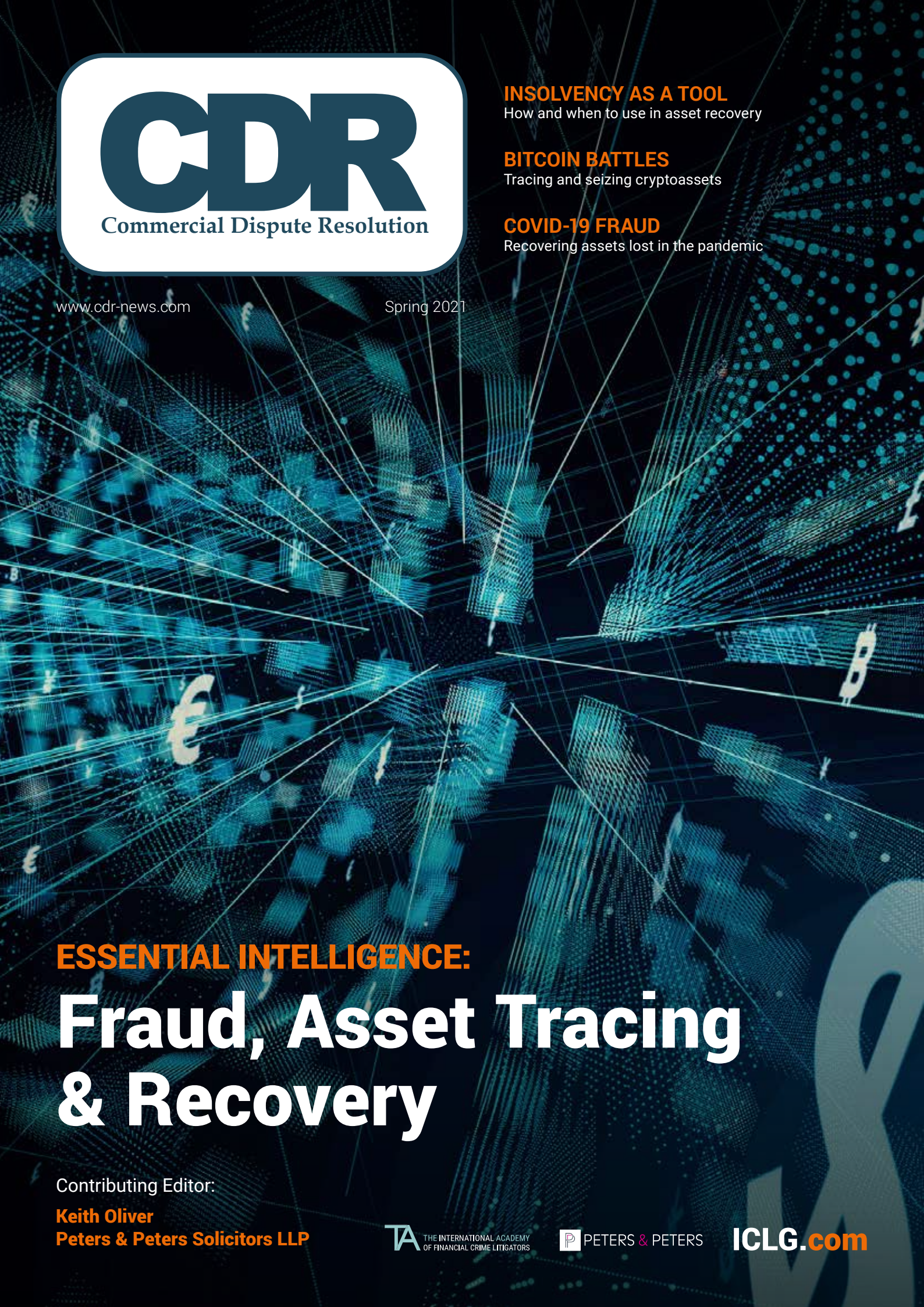


CDR
Commercial Dispute Resolution

INSOLVENCY AS A TOOL
How and when to use in asset recovery

BITCOIN BATTLES
Tracing and seizing cryptoassets

COVID-19 FRAUD
Recovering assets lost in the pandemic

www.cdr-news.com Spring 2021

ESSENTIAL INTELLIGENCE:

Fraud, Asset Tracing & Recovery

Contributing Editor:

Keith Oliver
Peters & Peters Solicitors LLP

THE INTERNATIONAL ACADEMY OF FINANCIAL CRIME LITIGATORS
PETERS & PETERS
ICLG.com

TABLE OF CONTENTS

EXPERT ANALYSIS

COUNTRY CHAPTERS

PREFACE

It is with great pleasure that we welcome you to the Second Edition of the *CDR Essential Intelligence Series*. Peters & Peters Solicitors LLP has been delighted to serve again as the Contributing Editor to this all-encompassing and comprehensive guide on the practice of global fraud, asset tracing and recovery litigation.

The past 12 months have been trying for us all. According to the *PwC Global Economic Crime and Fraud Survey 2020*, 47% of companies worldwide were victim to fraudulent attacks over the past two years. Another report published by the *Association of Certified Fraud Examiners* estimates that organisations lose approximately 5% of their revenue to fraud each year, which taken collectively, amounts to a global figure of over $4.5 trillion. Compound this growing trend with the economic uncertainty caused by the COVID-19 pandemic. A breeding ground for fraudulent acts now prevails. Fraudsters have been quick to make use of the international mass migration to online platforms. Cyber-criminality is now one of the most prevalent issues to impact the sector. The surge in online commerce, the increasing reliance on artificial intelligence and the introduction of virtual justice are but to name a few of the driving forces that have become commonplace over the past year. The 1999 book, *The Network Society* by Van Dijk, suggested that *'the monitor is everywhere…it is not merely a medium for reproduction which increasingly dominates mass communication'*. Perhaps this foreshadowed the rise (and rise) of *'Zoom culture'* and the like that we are so heavily dependent on now. It is consequently ever more vital that we adapt to the pace set by the March of Technology. Nevertheless, in 2021 we have found opportunities to flourish, to effectively meet these new challenges head on, and as a result the fraud, asset tracing and recovery landscape has never been busier.

The intention of this guide, therefore, is to provide a clear and cogent overview of the practice of fraud, asset tracing and recovery litigation in varying countries around the world, working towards global innovation and best practice through the sharing of knowledge and expertise. We would like to take this opportunity to thank the tireless efforts of our contributing authors, who include some of the world's leading law firms, a wide range of expert practitioners, barristers' chambers and forensic accountants. Their generous contributions to this project have created an invaluable holistic picture of the international legal response, which we hope will be useful for our readers both now and in years to come.

Keith Oliver
Head of International
Peters & Peters Solicitors LLP

CDR
Commercial Dispute Resolution

New threats for 2021 and beyond

The pandemic is not the only agent of change keeping lawyers, experts and clients on their toes this year. Technologically sophisticated frauds, cryptocurrencies and increased regulation will all require close observation

Andrew Mizner
Commercial Dispute Resolution

After

a turn of events which no-one could have foreseen when *Fraud & Asset Tracing 2020* was published, many of the past decade's business certainties have been challenged, as the pandemic has created global economic uncertainty and led to greater reliance on online systems.

There will, of course, be frauds stemming from COVID-19 itself, such as fake treatments, the supply of fake or non-existent personal protective equipment (PPE) and corruption by government officials, all of which are expected to emerge in high numbers later in 2021.

The increased pressure on online business has also led to greater risks, and in an era when technology is moving incredibly quickly and the financial markets are vulnerable, businesses have to be more alert than ever.

On top of the existing dangers of ransomware attacks and fraud emanating from the dark web, one growing threat comes from push apps – mobile applications which allow the makers to send notifications. Fraudsters are infiltrating businesses and using push apps to trick staff into illicit payments, explains **Syed Rahman**, a partner with United Kingdom firm **Rahman Ravelli**. "Before you know it the clients are chasing their tail, because they paid an invoice and it has all gone wrong."

Perhaps even more sophisticated is what **Toby Galloway**, based in Texas as co-chair of securities litigation and enforcement for **Winstead**, calls "synthetic identity fraud".

"The fraudster uses a combination of real and fake information to create an entirely new identity", combining details gleaned from data breaches with false information and using artificial intelligence to create "Frankenstein faces", combining "facial features from different people. This creates a humongous challenge for businesses that rely on facial recognition technology as a significant part of their fraud detection and prevention compliance strategy".

Although understanding of this area is still developing, it is a fast-growing form of fraud, one of many that capitalises on data exposed by breaches, alongside automated methods such as "script creation – using fraudulent information to automate the creation of an account, [or] credential stuffing – using stolen data", says Galloway. "The industry is going to have to move away from usernames and passwords. Two-factor authentication is certainly better."

Regulation Rising

Then there are cryptocurrencies. "Cryptocurrency transactions are a concern from a sanctions perspective," says Rahman, "cryptocurrency is harder to trace, it is easy to launder many times over, and it is by and large independent from most government regulations".

Regulators are taking notice of this new world. In February, the United States Department of the Treasury's **Office of Foreign Assets Control** (OFAC) accepted USD 507,000 settlement from **BitPay**, an Atlanta-headquartered Bitcoin payment provider, to settle charges that it allowed customers in Crimea, Cuba, North Korea, Iran, Sudan and Syria to make payments in violations of US sanctions.

The United Nations has warned that North Korea is stockpiling Bitcoin to pay for its weapons programme, while it has been suggested that Venezuela is using cryptocurrency to bypass sanctions.

With regulators catching up, companies which operate in this space must be aware of their increasing liability. "Cryptocurrency moves in milliseconds, extremely quickly and everybody is having to play catch up with it," Rahman continues.

When it comes to fraud however, **Angela Barkhouse**, Caribbean managing director for advisory firm **Quantuma**, argues that it is a misconception that assets can be made to disappear through cryptocurrency exchanges. "Transactions are publicly recorded and available in a ledger and yes, there are ways and means of hiding or obscuring the trail of money flows, but actually they are still traceable in very many circumstances," and good firms are finding it easier to quickly identify and trace the assets, whereas traditional fiat currencies are more problematic.

Market Concerns

Regulators will also be looking at more conventional markets. Rahman warns of rising abuse of special purpose acquisition companies (SPACs), which allow businesses to bypass the regulatory requirements of the initial public offering (IPO) process. The SPAC shell company goes through

the offering, then acquires the company which was intended for the floatation, meaning that the target company has not had to comply with IPO regulations.

While SPACs themselves are nothing new, "you are going to see a lot of misleading statements to raise funds for the company that they are trying to take public. You are going to see accounting fraud because of how the money was raised. You are going to see an increase of fraud in the share market through SPACs", Rahman explains, warning investors to beware.

"At the moment, SPACs are legitimate as they have been around for a while, but there will be regulatory issues for investors because they almost bypass the regulatory points through a traditional IPO process," he adds.

In the US, there is concern about abuse of the Coronavirus Aid, Relief, and Economic Security (CARES) Act and any future stimulus packages. Already there have been prosecutions for what Galloway calls "the low-hanging fruit" such as falsified claims. But those will be replaced by cases "that are a little more grey", such as applicants who "almost qualified for [protection] but fudged some numbers to get a loan", and he expects government agencies to proactively prosecute, as they did after the 2008 financial crisis. "There is going to be an increased level of assertiveness or aggression [from regulators], there is definitely going to be an uptick in enforcement activities."

Meanwhile, publicly listed companies that are regulated by the **Securities and Exchange Commission** (SEC) and also received loans can expect scrutiny over whether they met the requirements and filed correct applications.

The regulatory scrutiny extends into cryptocurrencies. In January 2021, the UK **Financial Conduct Authority** (FCA) announced that all cryptoasset companies must be registered. "This year is going to be the year where effectively all [crypto firms] will have to start putting their ducks in a line, and towards the end of the year or the beginning of next year you are going to see a lot more enforcement from the FCA," says Rahman.

That also puts scrutiny on the tracing of cryptoassets. Rahman highlights *Ion Science & others v Persons Unknown* in the High Court of England and Wales, which is considering fraud in relation to an initial coin offering (ICO) and whether cryptoassets can be considered as common law property and where they are located.

"Courts are becoming increasingly flexible and they are willing to ensure that they are assisting victims of fraud, in particular when it comes to ever-evolving areas such as cryptocurrency," he says.

An advantage of the new technology is its use for asset tracing. Barkhouse heralds the increasingly advanced tools that go beyond e-discovery and predictive coding. "You really do have to be at the forefront of it as a data scientist to be able to obtain the information, extract it and interpret it in a way that is beneficial for asset tracing, recovery and investigations," particularly as data leaks become more prevalent. "Data itself is becoming the key to investigations. The analysis of data, being able to interpret it, and being able to use it in a way that can be easily explained for evidence is something that is moving forward but which I see being enhanced further in the next couple of years."

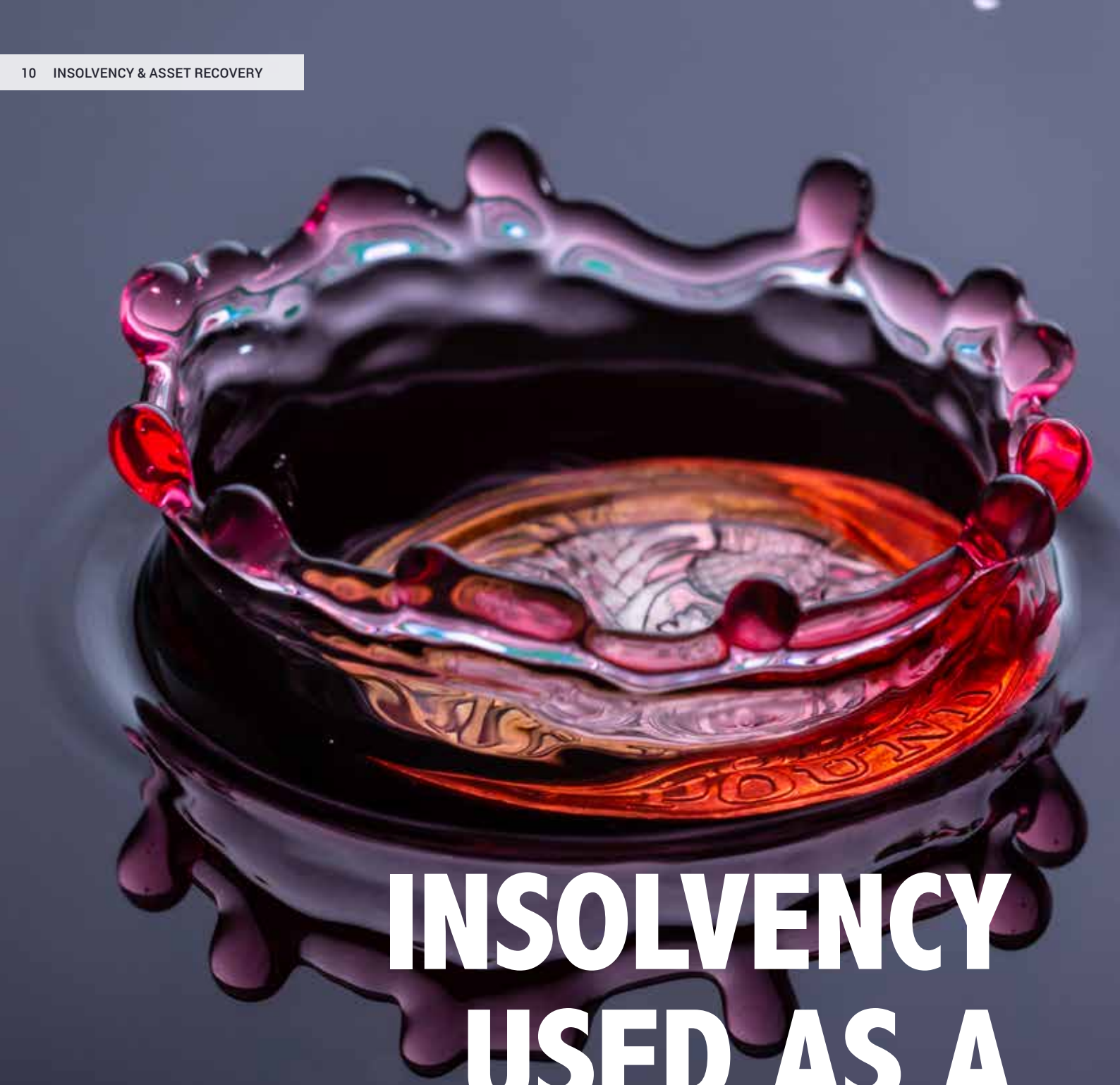
Clients are making more requests for asset tracing before litigation has even begun, "you really do need to understand where the money has gone and if your alleged fraudsters still have your assets and where they have invested them, rather than going straight into litigation and paying expensive legal fees only to find that the assets have dissipated beyond a reasonable recovery", says Barkhouse.

Insolvencies will be on the rise following the pandemic, and while the range of bailout, stimulus and furlough packages may make that less than expected, notes Barkhouse, restructuring could become very busy: "I expect to see an increase in contentious or dispute-related insolvencies, where companies or investment funds have financial exposures and liquidators need to understand why companies are in that position, other than as a result of simply operational or working capital pressures. As a result of that, you will see much more dispute resolution and investigations in insolvency related matters."

Finally, with the UN due to meet this year and make firm commitments to anti-corruption measures, 2021 could see a more balanced approach between civil recovery and criminal prosecution of fraud. Barkhouse hopes for greater scrutiny and collaboration between governments, particularly between civil and common law jurisdictions, and with the private sector on asset recovery.

Despite all the potential changes brought by technology, the pandemic and governments, much remains the same, she concludes:

"Ultimately, setting aside COVID and regime change, the law is the law, the law doesn't actually change too much, it may be tweaked, may be improved, but in terms of asset recovery, you are still relying on the same principles you used before."



INSOLVENCY USED AS A TOOL IN ASSET RECOVERY

Andrew Stafford QC
Kobre & Kim

James Chapman-Booth
Kobre & Kim

When this article was first published in last year's edition, masks were the reserve of comic book heroes, toilet roll was a widely available commode-ity, and a "zoom" referred to a spirited weekend drive down a winding country lane. The phrase "the new normal" had not yet forced its way into the public lexicon, and the closest thing many of us had experienced to a "lockdown" was a "lock-in". Sadly, the past year has seen life in many respects turned on its head.

But some things have not changed. In litigation, winning a favourable judgment or award is still a high for the lawyer but, from the client's perspective, a judgment by itself remains just a piece of paper (and an expensive one, at that). The client's objective is to receive money, and as swiftly as possible. Yet, collecting that money can be as hard-fought, as lengthy, and as costly a process as winning the award was in the first place. And, now, the severe disruption caused by COVID-19 has presented new opportunities for cynical judgment debtors to seek to frustrate enforcement efforts across the globe. The judgment creditor's position has arguably been weakened further by Brexit: the eleventh-hour deal struck with the EU is silent on the question of cross-border recognition and enforcement of civil judgments, meaning that, for the time being at least, it is likely to become more difficult, time-consuming, and costly to enforce an English judgment within the European Union.

In this article, we address one of the specific tool-sets available to lawyers specialising in judgment enforcement: insolvency tools. It is important to note that the insolvency framework is a targeted vaccine, not a panacea, and so will not be suitable in every case. And, like any specialised tool, it has greater utility in experienced hands than those of a novice. To understand how, when and where to deploy insolvency tools, it is important to take account of the alternative enforcement mechanisms, and to think about the need for recovery strategies generally.

As we discuss below, practitioners and clients alike should be alive to the (sometimes extraordinary) steps taken by governments around the world to help shield their businesses from knock-on effects of the pandemic, including by implementing temporary changes to procedures under the insolvency regime. These methods may tilt the playing field. Each jurisdiction will have its own specific measures which will need to be identified and navigated.

No claimant should start litigation (or arbitration) assuming that the defendant, if defeated, will meekly pay up. Some – perhaps many – will do so. The defendant may be solvent and reputable but, even so, the collection challenges might incentivise the defendant to hold out for a 'better deal'. Worse, there are some judgment

A final and enforceable judgment will establish the defendant as a judgment debtor, and the claimant as an unsecured creditor. This principle underpins the use of the insolvency process as an asset recovery tool

debtors which are not reputable, have structured their assets in a robust manner, and which are of dubious solvency. For these disreputable judgment debtors, the judgment creditor's collection challenges align with the judgment debtor's predisposition to hold out.

To make things more difficult for the claimant, the judgment enforcement landscape is becoming increasingly complex. The Court of Appeal's recent decision in *Strategic Technologies PTE Ltd v Procurement Bureau of the Republic of China Ministry of National Defence* [2020] EWCA Civ 1604 has (subject to further appeal) closed the door to those hoping to register and enforce in England a "judgment on a judgment" (i.e., a judgment obtained by a common law action for the purposes of enforcement in Commonwealth Jurisdiction B of a money judgment obtained in Commonwealth Jurisdiction A).

And, from a practical perspective, technological innovations such as electronic banking and faster payment schemes mean that assets can be acquired, transferred, and disposed of more easily than ever before. Consequently, judgment debtors are able to move their assets further afield, faster, with less effort and in ways that can be more difficult to track using conventional methods. With a click of a mouse, or even the tap of a smartphone screen, a delinquent judgment debtor can acquire a new shell company, convert their fiat currency to a readily transferrable cryptocurrency, or empty multiple bank accounts in mere seconds. New bank accounts, perhaps in a jurisdiction with aggressive confidentiality laws and limited frameworks for judgment recognition, might be opened without ever requiring the judgment debtor to physically step foot in the territory.

These types of collection challenges can make the lawyers' victory jig short-lived. Telling the clients that collection might take some time and will involve considerable further expense can quickly sour the client relationship. But that strain can be avoided by strategising about collection ahead of the judgment (speaking from experience, our firm sometimes finds itself called in to act as specialist co-counsel on enforcement more than a year before the judgment is delivered, and sometimes as early as the pre-action stage).

Of course, if a pre-judgment freezing order, or interim receivership, has already been granted by the court, the collection strategy has already been partly addressed – renew the relief so that it operates post-judgment, and (in the case of a freezing order) close in on the assets identified and frozen. However, this type of relief is the exception rather than the rule. More often than not, the visible facts have not warranted the grant of a freezing order or an interim receiver, yet the client nevertheless has a legitimate anxiety that the defendant will not pay without a further fight, or that, while the litigation was still pending, the defendant (now judgment debtor) will have taken steps to render itself more enforcement-proof.

A final and enforceable judgment will establish the defendant as a judgment debtor, and the claimant as an unsecured creditor. This principle underpins the use of the insolvency process as an asset recovery tool. An unpaid judgment debt forms the basis of a statutory demand; an unsatisfied statutory demand creates a presumption of insolvency which may then lead to a winding-up or bankruptcy order.

Weighing up the insolvency option

When analysing the enforcement options, there are numerous issues to resolve in order to decide whether insolvency tools are the right fit. Only by working through these issues can a properly informed decision about the suitability of insolvency be determined. Insolvency tools are powerful, but they can backfire badly if used incorrectly. In some cases, such strategies even if used properly may just be a bad fit. So, for example:

- Will there be competition for the debtor's assets? This question is particularly pertinent during times (such as these) of economic instability. A winding-up order may leave the client at the wrong end of a queue of secured and unsecured creditors, rendering the immediate victory pyrrhic. An existential threat

to the defendant may increase its determination to fight to the bitter end. Playing the strongman sounds good, but if the strongman is Samson you just end up pulling the temple onto your client's head.

- On the other hand, if available assets are limited, are there competing judgment creditors further down the collection road? If so, it may be that insolvency will help to level the playing field for your client.
- Are any of the jurisdictions enforcement-friendly (or, indeed, unfriendly)? Some civil jurisdictions provide for pre-recognition attachment, which can make any insolvency strategies unnecessary. Alternatively, recognition in some jurisdictions can be so slow or hostile that the assets identified as being located within such a jurisdiction may be beyond the reach of a judgment creditor: it may be that the foreign court would instead be more receptive to an office-holder, like a liquidator, seeking recognition of the insolvency process. Now that the Brexit transition period has ended, recognition of an English insolvency process within the European Union will largely be governed by the local law of each Member State. The exceptions are Greece, Poland, Romania, and Slovenia, each of which has enacted the UNCITRAL Model Law on Cross-Border Insolvency ("the Model Law"), which facilitates a more streamlined process for the international recognition of insolvency processes. Recognition in these jurisdictions under the Model Law does not require reciprocity but, in any event, it has been given force in Great Britain by the Cross-Border Insolvency Regulations 2006.
- Is there a robust insolvency regime in the jurisdiction in which the judgment was obtained? The Court of Appeal's decision in *Strategic Technologies* may affect the chosen strategy, since practitioners may now find that re-locating a judgment to a location with insolvency jurisdiction requires re-recognition of the original judgment, rather than recognition of the first recognition, thereby making the process that bit stodgier than some had hoped.
- Is the target debtor asset-rich or revenue-rich? If analysis shows that that the target has strong regular revenue streams rather than piles of cash and property, insolvency would likely dam up those revenue streams. Maybe garnishment or receivership by way of equitable execution would collect the golden egg without killing the goose.
- To what will the debtor better respond? A consensual settlement of the outstanding judgment debt is always going to be quicker and cheaper for all parties concerned than an international war of attrition, but what will it take to get the debtor to want a consensual outcome? In some cases, commencing insolvency procedures may actually eliminate the option of driving the debtor to the settlement table. At the very least, insolvency brings

An existential threat to the defendant may increase its determination to fight to the bitter end. Playing the strongman sounds good, but if the strongman is Samson you just end up pulling the temple onto your client's head

into play an office-holder less vulnerable to commercial pressure points felt by the debtor, and more focused on the interests of creditors as a whole.

- Is the target based in only one jurisdiction or does it have assets, interests or affiliates in numerous jurisdictions? Although a multi-jurisdictional enforcement effort is naturally more complex, the international footprint of the debtor creates the opportunity to leverage differences in enforcement tools as between one jurisdiction and another. However, identifying the right lever requires not only experience and expertise in comparative law, but also a keen sense of timing and global control of the enforcement team. Timing is important because a step taken in one jurisdiction is likely to have knock-on effects elsewhere. Control is vital because a trigger-happy local co-counsel can disrupt the carefully developed global enforcement strategy.

Two points emerge from these typical issues. First, choosing to use insolvency tools should not be a reflex decision, but a sensible conclusion reached following a careful holistic analysis of the enforcement options at the earliest opportunity. Second, accurate and comprehensive information about the target is vital – no informed decision can be made without information.

Practitioners must now also account for an additional variable: the changes made to the local insolvency regime as a consequence of COVID-19. The extent to which the "usual" policies and procedures have been departed from, and the duration of any changes, will vary from jurisdiction to jurisdiction, and it is essential to obtain local advice in that regard. But, to give one British example, the Corporate Insolvency and Governance Act 2020 temporarily restrains the use of statutory demands as proof of insolvency, and requires a creditor presenting a winding-up petition to show that the pandemic is not the reason the company cannot pay its debts. The suspension will last until at least 31 March 2021 *(correct at the time of drafting – the period of suspension might be further extended in due course).*

Leveraging cross-border discovery

Information is a vital commodity in the world of asset recovery. In any enforcement attempt, the judgment creditor must overcome an imbalance of knowledge: the judgment debtor will know where all of their assets are; the judgment creditor will not. Before the judgment creditor can enforce against an asset, they first need to know that it exists and, just as importantly, they must know where it resides. Information gathering therefore forms an important first step in any asset recovery campaign.

Some types of necessary information can be

Information is a vital commodity in the world of asset recovery. In any enforcement attempt, the judgment creditor must overcome an imbalance of knowledge: the judgment debtor will know where all of their assets are; the judgment creditor will not

If the client believes that the defendant has been re-organising its affairs during the pendency of the litigation so as to render itself more enforcement-proof, this may tip the balance in favour of deploying insolvency tools

readily obtained through sources freely available to the public. Other information can be obtained through post-judgment discovery procedures. To that end, a judgment creditor may apply for an order requiring the judgment debtor to attend court to provide information on oath about their means, or any other matter about which information is needed to enforce a judgment or order. If the order is granted, the judgment creditor can compel the judgment debtor to provide information about their assets worldwide.

In this context, once again there may be cross-border opportunities to leverage differences in discovery procedures. But there is the ever-present risk that using discovery procedures may simply tip off the debtor, with the result that it re-doubles its efforts to render its assets enforcement-proof. Although claimants are sometimes motivated to seek disclosure of every document under the sun, this strategy is rarely sensible; rarer still is it accepted by the courts. And in some jurisdictions, third-party discovery may require the creditor to indemnify the third party for the costs of the discovery exercise – this can be a high price unless the discovery request is accurately made and is aimed at obtaining a narrow class of highly useful documents. Discovery requests in this context should be used as a scalpel, and not a sledgehammer.

The position of a liquidator seeking information may be very different. As an office-holder, a liquidator can obtain access to the internal documents held by the company. The liquidator may be able to summon the directors to answer questions, and (subject always to jurisdictional differences) may be able to seek post-judgment discovery on a wider and less costly basis. Since a liquidator wields the right to access documentation, proportionality is less of a concern – although economic and strategic factors should nevertheless help shape and narrow what is sought.

If the client believes that the defendant has been re-organising its affairs during the pendency of the litigation so as to render itself more enforcement-proof, this may tip the balance in favour of deploying insolvency tools. The liquidator has visibility into the internal affairs of the target entity, and the capacity to interrogate the directors can uncover activities designed to thwart enforcement efforts. Moreover, the liquidator can hold the directors and recipients to account and, where appropriate, can take recovery actions to restore to the company the assets which were placed elsewhere. Sometimes these powers are more valuable than the claimant's capacity to challenge transactions as being fraudulent transfers, useful though that power can be.

Akin to, but different from, liquidation is receivership. This places in the cross-hairs a specific revenue stream or asset. The receiver collects a specific asset and handles it in accordance with the distribution process sanction by the appointing court, leaving the debtor entity intact. Its availability varies from jurisdiction to jurisdiction. A court-appointed receiver is an office-holder and acts subject to the bespoke powers granted to him/her by the court. As with liquidation, an office-holder is accorded considerable respect by the courts. In the right case, receivership is the right insolvency tool.

Show me the money

However, office-holders – whether liquidators or receivers – cost real money. In the current economic climate, clients are motivated to scrutinise ever closer the bang for their buck. The expense involved in deploying insolvency strategies demands an answer to the question – what are we going to do with all these powers? There is no useful purpose in triggering this strategy if the client's objective – getting money in its hands – is not going to be achieved, or at least significantly advanced, by these means.

Client buy-in is essential, and many clients

– financially depleted by the litigation which led to the judgment and generally war-weary – may reasonably disagree with the idea of insolvency strategies that promise yet more expense. But a fully worked-out insolvency strategy might appeal to the client if the expense is to be met by a third party. The emergence of funders, willing in the right case to fund the cost of enforcement on a non-recourse basis in return for a share of the collections, can often render viable insolvency strategies which would be beyond the client's appetite for further expense. From the funder's perspective, the existence of a valid judgment or award removes several significant contingencies from its calculation of risk. From the client's perspective (and especially that of the General Counsel), it takes the expense and risk off the balance sheet – collections can become all up-side once acceptable commercial terms have been struck.

In our experience, there is no hard or fast rule about when, how, and where, to deploy an insolvency strategy in aid of judgment enforcement. But it should not be used without prior careful consideration. Whether or not the tool is appropriate will be determined by the specific facts of the case at hand: the location, type, and extent of assets; the extent of available information about those assets; the conduct and sophistication of the defendant; the client's litigation appetite; and wider commercial considerations, are each factors that should be weighed before starting down the insolvency path. Nevertheless, when wielded properly, the insolvency framework can itself be an extremely valuable asset to the client.

Andrew Stafford QC is an English barrister and Queen's Counsel who represents corporations, hedge funds and high-net-worth individuals in complex, high-value litigations spanning multiple jurisdictions and that involve significant cross-border elements. He has particular experience in international judgment enforcement, developing and executing strategies designed to secure effective collection of awards and judgments, including relating to enforcement against sovereign judgment debtors. In the area of financial services and products, Andrew handles swaps litigation, including matters of currency fixing related to Libor, Euribor and foreign exchange markets.

Andrew also represents clients in joint venture and partnership disputes, as well as in regulatory defence matters involving UK authorities.

A highly regarded appellate advocate and trial lawyer, Andrew appears in the Supreme Court of the United Kingdom and acts in international arbitrations on a range of matters, including financial derivatives, insurance and international commercial fraud. He has been cited by industry publications as "a really good lateral thinker" and "a great tactician" with "fantastic courtroom demeanor".

andrew.stafford@kobrekim.com

James Chapman-Booth is an English barrister who focuses on cross-border commercial litigation. His experience includes disputes related to financial products and services, insolvency proceedings and US regulatory enforcement matters.

James studied English law and was called to the Bar at the Honourable Society of the Middle Temple.

james.booth@kobrekim.com

Kobre & Kim is an Am Law 200 global law firm focused exclusively on disputes and investigations, often involving fraud and misconduct. Recognised as the premier firm for cross-border disputes, the firm has a particular focus on financial products and services litigation, insolvency disputes, intellectual property litigation, international judgment enforcement and asset recovery, and US government enforcement and regulatory investigations. By avoiding repeat client relationships, and the conflicts of interests that come with them, the firm maintains its independence as advocates ready to litigate against virtually any institution.

The firm has more than 150 lawyers and analysts located in multiple jurisdictions throughout its 15 locations around the world.

www.kobrekim.com

KOBRE & KIM

Cryptocurrency fraud and asset recovery

Syedur Rahman
Rahman Ravelli

Cryptocurrency and the use of blockchain is becoming increasingly popular in the commercial world, with more investors now convinced that crypto is a long-lasting asset of genuine value. We are seeing organisations, corporate entities and even governments investing in crypto assets. They do this as a means of diversifying their portfolios or treasuries; using cryptocurrency as a serious alternative to traditional fiat (meaning government-issued) currency.

While cryptocurrency is increasingly attractive to many in terms of potential investment, from a legal perspective (particularly in England and Wales) it is still a developing area. At the time of writing, the value of a Bitcoin is currently around US $35,000. This means that Bitcoin's market capitalisation (market cap) – the total value of all Bitcoin – is somewhere in the region of US $600 billion. This is lower than its highest-ever market cap of US $1 trillion, but is nonetheless a strong indicator of its progress. Yet the law has still to catch up with the rapid emergence of crypto.

Unfortunately, there is one aspect of cryptocurrency that is not quite so appealing – its use is often associated with wrongdoing and fraud. Part of its appeal is the anonymity that many believe it offers. But it needs to be emphasised that with the right tools and correct legal applications, crypto assets can be tracked, traced, identified and then

safely recovered from those who have gained them through wrongdoing. But doing this requires careful planning, the right strategy and taking the right action at the most appropriate time.

Pre-seizure planning

Taking the right steps to regain your crypto assets

The most important factor in any pre-seizure planning is to remember at all times that the primary objective is to recover the assets. This may involve going beyond tracing the cryptocurrencies. In many situations, following the crypto assets into the right exchange will not be enough. There can be scenarios where the proceeds for the fraud go into an exchange and are then subsequently transferred out to a bank account and then into physical property that is registered in another party's name, such as a partner or relative.

When this does happen, you will need to find and produce the evidence that proves that such physical property is also the proceeds of fraud. Finding the money can be difficult, and identifying any assets it has been used to buy takes time and resources. There is nothing that ensures success when it comes to recovering assets more than pre-seizure planning. Attempting to freeze crypto assets takes considerable time and preparation. This is not an action that can wait until the last minute. Preparation is required at each and every stage of any attempt to recover crypto assets.

Cryptocurrencies are truly global. The bad actors that use them to perpetrate fraud or gain them as a result of fraud may be located in various jurisdictions around the globe. This has to be taken into account when plans to recover assets are being devised. Not all countries have the framework to deal with freezing crypto assets; which can mean that it often seems like the Wild West when dealing with crypto in some jurisdictions. This is one more reason why preparation is key. That preparation requires having the right crypto recovery specialists on board and considering whether there is a need to co-ordinate with foreign counterparts.

Attempts to regain crypto assets can differ from efforts to locate and regain more traditional assets. Planning and executing an asset tracing and recovery plan for them can, therefore, require a different mind-set.

Intelligence collection

The key to successful tracing of cryptocurrency is assessing the information available to you, giving due consideration to the assets in question and taking all necessary steps to ensure that the investigations are carried out in a comprehensive manner.

It is important to dispel the myth that cryptocurrencies are anonymous. While they do give users some degree of privacy not available when acquiring more conventional assets, they are not entirely anonymous. It is well known that all transactions relating to cryptocurrencies are publicly available on the blockchain. By using the correct investigation support and technology, you can obtain the right information relating to the bad actors involved.

Cryptocurrencies have to be tracked and traced through the blockchain for any meaningful recovery to take place. During the course of your initial investigation, the right software and algorithms for tracing the assets must be used so that you then have an accurate blockchain analysis. Such an analysis will prove essential to your enquiries.

Hosted v un-hosted wallets

A hosted wallet is a digital account hosted by a third-party, like an exchange. It allows the account holder to store, send and receive cryptocurrency. An unhosted wallet, however, is not hosted by a third-party financial system.

The chances of recovering crypto assets increase if you can identify them as being in a wallet that is hosted by an exchange. This means that recovery of them can use the traditional process employed for tracing assets such as, for example, the proceeds of fraud when they are deposited in a bank account. You can apply to freeze the assets in question and serve the freezing order on the exchange.

Un-hosted wallets make anonymity possible, leading to difficulties in identifying who is accessing or controlling the cryptocurrencies in that wallet. In this scenario, it is much harder to serve a freezing injunction on a person whose identity you do not know. It is likely that the defendant or their co-conspirators may have private keys to gain access to the un-hosted wallet in question. This then changes the dynamic of the investigation: a proactive approach will be needed to identify who has the crypto asset in question, and whether it is in a private wallet or in cold storage (i.e. stored in a wallet offline/not connected to the internet).

Before takedown – making legal applications

Crypto assets move in milliseconds. If you find them at a particular place it is imperative that you ensure legal action is taken as swiftly as possible. Once the crypto assets are identified, you need to utilise the right legal applications immediately. The English civil courts have a significant range of tools available to judges to act quickly. Some of these interim remedies (i.e. those before trial) include:

i) urgent *ex parte* applications;
ii) proprietary injunctions;

iii) freezing orders / injunctions;
iv) third-party disclosure orders (*Norwich Pharmacal* and *Bankers Trust*), made to a third party compelling it to disclose certain information to the applicant to assist in the identification of the perpetrators;
v) "I am Spartacus" orders; and
vi) other ancillary orders.

When it is an issue that crosses borders and includes other jurisdictions, it is important to have the proper legal approaches in place to effectively freeze and recover the assets. In the first instance, there is a very good chance that the person you will go after is "persons unknown". It is well established in England and Wales that freezing injunctions can be granted against persons unknown. However, you will eventually need to find the bad actor that you can enforce the judgment against.

When you are assessing who you are going after, it is essential to also include the exchanges. Exchanges often carry out "Know Your Client" (KYC) and anti-money laundering checks. Information from these can prove valuable in your attempts to locate and identify who has your assets.

The next important issue to consider is the need to clearly define crypto assets before the court. This is important because this will determine the type of relief that judges are willing to grant, particularly in an urgent (without notice) application. There are various issues surrounding tracing, and a judge will have to be persuaded that there is a tracing remedy available to resolve your problem.

Finally, you will have to consider exactly where the respondent or defendant is in these proceedings. This could involve you needing to convince a judge to grant the order out of the jurisdiction in which the court sits. The majority of crypto exchanges are not likely to be located in England and Wales, and the bad actors' location is not likely to be known. For these reasons, innovative legal arguments will need to be mounted to persuade the court to grant orders out of the jurisdiction. For example, you may need to use the *Bankers Trust* jurisdiction to obtain a disclosure order against an exchange for service outside of the jurisdiction. Here you must show that the case meets the jurisdictional "gateways" as set out in CPR Practice Direction 6B. The gateways allow English courts to exercise jurisdiction over foreign defendants, where the dispute has a sufficient connection to England. Some examples of the gateways that may be appropriate include:

i) a remedy is sought against a person domiciled within the jurisdiction;
ii) the claim relates wholly or principally to property within the jurisdiction;
iii) the contract was made in the jurisdiction;
iv) the contract is governed by English law;
v) the contract contains a term giving the English courts jurisdiction; and
vi) the damage was/will be sustained within the jurisdiction.

The question of service will also need to be considered. If an order is made to be served outside of the jurisdiction, personal service is not likely to be possible. You will, therefore, need to convince a judge why service by an alternative means, for example, via email, is appropriate in the circumstances.

The tools for interim relief at a judge's disposal are certainly powerful. But the criteria that must be satisfied to secure the interim reliefs are of a high standard. For example, in order to obtain a freezing order, the applicant must satisfy the court that:

i) it has a substantive cause of action against the respondent;
ii) it has a "good arguable case";
iii) there is a "real risk of dissipation of assets"; and
iv) it is "just and convenient" to grant the order (here, the court must consider: (a) the conduct of the applicant (coming to court with 'clean hands'); (b) the rights of, and any impact upon, any third parties who may be affected by the order; and (c) whether the order would cause legitimate and disproportionate hardship for the respondent).

As such, careful consideration must be given when making such applications.

Seizure

During takedown – actions after the legal applications

Ongoing risk management is key once the relevant applications have been made to the court. Once crypto assets are frozen, you need to ensure that they do not fall into the hands of any bad actors. When you freeze cryptocurrency, it is important to ensure that there is no dissipation of assets. You need to plan what will happen as soon as the relevant orders are served on the parties involved.

The most important information will come from the exchanges following a disclosure order and/or *Bankers Trust* order served outside of the jurisdiction. It may be that you will need to remind the relevant exchanges of the severe consequences for not complying with such orders. It is well established that such orders contain within them a penal notice, which states that it is a contempt of court to breach the order. The result of any such breach can be the company and its directors being liable to have their assets seized and individuals facing the prospect of up to two years' imprisonment.

After takedown – holding those responsible to account

It has to be understood what this should look like. The aim is to bring the perpetrator to book as soon as possible. Anyone seeking to do this has to know how to proceed.

In our experience, the exchanges hold crucial information so that a claim can be made, and enforcement action can commence. This is where use of a disclosure order is so important.

In a typical disclosure order, you would expect the exchange to provide the lawyers with:

- Information regarding any customer accounts which the crypto assets in question were allocated to and/or received on behalf of.
- The names of the account holders for the accounts in which the crypto assets in question are held.
- Any other information about the account holders, such as residential addresses, bank account details, email addresses and contact numbers.
- Any documents supplied when the wrongdoer opened an account with the exchange.
- An explanation of what has become of the crypto assets in question.

Potential pitfalls and defence considerations

As emphasised earlier, careful consideration must be given to any application for interim relief.

Rahman Ravelli acted for the defendant – an international private client and investor – in the leading case of *AA v Persons Unknown*. This was a landmark judgment in England and Wales as it was the first case where Bitcoin was defined as property and, as a result, a proprietary injunction was granted over crypto assets. The defence in this case argued the defendant was a *bona fide*, good faith purchaser of the Bitcoin in question.

The claimant, AA, said it had a claim for restitution and/or under constructive trust against persons unknown and the exchange. The Honourable Mr Justice Bryan had to assess whether it was possible to have a proprietary claim over Bitcoin (and, by implication, any other crypto asset). The claimant's case relied on the fact that this was a claim for an interim remedy pursuant to S25 of the Civil Jurisdiction and Judgments Act 1982 (the Act). The claimant also stated this was a claim in tort where the damage sustained was in England.

S25 of the Act is in relation to interim relief in support of foreign proceedings. The initial application in *AA v Persons Unknown* made no reference to foreign proceedings being issued. This was a mistake by the claimants as they were attempting to serve overseas. Furthermore, the claim that was bought in this case was for restitution and a claim under a constructive trust. The test that was applied before the court related to a claim for tort. This again was a blunder by the claimants as the wrong test was applied. Mistakes like the above can sometimes be made in uncontested *ex parte* hearings such as these.

Upon identifying the above pitfalls, the matter led to negotiations and was concluded by way of a settlement.

Conclusion

As crypto asset litigation is still developing in England and Wales, it is currently unclear to what extent the courts will be asked to grant innovative legal arguments in order to secure such assets. That is something that will have to be closely monitored on a case-by-case basis.

This was highlighted in the recent case of *Ion Science Ltd and Duncan Johns v Persons Unknown, Binance Holdings Limited and Payward Limited*; in which the applicants were represented by Rahman Ravelli.

The case is an indicator of both the courts' evolving response to cryptocurrency and the flexibility that courts are willing to extend to assist victims of fraud involving cryptocurrency.

It is also a landmark case because it is:

- believed to be the first case of fraud involving an initial coin offering – where a company looks to raise money to create a new currency – to go before the Commercial Court;
- one of the only cases where the court has granted permission to serve a free-standing *Bankers Trust* order out of the jurisdiction against cryptocurrency exchanges; and
- the first time that a court has considered the *lex situs* (location) of Bitcoin.

In our experience, judges in English courts are willing to show that they are prepared to adopt formidable tools to accommodate cryptocurrency fraud applications. Yet much will always depend on the strength of the application you make in such cases. This, ultimately, is determined by the effort and intelligence involved in your preparation.

Syedur Rahman's areas of expertise include white-collar crime, cryptocurrency-related fraud and multi-jurisdictional asset tracing and recovery. He represented clients in the landmark cryptocurrency asset recovery cases *AA V Persons Unknown and Others* and *Ion Science Ltd and Duncan Johns v Persons Unknown, Binance Holdings Limited and Payward Limited.* His use of civil recovery proceedings under Part 5 of the UK's Proceeds of Crime Act (POCA) has seen him record notable national and international successes. He is a partner at Rahman Ravelli and has contributed chapters to books on white-collar crime. He also hosts seminars and speaks at international conferences.

His in-depth experience of business crime and multijurisdictional asset recovery cases and his ability to negotiate with investigators have ensured his clients receive the strongest representation. He is proficient in both criminal and civil proceedings and has widely acknowledged expertise in national and international regulatory and compliance cases. The latest edition of the Chambers UK guide ranks Syed as a lawyer to watch, calling him "a very technically gifted lawyer" who "gets on top of all the facts in complex cases". Chambers has repeatedly highlighted his expertise in POCA work and asset recovery proceedings. The Legal 500 has said he "goes the extra mile to get the best results for his clients". Its most recent edition says he has "incredible depth of experience when it comes to fraud matters".

syedur.rahman@rahmanravelli.co.uk

Rahman Ravelli's depth of experience and acknowledged expertise in serious and corporate fraud, white-collar crime, bribery and corruption, regulatory matters, complex crime, market abuse, asset recovery and commercial litigation – particularly civil fraud – have ensured the highest legal guide rankings, a string of awards and legal successes, and a reputation second to none.

It is among the UK's most prominent legal firms for managing all aspects of criminal and regulatory defence and dealing with UK and worldwide agencies. The Legal 500 called it "an exceptional firm with exceptional people", while Chambers UK said it was: "Absolutely outstanding. An impressive team with real depth."

Rahman Ravelli receives instructions on the largest and most notable and complex multinational and multi-agency white-collar crime investigations.

It is in increasing demand to help corporates and senior executives investigate and self-report wrongdoing to achieve a civil, rather than a criminal, solution to an issue.

www.rahmanravelli.co.uk

RAHMAN RAVELLI

CORRUPTION IN THE PANDEMIC AND THE IMPORTANCE OF ASSET RECOVERY

Angela Barkhouse
Quantuma Advisory Limited

The COVID-19 pandemic

has brought unprecedented challenges to health and human suffering, requiring rapid responses from governments to limit the rates of infection. At its onset, the extreme and sudden nature of the pandemic led governments to enforce nationwide lockdowns, which caused an immediate impact on the economy. In response, governments created economic packages to meet the urgent needs of its citizens and corporations, leading to an unprecedented fiscal bail out; government assistance programmes such as the UK furlough scheme have cost billions (see https://fulcrumchambers.com/hmrc-is-looking-at-furlough-fraud-and-company-directors-may-be-jointly-liable-over-1900-furlough-fraud-claims-reported/).

