clients in criminal cases related to business activities and anti-corruption regulations, as well as in securities enforcement proceedings and in asset recovery related to fraud cases. He has also been involved in the development of compliance programmes and has conducted internal corporate investigations.

Mr Praetorius’ background combines working with the Business Crime Department at the National Prosecutor’s Office and at foreign and local corporate firms, including Freshfields Bruckhaus Deringer, Frankfurt office.

He received his law degree (JD equivalent) from University of Chile, *summa cum laude*. He obtained his LLM degree, *summa cum laude*, at Albert Ludwig University of Freiburg, Germany, studies that were sponsored by the Alban Program of scholarships of study of High Level for Latin America implemented by the European Commission.

**CHRISTOPHER PRESTWICH**  
*Allens*

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.
AIMEE PRIETO

Prieto Cabrera & Asociados SRL

Dr Aimee Prieto is partner at Prieto Cabrera & Asociados, a leading firm in asset recovery, business and real estate transactions in the Dominican Republic.

She 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.

Aimee 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.

In addition, as the founder of Prieto Cabrera & Asociados, Dr 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; (6) technology, privacy and data protection; and (7) litigation.

TIM PRUDHOE

Prudhoe Caribbean

Tim Prudhoe is a commercial litigator and trial advocate. He founded Prudhoe Caribbean in 2018 having for several years been a partner at a global disputes firm. Mr Prudhoe represents companies and high-net-worth individuals based in the Caribbean and elsewhere 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 Turks & Caicos Islands and the British Virgin Islands. In addition those jurisdictions and England, Mr Prudhoe is also admitted to practise in Bermuda, Dubai IFC, Gibraltar, Grenada, Trinidad & Tobago, St Vincent and the Grenadines. He appeared at the 2009 Turks and Caicos Islands Commission of Inquiry for the then premier’s wife.

In April 2019, he was issued with the first TCI insolvency practitioner licence. He has also acted in liquidator elsewhere in the Caribbean region.

CHIYONG RIM

Kim & Chang

Chiyong Rim is an attorney at Kim & Chang. He practices 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.

JACOBO ENRIQUE RUEDA FERNÁNDEZ

Hogan Lovells

Jacobo E Rueda, a young associate at Hogan Lovells, has always shown great aptitude and talent in the tasks he has been trusted with. Moreover, he has exhibited great enthusiasm to keep learning and growing as a lawyer.

As part of the commercial arbitration and litigation team, Jacobo focuses on performing daily work at courthouses 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, IT and class actions, among others. He has also been involved in the annulment, recognition, and enforcement of domestic and international arbitration awards and foreign judgments.

Recently graduated from Universidad Panamericana with summa cum laude, Jacobo obtained his degree with a thesis on arbitration and class actions. He also gained international experience during his studies abroad in France at Science Po, one of the most recognised schools in the Gallic country.

PEDRO SERRANO ESPELTA

Marval, O'Farrell & Mairal

Pedro Serrano Espelta is a partner of Marval, O’Farrell & Mairal and has been a member of the firm since 1997. He is the head of Marval’s compliance, anti-corruption and investigations practice and has led numerous local and international investigations and cases in the field.

He also has extensive experience in corporate law, M&A, and oil and gas.

Pedro received his law degree from the Universidad Nacional del Litoral in 1992. He was a Visiting Scholar at the University of California at Berkeley from 1993 to 1995 and received a master of laws degree (LLM) from the University of California at Los Angeles in 1997.

He was foreign associate at the law firm The Americas Law Group in San Francisco, California from 1993 to 1996, where he worked on complex international agreements.

As an Argentine representative to the International Organization for Standardization (ISO) in 2016, he participated in the preparation of the Anti-Bribery Management standard 37001.
Pedro is a regular speaker at international conferences and seminars on issues related to his expertise.

He is a member of the Buenos Aires Bar Association.

JUAN FRANCISCO TORRES LANDA RUFFO

Hogan Lovells

Juan Francisco Torres Landa Ruffo is a partner in corporate and M&A law and managing partner of the Mexico City office. 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. A combination of experience and know-how results in 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 that stems from decades of experience and 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 trouble shooter and his commitment to pro bono and citizenship programmes.

PETER TYERS-SMITH

Kobre & Kim

Peter Tyers-Smith is an English barrister who focuses his practice on complex commercial and insolvency litigation, often venues in offshore jurisdictions with ties to Asia, the US or Latin America. Mr Tyers-Smith regularly advises shareholders in joint venture disputes and acts in contentious matters involving offshore trusts and involuntary liquidation. He has particular experience in matters with onshore–offshore components, including conducting cross-border asset tracing and recovery strategies. As an experienced advocate, Mr Tyers-Smith has appeared numerous times in the highest courts and appellate courts of multiple jurisdictions.

Chambers and Partners has ranked Mr Tyers-Smith as a leading company law barrister, described as ‘switched-on,’ with ‘a reputation for getting the results his clients want’.