Pandemics increase the opportunity for fraudsters

Fraudsters are taking advantage of the opportunity that has presented itself with decreased face-to-face interactions, remote working, and potential technological weaknesses, to attack individuals and corporations for illicit gain. In the UK, a survey conducted by PWC found that economic crime reached its highest level in the past 24 months, with 56% of UK businesses surveyed stating that they were impacted by fraud, corruption or other economic crime. From phishing scams, supply chain fraud, and fake charities, organised crime groups are adapting quickly to the pandemic, accentuated by unprecedented changes in work, social and economic conditions.

The UK and other governments have promised to deal with COVID-19-related frauds with prosecution, and indeed we have seen the Coronavirus Act 2020 extend HMRC's powers to pursue parties who have broken the rules governing furloughing, including the ability to pursue company office holders in the case of businesses becoming insolvent, with joint and several liability. However, "*the argument often made in critical criminological literature is that the less powerful typically find themselves on the receiving end of the process of law enforcement, while the wealthier and privileged are better able to evade punishment and criminalisation*" (Box 1983; Reiman 1979; Whyte and Wiegratz 2016, cited Chistyakova, Y., Wall, D.S. & Bonino, S. The Back-Door Governance of Crime: Confiscating Criminal Assets in the UK. Eur J Crim Policy Res (2019)).

Whilst governments were compelled to act for the health and safety of their citizens to obtain crucial resources such as medicines and medical equipment, the Financial Action Task Force (FATF) identified that as a result of government funds or international financial assistance, there were increased risks of illicit finance and corruption from the misdirection of those funds (FATF Webinars on Money Laundering and Terrorist Financing and COVID-19, (30 July 2020)). The emergency provided opportunities for the corruption and misappropriation of public funds, particularly in procurement and government contracts. This may involve embezzlement of the immediate economic and financial aid that is received, as well as the abuse of emergency procurement processes for private benefit.

It is particularly galling when public officials who have directly or indirectly taken advantage of the urgent roll out of government schemes to create high value contracts, or to procure goods for themselves at the risk of endangering public services and the lives they are meant to protect as public servants. Yet public and private sector participants of a FATF webinar on "COVID-19 and the changing money laundering and terrorist financing landscape" on 30 July 2020, highlighted misuse of government stimulus funds as the third most prevalent COVID-19 related crime after fraud and cybercrime (Financial Action Task Force, FATF Webinars on Money Laundering and Terrorist Financing and COVID-19, (30 July 2020)).

Indeed, we have seen several cases worldwide to date (https://images.transparencycdn.org/images/COVID-19-Documented-corruption-and-malfeasance-cases.pdf), including:

- **United Kingdom**: Some 50 million masks the UK purchased as part of a US$326 million contract will not be used by the NHS due to fears of defects. The contract was between the British government and provider Ayanda Capital Limited, described as "a 'family office' owned through a tax haven in Mauritius". It is alleged the company has ties to a prominent member of the Conservative Party. (Source: David Klein, 14 August 2020, available: https://www.occrp.org/en/daily/12955-uk-paid-at-least-us-204-million-fordefective-masks.)
- **Brazil**: A São Paolo Governor is under investigation for a US$100 million contract to purchase 3,000 ventilators at 10 times the usual price from a Chinese company. (Source: Brenno Grillo, 11 May 2020, https://brazilian.report/coronavirus-brazil-liveblog/2020/05/11/brazilian-prosecutors-crack-down-covid-19-corruption/.)
- **Mexico**: The son of a Mexican government official was awarded a government contract worth US$1.3 million to provide 20 ventilators – costing US$65,000 each. According to an investigation by Mexicans against Corruption and Impunity (MCCI), the ventilators cost 85% more than the cheapest models previously purchased by the government (see https://mexiconewsdaily.com/news/government-contractor-denies-getting-helpfrom-his-father/).
- **Zimbabwe**: The Health Minister faces corruption charges relating to a US$20 million contract awarded to a firm incorporated in Hungary only two months prior. The award is alleged not to have gone through the Zimbabwean procurement registration authority. This follows a suspicious US$2 million payment made to the firm in March, which had been flagged as suspicious by Hungarian authorities (see https://www.bbc.com/news/world-africa53119989).

Asset recovery must play a bigger part

If governments are to recover economically, it is highly likely that they will need to find revenue from new or expanded resources. This may be through personal or corporate taxes, or by attracting foreign investment. Yet both will be difficult to promote if the government has a lackadaisical response to fraud and corruption within its own ranks. Indeed, curbing fraud and public corruption will be imperative, and to be effective, must also include an element of deterrence, and that inevitably means prosecution and recovering the spoils of those frauds. States need to be alive to the fact that an acquittal of a corrupt public official sends a poor message.

In the immediate term, as societies work to contain the virus while sustaining their economies, the emphasis will be on prevention and reporting. However, lessons learned from the Ebola outbreak showed that traditional anti-corruption policies were insufficient in situations of an outbreak to build better economies after the pandemic. Arguably then, tracking financial flows, publicising complaints, prosecution and asset recovery must play a bigger part.

We must include a swift reactive as well as proactive response and follow through on pronouncements to deter fraud and corruption, by implementing and not just threatening redress, and by turning to other civil remedies that are available if criminal sanctions are lacking in their timely response.

There is a dearth of published data on successful asset recovery generally, even more so

when discussing the pandemic. Much more can be found on anti-corruption prevention than on restorative justice, and perhaps understandably so; it is a daunting task to trace and find evidence after the event, and as the saying goes, "prevention is better than cure". It is also, quite frankly, easier to measure success; strengthening institutions, improving processes, and providing capacity building against development targets, is an easier goal to achieve than recovering millions of dollars from a corrupt former President and his cronies. But this is exactly where we need to be putting the hard yards in; asset recovery is perhaps the strongest message available that crime does not pay.

Asset recovery tools and tactics

Asset recovery – the process of tracing, freezing, and returning illegally acquired assets to the jurisdiction of origin – requires tenacity and willpower. The key to combatting fraud can be achieved through a mix of intelligence, financial investigation and understanding the legal steps to undertake to maximise the possibility of a recovery, but what is verily needed is a concerted response to combat the threat posed by corrupt political elites and international crime, involving international and national courts, law-enforcement agencies, international financial regulators, professional bodies, private practitioners, and national governments in partnership with each other.

The UN Convention Against Corruption (UNCAC), a tool to assist signatories in combating corruption, largely focuses on criminal mechanism. It has powerful potential for prosecuting the perpetrators of corruption, but onerous requirements for mutual legal assistance, a lack of non-conviction-based recovery procedures and restrictive evidentiary and procedural legislation in either the requesting or requested country can stop a corruption investigation in its tracks. Vast sums of financial assets are stolen from developing countries and hidden in financial centres around the world, but it requires political will and positive responses from both requesting and requested countries to make asset recovery a true success.

Recovery and jurisdiction

Many fraud and corruption schemes involve the creation and use of domestic or overseas companies, for the purpose of receiving or paying bribes, transferring misappropriated assets or holding embezzled funds, which is why using civil remedies may well be the most expedient way to restrain and recover those assets. Indeed, we have used insolvency proceedings to either the entity that committed or assisted in the corruption. In one recent case I advised upon recently, a UK firm had entered high value contracts with two offshore companies for the provision of PPE masks, which never arrived. The company was incorporated in the BVI. Months of prevarications ensued before the UK customer came to the realisation that the funds had never been used to purchase PPE masks, but instead was highly likely to have gone into the pockets of fraudsters.

Despite the shareholders, directors and the assets residing outside of the jurisdiction, which totalled tens of millions of pounds, it was possible to enter a simple debt claim against the company for unpaid services or goods, seeking a winding up to recover debts owed, and then installing a liquidator who, under Statute, could compel the receipt of banking information from its professional service providers, including its bank. The use of insolvency processes and/or the court appointment of a receiver or liquidator (particularly in jurisdictions that follow common law) in this case was particularly advantageous in investigating cases of fraud. Seeking a debt judgment against a company which may have provided substandard goods or has not supplied goods is appropriate for both insolvent and solvent companies. In the case of a solvent company, it would be considered in the public interest for the company in question to be wound up, having been complicit in, or used as a vehicle for, fraudulent misconduct.

A good example of using insolvency to recover assets in a corruption scheme is that of the former mayor of São Paulo, Brazil, who stole approximately 20 per cent of funds intended for the construction of a highway around the city. A large amount of the cash had been deposited into bank accounts overseas, and transferred into the control of two private companies, incorporated in the BVI. After uncovering the scheme, the governments of Brazil and São Paulo successfully sued the two companies in the BVI. Brazil and São Paulo then applied for creditors rights in a BVI court, so that insolvency representatives would be appointed. The BVI court agreed, and appointed insolvency representatives to take control of the companies. They immediately gained access to records and witnesses, enabling them to piece together the remaining assets from what had been stolen, to be returned to taxpayers in Brazil (see https://star.worldbank.org/sites/star/files/going-for-broke.pdf).

It is a truism, that whilst COVID-19 has changed the world in many respects, what remains the same is the law. What will define our response to corruption in the pandemic will be our selective use of the law to choose the quickest route in recovering stolen government and development funds. The use of MLA requests, bi-lateral treaties, civil remedies and insolvency all lend themselves to obtaining evidence and recovering assets.

Understanding the different elements within an asset recovery strategy determines the potential jurisdictions and remedies that may be available and will be critical.

Depending on the evidence and on the jurisdiction, an assessment may be made on whether to seek assistance from counterparts in criminal or regulatory law enforcement agencies, or to pursue private civil action or use of insolvency mechanisms. In many of our cases, like in the case referred to above, cross-border insolvency treaties and recognition principles have provided significant advantages if there is a debt owed, and in some fraud causes it may be possible to obtain a winding-up or receivership of a legal entity based on a "just and equitable" application, which could provide additional discovery powers regarding its assets. The basis of a J&E winding up, can be based upon evidence that the company was used as a vehicle for fraud or that assets may be dissipated.

One of the biggest problems in recovering assets using criminal law across borders is that criminal procedures have more stringent requirements for the manner in which evidence is obtained, and how it may be used in the requesting jurisdiction, whereas using civil claims to recover the money has the undoubted advantage of requiring a less strict burden of proof than is required in applying criminal law, and claims can be brought in commercial courts. In England and many common law countries, for example, criminal allegations must be proved 'beyond a reasonable doubt', whereas allegations in civil cases must be proved on the 'balance of probabilities'. This can be a useful metric in deciding in which direction to take a case; if a criminal prosecution appears unlikely, perhaps due to lack of evidence, then restitution via civil remedies should be sought, whether that ultimately results in a civil claim for breach of contract or financial misfeasance, or indeed a simple debt claim. I am a strong proponent of justice, but justice takes many forms, and stripping a fraudster of their spoils and returning assets to their rightful place, is surely the most satisfying.

Recovery and reinvestment: a unique opportunity

We face a unique opportunity to fundamentally rethink anti-corruption policies and prioritise the recovery of stolen government and development funds which can be reinvested into healthcare, education, and welfare to support those who need it most in the global recession. States lose significant resources through illicit financial outflows, affecting their capacity to fulfil their obligation to maximise available resources for the realisation of economic, social and cultural rights and to achieve the right to development.

Acknowledging the negative effects of these outflows, particularly in developing countries, States committed, through the 2030 Agenda for Sustainable Development (SDG 16.4) and the Addis Ababa Action Agenda on Financing for Development, to reduce illicit financial and arms flows, and to strengthen the recovery and return of stolen assets. The forthcoming UN General Assembly Special Session (UNGASS) on Corruption 2021, scheduled for April 26-28, 2021, will be important in setting the stage for the expectation of states to combat corruption.

Member States should make firm commitments on taking decisive action to significantly improve asset recovery and return, in particular pursuing corrupt officials that have taken advantage of the pandemic to purloin state coffers. Even more topical in recent times is the repatriation of stolen assets and how they are managed. Kenya's President announced that US$19 million in recovered stolen assets would be used in the fight against COVID-19. As noted by the Basel Institute on Governance, "*it illustrates very pertinently that while corruption can kill, asset recovery has the potential to save lives*" (see https://baselgovernance.org/sites/default/files/2020-04/covid_asset_recovery_analysis.pdf).

How very apt that the assets recovered from corruption which impacts on citizens' rights to education, family, life and health are then used for repairing the harm caused by grand corruption, and for implementing measures to meet SDG 16.

Angela Barkhouse is a Managing Director in the Cayman Islands and leads Quantuma's Caribbean and Cross-Border Asset Recovery Groups. She is a recognised expert and "thought leader" in financial investigations, offshore asset tracing and recovery, data analysis and intelligence.

As a cross-border asset recovery specialist, Angela provides project management and litigation support to locate and repatriate the proceeds of fraud and corruption hidden in foreign jurisdictions. Her broad expertise in financial investigations, asset tracing and dispute resolution provide her with the knowledge to derive practical solutions to seemingly complex cross-border issues. Angela has consulted with governments, law firms, banks, corporations, and NGO's. She has led high profile and complex investigations in bribery, corruption, malfeasance, conflicts of interest, embezzlement and stolen sovereign wealth and recovered assets for clients and victims of fraud, corruption and misconduct. Recent examples of assignments include acting for a newly elected Government in Asia in investigating money laundering through the central bank with the collusion of high-ranking members of the former government and government agencies.

Angela has also recently led the forensic investigation into the misappropriation of substantial assets by members of a former regime in South Asia through the central banking system and government-owned entities, supporting multi-jurisdictional litigation for both criminal and civil proceedings in claims exceeding $1billion.

angela.barkhouse@quantuma.com

Quantuma is an independent advisory firm serving the needs of mid-market and corporate companies, high-net-worth individuals, governments and regulatory agencies. Our experts advise clients on business transactions, resolving business disputes, mitigating risk, and managing operational as well as financial challenges. We have deep experience and specialist expertise in restructuring and insolvency, corporate finance, forensic accounting, and investigations and financial advisory. We work alongside accountants, major law practices, private equity houses, lenders and regulators. Our 250-strong team operates from 22 offices across the UK, Cyprus, Mauritius, and the Cayman Islands.

www.quantuma.com

FRAUD AND ASSET TRACING INVESTIGATIONS:

THE ROLE OF CORPORATE INTELLIGENCE PART II

Alexander Davies
BDO

Peter Woglom
BDO

Introduction

In this chapter, we will further develop and broaden the discussion we initiated in last year's publication on the various important roles that Corporate Intelligence can play both in investigating fraud and in cross-border asset tracing.

For the most part, we will not recapitulate the scene-setting discussions we laid out last year, and this chapter should be read as both sequel and complement to our 2020 piece.

Suffice to reiterate the main starting point for our thinking: that, however well or poorly understood or called upon in practice, there will potentially be a significant – and in many cases, essential – role for Corporate Intelligence specialists in almost all investigations of fraud (and indeed the numerous other categories of malfeasance), as well as those focused on asset tracing and recovery.

'Internal' vs 'External' sources of information

The fundamental reason for this is that on any individual person or corporate entity there exist two distinct and valuable pools of information, what we might call the internal (private and essentially proprietary) and the external. Each of these information pools is composed of numerous different elements of varying degrees of reliability – and varying levels of claim to official status or truth value. And the truth value of (almost) every one of these elements on its own is in principle contestable. Even the actual claims to truth of each of these elements are extremely partial: a set of audited accounts, for example, does not lay claim to presenting an objectively truthful picture of all (or, some would contend, even any) aspects of a corporate entity; even less can a media article discussing, say, aspects of an individual's professional activities and expertise, lay claim to any more than the truthful perception of one, or at most a few, others about a very small portion of the total relevant truths about the individual. At the other end of the spectrum of reliability, a clearly authentic record of current ownership by an individual of, say, a real estate property does not rule out such an ownership claim being contested in court, as we have seen, for instance, in the spate of legal actions on this theme in countries such as Russia. Taken together, however, a thorough – forensic, to use the word in an informal sense – review and interrogation of each of these elements of both the internal and external pools of information should produce a complex and nuanced, in some cases paradoxical, picture close to something with the claim of objective truth.

To the degree that resources allow, any fraud or asset tracing investigation, the subjects of which are in most cases likely to be multiple, will seek to access and analyse as many elements as possible of both the external and internal information pools. Investigating the internal pool is largely the domain of Forensic accountants, Forensic Technology specialists and in certain cases internal auditors. Investigating the external pool is largely the domain of Corporate Intelligence professionals.

On each such investigation, there is also of course a question of information accessibility. Internal pools of information mostly comprise the books and records, both paper-based and digital, of a person or company, as well as (in the case of a company or an individual who has a family office or uses external advisors) the various types of knowledge residing in the heads and perhaps electronic devices of their staff and advisors. The relevant elements of this internal pool of information are likely to be quite highly concentrated in terms of both the physical locations at which they are held and, perhaps to a lesser extent, the number of discrete sources of such information. The relevant elements of the external pool are likely to be far more widely dispersed, and the degree of accessibility of each element may vary considerably. Think, for instance, of all the potentially relevant knowledge that might reside in the heads of former employees, shareholders, advisors – as well as competitors, suppliers, distributors, clients – of even a modest owner-managed business. Equally, the range of potentially relevant information on all manner of public records – paper-based as well as electronic – can be vast.

It is not uncommon, however, for an investigation, whether just at the outset or throughout, to face insurmountable obstacles to accessing many or all of the elements of the internal information pool. By contrast, the greater part of the external information pool is always in principle accessible – it is limited only by the skills and financial resources available for the job, along with an appropriate strategic approach to dealing with the problem of highly dispersed information.

As a consequence – and this may not be widely understood – we encounter a large number of investigations, whether into suspicions of fraud or other malfeasance or those focused on asset tracing, which rely wholly on the skills of Corporate Intelligence professionals, usually working closely with lawyers.

In other situations, where a reasonable degree of access to the internal information pool is possible, a crucial point is to ensure that the relationships and feedback loops between the Forensic accounting, Forensic Technology and Corporate Intelligence teams function well and within a clear overarching strategic framework.

Corporate Intelligence methodologies in a nutshell

Again to recap very briefly, Corporate Intelligence-based investigation work essentially boils down to two groups of methodologies: first, identifying, accessing and analysing relevant public records, whether paper-based or in electronic form, in whichever language they may be written, and wherever in the world they may be held. And second, human intelligence gathering through the networks of tried and trusted contacts of diverse disciplines that all experienced Corporate Intelligence professionals put a premium on developing and maintaining in each of the parts of the world they cover.

There is in fact a third category of information source which may be tapped by Corporate Intelligence specialists, lying somewhere on the border between the public domain and human intelligence enquiries: the observational site visit. We shall return to this theme later in this chapter by way of some case examples, as it is a category of information source which can often have an extremely high value.

Surveying the fraud investigation scene

It is not part of the remit of this chapter to provide a detailed examination of the changes wrought by the ongoing COVID-19 pandemic. Nonetheless, this context cannot be ignored completely.

Some of the big fraud-related themes this year have plainly arisen as a result of the pandemic crisis: notably, to briefly adopt a UK-centric point of view, reports of significant losses to fraud in the UK government's short-term funding assistance scheme for businesses; and numerous cases of fraud in the procurement of PPE. More indirectly COVID-related, there seem to have been a number of cases of hackers successfully targeting individuals making large cash transfers to solicitors for real estate property purchases, a problem undoubtedly exacerbated by the numbers of people rushing to beat the UK government's stamp duty holiday deadline. There will undoubtedly have been similar examples in other countries.

None of these are areas in which we have yet been directly involved in reactive investigation work. We have, though, undertaken a number of preventative Integrity Due Diligence projects this year to assist health service bodies in ensuring that they are procuring emergency PPE and related medical supplies from reputable providers with a proven record of operating successfully in these fields over several years.

Looking more broadly than the procurement of PPE, the combination of the pandemic and pre-existing international trade tensions has driven many firms to pay fresh attention to ensuring the robustness of their supply chains. Alongside this, a number of clothing manufacturers and retailers have faced allegations of indirectly sourcing their cotton from Xinjiang, where the risks of the cotton being produced by forced labour is significant. Closer to home, investigators found that numerous UK-based suppliers used by BooHoo.com have consistently been paying staff less than the minimum wage, which after all amounts to such firms defrauding their staff.

CASE STUDY 1

Unrelated to the pandemic, another of the big stories this year has been the Wirecard fraud case. Again, while we have been following this matter closely, we have not been involved in investigating it. Interestingly, though, we have seen a substantial investigation of corporate fraud this year that bore some of the same hallmarks; and the existence of two sizeable cases where a similar mechanism has been adopted to perpetrate fraud leads us to believe that there will be other such cases yet to be uncovered. An important theme in this case – as with Wirecard – was that a core group with operations on a global scale was making use

of aggregator companies to collect and hold on its behalf revenues generated in particular regions, including Latin America, East Asia and Eastern Europe.

Claims were made by the group that these regional aggregators – in most cases registered in offshore jurisdictions with low financial disclosure requirements – had collected and were holding very substantial sums on the group's behalf, allowing the core group to present a very rosy picture of its revenue and profitability growth. Auditors, however, were having difficulties in obtaining reliable evidence to support the claimed extent of such revenues: the aggregator companies were, it was claimed, completely independent of the core group in both ownership and control and, while swift to provide general assurances, were slow to respond to requests for documentary evidence such as bank statements. Moreover, some publicly verifiable statistics which together should logically serve as approximate indicators of the volume of business being generated by the group in various parts of the world were giving concerningly low readings, lending an air of implausibility to the reported revenues emanating from those regions.

The Corporate Intelligence investigation work on this case centred on multi-jurisdictional information and record gathering on – on the one hand – the key officers and shareholders of the core group and – on the other – the revenue aggregator companies and their principals. Through this detailed and systematic mapping process (this was a case on which the use of effective visualisation tools proved critical), which also incorporated categories of information such as addresses, close family networks and the identity of the lawyers and accountants used by each of the parties, the investigation was able to demonstrate clear indirect ownership and control linkages between one or other of the core group's key principals and over half of the aggregator companies; with more indirect connections indicating a high probability of the existence of such ownership and control relationships identified for a further 20% of these aggregators.

This is also the first of the case studies we will highlight in which observational site visits to addresses associated with the various companies proved invaluable. We arranged such visits to both regional operating addresses of the core group and to registered addresses of the aggregator companies in several jurisdictions. In a clear majority of these cases, our visits observed a complete absence of any signage indicating the

presence at the address of the company in question. Some of the local operating addresses of the core group were buildings run by providers of serviced offices and in two cases staff at these addresses were able to confirm that their previous agreements with the core company had ceased several months previously. In another case, the registered – and sole identifiable – address of one of the aggregator companies turned out to be a residential building, and further local enquiries identified this as the personal address of a senior partner at a small local law firm that had strong connections to the core company.

CASE STUDY 2

In our chapter last year, we initially focused on cases of procurement fraud, before moving on to highlight some cases in which those controlling companies had found mechanisms illicitly to strip large sums of money out of the businesses they controlled in order to fund lavish personal lifestyles. The next case we will discuss, also from the past 12 months, combined both of these.

A long-established group (in this case also the client) headquartered in Western Europe, but with very substantial industrial operations in Eastern Europe, still included one of its main founders on its Board. Although formally just one of a full complement of Board Directors and no longer holding an executive position, this founder still wielded very substantial effective decision-making power within the organisation by virtue of his role in the group's history, his remaining the single largest shareholder, and his ability to rely on a number of individuals in executive positions who remained loyal to him.

Under this influence, the group had signed a multi-year sponsorship deal worth millions of euros with an entity based in the same region as the group's largest Eastern European operations. The entity in question just happened also to be owned by the self-same founder of the group. At first sight, this seemed to present a major conflict of interest; moreover, the sums involved seemed outsized when imagining the running costs of such an entity in the country in question.

Counter-arguments were presented, though, by members of the Board: it was felt to be important for the group to maintain such a form of legitimate 'soft power' influence in its region of Eastern European operations; on balance, the group's resulting maintenance of a high and positive profile in that region, above and beyond that deriving from its contribution to local employment, would lead the region's leading politicians to look favourably upon it whenever decisions were being made that might impact the group. Meanwhile, the size of the sums involved was explained by the fact that the entity required a major upgrading of its buildings and infrastructure; a detailed and costed plan of works had been presented.

Now well over halfway through the term of the sponsorship agreement, investigators were tasked to examine how the money had been spent but the entity itself had stonewalled and, while providing a limited amount of documentation, refused to grant investigators access to its facilities.

As a result, this became an investigation wholly reliant on a Corporate Intelligence approach. This work, in rapid sequence, followed a three-step process. First, thorough public record research was undertaken, the central finding of which was that a large portion of the costed work plan presented at the time of the sponsorship agreement had actually – according to public pronouncements by officials of the entity themselves – been completed over two years prior to the commencement of the sponsorship deal. Further, in their public pronouncements, officials of the entity had provided clear indications of the total cost of such works, and these were a small fraction of the costs allocated to identical works at the time of the sponsorship agreement.

Secondly, it was arranged for local agents to make observational site visits to the facilities owned by the entity. Although from these observations it was impossible to be certain of what works might be under way within the interior of the main buildings, in all other cases it was clear that no significant upgrade works were ongoing, nor were any indications found of recently completed works.

Finally, discreet approaches were made to a range of individuals well placed to possess detailed knowledge of any recent programme of works at the entity – in what are usually described as human intelligence enquiries – and several of these individuals provided lengthy and granular interviews to the investigators. As far as possible during this process, attempts were made to seek corroboration of points made by one interviewee during interviews with others.

Taken as a whole, the findings were extraordinary, and some of them are too sensitive to elaborate upon here. The results, though, did include entity insiders providing detailed descriptions of the works which had (and had not) taken place in recent years, along with the approximate timing

of these and their estimations of the likely total sums spent. The findings also included the disclosure by regional politicians that they themselves had agreed and dispensed a grant to the entity which covered the costs of much of the minor programme of works which had actually been undertaken.

Finally, and perhaps most interestingly, key players in the region's construction sector highlighted that the company selected as the lead contractor for the works programme – which we were told had been given control of the entire budget allocated for the works programme – was in fact controlled by the key founder of the client group who also of course owned the sponsored entity. Moreover, this lead contractor itself acted only as an intermediary, passing on the responsibility for completion of the minor programme of actual works to subcontractors. The sums actually paid for such works were reported to the investigators as being exceptionally small in the context of the total value of the sponsorship deal, and several interviewees made clear their views that the entire scheme had been invented by the client group's founder to strip large sums of cash out of that company for his own use.

As a concluding step, investigators undertook a further wave of public record research in order to corroborate as many of the findings of the human intelligence work as possible. A final indication of the lengths the company founder would go to in order to secure the maximum amount of money for himself came in the form of a court case unearthed during this research process, which showed that one of the firms subcontracted to carry out works at the club had needed to go to court in order to secure payment of the final tranche of money it was owed by the lead contractor.

CASE STUDY 3

The circumstances around fraud investigations, and the roles that Corporate Intelligence professionals and other investigators are called upon to play, can vary considerably.

In another case from this past year, a multinational firm had experienced a large case of fraud within its African operations. By the time external investigators were approached, the company itself had already sent a team from its headquarters who had resolved the matter to the Board's satisfaction. It had been an essentially unrepeatable scam whereby a small number of insiders had colluded with corrupt customs officials to produce inflated (but of authentically official provenance) export duty invoices which the insiders then ensured were paid, before proceeds were shared out between the perpetrators.

Corporate Intelligence investigators were brought in at this point and, with the fraud investigation itself now over, their role became somewhat different. The lingering concern of the company was over whether the local Finance Director, who had signed off the inflated invoices – without asking sufficiently probing questions but apparently in good faith – had merely showed his relative inexperience; or whether, by contrast, he may potentially have colluded with the main perpetrators. Corporate Intelligence was therefore brought to bear in undertaking a highly detailed Integrity Due Diligence investigation on this Finance Director. This involved a far closer examination of his career track record than his employer had attempted at the time of his hiring, along with broader enquiries to gauge the perceptions of the Subject's trustworthiness amongst those who knew him, whether socially or as former colleagues.

Given the types of information sought, it was inevitable that most of the emphasis would be placed on carefully conducted human intelligence enquiries, which in the circumstances needed to be undertaken with great sensitivity. This Integrity Due Diligence work produced a thorough and complex picture of the Subject as a modestly competent professional who was felt by some of our interviewees to have been promoted too far too soon. While, based on these findings, the client decided to keep him in post, our investigation did uncover some aspects of his character that were less than trustworthy and which led to him being hauled in for discussions with his superiors. Most concretely, the investigation work identified that the Subject had for several years secretly been running a separate commercial business in a neighbouring town in parallel to his employment by the client. And though he was in no way at fault for this, the investigation also revealed that the subject's sister had served a prison sentence for bank fraud a few years previously.

Cases combining fraud investigation and asset tracing

There are of course many cases, particularly in the field of contentious insolvencies, where there is a need for both fraud investigation and asset tracing work, and we will now discuss a couple of examples of such matters.

CASE STUDY 4

An area we did not touch upon in our 2020 chapter is real estate investment fraud but, certainly in the UK, this has long been a feature of the landscape – or one might say in certain cases, a feature that was planned to be added to the landscape but never materialised. Over the past six to seven years in particular, we have seen a number of cases in which mostly overseas investors lured by the apparent attractions of the UK real estate market have put substantial sums of money into lucrative-sounding development opportunities, only to see the developers take the money and run. The schemes involved often seem to involve the construction of student accommodation or the conversion of stately homes into hotels or high-end apartments.

The particular case we will discuss here came to light four to five years ago. The core of the matter was relatively straightforward and familiar: developers purchased a run-down stately home, along with some surrounding plots of land; plans were laid to convert this property into a hotel and leisure complex, featuring the obligatory golf course; a regional office of a well-known real estate valuation firm somehow came to place a manifestly inflated value on what would be the completed development; the scheme was successfully marketed to investors in countries such as Taiwan and Malaysia; the developers dissipated several million pounds of investors' money and the development was never completed. Insolvency practitioners were appointed and investigations began.

This case was unusually interesting, though, in featuring a number of sub-plots. This included some well-connected local farmers who – investigations identified – had long known some of the individuals behind the developer company, and who made large sums selling land for the development scheme. As soon as insolvency practitioners started moving to recover the assets of value that remained, a multiplicity of charge-holders emerged from the woodwork to press their own claims on recovered funds. Corporate Intelligence enquiries were rapidly launched to gain a clearer understanding of who these parties were and the connections between them. By happy coincidence, some of these charge holders were based on the Costa del Sol, where our parallel asset tracing work was also finding high-value apartments owned by some of the individuals behind the insolvent developer.

Much of the money that had flowed through the development company had in all likelihood disappeared offshore untraceably, so much of the recovery effort revolved around the personal assets of the individual officers and a number of lucrative contracts which had been given out to building contractors. In this latter area, the dissipation of funds had been egregious: almost no work at all had been undertaken on the planned hotel building itself; and £3 million had been dispensed to a contractor that had built only a roundabout close to the hotel – no work had been started on access roads. At our present stage in the economic cycle, where governments seek to boost the economy through large infrastructure projects, one hears a lot from critics talking about 'roads (or bridges) to nowhere'; but there is something almost mystical about the idea of a roundabout to nowhere. This calls to mind a moment in Geoff Dyer's often hilarious book 'Yoga For People Who Can't Be Bothered To Do It' where he falls in with a modern flower child who insists on calling herself Circle. They are on a tourist boat on the vast Cambodian lake Tonlé Sap when the engine on one side of the boat packs up. "I think we're going around in circles, Circle," Geoff chimes in.

The sheer number of targets for asset tracing eventually led to considerable success for the combined Corporate Intelligence and Insolvency Practitioner team in recovering funds; but the necessity of entering into complex negotiations with each of these parties – including the Directors themselves – as well as the various charge holders led to intense bouts of work continuing on the case for over two years.

CASE STUDY 5

Finally in this section, we will briefly review a case from a few years ago which, as with many instances of corporate fraud, highlighted some of the considerations in the minds of Board Directors of companies that have suffered fraud.

In this instance, our client was a truly global business whose Western Europe-based operations had suffered a fraud in which it was suspected that some of the Directors of this European subsidiary had been involved. Through a combination of Forensic Technology, Forensic

accountants, expert interviewers and a relatively modest Corporate Intelligence role, the case was relatively easily solved and three Directors of the European subsidiary were exposed as the primary perpetrators. The client, however, in consultation with its lawyers, faced a dilemma on how to act on these findings. On the one hand, as with most corporates, it wished knowledge of the existence of the fraud to remain away from the public domain. On the other hand, given the relative seriousness of the fraud, it ideally wished both to send a message of zero-tolerance internally and to recover some of the money lost.

The client therefore asked Corporate Intelligence investigators to undertake an asset tracing exercise on the three Directors in advance of any further discussions with them. This work confirmed their ownership of at least two valuable real estate properties for each of them, spread across the UK, France and Spain.

The client was then able to make use of these findings in their negotiation of an exit settlement with the three Directors whereby court proceedings would be avoided and the Directors would each disgorge substantial cash sums.

Asset tracing investigations

We will now move on to discuss the role of Corporate Intelligence in asset tracing investigations. Last year, in this context, we presented a detailed picture of a single asset tracing case in the Americas. This year, we will examine a number of smaller cases collectively spanning a wider geographical spread, in order to bring to life some of the varied situations in which such investigations can arise; to illustrate some of the investigative techniques used by Corporate Intelligence professionals; and to highlight some of the less obvious features of some investigations which over-simplistically fall under the asset tracing banner.

Concurrently, one should keep in mind that the current economic environment has given parties 'cover' to claim financial duress or an inability to abide by commercial agreements, satisfy debts, judgments and the like. We have seen a marked increase in clients seeking to understand whether parties are being forthright in these representations before costly and time-consuming litigation ensues. As such, even used as a preliminary assessment, Corporate Intelligence can provide a window into parties' history and track record to understand how to assess such representations.

CASE STUDY 6

Asset tracing to assist in a decision on whether or not to pursue litigation

This case was in the now-classic mould of a major commercial dispute between Eastern European oligarchs. The oligarch on the client side felt he had a strong legal case against the other and would seek compensation of several tens of millions of pounds. He also knew that the other oligarch would have significant wealth, but was unsure how well hidden such wealth would be, what form it would take and in which jurisdictions it would be located.

The client oligarch therefore determined with his lawyers to commission a Corporate Intelligence-based asset tracing investigation. While it was known that the Subject of the investigation travelled extensively and the net could in principle be cast widely in geographic space, the client and his lawyers wished to make a decision on whether to pursue litigation within a matter of weeks, and the budget allocated for the investigation was sensible but tight. A relatively focused approach would therefore be required and, given the timescale, the role of human intelligence enquiries would necessarily be rather limited.

Despite these factors, this turned out to be one of the more interesting asset tracing cases we have seen, both in terms of the sheer variety of assets uncovered and their geographical spread.

Research rapidly unearthed two important leads. The first of these was an offshore company whose Director was a known proxy of the Subject. This vehicle was in turn identified as the sole shareholder of a French-registered property holding company which bore the name of a villa – we found a match for this name in a large property of some historical significance on the Côte D'Azur, and subsequent checks at local property registries confirmed the suspected ownership. We were able to estimate the current market value of the property at around Euro 20 million.

The second helpful initial lead was a private jet registered in the Subject's own name. This was a significant asset in itself but also led us to another: research had separately identified a residential listing for an individual with the same name as

- the Subject at a substantial property in Germany, but the Subject's name was far from unique and this reference could easily have been to a different person. Research of aircraft spotter blogs, however, pieced together regular sightings of the Subject's jet at airports around Europe, and these showed that on several occasions in the preceding three years, he had landed this plane at the airport closest to the German property. It was clear that the property was indeed his.

Knowledge of these locations also pointed the way to the identification of business assets of the oligarch, including a large minority stake in a German property development company engaged in active construction projects in major cities there; and this in turn led to the identification of related and similarly active companies in the Baltics and elsewhere which formed part of a loose corporate group.

Meanwhile, although the client placed a somewhat lower value, for the purposes of potential recovery, on assets in the oligarch's home jurisdiction, these were still considered to be of some importance. Launching a combination of detailed research and human intelligence enquiries in that jurisdiction led to the identification of a plethora of assets: several apartments; over 20 businesses, a handful of which remained actively engaged in profitable activity including work on large State contracts; large tracts of development land; and an art collection of some considerable significance.

Finally, though on a lower tier of value than the properties, jet, art collection and key businesses, our research found that the oligarch had in recent years driven the same classic car at several races and parades and was therefore, in all likelihood, its owner. Taken together these findings were more than sufficient to allow the client to make a clear decision to press ahead with litigation.

CASE STUDIES 7 AND 8

Asset tracing in the context of hostile divorce proceedings

In recent years, we have regularly seen a demand for asset tracing work in the context of divorce cases. Some of these cases have had their strange aspects: there was one such matter in which both husband and wife were so insanely wealthy that they had genuinely lost track of a significant portion of their assets. While in the case of investment holdings and the like they had been able to employ their own staff to sift through the mountains of relevant

paperwork, when it came to our own work to trace physical assets, we unearthed a London apartment which they co-owned and had both somehow forgotten about (to be fair, they owned three other apartments in the same vicinity, so it must be easy to forget one).

The two divorce-related asset tracing cases we will discuss now, however, had aspects in common but also unusual features that we found interesting, and that in each case give a sense of the broad range of investigation categories which can find themselves classed under the asset tracing banner. These cases also give the lie to the common idea that Corporate Intelligence-based asset tracing is overwhelmingly about identifying real estate property.

In the first of these cases, a divorce case featuring a UK entrepreneur with a business in the oil services sector had turned spectacularly acrimonious, to the extent that he had liquidated his business and fled overseas (taking their teenage son with him) to avoid his ex-wife gaining access to any of their money. After a couple of years, the ex-wife had declared herself bankrupt, and our work was therefore undertaken on behalf of the Trustee in Bankruptcy.

Last heard from in Turkey, through public record-based investigation alone, the husband was soon tracked down to the UAE. He had not sat still there, however. Further research identified that he had initially lived at an apartment in Abu Dhabi, but had soon moved across to Dubai, presumably to be close to the Jebel Ali Free Zone where we found he had re-established his former business, reportedly with some of the same clients and also bringing over some key employees of his former business from the UK. An agent was subsequently sent to Jebel Ali to identify the physical site of the business, not always an easy task in an area where everything is based on PO Box numbers.

So this began as a person-tracing – rather than an asset tracing – exercise, and the identification of these addresses allowed the client to choose their moment to serve papers on the husband.

Moving further into the research process, though, eventually led us to the identification of two separate assets, one small, the other very large. The more minor of the two materialised after investigations identified an Instagram account for the couple's son who had initially accompanied the husband to a Turkish resort. The son boasted on this account that his father had set him up in business there by buying him a café to run, and it appeared that he continued to manage this business even while spending part of the time with his father in the UAE.

The more interesting asset took the form of the business the husband had reconstituted in Dubai. Once the relocated business had regained a firm footing, it was not long before it was subject to a buy-out offer from a larger competitor headquartered outside the Gulf region. To begin with, we were concerned about the risk that the husband might now take the cash and run; but further research in specialist journals located more detailed reporting on the deal. These articles reported that the husband had initially been paid around £6 million for his business, but also that the purchasing company had secured an earn-out agreement under which he would continue to run the Dubai-based business but now effectively as the new regional office of the purchaser. Not only did this helpfully confirm that he would continue to be physically present at the company's premises on at least a moderately regular basis, it also gave us a precise date in the future when he would receive a further £3 million on completion of the earn-out period.

By coincidence, the case we will discuss now also involved a British husband fleeing to the UAE in the midst of divorce proceedings. In this case, the divorcing couple had led a comfortable lifestyle but initially there was no suspicion of the existence of major hidden assets. Instead, this began as an *income-tracing* case: the husband had for several years run a UK-based security company along with a business partner but shortly before the divorce this had been put into voluntary liquidation and the husband claimed that he had been unemployed since that point. The wife's lawyers – our client – had a strong suspicion that the husband was still receiving a regular income, and that the liquidation of his company had been a pre-emptive strike in advance of the divorce. One basis for the suspicion on the wife's side was that he had been travelling regularly, for unknown purposes, sometimes spending several months overseas.

It is common in situations of this type for individuals involved in a senior capacity in new business ventures to avoid taking formal officer positions while nonetheless securing a shareholding stake – whether direct or indirect – these being less easy to track. Hammering our databases, initial research did identify one direct shareholding for the husband but in this case he was just one of over 70 shareholders in a technology start-up in which he had invested around £10,000. Nor had he been one of the founding shareholders. It seemed implausible, given the

husband's background and regular travel, that he could be involved in the management of this business or be working there as a regular employee.

The next investigatory line of attack was to search for any current professional activity of the husband's former business partner, and it was this that produced the lead we needed. Research identified this individual as one of three people behind a quite newly established security group headquartered in Dubai. There was no mention of the husband on the group's website and the business had received no significant publicity but it did advertise itself as having several named current clients.

Given that the husband had been out of the country for over two months at that point, our suspicion was that he would be in Dubai. It was therefore arranged for an agent to visit the official address of the company, located in a Dubai tower block. On asking after the husband with the receptionist, the agent was told that he was not in the office that day but would "be in on Wednesday". A further question confirming his official role in a sales capacity was sufficient to confirm that he was employed in something close to a full-time capacity by this company. We were able to leave any further questions to the lawyers to pose at a later date.

There was an interesting coda to this case. While pulling together our report, investigators revisited the records of the technology start-up in which the husband had invested. It was impossible to gauge the value of such a company, as it was a fairly early-stage venture and had no real revenues, let alone profits. At this point it was spotted, however, that shareholding filings had been updated following a new funding round. The sums raised were in the order of millions of pounds and a significant stake had been taken by a well-known corporate player in the TMT sector.

Putting these findings to the client, they were persuaded that this was worth examining further, so discreet human intelligence enquiries were launched through direct contacts who knew parts of the UK technology start-up scene well. It soon proved possible to network through to other investors in this venture and to present a detailed picture of its progress on both the financing and product development side. Intelligence was gathered that the company was planning a major product launch later the same year and would from that point be revenue-generating. From the estimates of valuations placed on the company by those we spoke to, the husband would already have seen considerable appreciation in his stake and it was thought likely that in the aftermath of the product launch it would be worth in excess of £150,000.

CASE STUDY 9

Estimating asset values in the context of an amicable divorce case

In another divorce-related matter, there was no real suspicion of hidden assets; the role of Corporate Intelligence here was to assist in placing a valuation upon some overseas assets in the context of an amicable post-divorce division of wealth.

Aside from a UK property, the main assets of the couple were a mothballed, Greek-based leisure business and some neighbouring real estate assets – including the premises used by the leisure business – which were owned directly by the couple separately from the business.

We had the advantage of being able to arrange an open visit to the sites where members of the couple's family would be present, though these sites were on an island. Our task was broadly twofold: to collect copies of the books and records of the business covering several years, and to arrange for certified translations of the major parts of these which were in Greek, subsequently allowing these to be examined by a UK business valuation expert; and to obtain confirmation of official ownership and an estimate of current market valuation of the real estate assets. The approach we took was to arrange for a local investigator contact to visit the sites accompanied by a local business valuation expert. The task of the latter was to oversee the copying of books and records, hold discussions with the family members to identify the key asset purchases of the business in recent years (primarily leisure boats) and cross-check these with the records, and then to identify other non-real estate assets present on the site which did not formally belong to the business (these included one other boat and two motor vehicles owned neither by the business nor by the family members present).

Meanwhile, the investigator made detailed notes on the nature and condition of the real estate assets, which were spread across around 20 separate plots, identified beforehand through enquiries at the local property registry. From there, a local real estate agent was consulted for a formal view on the different market values which might attach to this group of properties together both in the case of the business remaining dormant and in the case of it resuming its former level of operations.

The direct observations made at the site, and at the property registry, proved invaluable. Some of

the smaller buildings were in a state of considerable disrepair; two of the 20 plots were identified as essentially worthless as they consisted of small parcels of bare land with large electricity pylons placed on them; and by far the largest residential building which had not been used by the business turned out to occupy an excellent coastal location but to have been constructed illegally. On consulting local lawyers, it was identified that this was a fairly common situation and that the costs of putting the building through a legalisation process was predictable in terms of both outcome and the costs involved.

All these findings were fed to our client, allowing a total estimation to be made of the worth of this pool of assets to the satisfaction of both the husband and the wife.

CASE STUDY 10

Asset tracing in Southeast Asia in the context of a commercial dispute

Let's now step back into the world of commercial litigation. The client on this matter was a multinational operating in a very cash-generative sector which used specialist payment services providers in some parts of the world to assist in transferring money from its local operations back to HQ. In one of these regions, Southeast Asia, the payment services company which it had been using for almost two years suddenly managed to 'lose' several payments in quick succession at what was the busiest time of year for our client's business in that region. The losses to the client amounted to over £20 million – these were not catastrophic losses in the context of their overall business but fraud was suspected and the client was determined to send a signal that it would respond forcefully to such situations.

While there was some uncertainty over whether fraud specifically on the part of the payment services company could ultimately be proved, the client and its lawyers began also to explore alternative remedies and Corporate Intelligence investigators were tasked with an asset tracing investigation with several distinct goals. These included elucidating the structure, inter-relationships and ownership of the loose grouping of which the payment services company was a part; seeking to identify significant assets of the three brothers understood to be the key officers of the payment services company; and also to identify other individuals associated with that company who might legitimately be presented as targets for litigation and asset recovery.

A first observation, following just a few hours' research, was that the client's due diligence procedures needed to be made more robust. It was quickly identified that the payment services provider had close links to known organised crime operatives. In the light of this initial finding, our suspicion was that the assets of the key people behind the company would be carefully concealed, and therefore that the third element of our work, as described above, would be all the more important. Equally concerning was that initial investigations revealed clear signs that the core operations of the payment services group were rapidly being wound up.

Investigators began by retrieving company filings for a range of entities identified by research as forming part of the target group. This work pinpointed the paterfamilias, ageing and previously thought likely to have left his three sons to manage the business, as both the dominant owner of the group and – subsequent human intelligence enquiries showed us – still actively involved in its management. He therefore became a central target for us, and investigations in due course identified a vast residential complex in Thailand which he owned through an investment vehicle.

Examination of the filings of several companies within the target group, particularly those registered in Thailand and the Philippines, threw light on extensive related party transactions and these led us to active businesses trading under wholly different brand names but ultimately owned by the same small group of individuals. There had been recent moves to restructure their ownership using offshore secrecy jurisdictions such as the Marshall Islands but there was enough evidence within historical filings to enable the true current ownership to be demonstrated. With respect to the largest active business, site visits to its Philippines offices uncovered an entire floor of a prestigious office block which it had recently rented to house a large commodities trading operation and, even prior to this, that business had a demonstrable track record of profitability.

As for the payment services business itself, which comprised several entities registered across Southeast Asia and the Gulf, the family owners clearly felt that in large part they were not up to the task of managing it, so had brought in a range of long-time associates alongside some independent executives with genuine relevant experience to run it on their behalf. There had

been a regular turnover of such individuals but retrieval and analysis of precisely dated archived versions of the group's website, along with various press reports, allowed us a high degree of certainty as to the identity of the group's key executives at the time our client's payments went missing.

One oddity among this group was an individual long resident in Thailand who had become increasingly involved in the management of the payment services business in recent years despite, research found, also running a long-standing, successful and manifestly legitimate business in Thailand. The very obvious wealth and easily locatable assets of this individual potentially made him a prime target for litigation by our client.

A final word on physical site visits

As promised at the outset, we included several case examples above in which the arranging of physical site visits to specific locations proved of great value on investigations. Let us provide a few further examples of the surprises such site visits can spring.

In one case of procurement fraud many years ago, the agent making the site visit was clearly able to see a sizeable yacht parked in the back garden of the subject. In a more recent contentious insolvency case, access was eventually negotiated to view a property owned by one of the Directors of the collapsed company, and the interior was found to contain a large stained glass artwork which turned out to be worth hundreds of thousands of euros.

Two very different matters within the past five years – one a suspicious insolvency, the other in the aftermath of a civil litigation judgment – led to quite similar outcomes. There are at least two quirks to the Cypriot property registration system: firstly, there are stringent privacy rules around disclosure of the owners of properties, and in particular there is no way (at least without the powers that come with a court appointment) that a general search can be undertaken at any of the island's regional registries for property owned by a particular individual or company. Secondly, if an individual purchases a new-build property, they are permitted for a few years to keep the formal ownership of that property in the name of the developer while signing a contract with the developer confirming that ownership actually now lies with the individual; this at least was the prevailing situation at the time of our investigation. In the insolvency case, it had been disclosed that one of the Directors whom investigators were pursuing on behalf of the creditors committee owned a property in a specific new development in Cyprus. Our approach in this case was to send an agent to the site and to arrange to meet a representative of the developer, who revealed that the subject had in fact purchased not one but three houses in the development, but that for official purposes documents still showed the ownership of these properties residing with the developer. It was made clear to us, however, that the Director herself held a copy of the contract confirming herself as the true owner.

Switzerland also has its property quirks, in particular that there are a large number of relatively isolated small villages in the country where decades can pass without a single property changing hands. Consequently, it can in some cases be very difficult to estimate current market values for such properties. In this asset tracing case, a property had been identified and verified as being owned by our subject. It had been purchased many years previously, however, so it was arranged for an investigator to pay a discreet visit to the village in question and, armed with his observations, move on to some informal discussions with estate agents in the wider area. While actually in the village, the investigator was able to engage a passing villager in conversation about the architecture of our subject's house which led to the unexpected revelation that the subject was "a very generous man – a few years ago he bought the house next door and installed his housemaid there".

Another good reason to make a site visit is to view official paper-based records. Most commonly, these are corporate registry or property registry records in one of the numerous jurisdictions where these are not yet digitised or networked. There can be several other categories of useful official records, however, and those which have proved exceptionally helpful on recent cases include Tunisian court records and the logbooks of public events from several town halls in Ukraine.

Summing up

Bringing together the various strands of our discussion above, as with any post-crisis situation,

in due course the ongoing pandemic will doubtless lead to an increase in instances of previously hidden fraudulent activities being uncovered or parties attempting to exploit the environment as a means of concealing assets or avoiding satisfying debts and obligations; it may also spawn an increase in commercial disputes. Corporate Intelligence methodologies are vital tools for anyone seeking to combat fraud or the numerous other categories of malfeasance related to the corporate sphere – whether preventatively or in ensuring such actions are properly investigated upon discovery.

Such methodologies are equally important in ensuring to the maximum degree that the truth is aired about the events leading to commercial disputes; and in giving those awarded settlements by the courts or in arbitration the best chance of actually receiving payment.

In ideal circumstances, most of these categories of investigations will see the effective dovetailing of several distinct disciplines, a combination of any number of the following: Forensic accountants, Forensic Technology specialists, Corporate Intelligence professionals, Insolvency Practitioners, lawyers, barristers, internal auditors and in-house risk and investigation specialists within corporate organisations. Where such circumstances are not in place, the application of Corporate Intelligence skills alone – or in combination with just one or two of these disciplines – can nonetheless go a long way towards achieving the goals of an investigation.

We have seen, through the case examples set out earlier, a few of the multiplicity of contexts in which requirements can arise for fraud investigation work; and we have endeavoured to provide at least a partial sense of the extraordinary variety of investigative techniques which can be brought to bear in these and other types of investigation.

Equally, we hope our case examples have illuminated some of the several types of investigative work which sail under the asset tracing flag of convenience: people tracing, income tracing, practical steps towards the recovery of identified assets (securing proof of ownership, arranging for charges to be placed over assets), close examination and valuation of assets, identification of a wider array of potential subjects on a case who may legitimately be pursued for recovery of assets; the past sale of assets at an undervalue, and so forth.

Alexander Davies is BDO UK's head of Corporate Intelligence and has spent 25 years as a dedicated Corporate Intelligence professional.

Following two years working in the international investigations team at specialist firm Control Risks, in 1997 Alex became one of the two co-founders of the first corporate intelligence team to be created within any of the major accounting firms anywhere in the world, at Deloitte in London. Latterly he was director of this team and was instrumental in building it into a team of 30.

Having subsequently run his own firm for several years, Alex was then a partner and head of corporate intelligence at a rival accounting firm before joining BDO in 2018.

He has an MBA from IMEA in France and speaks fluent French.

alexander.davies@bdo.co.uk

Peter Woglom is a managing director in BDO USA LLP's Forensic and litigation services practice. Peter began his career at Kroll, later working for Control Risks and Deloitte, where he and Alex worked together on a number of high-profile investigations over the course of several years.

Peter focuses on intelligence gathering for complex M&A engagements, dispute matters and asset tracing/recovery assignments.

Peter received his Bachelor of Arts from Claremont McKenna College and an MBA from Emory University's Goizueta School of Business.

pwoglom@bdo.com

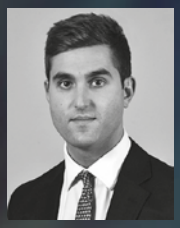
BDO's Corporate Intelligence team forms part of the firm's Forensic Practice. In the context of 'reactive' investigations, such as those concerning suspicions of fraud or other malfeasance, the team frequently works in tandem with the adjacent Forensic accounting investigations and Forensic Technology teams, and also on occasion with the firm's appointment takers with a contentious insolvency specialism. With respect to more 'proactive' integrity due diligence work, the corporate intelligence team instead links more often to various parts of our corporate finance practice.

Although the team's skills may be called upon in numerous other contexts, most frequently our corporate intelligence experts gather information on individuals and entities in the context of contemplated business relationships or transactions, fraud and corruption investigations, asset tracing, litigation support and other disputes. The team works worldwide on behalf of global financial institutions, law firms and corporate clients, developing insight and intelligence through a robust review of information available in the public record and, when necessary, through our external network of expert, local sources.

www.bdo.com

International civil or criminal law tools that can be used to aid in asset recovery

Olga Bischof
Brown Rudnick



Theodore Elton
Brown Rudnick

Introduction

This article examines key examples of civil or criminal tools that aid asset recovery, as well as providing a summary of the way in which those tools function in practice. Brexit and the ongoing march of technological advancement have potentially significant impacts on the way in which international civil or criminal law tools are used to aid in asset recovery. They are key considerations to be taken into account in the ever changing landscape of asset recovery. Whilst many of the civil and criminal law tools are now well known and will continue to be well utilised, the manner in which they are used and their efficiency will continue to evolve and develop.

Against this background, this article looks at certain key tools for international asset tracing, all of which will continue to develop and change to meet both the advances in technology and the different classes of asset created by these advances. The following tools are examined:

1. Mutual Legal Assistance;
2. European Investigations Orders;
3. Unexplained Wealth Orders; and
4. Norwich Pharmacal Orders.

The efficiency of asset-tracing methods is likely to be enhanced by technological advancement in the upcoming years, as developments in computing and technology-aided processes are set to continue to grow exponentially. Little if any aspect of legal, commercial and business life is therefore likely to pass unscathed.

In particular, artificial intelligence (AI) tools can be used to cluster and review data in order to get to key information more quickly. It seems apparent that greater training and understanding

on the broader technology, including the ability and best practice to secure digital assets, is needed to assist the industry to tackle Cloud-based matters/issues, e.g. Alexa recordings in the Cloud and/or information and records on the Blockchain. It is expected that such matters will become an increasing feature of insolvencies and therefore issues surrounding the practical seizure and control of cryptoassets must be addressed.

Key concerns include:

- a need for a much greater understanding of the technology on the part of the judiciary;
- the lack of transparency in accounting as to the book balance and value of the cryptoassets of a business;
- issues surrounding the practical seizure and control of cryptoassets;
- the volatility of cryptoassets and the impact of any decision to sell or hold; and
- issues of applicable governing law and jurisdiction of assets.

Inadequate anti-fraud systems compound the problems of money laundering, asset misappropriation and insider trading, which are ever present in financial institutions and across other sectors.

The legal profession is faced with the ever-increasing international nature of investigations in areas such as money laundering and data breaches, and the rise of cross-border misconduct means more complex investigations are being conducted by more regulators in more jurisdictions. In this regard, it is abundantly clear that AI will be useful in disclosure exercises and for thematically categorising documents for human review, mapping communications between certain people to show how often they might be communicating, and helping identify areas of interest. Regulators such as the Serious Fraud Office and the courts are already recognising the usefulness of AI in investigating fraud and this trend is sure to continue.

We now turn to the key examples of asset tracing tools.

1 Mutual Legal Assistance

The Mutual Legal Assistance (MLA) regime or "judicial co-operation" remains one of the primary methods of co-operation between states for obtaining assistance in the investigation or prosecution of criminal offences, usually requested by courts or prosecutors. Requests are made by a formal international letter of request. They may also be known as "Commissions Rogatoires". Requests for information can include asset tracing enquiries.

The UK can provide MLA to any country or territory in the world, whether or not that country is able to assist the UK. The UK is party to a number of bilateral and multilateral MLA treaties, but the country being aided does not need to have an agreement in place in order to receive assistance. The UK International Crime Bureau (UKICB) is the international division of the National Crime Agency (NCA). UKICB facilitates access to international law enforcement through INTERPOL and Europol.

Informal MLA is another facet of this type of aid. It is also known as law enforcement (police) co-operation and involves law enforcement officers in a requesting state asking for the assistance of law enforcement agencies in the UK to gather information for an investigation. The informal nature allows for an easier and quicker method of obtaining intelligence and evidence. In many countries' legal systems, information collected by UK law enforcement agencies is directly admissible as evidence in criminal trials abroad (with the permission of UK law enforcement).

The impact of Brexit on MLA and international co-operation

The UK's negotiating position, outlined in the *Future Relationship with the EU - The UK's Approach to Negotiations* (FRWEU), states: "*The agreement should provide for arrangements delivering fast and effective mutual legal assistance in criminal matters including asset freezing and confiscation.*" Following the end of the EU transition period, the UK is no longer part of the European Investigation Order (EIO) procedures. Instead MLA requests from European Union Member States (EUMS) are based on the Council of Europe's 1959 European Convention on Mutual Assistance in Criminal Matters and its two additional protocols as supplemented by the EU-UK Trade and Cooperation Agreement. (See https://www.gov.uk/guidance/mutual-legal-assistance-mla-requests.)

Therefore, in practice, there is likely to be limited impact only on much of the existing framework of MLA with EU states. However, Europol will no longer include a UK representative and there could be restricted or reduced access to the European security database (Schengen Information System (SIS II)).

Whilst MLA typically operates via treaties where

available, the traditional tool is letters of request/rogatory (LOR). With LORs, the requested judicial authority is asked to perform one or more specified actions, such as collecting evidence and interviewing witnesses, on behalf of the requesting judicial authority. These requests are conventionally transmitted through diplomatic channels and the process is considered time-consuming and unpredictable. Formal treaties have created a more solid basis for international cooperation and prosecutors typically consider letters rogatory a last resort for accessing evidence abroad.

Established avenues of mutual legal assistance such as the above will continue to be important after Brexit, as the Supreme Court made clear in their recent judgment in *R (oao KBR, Inc.) v Director of the Serious Fraud Office [2021] UKSC 2*. In this case, the court considered extraterritorial scope of the Serious Fraud Office's (SFO) investigatory powers. The court unanimously decided that the SFO's broad powers to compel production of information and documents under section 2(3) of the Criminal Justice Act 1987 (CJA) did not extend so far as to be effective against a foreign person who holds the relevant documents or data outside of the UK's jurisdiction.

It was noted that the CJA did not rebut the general presumption against extra-territorial application of UK law and if Parliament has intended s.2 Notices to have such an effect, then the Act should have made that plain through express provision. The court relied upon the established principles of international comity as between sovereign states and argued that the SFO should have used established, albeit slower, avenues of MLA to seek the documents held overseas instead of serving a s.2 Notice.

2 European Investigations Orders

As set out above, usually, international cooperation in relation to criminal investigations is based on a variety of mutual treaties or the principle of reciprocity. However, in 2017, the EU introduced European Investigation Orders (EIO), a criminal investigatory tool which would facilitate cooperation on criminal investigation matters across member states, especially in relation to evidence gathering and transfer between them. Whilst it is a relatively new instrument, the EIO process has established mutual recognition of investigations and decisions (*Directive on the European Investigation Order (2014/41/EU)*) and simplified the previously 'red tape heavy' processes. As such, it has already proved to be efficient and useful for defence and prosecution in foreign examination of witnesses or seizure of documents, in order to assist with the asset tracing process.

From 1 January 2021, EIOs no longer apply to the UK and so it remains to be seen how these, as well as other well-established international enforcement processes, will function in the foreseeable future. Initially, it appears that UK law enforcement is in a worse position than prior to 1 January 2021 as it will have to fall back to the operations under European Convention on Mutual Legal Assistance (*https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/7707.htm*), but the additional Brexit deal provisions also maintain expedited information exchange mechanisms which should be of assistance (*Title VIII of the EU-UK Trade and Cooperation Agreement*). Further, the EU has agreed with the UK to create a standard form for requests, allowing 45 days (*https://www.ejn-crimjust.europa.eu/ejn/NewsDetail/EN/734/H*) for the requestee to make a decision, at its discretion, whether or not to execute the request. However, this procedure is less attractive than an EIO due to increased time limits, potential delay or even rejections, as well as the overall increased complexity of the process.

Although EIOs were not a direct asset recovery tool, they facilitated the information gathering process. This in turn assisted with asset tracing in member states. Now this is off the table, enforcement authorities may face delays which can have a knock-on effect and create more uncertainty in international criminal investigations.

3 Unexplained Wealth Orders

Turning to a more UK-specific tool, in January 2018, the power to apply for an Unexplained Wealth Order (UWO) was introduced by virtue of section 1 of the Criminal Finances Act 2017, which created a new section 362A of the Proceeds of Crime Act 2002 (POCA), to enable law enforcement authorities to obtain evidence from respondents as to the source of their wealth.

UWOs are available to the Serious Fraud Office, the National Crime Authority (NCA), the Crown Prosecution Service, HM Revenue and Customs, and the Financial Conduct Authority. Whilst UWOs are essentially investigative tools used by such enforcement authorities to obtain

information and documents in relation to suspiciously obtained assets or property, these can also assist with asset recovery more widely through, for example, the court's ability to "*identify, freeze, seize or otherwise deny criminals access to their finances, assets and infrastructure, at home and overseas*" (*Serious and Organised Crime Strategy (1 November 2018)*), and can also have serious consequences for the respondents, whether or not they comply with its terms.

Enforcement authorities can apply to the High Court (including without notice (*section 362I, POCA*)) in order to obtain a UWO in circumstances where there are 'reasonable grounds' for suspicion that: (i) a person (the respondent) holds specific, identified, property valued at or above £50,000; (ii) the respondent's known sources of income are insufficient to acquire that property; and (iii) either (a) the respondent is a PEP, or (b) there is reasonable suspicion that the respondent (or a person connected to him/her) is or has been involved in serious crime in the UK or abroad (*section 362B, POCA*). In this way UWOs have introduced a lower standard of proof and also reversed the usual order of play in criminal proceedings as it is now the respondent and not the prosecution, which is required to prove that the property is not the proceeds of crime. It should be noted that the respondents, against whom such orders may be sought, and the suspiciously obtained property or assets in question need not be UK-based. UK enforcement authorities will be cooperating with their counterparts overseas to freeze any suspected foreign assets pending a satisfactory response to a UWO.

As aforementioned, the consequences of failure to comply with a UWO are serious and can bear criminal as well as civil liability. For example, in the eyes of the court, such failure may create a presumption that the relevant property was obtained through unlawful conduct, and that it is therefore vulnerable to recovery proceedings (albeit civil not criminal) under Part 5 of the Proceeds of Crime Act 2002. Separately, if the respondent made a false or misleading statement in their response, it could be a criminal offence attracting two years' imprisonment and a fine.

Whilst the enforcement authorities have to present evidence of "reasonable grounds" for suspicion, the court will not tolerate, for example, a mere existence of complex corporate structures as evidence of suspicious activity.

However, it should be noted that with these orders, the "wealth" has to really be "unexplained" and where there is a perfectly clear explanation, the UWO will fall away. This is essentially what happened in August 2019 in *CA v Baker and Others [2020] EWHC 822 (Admin),* where the respondent was able to explain the source of funds in relation to three London properties suspected of being purchased through the proceeds of crime.

Nonetheless, UWOs can still cause potentially significant disruptions to respondents through lengthy information gathering, freezing and seizure of suspected assets without actually securing a criminal conviction at trial. The very first UWO case in UK of *Zamira Hajiyeva* (*National Crime Authority v Zamira Hajiyeva* [2018] EWHC 2534 (Admin)) is a clear example of this. Ms Hajiyeva fought against the UWO for almost three years; however, in December 2020, she lost her final right of appeal against the UWO and now must explain legitimacy of funds used to purchase properties which are the subject of the order. If the acquisitions prove to have been reached through illegitimate funds, the properties will be seized.

UWOs remain a relatively new tool and so it is not yet possible to comment fully on their efficacy and efficiency. Further, it remains to be seen as to how and to what extent enforcement authorities will use this tool in asset recovery; however, it is anticipated that this new and developing tool will become far more commonplace in the world of asset recovery.

4 Norwich Pharmacal Orders

A Norwich Pharmacal Order (NPO) is a court order for the disclosure of documents or information available in the UK and Ireland, granted against a third party involved in wrongdoing. It remains the key civil law tool in asset recovery litigation.

Through NPOs, the court can compel a party to assist the person suffering damage by giving them certain required information. These orders are an exception to the standard rule that third parties to litigation can only be required to disclose specific pieces of evidence, rather than conduct wide-ranging searches for documents and information. However, the requirements set out below demonstrate how the courts ensure that this equitable doctrine is not used as a "fishing expedition".

When used

An NPO may be used:

- against the Land Registry, to check the property ownership register as part of investigations into a wrongdoer's assets or whether stolen funds have ultimately been used in the purchase of properties;
- to trace the proceeds of intellectual property infringements such as counterfeiting;
- to obtain IP address information from an internet service provider or website operator, helping to identify an individual who has anonymously posted defamatory content or engaged in illegal file-sharing;
- to require a party who has received the applicant's confidential information to reveal their sources; or
- against organisations such as banks, internet service providers and mobile phone operators, which store a wealth of information about their users. NPOs provide a means of accessing this otherwise confidential information.

Requirements

Firstly, it must be shown that there is a good, arguable case that a form of legally recognised wrong has been committed against the applicant by a person. The applicant must then show that the respondent has been 'mixed up' or involved in the wrongdoing. These orders cannot be sought against a 'mere witness', the person must somehow be involved in the wrongdoing. Yet they are not usually available against a respondent who is likely to be a party to the potential proceedings.

An applicant must show that the order is needed to take action against the wrongdoer, i.e. no other means are available that would achieve what they need, such as an application for pre-action disclosure from the wrongdoer under Civil Procedure Rules (CPR) 31.16 and 31.17, or via internal investigation. However, it is not required to be a last resort and the applicant does not have to show the court that they have exhausted all other routes first before pursuing it.

Related to this is the need to show that the respondent must be able, or likely to be able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued, which can only be accessed via pre-action disclosure through an NPO. This will vary depending on the facts of the case.

Granting the order must also be necessary and proportionate. To decide this, the court has a discretion and will weigh up various factors, including:

- the strength of the potential claim;
- public interest;
- whether making the order will deter future wrongdoing;
- whether the information could be obtained from another source;
- whether the respondent knew or should have known that he was facilitating wrongdoing;
- whether complying with the order might reveal the names of innocent people;
- the degree of confidentiality of the information sought;
- the privacy and data protection rights of any individuals whose identity is to be disclosed; and
- how onerous complying with the order will be.

However, this does not mean that competing rights such as individuals' privacy rights will necessarily prevent an NPO from being made. NPOs are a flexible and discretionary remedy that will be granted if necessary and proportionate in all the circumstances. NPOs are an equitable remedy and granted only where necessary in the interests of justice.

Finally, the importance of an applicant for an NPO identifying the purposes for which the information disclosed would be used was established in *Orb ARL and others v Fiddler and another (2016) EWHC 361*. This was necessary so that the court could determine whether the information was to be used for a legitimate purpose. In *Orb v Fiddler*, the judge found the NPO application had been improperly used in the hope of acquiring evidence that would discredit the respondent and enable the applicants to attain an advantage in the main proceedings. These orders are commonly used to identify the proper defendant to an action when legal proceedings for alleged wrongdoing cannot be brought because the identity of the wrongdoer is not known. But it is important to note that the applicant does not need to show it intends to bring proceedings or the information it seeks from the order is necessary to allow it to do so – they can seek the information simply to determine what to do, which may or may not include commencing proceedings.

Further considerations

Although the requirements for an NPO may be considered onerous, in terms of timing they can be seen as very flexible. Not only are they quick to obtain in practice, but they are acquirable pre-action, during an action, or post-judgment.

However, there are certain considerations which it is important to flag.

Firstly, there are the cost considerations: an applicant will normally be ordered to pay the respondent's legal costs and reasonable costs of providing the disclosure itself. They will also be required to give certain undertakings to the court, including in damages. This means that they will compensate the respondent if it is subsequently determined that the applicant was not entitled to the relief granted by the court.

Secondly, NPO applications are mostly made without notice and so the applicant must be careful to ensure that the duty of full and frank disclosure to the court is complied with, or it runs the risk of seeing any order discharged (and, indeed, potential professional sanctions).

Conclusion

The above tools are certain key examples of the tools available to aid asset recovery. They provide a formidable array of powers to assist in this regard and, despite the changes that will occur as a result of Brexit and technological advances, they remain and will continue to remain essential for ongoing asset recovery. Their adaptation to the changing global asset scene is inevitable and the foundations already in place stand the tools in good stead for future use.

Note

The views expressed herein are solely the views of the authors and do not represent the views of Brown Rudnick LLP, those parties represented by the authors, or those parties represented by Brown Rudnick LLP. Specific legal advice depends on the facts of each situation and may vary from situation to situation. Information contained herein may be incomplete and is not intended to constitute legal advice by the authors or the lawyers at Brown Rudnick LLP, and it does not establish a lawyer-client relationship.

Olga Bischof is a partner in the Firm's Litigation & Arbitration Practice Group, where she practices in all areas of commercial litigation and arbitration with an emphasis on complex fraud. She has represented clients in disputes in all divisions of the High Court, the Court of Appeal and pursuant to the rules of many arbitration institutions. Olga also has a wide range of experience of litigating in offshore jurisdictions, such as the British Virgin Islands and Cyprus.

Olga has received ranking in Chambers UK as an Up-and-Coming Lawyer. She was described as "impressive and knows her stuff".

Olga speaks Russian, English and German.

obischof@brownrudnick.com

Theodore Elton is an associate in the International Disputes group in Brown Rudnick's London office.

He has experience in a wide range of commercial work, in both litigation and arbitration, and more generally.

telton@brownrudnick.com

Brown Rudnick combines ingenuity with experience to achieve great outcomes for our clients. We deliver partner-driven services, with a focus on collaboration in the client's best interest. Brown Rudnick is an international law firm, serving clients around the globe. With more than 250 lawyers and government relations professionals, the firm has offices in key financial centres across the United States and Europe. We are recognised for our market-leading practices covering several targeted industries, including bankruptcy and corporate restructuring, life sciences, technology, commercial litigation, white-collar defence and government investigations, strategic capital, distressed debt, intellectual property, M&A, and cross-border deals and disputes.

www.brownrudnick.com

brownrudnick

Confiscation Proceedings and Civil Recovery: Proportionality and Abuse of Process

Colin Wells
25 Bedford Row

Preamble

In 2020, the global pandemic resulted in many lifestyle and business changes, alongside the continued growth of fraud. Fraudsters continue to operate amending and adapting their techniques to cheat corporations, state agencies and individual victims. New technology is being used to increase the opportunity to commit fraud and successfully conceal the proceeds of crime. Tracing and investigatory techniques are also adapting to improve internal and external asset tracing and recovery by forensic accountants, technology experts, fraud examiners and law enforcement. The use of legal remedies by state agencies, private bodies and individuals, will continue to be of use to combat fraud and assist the recovery of the proceeds of fraudulent activity to achieve restorative justice for victims.

This chapter examines the English criminal confiscation and civil recovery regimes, in terms of proportionality and abuse of process, that apply to fraud-related litigation.

A Criminal Confiscation Proceedings

Introduction

Criminal confiscation proceedings as a form of restitution were first established in English law in 1987 with the introduction of the Drug Trafficking Offences Act 1986. Statutory provisions developed overtime, with case law decisions interpreting the Criminal Justice Act 1988, Criminal Justice (International Co-operation) Act

1990, Drug Trafficking Act 1994, culminating in the Proceeds of Crime Act 2002 (POCA) with amendments covering a number of different topics (including third party interests in section 10A POCA; see the Supreme Court decision in *R v Hilton* [2020] UKSC 29; *R v Johnson* [2016] EWCA Crim 100, *R v Hayes* [2018] EWCA Crim 100, *R v Box* EWCA Crim 542, *R v Morrison* [2019] EWCA Crim 351, [2019] 2 Cr App R (S) 25 for the available amount calculations).

The structure of POCA, for the purposes of calculating the recoverable amount, is set out below:

The prosecutor has a discretion to instigate proceedings. Guidance on the exercise of the discretion was issued to the Crown Prosecution Service in May 2009. The prosecutor, in deciding whether to seek permission from the court to proceed with confiscation, must bear in mind his or her duty to be fair to the offender: *Rezvi* [2002] UKHL 1. See also *Wokingham Borough Council v Scott* [2019] EWCA Crim 205.

Where the prosecutor has asked the court to proceed under section 6, the court must decide whether or not the defendant has a criminal lifestyle.

If the defendant does not, then the court must decide, on the balance of probabilities, if the defendant has benefited from particular criminal conduct.

- Section 6 (5) POCA, as amended, provides as follows:

"(5) If the court decides under subsection (4)(b) or (c) that the defendant has benefited from the conduct referred to it must—

(a) decide the recoverable amount, and

(b) make an order (a confiscation order) requiring him to pay that amount.

Paragraph (b) applies only if, or to the extent that, it would not be disproportionate to require the defendant to pay the recoverable amount."

- Section 7 recoverable amount: which is the lower of the benefit or the available amount.
- Section 8 benefit.
- Section 9 available amount.
- Section 10 criminal lifestyle provisions.

The overall POCA approach is summarised in *May* [2008] UKHL, 28.

(1) Has the defendant benefited from relevant criminal conduct?

(2) If so, what is the value of the benefit so obtained?

(3) What sum is recoverable from the defendant?

The objective and intended effect of criminal confiscation proceedings is draconian in nature. Confiscation legislation focuses on the value of the defendant's obtained proceeds of crime, whether retained or not. It is an important part of POCA proceedings that even if the proceeds have been spent, a confiscation order up to the value of the proceeds will follow against legitimately acquired assets to the extent that they are available for realisation.

Judicial decisions have made it clear that fraudsters must not be able to defeat confiscation proceedings by making gifts of assets which cannot be recovered. That is why Parliament has included the deliberately severe tainted gifts regime in POCA.

The restorative rather than punitive thrust of POCA is illustrated, by the Supreme Court observations, in *Waya* [2012] UKSC 5:

"[29]…. where the benefit obtained by the defendant has been wholly restored to the loser. In such a case a confiscation order which requires him to pay the same sum again does not achieve the object of the legislation of removing from the defendant his proceeds of crime, but amounts simply to a further pecuniary penalty – in any ordinary language a fine. It is for that reason disproportionate…"

Since a confiscation order is not a penalty, but a civil debt, the safeguards surrounding the criminal trial process do not apply. Both the prosecution and defence discharge the burden of proof on the civil balance of probabilities and any contested hearing is determined by a judge alone.

Proportionality

The test when considering the imposition of a criminal confiscation order is one of proportionality. The Supreme Court in *Waya* ruled that, in terms of challenges to the making of a criminal confiscation order, there was no need to invoke the concept of abuse of process. Instead, the court must consider whether the making of criminal confiscation order would be 'wholly disproportionate' or there had been a breach of Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms (A1P1). Where the POCA benefit exceeds the real benefit, the Judge must decide whether it is proportionate to base the confiscation order on the POCA benefit.

The question to consider is whether or not an order is proportionate to the achievement of the statutory objective of depriving criminals of the proceeds of their criminality.

The case law authorities make clear:

(1) that the word "proportionate" does not reintroduce by the back door the notion of a residual judicial discretion;

(2) an assessment of proportionality is not to be made by a balancing of factors and competing interests in the way that may be appropriate in some public, procedural or family law contexts; and

(3) proportionality is not assessed by reference to the proportion which the available amount bears to the benefit.

What is 'proportionate' is factually sensitive and considered on a case-by-case basis. Accordingly, it is neither appropriate nor helpful to seek to set out an exhaustive list of circumstances in which the proportionality exception may be satisfied. However, an illustrative example of the proportionality exception in practice can be found in the facts of *Waya*. There, the loan obtained by the mortgage fraud was repaid because there was enough equity in the property which was purchased to do that. The Supreme Court reduced the confiscation order, finding that:

"*Where the mortgage loan has been repaid or is bound to be repaid because it is amply secured, and absent other property obtained, a proportionate confiscation order is likely to be the benefit that the defendant has derived from his use of the loan, namely the increase in value of the property attributable to the loan*" (paras 35, 78-81).

The concept of proportionality was further considered in *Harvey* [2015] UKSC 73. The Supreme Court held that a trader in a criminal lifestyle case had obtained the VAT element in the sums he had obtained by fraud even where he had accounted to HM Revenue and Customs for those sums. It would nevertheless be disproportionate to make an order in that sum and the VAT element should be stripped out from the amount to be paid. This was said to be "quite similar" to the *Waya* situation where the property which had been obtained had been restored to the loser by the offender.

Residual protection

There is a residual area of procedural protection, outside the application of the terms of the confiscation legislation, which the abuse of process remedy offers. For example, in *Ali* [2010] EWCA Crim 2727, the Court of Appeal considered the question of the defendants' absence and whether or not a fair hearing on that basis could be held. Whilst concluding that the judge had not exercised his discretion improperly to conclude that no unfairness would occur, the Court of Appeal emphasised the need to proceed with caution in relation to the abuse of process jurisdiction.

Oppressive confiscation

In *Morgan and Bygrave* [2008] EWCA Crim 1323, the Court of Appeal set out the circumstances where confiscation proceedings might be oppressive (now disproportionate) based on prior agreed restitution:

"*...where demonstrably (i) the defendant's crimes are limited to offences causing loss to one or more identifiable loser(s), (ii) his benefit is limited to those crimes, (iii) the loser has neither brought nor intends any civil proceedings to recover the loss, but (iv) the defendant either has repaid the loser, or stands ready willing and able immediately to repay him, the full amount of the loss.*"

Lifestyle

Another example of the factually sensitive nature of a criminal confiscation order being overturned on appeal is *Shabir* [2008] EWCA 1809. The offender pharmacist had fraudulently overclaimed £464 of prescription fees. His benefit figure was correctly calculated to include all the fees he had received (£179,731), the vast majority of which were legitimate, and the indictment was drawn so as to engage the criminal lifestyle provisions. The result was a confiscation claim of over £400,000 and an order for £212,464.17. In *Waya*, the Supreme Court endorsed the result that the Court of Appeal had arrived at in *Shabir* and concluded that such a set of facts would also make for a 'disproportionate' order in the use of the POCA 'lifestyle provisions'.

In *Beazley* [2013] 1 WLR 3331, there was nothing inappropriate in making an order based upon the entirety of the proceeds of a business that was founded entirely on illegality. There is a distinction between that situation and one where a defendant would have been entitled to the monies notwithstanding the commission of an offence (e.g. the failure to obtain a permit). In *Sumal and Sons* [2013] 1 WLR 2078, the Court of

What is 'proportionate' is factually sensitive and considered on a case-by-case basis. Accordingly, it is neither appropriate nor helpful to seek to set out an exhaustive list of circumstances in which the proportionality exception may be satisfied

Appeal held that where a landlord would have a complete right to obtain rental payments that would be due to it, those sums were not obtained for the purposes of the confiscation legislation if there was a failure to obtain a licence to rent the property out. Although not strictly an application of proportionality, the distinction is important.

Benefit calculation

Having determined that a criminal confiscation order is required, the court will next proceed to calculating the benefit obtained by a defendant either by way of their criminal conduct (see for example *Panayi* [2019] EWCA Crim 413), or as a result of a criminal lifestyle.

Joint benefit

When considering the value of the benefit figure in confiscation proceedings, the Supreme Court, in *Ahmed and Fields* [2014] 2 Cr App R (S) 75, decided that where there was a joint obtaining of benefit (which was still the correct approach in appropriate cases), it would be disproportionate to make an order against two or more persons the result of which would be at least 'double' the recovery of the benefit obtained.

Entire contract value

In *Sale* [2014] 1 Cr App R (S) 60, the Court of Appeal held that in a case where contracts were obtained by a corrupt process, the legislation was apt to include the entire value of the contracts as the benefit. However, a proportionate order would be limited to the profits obtained and the advantage gained by obtaining a market share, excluding competitors and saving on the costs of preparing proper tenders.

No allowance

It is not disproportionate to make no allowance for any expenses incurred in relation to the criminal activity when it comes to making a confiscation order: *McDowell* [2015] 2 Cr. App. R. (S.) 14.

Just order

In relation to a prosecutor's request to increase the value of a confiscation order on the basis of after-acquired assets, section 22 of the Proceeds of Crime Act 2002 specifically requires the court to make a 'just' order. Provided that occurs, an order will be proportionate: *Padda* [2014] 2 Cr App R (S) 22.

DPP guidance

As a result of the Court of Appeal decisions in *CPS v Nelson, Pathak, and Paulet* [2009] EWCA Crim 1573, the DPP issued 'Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings' in an attempt to secure consistency of approach by prosecutors, both state and private.

The Court of Appeal has made it clear that private prosecutors, whether individuals, commercial companies or trade organisations, can initiate confiscation proceedings under section 6 POCA as part of a private prosecution, and it is not an abuse of process to do so: see *Zinga* [2014] EWCA Crim 52 and *R. (Gurja) v Crown Prosecution Service* [2012] UKSC 52.

Double jeopardy

Allegations of criminal behaviour not pursued in a separate prosecution, but relied upon in confiscation proceedings for another offence, do not offend the double jeopardy rule, as confiscation proceedings do not amount to the bringing of a criminal charge: see *Darren Bagnall* [2012] EWCA Crim 677.

Enforcement

Once a confiscation order is made, unless paid, it stands to be enforced as a civil debt. If an enforcement receiver is appointed, it appears that

- the court's process is capable of being abused although this will, as ever, be rare and difficult to demonstrate.

Delay

In relation to enforcement in the magistrates' court, either by warrant of commitment to prison, or by civil remedy, proceedings may be stayed if the Article 6 ECHR reasonable time guarantees have been breached.

In *R (Lloyd) v. Bow Street Magistrates' Court* [2004] 1 Cr App R 11, the defendant was committed to custody for non-payment of a confiscation order some five years after his release from custody. The Divisional Court ruled that:

(i) a defendant enjoyed the full protection of Article 6 (1);

(ii) the continuing non-payment by a defendant of a confiscation order cannot affect the question of whether he is entitled to the protection of the reasonable time guarantee;

(iii) the threshold for proving a breach is high and all the circumstances of the case must be taken into account;

(iv) in deciding what amounts to a reasonable time, attention should be given as to what other efforts have been made by the state to extract payment and the behaviour of the defendant. Any evasion or avoidance of diligent attempts to extract the money will result in the defendant being unable to rely upon any resultant delay; and

(v) if unreasonable delay is established, the remedy must be proportionate.

Also consider *R (Marsden) v. Leicester Magistrates' Court* [2013] EWHC 919 (Admin), where the defendants were committed to custody for a term of six years some six and a half years after being released from their sentence. The Divisional Court held, in considering what was a reasonable time, that regard should be had to:

(i) all the circumstances of the case including the complexity of it, the defendant's conduct, the conduct of the state authorities and the importance of what is at stake for the defendant;

(ii) whether or not the defendant was aware that the prosecution's intention was to enforce against them by way of commitment to prison in the absence of payment of the order; and

(iii) that the non-payment of the confiscation order is not relevant to whether or not the state must act within a reasonable time but is relevant to what will be considered a reasonable time or not and raises the bar of proving the same.

Delay in enforcement of a confiscation order can lead to such proceedings being stayed as an abuse of process. In *Malik v Crown Prosecution Service* [2014] EWHC 4591 (Admin), Lord Justice Fulford identified two principal questions to be answered:

(1) Whether reinstating enforcement proceedings after such a long period of time was oppressive, given the delay caused by the prosecuting authorities.

(2) Whether the delay for which the prosecution is responsible is so extensive and so culpable or unexplained that a stay is appropriate. In reaching a decision as to whether to impose a stay, the court must ensure that the order it

In addition to criminal confiscation proceedings, the Serious Organised Crime Agency, the Director of Public Prosecutions and the Director of the Serious Fraud Office can apply under Part 5 Proceeds of Crime Act 2002 to the High Court for civil recovery of the proceeds of crime

makes is not disproportionate.

Lord Justice Fulford found on the facts of *Malik* that the learned judge was wrong to decide that the civil enforcement proceedings should continue:

"[36]... Although the threshold for finding a breach of the reasonable time requirement is a high one (see Lloyd [26]) the delay here was not only extensive (six and half years) but it is also culpable and it is essentially unexplained… Moreover, of real additional significance is the fact that the appellant and his solicitors repeatedly sought the co-operation of the prosecution to enable him to discharge his obligations responsibly,"

concluding that *'all forms of enforcement are to be stayed as an abuse of the process of the court'.*

B Civil Recovery: Part 5 POCA Cases

In addition to criminal confiscation proceedings, the Serious Organised Crime Agency, the Director of Public Prosecutions and the Director of the Serious Fraud Office can apply under Part 5 Proceeds of Crime Act 2002 to the High Court for civil recovery of the proceeds of crime. This power is independent of any criminal proceedings and can be used where a defendant has been acquitted of criminal charges. In civil recovery proceedings, the court need only find on a balance of probabilities that any matters alleged to constitute unlawful conduct have occurred, or that any person intended to use any cash in unlawful conduct.

Whether a claim for civil recovery amounts to an abuse of process has been considered in a number of cases:

- A claim for civil recovery is not an abuse where it is based on unlawful conduct notwithstanding the fact that the unlawful conduct was tolerated by senior police officers, leading to a stay of the related criminal proceedings: see *The Queen (Director of Assets Recovery Agency) v E and B* [2007] EWHC 3245 (Admin).
- Bad faith leading to a stay in criminal proceedings does not preclude a civil recovery claim under Part 5 POCA: see *The Queen (Director of Assets Recovery Agency) v T* [2004] EWHC 3340 (Admin), in which Mr Justice Collins said:

  "... even if it were established that there had been bad faith in the manner in which the prosecution had conducted the criminal proceedings, [it] would not enable the defendants successfully to argue that it was an abuse of process to bring proceedings under Part V. The reason is simply this: these proceedings are civil proceedings instituted by the Director who is an independent person."
- A confiscation order quashed on appeal does not preclude the subsequent making of a civil recovery order: see *Director of Assets Recovery Agency v Singh* [2005] 1 WLR 3747, in which Lord Justice Latham identified the purpose behind the enactment of Part 5 POCA:

  The clear intention of parliament was to ensure that, so far as possible, criminals should be deprived of the possibility of benefiting from crimes... in the present case the meaning of the words and the purpose of the legislature are both abundantly clear and march had in hand. To permit the technicality which resulted in the confiscation order being quashed to preclude recovery by the civil recovery route would be to perpetuate a mischief which the 2002 Act was clearly designed to prevent.
- Compromised settled cash forfeiture proceedings do not preclude a Part 5 SOCA civil recovery order being made: see *Serious Organised Crime Agency v Agid* [2011] EWHC 175(QB). SOCA was entitled under Part 5 POCA to recover property worth £1.2 million (the subject of a Property Freezing Order) from the respondents who had benefited from corrupt relationships with companies in obtaining multi-million $US dollar contracts from Nigeria. The fact that the Metropolitan Police had settled cash forfeiture proceedings (under section 298 POCA) against the respondents, in the sum of £171,367.53, did not preclude SOCA from subsequently applying and obtaining a Part 5 POCA Recovery Order made under section 266. SOCA had brought Part 5 proceedings within the relevant limitation period, the respondents held recoverable property, SOCA had acted in good faith and the circumstances in which the proceedings were brought were not in conflict with Part 5. The onus was on the respondents to establish abuse and they had, in the judgment of Mr Justice Sweeney, failed to do so.

Colin Wells, barrister at 25 Bedford Row, London, specialises in fraud and money laundering. His reported cases include Supreme Court (extradition of foreign nationals in fraud cases): *OB v SFO* [2012] EWCA Crim 67.

Colin is regularly instructed to conduct internal investigations and offer compliance advice to companies and local authorities facing issues of wrongdoing.

A regular speaker to both English and overseas practitioners and law enforcement agencies, covering fraud investigation, search warrants and powers, case management, abuse of process, private prosecutions, deferred prosecution agreements, and sentencing in fraud cases.

Colin's published work includes: *Abuse of Process*, 3rd edition, Oxford University Press; and *Fraud: a practitioners handbook*, Bloomsbury 2014.

cwells@25bedfordrow.com

Bermuda

Keith Robinson
Carey Olsen

Kyle Masters
Carey Olsen

I Important Legal Framework and Statutory Underpinnings to Fraud, Asset Tracing and Recovery Schemes

Bermuda's constitution establishes the Supreme Court as the primary court of first instance and the Court of Appeal as the court with jurisdiction to hear appeals from judgments of the Supreme Court. The Judicial Committee of the Privy Council is Bermuda's final court of appeal. The common law, the doctrines of equity, and the Acts of the Parliament of England of general application that were in force in England at the date when Bermuda was settled on the 11 July 1612, have force within Bermuda pursuant to the Supreme Court Act 1905 (subject to the provisions of any acts of the Bermuda Legislature).

A range of remedies, familiar to practitioners in other common law jurisdictions are available to litigants in fraud, asset tracing and recovery cases in Bermuda. These include actions for information, such as *Norwich Pharmacal* and *Bankers Trust* orders, actions to protect and guard against the dissipation of assets, such as freezing orders and other injunctive relief, and actions to enforce judgments awarded against wrongdoers including the ability to appoint equitable receivers over assets, garnishee orders and orders for the seizure and sale of assets in satisfaction of judgments.

Victims of fraud can make claims for unjust enrichment, breach of trust, breach of fiduciary duty, conversion, dishonest assistance, breach of contract, misrepresentation, as well as a host of other actions ordinarily available in the equitable jurisdictions in the High Court of England and Wales and other parts of the Commonwealth.

II Case Triage: Main stages of fraud, asset tracing and recovery cases

Victims of fraud seeking to protect their interests and enforce their rights in Bermuda should consider the following key stages in their claim: investigation; preservation of assets; the action/claim; and enforcement. Because of the complex and often fluid nature of fraud, these issues will need to be considered in the round by any potential litigant. The particular circumstances arising in connection with a claim may require certain stages to be considered, and actions taken in connection with them, in tandem with, or in advance of, others. For the purposes of this article, however, we will consider these stages in turn.

Investigation

In cases of a suspected fraud, the speed and accuracy with which parties are able to discover information can be crucial to the successful outcome of a claim. Such matters are paramount at the early stages of a claim in order to discover, protect and recover assets. There are several avenues available to a litigant to gather such information. The following are worth a closer review.

Public sources of information

When a company is the target of an investigation or a potential action, litigants can search and obtain from the public records of the Registrar of Companies, amongst other things, the location of the company's Registered Office (crucial for proper service of documents in litigation), registered charges (note registration is voluntary), winding up notices, share capital information, the memorandum of association and the company name and its registration number. Requests to the company secretary can also allow an interested party to discover the current register of shareholders and the appointed directors and officers of that company.

The Court (Records) Act 1955 also gives any person the right to request to inspect and take copies of originating process and any orders on the court file in respect of pending cases, and there is a broader right of access in respect of historic cases and material which has been referred to in open court subject to the payment of the requisite fee and other stated exceptions.

The Public Access to Information Act 2010 also provides a right of access to information held by a government body. This can be used to great effect in a myriad of circumstances; however, certain kinds of information is subject to exemptions under this legislation.

Disclosure

Pre-action disclosure is not generally available in Bermuda and, in the context of fraud and asset tracing claims, may not always be the most desirable route for seeking and receiving disclosure of key information. *Ex parte* applications seeking the types of orders described below, when coupled with orders sealing the court file and "gagging" orders preventing the subject of the applications from "tipping off" the subject of the underlying claims, are available in Bermuda.

Norwich Pharmacal orders are available in Bermuda. If the court is satisfied that there is a good arguable case that wrong doing has occurred, it has the power to order that third parties mixed up in the wrong doing, albeit innocently, to provide documents or information which may identify the wrong doer. A *Norwich Pharmacal* order is sought by way of a summons supported by an affidavit on an interlocutory basis – usually *ex parte*.

Bankers Trust orders can also be sought to require banks to provide records that would allow the assets of the ultimate wrongdoer to be traced. The Bermuda court has extended the effect of such orders beyond banks holding the proceeds of fraud to include a defendant against whom the fraud has been alleged [*Crowley Maritime Corporation v International Marine Assurance Group Ltd* [1988] Bda LR 42]. There is no requirement to show involvement in the wrongdoing – unlike the *Norwich Pharmacal* jurisdiction.

The Bermuda courts have applied the principles set out in the case of *Vide Anton Piller K G v Manufacturing Processes Ltd* [1976] 1 All ER CA, making orders granting plaintiffs the right to enter and search a defendant's premises for the purposes of preserving critical evidence for the trial of the substantive claim [*Crane and Dutyfree.com Inc v Booker and H.S & J.E Crisson Ltd.* [1999] Bda LR 51]. *Anton Piller* orders, particularly when made on an *ex parte* basis, can be extremely useful tools for litigants dealing with less than scrupulous actors in a fraud and asset tracing context.

Undertakings as to damages are ordinarily required as a condition upon which such orders are normally granted – particularly when such orders are granted on an *ex parte* basis. The ordinary rules concerning the requirement to give full and frank disclosure also apply.

Preservation of assets

Bermuda courts have jurisdiction to grant injunctive relief. Orders can be made on an interlocutory basis to maintain the status quo until a party's substantive rights can be ascertained. An application for an injunction can be made prior to the commencement of proceedings, after proceedings have started or after trial, for example, in aid of preservation of assets pending the enforcement of a judgment.

Interim injunctions can be granted on an *ex parte* basis or on an *inter parties* basis. The Bermuda court will assist litigants seeking to protect assets from being dissipated pending the outcome of underlying proceedings. The basis upon which the Bermuda Supreme Court's common law power to grant injunctive relief, including prohibitory injunctions requiring a party to refrain from doing something and mandatory injunctions requiring a party to do something, does not materially differ from the

UK and other commonwealth jurisdictions. This includes worldwide *Mareva* injunctions [See *Griffin Line Trading LLC v Centaur Ventures Ltd and Daniel James MCGowan* [2020] SC (Bda) 29 Com].

The courts will often make orders for specific discovery concerning the assets which are the subject of a freezing order. Such orders, in addition to providing a clear picture of the assets in the defendant's possession, their locations and the ownership, can also provide key insight with regard to the compliance (or not) with the terms of any order by the defendant during the progress of the substantive claim. Such orders can, and often are, endorsed with a penal notice. Non-compliance with such orders so endorsed can result in contempt of court proceedings and, ultimately, committal in some circumstances.