Prior to joining Kobre & Kim, Mr Tyers-Smith practiced at Harneys and No5 Chambers, where he focused on commercial and chancery litigation with a particular emphasis on insolvency, company and partnership disputes.

ÁNGELA URÍA

Pérez-Llorca

Ángela is a senior associate in the white collar crime and investigations practice area at Pérez-Llorca. She takes part in internal investigations and criminal proceedings concerning white collar crime and international mutual legal assistance (MLA) matters. Ángela also advises national and foreign clients on the drafting and implementation of compliance programmes, crisis management and occupational health and safety protocols.
In 2016, Ángela completed an LLM at Columbia University in New York and subsequently spent a year working as a visiting attorney in the litigation area of a New York-based law firm. During her stay in the United States, she participated in transnational FCPA investigations, the drafting of deferred prosecution agreements and presentations to the Department of Justice and the Securities and Exchange Commission.

Ángela has published articles relating to white collar crime and corporate criminal liability in both national and international publications.

JORGE FRANCISCO VALDÉS KING

*Hogan Lovells*

Jorge Valdés King has a keen eye for assessing risks of legal strategies and keeps surprises to a minimum. He knows the ins and outs of a case and handles any dispute with perseverance and passion. Jorge does not leave any stone unturned.

Involved in dispute resolutions since the beginning of his career, Jorge has developed robust trial experience, which allows him to remain calm and creative even during the most pressing times.

Besides working in 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 industries, including automotive, banking, construction, entertainment, gambling, insurance, media, mining, transport and IT. As part of his diverse practice Jorge assists clients in both English and Spanish.

HANS VAN BAVEL

*Stibbe*

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 the University of Paris V (1992), and has been an assistant lecturer in criminal law at the Catholic University of Leuven. His practice focuses on litigating Belgian corporate crime cases and white-collar crime.

NEYAH VAN DER AA

*Allen & Overy LLP*

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 WALS

Edmonds Marshall McMahon Ltd

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 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.
MERRICK RICARDO WATSON  
*Kobre & Kim*

Merrick Watson focuses his practice on civil disputes, insolvency litigation and international judgment enforcement. He advises clients on matters that involve both onshore and offshore jurisdictions, including civil fraud cases, asset recovery and debtor-creditor disputes.

Prior to joining Kobre & Kim, Mr Watson practiced at Martin Kenney & Co Solicitors, where he worked on complex commercial litigation and cross-border insolvency matters.

Earlier in his career, Mr Watson served as a judicial assistant for High Court Judge His Lordship Justice Ephraim Georges and as Legal Intern at the Eastern Caribbean Court of Appeal headquartered in Saint Lucia.

FLORIAN WETTNER  
*METIS Rechtsanwälte LLP*

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* 2013 to 2016 and 2018 acknowledge Dr Wettner as one of four experienced practitioners for asset tracing and recovery in Germany. Since 2015, the 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 as of 2018 for arbitration as well.

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  
*Kobre & Kim*

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.

JACK YOW  
*Rahmat Lim & Partners*

Jack heads the litigation practice at Rahmat Lim & Partners. His areas of practice include corporate, banking, industrial relations and employment law litigation. Jack’s extensive experience includes, among other things, acting for a local financial institution leading to recovery of a multimillion ringgit facility from a public listed company, obtaining a favourable KLRCA (AIAC) arbitration award for the Malaysian subsidiary of a publicly listed German company in a multimillion dollar contractual dispute, advising receivers and managers of companies in receivership, as well as acting for liquidators in insolvency proceedings.
Jack is consistently recognised by legal publications including *Chambers Asia-Pacific* for his professionalism. The publication noted him as being ‘very professional, ethical and really humble’. *The Legal 500 Asia Pacific* recognised that Jack ‘gives sound advice’ and quoted him as giving ‘pragmatic advice and out-of-the-box thinking’. Jack was also listed as a Local Disputes Star in *Benchmark Asia-Pacific*.

**SERGEY YURYEV**

*CMS Russia*

Sergey Yuryev is a partner at CMS Russia and heads the dispute resolution practice. He has worked at the firm since 2000. Before joining CMS, he worked at an American law firm in its Moscow and Baku offices, as well as in the United States.

Mr Yuryev has over 20 years’ experience advising clients in the practice areas of dispute resolution, general commercial law and employment law. Leading CMS Russia’s dispute resolution practice, he handles commercial, corporate and energy disputes. He also has substantial experience in handling international arbitration cases before various arbitration institutes as well as in supporting debt restructuring procedures and insolvency proceedings. Mr Yuryev holds a master of laws degree from the Moscow State Institute of International Relations (1995), as well as an LLM from the Southern Methodist University Dedman School of Law of Dallas, Texas (1997). He is fluent in English.

One of the leading legal rankings *The Legal 500 EMEA* regularly recognises Sergey Yuryev for dispute resolution, arbitration and mediation in Russia.
Appendix 2

CONTRIBUTORS’ CONTACT DETAILS

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