The claim

A party equipped with sufficient information about the target of their claim and the location and value of assets, and having taken steps to preserve those assets pending the outcome of the substantive action can make a substantive claim in the Supreme Court.

Typically, civil proceedings brought in the Supreme Court may be commenced by writ, originating summons, originating motion or petition. In respect of claims related to fraud and asset tracing, such actions are usually founded in equity and/or the common law and are therefore normally begun by filing a generally endorsed writ of summons which names the parties to the action and provides very brief details of the relief sought. If the defendant defends the claim, a generally endorsed writ must then be supplemented by a statement of claim in which the initiating party provides the facts upon which it relies to found its action.

A plaintiff seeking to recover assets lost can rely on actions similar to those available to litigants in England and Wales. Such actions commonly may include an action for conversation, unjust enrichment, a claim in fraudulent misrepresentation or an action for breach of trust or fiduciary duty. These claims are brought on the same footing as they would be in England and Wales and many other Commonwealth jurisdictions.

In circumstances where the vehicle used to perpetrate the wrongdoing is a Bermuda company, litigants may look to the Companies Act for relief. The Minister of Finance has a statutory power under section 110 of the Companies Act 1981, on his own volition or on the application of "that proportion of members of a company, as in his opinion warrants the application" to appoint one or more inspectors to investigate the affairs of a company and to report on their findings. This remedy is not available in respect of exempted or permit companies.

Insolvency proceedings, allowing for the court to appoint and empower Joint Provisional Liquidators (JPLs) for the purpose of working with (or in some cases in place of) management of the company to secure the assets of the company for the benefit of its creditors can be instituted where appropriate. Where a company is insolvent and/or it is otherwise just and equitable that it be wound up, and the petitioner in a winding up petition can demonstrate that there is a real risk that the company's assets are at risk of dissipation to the detriment of the creditors, the Bermuda court has the power to appoint JPLs on an *ex parte* basis, whilst the underlying winding up petition is afoot. In *Re North Mining Shares Company Limited* [2020] Bda LR 8, the Supreme Court found:

> "The appointment of a provisional liquidator can sometimes be described as a draconian measure employed by the court to paralyse the directors of a company from their ability to deal with and dispose of the company's assets. In such cases, the appointment of a provisional liquidator is ordinarily ordered on an urgent *ex parte* basis to enable swift and unforeseeable seizure of the control of the company's assets by the provisional liquidators. The underlying purpose here is to protect the interest of the company's creditors who are at risk of not being repaid their debts due to the likely dissipation of the company's assets."

Enforcement

A domestic judgment can be enforced in various ways under Bermuda law provided the judgment is for a sum of money payable on a certain date. A writ of *fieri facias*, which is a direction to the court-appointed bailiff to seize the property of the judgment debtor in execution of the judgment to satisfy the sum of the judgment debt, together with interest and the costs of execution, can be issued. The court can also make an order for committal, grant garnishee orders and/or a writ of sequestration in aid of enforcement, amongst other things.

A money judgment entered against a party in the Supreme Court may be entered as a charge over that party's real property. An application for the appointment of a receiver over that property can be made. The Rules of Supreme Court 1985 (RSC) also provide for an application for the appointment of a receiver over property by way of equitable execution. Provided the court is satisfied that it is reasonable to make such an appointment, taking into account the amount

of the judgment debt owed and the costs of appointing the receiver, upon such an order all debts due to the judgment debtor would be paid to the receiver.

The Judgments (Reciprocal Enforcement) Act 1958 (1958 Act) allows judgments for the payment of money (including arbitration awards which would be enforceable as a judgment in the UK) from the superior courts of the UK to be enforced by registration of the judgment in the Supreme Court at any time within six years after the date of the judgment. The Governor can also declare the application of the 1958 Act to other territories. So far, orders have included many countries within the Commonwealth.

A foreign judgment which does not fall within the 1958 Act can be enforced in Bermuda under common law where the foreign court had jurisdiction over the debtor according to Bermuda's conflicts of law rules. Formal pleadings must be filed in the Supreme Court. The debt obligation created by the foreign judgment can form the basis of a cause of action. There is no requirement for the creditor to re-litigate the underlying claim which gave rise to the foreign judgment. A foreign judgment obtained where the foreign court had no jurisdiction over the debtor according to Bermuda's conflicts of law rules is not enforceable in this way and fresh substantive proceedings would be necessary in Bermuda seeking to prove once again the debt.

A company truly and justly indebted to a creditor can be the subject of winding up proceedings under the Companies Act 1981. A statutory demand which has been left at the company's registered office (for example) and which remains unsatisfied for a period of 21 days is evidence of that company's insolvency for the purposes of founding a winding up petition.

JPLs appointed under Bermuda's insolvency regime can be provided with broad powers to, *inter alia*, set aside transactions which are voidable under the Companies Act 1981, investigate the affairs of the company, bring actions against current of former directors of the company for breaches of directors and/or fiduciary duties as well as other common law claims typically used to trace assets for the purposes of the enforcement of such claims. The Bermuda courts are empowered by the doctrine of comity and Bermuda's common law insolvency regime to issue letters of request to courts in jurisdictions where the company may have assets or other relevant interests that the JPLs' appointment and powers – in so far as they can in that jurisdiction – be recognised for the purposes of *inter alia* carrying out their role of getting in and preserving the assets of the company for the benefit of the creditors [*Re North Mining Shares Company Limited*].

III Parallel Proceedings: A combined civil and criminal approach

Victims of crime can complain to the police by attending any police station. In the ordinary course, a complaint is investigated after it is made by way of initial written statement – usually recorded and taken down in the presence of police investigators.

A complaint to the Bermuda Police Service can provide a resolution for victims of fraud. The Bermuda Police Service is a highly sophisticated, well resourced, independent investigatory body

with particular expertise in detecting and gathering evidence in support of criminal prosecutions. In addition to general powers of investigation, Bermuda's statutory framework provides specific powers to the Police Service allowing for the gathering of information – beyond those available to private citizens.

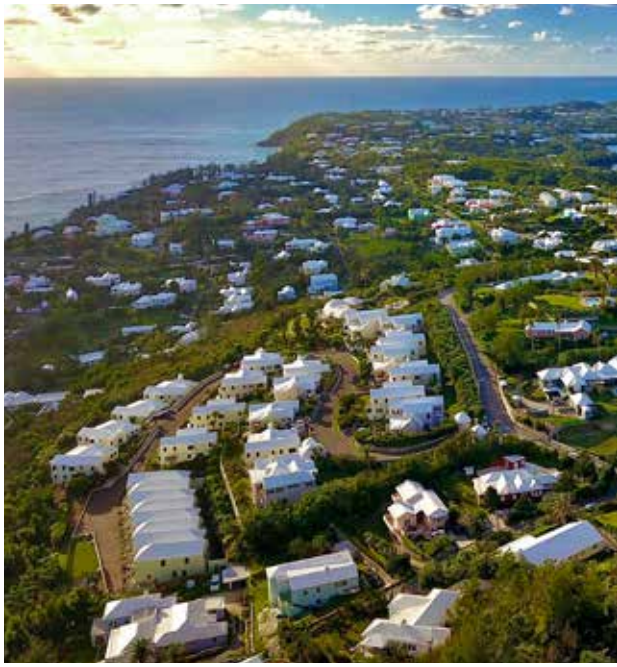
The Proceeds of Crime Act 1997 has been described by the Bermuda Supreme Court as being "…designed to create a comprehensive and rigorous legislative framework designed to both prohibit money laundering activities and facilitate vigorous and effective enforcement action to investigate such activities, prosecute offenders and seize the proceeds of criminal conduct". [*Fiona M. Miller v Emmerson Carrington* [2016] SC (Bda) 106 APP.]

The court in *Carrington* went on to say this about the wide range of powers provided to law enforcement under the Proceeds of Crime Act 1997:

> "… it equips the law enforcement authorities with the ability to acquire the most important tool for enforcing the Act: information. Powers which interfere with privacy rights in the public interest include the powers conferred on the Supreme Court to make production orders (sections 37-38), issue search warrants (section 39), and compel Government Departments to produce information (section 40). Customer information orders are provided for by section 41A-41G, with jurisdiction conferred on both the Magistrates' Court and the Supreme Court."

In addition to the Proceeds of Crime Act 1997, Bermuda's Companies Act 1981 provides for specific criminal offences that may be committed by directors of companies including falsifying records and altering documents relating to the company's affairs. Other Bermuda legislation dealing with crime in the area of fraud include the Criminal Code Act 1907 and the Bribery Act 2016.

Civil proceedings based on facts which concern a criminal complaint can be advanced simultaneously. The court retains a general discretion to stay the civil proceedings pending the outcome of the criminal complaint. When considering an application for a stay, the court will consider the fair trial rights of the defendant and, in particular, whether there is a real risk that those rights would be prejudiced. In an application for a stay, the burden for demonstrating that the rights of the defendant would be prejudiced is on the applicant [*Hiscox Services Ltd et al v Y. Abraham* [2018] SC (Bda) 68 (Civ)].



IV Cross-jurisdictional Mechanisms: Issues and solutions in recent times

The 1958 Act provides that judgments for the payment of money from many Commonwealth countries and territories can be enforced by registration of the judgment in the Supreme Court. A foreign judgment which does not fall within the 1958 Act can be enforced in Bermuda under common law.

The Bermuda Supreme Court has also granted interim injunctive relief in support of foreign proceedings. This jurisdiction can be usefully exercised, for example, to prevent the sale of shares in a Bermuda company by the company pending the outcome of US or Hong Kong proceedings. Provided the court is satisfied of the usual test for the granting of an injunction and the court has jurisdiction over the defendant, if the court considers that the granting of the relief sought would be considered judicial assistance the court can exercise its discretion to make such an order [*ERG Resources LLC v Nabors Global Holdings II Limited* [2012] Bda LR 30].

Where it appears necessary for the purposes of justice, the RSC Order 39 provides the Supreme Court with the power to make an order for the examination on oath before a judge, an officer or examiner of the court or some other person, at any place. Part IIC of the Evidence Act 1905 and RSC Order 70 provide a statutory footing

for the Supreme Court to make an order for evidence to be obtained in Bermuda for use in other jurisdictions.

V Recent Developments, Technology and Other Impacting Factors

COVID-19 has resulted in a fundamental change in the way Governments, courts, litigants and their attorneys have approached these matters.

Governments around the world, including in Bermuda, implemented strict social distancing measures designed in large part to slow the spread of the virus. As a result, more businesses were required to develop business platforms and user interfaces for completely digital transactions. More online payments coupled with less in-person verification mechanisms has required a greater degree of diligence in conducting transactions.

The Bermuda courts have developed a platform for the conduct of hearings via video conference. During strict shelter in place orders, the Supreme Court continued to receive and act on urgent applications for injunctions, stays and other ordinary civil remedies. Hearings were conducted via telephone and online video link with decisions being rendered as quickly as possible. The ability to search the court records, on the other hand, were suspended for a brief period. Searches at the Registrar of Companies and the Registry General have resumed in person, but during shelter in place, were done by request online.

The COVID-19 pandemic has also slowed government innovation in some areas whilst resources earmarked for non-essential but welcome advancements were diverted to support essential, sometimes life-saving, programmes and government initiatives. In November 2020, the Evidence (Audio Visual Link) Act 2018 became operative placing the discretion to allow evidence by audio visual link in court hearings exercised by the Supreme Court on a statutory footing. It is expected that powers under this act will be exercised to allow key expert witnesses to attend hearings, and be tendered for cross-examination, in the Supreme Court from outside of Bermuda. Given the ongoing travel restrictions both inside and outside of Bermuda connected with COVID-19, the coming into operation of this legislation is a welcomed development.

With the appointment of a Privacy Commissioner in early 2020, the Personal Information Protection Act 2016, is expected to shortly come into force in full. The Privacy Commissioner will need to staff his office and provide guidance on how the act will be implemented. Broadly speaking, in addition to providing general protections concerning the capture, processing and use of information, as companies and service providers implement more stringent protections around that information, the Act and the safeguards it will require, will assist in mitigating the risk against cybercrime to the ultimate benefit of Bermuda and her people.

Keith Robinson is head of the dispute resolution and trusts and private wealth practices of Carey Olsen Bermuda.

He has over 20 years' experience in a wide range of commercial litigation matters, including corporate and commercial disputes, fraud and asset tracing, restructuring and insolvency, arbitration, breach of contract and public law.

He also has expertise in high-value trust litigation and court-approved trust restructurings, and has been involved in many of the major trust cases in Bermuda.

Keith is ranked as a band 1 lawyer for dispute resolution in Bermuda by Chambers Global 2020 and as a leading individual by The Legal 500. He has written extensively and is a regular speaker on Bermuda law matters.

He is a member of the Bermuda branch of the Restructuring and Insolvency Specialists Association (RISA). He is a fellow of the American College of Trust and Estate Counsel (ACTEC), a member of the International Academy of Estate and Trust Law (TIAETL) and a member of the Society of Trust and Estate Practitioners (STEP).

keith.robinson@careyolsen.com

Kyle Masters is a senior associate with extensive experience in regulatory and compliance law, internal and external risk mitigation, corporate governance, enforcement actions and business strategy.

He has appeared in the Bermuda Supreme Court and Court of Appeal undertaking a wide variety of commercial and civil litigation. He has particular expertise on regulatory matters including telecommunications and energy law, employment law, and general corporate disputes.

Kyle was called as a barrister in 2009. He practised in a Bermuda firm specialising in civil and commercial litigation until 2013 when he joined the Bermuda Regulatory Authority. As senior legal advisor, Kyle was responsible for developing and enforcing regulatory rules and statutes on behalf of the Authority as well as advising the board of commissioners on regulatory trends and strategy.

kyle.masters@careyolsen.com

Carey Olsen has one of the largest dispute resolution and litigation teams in the offshore world. We represent clients across the full spectrum of contentious and semi-contentious work.

We are recognised for our expertise in both international and domestic cases, including investment funds, corporate, commercial and civil disputes, banking, financial services and trusts litigation, fraud and asset tracing claims, restructuring and insolvency, regulatory investigations, employment disputes and advisory work.

From mediation to trial advocacy, we guide our clients through the full range of disputes, from multi-party, cross-jurisdictional corporate litigation to domestic claims before the local courts. We have also represented clients before the Privy Council. Many of our cases have established judicial precedents that are referred to in jurisdictions around the world.

We advise on the laws of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey and Jersey across a global network of nine international offices.

www.careyolsen.com

CAREY OLSEN

British Virgin Islands

Alex Hall Taylor QC
Carey Olsen

Richard Brown
Carey Olsen

Tim Wright
Carey Olsen

Simon Hall
Carey Olsen

I Executive Summary

The BVI is a major offshore financial centre, particularly specialising in the formation of group parent companies, asset-holding special purpose vehicles and investment funds. The BVI's recognisable English law origins and progressive legal framework governing the administration of trusts has made it a popular jurisdiction for international private wealth structures. As described further below, the BVI is a truly international jurisdiction and its relationship to fraud, asset tracing and recovery must be seen in this context.

The key challenges and recent developments relate specifically to this internationalism. Most pertinently, in the last year, the BVI's *Black Swan* jurisdiction for injunctions in support of foreign proceedings had its wings judicially clipped, then was quickly rehabilitated to fly again by the BVI legislature.

II Important Legal Framework and Statutory Underpinnings to Fraud, Asset Tracing and Recovery Schemes

As a self-governing British Overseas Territory, the BVI's legal system is rooted in English common law and equitable principles supplemented by legislation passed by the BVI's legislature and certain statutes and instruments passed by the UK Parliament and extended to the territory by Order in Council.

The BVI has a sophisticated High Court and Commercial Court, and a strong local appeal Court in the Eastern Caribbean Court of Appeal, based in St Lucia. The final Court of appeal is the

Judicial Committee of the Privy Council, which sits in London and consists of justices of the UK Supreme Court.

The legal rights and remedies available in relation to fraud, asset tracing and recovery are broad and powerful, in a similar manner to other developed common law jurisdictions. The key BVI legislation regulating company law is principally the Business Companies Act 2004 (the BCA), the Insolvency Act 2003 (the Insolvency Act) and related enactments. Civil litigation procedure is governed by the ECSC Civil Procedure Rules 2000 and practice directions (EC CPR).

Injunctions and receivers

As a predominantly holding company jurisdiction, the preservation and protection of assets is vital as is the ability for litigants and creditors to enforce against them. At the early stages of a dispute, often a party suspects illegitimate dealings in the shares of BVI companies. EC CPR 49 allows any person claiming to be beneficially entitled to stock (shares) to apply for a Stop Notice or a Stop Order. In short, a Stop Notice requires a party on whom it is served to give notice of any proposed dealings with specified shares, and a Stop Order prevents certain steps being taken with respect to shares and/or monies held in Court. These are useful tools but only go so far. The need for further protection means that injunctions are an important and regular part of BVI legal practice.

The BVI Courts exercise a statutory jurisdiction pursuant to section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act (the Supreme Court Act) to grant injunctive relief where it is just and convenient to do so. This gives the BVI Court a broad and flexible jurisdiction similar to relief available in other common law jurisdictions. The BVI Court may therefore, for example, grant freezing ("*Mareva*"), prohibitory, mandatory or proprietary injunctive relief on an interim or final basis. In appropriate circumstances, injunctions may be obtained on an *ex parte* and urgent basis.

In a welcome statutory development in early 2021, an amendment was made to the Supreme Court Act (incorporated as section 24A) to confirm that the BVI Court also has jurisdiction to grant injunctive relief in support of foreign proceedings, including against non-cause of action defendants (the so-called *Black Swan* jurisdiction, see further below).

The BVI Court may also grant injunctive relief in relation to any arbitral proceedings which have been or are to be commenced in or outside of the BVI pursuant to section 43 of the BVI Arbitration Act 2013. Indeed, relief in support of foreign arbitrations and the enforcement of arbitration awards is a major part of BVI litigation, and the BVI is generally a pro-arbitration jurisdiction.

For an additional level of protection, a claimant may also apply to Court for the appointment of a receiver. A receiver is a professional person (such as a qualified accountant or insolvency practitioner) appointed by the BVI Court to receive and deal with certain assets, usually in support of and in order to "police" a freezing injunction. The Eastern Caribbean Court of Appeal recently emphasised that receivers should only be appointed when it is just and convenient, and should not be ordered when the freezing injunction provides adequate protection. (*Alexandra Vinogradova v (1) Elena Vinogradova, (2) Sergey Vinogradov* (BVIHCMAP 2018/052).)

It is standard practice for the BVI Court to order a respondent to disclose information about its assets when it makes a freezing injunction or a receivership order, in order to allow the claimants and/or the receiver to police the orders.

As such, BVI injunctions have some teeth. A defendant may be found in contempt of Court if they are in breach, which may have grave consequences for the defence of a BVI claim, but only goes so far. If an individual defendant, or the director of a BVI company, is out of the jurisdiction then a BVI Court ordering committal may be of little concern.

Further, and similarly, BVI injunctions and receivership orders may technically have "worldwide" effect, but the BVI Court does not seek to impose exorbitant, extra-territorial jurisdiction on persons not before the Court and regarding property abroad. The BVI Court has adopted the same "*Babanaft*" provisos in its injunction orders as the English Commercial Court (*Babanaft International Co v Bassantne* [1990] Ch. 13 at 44), out of respect for judicial comity. Steps may therefore be required in the local Courts before a BVI order becomes fully effective abroad.

Third party disclosure orders & letters of request

The BVI has long followed the equitable common law jurisdiction to grant disclosure orders. A "Norwich Pharmacal" order allows an applicant to obtain disclosure from a third party who is likely to have the relevant documents or information and who has become mixed up in wrongdoing committed against the applicant. Letters of request to foreign Courts to obtain evidence in support of BVI proceedings, and to the BVI Courts in support of foreign proceedings, are also an option in line with the Hague Evidence Convention.

Potential claims

As in the UK and other common law jurisdictions, there is no specific civil cause of action in "fraud"

in the BVI. However, various claims are available in contract, tort, equity or otherwise depending in the circumstances, such as deceit, fraudulent misrepresentation, conspiracy, dishonest assistance, knowing receipt, breach of fiduciary duty, restitution, bribery and secret commissions. The legal and equitable remedies of tracing and following are also available to claimants in order to seek the return of property and assets.

Section 184I of the BCA allows a shareholder of a company to apply to the BVI Court for relief from unfairly prejudicial conduct towards them in their capacity as a shareholder. The Court has broad powers to make such orders "as it thinks fit", such as a share buyout, orders regulating the future conduct of the company, the payment of compensation, or even the appointment of a liquidator in extreme circumstances.

Remedies and enforcement

Wide remedies are available in the BVI, including damages, equitable compensation, mandatory and prohibitive injunctions, proprietary injunctions and property preservation orders, restitution and rectification remedies, declarations and other orders including as to status or transfer of ownership, valuation orders, property or share transfer or buy out orders, and those relating to the management of companies and personal or corporate insolvency proceedings or receiverships.

Modes of enforcement include charging orders, attachment orders, injunctions, a judgment summons, orders for seizure and sale of goods or property, and appointment of liquidators or receivers. However, as discussed below, fully remedial enforcement will often require action abroad.

Insolvency regime

It is also common for claimants to take advantage of the BVI's corporate insolvency legislation as part of an asset recovery strategy in fraud cases. The BVI's Insolvency Act includes a suite of powers and remedies available to liquidators of a BVI company, which can provide a very powerful basis to investigate and recover assets, both within the BVI and internationally. There are a number of BVI insolvency practitioners who are very experienced in international asset tracing matters. As discussed below, co-operation with foreign Courts and insolvency practitioners is vital.

III Case Triage: Main stages of fraud, asset tracing and recovery cases

Fraud in general

The main stages of BVI fraud, asset tracing and recovery cases will be familiar to civil litigators worldwide. Common BVI scenarios are shareholder disputes, where one shareholder has sought to push out the other with sharp elbows, and/or one shareholder claims the other has never contributed to the business or does not own the shares, and/or the situation where one party in a BVI company structure has transferred away valuable assets to another separate structure. In short, often a party will allege that he or she used to own an asset, that he or she has been wronged by a fraudster, and that urgent BVI legal action is required to ensure that justice prevails and the asset is returned.

There may be various options available. The BVI's insolvency regime may provide a solution (see below). But first we consider the usual course of action, by way of proceedings under the EC CPR.

Pre-action – gathering the evidence

The initial stage for a BVI legal practitioner is to consider forensic, ethical and practical issues. As noted above, "fraud" claims may include a multitude of actions, all with different tests, different mental states, and different defences. What is the background and commercial rational of a business relationship going back years? What is the evidence of wrongdoing? Is there enough evidence to plead dishonesty? These questions require a lot of fact finding and careful analysis. One must have solid evidence to plead fraud.

Much of this initial work is often carried out with the assistance of foreign lawyers and representatives. The ultimate client will almost certainly live abroad, and may not speak English. It is common for BVI company structures to have subsidiary companies in other jurisdictions (such as Cyprus), and the underlying asset will often be located elsewhere (a Chinese power station, or Russian coal mine, for instance). Legal steps may have already been taken and proceedings instigated in other jurisdictions, so questions of the appropriate forum and avoiding parallel proceedings may arise early on.

Injunctions

At this juncture, it may be necessary to apply for a Norwich Pharmacal order, especially if fraud is suspected but there is currently not enough evidence. For instance, it is common to seek a disclosure order against the "registered agent" of a BVI company in order to obtain information about the beneficial ownership, shareholding, directors, management and (to some extent) business of companies which appear to be involved in a fraud (see *UVW v XYZ (BVIHC (COM) 2016/108*). Such disclosure, in particular identifying wrongs and wrongdoers, can help form the case for fraud claims and injunctions in the BVI,

and also assist with substantive legal proceedings in other jurisdictions.

If proceedings are afoot in other jurisdictions, then it may be appropriate to apply for injunctive relief in support of foreign proceedings. The BVI Court will first consider whether the applicable test is met (as if the proceedings had been commenced in the BVI) and, second, whether it is expedient to grant the relief sought. In doing so, the BVI Court will consider whether the injunction would have some utility which is related to and ancillary to the foreign proceedings. It will also take into account the question of whether the BVI Court has power to enforce its order if disobeyed abroad.

If substantive proceedings are required in the BVI, then the next step is to plead the claims, issue the claim and then apply for an injunction in support of those proceedings (either before or after service depending on the risk of tipping off). The principles applicable to the granting of an injunction will be familiar to most common law jurisdictions. The Court will grant a freezing injunction where the applicant has a good arguable case on the merits of its underlying claim and there is a real risk of dissipation of assets against which a judgment may be enforced. Slightly different equitable principles apply in the context of "proprietary" freezing injunctions, where the applicant claims an ownership right over assets in the hands of the respondent, but the BVI Courts will be swift to grant such relief in appropriate circumstances, and such injunctions can be a particularly effective remedy in trust disputes. As noted above, disclosure orders and the appointment of receivers may help to police such injunctions.

The steps to trial

At this stage, relevant assets may be relatively well secured. However, often in cases of fraud and asset tracing a lot more work is required to achieve justice.

The BVI legal system is relatively quick and efficient. Most trials come on within a year of issuing proceedings, and some may be "expedited" to trial in a shorter time period or determined on narrowed "preliminary issues" or determined summarily if the defence has no prospect of success. However, fraud claims are often complicated and involve voluminous documents and the resolution of conflicting evidence. They are rarely concluded on an expedited basis. Indeed, high-value cases with numerous parties and interlocutory applications, such as multi-billion dollar Oligarch battles, may take years to be determined, particularly where appeals against interlocutory orders are pursued to the highest level. This is a key challenge in the BVI, as in other jurisdictions.

Interlocutory battles

Various interlocutory battles are often fought before the parties get to trial. Permission from the BVI Court is required to serve claims and injunctions on foreign defendants (Part 7 of the EC CPR, and *Nilon Ltd & Another v Royal Westminster Investments SA and others* [2011] UKPC 6). Due to the international nature of fraud cases involving multiple jurisdictions, often defendants will seek to set aside service and challenge jurisdiction on the basis that the BVI is not the appropriate forum for the trial of the claim (on the basis of the principles in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, see further below). Depending on the location of a defendant, service may need to be effected under the Hague Service Convention via diplomatic channels, which takes time. Further, some defendants try to evade service. These delays are often unavoidable when dealing with fraudsters out of the jurisdiction and it may be necessary to seek alternate service.

Assuming that the claim proceeds, statements of case are exchanged by the parties, experts instructed and reports exchanged (on matters of foreign law, or forgery, for instance), disclosure takes place, and witness statements exchanged by witnesses of fact. Various hearings may take place prior to trial, dealing with issues such as specific disclosure applications, directions, and even contempt of Court if injunctions are breached. It is unusual for fraud cases to proceed to trial without various skirmishes along the way, including appeals of certain interlocutory issues. However,

certain interim applications may bring proceedings to an early conclusion, for example an application for security for costs.

Trial and enforcement

Trial takes place in the ordinary adversarial manner, overseen by a single judge. The trial may take days or weeks depending on the number of documents, legal issues, witnesses and experts. The judge will then make a decision on the facts and the law and deliver judgment. Rights to appeal may lie to the Court of Appeal, and in turn, to the Judicial Committee of the Privy Council. Final determination of the claim can take some time.

At the end of a fraud trial, the ultimate remedy may be simple. For instance, in the case of a dispute over shares, rectification of the register of members of a BVI company under section 43 of the BCA allows the name of the true owner of shares to be entered. That may be enough. However, in many cases, following judgment a whole new battle begins, seeking enforcement of the judgment abroad, seeking payment of damages, appointing liquidators, tracing and following assets into other jurisdictions, and initiating further proceedings abroad. These further steps and difficulties are often unavoidable when the underlying assets and wrongdoers are located elsewhere.

The Insolvency Act – Liquidation

There can, on occasion, be a quicker route. As noted above, rather than pursuing fraud claims in the BVI Court, it may be possible to utilise the BVI's insolvency regime. In the fraud and asset tracing context, the starting point is to identify a BVI company which is indebted to the claimant, for example pursuant to an unsatisfied debt, judgment or arbitral award. That will often provide a basis to appoint a liquidator on insolvency grounds, provided that the debt is not disputed on substantive grounds.

Once appointed, the liquidator assumes control of the company and its assets, and has broad powers under the Insolvency Act to investigate the company's affairs, and to collect in and take control of the company's assets. As such, if the company holds valuable assets, such as real property, shares, or high value moveable assets such as aeroplanes or yachts, the liquidator will be able to take control of those assets and sell them.

The Insolvency Act gives liquidators strong powers of investigation, and crucially, a liquidator can pursue a wide range of claims, either in their own name or in the name of the company, in order to seek to recover assets for distribution to creditors. These claims fall into the following broad categories. First, claims vesting in the company, for example the right to recover sums due from debtors, or any other cause of action (for example in contract or tort). Secondly, claims against former directors, including claims for misfeasance, insolvent trading, and fraudulent trading. Thirdly, claims in relation to voidable transactions, including claims relating to unfair preferences and transactions at an undervalue. Such claims can be particularly effective in an asset tracing context where a company has transferred assets prior to liquidation in an attempt to render itself judgment proof, as the BVI Court has a broad discretion as to the relief it may order.

In cases of urgency, for example if the company's assets are in jeopardy, a creditor can apply on an urgent, *ex parte* basis for the appointment of a provisional liquidator. This enables the immediate appointment of provisional liquidators pending the final determination of an application for full liquidators, who can take control of the company and take steps to prevent the dissipation of assets.

IV Parallel Proceedings: A combined civil and criminal approach

It is incredibly rare for the BVI criminal Courts to be involved in the same matters as the BVI civil Courts by way of parallel proceedings or otherwise. This is largely because those most interested in pursuing proceedings are usually more interested in available civil recoveries and remedies, and generally the relevant frauds are international, any criminal offences take place abroad, the

wrongdoers are resident abroad, and the relevant assets are located abroad. Further, the BVI civil Courts have extensive powers akin to criminal sanction, such as powers in relation to contempt of Court for breaches of their orders such as freezing injunctions, including sequestration and committal orders in extreme cases.

In theory, a private party wronged by a fraud can initiate a private prosecution in the BVI, and then the Director of Public Prosecution will consider whether to take over and continue such a prosecution as a public prosecution. However, for the reasons given above, in most cases a private party would be better off initiating BVI civil proceedings, or liaising with BVI legal practitioners to work with foreign lawyers and obtain justice elsewhere, particularly where the criminal courts of another jurisdiction may increase available remedies or recoveries. Further, as in most jurisdictions, there is a danger that if parallel civil and criminal proceedings are instigated, then the civil claim may be stayed pending the outcome of the criminal claim, and the claimant would face a lengthy delay and also the prospect of losing control of the case. There is also the potential risk of criminal proceedings failing due to the higher standard of proof applicable, and that outcome then being used to stymie civil action.

That said, it is important to note that the BVI is a highly regulated offshore financial centre, overseen by agencies such as the Financial Investigation Agency (the FIA) and the Financial Services Commission (the FSC). The FIA has responsibility for the investigation and receipt of disclosures made in relation to money laundering. Further, the FSC investigates contraventions of the BVI's FSC Act by all regulated entities in the BVI, along with monitoring international financial sanctions measures. Accordingly, in cases of serious fraud, money laundering and sanctions, BVI legal practitioners may be obliged to liaise with the FSC and FIA, and potentially other international agencies.

V Key Challenges

As Lord MacNaughten once put it in the English Courts, "*Fraud is infinite in variety*" (*Reddaway v. Banham* (1896)). This quote pre-dated the establishment of the BVI as an offshore financial centre by nearly a century, but the challenges remain the same. Further, the boundless ability of dishonest people to perpetuate fraud is complicated further by globalisation and company structures involving various jurisdictions.

The BVI is a highly regulated financial centre, but it is inherently international. The key challenges therefore come out of internationalism and multi-jurisdictional relationships, along with of course, technological advances which can be used by fraudsters to their advantage, or against them. The need for effective cross-jurisdictional mechanisms is especially topical in the BVI at the moment.

VI Cross-jurisdictional Mechanisms: Issues and solutions in recent times

Black Swan jurisdiction

The BVI Commercial Court's decision in *Black Swan Investments v. Harvest View* (2010) was viewed as a welcome development by many in the BVI. In that decision, the BVI Court sought to fill a legislative void to establish the Court's jurisdiction to grant injunctive relief in support of foreign proceedings. The *Black Swan* jurisdiction, as it came to be known, was applied on numerous occasions by the BVI Court for many years, until the Court of Appeal's decision in *Broad Idea International Ltd & Anr Convoy Collateral Ltd* in May 2020. In that judgment, the Court of Appeal overturned the reasoning in *Black Swan*, finding that, absent statutory provision, the BVI Court had no jurisdiction to grant injunctive relief in the absence of substantive proceedings in the BVI.

Obviously, for an offshore jurisdiction such as the BVI, the Court of Appeal's decision in *Broad Idea* caused a certain degree of concern, particularly for those who had developed a certain degree of pride for the judicial ingenuity demonstrated by the BVI Court in *Black Swan*. Fortunately, it was not long before legislative proposals were made and, in January 2021, the BVI legislature introduced section 24A of the Supreme Court Act granting the BVI Court the necessary jurisdiction on a statutory footing, including against non-cause of action (or "*Chabra*") respondents. The section also includes confirmation of the Court's jurisdiction to grant Norwich Pharmacal relief in support of foreign proceedings (which had also been the subject of more recent, but no less welcome, judicial ingenuity).

At the time of writing (February 2021), the Court of Appeal's decision in *Convoy Collateral Ltd v Broad Idea International Ltd & Anr.* has been referred to and heard in the Privy Council, and judgment is awaited. Although the BVI Court's jurisdiction to grant such relief cannot now be in doubt, as a result of the statutory amendment, that decision of the Privy Council will no doubt provide essential guidance on the applicability of the relevant principles to the exercise of that jurisdiction.

Substantive jurisdiction and forum conveniens

The test for *forum conveniens* is often difficult to apply in the context of international fraud committed

through offshore companies in multiple jurisdictions. In recent years there has perhaps been a restrictive approach to jurisdiction taken by the BVI Courts at first instance and on appeal. However, the Privy Council recently handed down judgment in the long-running jurisdiction challenge of *JSC MCC Eurochem & anr v Livingtson & ors* [2020] UKPC 31 where it has again re-affirmed the application of the *Spiliada* test. In so doing, it overturned the Eastern Caribbean Court of Appeal's decision that the BVI Commercial Court did not have jurisdiction to hear a claim against companies based in the BVI and elsewhere, which had received bribes in the context of an alleged international bribery scheme.

The Court of Appeal's decision had been criticised by some commentators in limiting the BVI Court's ability to address cross-border frauds involving BVI entities, especially when the alternative forum (such as Russia) would not allow equivalent tracing or proprietary claims. It will be interesting to see the effect of the recent Privy Council decision on future forum challenges in the BVI Courts.

Cross-border insolvency

Liquidators appointed by the BVI court are usually able to seek recognition and/or assistance from the courts of other jurisdictions. That can provide a useful basis to co-ordinate a multi-jurisdictional asset recovery exercise, particularly where a BVI company holds assets in other jurisdictions, as is routinely the case. Foreign insolvency office-holders can also apply for assistance from the BVI court, which may include orders to preserve assets within the jurisdiction or, crucially, provide access to information or documents held in the BVI.

Assistance may be available on a limited basis under the common law, applying the principles of modified universalism, or, to insolvency office holders from certain specific countries, under Part XIX of the Insolvency Act 2003. The statutory remedies available under Part XIX are helpful but not as broad as they might be. Provisions based on the UNCITRAL Model Law on Cross-Border Insolvency 1997, allowing increased efficient co-operation between the BVI Courts, foreign insolvency office-holders, and designated foreign countries were incorporated into the Insolvency Act. However, they are not currently in force and as such there is not currently a broader concept of Model Law "recognition" for foreign office-holders in the BVI.

VII Technological Advancements and their Influence on Fraud, Asset Tracing and Recovery

E-litigation and remote trials

As in other sophisticated jurisdictions, BVI legal practitioners, accountants and insolvency practitioners are all focused on using the latest technology to investigate fraud, carry out disclosure exercises and trace assets. Further, the BVI Courts have been nimble in recent years to react to disaster and change. Following the devastation of Hurricane Irma in September 2017, the Courts quickly moved to temporary electronic filing and remote hearings. Following this success, a sophisticated E-Litigation Portal was brought into play in 2018, essentially replacing all paper filings and introducing online management of cases. Then in 2020, the BVI was quick to adapt to COVID-19 restrictions with minimal disruptions. After a short hiatus, when anything other than urgent hearings were put off, the High Court and Commercial Court began operating remotely almost as normal

and have since conducted all hearings, including urgent injunction hearings and full trials by video link with appearances of counsel and witnesses from within the Territory and outside it.

Cryptocurrency

The BVI regulator, the FSC, has recognised crypto-focused funds and the BVI government has indicated a crypto-friendly approach in the past few years, which has led to the establishment of such businesses in the BVI, including several major crypto exchanges. However, to date, there is no legislation relating to initial coin offerings and initial token offerings, or to cryptocurrency more generally. Such legislation is expected in the future, but in the meantime the existing regulatory framework, relating to legal tender for instance, has to suffice, which was drafted years ago with no contemplation of cryptocurrency. It will be interesting to see how this plays out in the Courts if, as appears likely, BVI crypto businesses are involved in fraud and asset tracing cases. The BVI Courts are likely to apply the reasoning adopted by the English Courts in recent decisions relating to issues over ownership, situs, etc. of crypto assets.

VIII Recent Developments and Other Impacting Factors

The key recent developments discussed above all relate to the ability of the BVI Courts to operate effectively and efficiently in light of increasingly international fraud and the inter-relation with other jurisdictions. On that note, various amendments to the EC CPR are under consideration following the establishment of a Rules Review Committee in 2019. Amendments under consideration include third party disclosure orders and whether to remove the requirement for permission to serve a claim out of the jurisdiction. It may be that this requirement under part 7 of the EC CPR will be dispensed with, subject to the ability of a defendant to apply to set aside such service.

In the past year, the BVI Commercial Court handed down its first reasoned judgment on third party litigation funding (*In the Matter of Exential Investments Inc (in Liquidation)*). Following this judgment, the BVI appears to be "open for business" to professional funders looking to fund meritorious litigation and liquidations for a commercial return. This is likely to increase the already growing appetite among litigation funders to fund BVI liquidations and litigation, and to encourage creditors, liquidators and litigants to explore funding options. This should be seen as a welcome development for those affected by fraud.

Otherwise, topical issues in the BVI continue to be economic substance, following the BVI Economic Substance (Companies and Partnerships) Act coming into force in 2018, and beneficial ownership registers, following the enactment of the BVI Ownership Secure Search System Act in 2017, which makes certain information regarding BVI companies privately available to UK law enforcement agencies on request. Whether or not a fully public register of beneficial interests of BVI companies should be in place is a live and controversial political and economic issue.

Alex Hall Taylor QC is head of Carey Olsen's BVI dispute resolution and insolvency practice. He lives and works in the BVI, appearing regularly in the ECSC Commercial Court. Alex has over 20 years' Court experience in commercial litigation and dispute resolution across a broad range of commercial, company, shareholder, trusts, insolvency, restructuring, civil fraud, asset tracing, security enforcement, tax, professional liability and fiduciary claims, arbitrations and mediations. He has extensive case management, interlocutory, trial and appellate advocacy experience including before the Privy Council. He is a CEDR-accredited mediator. His practice is principally contentious, involving advocacy, tactical advice and strategic expertise in high-value, complex, document-heavy matters that are frequently multi-jurisdictional in nature.

He is a member of the BVI Bar Association, the Recovery and Insolvency Specialists Association (RISA), the Chancery Bar Association, the Financial Services Law Association, and is a Governing Bencher of the Inner Temple.

alex.halltaylor@careyolsen.com

Richard Brown is a BVI partner in the dispute resolution and insolvency team, based in London. His practise encompasses all aspects of BVI commercial disputes, but with a focus on insolvency, fraud and asset recovery, shareholder disputes and contentious trust matters. Richard has particular experience of obtaining interlocutory relief such as freezing injunctions and Norwich Pharmacal orders, often in support of foreign court proceedings or arbitrations. He is a solicitor advocate and regularly appears in the BVI Commercial Court and Eastern Caribbean Court of Appeal. Richard started his career with Hogan Lovells in London, prior to moving to the BVI in 2013. He was admitted as a solicitor advocate in the BVI in 2013. Between 2015 and 2017, Richard worked for Carey Olsen in Jersey. He is a member of the Insolvency Lawyers Association, R3, INSOL, RISA, and the Commercial Fraud Lawyers' Association.

richard.brown@careyolsen.com

Tim Wright is a partner in Carey Olsen's British Virgin Islands Dispute Resolution and Insolvency team. He rejoined Carey Olsen in December 2020 having been head of litigation at another offshore law firm. Tim advises on a wide range of litigation and insolvency matters drawing on his broad onshore and offshore experience. He is a Solicitor Advocate and Barrister and regularly appears in Court.

Tim's work in the BVI has focused on cross-border fraud and asset tracing, and all forms corporate insolvency work, including liquidation. Tim has particular experience in acting for and against liquidators, in shareholder disputes and unfair prejudice petitions, trust disputes and fraud work, and complex multi-jurisdictional cases emanating especially from Russia/CIS and China. He is regularly instructed on an emergency basis in relation to interim remedies such as freezing injunctions, the appointment of receivers, and Norwich Pharmacal relief (third party disclosure orders).

Tim is a member of INSOL and sits on the Board of the BVI's Recovery and Insolvency Specialists Association (RISA).

tim.wright@careyolsen.com

Simon Hall is counsel in Carey Olsen's BVI Dispute Resolution and Insolvency team.

Simon moved to the BVI in 2015 and has significant BVI litigation experience. His caseload has primarily involved shareholder / director disputes, fraud and asset tracing, contentious trust and probate, and insolvency work. This has also included a wide array of interlocutory work including applications for freezing orders, prohibitory injunctions and the appointment of receivers. Simon has conducted litigation before the BVI Commercial Court, ECSC Court of Appeal and the Privy Council. He has acted for a wide range of clients including large financial institutions, high-net-worth individuals, insolvency practitioners and professional trustees.

Simon has considerable advocacy experience and regularly appears as lead and junior counsel before the BVI Commercial Court and ECSC Court of Appeal. He has conducted numerous trials in the BVI as well as interlocutory hearings, and interlocutory and final appeals. Simon originally trained as a solicitor in England and Wales and was admitted in the BVI in 2015. He has Higher Rights of Audience.

simon.hall@careyolsen.com

Cayman Islands

Jan Golaszewski
Carey Olsen

Denis Olarou
Carey Olsen

Sam Dawson
Carey Olsen

Peter Sherwood
Carey Olsen

I Executive Summary

The Cayman Islands is a leading global financial services industry centre, hosting most of the world's hedge funds by number and by net assets, the second most captive insurers, and half of the companies listed on the Hong Kong Stock Exchange. Inevitably, such concentration of financial services activity generates a considerable number of complex disputes, including fraud disputes.

The international nature of the financial services industry and other companies registered in the Cayman Islands necessarily means that fraud litigation is almost invariably cross-border. Sometimes this will be because the assets against which the victim will need to enforce are abroad. Other times, the jurisdiction may play a supporting role in the enforcement of foreign judgments over assets in the Cayman Islands and the preservation of such assets pending the conclusion of foreign proceedings.

Whichever it is, the jurisdiction's judiciary and legal profession are highly experienced in all types of complex cross-border fraud disputes. The Cayman Islands Grand Court has handled some of the biggest and most complex fraud trials, including the *AHAB v Al-Sanea* trial which concerned claims over US$9 billion, lasted over a year, resulted in a 1,300-page judgment, and has been said to have dealt with one of the largest Ponzi Schemes in history.

As described in more detail below, the jurisdiction offers a full suite of discovery, document and asset preservation, and enforcement tools that will be familiar to common law practitioners. The Cayman Islands Courts are also used to rendering

and obtaining mutual cross-border judicial assistance in appropriate cases. These factors facilitate the successful pursuit of fraudsters in the jurisdiction, whether on a domestic level or as part of a cross-border multi-jurisdictional effort as is more often than not the case.

II Important Legal Framework and Statutory Underpinnings to Fraud, Asset Tracing and Recovery Schemes

The legal system of the Cayman Islands is close kin to that of England and the various Commonwealth jurisdictions. Those familiar with such common law jurisdictions will find that, for the most part, they are on familiar ground when it comes to fraud litigation generally and the business of asset tracing and recovery in particular.

While there may occasionally be some devil in the detail, particularly with many elements of common law in England becoming increasingly codified in statute, the substantive common law causes of action typically utilised by a fraud litigator in England are known to the Cayman Islands legal system.

Similarly, all the classic discovery, document preservation, and asset preservation instruments of the fraud-fighting toolkit, such as *Norwich Pharmacal*, *Anton Piller*, *Bankers Trust*, and *Mareva* orders are available and the Cayman Islands Courts are well versed in their use. In appropriate circumstances, the Cayman Islands Courts both issue and honour requests for foreign judicial assistance. Where fraud has resulted in insolvency and the appointment of official liquidators over a Cayman Islands company, this might sometimes open up additional avenues for making recoveries.

Publicly available information

Some information that could be useful in pursuing recoveries is, in fact, publicly available without the need to make any application to the Court:

- The list of current directors of every company, whether resident or exempted, is publicly available online.
- The list of shareholders of resident companies is also available for public inspection.
- The land registry records identifying the owner of land and the existence or otherwise of a mortgage over it is open for public inspection.
- The register of aircraft, which shows the registered owner and other information, is publicly available on the Civil Aviation Authority website.
- Vessel transcripts for maritime vessels registered in the jurisdiction are publicly available from the Cayman Islands Shipping Registry website and include information about the current owner. Further information, including previous owners, mortgages, and the history of transfers is available via an in-person inspection at the offices of the Registry.

The list of shareholders of exempted companies is not currently available to the public. However, the Cayman Islands Government has committed to the implementation of public beneficial ownership registers of companies by the time they are implemented by the EU Member States (which is expected to be in 2023).

As such, despite the jurisdiction's somewhat romanticised reputation for secrecy, it is sometimes possible to collect useful information in support of a fraud claim before resorting to the assistance of the Courts. When the time to seek the Courts' assistance does arrive, the applicant will invariably find that the judiciary is highly experienced in deciding the relevant applications and that genuinely urgent matters are decided with due expedition.

Norwich Pharmacal

Norwich Pharmacal orders are available against those who have become "mixed up" in the wrongdoing committed by another and are a potentially powerful tool for identifying the wrongdoer and obtaining other information that might be vital to the successful prosecution of a fraud claim. The applicant must show a good arguable case of wrongdoing, that the respondent is involved in the wrongdoing as more than a mere witness, that the target of the order is likely to have the documents sought, and that the order is necessary and proportionate in the interests of justice.

The classic targets of such orders in the Cayman Islands are the professional service providers (RO Providers) that provide registered office services to exempted Cayman Islands companies. The RO Providers are subject to strict KYC and AML requirements in respect of each company to which they provide registered office services. Among other things, they must collect and keep information about the companies' shareholders and, in certain cases, their beneficial owners. While this information is not public, it can be the target of *Norwich Pharmacal* applications in appropriate circumstances.

In appropriate circumstances, a *Norwich Pharmacal* order can be combined with a "gag order" which prevents the subject of the order from disclosing to its client that it has been ordered to provide information. This can be important to avoid tipping off the wrongdoer and reduce the risk of the wrongdoer destroying evidence or dissipating assets.

The Cayman Islands Courts can also make *Norwich Pharmacal* orders in support of foreign proceedings. However, in such cases, consideration may need to be given to whether it might be more appropriate to seek relevant disclosure pursuant to a letter of request from the foreign Court (*Arcelormittal USA LLC v Essar Global Fund Limited* [2019 (1) CILR 297], under appeal). The Cayman Islands Courts have statutory jurisdiction to honour such letters of request in appropriate circumstances under the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978. Whether the statutory remedy displaces the equitable *Norwich Pharmacal* jurisdiction will be a question of fact in each particular case.

Bankers Trust

Exceptionally, discovery might be obtained from banks under *Bankers Trust* orders to assist in the tracing and preservation of assets where there is a proprietary claim. In addition to all of the requirements that must be satisfied for a *Norwich Pharmacal* order, the applicant will also have to show that there is good reason to believe that the bank holds property misappropriated by fraud or breach of trust and to which the applicant has a proprietary claim. It must also be shown that the information will be used solely to trace the funds.

Anton Piller

Anton Piller orders enable an applicant to enter and search the respondent's premises for documents and property that are the subject matter of the dispute, and to remove the same. Given the draconian nature of the remedy, the test is even more demanding than for *Norwich Pharmacal* orders and requires an extremely strong *prima facie* case, clear evidence that the respondent has incriminating evidence in their custody which there is a real possibility they will destroy, and the potential for serious damage to the applicant.

Mareva

Finally, *Mareva* freezing orders are available both in support of domestic proceedings and in aid of proceedings abroad. Freezing orders under the so-called "Chabra" jurisdiction may be available against parties against whom there is no claim, if it can be shown that there is a good arguable case that the third party holds assets that belong to the defendant against whom there is a claim. Chabra freezing orders may be made against third parties based in the Cayman Islands or against third parties (whether based in the Cayman Islands or not) which have assets within the jurisdiction. Freezing orders are often combined with ancillary disclosure orders that are intended to help the applicant police compliance with the freezing order.

If the applicant has a proprietary claim to the relevant assets, proprietary freezing orders may be obtained, which do not require the applicant to show a risk of dissipation.

Receivers

If the risk of dissipation is so high that even a freezing order does not offer adequate protection, the Cayman Island Courts may appoint a receiver, whose function it is to preserve the relevant assets until judgment. As with freezing orders, receivers may be appointed in support of foreign proceedings.

Official liquidators

It is often the case that fraud results in the appointment of official liquidators over the company that was defrauded or was used as the vehicle of fraud by those in control. Appointment of liquidators denudes the directors (who sometimes are the wrongdoers) of their power and brings in a partially retrospective moratorium on disposals of the company's property, thus acting almost as a form of asset preservation. In suitable cases, appointment of provisional liquidators can be made *ex parte* in order to secure the remaining assets.

Further, official liquidators have unique powers that may sometimes assist in the pursuit of the fraudsters, although their exercise in that context is not always without certain difficulties.

Official liquidators have statutory powers to call for documents and information about the company's business from certain persons (ss 103 and 138 of the Companies Act (2021 Revision)). The Cayman Islands Courts will enforce those powers by their orders, including, in appropriate circumstances, against persons resident outside the Cayman Islands. Letters requesting foreign judicial assistance will be issued where appropriate. However, while these powers can prove very useful indirectly, the way in which they can be exercised is tightly controlled by the Courts to avoid conferring on liquidators unfair advantage in litigation (Re Basis Yield Alpha Fund (Master) [2008 CILR 50]).

In addition to their information gathering powers, the official liquidators also have access to certain causes of action that are not available to ordinary litigants:

- avoiding preferential payments (s. 145 of the Companies Act);
- avoiding fraudulent dispositions at undervalue (s. 146 of the Companies Act); and
- seeking orders requiring persons guilty of fraudulent trading to contribute to the assets of the company (s. 147).

To the extent the company over which the

liquidators are appointed still retains some cash or other liquid assets, it can also be the case that liquidators are in a stronger financial position to pursue recoveries than any of the smaller individual victims of the fraud might be. Of course, the obverse of this is that the recoveries the liquidators make go to the liquidation estate to be distributed between the relevant stakeholders *pari passu*.

III Case Triage: Main stages of fraud, asset tracing and recovery cases

Litigation is expensive and fraud litigation is more expensive than most others. Therefore, a preliminary high-level assessment of prospects of recovery (as opposed to merely prospects of winning) coupled with early consideration of funding issues is often a sensible first step. At such an early stage this can never be anything like a precise exercise, but, even so, giving these issues some early thought can be helpful. This may require collaboration between the client, its lawyers in various jurisdictions, private investigators, forensic accountants, and funders. Key jurisdictions of interest are identified, any evidence that can be collected without involving the Courts is collected, and a high-level case strategy is worked out through to enforcement.

In the next stage, the strategy is implemented in respect of any further information gathering with the help of the Court (e.g. via *Norwich Pharmacal* and other orders discussed above). Often, this is done in conjunction with obtaining freezing relief.

With the assets secure, substantive claims can then proceed to trial and, eventually, enforcement of judgment.

IV Parallel Proceedings: A combined civil and criminal approach

Parallel civil and criminal proceedings are possible in principle and consideration might be given to this approach in appropriate circumstances. However, they are, in practice, uncommon.

Although private prosecutions are possible in theory under ss 13 and 108 of the Criminal Procedure Code (2021 Revision) (CPC), it is the Director of Public Prosecutions (DPP) that has ultimate authority in respect of conduct of prosecutions. In particular, the DPP has the power to take over any private prosecution at any time (s. 12(5) CPC). Even if the DPP does not exercise its power to take over the proceedings, a private prosecution may not be as easy to settle and discontinue at will as a civil case. Therefore, while engaging the criminal jurisdiction may certainly have some advantages, it also inevitably involves at least some loss of control over the process, which may be an important commercial consideration.

Further, when it comes to relief, it is the DPP that has standing to seek the powerful remedies under the Proceeds of Crime Act (2020 Revision). The decision as to whether to seek such remedies, when to do so, and which remedies to pursue is up to the DPP. Not all of those remedies might necessarily always be optimal from the point of view of a private litigant's imperative to maximise its own recoveries. As with any prosecutorial authority, there can be no expectation that the DPP will take the same view on how to proceed as the private litigant would.

Finally, undertaking parallel civil and criminal proceedings does run the risk that the civil proceedings might be stayed.

V Key Challenges

Funding is often a key practical challenge in fraud claims. The claim funding landscape in the Cayman Islands is about to be revolutionised with the anticipated coming into force of the Private Funding of Legal Services Act 2020. This Act will, when it comes into force, abolish the offences of maintenance and champerty and, subject to certain requirements, will enable lawyers to accept cases on the basis of conditional and contingency fee arrangements. This can be expected to enable some claims which could not otherwise be brought for financial reasons to be prosecuted and to open up the world of litigation funding and innovative fee structures, which hitherto was largely restricted to liquidations, to litigants in general.

With defendants, evidence, witnesses, and assets often strewn across the entire globe, the other common key challenge is effective coordination of service, evidence gathering, protective measures, and enforcement strategies across multiple jurisdictions and time zones. Fortunately, the Cayman Islands Courts and legal practitioners are well versed in dealing with these challenges.

VI Cross-jurisdictional Mechanisms: Issues and solutions in recent times

As noted above, the Cayman Islands is a jurisdiction that is well versed in providing and seeking cross-border judicial assistance in appropriate cases. The jurisdiction is also party to essential international service conventions, has a robust regime for the enforcement of foreign Court judgments, and is a signatory to the relevant arbitration conventions facilitating the enforcement of arbitral awards. Taken together, these cross-jurisdictional mechanisms make the Cayman Islands a friendly jurisdiction for cross-border litigation.

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 applies in the Cayman Islands and enables service of documents via the Clerk of the Court pursuant to a written request from the relevant authority of the requesting jurisdiction.

In the area of evidence gathering, the principal provisions of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 apply in the Cayman Islands, having been extended by the Evidence (Proceedings In Other Jurisdictions) (Cayman Islands) Order 1978. Pursuant to these provisions, the Grand Court of the Cayman Islands regularly facilitates discovery requests from Courts of other jurisdictions. While there are some safeguards on the type of evidence gathering requests that will be effected, mostly to prevent fishing expeditions and oppressive behaviour, a considerable degree of deference is exercised to the requesting foreign Court's views on what documents are necessary for the purposes of the foreign proceedings.

Enforcement of foreign judgments in the Cayman Islands proceeds on the basis of common law principles (with the exception of Australian judgments, in respect of which there is a statutory basis for enforcement). Subject to satisfying the requirements of personal jurisdiction and finality, and in the absence of any fraud, breach of natural justice, or violation of public policy, both money and (in certain circumstances) non-money judgments can generally be enforced without re-litigating the merits of the dispute.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been extended to the Cayman Islands by the United Kingdom and is given domestic effect by the Foreign Arbitral Awards Enforcement Act (1997 Revision). This makes the Cayman Islands a robust jurisdiction for the enforcement of arbitral awards, and makes arbitral awards made in the Cayman Islands enforceable in other New York Convention states. Similarly, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of

Other States has been extended to the Cayman Islands, making it possible to enforce Washington Convention investment arbitration awards in the Cayman Islands.

VII Technological Advancements and their Influence on Fraud, Asset Tracing and Recovery

Fraud and technological advancements are inextricably linked in a variety of ways. Fraudsters are often early adopters and adept users of new technology. They can also become its unwitting victims, leaving traces they did not intend to leave. The world of fraud technology can both enable and entrap. Technology can also be a powerful tool for untangling the web the fraudsters weave, helping lawyers and investigators sift otherwise unmanageable volumes of data for nuggets of evidence. Those who pursue fraud proceedings need to remain alive to the relevant technological advancements to succeed.

In this regard, the Cayman Islands faces some of the same issues faced by other jurisdictions the world over: the explosion in the volume of digital information, the proliferation of multiple private messaging services with end-to-end encryption that bypass the traditional email, tracing cryptocurrency to its owners. But the Cayman Islands also benefits from the same advances in investigative technology that are available to other jurisdictions, such as, for example, the increasing sophistication of document review AI's, which can enable drastic reductions in the manpower requirements for the traditionally expensive discovery stage of fraud litigation.

VIII Recent Developments and Other Impacting Factors

The most immediate recent significant development, albeit one which is yet to come into force, is the passage of the Private Funding of Legal Services Act 2020. As well as doing away with the offences of maintenance and champerty, the Act will introduce much needed clarity into the parameters within which claimants can negotiate and agree litigation funding arrangements, contingency fee arrangements, and conditional fee arrangements in the Cayman Islands.

However, 2020 has also seen a number of legislative developments in the cryptocurrency space which, although they will perhaps have a less immediate and obvious impact on the business of fraud litigation in the short term, might be expected to have longer term effects.

In particular, during the course of 2020, the Cayman Islands legislature passed the Virtual Asset (Service Providers) Act, 2020 (VASP Act). The VASP Act introduces a broad definition of "*virtual assets*", which covers digital representations of value that can be digitally traded or transferred and can be used for payment or investment purposes. The main purpose of the VASP Act is to establish a FATF-compliant framework for the supervision and regulation of virtual asset services businesses in the Cayman Islands, and it can be expected that it will facilitate the growth of this industry in the jurisdiction in the coming years.

As with any other financial industry product, sector growth might be expected to correlate with a growth in connected fraud litigation in due course.

Finally, the Cayman Islands continues to expand public access to corporate records. Having made the names of current company directors open for public inspection (in person) back in 2019, the jurisdiction has now opened up the register for online access. The jurisdiction committed to providing public access to beneficial ownership registers once such access is implemented by the EU Member States, which is expected to be in 2023.

Jan Golaszewski is a partner and head of Carey Olsen's dispute resolution and insolvency practice in the Cayman Islands office. He has a broad range of experience in the offshore and financial services context with an emphasis on multi-jurisdictional commercial litigation, arbitration and insolvency matters including fraud and asset tracing, corporate disputes and banking and finance litigation. Many of his cases have involved interim protection for creditors and shareholders. Jan is an experienced advocate and he has appeared at all levels of the Courts in the Cayman Islands.

Jan has acted as an expert witness on Cayman Islands law in many foreign court and arbitration proceedings, including being deposed and appearing in Court and giving testimony in the United States District Court, Southern District of New York.

Jan is a member of the International Bar Association, INSOL and the American Bankruptcy Institute (ABI).

jan.golaszewski@careyolsen.com

Denis Olarou is counsel in the Cayman Islands' dispute resolution and insolvency team. He advises on the laws of the Cayman Islands and of the British Virgin Islands. Denis has over a decade of experience in helping clients resolve complex high-value multi-jurisdictional disputes. His broad practice spans all aspects of insolvency litigation, fraud and asset tracing, shareholder and partnership disputes, as well as general contract and tort claims, including applications for urgent injunctive relief. Denis has also represented clients in international commercial and investment treaty arbitrations and advised on the enforcement of arbitral awards.

Denis has published a number of articles on the subjects of litigation, arbitration, and anti-corruption regulations. He is a member of the British-Russian Law Association, INSOL International, the American Bankruptcy Institute (ABI), the Recovery and Insolvency Specialists Association (RISA), and the Cayman Islands Legal Practitioners' Association. Denis is also an associate of the Chartered Institute of Arbitrators (CIArb) and a native Russian speaker.

denis.olarou@careyolsen.com

Sam Dawson is a partner in Carey Olsen's dispute resolution and insolvency and restructuring practice in the Cayman Islands. He has extensive litigation experience with a primary focus on the financial services sector.

Sam also has particular expertise in the field of insolvency and restructuring and is regularly instructed to act for liquidators and receivers (including foreign appointees), management, security holders, investors, and unsecured creditors in relation to both contentious and non-contentious matters.

Sam is a former Director of the Recovery and Insolvency Specialists Association of Cayman (RISA), as well as a member of the American Bankruptcy Institute (ABI) and INSOL International.

sam.dawson@careyolsen.com

Peter Sherwood is a partner in the dispute resolution and insolvency team in the Cayman Islands. He advises on all aspects of insolvency litigation, general banking and commercial litigation, fraud and asset tracing and non-contentious insolvency and restructurings.

Peter qualified as a solicitor of England and Wales in 2008. Prior to joining Carey Olsen in 2015, he worked for leading international firms in London and in Sydney, working on contentious and non-contentious insolvencies and restructurings. Peter has acted for insolvency practitioners and creditors in complex financial services firms and brokers insolvencies, and has advised creditors and debtors on large, cross-border restructurings. He also has banking and commercial litigation experience. Peter was admitted as an attorney-at-law of the Grand Court of the Cayman Islands in 2015.

peter.sherwood@careyolsen.com

Carey Olsen has one of the largest dispute resolution and litigation teams in the offshore world. We represent clients across the full spectrum of contentious and semi-contentious work.

We are recognised for our expertise in both international and domestic cases, including investment funds, corporate, commercial and civil disputes, banking, financial services and trusts litigation, fraud and asset tracing claims, restructuring and insolvency, regulatory investigations, employment disputes and advisory work.

From mediation to trial advocacy, we guide our clients through the full range of disputes, from multi-party, cross-jurisdictional corporate litigation to domestic claims before the local courts. We have also represented clients before the Privy Council. Many of our cases have established judicial precedents that are referred to in jurisdictions around the world.

We advise on the laws of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey and Jersey across a global network of nine international offices.

www.careyolsen.com

CAREY OLSEN

England & Wales

Keith Oliver
Peters & Peters Solicitors LLP

Amalia Neenan
Peters & Peters Solicitors LLP

The past 12 months have been unprecedented. Not since World War II have we, as a global community, faced a threat of this magnitude that has interrupted and altered our day-to-day lives in such a drastic way. Shockwaves have been felt in all sectors. As was mentioned in last year's edition, fraud is a major risk to the global economy. Now, as we enter a worldwide economic downturn in the wake of COVID-19, the threat is exponentially higher. According to *UK finance,* £1.2 billion was lost to fraud in the UK in 2019. However, with the 2020 figures yet to be released, and factoring in the mass disruption created by the pandemic, it is highly likely that these numbers are set to rise. Such is the case that the *Royal United Services Institute* (RUSI) has suggested that due to the scale of the problem, fraud should be classed as a threat to national security.

Additionally, the beginning of this year has heralded a new age – one in which the UK is no longer part of the European Union. Now that Exit Day has finally come and gone, the UK is aiming to find its own role on the global stage. Brexit presents various opportunities and challenges for practitioners in this sector, which have of course been compounded by the difficulties created during the global health crisis. Therefore, in this chapter we explore the current legal framework underpinning fraud, asset tracing and recovery cases in England & Wales, examining how it has stood up against these challenges and what issues the future may bring as we attempt to regain control over what has been termed the *'new normal'*.

Important Legal Framework and Statutory Underpinnings to Fraud, Asset Tracing and Recovery Schemes

"How oft the sight of means to do ill deeds make deeds ill done!"
King John
Act IV, Scene II

In last year's edition we quoted Shakespeare's immortal words in King Lear, *'tremble, thou wretch, that hast within thee undivulgèd crimes, unwhipped of justice'*. In this edition we instead focus on the Bard's dramatisation of another English monarch, King John. Both speeches focus heavily on the notions of crime and punishment, a theme that is a constant throughout

the entirety of Shakespeare's collective works – perhaps because criminality has consistently plagued society, from the Bard's time and beyond. However, just as *'ill deeds'* have played the role of antagonist, the English justice system has long assumed the protagonist role deftly. The English courts warrant this reputation. The unparalleled impartiality and extensive range of technical expertise of the judiciary are admired the world over. The *Portland Communications Commercial Courts Report 2020* indicates that in the area of civil fraud the English Courts have seen an increase in litigants from specific countries such as Kazakhstan and Russia – a promising sign for the English courts' place on the international stage despite the uncertainty of Brexit. Additionally, there were over 70 different litigant nationalities for the second year running, which indicates the English Courts' prominence as an international powerhouse and key centre for dispute resolution. Furthermore, although the impact of COVID-19 is yet to be fully quantified, during the pandemic the civil courts have embraced the aid of technology to hold remote hearings *et al*, as testimony to the innovative and adaptable nature of the English justice system.

This is unsurprising, as in relation to a fraud, asset tracing and recovery context, it was the English legal system's innovation that essentially launched the global methodology employed in this area that is used today. For instance, the English courts are well known for their development of unique and powerful orders for relief. Anton Piller orders (now termed search orders) were instrumental in sculpting the fraud recovery landscape worldwide. Derived from *Anton Piller KG v Manufacturing Processes Limited* CA 8 Dec 1975, these orders allow for the search and seizure of evidence if, as per Ormrod LJ, *'first, there must be an extremely strong prima facie case. Secondly, the damage, potential or actual, must be very serious for the applicant. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made'*. This then gave way to the statutory search order enshrined in section 7 of the Civil Procedure Act 1997, but not before the model established at the common law had been adopted by a plethora of different jurisdictions; e.g., Hong Kong and South Africa to name but two.

The same can be said of Mareva orders (now known as freezing orders). This freezing order was borne from the case *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509, and was an order deployed to prohibit judgment debtors from frustrating judgments against them by dissipating their assets. Similarly, these powers are now codified under section 37(1)&(3) of the Senior Courts Act 1981, and in Practice Direction 25A of the Civil Procedure Rules 1998. However, the original Mareva model has been adapted in some form or another internationally. In conjunction with this, the English system has another ace up its sleeve when it comes to utilising freezing orders on a global scale. Under section 25 of the Civil Jurisdiction and Judgments Act 1982, the English High Court has the ability to grant freezing injunctions to assist proceedings in a foreign country, as long as doing so would not be inexpedient, is ancillary to the foreign proceedings and there is a real and connecting link between the specified assets and England. This formidable international tool sets the UK apart in that this long-arm jurisdictional reach sends a powerful message to fraudsters. Wherever they run, the English courts will be in pursuit. Couple this power with a similar provision under US law, and the hunt for international fraudsters can be aided further still. Section 1782(a) of Title 28 (Judiciary and Judicial Procedure) of the US Code (28 USC) requires US-based persons to provide evidence for use in foreign proceedings outside the jurisdiction. On application to a federal district court, foreign litigants will be able to secure discovery for use in either criminal or civil matters. The section does not mandate that the discovery sought is admissible in the foreign proceedings, and neither is the applicant required to first seek the specified discovery from the foreign tribunal. Therefore, with the increasing globalisation of fraud matters, these devices are vital weapons that can be expertly deployed in the hunt for international fraudsters.

Another key mechanism is the Proceeds of Crime Act 2002 (POCA). Part 5 of POCA is intended to be used to enable '*the enforcement authority to recover, in civil proceedings before the High Court… property which is… obtained through unlawful conduct'* (section 240 (1)(a)). Unlawful conduct is defined as conduct which occurs *'in any part of the United Kingdom… if it is unlawful under the criminal law of that part'* (section 241 (1)). Part 5 also extends this provision to capture conduct '*which occurs in a country or territory outside the United Kingdom and is unlawful under the criminal law applying in that country or territory, and… if it occurred in a part of the United Kingdom, would be unlawful under the criminal law of that part'* (sections 241(2)(a) & (b)). The broad nature of Part 5 is demonstrated in section 242(2)(b), which does not impose restrictions of the type of conduct necessary to be counted as unlawful. *'It is not necessary to show that the conduct was of a particular*

kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct.'

However, the scope of POCA does not end here. Instead, it also provides for key court orders that can be deployed on a without notice basis during the course of an investigation. One of the most powerful tools is a section 357 disclosure order. *'A disclosure order is an order authorising an appropriate officer to give to any person the appropriate officer considers has relevant information notice in writing requiring him to do, with respect to any matter relevant to the investigation for the purposes of which the order is sought, any or all of the following— (a) answer questions, either at a time specified in the notice or at once, at a place so specified; (b) provide information specified in the notice, by a time and in a manner so specified; (c) produce documents, or documents of a description, specified in the notice, either at or by a time so specified or at once, and in a manner so specified.'*

Nevertheless, despite this order's wide-reaching effect, there are specific safety-net requirements that must first be met before it can be issued. For example, there must be reasonable grounds for suspecting that *'the person specified in the application for the order holds recoverable property or associated property'*, that the order be in the public interest, and *'information which may be provided…is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought'* (Section 358(2)(3)).

POCA is therefore a vital instrument in the war on fraud. Importantly, this is not a *'static'* statute, it is receptive to change to combat the ever-evolving threat of fraud head-on. Most recently, this was exemplified in the creation of Unexplained Wealth Orders (UWOs). UWOs are civil orders that shift the burden of proof by requiring individuals, who are either Politically Exposed Persons not in the EEA or suspected of involvement in serious crime, to explain how they obtained a particular property/asset (that is of a value in excess of £50,000), if it is reasonably believed that their legitimate known income would have been insufficient to finance those acquisitions (section 362A (3) POCA). It is important to note that UWOs are investigative powers only, and it is not a power to recover assets in and of itself.

II Case Triage: Main stages of fraud, asset tracing and recovery cases

Whilst the scope of this chapter is exclusively civil, criminal sanctions can be considered in conjunction with civil asset recovery if parallel proceedings are in play. For a more detailed exploration of parallel proceedings, please see Subsection III. Moreover, a symbiotic and complimentary approach, utilising both civil and criminal legal powers, should be considered throughout the process, to advance effective recovery practices.

When approaching civil fraud cases, it is generally accepted that there are four main stages to asset recovery: 1) *Triage/Preliminary Case Assessment*; 2) *Evidence Gathering*; 3) *Securing*

- *the Assets & Evidence*; and 4) *Enforcement & Confiscation*.

The first stage, *Triage/Preliminary Case Assessment*, is an initial assessment to fact-find and gather intelligence, as well as establish an investigation and tracing strategy. Part of this strategy planning will include identifying a preferred jurisdiction. Due to the wealth of court powers available under the civil system, England & Wales is an ideal jurisdiction. It is important to note that since exiting the European Union, instruments such as the EU Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation (Recast)) which have been used to claim jurisdiction over non-UK domiciled defendants cease to have effect. This particular instrument will apply to matters that were commenced prior to 31 December 2020 as per articles 67 and 69 of the Withdrawal Agreement and regulation 92 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479). The UK therefore is currently in the process of establishing independent mechanisms that will aid its ability for cross-jurisdictional enforcement. The UK is still able to do so under Common Law and also under individual jurisdiction agreements. In November 2020, the UK and Norway agreed to extend the 1961 Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters between the UK and Norway, whilst the UK awaits the outcome of its application to accede to the 2007 Lugano Convention.

It is also appropriate at this stage to determine the availability of third-party funding. Third-party litigation funding (TPLF) is now a well-established area in the UK, particularly in civil fraud and asset recovery cases. TPLF works through investors financing legal disputes in return for a percentage of any damages won. This can help to level the playing field, giving under-resourced claimants greater access to justice.

The second stage, *Evidence Gathering*, is essential and it is here that civil and criminal powers may complement each other. Without the proper gathering of the full spectrum of available and admissible evidence, a meritorious case may encounter difficulties at the first hurdle. This process may involve working with forensic IT experts/accountants and regulatory agencies. It can, and most likely will, require obtaining information from third parties (which may necessitate a range of civil disclosure orders, such as Norwich Pharmacal relief against banks or financial institutions). Finally, this may include collecting evidence from offshore jurisdictions. This can be difficult if the jurisdiction in question has a lax attitude towards preventing fraud, and so may be reluctant to share information. Therefore, it might be fruitful to deploy criminal powers in some instances to aid civil recovery. For instance, evidence can be gathered in multiple jurisdictions using domestic criminal powers or Mutual Legal Assistance, which can then be used in civil proceedings. For a further discussion on this aspect, see Subsection V.

Stage three, *Securing the Assets & Evidence*, uses the plethora of the UK courts' interim orders to protect evidence and assets that may become subject to litigation and enforcement. Take, for example, search orders. They allow for the defendant's premises to be entered to identify and preserve evidence relevant to the action. Moreover, worldwide freezing orders prevent defendants from dealing with any of their assets above a certain monetary level anywhere in the world. Tracing orders require defendants to set out in an affidavit their dealings with specific assets or monies over which the claimant asserts a proprietary right. Passport orders may be obtained in respect of defendants who pose a risk of flight from the jurisdiction. Finally, in certain cases, it may be possible to appoint a receiver to take control over the defendant's assets and manage them pending the determination of any claim.

Stage four, *Enforcement & Confiscation*, is contingent on the effective implementation of the first three stages. This will then ensure that appropriate remedies from the available suite of legal solutions are pursued, to successfully enforce a judgment against a fraudster for the confiscation and repatriation of stolen assets.

III Parallel Proceedings: A combined civil and criminal approach

In most scenarios, there is nothing to prohibit the use of parallel criminal and civil proceedings in this jurisdiction. The only caveat to this is when there is a real risk that the defendant would be subject to severe prejudice in either the criminal or civil proceedings, or both. This would be the case if there was sufficiently negative media coverage or publicity that has been caused by the simultaneous running of both cases. Notwithstanding these difficulties, the advantages of a multi-pronged attack can be fruitful. The shortfalls of one system can be addressed by the other. For example, punishment of offenders is the overriding objective of the criminal justice system. However, although this may be a consideration for victims, ultimately most parties are concerned with the retrieval of their stolen funds, which is why the civil mechanism is vital. Nevertheless, practitioners must be aware of the potential pitfalls that can occur when evidence or information is gathered through the investigation of one set of proceedings and whether, if at all, it can be used in the other. Moreover, defendants can employ stalling tactics by using the excuse that there are simultaneous proceedings in play. For instance, this could be to seek a delay in complying with court orders until the outcome of the other case. Yet, conglomerating these tools allows for an all-encompassing attack on fraudsters, assisting in making victims whole again.

However, despite the best efforts of a combined approach, in some instances neither a traditional criminal prosecution nor a civil litigation may be viable. Due to a variety of factors, the most prevalent of which is usually a lack of funding, it is increasingly common to find that the police or the CPS refuse to investigate or bring certain cases to trial. In 2017, only 3.1% of fraud cases were solved by local police, with 12.1% classified as *'ongoing'*, leaving 85% unsolved. Furthermore, even though the civil route may be able to pick up the slack in these circumstances, the process is still arduous in terms of both the length of procedure and the expense involved in bringing a civil claim.

Subsequently, there has been an increase in the utilisation of private prosecutions. In *R v Zinga [2014] EWCA Crim 52*, the Lord Chief Justice submitted that *'at a time when the retrenchment of the State is evident…it seems inevitable that the number of private prosecutions will increase'*. An individual or a company who has been defrauded can bring a private prosecution under section 6(1) Prosecution of Offenders Act 1985. Proceedings will take place in the same manner as if they were brought by the Crown and are normally held in the Magistrates' Court in a matter of weeks. Typical timeframes on these types of cases, depending on the evidence involved and whether funds or criminality have a foreign jurisdictional nexus, can take up to nine months to complete, which although substantial, can be faster than both the traditional criminal and civil avenues. Other benefits to this mechanism include greater control for victims in deciding how the case progresses. For example, victims can decide what compensation orders should be sought, the proceeds of which will go to the victim, unlike public prosecutions where confiscated assets are given to the State. However, some have raised concerns that the instrument is merely a tool to be exploited by wealthy litigants who can pay for justice. Nevertheless, the English legal system is striving to cultivate a standardised approach in this area, particularly with the creation of the Code for Private Prosecutors established by the

Private Prosecutors' Association which aims to institute guidance for best practice in the field.

Therefore, whether a symbiotic criminal and civil approach is taken, or a private prosecution is brought, it is clear to see that the courts of England & Wales are eager to offer redress for victims in a glut of inventive ways, sending the message that there is nowhere for fraudsters to hide in this jurisdiction.

IV Key Challenges

The process of investigating fraud and attempting to retrieve misappropriated funds can be hindered by different challenges. As with most things, information is key. In order to effectively trace assets, extensive information-gathering expeditions are made in order to secure leads on where assets may have been transferred (see Subsection II). This may be as simple as searching a public database, to more nuanced investigative tools such as seeking court orders to collate the requisite information. However, this may not be as simple as it sounds. It takes time and resources to collect such information.

Additionally, in the digital era, two scenarios commonly occur. The first is where technological advancements have created information *'blackholes'*, allowing fraudsters to hide behind levels of encryption to mask their identities when stealing assets. Data deficits can create severe hinderances to both the prosecution of fraudulent actors, and the retrieval of the monies they have taken. Scenario two looks at the opposite end of the spectrum, when there is an abundance of data that must be analysed, converted into a usable format and then interpreted. This is exceedingly time- and resource-intensive, requiring specialist knowledge and expertise.

V Cross-jurisdictional Mechanisms: Issues and solutions in recent times

Today, fraud, asset tracing and recovery cases are rarely domestic in their entirety. Misappropriated assets are often hidden across national borders and require international cooperation to be traced effectively. Nevertheless, different jurisdictions take different approaches to tracing and recovering assets. Differing legal procedures, or attitudes to fraud, can complicate the cross-border coordination of recovery. For example, offshore jurisdictions, like the BVI, have historically had reputations as alleged havens for illicit monies. This is in part due to secrecy provisions that cover the true identities of beneficial ownership. Nevertheless, some British Overseas Territories (Anguilla, Bermuda, Cayman Islands, the Falkland Islands, Montserrat, the Pitcairn Islands and St Helena, Ascension Island and Tristan da Cunha, and the Turks and Caicos Islands) have, as of July 2020, committed to introduce completely public ownership registers by 2023. This follows on from the general shift in global attitudes towards promoting transparency and accountability. During his first presidential run, former President Barack Obama brought attention to Ugland House in the Cayman Islands. This was the home to law firm, Maples and Calder as well as the registered offices of over 18,000 additional offshore corporate entities. Obama remarked, *"either this is the largest building in the world or the largest tax scam in the world"*. However, it should be noted that these registrations were perfectly legal. Instead, the problem is (and has always been) that nefarious actors will seek to exploit loopholes in the system, whether it be legitimate offshore structuring provisions, or the general challenges presented by cross-jurisdictional coordination. It is therefore essential that the courts of England & Wales continue to creatively circumvent these obstacles, adapting to the ever-changing fraud landscape.

Furthermore, one of the key considerations of international asset tracing is that once the

monies are located, they must stay put. Therefore, English courts use tools such as worldwide freezing orders that can block the transfer of any funds or assets in the possession of the fraudster, which can ensure both the successful enforcement of an English judgment overseas, and the ultimate retrieval of funds that have found themselves there. Fraud is truly a global crime and does not limit itself to one geographical or economic trading block. Therefore, the UK is incredibly adept at pursuing fraudsters and their loots internationally.

VI Technological Advancements and Their Influence on Fraud, Asset Tracing and Recovery

The March of Technology, which has raced forward with great momentum over the past few years, has been drastically supercharged by the pandemic. The civil fraud and asset recovery sphere is but one sector that has been impacted by the progressive challenges and opportunities created by the technological response to the global health crisis. One of the key features of last year in the wake of numerous governmental edicts to *'Stay Home, Save Lives'* was the migration of the English courts to online platforms. Virtual trials are now commonplace, with advocates, litigants, judges all *'dialling in'* from remote locations, making use of virtual witness testimony, and circumventing geographical boundaries that afflict many multi-jurisdictional matters. In a socially distanced new world, it appears as if we have never been more connected.

Nevertheless, with this exponential growth, there has been little to no time to test the limits of this new way of working. For instance, at present there has been no concrete study on the impact of remote access on trial procedure when it concerns virtual witness testimony. Historic opposition to the use of video conferencing has focused on the perceived inability of a party to effectively cross-examine witnesses, which could impact whether the trial judge would be able to assess that witness' demeanour in court. *In McGlinn v Waltham Contractors Ltd and others* [2007] EWHC 149 (TCC) (21 February 2007), the court rejected the notion that: *"the order sought causes or could cause any significant prejudice to the defendants. They can cross-examine the claimant effectively over a video link. Whilst, of course, that is never quite as satisfactory as direct cross-examination, no real prejudice to the defendants has been or, in my judgment, could be identified as a consequence of this."* At the time of writing, the only study into this issue is the April 2020 report entitled, *'Exploring the case for Virtual Jury Trials during the COVID-19 crisis: An evaluation of a pilot study conducted by JUSTICE'*. There is extensive guidance on virtual witnesses, discussing technical points such as choosing a neutral background for their 'Zoom' testimony and court dress. However, there is no specific mention of whether they can use papers or previous notes. Nor is there any information on the role of persons off-screen, indicating that there is a general lack of guidance in this area. If this is to be the way of the future, only time will tell what the long-term effects will be and whether any reactive policies will be enforced to homogenise the practice.

It should also be noted that this migration online has also created opportunities for fraudsters. The most prolific challenge has been the abuse of the UK government's Coronavirus Support Scheme package. In April 2020 the Treasury announced a series of support loans to help struggling UK businesses survive the economic uncertainty caused by COVID-19. The Coronavirus Bounce Back Loan Scheme is but one loan mechanism in the series, yet it is the most vulnerable to fraud according to a variety of sources including the National Audit Office, the Public Accounts Committee and the British Business Bank which supervises the Scheme. The loans are 100% government-backed, with applicants able to receive up to £50,000. The length of the loan is six years (which can be extended to 10 years on application) and is

interest-free for the first 12 months. However, there is a particularly heightened risk of fraud due to the pared-down online application process that has stripped back verification and due diligence checks in favour of application processing speed. This muted approach has left the Scheme exposed to a range of vulnerabilities such as multiple fraudulent applications that can be linked to single users and organised criminals establishing false companies on Companies House using stolen identities to apply to the Scheme. As of 19 November 2020, the Treasury reported that approximately 1.5 million government-guaranteed loans worth almost £65.5 billion had been delivered. 1.39 million of those loans were secured under the Bounce Back Loan Scheme alone, worth £42.2 billion. An October 2020 report published by the National Audit Office indicated that the Scheme could cause losses of £26 billion due to fraud, organised criminal infiltration and debt default. In the panic caused by the pandemic, we have seen the birth of a perfect breeding ground for fraudulent misuse. Appropriate safeguards have been relaxed potentially too far, at the expense of providing emergency access to funds. All we can do now is wait for the full scale of the problem to be unearthed, which may in time spawn subsequent litigious issues that practitioners must be live to.

VII Recent Developments and Other Impacting Factors

As mentioned in the above sections, alongside the impact of the global health crisis, the fraud and asset recovery sector in England & Wales has experienced the simultaneous effects of the UK's departure from the European Union. However, with the brokerage of the EU-UK Trade and Cooperation Agreement on 24 December 2020 (TCA), the storm of confusion and uncertainty surrounding Brexit has been somewhat quelled. The Agreement paves a way for the UK and the EU to mutually govern security, trade, as well as cooperative relationships regarding law enforcement. Nevertheless, the Agreement does not create long-term arrangements for key provisions dealing with cross-jurisdictional legal matters such as the enforcement of English judgments in foreign courts and *vice versa*. Fraud is rarely hampered by geographical borders, and international cooperation is vital in order to have a modicum of hope in repatriating misappropriated funds that have been stashed overseas. The mechanisms that we have employed to date (see Subsection II for details) have ceased to have effect. Yet, whilst this may cause a few teething problems in the short term, the UK is uniquely positioned to create bespoke arrangements with different States. We already have templates in place in the form of bilateral agreements with key players such as Cyprus, Germany and Italy.

The success of the TCA and other mechanisms is yet to be quantified. And whilst it can be said that the instrument has allowed us to create strong trade-related ties, it must be pointed out that it has (alongside differing opinions on the Brexit outcome) stoked stronger feelings of nationalism in Scotland and fanned the flames for a second Scottish Independence Referendum. Whether approved by the UK government or not, it is likely that the make-up of this 'United' Kingdom will be irrevocably changed, for better or worse. However, a new era for transformation is upon us and with that comes opportunity. As a jurisdiction, England & Wales has always been, and will remain, a vital player at the epicentre in the fight against economic crime.

This is certainly true with regard to the English courts' role in the curtailment of international cryptocurrency frauds. One of the fuelling factors that has led to the rise of this type of criminality, is the lack of homogenised classification. Therefore, the unprecedented publication of *The LawTech Delivery Panel Legal Statement on Cryptoassets and Smart Contracts*, distributed by the UK Jurisdiction Taskforce in 2019, suggests that the way to surmount this is to universally class these products as property. As per the statement, *'proprietary rights are recognised against the whole world'*. Therefore, by advocating for the attachment of property rights onto cryptoassets, if cryptoassets are misappropriated, we can now use the standing tools we have for the recovery of *'traditional'* properties in the crypto-sphere, across multiple borders. The then Chancellor of the High Court, and Chair of the UK Jurisdiction Taskforce, Sir Geoffrey Vos, stated that this was *'a watershed for English law…Our statement…is something that no other jurisdiction has attempted'*. A world first, by formally suggesting the blanket covering of cryptoassets as property. It appears as if this is a type of English law land-grab, demonstrating the innovative nature of the English courts in their attempt to create an organic and usable tool that applies existing mechanisms in nuanced settings. This approach was endorsed with great success in *AA v Persons Unknown* [2019] EWHC 3556 (Comm), where the High Court granted a proprietary injunction to assist an insurance company in recovering Bitcoin that it had transferred in order

to satisfy a malware ransom demand. This is a welcome safety net in the wake of the drastic price fluctuations that Bitcoin has seen at the start of 2021. On 8 January, the currency registered at an all-time high of $40,000, only to take a 17% dip weeks later, which is likely to have been caused by the economic uncertainty caused by the pandemic. The increased popularity and resultant fiscal attractiveness of the product are also likely to make cryptocurrencies ever more appealing to fraudsters. Over the past few months, practitioners have seen a surge in instructions on crypto-centric matters that have required a malleable skillset balancing legal knowledge with precise forensic tracing abilities. The scale of this task is enhanced when we look at the plethora of jurisdictional considerations that these issues present. The first and foremost being that there is no obvious jurisdiction. Instead, we are faced with a quasi-digital jurisdiction that does not corporeally exist. It is therefore vital that a robust legal underpinning be in place to act as a disincentive for nefarious uses. By attempting to enhance certainty amidst the confusion, the English courts are sending the message that they are a global leader in this domain.

It has been a year of unparalleled change. The government is now beating its drum in relation to its brokerage of trade deals with 63 countries as well as the EU worth £885 billion. A message of hope in light of the economic downturn caused by the pandemic. As history shows, however, out of every recession, an influx of frauds abounds. Unscrupulous individuals will always seek to exploit vulnerabilities. Whether this be vulnerabilities in new technologies, or the fiscal turmoil caused by the current health crisis. Fraudsters are adept at concocting new ways to target their victims, preying on people's naivety or optimism. As Michael Douglas' depiction of Gordon Gekko in the 1987 Oliver Stone classic, *Wall Street*, quips, *'greed is good'*. The mantra of the fraudster. Nevertheless, the unimpeachable reputation of the courts of England & Wales, compounded by their ingenuity and creativity when it comes to assisting the victims of fraud, should equip us to weather the storm. Whether it be the COVID-19 crisis, the influx of technological advancements, or the UK's evolution from EU Member State to autonomous nation, the next 12 months look set to be even more eventful than the last.

Peters & Peters Solicitors LLP is a leading commercial litigation and business crime specialist practice, providing outstanding services to governments, corporations and individual clients in the UK and abroad.

With a long and outstanding history, we strive to remain at the cutting edge of our specialist areas of expertise by pursuing innovative resolutions to legal problems. Our knowledge and experience across the full range of civil, regulatory and criminal issues uniquely positions us to advise clients on multi-faceted and complex crises arising in commercial contexts. We have worked on some of the most high-profile and challenging cases and investigations of recent years.

Our ability to handle what we term as 'crisis litigation' stands us apart from many of our peers. The confluence of our well-known business crime practice, our leading civil fraud expertise, and our commercial work ensures that when major corporates are faced with substantial claims involving these various disciplines, we are a first port of call.

www.petersandpeters.com

Keith Oliver specialises in commercial, regulatory and trust litigation. A renowned litigator and excellent practitioner, Keith is recognised as one of the world's best investigative lawyers and leads the firm's international strategy.

Keith has spent his career specialising in international disputes and the location, freezing and recovery of misappropriated assets involving emergency relief procedures and the management of legal teams from many jurisdictions. His work often involves multi-jurisdictional actions in the USA, continental Europe and worldwide. He is widely recognised as one of the UK's leading lawyers in civil fraud with a reputation for addressing and resolving the most intractable of disputes and crises faced by individuals and companies.

Keith is consistently ranked as a 'leading lawyer' in both The Legal 500 and Chambers and Partners legal directories in the Commercial Litigation, Civil Fraud and Fraud categories.

keoliver@petersandpeters.com

Amalia Neenan is the Commercial Litigation & Civil Fraud Legal Researcher at Peters & Peters Solicitors LLP in London. Having been called to the Bar of England & Wales in 2015, Amalia then completed a Master's in International Business Law at the London School of Economics and Political Science in 2019, where she specialised in Cryptocurrency Frauds and the intersect between the Law and Technology. Amalia recently lectured on this topic in Cyprus as part of the McNeil International Symposium on Laws and their Applications for Sustainable Development. She regularly co-authors articles in this area with the Head of International at Peters & Peters Solicitors LLP. Amalia is also a Professional Mentor for the nationwide charity 'The Girls' Network', which partners young women from underprivileged backgrounds with female professionals from a variety of different sectors and industries.

aneenan@petersandpeters.com

in·sight

/ˈin,sīt/

noun

noun: **insight**

• **the capacity to gain an accurate and deep intuitive understanding of a person or thing.**

synonyms: intuition, discernment, perception, awareness, understanding, comprehension, apprehension, appreciation, penetration, acumen, perspicacity, judgment, acuity; vision, wisdom, prescience

• **a deep understanding of a person or thing.**

plural noun: **insights**

synonyms: understanding of, appreciation of, revelation about; introduction to

GLI GLOBAL LEGAL INSIGHTS

The Global Legal Insights (GLI) series of print and online publications provides readers with essential intelligence on current legislative issues affecting their business. Each book focuses on a specific legal practice area, providing readers with expert analysis of legal, economic and policy developments through the eyes of the world's leading lawyers.

www.globallegalinsights.com

@GLI_GLG

The Global Legal Insights series is published by:

glg global legal group

France

Thomas Rouhette
Signature Litigation

Nicolas Brooke
Signature Litigation

Ela Barda
Signature Litigation

Jennifer Melo
Signature Litigation

I Executive Summary

In recent years, and notably under the impetus of the EU, France has considerably strengthened its substantive law to better fight against fraud and to allow better traceability and recovery of assets.

French courts are generally experienced in handling complex cross-border cases. France also plays an active role in MLA matters and, as an EU member state, benefits from the multiple judicial cooperation mechanisms for obtaining evidence and enforcing cross-border decisions.

However, the lack of effective procedural tools for disclosure is one of the major practical difficulties in dealing with fraud cases, especially in civil matters. This is a real challenge, especially since we are witnessing a gradual increase in the complexity of fraud cases with increasingly sophisticated debtors who do not hesitate to use technological advancements to render recovery even more difficult.

The purpose of this chapter is to provide readers with an overview of the French legal framework relating to fraud, asset tracing and recovery.

II Important Legal Framework and Statutory Underpinnings to Fraud, Asset Tracing and Recovery Schemes

The notion of "fraud" is not defined as a separate criminal offence or a specific tort under French law.

The French Criminal Code rather refers to the term "fraudulent conduct" to define various

criminal offences such as embezzlement, bribery, money laundering or insolvency organisation.

Under civil law, fraud is generally invoked in the context of a breach of contract or a tort. In both cases, the victim has to demonstrate the breach of duty, the loss suffered, and the causal link between the breach and the loss suffered as a result.

A victim of fraud has two procedural avenues for obtaining relief: summoning the wrongdoer before the civil courts; or initiating criminal proceedings and becoming a civil party (*partie civile*) in the process.

This section focuses on the key legal tools and mechanisms that are used in French criminal and civil proceedings to pursue fraud, asset tracing and recovery cases.

2.1 Criminal proceedings

The main purpose of criminal proceedings is to put an end to criminal conduct and punish the perpetrator in order to protect the interests of society. During the course of criminal proceedings, a victim is also entitled to seek personal relief by joining the proceedings as a civil party (*partie civile*).

Victims have several options for initiating criminal action against a wrongdoer: they can file a complaint (*plainte simple*) before the police or the Public Prosecutor (*Procureur de la République*). If this step is unsuccessful (i.e., if the prosecution services decline to prosecute, or no action is taken by the authorities within three months of filing the complaint), victims can file a complaint before an Investigating Judge (*juge d'instruction*) as a civil party (*plainte avec constitution de partie civile*). Victims can also directly summon the wrongdoer before the criminal court. However, this last option will be less interesting for the victim in complex fraud cases given that the matter will go to trial and will not be preceded by a sophisticated evidence-gathering phase led by the prosecutorial authorities or an investigating judge.

2.1.1 Fraud investigations and asset tracing tools

Several types of investigations can be conducted to gather evidence of fraud. Investigations conducted by the police are supervised by the Public Prosecutor's office: they can be preliminary or *flagrante delicto* investigations. These investigations can be supplemented by a judicial enquiry (*information judiciaire*) conducted by the Investigating Judge.

In both cases, the authorities have a broad range of investigative prerogatives that include "dawn raids" on premises including home searches and the seizures of documents or other assets, wiretapping, computer intrusions, remote interception of electronic correspondence, custodial interrogations, confiscation of travel documents, requests for information/documents from any public or private entity, including tax authorities and banks. Bank secrecy cannot be opposed to investigating authorities.

2.1.2 Freezing, confiscation and seizures of assets

Over the last 15 years, the mechanisms for the confiscation and seizure of criminal assets have been considerably strengthened.

During the investigation phase, the Investigating Judge may freeze any asset that could ultimately be confiscated at the end of the proceedings.

For the offences punishable by a prison sentence of more than one year, the Investigating Judge can order the confiscation of any asset that was used (or intended to be used) to commit the offence and of which the convicted person is the owner or has the free disposal of (Article 131-21 of the Criminal Code).

For serious offences punishable by a prison sentence of five years or more and which have produced any direct or indirect benefit for the wrongdoer, any asset can be frozen/confiscated if the defendant cannot prove its origin. For the most serious offences, including money laundering, the scope of confiscation is broadened and may extend to all the assets of the convicted person, whether of licit or illicit origin (Article 324-7 of the Criminal Code). If these legal conditions are met, a wide range of assets can be frozen/confiscated, such as real estate, vehicles, or bank accounts. The confiscation order shall entail the suspension of any enforcement proceedings initiated on the civil ground on the confiscated property.

Several agencies have been created in France to support investigations in financial crime cases, PIAC and AGRASC in particular. PIAC (*Plateforme d'identification des avoirs criminels*) was created in 2007 and is tasked with identifying and collecting information on the financial assets owned by organised criminal groups (the date of acquisition and method of financing the asset, the link with the offence, etc.) with a view to allowing their seizure or confiscation. AGRASC (*Agence de gestion et de recouvrement des avoirs saisis et confisqués*) was created in 2010 to assist judges and investigators in matters of seizure and confiscation, including with respect to the legal requirements, and formalities for ordering such measures. AGRASC is also responsible for the management of seized/confiscated assets, including their sale at the highest price. In 2019,

the value of the assets managed by AGRASC has been estimated at more than EUR 250 million. Among the most prestigious assets is, for example, a Parisian mansion that belonged to the son of Teodoro Obiang, the President of the Republic of Equatorial Guinea: the mansion was seized as part of Obiang's conviction for embezzlement and is valued at EUR 200 million.

A portion of the proceeds of confiscations can be ultimately paid to civil parties who qualify for compensation. Indeed, civil parties who benefit from a final judgment awarding them damages and could not recover such a compensation may request to be paid out of the funds or the net value of the assets of their debtor whose confiscation has been ordered. The request must be made to AGRASC and relate to goods in the custody of the Agency. In the event of several claimant creditors and insufficient assets to fully compensate them, payment shall be made to the first creditor requesting it. If several requests are received on the same date, payment shall be made on a *pro-rata* basis (Article 706-164 of the French Criminal Procedure Code).

2.2 Civil proceedings

The purpose of civil proceedings is, broadly speaking, to obtain relief with respect to a form of loss or damage.

Proceedings on the merits can be initiated by way of summons or, in some circumstances, by way of an *ex parte* application (i.e., non-adversarial).

It is possible to involve third parties in the proceedings, even without their consent, by means of a third-party notice. This may be useful in cases where these third parties have contributed to the fraud. For instance, to have a fraudulent sale annulled when a third party is involved in it, whether in good or bad faith.

2.2.1 Asset tracing tools

a) Limited disclosure from the debtor and the third parties

There is no duty of disclosure or discovery mechanism before the French civil courts. The conduct of the trial belongs to the parties who can "pick and choose" the documents they wish to file or not as evidence. Each party has the burden of proving the allegations in support of its claims. Thus, parties to civil litigation in France have no obligation to produce documents that would be detrimental to one's case, nor to force the other party to disclose documents that would prejudice their case.

General disclosure orders are not available under French civil procedure. However, in certain cases, the judge may authorise a party to instruct a bailiff to search for specific information or document at the debtor's premises. The creditor may also request the appointment of an expert (e.g., a forensic accountant) who will provide his opinion on a technical issue (e.g. identification of a fraud within a company). These orders can be requested prior to any proceedings on the merits if the creditor demonstrates that there is a legitimate reason to preserve or establish, before any trial, evidence of facts on which the solution of a dispute may depend (Article 145 of the French Civil Procedure Code).

An injunction to produce evidence can also be ordered by the judge during the proceedings at the request of any party whether the document is held by an opposing party or a third party (Articles 138 to 142 of the French Civil Procedure Code). The debtor may raise several grounds for objecting to the disclosure of the requested documents, such as the bank secrecy or the recently enacted trade secrets law (Articles L. 151-1 *et seq.* of the French Commercial Code).

b) Preservation of assets

Fraud victims may take preliminary attachments on the debtor's assets to preserve their claim either prior to initiating proceedings on the merits or in parallel to these. For such attachments to be valid, the creditor must demonstrate the existence of a *prima facie* claim (*créance fondée en son principe*) and of threats on the recovery of the claim (Article L. 511-1 of the French Code of Civil Enforcement Procedures).

The preliminary attachment may take the form of protective measures (*saisie conservatoire*) and/or securities (*sûreté judiciaire*) over the debtor's assets. The main difference between these attachments is that protective measures render the protected assets unavailable to the debtor who is no longer able to dispose of them; whereas securities do not prevent the debtor from disposing of their assets, but enable the creditor to be reimbursed in priority in case the attached property is sold (notwithstanding whether the sale is made by the debtor or by auction as these securities are enforceable against third parties).

Preliminary attachments can be granted on a wide range of assets including shares, bank accounts, movable assets, and real property, as well as any debts owed to the debtors.

2.2.2 Enforcement

Once in possession of an enforceable claim (e.g. adjudicated by a judgment or an arbitral award that has been duly recognised in France), the creditors may take enforcement measures on the fraudster's assets to recover their claim (Article L. 111-1 *et seq.* of the French Code of Civil Enforcement Procedures). If they have already taken preliminary attachments, they can convert them into enforcement measures. If no preliminary attachment has been taken, they can directly instruct bailiffs to initiate enforcement measures. Such measures can be granted on essentially the same range of assets as for the preliminary attachments.

2.2.3 Insolvency proceedings

To recover their claim, fraud victims may also consider triggering bankruptcy proceedings against their debtors. However, this action must not be abusive: in case of malicious intent on the creditor's part or if such a request is brought as a threat or a mere means of pressure on the debtor, the creditor may be held liable.

The judgment opening the bankruptcy proceedings sets the date upon which the debtor actually became unable to settle debts as they fell due (*cessation des paiements*). The date of insolvency is deemed to coincide with the bankruptcy judgment date. However, in some cases, the court may backdate it by up to 18 months. Payments that occurred during the period running from the date of insolvency until the bankruptcy judgment are considered as "suspect" (*période suspecte*) and can potentially be challenged during the proceedings. One of the main benefits for a creditor to bring insolvency proceedings is indeed that transactions concluded by the debtor in breach of its creditors' interests during this period may be unwound/declared null and void (Article L. 632-1 of the French Commercial Code).

Some acts are automatically withdrawn if they were taken during the suspect period as payment of unmatured debts, notarised declaration of unseizability or any preliminary attachment taken on the debtor's assets.

In the event of a voluntary deed providing for the transfer of real estate properties without consideration, the court may order the annulment of such transfers over a period of six months preceding the date of the cessation of payments. The request for annulment of suspicious transactions will, in principle, be made by the court-appointed trustee and is not available to the creditors. Such request is not subject to a limitation period and can be made as long as the trustee exercises its mission.

However, bankruptcy proceedings present some major disadvantages. First of all, any legal action relating to payment initiated by creditors against the debtor will be stayed, including provisional and enforcement proceedings: the debtors' assets are frozen (Article L. 622-21 of the French Commercial Code).

Thus, initiating a bankruptcy proceeding may not always be the wiser choice for creditors to recover their claim, even more so as bankruptcy proceedings very rarely ensure full recovery for all creditors. Indeed, creditor recovery is strictly regulated: creditors are required to file a statement of their pre-existing claim (i.e., claims outstanding before the opening of insolvency proceedings) with the court-appointed trustee whose task will be to verify and approve the creditors' claims,

under the supervision of the court. At the end of the proceedings, creditors are reimbursed according to their rank and priority over the proceeds of the sale(s) of the company's business or assets sold by the trustee.

More generally, creditors have little control over the conduct of the bankruptcy proceedings, which is the responsibility of the court-appointed trustee. If they hold a large claim, victims of fraud may, however, have an interest in having themselves appointed as "controllers" to exercise some control over the operations carried out by the trustee and to hold the trustee liable in the event of a breach of their duties.

III Case Triage: Main stages of fraud, asset tracing and recovery cases

Before initiating any procedure, considerable attention should be paid to choosing the strategy best suited to the specifics of the case. The successful outcome of the procedure often depends on the care taken in the preparation of this preliminary phase. On the contrary, choosing the wrong procedural path can lead to lengthy proceedings and jeopardise recovery.

It is at this stage that the creditors must analyse the evidence available or, in the absence of sufficient tangible evidence, identify the procedural means to obtain it. It will be necessary to choose the most appropriate route between civil or criminal proceedings and to assess the interest of instituting bankruptcy proceedings against the debtor.

In complex fraud cases involving assets located in several countries, it is necessary to implement a global strategy upstream, which often requires close coordination with foreign counsel.

3.1 Pre-litigation phase

3.1.1 Criminal proceedings

By becoming a civil party, fraud victims may actively participate in the criminal proceedings, which is very specific to French criminal procedure. Civil parties can indeed trigger and take part in the criminal proceedings. They can be assisted by a lawyer, who will have access to the case file, especially during the investigatory stage. Victims not only have access to the criminal file, and to the evidence it contains, but they can also ask the Investigating Judge, during the investigation phase, to perform any investigation act that they deem necessary to establish the truth, such as hearing a party or a witness, and requesting the disclosure of any information/documents from any person, or public or private entity. These requests must meet formal requirements and the Investigating Judge must decide whether to grant them within one month. The Investigating Judge's decision can be appealed before the Investigation Chamber.

The criminal court can decide both on the punishment of the infringer and on the damages to be awarded to the civil parties in consideration for the loss suffered as result of the criminal offence.

3.1.2 Civil proceedings

As a first step, fraud victims can collect all the publicly available information to start gathering evidence prior to initiating civil proceedings.

Fraud schemes regularly involve multiple layers of corporate entities. Creditors may access corporate information in relation to any entity registered in France through the trade and companies' register's website (*registre du commerce et des sociétés*) on www.infogreffe.fr. The available information includes the address of the company's registered office, the name and address of the directors, the articles of incorporation, the latest by-laws, and the annual accounts of the company if it is subject to a mandatory publication. The documents can be downloaded online immediately and at very low cost.

If creditors are informed of the existence of real estate owned by the debtor, they may request further information from the land registry office (*service de la publicité foncière*) of the place where the property is located. The information available includes details of previous sales such as the price and date of sale, the names of the seller and buyer, the value and term of any mortgages registered by

other creditors (which will provide valuable information on the ranking of the new creditor). It is also possible to carry out a search based on the debtor's name alone to identify all the real estate owned by the debtor within a defined geographical area. However, it is not possible to search the entire French territory.

Where relevant, creditors may also access the trademark and patent register of the French Intellectual Property Institute (INPI) to identify all trademarks registered or patents filed under their debtor's name with a view to attach them. This research is free and the results are immediate on the INPI Register website (https://bases-marques.inpi.fr for the trademarks and https://bases-brevets.inpi.fr/fr/accueil.html for the patents).

When the evidence is not publicly available, creditors can petition the judge for an authorisation to instruct a bailiff to seize copies of specific documents without prior notice to the debtor (Article 145 of the French Civil Procedure Code). This can be an inexpensive and effective tool to gather evidence prior to initiating legal action, particularly when it is implemented on an *ex parte* (i.e. non adversarial) basis; provided, however, that the creditor has gathered sufficient intelligence to actually know where to locate such evidence.

Summary proceedings can also be used in emergency cases in which the judge may order all measures which are not seriously challenged or which the existence of a dispute justifies (Article 834 of the French Civil Procedure Code). These measures can be ordered even if they are seriously contested to prevent imminent damage. If the claim is not seriously disputed the judge may also grant a deposit to the creditor or order specific performance of the obligation. These mechanisms can be useful to gather evidence or to prevent its destruction.

3.2 Inquiry/trial phase

Since there are no asset disclosure proceedings in France, the burden of proof lies with the party who alleges a fact: where an allegation is not documented, the opposing party may ask the judge to summon the party or a third-party to communicate the evidence (Articles 138 to 142 of the French Civil Procedure Code). The disclosure order from the judge is provisionally enforceable.

Such an injunction can only be ordered at the request of a party, the judge does not have the power to *ex officio* enjoin a party or a third party to disclose a document (Paris Court of Appeal, 12 September 2013 docket no. 12/08770).

At the request of a party or third party, the judge may withdraw or modify their order if any difficulty arises or if a legal obstacle is invoked. The third party can further appeal the judge's decision within 15 days. If the parties do not perform voluntarily such an injunction, the court may draw adverse consequences (Article 11 of the French Civil Procedure) and/or attach a penalty payment to the injunction.

During the trial, the creditors may also take preliminary attachments to ensure the recovery of their claims through an *ex parte* proceeding. When such measures have been taken, the proof of service must be served through bailiff within eight days on the debtor failing which the provisional measure will be deemed null and void. It is at that time only that the debtor will be made aware of the provisional measures (which will preserve the surprise effect) and may ask that they be annulled if the conditions for their ordering were not met.

3.3 Enforcement phase

Any criminal judgment ordering compensation for damages suffered by a civil party is an enforceable title that can be enforced against the debtor's assets in the same way as a judgment obtained in the civil courts. The same applies to a foreign decision or an arbitral award that has been recognised by the French courts and that can thus be enforced against the debtor.

Creditors can immediately instruct a bailiff to access the national registry of bank accounts (FICOBA) which provides the names of all the banks where the debtor holds accounts (albeit excluding the bank balance). Therefore, creditors

with an enforceable title can quickly trace and attach all the bank accounts owned by their debtors.

They can further instruct the bailiff to "convert" their preliminary attachments, if any, into enforcement seizures and/or to seize any new asset which could be identified. Once the bailiff has performed the enforcement measure, the assets seized are deemed creditor's property and are rendered unavailable to the debtor. The debtor whose assets have been seized has a right to challenge the seizures before the Enforcement Judge within a month of the notification of the seizure. Otherwise, the assets are transferred to the creditor.

IV Parallel Proceedings: A combined civil and criminal approach

It is theoretically possible for fraud victims to initiate parallel criminal and civil proceedings to seek recovery of their stolen funds (article 4 of the French Code of Criminal Procedure). However, pursuant to a general procedural principle, where the civil action aims precisely at repairing the damage caused to the victim by the criminal offence, this action is stayed until a final judgment has been pronounced in the criminal proceedings.

Consequently, in practice, victims who wish to set in motion a criminal action against the fraudster will have more interest in applying to join the proceedings as a civil party (*partie civile*) to seek personal compensation for their loss directly in the criminal proceedings: as we have seen, the criminal court can pronounce a sentence for damages and this decision will then be enforced by the victim against the debtor's assets under the same conditions as a sentence pronounced by the civil courts.

The question to be asked is in fact whether it is even in the interest of the victim to initiate criminal proceedings.

The main advantage of criminal proceedings is that they provide more means of gathering evidence than civil law, since the public authorities and the Investigating Judge have broad investigative powers and coercive tools to obtain disclosure of information/documents that are not available in civil proceedings. It may therefore be appropriate for the victim to initiate criminal proceedings in cases of complex fraud where there is insufficient evidence to establish the civil liability of the debtor.

Nevertheless, criminal proceedings tend to be slower than civil proceedings which represents a risk of delaying claim recovery. In addition, criminal proceedings are strictly regulated: creditors do not have any control over the procedure which is in the hands of the public authorities, and the standard of proof is much higher than in civil proceedings. Finally, there is some uncertainty as to whether/under which conditions fraud victims can recover claims over assets that have been seized/confiscated during the criminal proceedings.

Fraud victims must therefore carefully assess the most appropriate procedural route: in cases where they have gathered sufficient materials or can rely on evidence obtained abroad, our recommendation would be to focus only on civil remedies.

V Key Challenges

In comparison with common law countries, the French civil law system provides only a limited number of procedural tools to trace and gather evidence. The lack of effective discovery tools constitutes a real hurdle in complex fraud cases. Depending on the specificities of the case, one way to get around these information deficiencies may be to gather the evidence abroad (e.g., by seeking disclosure and worldwide freezing orders in common law jurisdictions).

Another key challenge in the field of asset-recovery is the general principle according to which creditors may only take interim and enforcement measures on the assets which are directly owned by their debtors. However, we are witnessing more and more sophisticated fraud cases with well-organised (and certainly well-advised) debtors who rarely own any assets in their own names. These assets are often hidden, through complex corporate structures which may be spread over multiple jurisdictions, including offshore.

In order to enforce against such properties, one must pierce the corporate veil, i.e. by proving that the assets are effectively owned/controlled by the debtor. The analysis of case law shows that French courts may disregard the corporate veil where one can demonstrate (i) the existence of a fraud, (ii) an intermingling of estates between a company's assets and those of its directors, or (iii) the existence of a fictitious/shell company.

In a recent case involving former Russian oligarch Sergei Pugachev, the French Supreme Court held that the corporate veil can also be lifted to allow a creditor to take a provisional attachment on the underlying asset where the fictitious nature of the intermediary company is established *prima facie* (French Supreme Court, 17 Oct 2019, docket no. 18-16.933). The Court held that the fictitious nature of Pugachev's sale of his

property to an intermediary company in order to evade his creditors had been demonstrated *prima facie* by the creditor acting as a claimant.

Piercing the corporate veil is a difficult task to achieve in practice: French courts conduct a case-by-case analysis of the evidence presented to them. This is all the more reason to put a lot of effort at the investigative stage to build a solid case with the help, if necessary, of experts or private investigators to gather as much evidence as possible to demonstrate fraud and establish the links between the debtor and the assets.

VI Cross-jurisdictional Mechanisms: Issues and solutions in recent times

Fraud is rarely confined to the borders of a single country and misappropriated assets are often hidden abroad. Effective international cooperation is key to trace and recover these assets. France is a party to numerous international conventions on judicial cooperation and, as a member of the EU, benefits from European cooperation mechanisms for obtaining evidence and enforcing foreign decisions.

In civil matters, the Hague Evidence Convention of 1970 sets out the provisions for the communication of evidence in the scope of foreign court proceedings in civil and commercial matters. The letter of request procedure set out in the Convention has proven to be an efficient tool in France. It enables the judicial authority of any contracting state to ask the relevant authority of another contracting state to perform any taking of evidence, as well as other judicial acts. A similar and even more simplified mechanism exists at the European level between the Member States and was established by the Council Regulation (EC) No 1206/2001 of 28 May 2001.

The enforcement of EU judgments is governed by the Brussels 1 Regulation (Recast), which sets out an effective mechanism of mutual recognition and aims to facilitate and speed up the circulation of decisions in civil and commercial matters within the EU. Thus, when fraud has been established and the debtor condemned by an EU judgment, such decision is automatically recognised and enforced in France without the need to accomplish any formality beforehand.

With respect to judgments rendered outside the EU, in the absence of a bilateral agreement with France, the decision must first obtain recognition (through the so-called "exequatur" proceedings) before it can be enforced in France. According to well-established case law, recognition may be refused if the foreign judge who rendered the decision had no jurisdiction, if the decision is contrary to international public policy or in case of fraudulent evasion of the law (Cornelissen, French Supreme Court, 20 Feb 2007, docket no. 05-14082).

An interesting recent development is the creation of the European Account Preservation Order (EAPO) which aims at further facilitating debt recovery between EU countries in civil and commercial matters. The new procedure, which was created by EU Regulation no. 655/2014 and came into force in January 2017, allows a creditor to seek authorisation from a court in one EU country to freeze funds in the bank accounts of a debtor in other EU countries (except in Denmark). This Regulation also

- enables a creditor, who ignores the debtor's account information, to ask the court with which the application for the Preservation Order is lodged to request that the information authority of the member state of enforcement obtain such account information. Such request can be made even if the creditor does not hold an enforceable title yet if the following conditions are met: (i) the creditor has obtained a judgment, court settlement or authentic instrument issued from a member state; (ii) the amount to be preserved is substantial taking into account the relevant circumstances; and (iii) the creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for account information because there is a risk that, without such information, the subsequent enforcement of the creditor's claim against the debtor is likely to be jeopardised.

The major development in the field of criminal cooperation consists in the creation, in 2017, of a European Public Prosecutor's Office (EPPO) by EU Regulation no. 2017/1939. The mission of this independent and decentralised prosecution office is to investigate and prosecute crimes against the EU's financial interests, such as fraud, corruption and cross-border value-added tax fraud. The stated ambition of the EPPO is to combine European and national enforcement efforts in a homogeneous and effective approach. The EPPO is currently in its implementation phase and is expected to become operational in March 2021.

VII Technological Advancements and Their Influence on Fraud, Asset Tracing and Recovery

Technological advancements undoubtedly offer new perspectives for tracing assets: the increased use of social networks betrays the lifestyle of unscrupulous fraudsters, giving indications on their movements and sometimes even making it possible to identify certain assets. Artificial intelligence now enables investigators to process, in a short time, a very significant amount of data obtained on the net, sometimes tracked via dark web sites and discussion forums, to trace hidden assets.

Conversely, these advancements are a source of new difficulties for investigators, as they are also increasingly used by fraudsters to conceal embezzled funds and then launder them using cryptocurrencies, thus considerably complicating any traceability and therefore recovery. These new criminal processes will undoubtedly be one of the major areas of focus in the development of new investigative tools.

VIII Recent Developments and Other Impacting Factors

The creation of a register of beneficial owners is a recent development that should be mentioned. The registry was introduced in 2017 after transposition of European Directive 2015/849 on the fight against money laundering and terrorist financing, and its regulations were strengthened in 2020. Each company registered in the trade and companies' register must now disclose all its beneficial owners. Beneficial owners are any natural person owning directly or indirectly more than 25% of the company's capital/voting rights or exercising control over its management or executive bodies. Failure to file this information or filing inaccurate or incomplete information may result in multiple penalties, including six months imprisonment and a management ban for the legal representative in addition to any fines incurred.

Another novelty is the ground-breaking ruling of the French Supreme Court dated 25 November 2020 concerning the question of the transfer of the criminal liability of a legal entity in case of mergers by absorption of a company by another. The Supreme Court overturned its case law and held that the absorbing company may be held criminally liable for acts constituting an offence committed by the absorbed company prior to the merger (French Supreme Court, 25 November 2020, docket no. 18-86.955). This reversal of case law will only apply to merger operations subsequent to this decision, i.e. concluded after 25 November 2020. However, the Supreme Court also ruled that there is no time limitation in case of fraud: where the merger-absorption operation was intended to exempt the absorbed company from its criminal liability, the absorbing company will incur criminal liability regardless of the date of the merger-absorption.

Thomas Rouhette is a founding partner of the Paris office of Signature Litigation and a leading commercial and international litigator. Previously a partner in a major international law firm, Thomas has almost 30 years' experience in litigation. Thomas has a seasoned, wide and multifaceted practice, spanning from international fraud, asset tracing and enforcement proceedings to contract litigation, as well as corporate and banking disputes. He is described as "an intelligent and clear-minded lawyer", a "tough but excellent" litigator, and "a pre-eminent figure in the French market".

Thomas has acted in several complex, high-profile fraud matters, often stemming from the global financial services industry, advising clients in relation to tracing assets across jurisdictions, as well as on enforcement proceedings. He has also represented corporate clients in defending post M&A claims made on allegations of fraudulent inducement and misrepresentation.

thomas.rouhette@signaturelitigation.com

Nicolas Brooke is a partner at Signature Litigation's Paris office. He has deep experience in the management of complex and international high stakes litigations.

Nicolas specialises in internal investigations and compliance, and advises the Firm's clients on white-collar crime issues, the implementation of compliance and remedial programmes, and crisis management. Notably, he has previously acted in proceedings relating to the recovery and remedial aspects of a multi-million-dollar Ponzi scheme.

His previous role as Litigation and Investigations GC at Société Générale means he has in-depth knowledge of multi-jurisdictional litigations with prosecution authorities and is an expert in relation to international investigations.

Nicolas is a 'Leading Individual' for compliance in the legal directories, which note he has "outstanding professional skills and shows a good sense of strategy". He is also recognised for his investigations expertise and his "impressive hands-on experience of negotiating multi-jurisdictional settlements".

nicolas.brooke@signaturelitigation.com

Senior Associate **Ela Barda** is a litigator specialising in commercial litigation, civil fraud and enforcement matters at Signature Litigation's Paris office. Ela has a particular focus on high-profile cross-border disputes and frequently advises international clients on complex issues of conflicts of laws and jurisdiction, asset tracing and e-discovery procedures.

Ela frequently handles multi-jurisdictional litigation matters. She has extensive experience in investigating, initiating and defending all types of civil fraud claims.

Ela represents both claimants and defendants before French civil and commercial courts at all stages of litigation. She has in-depth experience in pre-action proceedings on a wide range of interim applications. She has also developed a strong expertise in the enforcement of national and foreign judgments, arbitral awards and other enforceable titles.

ela.barda@signaturelitigation.com

Jennifer Melo is a trainee at Signature Litigation's Paris office. She works alongside the team across a range of practices and, in particular, the Firm's civil fraud, asset tracing and enforcement practice.

jennifer.melo@signaturelitigation.com

Signature Litigation is a specialist law firm handling complex litigation, arbitration and regulatory investigations.

With offices in London, Paris and Gibraltar, Signature has extensive experience in investigating, initiating and defending all types of civil fraud claims.

Its members understand the commercial and strategic issues relating to claims and provide robust advice on how to handle them. Interim measures are frequently required, including search and seizure orders and freezing injunctions, to prevent dissipation of assets prior to the issue of proceedings. In securing and enforcing foreign judgments, Signature regularly works with claimants who wish to freeze and recover the assets of defendants.

Signature and its Partners are highly regarded for their civil fraud expertise. The leading legal directories describe the practice as "dedicated and meticulous" and note the Firm is "active in investigations and large-scale disputes, in which they act for claimants and defendants in various countries".

www.signaturelitigation.com

SIGNATURE

Guernsey

Simon Florance
Carey Olsen

John Greenfield
Carey Olsen

David Jones
Carey Olsen

Executive Summary

As Guernsey developed into a thriving offshore financial centre from the 1980s, it has had to adapt to meet the challenges posed by the model and resourceful fraudster. Its laws and jurisprudence have evolved rapidly to ensure it does not provide a haven for such people and their ill-gotten assets.

The Bailiwick of Guernsey has one of the oldest constitutions, political systems and judicial systems in the world and, apart from certain events beyond its control between 1940 and 1945, it has enjoyed centuries of stability. Guernsey's close links judicially with senior (and indeed the most senior through the Privy Council) members of the United Kingdom Bar and judiciary means it has a system which is readily understood throughout the world.

This chapter deals with how those challenges have been met following the rapid popularity of Guernsey structures typically involving trusts, foundations and underlying companies. Guernsey courts have adopted international rules when required to make orders assisting proceedings in those jurisdictions whether freezing assets, disclosing documents/information and straightforward asset tracing and recovery.

As will be seen later on, there are now many weapons in the armoury of those assisting the victim of fraud, when there is reason to believe that there exists in Guernsey either assets or information to which the victim is entitled.

II Important Legal Framework and Statutory Underpinnings to Fraud, Asset Tracing and Recovery Schemes

Over many centuries the Bailiwick of Guernsey (the main Islands of which are Guernsey, Alderney and Sark) has developed a unique legal framework judicial system drawing on its routes and past connections with both England and France. Part of the Duchy of Normandy at the time of the Battle of Hastings but now a Crown Dependency of the United Kingdom, Guernsey follows the customary laws of Normandy which have continued unless replaced with modern laws or statutes. These modern rules are passed by an elected government ("the States of Guernsey") or more fundamental rules which also need to be approved by the Queen of England through her Privy Council.

The judicial process starts with the Royal Court of Guernsey (the Royal Court) constituted by local judges with right of appeal to a Court of Appeal, which is in Guernsey but is constituted by Senior Queen's Council from the Bar in the United Kingdom. In certain cases, there is ultimate right of appeal to the Privy Council in London.

For the purposes of this chapter, developments of Guernsey's laws relating to fraud, asset tracing and recovery schemes have tended to follow those found in many developed legal jurisdictions and will have a familiar ring to them. In terms of its common law, decisions of the courts in England and Wales are persuasive but not binding unless they are based on provisions of statutory authority passed by the UK parliaments. For good reasons, Guernsey does not recognise the authority of any of the UK parliaments.

Civil remedies and tools

As stated above, common law practitioners in the area of fraud and asset recovery will find Guernsey's law overall familiar, but there are some unique and useful differences. As far as civil fraud is concerned, the cause of action and remedies are for the most part drawn from Guernsey's customary law, with a couple of limited exceptions under legislation, although modern day actions for civil fraud in Guernsey reflects the common law position in the United Kingdom.

In addition, given Guernsey's status as an offshore finance centre, its courts will often deal with claims brought for breach of trust/fiduciary duties and by insolvency practitioners (both of local and foreign companies).

So, what are the main weapons in the legal arsenal for tracing and recovering the proceeds of fraud? Of course, there is obviously the remedy of damages but, as practitioners in the area will know, the proceeds of fraud will usually be moved quickly out of the hands of the actual fraudster – often, through various financial institutions across a number of jurisdictions.

Guernsey courts have available to them the well-recognised tools of asset tracing originating from the English courts, including:

- Disclosure orders under the principles set out by the House of Lords in *Norwich Pharmacal v Commissioners of Customs & Excise* [1974] UKHL 6, which requires a third party even if innocent of any wrongdoing to disclosure information or documents to identify the wrongdoer (known as a *Norwich Pharmacal* order). The availability of a *Norwich Pharmacal* order is important in Guernsey, as there is no pre-action disclosure available under the procedural rules of the Guernsey courts, with the exception of personal injury/fatal accident cases.
- A variant of a *Norwich Pharmacal* order, which again requires a third party to disclose information and documents, is aimed at locating the victim's proprietary funds and protecting them from dissipation. This comes from the English High Court decision in *Bankers Trust Co. v Shapira* [1980] 1 WLR 1274.
- *Mareva*-type freezing orders to prevent a defendant dissipating assets before final judgment, the statutory power for which comes from section 1 of the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987. The Guernsey courts also have the power to grant ancillary disclosure orders as part of the injunction, particularly as to where funds have gone, so as to give the injunction "teeth".
- Albeit rare, the Guernsey courts have been known to grant *Anton Piller* orders; that is, permitting a party to search premises and seize evidence without prior notice, where there is a real possibility that the evidence in their possession will be destroyed.
- "Gagging orders" which often form part of the above orders.

In Guernsey, injunctions in asset recovery cases for fraud are generally against local banks. As regulated and respectable financial institutions, the banks should abide by the Guernsey courts' orders – this will ensure that any funds that are the subject of a freezing order are well and truly locked down.

Although it is a condition for a freezing order under the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987 that the substantive

proceedings are (or will be) brought in Guernsey, the Guernsey courts do have the power to waive this requirement if substantive proceedings are taking place in a foreign jurisdiction. A common example of this is where the Guernsey courts are asked to grant a "mirror injunction" to give effect to a worldwide freezing order granted in another jurisdiction – that is, where the order extends to assets located outside of the jurisdiction where the original injunction was granted.

Prior to the modern day *Mareva*-type injunctions, a Guernsey customary law procedure known as an *arrêt conservatoire* was traditionally used to seize property to prevent its dissipation. An *arrêt conservatoire* is available pre-action provided there is a Guernsey claim, and there is Guernsey property at risk of dissipation. The procedure is relatively straightforward with an *ex parte* application made to a judge in chambers, who then issues the *arrêt* which is executed by HM Sherriff (an officer of the Court with equivalent powers of a United Kingdom bailiff).

Albeit rarely used nowadays, the *arrêt conservatoire* retains some practical usefulness in that, unlike a freezing injunction, it takes effect *in rem* rather than *in personam*. If a defendant does not comply with an injunction, then the sanction is a contempt of court – this will mean little if both the fraudster and his/her assets have long left Guernsey. However, under an *arrêt conservatoire*, HM Sheriff can physically seize and lock down the property the subject of the fraud, in short order. This could be useful where the location of the property is known but the location and/or identity of the fraudster is not, or where, for example, the property is a luxury yacht (berthed in Guernsey) that could sail away at any time.

Another tool available to a claimant in Guernsey proceedings is the registration of an interlocutory act in those proceedings in the *Livre des Hypothèques*, with the leave of the Royal Court of Guernsey (the Royal Court). This is a customary law procedure dating back to at least the 19th Century, the effect of which is to create a charge over the respondent's interest in any Guernsey property, with priority over any subsequent charges.

However, there will be times when the trail of the fraudulent proceeds goes cold and all the victim is left with is a judgment against a company or individual with no assets to their name. In that situation, the Guernsey courts have demonstrated a willingness to entertain a *Pauline* action.

The Royal Court acknowledged the availability of a *Pauline* action in *Flightlease Holdings (Guernsey) Ltd v International Lease Finance Corporation* (Guernsey Judgment 55/2005), which cited with approval the Royal Court of Jersey's decision in *In re Esteem Settlement* (2002) JLR 53. In essence, a *Pauline* action provides a remedy to a creditor to set aside an agreement between its debtor and a third-party recipient, which was made to defeat the interests of that debtor's creditors. It is a restitutionary remedy, and so does not result in the plaintiff being awarded damages.

Where a *Pauline* action can be very useful is where a debtor has deliberately transferred all of its assets, or at least enough to render the debtor insolvent, in a blatant attempt to defeat a creditor enforcing its judgment. Unlike many other restitutionary claims, a *Pauline* action does not require the creditor to have an equitable interest in the transferred assets.

The availability of the *Pauline* action in Guernsey is important for creditors as the Companies (Guernsey) Law, 2008 (Companies Law), which contains the statutory provisions for insolvent companies, does not currently contain an equivalent to section 423 of the UK Insolvency Act, 1986 (that is, the statutory remedy for the court to set aside a transaction defrauding creditors).

However, the Companies Law does provide a statutory civil remedy where the business of the company was carried on with the intent to defraud its creditors. This remedy is available to a liquidator, creditor or member of the company against any person knowingly involved in the conduct – "person" is not limited to, but will invariably be, a director of the company. The limitation with this remedy is that the Royal Court can only order that the person contribute to the company's assets – if that person is a "man of straw", then the Royal Court's award will be pyrrhic.

It is also a useful tool where a debtor may have transferred assets into a trust at a time when he knew or ought to have been aware that he was unable to pay his debts. The Royal Court can make an order which will have the effect of setting aside the trust leaving the funds available for enforcement against the settlors' debts.

Following judgment, a judgment creditor has three years to enforce a default judgment, or six years to enforce a judgment obtained after trial or by consent, with those periods being renewable for a further period on application to the Royal Court.

The principal enforcement procedure available to a judgment creditor is an *arrêt* execution. HM Sheriff seizes the judgment creditor's moveable property which (if the judgment is not satisfied beforehand) is sold by court ordered auction with the proceeds distributed amongst all creditors.

A judgment creditor may also commence *saisie* proceedings (another remedy derived from customary law) before the Royal Court for the vesting of the judgment debtor's land situate in Guernsey. *Saisie* is a procedure with a number of formal steps, and requires the marshalling of all the creditors to determine the priority of their claims.

The Royal Court also has the power to register foreign judgments under the Judgments (Reciprocal Enforcement) (Guernsey) Law, 1957. However, that law is limited as currently it applies only to the judgments of the superior courts of the United Kingdom and its Crown Dependencies, Israel, Netherlands, the former Netherlands Antilles, Italy and Surinam. Registration requires an application to the Royal Court, and the grounds of opposition are very limited. If granted, the judgment may be enforced in the same way as a Guernsey judgment.

If a foreign judgment was obtained in a jurisdiction not covered by the above law, then the foreign judgment creditor must effectively sue on the debt by issuing fresh proceedings in Guernsey. Although, the grounds for defending such an action are again limited – the judgment creditor is not required to re-litigate the substantive claim. If successful, then the claimant will be awarded a Guernsey judgment.

Lastly, and although not strictly a debt collection regime, a creditor can apply to the Royal Court for the winding up of a debtor company. If the debtor is an insolvent individual, he or she can be declared *en désastre* by the Royal Court, with all creditors sharing in the proceeds of the sale of the available assets. *Désastre* is not the same as a bankruptcy order, and the debtor is not discharged from his or her liabilities – the creditors can continue to pursue the debtor if more assets become available in the future.

Anti-money laundering regime

On the criminal side, it will come as no surprise that fraud is a criminal offence in Guernsey, both under the customary law and the codified offences contained in the Fraud (Bailiwick of Guernsey) Law, 2009.

As a result, Guernsey's anti-money laundering is a key weapon in the fight against fraud (both locally and internationally). This is particularly so as the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 (the POCL), being Guernsey's principal anti-money laundering legislation, applies a dual criminality test in determining criminal conduct caught by that law. That is, an act done legally in a foreign jurisdiction will be deemed criminal conduct for the purposes of the POCL (and, importantly, the money laundering offence) if it would be illegal to do that act in Guernsey.

The POCL created three significant criminal offences, namely:

- concealing or transferring proceeds of crime from criminal conduct;
- assisting another person to retain the proceeds of criminal conduct; and
- acquisition, possession or use of proceeds for criminal conduct.

The proceeds of crime includes a broad catch-all definition of property, situated in or out of Guernsey, which arises "*directly or indirectly, in whole or in part*" from criminal conduct.

There is an exemption from criminal liability under the POCL offences if, before handling (or assisting in handling) criminal property, a

person makes a disclosure of the relevant law enforcement agency – this is in the form of a suspicious activity report. In addition, there is a specific defence to the acquisition, possession, offence, where a person obtains criminal property for adequate consideration.

The POCL contains a wide range of investigatory and enforcement powers, which are available to Guernsey's prosecuting authorities. These include the power to require the production of documents, and to seek from the Royal Court restraint orders over property, customer information orders and account monitoring orders.

Following the conviction of a person within the Bailiwick, the POCL gives the Royal Court wide powers to confiscate property (which was most likely secured pre-conviction by a restraint order) and to enforce that order. Further, the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Enforcement of Overseas Confiscation Orders Ordinance, 1999 provides the statutory framework for the enforcement of foreign confiscation orders by the Royal Court as if they were a domestic confiscation order.

However, in practice, where fraud is concerned, the authorities usually utilise the provisions of the Criminal Justice (Fraud Investigation) Bailiwick of Guernsey Law, 1991 (the Fraud Investigation Law) which provides them with considerably stronger investigative powers, in particular:

- the POCL deals with the proceeds of crime only whereas the Fraud Investigation Law is directed at the crime itself;
- under the Fraud Investigation Law, the person producing the disclosed documents may be compelled to explain them (or if he cannot produce the documents to state where they are), whereas under the POCL there is no power to compel explanation; and
- the Fraud Investigation Law empowers the authorities to issue a notice to attend, answer questions and provide information if there is reason to believe that the person has such knowledge or information. The POCL, however, requires an application to the Bailiff (Guernsey's senior judge) for an order to produce information or documentation only where there is an investigation into whether a person has benefitted from criminal conduct or to the extent or whereabouts of the proceeds of criminal conduct.

Finally, Guernsey's anti-money laundering arsenal is bolstered by the Forfeiture of Money, etc. in Civil Proceedings (Bailiwick of Guernsey) Law, 2007 (the Civil Forfeiture Law). This provides Guernsey's authorities with non-conviction-based remedies to seize, detain, freeze, confiscate and have forfeited money which is the proceeds of or is intended to be used in "*unlawful conduct*", coupled with investigatory powers similar to those under the POCL.

The Civil Forfeiture Law is, as the name denotes, a civil procedure to which the lower standard of proof applies, being the balance of probabilities. As a result, the authorities are provided with a useful avenue to investigate and confiscate monies where they cannot prove an offence to the criminal standard of proof (that is, beyond reasonable doubt).

In addition, the Civil Forfeiture Law can be beneficial to the victims of a fraud, as discussed later in this chapter.

III Case Triage: Main stages of fraud, asset tracing and recovery cases

The main stages of civil fraud and asset recovery in Guernsey reflect those in most other jurisdictions which have an adversarial system of litigation.

Civil fraud and asset recovery proceedings can take a number of forms – from a substantive fraud action in the Guernsey courts, to applying for disclosure orders or a mirror injunction to assist foreign proceedings, to enforcing a foreign judgment/arbitral award against Guernsey assets. Each of those various actions will have their own procedure and considerations, and

it is outside the scope of this text to deal with each scenario. Rather, the stages below relate to fraud proceedings commenced in the Guernsey courts, but many of those stages will also apply to the other possible forms of action.

The first stage is pre-action, which is largely evidence gathering from available resources – both the information and documents held by the claimant and any other public available resources. This is the collation of the necessary evidence required to either commence the substantive action or, at the very least, sufficient evidence in order to apply for pre-action disclosure orders.

Unlike some other jurisdictions, Guernsey does not have a codified pre-action protocol, and so a plaintiff can commence proceedings without first sending a letter before action. However, in practice, such a letter will usually be sent, as there is an expectation by the Guernsey courts that it will be.

Of course, in fraud cases a pre-action letter may not be sent for risk that it will "tip off" the defendant and assets dissipated, at least not until some form of injunction is in place. This brings us to the second stage of fraud cases in Guernsey, which are disclosure orders and injunctions.

As discussed in the previous section, claimants in Guernsey can avail themselves of *Norwich Pharmacal* and/or *Bankers' Trust* orders to identify the correct defendant and where proprietary funds have gone. These orders are often brought as a precursor to an injunction, once the wrongdoer and the location of the funds are known.

At the time an injunction application is brought, substantive proceedings will have been brought or will be soon after. Proceedings are commenced in Guernsey by way of summons which is served on resident defendants by HM Sergeant. Given the nature of Guernsey's business, the defendant is often domiciled in another jurisdiction, which includes the United Kingdom, requiring the Royal Court to first grant leave to serve a summons out of the jurisdiction.

In order to obtain leave to serve, a defendant must be out of the jurisdiction. This is a fertile area for satellite litigation, which can greatly delay the substantive action, as a determined and well-funded foreign defendant can seek to challenge jurisdiction.

Nevertheless, the Guernsey courts have often expressed the view that if a foreign defendant has decided in the past to avail themselves of the advantage of using a Guernsey-based structure, he should not be allowed to wriggle out of being answerable to Guernsey Courts.

As for criminal fraud proceedings, these are commenced by the Law Officers of the Crown (being Guernsey's prosecutorial authority) (the Law Officers) and follow the common criminal procedure of charge, plea, trial and sentence. Following conviction and upon sentencing, the Law Officers of the Crown can apply for confiscation of the proceeds of the crime under the POCL, as discussed above.

The potential interplay between civil and criminal proceedings for fraud is considered in the next section.

IV Parallel Proceedings: A combined civil and criminal approach

Unlike other jurisdictions such as England and Wales, it is generally accepted that there is no right to a private prosecution in Guernsey. All criminal prosecutions are conducted by the Law Officers.

As a result, the most a victim of fraud (or their advocate) can do is make representations to the Law Officers that the offender should be prosecuted criminally. The victim will have no control over the criminal prosecution, in particular the evidence that may be adduced. However, the question which arises is whether to bring civil proceedings simultaneously, or await the outcome of the criminal trial.

One important consideration for a victim is the impact that civil proceedings may have on a

confiscation order under the PCOL, made upon sentencing a convicted fraudster. If a victim has not, and does not intend to commence civil proceedings, then the Royal Court has a duty to impose a confiscation order over the fraudster's property. That order will then be realised with the proceeds going to Guernsey's general revenue and not the victim.

However, if a victim has brought or intends to bring a civil action, then the Royal Court only has power and not a duty to impose a confiscation order and, if it does, has a discretion to take into account a civil award. These provisions in the POCL are obviously designed to allow a victim a first bite of the offender's assets by way of compensation.

Therefore, a decision will need to be made on timing. If the claimant starts civil proceedings first and then subsequently seeks to persuade the Law Officers to bring criminal proceedings, there may be a temptation for the Law Officers to await the outcome of the civil action. It may be prudent to persuade the Law Officers to commence criminal proceedings and as soon as these are underway commence a parallel civil action. Also, it should be borne in mind that under Guernsey law and rules of evidence, a criminal conviction for fraud will be admissible in civil proceedings of the fact of that conviction.

Accordingly, a claimant may be well advised to have commenced civil proceedings to ensure that the Court takes them into account in deciding to impose a post-conviction confiscation order (and, if so, in what amount).

Further, if moneys have been seized and are to be forfeited under the Civil Forfeiture Law (see above), then a victim may apply to the Royal Court for those monies if they (or property representing those monies) belong to the victim. There is no guarantee that the Law Officers would pursue to the civil forfeiture route but, if they did, then this avenue may be attractive (and arguably more cost effective) to a victim of fraud who is likely to have a proprietary interest in the monies seized.

V Key Challenges

The extent of any challenges facing a victim of fraud will depend on how sophisticated the fraudster has been especially in covering his tracks. Generally, it follows that fraudsters using offshore structures will indeed be sophisticated and often have used many different jurisdictions – thus creating a structure of smoke and mirrors. Furthermore, the digital age has facilitated the ability of fraudsters to spread the schemes like a web across the globe.

This is further compounded by the use of crypto currencies which are tougher to trace, together with darknet inscription technology which utilises a number of intermediate servers to mask the user's real identity.

Despite all these more recent challenges, the main difficulty for the victim usually continues to be having access to the funds, resources and stamina needed to pursue the claim. Inevitably it is likely that the victim is already low on funds by reason of the loss arising from the fraud. The victim may be required to fund expensive professional advice and court proceedings over a number of years. Unfortunately, in Guernsey, lawyers remain prohibited from having a financial interest in the outcome of a case for their client so arrangements such as conditional fee agreements are not possible.

However, in recent times, litigation funding has found traction in Guernsey, which is discussed in the section on recent developments below.

VI Cross-jurisdictional Mechanisms: Issues and solutions in recent times

It is common when tackling modern fraud that the fraudsters' footprints can be found across multiple jurisdictions, requiring the engagement of different lawyers and courts and pursuing a joined-up strategy between all those

jurisdictions. Modern fraud is "a patron of many countries but a citizen on none".

For well over 30 years the Guernsey judicial system has recognised the need for it to be fully up-to-date in the global processes for ensuring that Guernsey does not become a "black hole" into which fraudsters can hide away their proceeds. The Guernsey courts have been quick to adopt all the usual mechanisms to assist the *Mareva* injunctions, disclosure orders, *Norwich Pharmacal* orders, *Anton Piller* orders – all pre-action and may include gagging orders if necessary. It is also commonplace for the Guernsey courts to grant in effect orders in aid of other jurisdictions, particularly upon receipt of letters of request from those jurisdictions.

Guernsey has also developed the principles arising from the common law concerning the characterisation of constructive trusts over assets which may be held in the possession of a relatively innocent third party, but nevertheless in law belong to the victim.

So far as international conventions are concerned, and arising from Guernsey's positions as a Crown Dependency, it looks to the United Kingdom to be responsible for its international relations. The result is that Guernsey rarely enters directly into international treaties or conventions, but has their effect extended to it by reason of the UK's participation. For example, the Hague Service Convention and the New York Arbitration Convention both extend to Guernsey.

On the criminal side, a number of international conventions have been extended to Guernsey, including the Council of Europe Convention on mutual legal assistance in criminal matters, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, and the United Nations Convention against Corruption.

VII Technological Advancements and Their Influence on Fraud, Asset Tracing and Recovery

Investigation and asset tracing for large-scale multiple jurisdiction fraud litigation is rarely undertaken without the use of increasingly sophisticated software. The lawyer advising the victim will have a whole new range of experts familiar with the investigations needed using modern technology.

In particular, use of artificial intelligence has proved very effective with specialist service providers offering to track down both the current whereabouts of the fraudster and the possible site of assets in financial institutions around the world. The larger accountancy firms offer a wide range of services in this field, and all the "Big Four" accountancy firms (together with many others) have offices established in Guernsey.

VIII Recent Developments and Other Impacting Factors

A most important development globally in recent years has concerned litigation funding. It is probably fair to say that it was rarely seen in Guernsey until recently, given concerns that it may breach the rules against champerty and maintenance, where a third party has a financial interest in the outcome of any judgment.

The Royal Court finally addressed this issue in a decision in 2017 in *Providence Investment Funds PCC Limited and Providence Investment Management International Limited*. The outcome of that case, which considered the use of a litigation funding agreement by joint administrators, was that litigation funding can be used providing the terms of the agreement did not give the funder "control" of the litigation. In *Providence*, the Court held that the agreement did not give the funder control even though it required the joint administrators to follow the legal advice of a funder's lawyers and in addition to consult with the funder.

The result is that litigation funders are now active in litigation conducted in Guernsey and

victims are recommended to shop around for the best deals.

Other major developments have occurred in the area of insolvency. In January 2020, the States of Guernsey approved the Companies (Guernsey) Law 2008 (Insolvency) (Amendment) Ordinance 2020. That ordinance was designed to further enhance Guernsey's reputation as a robust jurisdiction for restructuring and insolvency. Key changes include the introduction of new powers for liquidators who will be able to compel the protection of documents from former directors and officers and to appoint an Inspector of the Court to examine them. The proposed changes present a significant "beefing up" of the statutory investigatory powers available to insolvency office holders in Guernsey, which will be a vital tool in the investigation of wrongdoing and subsequent recovery action.

In addition, the Ordinance introduces a formal statutory remedy by which office holders will now be able to pursue recovery of transactions at an undervalue and extortionate credit transactions. Another important change is the ability to wind up a non-Guernsey company. It was felt that this was necessary in the light of Guernsey's non-status of an international finance centre providing administration and asset management services to many foreign companies. This change brings Guernsey into line with other major jurisdictions and will allow the Royal Court to apply the Guernsey regime to foreign companies where they have a sufficient connection.

Simon Florance is counsel to the dispute resolution and litigation team specialising in commercial litigation and regulatory matters. Simon's experience and expertise encompasses a wide range of areas including complex contractual disputes, shareholder and investor actions, cross-border litigation, fraud and asset tracing, freezing orders, contentious banking and finance issues, and property and construction disputes. Simon also advises on regulatory matters including anti-money laundering, data protection, directors' duties and renewable energy.

Simon was admitted as a solicitor to the Supreme Court of New South Wales, Australia and to the High Court of Australia in 1994 and as a solicitor in England and Wales in 2017. Simon was admitted as an Advocate of the Royal Court of Guernsey in November 2019.

simon.florance@careyolsen.com

John Greenfield is a consultant for the dispute resolution and litigation group in Guernsey where he was previously senior partner. John undertakes the complete range of major litigation and advocacy work including fraud and asset tracing, multi-jurisdictional disputes and commercial and trust litigation. He has been counsel in many of the major litigation cases before the Royal Court of Guernsey and the Guernsey Court of Appeal and is one of the few Guernsey advocates to have appeared as counsel in the Privy Council.

John was a member of the Committee which completely overhauled Guernsey's civil procedure in 2008 and is now part of the new review Committee in 2021. He has been the Guernsey member of the UK Fraud Advisory Panel since 2001. He is a founder of Fraudnet, a body of the world's leading fraud lawyers set up by the International Chamber of Commerce. He is a member of the Association of Contentious Trust and Probate Specialists (ACTAPs) and a Notary Public.

john.greenfield@careyolsen.com

David Jones is an advocate and head of the restructuring and insolvency team in Guernsey. He gives specialist advice in relation to complex restructurings and formal insolvencies in contentious, non-contentious and multi-jurisdictional matters. David has been involved in many of the largest insolvencies involving Guernsey entities, ranging from investment funds to global retailers. He is able to assist lenders in respect of the taking and enforcement of all forms of security. He regularly advises the boards of distressed entities and has extensive experience acting for office holders. His practice extends to tracing and recovering assets on behalf of office holders and other stakeholders.

David is a member of the Insolvency Lawyers Association and R3 and sits on the young members Committee of INSOL International. He lectures on INSOL's Foundation Certificate in International Insolvency and is part of the working group tasked with updating and revising Guernsey's insolvency laws. He has also been appointed as a member of Guernsey's first ever Insolvency Rules Committee (IRC). He is also a Channel Islands' committee member for ThoughtLeaders4U FIRE committee (Fraud, Insolvency, Restructuring and Enforcement).

david.jones@careyolsen.com

Carey Olsen has one of the largest dispute resolution and litigation teams in the offshore world. We represent clients across the full spectrum of contentious and semi-contentious work.

We are recognised for our expertise in both international and domestic cases, including investment funds, corporate, commercial and civil disputes, banking, financial services and trusts litigation, fraud and asset tracing claims, restructuring and insolvency, regulatory investigations, employment disputes and advisory work.

From mediation to trial advocacy, we guide our clients through the full range of disputes, from multi-party, cross-jurisdictional corporate litigation to domestic claims before the local courts. We have also represented clients before the Privy Council. Many of our cases have established judicial precedents that are referred to in jurisdictions around the world.

We advise on the laws of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey and Jersey across a global network of nine international offices.

www.careyolsen.com

CAREY OLSEN

Hong Kong

Dorothy Siron
Zhong Lun Law Firm

With over 7.4 million people of various nationalities in a 1,104-square-kilometre (426 sq mi) territory, Hong Kong is one of the most densely populated places in the world. As a special administrative region, Hong Kong still maintains separate governing and economic systems from that of Mainland China under the principle of "one country, two systems". As one of the world's leading international financial centres, Hong Kong has a major capitalist service economy characterised by low taxation and free trade, and the Hong Kong dollar is the eighth most traded currency in the world. (The territory's 2,755 km^2 (1,064 sq mi) area consists of Hong Kong Island, the Kowloon Peninsula, the New Territories, Lantau Island, and over 200 other islands.)

Within this legal and economic framework, Hong Kong has become and still looks to be a hot bed for bank and cyber frauds and other financial, white-collar crime.

With this diet of commercial and white-collar crime, we look to discuss the legal framework that exists to assist a 'victim' of such white-collar crime to see what help may be available to seek redress.

1 Key Legal Framework and Statutory Underpinning Hong Kong Uses to Pursue Fraud, Asset Tracing and Recovery Cases

Hong Kong has a variety of legislation which provides for criminal offences relating to fraud.

The primary legislation for the main offences relating to fraud are the Crimes Ordinance (Cap. 200) (CO) and the Theft Ordinance (Cap. 210) (TO). These include:

i. fraud under section 16A of the TO;
ii. conspiracy to defraud under section 159E(2) of the CO;
iii. the basic definition of theft under sections 2 and 9 of the TO;
iv. offences involving deception, such as obtaining property or pecuniary advantage by deception under sections 17 and 18 of the TO;
v. offences relating to documents, such as forgery under section 71 and copying, using, using a copy of or possessing a false instrument under sections 72, 73, 74 and 75 of the CO;
vi. offences related to technology, such as altering or erasing data which constitutes

destroying or damaging property under section 60 of the CO or accessing a computer with criminal or dishonest intent under section 161 of the CO; and

vii. offences committed by any person who aids, abets, counsels or procures the commission by another person of any offence, are guilty of the underlying offence under section 89 of the Criminal Procedures Ordinance (Cap. 221).

Additional offences may also be found in Securities and Futures Ordinance (Cap. 571), Companies Ordinance (Cap. 622), Telecommunications Ordinance (Cap. 106) and Inland Revenue Ordinance (Cap. 112). (*Financial crime in Hong Kong: overview*, Practical Law.)

In Hong Kong, there are also various civil causes of actions which are available to a party who is a victim of fraud, such as:

Proprietary claim based on constructive trust

This allows a defrauded party to obtain relief in equity by claiming that the fraudster held the fraudulently obtained assets on constructive trust in favour of the defrauded party, and therefore the fraudster is held to account as a constructive trustee.

Third parties may also be liable to account if they are sufficiently implicated, in that they knowingly received fraudulently obtained assets.

Proprietary claim based on unjust enrichment (money had and received)

This allows a defrauded party to claim that the fraudster was enriched at the expense of the defrauded party in circumstances which are unjust, such as where there is a total failure of consideration or a mistake of fact or law.

Tort of conspiracy

Where a defrauded party's interests were injured by use of unlawful means (i.e. fraud) by two or more persons who conspired together to do so, the defrauded party may bring a tortious claim of conspiracy against the fraudsters.

The defrauded party does not need to show there was actual damage or that damage was the main purpose, just that the intention of the conspiracy was to cause damage to the defrauded party.

Fraudulent misrepresentation

Where a fraudster has made a representation knowing it to be false or without actual belief in the truth of the representation (i.e. recklessly) and a defrauded party relies on the representation and suffers loss as a result, a defrauded party may bring a tortious claim of deceit based on fraudulent misrepresentation.

As a spring board for the civil claims that a victim can launch, there are a variety of orders which may be sought in the interim that allow for the freezing of assets, such as bank accounts, and tracing and discovery of assets which victims can look towards.

Norwich Pharmacal order (NPO):

An order against a third party for disclosure of documents and information which allows the defrauded party to trace the passage of information or assets prior to starting proceedings against the fraudsters. The disclosure is generally restricted to information which allows the defrauded party to identify and go after the fraudsters.

This principle was established in the English case *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133 and has been applied in Hong Kong repeatedly.

A *Bankers Trust* order

A form of relief derived from the English Court of Appeal's decision in *Bankers Trust Company v Shapira* [1980] 1 WLR 1274, which is essentially an NPO directed at third-party banks or professional advisers. This order directs them to provide information which enables tracing of assets, but which normally is protected by confidentiality.

Disclosure has been extended by the Hong Kong Courts to discovery of bank books and other documents including bank statements and account opening forms.

Bankers' records/books order

Any party to any legal proceedings may apply to the Court, under section 21 of the Evidence Ordinance (Cap. 8) (EO), for an order that a bank allow that party to inspect and take copies of its records/books for the purposes of discovery.

The disclosure is generally limited to documents necessary for the purpose of those particular proceedings.

Mareva injunction

This is a freezing order which a defrauded party may apply to the Court for in order to prevent a fraudster from dealing with, moving or disposing of assets. Courts in Hong Kong apply the principles set out in the English case *Mareva Compania Naviera SA v International Bulk Carriers SA* [1980] 1 All ER 213.

A freezing order can apply to all asset classes

including, but not limited to, property, bank accounts, shares, account receivables and chattels.

Such an order can restrain fraudsters from dealing with their Hong Kong assets only (domestic *Mareva*) or can prevent fraudsters from dealing with assets outside Hong Kong as well (worldwide *Mareva*).

An order is also binding on third parties who are served with the order; therefore, it is common to serve such orders on banks at which the fraudsters have accounts in order to get those accounts frozen.

Hong Kong Courts may also enforce worldwide *Mareva* injunctions obtained overseas in Hong Kong by getting a local domesticated equivalent injunction order under S.21M of the High Court Ordinance (Cap 4) (HCO).

Anton Piller order

This is a search and seizure order to assist with the preservation of documents. This order will require a fraudster to let the defrauded party, which applied to Court for an order to enter the premises of the fraudster, search for and remove documents relevant to the defrauded person's case.

Prohibition against debtors from leaving Hong Kong

A defrauded party which has a judgment in its favour – therefore a judgment creditor – may apply to the Court for an order to prevent a debtor fraudster from leaving Hong Kong to another jurisdiction. Armed with a Prohibition Order which has been served on the Immigration Department, the fraudster would be stopped from departing Hong Kong at check points pursuant to Order 44A of the Rules of the High Court (Cap. 4A).

The Prohibition Order is usually a month long and renewable for two further one-month extensions.

Interim attachment of property

Where a defendant fraudster in an action is about to dispose of property (or any part thereof) with the intent of obstructing or delaying the execution of any judgment, a defrauded party may apply to Court for an order that the fraudster furnish security which would be enough to satisfy any judgment that may be given against the fraudster pursuant to Order 44A of the Rules of the High Court (Cap. 4A).

With all of the cases coursing through the Hong Kong Courts, there is no lack of cases illustrating the effectiveness of Hong Kong's system.

CXC Global Japan Kabushiki Kaisha v Kadima International Ltd [2019] HKEC 3988: this is a typical email fraud case which illustrates the main stages of fraud, asset tracing and recovery.

The defrauded plaintiff is a Japanese company and the two defendants are Hong Kong companies which maintained bank accounts with OCBC Wing Hang Bank Limited (OCBC). The plaintiff was duped into transferring US$108,632.50 into the defendants' bank accounts in the belief that the instructions were for a merger and acquisition planned by the chairman of the group of companies the plaintiff belonged to. (This is an illustration of your typical CEO fraud.)

The plaintiff obtained proprietary and *Mareva* injunctions, as well as bankers' books orders, against both defendants. Pursuant to the bankers' books orders, the plaintiff obtained account statements and transaction records of both defendants' accounts.

The plaintiff filed a writ of summons and then sought, by way of Summons, a default judgment against the defendant, as well as to join OCBC to seek a vesting order for the sum of US$108,632.50.

The second defendant was absent from the Summons hearing. Default judgment was obtained against the first defendant and the Court found that the sum of US$90,000 in the second defendant's OCBC account was held on constructive trust for the plaintiff, thus OCBC was ordered to pay that sum to the plaintiff.

Effectiveness of the Hong Kong system can particularly be seen with regard to how it handles new challenges, such as the general increase in online business fraud, email fraud and investment fraud cases in recent years.

Hong Kong Courts have shown a rising willingness to assist victims of such frauds, notably by granting declaratory relief to victims at an interlocutory stage of proceedings, without trial.

Recently in *Skandinaviska Enskilda Banken SA v Hongkong Liling Trading Ltd* [2018] HKCFI 2676, a victim of email fraud claimed that the funds the defendant held defrauded from it were held on trust for the victim by way of a proprietary constructive trust.

The Court granted default judgment along with a declaration that the defendants held the funds on trust for the plaintiff.

While the Court noted that "a court will not normally make a declaration without a trial", it viewed there was a genuine need for declaratory relief in which "the practice will give way to the requirements of justice".

The same reasoning has been followed in a number of other recent first-instance judgments in the High Court and the District Court.

In another recent case, *Terence John Stott v Larks*

Trading Ltd [2019] HKCFI 1317, the victim of a fraudulent investment scam brought a claim based on proprietary constructive or resulting trust and seeking default judgment. The Court again granted the victim declaratory relief without a trial.

Does the regime go far enough in the pursuit of fraudsters and the recovery of stolen assets?

In other jurisdictions, Courts and regulators have sought to share the burden with banks opening accounts, but in Hong Kong, it seems that one can still open a bank account with a shelf company with relative ease and facility, thereby allowing a large portion of bank frauds as recipient accounts for proceeds of fraud. Notwithstanding AML requirements, the banks in Hong Kong still require more stringent risk assessments of the information they collect and the individuals whom they allow to open bank accounts, whether under individual's names or corporate accounts, failing which, Hong Kong will continue to remain an attractive jurisdiction for would-be money launderers.

2 Case Triage: Main stages of fraud, asset tracing and recovery cases

Main stages of how fraud, asset tracing and recovery cases are approached in Hong Kong

Early steps: contacting law enforcement, banks involved and engaging lawyers

Contacting law enforcement: defrauded parties may look to the Hong Kong Police Force and other authorities such as the Joint Financial Intelligence Unit (JFIU) (which is jointly run by officers from the Hong Kong Police Force and the Hong Kong Customs & Excise Department), the Commercial Crime Bureau, the Organized Crime and Triad Bureau or the Independent Commission Against Corruption. An online police report should be filed to register the fraud at the earliest opportunity.

If they are able, the police may require the bank receiving fraudulently obtained assets to temporarily block any attempts to transfer or withdraw the assets.

Effort should be made to contact both the company's bank and the recipient bank to obtain information about the status of the transfer and the whereabouts of the monies.

Lawyers can issue a letter to the banks to point out any potential criminal consequences of transferring funds which they know or suspect are the proceeds of crime (*section 25 of the Organised and Serious Crimes Ordinance*).

The letter to a bank which sets out details of the fraud and points out the potential criminal consequences for moving the funds may make a bank pause before honouring transfer instructions received from a fraudster, and buy time to freeze the money by other methods.

Efforts should be made to contact the police in both the fraudster's home jurisdiction and the jurisdiction to which the money has been transferred.

Commencing civil proceedings, which may be done together with tracing and identifying assets and freezing or restraining assets (explained further below): once the defrauded party's money has hit a local bank account, there is no means by which the recipient bank would

voluntarily reverse the transaction. Hence the defrauded party should commence private civil proceedings in the Hong Kong Courts against parties holding or having an interest in the assets/property sought to be recovered, namely the bank account holder in the case of a bank account fraud.

The most common relief sought for fraud is damages, although other remedies such as equitable relief (e.g. a proprietary claim based on constructive trust) may also be sought.

Tracing and identifying assets

The defrauded party should make sure that there are identifiable assets/property in Hong Kong which may be restrained or confiscated, as authorities in Hong Kong cannot act on any request to restrain or confiscate assets which does not identify particular assets/property.

The relationship between the identified assets/property and the defendants should also be shown and established. If the assets/property is held by third parties, the basis upon which you seek to confiscate this property in your proceedings must be made clear.

The defrauded party may also need more information or evidence about the assets/property of the fraudster. Aside from searching public resources such as the Land Registry or the Companies Registry and the statutory rules in Hong Kong on the discovery and inspection of documents for parties to civil proceedings, the defrauded party has the option of making applications for discovery orders such as *Norwich Pharmacal* orders, *Bankers Trust* orders or bankers' records/books order under section 21 of the EO.

These are important for acquiring information or evidence about fraudsters or the fraudster's assets from third parties.

Freezing or restraining assets under a Court application for an injunction

There are various forms of interim relief available to restrain fraudsters from dealing with, moving or disposing of assets, such as obtaining a *Mareva* injunction or an *Anton Piller* order as discussed above.

A hearing for such interim relief may be obtained at short notice and is heard *ex parte*, and the Court will issue the freezing order if it is satisfied that the required conditions for making the order are met. The initial order to freeze assets is an interim order for a limited period only and parties will be given time to effect service of the order and related documents on the defendant fraudster(s) and other affected parties, such as banks.

Parties will then get a return date to go back to Court, at which they will need to provide to the Court with evidence that service on the defendant fraudster(s) and other affected parties was effected. The defendant fraudster(s) and other affected parties may appear at this hearing.

If the defendant fraudsters and other affected parties do not appear, normally the Court will grant a continuation of the freezing order "until further order of the Court" so it will remain effective until the proceedings complete.

Recovering assets and enforcing judgments

Once assets have been frozen in Hong Kong, the proceedings will need to continue to be litigated, as frozen assets cannot be recovered until the defrauded plaintiff has obtained a final judgment and executed on the judgment.

In cases where the defendant fraudster(s) do not participate in the civil proceedings and fail to file an acknowledgment of service of a defence – as is common in email fraud cases – the defrauded plaintiff can obtain a default judgment (judgment without a trial) against the defendant fraudster(s).

Obtaining summary judgment – where the defendant has no defence to the claim – is generally not available to plaintiffs where their claim is based on an allegation of fraud as the Court has no jurisdiction to grant summary judgment in such cases.

However, in recent years there have been some cases where the fraud exception did not automatically apply where the facts of the case include fraud, but the defrauded plaintiff could show the

claim would success even without proof of fraud.

For instance, in *Laerdal Medical Limited v Hong Kong Hoacheng International Trade Limited HCA* 2193/2016, the plaintiff showed its case could succeed based on unjust enrichment without proving fraud. The Court also additionally found the defendant's defence "hopeless".

Types of relief after successfully obtaining a judgment include:

1. *Mareva* injunctions in aid of enforcement;
2. the appointment of a receiver;
3. examining the judgment debtor(s) (who were the fraudster defendants), if available, on oath in order to identify the whereabouts of the assets of the judgment debtors; or
4. discovery or disclosure of documents against third parties.

There are a variety of methods for enforcing such judgments, such as garnishee proceedings and charging orders.

Garnishee proceedings are against a third party, typically the local bank with which the defendant fraudster has an account containing the fraudulently obtained assets. A garnishee order will require the bank to pay money directly to the defrauded plaintiff as part of the execution of a judgment obtained by the defrauded plaintiff.

Where the defendant fraudster has assets such as landed property, securities or funds in court, the defrauded plaintiff can try to obtain a charging order to impose a charge over those assets. This provides the defrauded plaintiff with security, though further action would have to be taken to realise those assets.

Other options, depending on the circumstances, include, writs of *fieri facias*, writs of sequestration, vesting orders (discussed further in section 7 below), winding-up proceedings or bankruptcy proceedings and orders for committal.

What are the benefits to this system and are there any difficulties?

Generally speaking, the Hong Kong legal system and its courts are well equipped to deal with disputes and cases which result from fraud and also provide relief to those parties who have fallen victim.

However, the process discussed above does take time, and if the various orders discussed above are not obtained quickly enough, particularly to freeze misappropriated assets in the fraudster's bank accounts, it is likely the fraudster will have already transferred those assets elsewhere (usually out of the jurisdiction). (Discussed further in section 4 below.)

3 Parallel Proceedings (a Combined Civil and Criminal Approach)

There are no restrictions on civil proceedings progressing in parallel with criminal proceedings on the same subject matter. A combined civil and criminal approach occurs frequently in Hong Kong; however, not at the instance of the victim but rather at the discretion of the Police. Once a party has been defrauded, there is much advantage to be gained by reporting the fraud online as described above. With that report, it is hoped that the Police will get involved to impose and issue a Letter of No Consent to the bank, informing the bank that the police does not consent to their handling or dealing with the fraudster's account. Having said that, however, this is not something that the victim of a fraud can 'order' or request the Police to do, and if the Police does issue such a freeze, then the victim can save on legal fees as the bank account will be frozen without a Court order.

The police may have powers to freeze a bank account much more quickly by the 'Letter of No Consent' procedure, and it is possible that the police may assist in recovering stolen funds or even carry out the recovery process themselves.

The 'Letter of No Consent' procedure in Hong Kong is as follows:

i. When fraud is reported to the JFIU, including as a suspicious transaction report (STR), the JFIU issues a Letter of No Consent to a bank. This means that JFIU does not consent to the bank dealing with the funds in the account.
ii. Section 25A of the Organized and Serious

Crimes Ordinance (Cap. 455) (OSCO) requires a person (an "informant") to disclose his/her knowledge or suspicion that any property represents the proceeds of crime to JFIU. If JFIU gives the informant consent to deal with the property, then the informant does not commit an offence under section 25 if s/he deals with the property.

iii. If JFIU does not give consent to the bank to deal with the property (the "no consent" regime), the informant or bank cannot deal with the property because this will constitute a criminal violation of section 25.

iv. However, section 25A(2)(a) and the "no consent" regime does not operate to withhold or freeze the accounts or property of a suspect. It only creates a defence for further dealings with the property after disclosure.

v. It remains for financial institutions to decide whether to honour the instructions of their customers despite their suspicion and the disclosure.

vi. If on the other hand the police does not issue the Letter of No Consent, the victim of the fraud is then left with having to run into Court to apply for the typical *Mareva* injunction to prevent further dissipation and a banker's records order to trace the funds, thereby having to incur legal fees.

Note on criminal proceedings in Hong Kong: For serious offences – which likely includes 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 (section 26 of the Magistrates Ordinance (Cap. 227)).

Benefits of the combined civil and criminal approach

Apart from the civil causes of action and the Court orders that may be granted in civil proceedings, with respect to criminal matters, law enforcement 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.

The Hong Kong Police Force acts pursuant to the Police Force Ordinance with respect to evidence-gathering procedures and seizure of suspected property. Prosecutors will likely have the benefit of receiving evidence gathered by law enforcement. In particular circumstances, they may pursue their own applications to the Court for evidence-gathering orders. The Police, however, do not share the results of the investigations with the public and hence victims of the fraud cannot rely on this as a resource for their civil claims.

Under section 15 of OCSO, 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 such property. In addition, an authorised officer may also seize restrained property to prevent its removal from Hong Kong.

Section 16 of OSCO allows for the prosecutor to apply to the Court for a charging order on realisable property, which has the effect of securing payment to the Hong Kong government backed by the property charged.

In any event, a discontinued or failed criminal prosecution is not a bar to civil action in Hong Kong since the standard of proof in civil proceedings is lower than in criminal proceedings.

The difficulties as mentioned above are that a victim of a fraud cannot expect to work in tandem with the Police or rely on Police investigations to assist in the recovery of the funds, but rather must incur legal fees in its effort to recover the funds. The chicken or egg situation prevails because, at all times, victims would want to have certainty of recovery before deciding to spend

good money after bad. To this extent, the legal practitioner is not in a position to advise with any certainty of outcome.

Civil fraud claims must be brought within six years from the date on which the cause of action accrues. This clock does not begin to run until the defrauded plaintiff discovers the fraud or could, with reasonable diligence have discovered it.

Plaintiffs, however, cannot act against an innocent third party who purchased the property for valuable consideration and without notice of the fraud, i.e. the defence of *bona fide purchaser for value without notice* prevails – in other words, at the time of the purchase, where the third party did not know or have reason to believe that a fraud had taken place.

4 Key Challenges

Banks have contractual duties to their customers, which usually include the duty to honour any instructions to transfer funds out of a bank account before any injunction order is granted by the Court and/or any action is taken by the authorities.

Given also that it can take time to communicate the details of a fraud to the right person in a large banking organisation and to persuade them to take action, it may be that a recipient bank can do, or will do, nothing to stop further transfers of the monies.

It can take time to communicate the details of a fraud to the right individual in a large banking organisation and to persuade them to take action, so it may be that a recipient bank can do, or will do, nothing to stop further transfers of the monies promptly.

The defrauded monies may have been transferred out of the bank account of the fraudster defendant.

The defrauded monies may have been transferred out of jurisdiction – if the defrauded monies have been transferred to the People's Republic of China, it would be particularly difficult to recover the same.

Furthermore, commencing civil proceedings and taking out the interlocutory applications mentioned earlier in this chapter can come with a significant legal cost and there is no guarantee that the defrauded party will recover all, or even any, of their money.

5 Cross-jurisdictional Mechanisms – Issues and Solutions in Recent Times

Most frauds now span multiple jurisdictions and often, the cooperation of cross-border litigators may need to be involved or mobilised with despatch quickly to try and arrest the funds.

Given that Hong Kong is an international hub where the incorporation of private limited companies is inexpensive and relatively easy and banks are accustomed to customers dealing in large amounts of money, Hong Kong is a popular destination for fraudulently obtained funds to be transferred to, particularly in email fraud cases.

In August 2015, the United States' Federal Bureau of Investigation (FBI) reported that the majority of wire transfers in fraud cases involving business email compromises were going to Asian banks located within Hong Kong and China.

In July 2018, the FBI reported again that Asian banks located in Hong Kong and China remained the primary destinations of fraudulent funds where wire transfers were made pursuant to business email compromises/email account compromises.

The mechanisms in place for effective tracing of assets cross-jurisdictionally

Criminal proceedings

Article 96 of the Basic Law provides that with the assistance or authorisation of the Central People's Government, the Hong Kong government may make appropriate arrangements with

foreign states for reciprocal juridical assistance.

There are also several multilateral agreements which apply to Hong Kong which provide for mutual legal assistance in criminal matters. Hong Kong also has bilateral mutual legal assistance agreements with 30 other jurisdictions as of November 2018.

As a matter of common law, the Hong Kong Police Force can exchange information with, and release information to, law enforcement bodies in other jurisdictions (such as the FBI) for intelligence and investigation generally.

The Hong Kong Police also has mutual assistance arrangements with enforcement bodies of other countries where assistance is required across jurisdictions for situations such as the obtaining of information for use in a prosecution or the production of materials relating to a criminal matter from the party in possession or control of those materials. Such a request will be dealt with under Hong Kong's mutual legal assistance framework and be processed under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (MLAO).

The MLAO was enacted so that Hong Kong's law enforcement authorities could work with their counterparts abroad in investigating and prosecuting criminal offences. It provides for a variety of available legal assistance which is important in the context of asset tracing.

Under the MLAO, the Secretary of Justice of Hong Kong may assist another jurisdiction or make requests to another jurisdiction for assistance of the types set out in the MLAO. These include:

1. taking of evidence and production of things;
2. search and seizure;
3. production of material;
4. transfer of persons to give assistance in relation to criminal matters;
5. confiscation of proceeds of crime; and
6. service or certification of documents.

These types of assistance allow Hong Kong to work with other jurisdictions to get orders to trace assets, such as by getting a bank to produce documents, as well as to freeze or confiscate assets.

Where the jurisdiction making a request to Hong Kong does not have a bilateral agreement with Hong Kong, that jurisdiction will need to provide a reciprocity undertaking. Otherwise, Hong Kong will refuse such a request.

However, section 3 of the MLAO specifically provides that it does not apply to the provision or obtaining of assistance in criminal matters between Hong Kong and any other part of the People's Republic of China.

Parts VIII and VIIIA of the Evidence Ordinance (Cap. 8) (EO) also provide that the Court of First Instance in Hong Kong has the power to assist in obtaining evidence for criminal proceedings in an overseas Court, as well as the power to order that a letter of request – a formal written request – be issued to an overseas Court to assist in obtaining evidence for criminal proceedings in Hong Kong.

Civil proceedings

Part VIII of the EO provides that the Hong Kong Courts have the power to assist in obtaining evidence for civil proceedings in overseas Courts.

Order 70 of the Rules of the High Court (Cap. 4A) (RHC) then provides the framework for the Hong Kong Courts to obtain evidence for overseas Courts pursuant to Part VIII of the EO or pursuant to The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention"), which Hong Kong is a contracting party to. The Hague Evidence Convention provides a mechanism for the 61 states which are contracting parties to obtain evidence located overseas by issuing a letter of request (also known as letters rogatory).

A foreign defrauded party may get the judicial body of the overseas jurisdiction in which they commenced proceedings to issue a letter of request to Hong Kong Courts for assistance in obtaining evidence in civil proceedings. The jurisdiction of Hong Kong Courts to do so is provided under Part VIII of the EO.

A Hong Kong court may also issue a letter of request to foreign courts to acquire evidence from parties out of the jurisdiction based on the Hague Evidence Convention.

Where a letter of request is from a foreign country which is not a party to the Hague Convention, it can still be recognised even though no convention is in force. The language of Part VIII of the EO is wide enough to provide for requests from states which are not parties to the Hague Evidence Convention (Order 70, White Book).

While China is also a contracting party to The Hague Evidence Convention, it does not apply between Hong Kong and China since they are two jurisdictions within the same state.

Hong Kong and China separately entered into the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region, which came into force on 1 March 2017.

This arrangement assists parties to proceedings in Hong Kong and China in obtaining

evidence in civil and commercial matters with greater efficiency and certainty.

Foreign defrauded parties may also freeze and realise proceeds of fraud in Hong Kong by way of Section 21M of the High Court Ordinance (Cap. 4) (HCO).

Under Section 21M of the HCO, the Hong Kong court has the jurisdiction to grant interim relief in relation to proceedings which have been or are to be commenced in a place outside Hong Kong and are capable of giving rise to a judgment which may be enforced in Hong Kong.

This may provide a way for overseas victims of fraud which have identified assets belonging to the fraudster in Hong Kong to obtain interim relief, such as a *Mareva* injunction, in respect of those assets. The overseas victim may then continue pursuing their proceedings overseas without having to conduct concurrent proceedings in Hong Kong.

6 Technological Advancements and Their Influence on Fraud, Asset Tracing and Recovery

While the integration and use of artificial intelligence (AI) in the legal sector in Hong Kong is in its early days, law firms in Hong Kong are increasingly welcoming and embracing the use of technology in providing legal services.

This is likely to be the trend for most, if not all, law firms in Hong Kong in the next few years. So far, the legal sector has largely integrated and utilised technology, including AI and machine learning, in areas such as e-discovery, due diligence, contracts review and repetitive document management exercises, as those are areas where the volume of data and/or documents can be so massive that human review is either almost impossible or exceedingly difficult. The use of technology to assist makes it faster, more accurate and more cost-effective to carry out such tasks.

Hong Kong has also seen various start-ups take integration of technology into the legal sector beyond just large-scale document review and management, such as:

i. the Hong Kong-based Zegal, which offers cloud legal software solutions for both law firms and businesses by simplifying the search for legal documents and automating the legal document drafting process; and
ii. the not-for-profit Electronic Business Related Arbitration and Mediation, also known as "eBRAM", which is developing a new online platform for dispute resolution in which users can go through negotiation, mediation and arbitration entirely online, and AI will facilitate deal-making on this platform. This was formed with the support of the Law Society of Hong Kong and the Hong Kong Bar Association.

However, there are not yet any specific examples of technology being used by Hong Kong's legal sector to aid fraud, asset tracing and recovery in Hong Kong.

The advancement of technology *vs* the difficulties of asset traceability?

Has the advancement of technology enhanced the difficulties of asset traceability?

Cryptocurrencies and Blockchain, for example, allow for extended anonymity provisions, which can hinder asset recovery.

An example of a situation in Hong Kong where tracing assets was made more difficult due to the advancement of technology was the launch of the Faster Payment System (FPS) in September 2018.

FPS is a real-time payment system introduced by the Hong Kong Monetary Authority and operated by Hong Kong Interbank Clearing Limited allowing for immediate fund transfers and retail payments between consumers and merchants. All banks and e-wallet operators in Hong Kong could participate in the FPS.

However, soon after the launch of the FPS, fraud cases involving the FPS cropped up as a result of fraudsters stealing personal and bank account information of victims, then using this information to open up fake e-wallets and then stealing money from those victims' bank accounts using the fake e-wallets.

Real-time transactions leave more room for fraud because unlike traditional payment methods which take more time to go through, making payments through systems like the FPS are immediate and irreversible. Therefore, once your money is gone, it is essentially gone forever.

As for cryptocurrencies and virtual assets generally, with the rapid development of virtual assets, the number of frauds related to virtual assets has also risen.

Hong Kong turned into a flourishing market for cryptocurrency exchanges and initial coin offerings (ICOs) given that it has less strict rules on virtual currencies than China, where ICOs and cryptocurrency exchanges have been banned since 2017 (and now essentially all crypto-related commercial activities are banned).

By February 2018, however, the Securities and Futures Commission of Hong Kong (SFC), the statutory authority in Hong Kong which regulates the securities and futures markets, announced that they had received several complaints from cryptocurrency investors against issuers of ICOs alleging "unlicensed or fraudulent activities" or that cryptocurrency exchanges had "misappropriated their assets or manipulated the market". The SFC also received complaints from investors who claimed they were unable to withdraw fiat currencies or cryptocurrencies from accounts they opened with cryptocurrency exchanges.

In this February 2018 circular, as well as a number of other circulars, the SFC urged investors to be careful of the heightened risk of – among other problems – fraud when investing in cryptocurrencies and ICOs.

Given that such investments, along with the use of cryptocurrency exchanges, occur online, a victim of fraud may have trouble pursuing fraudsters if those fraudsters are not physically present in Hong Kong.

SFC also flagged that it may not have jurisdiction over issuers of ICOs or cryptocurrency exchanges if "they have no nexus with Hong Kong or do not provide trading services for cryptocurrencies which are 'securities' or 'futures contracts'".

Further, since digital tokens involved in ICOs are transacted or held on an anonymous basis, they pose inherent risks.

The SFC also noted that these technological advancements were causing an increase of intermediaries who were starting to provide asset management services involving virtual assets.

The SFC publicly expressed concern about virtual asset portfolio managers and virtual asset trading platform operators in November 2018 as these portfolio managers and platform operates may not have carried out enough due diligence before they invest in a certain virtual assets or allow a virtual asset to be traded on their platforms. Therefore, investors may end up being defrauded and lose their investments.

Has the law kept up with these advancements or is it lagging behind?

Since Hong Kong is still in its early days of seeing the impact of technological advancements on issues such as fraud and also utilising technological advancements in the legal sector, there has not yet been much visible influence on the law.

However, statutory bodies such as the SFC have worked to address issues which have come up so far, such as to try to bring virtual asset portfolio managements into the SFC's "regulatory net".

For instance, on 1 November 2018, the SFC announced a "conceptual framework for the possible regulation of virtual asset trading platforms" and subsequently met with virtual asset trading platform operators in Hong Kong to explain the SFC's regulatory expectations.

The SFC decided that it would be appropriate to regulate certain types of centralised platforms trading security and non-security virtual assets and published a framework for doing so in a Position Paper published on 6 November 2019. Where virtual asset trading platforms are able to meet the SFC's regulatory standards (which are similar to those for licensed securities brokers), the SFC will grant a licence to those platforms and regulate them under the SFC's existing powers.

However, the SFC pointed out in this paper

that the SFC does not have the power to grant licences to or oversee trading platforms which only trade non-security virtual assets.

Furthermore, the parts of the Securities and Futures Ordinance (Cap. 571) which enable the SFC to take action against market misconduct in the securities and futures markets will not apply to licensed virtual asset trading platforms because at the end of the day, they are still not a recognised stock or futures market and the virtual assets are not "securities" or "futures contracts" listed or traded on such a market (*paragraphs 1 to 9, SFC Position Paper on Regulation of virtual asset trading platforms*).

In 2018, the SFC also ordered a Hong Kong-based ICO issuer Black Cell Technology Limited ("Black Cell") to halt raising capital through an ICO and return all digital tokens to investors because Black Cell's activities may qualify as a "collective investment scheme" that would require the SFC's approval to market or sell to the general public.

7 Recent Developments and Other Impacting Factors

Other pertinent developments impacting the sector

The use of "mule" bank accounts

There has been an increase in the use of "mule" bank accounts in Hong Kong for moving money obtained by way of fraud.

These mule bank accounts have other trading purposes and become an issue where the beneficiary of the subject bank accounts argue that they received the funds of the defrauded party as a '*bona fide* purchaser' and should be entitled to keep those funds.

Hong Kong saw a spate of these cases, such as *Laerdal Medical Limited v Hong Kong Hoacheng International Trade Limited* HCA 2193/2016 (mentioned in Section 3 above), where the defendant claimed it had received funds from the defrauded plaintiff as consideration for a business transaction, which was a shipment of female shoes from a company in mainland China. However, the Hong Kong Court found that the defendant had a hopeless defence considering, among other factors, that the defendant had no contract with the defrauded plaintiff, but the defendant's own banking documents showed the funds were credited in favour of the defendant by the plaintiff.

Similarly, in *Ferrari North America, Inc v Changhon International Energy Co Limited and Others* HCA 862/2017, an email fraud case where the plaintiff was lured into paying US$6.7 million into the defendant's Hong Kong bank account. Part of this sum was transferred onward to other defendants and one of these defendants claimed it had received part of the funds as part of its "*bona fide* arm's length dealings" to buy frozen meat products from suppliers. In this case, the Hong Kong Court found enough issues with the defendant's evidence to raise a suspicion of dishonesty – such as the defendant's sales confirmation being inconsistent with its other sales confirmations and the defendant's bank documents showed it had no normal commercial banking or business-related activities at the time of the fraudulent transfers – and accordingly continued the injunction which the plaintiff had applied for to freeze the funds.

Dissenting judicial decisions in respect of vesting orders

As mentioned in Section 2 above, it was not uncommon in previous cases that victims who were defrauded of money would seek vesting orders under section 52 of the Trustee Ordinance (Cap. 29) ("Section 52") and enforce the same against the defendants as a remedy. These orders recognised that the defendants' rights to sue for and recover deposits (those representing defrauded money or its traceable proceeds) against the bank could be vested in the victims. Once a vesting order was granted by the Court, the monies held in the corresponding defendant's (in some cases, the fraudster's) bank account would "belong" to the defrauded victim. Vesting orders were also used to compel the bank to transfer such deposits directly to the victims after an order of the Court is granted and this is to be differentiated from a judgment creditor seeking to enforce a judgment and for all intents and purposes the money would now be treated as the victim's money. However, dissenting judicial decisions were handed down recently in 2020 rendering uncertainty to the cooperation of this relief.

On 24 June 2020, Recorder Eugene Fung SC in *800 Columbia Project Company LLC v Chengfang Trade Limited and Another* [2020] HKCFI 1293 declined to follow previous case law and ruled that the Court's jurisdiction under Section 52 to grant a vesting order should not be invoked to favour victims of fraud. The learned Recorder analysed the application of the Trustee Ordinance purposively and concluded that Section 52 envisages vesting orders to be made upon a change in the trusteeship, but not situations in which a person becomes a constructive trustee pursuant to a Court declaration.

In contrast, on 10 July 2020, Deputy High

Court Judge Paul Lam SC in *Wismettac Asian Foods, Inc. v United Top Properties Limited and Others* [2020] HKCFI 1504 granted a vesting order and ruled that Section 52, interpreted literally and independently, allowed the Court to vest the rights to sue for and recover deposits against the bank in any person the Court may identify, including implied or constructive trustees.

Since both decisions were followed by judges hearing similar cases at a similar Court of first instance level or below, the sector expects and hopes for appellate guidance to substantively shed light on this conflicting area of the law.

Since July 2020, the route for remedies in cyber fraud cases continues to be a developing area where there are divergent opinions in the Judiciary. In our submissions in one recent case, we attempted to explore an unprecedented enforcement route in the context of cyber frauds by invoking Order 45, rule 8 of the Rules of the High Court. Order 45, rule 8 can be applied in situations where the Court has ordered the defendants to return, deliver up, transfer and/or pay the balance in the bank accounts to the plaintiff and the defendant clearly will not comply with such order, the plaintiff may seek to have an order made under section 25A of the High Court Ordinance ("HCO") to order the registrar, or the plaintiff's solicitors, or any other person as it sees fit, to execute the document to effect such transfer of the balance instead.

Subsequently in August 2020, DHCJ Douglas Lam SC, in *Tokic, D.O.O. v Hongkong Shui Fat Trading Ltd.* [2020] HKCFI 1822 (4 August 2020), granted an order under section 25A of the HCO that the defendants were to execute documents which transferred the contents of their accounts back to the plaintiff and failing that, the plaintiff was permitted to seek a further order from him.

As a result of the uncertainty on whether a plaintiff in the context of cyber fraud cases has a basis for seeking a vesting order, and if so, what considerations shall apply in the exercise of discretion and the appropriate procedure to be followed, the plaintiff in *Essilor Manufacturing (Thailand) Co. Ltd. v G. Doulatram & Sons (HK) Ltd. & Anor.* [2020] HKCFI 1790 (3 September 2020) indicated that it was no longer pursuing the applications for vesting orders.

Practically speaking, obtaining a garnishee order or a remedy under section 25A HCO are both lengthier processes when compared to obtaining a vesting order. For an innocent party, usually a business, timeliness is essential, and the defrauded amount may take a few months or longer to return to the business, which may cause inconvenience or difficulty to the said business. In order to utilise section 25A HCO, the innocent party has to wait for a certain period of time during which the defendant does not fulfil the first judgment before applying for a further order. In reality, the innocent party may not be able to wait for that long as they need cashflow to run their business. In the meantime, victims pursuing vesting orders must be advised about the dichotomy arising from these dissenting decisions and be informed to consider using other options of enforcement for certainty of outcome.

Dorothy Siron is one of the Co-Managing Partners of Zhong Lun Law Firm's Hong Kong office and heads up the Litigation and Dispute Resolution practice.

Dorothy's practice focuses on complex cross-border commercial litigation and arbitration and international trade. She has expertise in several specialised areas of law, including commercial fraud, white-collar crime, cyber fraud, professional negligence, international trade disputes and enforcement of foreign judgments, contentious trust, probate and estate disputes, cross-border litigation, and family law work. Moreover, she frequently handles *Mareva* and other types of injunctions; enforcement; disciplinary actions against listed companies and its directors and officers by the Securities and Futures Commission; and enquiries by the Independent Commission Against Corruption (ICAC). Whether seeking made-to-order solutions or strategising steps forward, Dorothy will tailor make solutions with the clients' best interest as her paramount consideration.

Dorothy is a Director of TerraLex, an international network of independent law firms, a past Committee Member of the International Committee of the National Asian Pacific American Bar Association (NAPABA) and an associate member of the Chartered Institute of Arbitrators, UK.

She is also a fellow of the prestigious International Academy of Financial Crime Litigators and the International Association of Defense Counsel (IADC), membership of which are both by invitation only.

dorothysiron@zhonglun.com

Founded in 1993, **Zhong Lun** is one of the largest law firms providing a complete spectrum of legal services in China, with over 310 partners and over 2,100 professionals in 18 offices located globally.

Zhong Lun Hong Kong office serves a broad range of practice areas including dispute resolution (litigation and arbitration), employment and family, private client, tax and trust, capital markets, corporate, mergers & acquisitions, intellectual property, real estate, as well as securities regulatory.

Zhong Lun has been recognised as "PRC Firm, Hong Kong Office of the Year" by the prestigious Asian Legal Business Hong Kong Law Awards in 2017, 2019 and 2020, and is the exclusive Hong Kong member of TerraLex, a global network of over 155 leading independent law firms with over 19,000 lawyers in 100 countries.

www.zhonglun.com.hk

中倫律師事務所
ZHONG LUN LAW FIRM

India

Shreyas Jayasimha
Aarna Law

Aakash Sherwal
Aarna Law

I Executive Summary

The Indian legal system has a rich and varied jurisprudence based on common law principles dealing with aspects of fraud and asset tracing. The judiciary in India exercises wide powers not only in consonance with achieving the objectives of various statutes dealing with the subject matter of fraud, but also grants reliefs and orders as may be necessary for the ends of justice. The wide powers have been granted under the Civil Procedure Code, 1908, which is the principal statute dealing with the powers of the court to grant injunctive reliefs, appoint receivers of property, etc. Further, the mischief of fraud and its ramifications on a transaction is also sought to be addressed through specific statutes such as the Indian Contract Act, 1872, Companies Act, 2013, Insolvency and Bankruptcy Code, 2016, etc.

While the aforesaid statutes and inherent powers of the court have permitted implementation of internationally accepted practices in the asset tracing and recovery space, such as Anton Piller Orders, injunction on disposal of assets, etc., there are certain significant limits and variations in procedure which are addressed in detail in the section below.

II Important Legal Framework and Statutory Underpinnings to Fraud, Asset Tracing and Recovery Schemes

The Indian legal system is common law-based with many important statutes sharing similarities with the principles and rules of law prevalent among other common law jurisdictions such as United Kingdom. Further, the judicial system consists of a three-tier hierarchical system with the District Courts at the town/city level, a High Court in each state capital and Supreme Court of India located in New Delhi. The jurisdiction for each judicial institution varies based on state-specific rules and subject matter; however, broadly speaking, the District Courts exercise original jurisdiction where cases are instituted in the first instance, and appellate jurisdiction is vested with the High Courts and the Supreme Court. Also, various tribunals consisting of experts and judicial members have been constituted to deal with specialised subject

matters and the jurisdiction of the District Courts and High Courts is usually excluded for such subjects. Certain important tribunals include: National Company Law Tribunal and National Company Law Appellate Tribunal (company and insolvency-related subjects); Debt Recovery Tribunal and Debt Recovery Appellate Tribunal (recovery by financial institutions); National Consumer Dispute Redressal Commission along with the State and District Forum (consumer-related issues including product liability); National Green Tribunal; Competition Appellate Tribunal; Securities Appellate Tribunal; Real Estate Regulation Authority (group housing); etc.

Injunction

The institution of civil proceedings, including any proceedings related to fraud and asset tracing, is governed by the Civil Procedure Code, 1908 (CPC), which is the principal statute for the determination of several important issues including the determination of the relevant court which may exercise jurisdiction over a party against whom proceedings must be initiated (see Section 20, CPC). CPC empowers any court seized with any civil proceedings to issue a temporary injunction, including an *ex parte* injunction, against the disposal of any assets, or restrain any action by a party till the continuation of the legal proceedings (see Order 39 Rule 1 and 2, CPC). The courts have established a three-pronged test to determine the basis on which an injunction against the disposal of assets or restrain on a party may be granted. The court takes into consideration (a) whether the plaintiff has established a *prima facie* case, (b) the balance of convenience, and (c) whether irreparable harm or injury may be caused which may not be adequately remedied through the grant of damages (see *Gujarat Bottling Co. Ltd. v. The Coca-Cola Co* AIR 1995 SC 2372). Additionally, it may be kept in mind that the injunction is usually granted with respect to actions or assets of the party which form the subject matter of the proceedings only.

Attachment before Decree

A party seeking a freezing injunction to seek protection against the dissipation of assets of a party to prevent the obstruction of any potential decree may seek attachment of property or furnishing of sufficient security before decree is passed by the civil court under CPC (see Order 38 Rule 5, CPC). Alternatively, a party may also seek appointment of a Receiver of a property who may take possession of the asset and thus preserve the same till the adjudication of the matter is complete and decree is secured (see Order 40 Rule 1, CPC).

However, it may be kept in mind that power to attach before decree or seek appointment of a receiver is a drastic and extra-ordinary power and is used sparingly, unlike English Courts granting Mareva Injunctions. The exercise of such power is subject to establishment of a *prima facie* case and establishing that a party is seeking to dispose of assets in order to obstruct the execution of a potential decree (see *Raman Tech. & Process Eng. Co. v. Solanki Traders* (2008) 2 SCC 302).

Discovery & Seizure

CPC also empowers parties with the leave of the court to ask interrogatories or questions from the opposite party in support of its case. The response of the party is required to be given on oath and in writing and constitutes evidence that may be relied upon by the court for adjudication (see Section 30 and Order XI of CPC). In the context of fraud cases, however, there are certain limits on the effectiveness of interrogatories as the party is not bound to answer any question which makes the party liable to criminal proceedings. Notwithstanding, the same interrogatories are effective tools in the information gathering exercise while seeking adjudication of cases on behalf of victims of fraud.

CPC also provides for appointment of commissioners or representatives of the court to conduct local investigations and thus enables courts in India to pass orders akin to the Anton Piller Order. The commissioner may even be appointed *ex parte* in certain exceptional circumstances. It may be kept in mind that while the burden of proof and the onus of leading best evidence is always upon the plaintiff, a party may not seek appointment of a court commissioner to undertake an evidence gathering exercise, but may seek appointment of a commissioner for the preservation and protection of evidence. The party seeking relief must also demonstrate that there are reasonable circumstances existing pursuant to which the party requires the assistance of the court through the appointment of a local commissioner. (See Section 75 and Order 26 Rule 9 CPC; *Autodesk Inc. v. AVT Shankardass & Ors.* AIR 2008 Delhi 167.)

Rules of Evidence & Limitation

In addition to the above, it is pertinent to note that the rules of evidence regarding any civil action are governed by the Indian Evidence Act, 1872. The same consists of well prescribed rules and onus of burden of proof for leading evidence on the actions related to fraud.

It may be kept in mind that while instituting any action, Indian law mandates a three-year limit from the cause of action before the institution of any action before the civil courts is permitted. The said limit is observed strictly by the courts in India; however, a special exception only in cases relating to fraud exists, i.e. the three-year period of limitation in cases of fraud commences from the date a party discovers the fraud or from the day when the party with reasonable due diligence could have discovered the fraud (see Section 17, The Limitation Act, 1963).

In addition to the various tools available with parties to seek remedy and undertake asset tracing and recovery under the CPC, the law and remedies relating to fraud and treatment of assets connected to fraud is also encapsulated in various statutes regulating the affairs between the parties based on the nature of their legal relationship. Certain important statutes are covered herein below:

1. Indian Contract Act, 1872

The Indian Contract Act, 1872 (ICA) is a key legislation regulating the conduct of private contracts between parties. The ICA defines fraud in a wide manner, defining fraudulent actions such as intentional suggestion of a fact which is untrue, active concealment of facts, false promise or any other action declared fraudulent by law. (See Section 17 of ICA.)

ICA also provides for options of declaring contracts as void at the decision of the victim party if the same are executed based on misrepresentation and frauds. Thus, a party who is a victim of fraud, perpetuated through a contract, may avoid the performance of the contract at her discretion. Further, the victim may also seek to be restored to *status ante quo* and seek damages for any loss suffered by it pursuant to such fraud or misrepresentation. (See Section 19 of ICA.)

It is pertinent to note that any dispute resolution clauses in a private contract involving arbitration may be affected by serious allegation of fraud rendering the arbitration clause inapplicable. However, allegation of fraud simpliciter may still be dealt by the arbitral tribunal. The Supreme Court has also recently specified that serious allegations of fraud *inter alia* would include any allegation where agreement to arbitrate has been obtained fraudulently and where any allegations of fraud have been made against the government or a state instrumentality. The aforesaid position of law has recently been clarified by the Supreme Court in *A. Ayysamy v. A. Paramasivam*, (2016) 10 SCC 386 and *Avitel Post Studioz Limited & Ors. v. HSBC PI Holdings (Mauritius) Limited* (2020) 6 MLJ 544.

2. Companies Act, 2013

Corporate fraud touching the internal affairs of a company and its dealings with third parties is dealt with under the Companies Act, 2013 (CA). CA has adopted a very wide definition of fraud to include any action, concealment or abuse of position undertaken to deceive or injure the interests of a company, shareholder, creditors, or any other person (see Section 447 of CA). The wide definition permits checking a wide variety of actions usually undertaken by unscrupulous actors including fraudulent inducement to invest money in a company, forgery or misstatement of accounts of the company, omission of any significant information in the prospectus or statement of affairs of a company.

The CA has also established a dedicated investigation agency called the Serious Fraud Investigation Office (SFIO) to investigate any offences of frauds related to companies. The SFIO is a multi-disciplinary agency consisting of experts in the field of accountancy, forensic auditing, law, information technology, etc.

With respect to the regulation of companies, the Ministry of Company Affairs, Government of India, is tasked with various aspect of corporate governance. It is significant to note that the Ministry of Company Affairs maintains a digital and publicly accessible database of all companies, their directors, abridged financial statement of affairs and the details of any charge created on the assets of the company for public inspection. This database is extremely useful in tracing the details of any related companies and its directors involved, or linked to, the target company for the purpose of fraud and asset tracing.

3. Transfer of Property Act, 1882

The Transfer of Property Act, 1882 (TOPA) has placed special emphasis on protecting creditors, including a decree holder, from fraudulent transfers of immoveable property. TOPA empowers the victim party to seek annulment of any transfer undertaken to defeat the claim of any creditors, including decree holders. The only exception being that a bonafide purchaser, who does not have any notice of a prior dispute regarding an immovable property, is protected from any proceedings instituted to set aside immovable property purchased by him. In such circumstances, the only recourse that remains is to seek restitution or damages from the target or the party responsible for fraud (see Section 53, TOPA).

4. Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code, 2016 (IBC) is one the most ambitious economic

reform laws that has been passed by the Government of India in recent history. It is the principal code for corporate and personal bankruptcy in India and adopts a creditor-centric approach, *vide* which an insolvent company is taken over by an insolvency professional who acts under the supervision of the creditors of the company.

IBC also empowers the insolvency professional to pursue remedies against various types of fraudulent transactions, including preferential transactions, fraudulent or wrongful trading, undervalued transactions, or extortionate transactions (see Section 43, 45, 47, 50 and 66 of IBC). It is pertinent to note that insolvency professionals have been granted a wide ambit of powers to pursue legal actions against any individuals, whether promoters of the company or third parties, to pursue recovery of dues for the benefit of creditors.

However, the challenge to undertake meaningful actions in the context of insolvency proceedings and liquidation proceedings for asset tracing and recovery is the limited time period available under the insolvency and liquidation (required to be completed in 180 days and 365 days, respectively). The same is incompatible with the longer time involved in adjudication of civil proceedings relating to fraud or asset recovery. The Insolvency and Bankruptcy Board of India (IBBI) in view of the issue has recently come out with a discussion paper on the desirability of the sale of any Non-Readily Realizable Claims (NRRA) and the appropriate mechanism that may be adopted to pursue the same within the provisions of the IBC. (See Discussion Paper on Corporate Liquidation Process, dated 26 August, 2020 at https://ibbi.gov.in/DP_26.08.2020.pdf.) Subsequently, Regulation 37A of the IBBI (Liquidation Process) Regulations, 2016 has been inserted on 13 November 2020. The same permits liquidators of companies to assign not readily realisable assets including fraudulent transactions.

III Case Triage: Main stages of fraud, asset tracing and recovery

The main stages of fraud, asset tracing and recovery cases can be broadly divided into the following heads while pursuing a target.

(a) investigation and information gathering exercises;
(b) initiation of proceedings with a focus on appropriate jurisdiction and securing ad interim or interim injunctions;
(c) undertaking discovery through the assistance of the court;
(d) securing decree and seeking attachment of assets before decree;
(e) filing execution along with seeking details of assets of the Judgment Debtor; and
(f) securing payment of decree amount through attachment and sale of assets.

Each distinct stage mentioned above involves specialised efforts and risks that are required to be mitigated. For example, while undertaking investigation and evidence collection exercises, it is useful to take advantage of the public

- databases relating to the target company and its related entities. Further, the public records available under the Registration Act, 1908 especially for transactions relating to immovable property are useful tools. However, the party at this stage may be hamstrung in securing private or confidential information not available in the public domain as the practice of a Banker's Trust Order, pre-suit discovery or other tools commonly utilised in other jurisdictions during pre-trial stage are not well established in India yet.

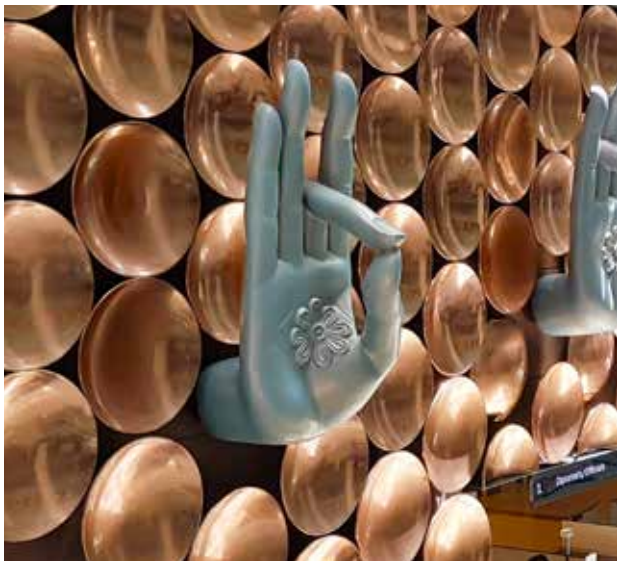
The legal tools available for the next stages involving initiation of proceedings, injunctions and undertaking discovery through court and attachment before decree have already been dealt with in Section I above. The process of execution after securing judgment/decree is dealt with below.

Execution

The execution of a decree is an important step which is regulated by separate rules and must be instituted as separate proceedings by the decree holder after securing judgment. CPC also permits judgments/decrees passed by foreign courts to be executed in India subject to the said country being notified as a reciprocating country under Section 44A of the CPC. Certain countries which are recognised by India for the purpose of execution of a foreign decree are United Kingdom, Singapore, Malaysia, etc.

The courts have been permitted wide powers for the purpose of executing a decree against a party, including seeking a disclosure on affidavit of all assets of the judgment debtor. Further, a party which fails to disclose all their assets may be liable for contempt of court proceedings against them. Also, if a party fails to pay any amount pending towards the decree, the decree holder may seek attachment and sale of properties both moveable and immoveable for the purpose of payment of decree amount. (See Order 21 of CPC.)

One of the difficulties encountered in execution of a decree is that the executing court can permit attachment against only those assets which fall within the territorial jurisdiction of the court where the decree is being sought to be executed. Accordingly, a party may sometimes be constrained to seek transfer of the decree from one execution court to another and henceforth if the assets of a party are located in multiple jurisdictions. (See Section 39 r/w Order 21 Rule 8 of CPC.)



IV Parallel Proceedings: A combined civil and criminal approach

The institution and continuation of parallel civil and criminal proceedings is permitted in India. (See *Syed Askari Hadi Ali Augustine Imam v. State (Delhi Admn.)*, (2009) 5 SCC 528.) However, the initiation and progress of criminal proceedings may be affected by several factors, including primarily a highly overburdened criminal investigation system wherein the investigation authorities are dealing with a huge backlog of cases and limited resources.

The Code of Criminal Procedure, 1973 (CrPc), which is the lynchpin statute governing the procedural rules for the conduct of crime-related prosecutions, permits limited participation of the complainant in the proceedings before the court adjudicating the criminal charges. Further, the prosecution authorities may even choose not to share the complete investigation details with the victim before the same is presented or filed in court. (See Section 225 and 302 of CrPc.)

The initiation of criminal proceedings may also sometimes open the possibility of the target seeking a stay of the civil proceedings till the adjudication of the criminal proceedings is completed. (See *P. Swaroopa Rani vs. M. Hari Narayana @ Hari Babu* AIR 2008 SC 1884.) Notwithstanding the above, it is generally recommended, subject to facts and circumstances, that criminal proceedings are initiated against instances of fraud as the same permits the unearthing of evidence and its utilisation in the civil proceedings to aid the victim party in the pursuit of asset tracing and recovery efforts.

V Key Challenges

The main challenge to undertake asset tracing and recovery efforts with respect to various stages mentioned in Section III is significant time delays in the adjudication of the matters by the courts. The same stems from the burden of a high pendency of the matters before the courts in India with a pendency of more than 37 million cases (as of 20 January 2021; see https://njdg.ecourts.gov.in/njdgnew/index.php). Further, the pendency rate of the matters varies significantly amongst the states due to varying level of infrastructure deployed therein. Accordingly, any delay in securing interim orders or decree may permit the target in siphoning off and disposing off assets.

Further, another key challenge remains the establishment of a strong *prima facie* case in order to secure *ex parte* or *ad interim* injunctions. In certain cases, it has been observed that the victim of fraud may not have access to sufficient records of the transaction to seek interim relief. The said issue takes a deeper root in instances of fraud where the target entity may be located overseas and the same may be perpetuated primarily through an online medium. Infact, with the increasing move towards digitalisation in India, the instances of online fraud and loss of assets is increasing. While the same are being sought to be addressed through various means like the creation of a dedicated online web portal (National Cyber Crime Reporting Portal at https://cybercrime.gov.in/), more efforts are required to meet the requirements of the dynamic space especially in relation to private prosecutions.

VI Technological Advancements and Their Influence on Fraud, Asset Tracing and Recovery

The increasing moves towards digitisation of public records by the Government of India is a significant development in assisting the victim of fraud to undertake asset tracing and recovery efforts. The same permits information gathering and seeking an injunction of assets in the judicial proceedings. An example of the same is the public searchable database consisting of Master Record Data of all companies incorporated in India. The Master Record Data also comprises details of directors and the same allows co-relation to other entities where the same individuals may be acting as directors. (See http://www.mca.gov.in/MinistryV2/aboutmasterdata.html.) Another example of digitisation assisting asset tracing efforts is the introduction of the public digital database of all motor vehicles in the country (see https://parivahan.gov.in). Further, concurrent with the rise of digitisation is the advent of an increasing array of software tools which can assist both with fraud detection as well as an investigation.

With respect to technological challenges and opportunities brought by the advent of cryptocurrencies, India is one of the few jurisdictions that sought to ban the utilisation of cryptocurrencies. The Reserve Bank of India which is the Central Bank of India had, *vide* circular dated 6 April, 2018, effectively banned the participation in the cryptocurrency market by prohibiting banks and other financial institutions from dealing with entities linked to virtual currencies. Although, the said circular was quashed by the Supreme Court of India in *Internet and Mobile Association of India v. Reserve Bank of India* (2020) 10 SCC 274.

Currently, a clear policy document/legislation from the Government of India is still awaited to establish a conclusive framework for the treatment and status of cryptocurrencies in India. There has been conflicting inputs arising from the government on the issue; on one hand, there was indication of an introduction of a new comprehensive law on the prohibition on cryptocurrency trading (see https://bit.ly/3t5OSUY), whereas on the other hand, it appears the government may be seeking to regulate cryptocurrency trading by imposing a tax on trading activities (see https://bit.ly/3a5H78Y).

Notwithstanding the aforesaid, while certain cases of investigation agencies recovering cryptocurrencies earned via fraud have already been

noticed, yet the absence of a holistic regulatory framework does continue to pose challenges.

VII Recent Developments and Other Impacting Factors

In recent times it is important to take note of the host of laws passed by the Government of India including the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, Fugitive Economic Offenders Act 2018, PMLA Amendment Act, 2019, etc., which have introduced additional disclosure requirements on certain individuals and introduced criminal sanctions for certain prohibited activities. Hence, an understanding of the framework introduced and initiation of actions under such laws may be immensely helpful in the asset tracing and recovery space.

Another, significant development has been the notification of the chapter dealing with Insolvency and Bankruptcy of the Personal Guarantors to Corporate Debtors (Companies) on 15 November 2019 by the Ministry of Company Affairs. The said notification brings into effect provisions of the Insolvency and Bankruptcy Code, 2016, which shall allow greater accountability of promoters/debtors of companies to the creditors, including accountability arising from fraudulent transactions. Further, recourse to the said provisions of personal insolvency can, as a result of the process, indirectly permit a moratorium on the dissipation of assets of the target and also allow an independent professional to verify the financial affairs of the target including any assets or funds treated inappropriately.

Shreyas Jayasimha read law at the National Law School of India University and was a Chevening Scholar at the University of Warwick. He is the founding partner of Aarna Law LLP. Shreyas spearheads Aarna Law's Banking, Finance, and Insolvency Law practice. Shreyas advises an array of clients including banks, financial institutions, non-banking financial companies and insolvency professionals on various issues including assisting banks and asset recovery companies in India to recover wrongfully retained assets presently concealed abroad, or round tripped back to India, issues in relation to cross-border insolvency, etc.

Shreyas also regularly provides advisory and opinions to corporations on issues relating to insider trading, regulatory investigations, securities fraud, corporate governance and other complex issues in relation to securities laws and regulations and represents clients before various Tribunals, High Courts and the Supreme Court. Shreyas is the only India-based representative of the ICC-FraudNet which formed the Asset Recovery Group India (ARGI) to pursue substantial value cross-border asset recovery claims for Indian Banks, ARCs and other creditors.

shreyas.jayasimha@aarnalaw.com

Aakash Sherwal read law at the WB National University of Juridical Sciences, Kolkata, and enrolled as an Advocate in 2011. He is a Civil and Commercial Disputes lawyer having advised institutional and individual clients on various issues involving asset tracing and recovery, insolvency, concealment and transfer of funds, prosecution related to fraud and cheating, etc.

Aakash has also conducted several complex trials involving fraud and commercial disputes, particularly including matters related to cross-border insolvency, institutional credit defaults, infrastructure projects and the energy sector.

aakash.sherwal@aarnalaw.com

Aarna Law is a counsel-led independent boutique law practice providing a range of legal services and solutions for domestic and international clients. Established in August 2013, the wide range of experience of its founder Shreyas Jayasimha and Kamala Naganand and other team members makes it a force to reckon with, particularly in the fields of domestic and international dispute resolution, corporate and commercial advisory, regulatory and forensic investigation and technology law.

The team at Aarna Law has the expertise to identify domestic and foreign assets owned by companies or other entities, both to verify suspicions of fraud or to collect evidence in post-transactional disputes. The practice also advises banks and financial institutions on cross-border asset tracing and recovery in cases of banking frauds. The firm's objective is to provide high quality legal and commercial advice that will facilitate the needs of the clients, while maintaining the strictest standards of probity and confidentiality.

www.aarnalaw.com

AARNA LAW

Ireland

Karyn Harty
McCann FitzGerald

Audrey Byrne
McCann FitzGerald

Ireland has a sophisticated and respected courts system which is experienced in dealing with complex cross-border disputes. As a member state of the EU, Ireland benefits from the co-ordinated civil litigation procedures available under the Brussels I Recast Regulation (1215/2012) and other EU law regimes, and the large number of global companies locating their EU operations here often places Irish entities at the centre of global investigations. This is likely to increase in the wake of the UK's departure from the EU (Brexit).

The Commercial Division of the High Court has dealt with many cross-border claims and applications in aid of fraud litigation in other jurisdictions. This chapter provides an overview of the system, remedies available and the approach of the Irish courts to fraud and asset recovery litigation.

1 Legal Framework and Statutory Underpinnings

Ireland, as distinct from the separate legal jurisdiction of Northern Ireland, has a common law legal system with a written constitution and a Commercial Court experienced in dealing with complex litigation. Understanding the legal parameters for dealing with investigations into suspected fraudulent conduct is essential.

Criminal Justice (Corruption Offences) Act 2018

Ireland's anti-corruption laws were recently overhauled through the Criminal Justice (Corruption Offences) Act 2018. This legislation consolidated existing law and introduced a number of new criminal offences, closely informed by the UK's Bribery Act 2010, including active and passive corruption and corruption in relation to office, employment, position or business.

The Act also provides for a new corporate liability offence which allows a corporate body to be held liable for the corrupt actions of *inter alia* any of its directors, managers, secretary, employees, agents or subsidiaries, with the intention of obtaining or retaining business, or an advantage in the conduct of business, for the body corporate.

Some provisions have explicit extra-territorial effect, so that Irish persons, companies and other organisations registered in Ireland which commit acts outside Irish territory which would constitute an offence if committed within Irish territory may be prosecuted.

As a member of the EU, Ireland is subject to legislation on the internal market which often

carries with it additional extra-territorial considerations. The Criminal Justice (Theft and Fraud Offences) Amendment Bill 2020 is a recent example of such considerations. Transposing Directive (EU) 2017/1371, the Bill will establish a new offence of fraud affecting the financial interests of the EU, as well as bolstering corporate liability for offences committed by employees and personnel acting in the interests of a company. It is expected to be approved by the Irish legislature (Oireachtas) in early 2021.

Regard should also be had to false accounting (Section 10 of the Criminal Justice (Theft & Fraud Offences) Act 2001) and offences relating to the falsification of company books and documents under the Companies Act 2014, and to the low threshold for mandatory reporting of information relating to suspected offences under Section 19 of the Criminal Justice Act 2011, which includes a range of different financial and corruption offences.

Anti-money laundering

EU legislation has had a significant impact on the anti-money laundering and counter-terrorist financing framework in Ireland. Transposition of the Fifth Anti-Money Laundering Directive (MLD5) (EU) 2018/843 is progressing through the second stage of the legislative process as the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2020. The Bill groups together individuals working in industries susceptible to money-laundering risk to create a new category of 'designated person'. Prior to establishing a business relationship with certain clients, designated persons will be required to adhere to strict Customer Due Diligence (CDD) measures, including establishing relevant beneficial ownership information. Additional CDD requirements will apply to high-risk third countries. The Bill further proposes a system of compulsory registration for virtual asset service providers governed by the Central Bank of Ireland, the country's first move to regulate non-fiat currencies. With moves by global companies such as Facebook towards setting up their own digital currencies, Ireland is at the centre of this new regulatory regime and is likely to be a forum for related disputes. Despite delays to the transposition of some provisions of MLD5, the resultant Bill is expected to be signed into law in 2021.

Hacking and cybercrime offences

Cybercrime is an increasing concern for businesses and the Criminal Justice (Offences Relating to Information Systems) Act 2017 was specifically targeted at hacking and cybercrime. The Act created new cybercrime offences and transposes the requirements of the EU Cybercrime Directive (Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems). It also addresses the cross-border impact of cybercrime by contributing to a harmonious approach to the issue across the EU.

Mutual legal assistance (MLA)

Applications for mutual legal assistance (MLA) are also commonly brought in Ireland again because of the large number of online/digital content providers domiciled here. The recent *Microsoft* litigation in the United States, which ultimately found that Microsoft's Irish entity was not required to produce information to US enforcement authorities other than through formal mutual assistance channels, leading to the CLOUD Act, is a case in point.

Criminal Assets Bureau (CAB)

Seizure of unexplained wealth has long been a focus of law enforcement in Ireland and the Criminal Assets Bureau (CAB) brings together law enforcement officers, tax and social welfare officials, as well as other specialist officers from different organisations. The CAB is an independent body corporate rather than part of the Irish police (*An Garda Síochána*) and has power to take all necessary actions in relation to seizing and securing assets derived from criminal activity. It is an investigating authority rather than a prosecutor (*Murphy v Flood* [1999] IEHC 9).

The CAB has many of the powers normally given to *An Garda Síochána*, including search warrants and orders to make material available to the CAB. In addition, the CAB enjoys extensive powers of seizure in respect of assets which are the proceeds of crime and can apply *ex parte* to the High Court for short-term 'interim' orders on the civil standard of proof prohibiting a person from dealing with a specific asset (Section 2 of the Proceeds of Crime Act 1996). Section 3 allows for the longer-term freezing of assets ('an interlocutory order'), for a minimum of seven years. At the expiry of seven years, the CAB can apply to transfer the asset in question to the Minister for Public Expenditure & Reform or other such persons as the court may determine.

Reporting obligations

Uncovering wrongdoing in the course of an internal investigation may give rise to a statutory reporting obligation. It is an offence under Section 19 of the Criminal Justice Act 2011 to fail, without reasonable excuse, to notify the appropriate authority where a 'designated person' has information which they know or believe to be of

material assistance in preventing the commission, or in securing the successful prosecution, of a relevant offence. 'Relevant offences' include: criminal damage; fraud; bribery; theft; company law violations; and offences relating to the investment of funds and other financial activities. The threshold is low and need not meet an evidential standard. Designated persons must be alert to this obligation as any failure to comply carries the risk of a substantial fine on conviction for individuals and entities, and/or a term of imprisonment of up to five years for relevant individuals.

A Section 19 report can be made orally but is best submitted in writing, a copy of which should be retained as a written record of the notification so that the extent/timing of the report is evident in the event of any subsequent attempt to prosecute the designated person.

Where money laundering is suspected, care must be taken to notify and to seek directions from the authorities as to the steps that the individual or entity must take in connection with the resulting criminal investigation. Tipping off in respect of money laundering is an offence.

Auditors also have strict reporting obligations under Section 59 of the Criminal Justice (Theft & Fraud Offences) Act 2001 if information of which the auditor may become aware in the course of an audit suggests that the audited entity may have committed offences of dishonesty.

The introduction of DAC6 (Directive (EU) 2018/822) in Ireland at the close of 2019 established a new category of reportable arrangement with mandatory reporting obligations for cross-border transactions which have the hallmarks of tax avoidance. The DAC6 reporting obligations operate to provide the authorities with prior warning of arrangements that may give rise to tax avoidance.

Whistleblowers

Whistleblowing reports often arise in Ireland in the context of investigations and litigation, where the conduct of specific individuals may be under scrutiny. The enhanced protection for whistleblowers under the Protected Disclosures Act 2014 aims to encourage disclosure of potential wrongdoing. The legislation gives no guidance as to how disclosures are to be investigated, but care should be taken to retain confidentiality and to avoid any steps which may be construed as penalisation of the discloser. It is essential that a defensible fact find takes place within the constitutional rubric applicable in Ireland. The potential exposure to damages for breaches of the Act is very significant.

Legal privilege

Irish law recognises legal professional privilege as a fundamental doctrine, grounded on the public policy that an individual or entity can consult lawyers and prepare for litigation in confidence. Three primary sub-classes of privilege protect communications: those evidencing legal advice (*legal advice* privilege); generated for the dominant purpose of existing or contemplated litigation or regulatory investigations (*litigation* privilege); or evidencing settlement negotiations (without prejudice privilege). A document may be either fully or partly privileged. Privilege confers an absolute immunity from production and inspection, but may be tested once asserted. A party making discovery must list on oath each individual document over which privilege is claimed.

Privilege may be waived voluntarily or if privileged documents are deployed in the course of proceedings and the benefit of privilege is generally lost once shared with a third party; although there is a mechanism for protection of privilege where privileged documents are shared confidentially for a defined purpose, on the express understanding that privilege is not waived. Reliance on certain privileged documents may result in broader waiver of privilege. Privilege may also be forfeited if it can be established that the author/creator of the documents did so for the purposes of engaging in a fraud or other illegal conduct.

Administration of justice in public

The Irish Constitution provides that justice shall be administered in public save in such special cases as may be prescribed by law (Article 34(1) of Bunreacht na hÉireann). This constitutional imperative of open justice means that hearings do not take place in chambers, and there is no precedent for the granting of gagging orders in the context of the making of orders for disclosure, for example. A recent decision of the Supreme Court may open up scope for the granting of such orders in an appropriate case. In *Sunday Newspapers Ltd. & Ors. v Gilchrist and Rogers* [2017] IESC 18, the Supreme Court considered whether a defamation action before a jury, involving highly sensitive evidence affecting a state witness protection programme, could be heard *in camera*. Finding it could on the facts, the Court said that any court must be resolutely sceptical of any claim to depart from the general principle of open justice, but where constitutional interests and values of considerable weight may be damaged or destroyed by a hearing in public, then the minimum possible restrictions can be imposed to protect those interests. This decision has resulted in reporting restrictions being imposed in cases where such orders would not previously have been contemplated, including anonymisation of parties' identities in certain cases. The *Gilchrist* decision opens up the

possibility of obtaining reporting restrictions in the context of an application for disclosure by way of injunctive relief, where publicity may place the information at risk of destruction or assets at risk of dissipation.

Data protection

Data protection in Ireland is governed by the Data Protection Acts 1988 to 2018 and the GDPR, which impose a range of obligations on 'data controllers' and 'data processors' as regards how they manage the 'personal data' of EU 'data subjects'. The definition of personal data is much broader than that applicable in the US, for example, and care must be taken to ensure that international transfers of such personal data meet the requirements of the GDPR.

There is a preliminary obligation on all data controllers/processors to identify at least one of the prescribed 'legitimate grounds' permitting the lawful collection and processing of personal data. Personal data must always be relevant to the purpose for which it is collected/processed. It should also be retained only for as long as is necessary for the purpose(s) for which it was originally collected and always properly secured against unauthorised access.

Data protection should always be a central consideration, particularly where, for example, a company requires access to the personal data of clients, employees or other third-party stakeholders as part of an internal investigation/audit or an external request from a third party (e.g. a regulator/investigative body). In most cases, data controllers/processors are required to first obtain either the express or implied consent of data subjects before collecting/processing their personal data, especially sensitive personal data which in virtually all cases requires express consent. Where, for example, a company is investigating a suspected fraud, one of a number of exceptions may apply permitting the requisite processing for the purpose of obtaining legal advice in connection with anticipated legal proceedings, or for the purposes of preventing, detecting or investigating suspected offences. For non-sensitive personal data, processing is generally permitted to the extent that it is incidental to and necessary for the pursuit of a company's 'legitimate interests' (e.g. compliance with the terms of an employment contract or protection of its commercial/financial interests) provided that this is done fairly and proportionately. The key questions are likely to be whether the intrusion is proportionate to the need and to what extent the information needs to be disclosed to anyone other than the investigator.

The Irish Data Protection Commission (DPC) is considered the lead supervisory authority in the EU due to the number of digital content providers domiciled in Ireland. Any breaches are required to be notified within 72 hours (where feasible) and it may also be necessary to notify those data subjects affected. In December 2020, the DPC found against Twitter in the first data breach decision to be concluded via the GDPR dispute resolution procedure in Ireland.

Constitutional privacy rights also underpin data protection law in Ireland. Privacy is recognised as an unenumerated right protected under the Irish Constitution and the potential for breaches of constitutional rights should also be borne in mind when handling personal data, conducting investigations or engaging in measures such as surreptitious monitoring, filming, or other intrusive conduct as part of any investigation or in the course of proceedings.

Breach of confidence

Claims for breach of confidence tend to arise in commercial contexts stemming from the

commercial exploitation of confidential information whereby a company, for example, might sue in respect of confidentiality obligations owed to it by third parties (e.g. (former) employees, clients, or other stakeholders). Companies routinely rely on the law of confidence in connection with the removal or disclosure of commercially sensitive information by an employee. Breach of confidence has a broader remit than data protection law as it applies to all information whether or not it constitutes 'personal data'. The information must be confidential and the party possessing it must have shared it in circumstances which impute a duty of confidentiality.

A company may also be sued in respect of confidentiality obligations owed by it to third parties (e.g. (former) employees, clients, or other stakeholders). Compliance with data protection law is also likely to satisfy the company's obligations in respect of confidentiality. Where a company feels that it is necessary to disclose confidential information received from a third party to parties other than public law enforcement authorities, it should, where possible, seek the consent of the party from whom it received the information.

Seeking/compelling disclosure from third parties

Irish law provides a number of mechanisms for obtaining disclosure from third parties either in the context of existing proceedings, or in aid of foreign proceedings, or with a view to commencing proceedings.

The court will grant orders for production of documents by a non-party if satisfied that it likely holds the documents and that they are relevant and necessary and not otherwise obtainable by the applicant, subject to the applicant indemnifying the non-party in respect of the reasonable costs of making discovery. The court will generally not make such orders against entities or individuals outside the jurisdiction, although such orders may be made with the consent of the affected non-party (*Quinn & Ors. v Wallace & Ors.* [2012] IEHC 334).

A party can also apply for the disclosure of information (see Order 40 of the Rules of the Superior Court (RSC) for details of the procedural requirements relating to sworn affidavit evidence) by a non-party where such information is not reasonably available to the requesting party provided that the court is satisfied that this information would not have been otherwise obtainable. The court may, unless it is satisfied that it would not be in the interests of justice that the subject matter be disclosed, grant an order on notice to the non-party directing them to: (i) prepare/file a document documenting the information; and (ii) serve a copy of that document on the parties to the proceedings (Order 31, Rules of the Superior Courts (RSC) (as amended)).

Preservation of assets/documents

The courts will make orders for disclosure of documents as part of measures to restrain the dissipation of assets (*Irish Bank Resolution Corporation Ltd. (in Special Liquidation) & Ors. v Quinn & Ors.* [2013] IEHC 388; *Trafalgar Developments Ltd. & Ors. v Mazepin & Ors.* [2019] IEHC 7). Failure to comply with such orders constitutes a contempt of court, punishable by committal or attachment. The court will also take action to protect copyright by way of prior restraint in appropriate cases, for example (*EMI Records (Ireland) Ltd. v Eircom plc* [2009] IEHC 411).

Norwich Pharmacal orders

The courts will grant orders requiring the disclosure of information or documentation by a third party by way of *Norwich Pharmacal* relief in order to identify a wrongdoer (*Megaleasing UK Limited & Ors. v Barrett & Ors.* [1993] ILRM 497). In *easyJet plc v Model Communications Ltd* ([2011] (Unreported)), the easyJet board had been the subject of a viral social media campaign and sought *Norwich Pharmacal* relief against the Dublin-based PR company involved, which was ordered to produce its client's details and design materials, which confirmed that the originator of the campaign was a former shareholder of the company. Such orders are also frequently granted against internet service providers in respect of anonymous online content (see, for example, *McKeogh v John Doe 1 & Ors.* [2012] IEHC 95).

2 Case Triage: Main stages

When information about potential fraudulent activity emerges, careful consideration must be given to strategy and next steps. An internal investigation may lead to a disciplinary process, which may span different offices within an organisation and different jurisdictions, or give rise to mandatory reporting obligations. External investigations may result, with the organisation and its officers facing regulatory sanctions or criminal prosecution. Where this occurs, civil litigation is likely to arise or the organisation may need to pursue litigation to protect its own interests and that of any shareholders and to recover losses. Whether the situation is contained or becomes public, reporting obligations should inform the next steps.

The process of planning and managing an internal investigation requires careful handling. Contractual considerations are key and the organisation must operate within the law. Contracts with officers and employees, as well as an organisation's internal codes and procedures, may include terms concerning the use of material that is protected by data protection law or that falls under separate confidentiality or privacy obligations. Even where there is no statutory requirement to report matters to the authorities, a decision may be made to do so voluntarily for internal policy reasons.

Documents, particularly electronic documents, should be immediately preserved. Depending on the purpose of an internal investigation, it may be possible to rely on legal professional privilege in respect of the communications and outputs from the process. If litigation is anticipated, a legal hold should issue to ensure preservation of relevant material.

A broad range of remedies is available to an organisation in tracing and recovering misappropriated assets depending on the circumstances of each case. Proving criminal fraud can be difficult, and it may be strategically more sensible to pursue alternative approaches to asset recovery via civil litigation.

When suspected fraudulent activity comes to light, an organisation should take immediate steps to investigate. Having preserved all relevant information, it may also be necessary to interview relevant personnel and/or secretly to view material stored on a personal computer or device, or hard copy documents located in an employee's office. An organisation must always have regard to its obligations to its employees, its customers and other third-party stakeholders under data protection law and, separately, under confidentiality and privacy law. Many of these legal requirements may be satisfied by prior agreement between the organisation and the employee via a contract of employment, a separate non-disclosure agreement or relevant internal policy documentation. If searches are to be conducted against personal data, a legitimate interest assessment should be conducted under GDPR prior to conducting any searches.

A further complicating factor in respect of internal investigations is that a protected disclosure may be made, sometimes by the person or persons under investigation. Where that occurs, considerable care should be taken to ensure compliance with the requirements of the Protected Disclosures Act 2014.

Remedies

There are various remedies available to organisations in Ireland in tracing/recovering misappropriated assets. These include:

Injunctive relief

The Irish courts have broad jurisdiction to grant injunctive relief in appropriate cases where damages are not an adequate remedy and where the applicant satisfies the court that the relief sought is necessary. In urgent cases, the courts may grant temporary orders (i.e. interim relief) without notice to the other side, but the applicant must make full and frank disclosure of all relevant facts and circumstances, and any failure to do so may lead to the relief being set aside and potentially to liability for damages. The applicant for interlocutory injunctive relief must also give an undertaking as to damages and show, if challenged, that it has sufficient assets to meet the undertaking.

Proceedings in general in Ireland are in open

court and this should be borne in mind if seeking some of the remedies listed below given the risk of tipping off the other side.

Mareva injunctions

If the claimant is not claiming that it is entitled to some form of ownership of assets in the defendant's possession, but that it is unlikely to be able to recover funds from the defendant without a freezing order in respect of assets, then the freezing order sought is what is referred to as a *Mareva* injunction. A *Mareva* injunction can be a valuable pre-emptive remedy. It *"affects the assets of the party against whom it is granted, so as to prevent that party from placing such assets (save for assets in excess of any value threshold specified in the relevant order) beyond the reach of the court in the event of a successful action"* (*Dowley v O'Brien* [2009] IEHC 566 at 760 per Clarke J). Given their nature, *Mareva* injunctions are often granted *ex parte*.

Ancillary orders in support of Mareva injunctions

Mareva injunctions are often accompanied by ancillary orders to ensure their efficacy, including Asset Disclosure Orders (*Trafalgar Developments Ltd. v Mazepin & Ors.* [2019] IEHC 7), aimed at ensuring defendants fully and accurately disclose the true extent of their assets, wherever situate, and/or orders for the cross-examination of a deponent on disclosure. The High Court in *AIB plc v McQuaid* ([2018] IEHC 516) invoked its inherent jurisdiction to join non-parties to proceedings to enforce its own processes/orders. There was no requirement for any substantive cause of action to subsist against the non-parties.

Anton Piller orders

Where there is an urgent fear that the respondent may try to move assets or hide evidence of wrongdoing, the courts may also grant search orders permitting the applicant to enter premises to look for evidence of wrongdoing and to demand information from named people about the whereabouts of assets ("*Anton Piller* orders"). The jurisdiction is *"sparingly used"* (see Section 1, Legal framework and statutory underpinnings). The courts may, in conjunction with freezing orders, order a respondent to disclose the whereabouts of assets in the respondent's possession identified as being 'stolen' assets or traceable back to such assets, or of the extent and whereabouts of assets that may need to be frozen so there are funds available to meet the claim.

Norwich Pharmacal orders

See Section 1, Legal Framework and Statutory Underpinnings.

Bayer orders

In *"exceptional and compelling circumstances"* (*O'Neill v O'Keeffe* [2002] 2 IR 1), the court may restrain a respondent from leaving the jurisdiction for a limited time period and compel delivery of passports. Such orders are extremely rare and the court will qualify the restrictions as far as possible so as to balance the necessity for the proper administration of justice with the defendant's constitutional right to travel (*JN and C Ltd. v TK and JS trading as MI and LTB* [2002] IEHC 16).

Appointment of a receiver by the court

The aim of appointing a receiver before judgment is to preserve assets for the person who may ultimately be found to be entitled to those assets. The appointment of a receiver can be effective but is also an expensive and intrusive remedy. The appointment may occur in conjunction with other relief such as a *Mareva* injunction if there is, for example, a risk that a defendant may use a complicated structure to deal with their assets in breach of the injunction. This power is not limited to Irish-based assets. In the Quinn Family Litigation (*Irish Bank Resolution Corporation Ltd. (in Special Liquidation) & Ors. v Quinn & Ors.* [2012] IEHC 507), Ireland's specialised Commercial Court appointed a receiver over the personal assets of individual family members and later went so far as to appoint an Irish receiver over shares held by a UAE entity in an Indian company.

Where necessary, the court will appoint a receiver over future income receipts derived from a defined asset in post-judgment scenarios (*ACC Loan Management Ltd. v Rickard* [2017] IECA 245).

Orders for the detention, preservation and sale of property

In addition to the inherent jurisdiction of the court under Section 28(8) of the Supreme Court of Judicature Act (Ireland), 1877 to grant relief, Order 50 of the Rules of the Superior Courts (RSC) provides for the detention, interim custody, preservation, securing and sale of property. Some of its rules apply to property that is the subject matter of proceedings and some apply more broadly to also include property that may be the subject of evidence given in proceedings.

European Account Preservation Orders (EAPO)

The European Account Preservation Order (EAPO), applicable since January 2017, has been little used, probably because Ireland already has many procedural options available as outlined above. An EAPO is a bank account preservation order that exists alongside national preservation measures (Recital 6 of the EAPO Regulation 2014) and it prevents the transfer or withdrawal of funds up to the amount specified in the order which are held by a debtor or on their behalf in a bank account in a participating member state. It also enables the identification of relevant bank accounts by a simple online application procedure.

3 Parallel Proceedings: A combined civil and criminal approach

It is possible to pursue civil and criminal proceedings on a parallel basis in Ireland, as occurs in civil law jurisdictions, although criminal proceedings may significantly delay the ability to obtain civil remedies. Private prosecutions are not a feature of Irish asset recovery because the Director of Public Prosecutions (DPP) has the option as to whether to prosecute where a private prosecution has been commenced and effectively takes over the prosecution. In general, civil proceedings are speedier and more effective than the criminal route. Note that where criminal proceedings do arise in respect of factual matters also arising in related civil proceedings, the courts may place a stay on the civil claim until the criminal trial has concluded if there is potential for prejudice to the accused. If stolen assets are involved, it may be possible to involve the CAB.

Principal causes of action

Where a claimant has been the victim of a suspected fraud, careful consideration must be given to the nature of any proceedings that can or should be brought with a view to either recovering the assets or obtaining compensation commensurate with their value. Depending on the facts, it may be possible to show that more than one party conspired in furtherance of the fraud such as to form the basis for a conspiracy claim; there may have been a (fraudulent) misrepresentation; it may be possible to show wilful deceit or unlawful interference with the claimant's economic interests or property; or there may be grounds to seek to rescind a contract on grounds of illegality. Where it is not possible to prove fraud, there may still be the option of an action for money had and received, provided that the claimant can identify the funds and demonstrate ownership of them, or for a garnishee order, for example.

Standard of proof

The standard of proof is the civil standard, i.e. the balance of probabilities (*Banco Ambrosiano SPA & Ors. v Ansbacher & Co. Ltd. & Ors.* [1987] ILRM 669), but the gravity of an allegation and the consequences of finding that it has been established are matters to which the court must have regard in applying the civil standard (*Fyffes plc v DCC plc & Ors.* [2005] IEHC 477). Counsel should not plead fraud unless satisfied that there are cogent grounds on which to do so and it is not permissible to allege fraud in vague or general terms. There must be evidence of conscious and deliberate dishonesty, and the plaintiff must be able to show that it has suffered a loss as a result of the fraudulent conduct.

Conspiracy

As with an allegation of fraud or deceit, any conspiracy claim must be pleaded in detail, with particulars of the facts giving rise to the conspiracy to the extent that they are known. A claim of conspiracy will usually be combined with other causes of action where it can be shown that

more than one actor was involved in the events leading to the loss to the claimant. As with torts generally, the claimant must be able to demonstrate a causal nexus between the conspiracy and the loss or damage sustained. It is, of course, in the very nature of a conspiracy that facts are often concealed, so it can be challenging to meet this standard.

4 Key Challenges

Parallel civil-criminal proceedings

It is not possible to control whether criminal proceedings will impact on civil asset recovery proceedings and, as identified above, the party pursuing the claim may find that it is fixed with reporting obligations which will necessarily result in involvement by prosecuting authorities. In general, if a claim meets the Commercial Court criteria, it is possible to move civil proceedings with expedition and obtain effective remedies through seeking injunctive relief and appropriate orders. The more egregious the facts, the better from the perspective of obtaining the assistance of the courts.

Norwich Pharmacal relief – limitations

The rationale for granting a *Norwich Pharmacal* Order was discussed recently in *Parcel Connect Ltd & Ors v Twitter International Company* [2020] IEHC 279, in which Allen J opined, "even if the defendant is not legally responsible for the wrongdoing … it has nevertheless got so mixed up in the wrongdoing … as to have facilitated the wrongdoing that it has come under a duty to assist the plaintiff by disclosing the identity of the wrongdoer". In contrast to recent developments in the UK, Irish courts have shown no willingness to extend the jurisdiction, requiring clear proof of wrongdoing and strictly limiting the information gained from such an order to matters of identity, as shown in *Doyle v Garda Commissioner* [1997] IEHC 147. In *Muwema v Facebook Ireland Ltd* [2017] IEHC 69, the court refused to grant an order where the life of the implicated third party would be endangered. If foreign proceedings are already in being, the better route may be to seek disclosure orders from the Irish court in aid of those proceedings, provided that it is possible to identify data or documents that are relevant and necessary for that purpose and in the possession or power of an Irish person or entity.

Obtaining and accessing personal data

Compliance with the stringent requirements of the GDPR can be challenging in the context of an internal investigation where there are no legal proceedings in being and searches must be conducted against personal data. The better the organisation's general compliance with the GDPR, the easier it will be to move quickly in such circumstances.

Third-party litigation funding not permissible

As matters stand, it remains unlawful under Irish law for a third party to fund litigation, with the ancient rules of maintenance and champerty still effective under the Maintenance and Embracery Act 1634. The Supreme Court has recently addressed this twice (*SPV Osus Ltd. v HSBC Institutional Trust Services (Ireland) Limited & Ors.* [2018] IESC 44; see also *Persona Digital Telephony Ltd. & Anor v Minister for Public Enterprise & Ors.* [2017] IESC 27), stating clearly that such funding remains unlawful without legislation to rectify the situation. This can be a significant barrier to obtaining relief from the courts and it is hoped that the legislature will bring Ireland into line with other common law jurisdictions in this regard.

5 Cross-jurisdictional Mechanisms: Recent issues and solutions

Misappropriated assets are often hidden across national borders and require international cooperation in order to be traced properly. The Irish courts have proved to be pragmatic and responsive in the recognition of judgments and other steps which will assist the tracing of assets cross-jurisdictionally.

This pragmatism can be illustrated by reference to a bankruptcy case arising out of the financial crisis (*Re: Drumm (a Bankrupt): Dwyer, applicant* [2010] IEHC 546). The bankrupt was the former CEO of the now notorious Anglo Irish Bank Corporation. The bank sued him for repayment of substantial share loans extended to him as CEO and in respect of the alleged fraudulent transfer of a property into his wife's name. He filed for bankruptcy in Massachusetts just prior to the hearing of the Irish High Court proceedings. The Trustee in bankruptcy applied to the Irish Court for orders in aid of the US bankruptcy proceedings vesting the property in the Trustee, assisting in the realisation of any other assets and in the examination of the bankrupt in respect of all matters relating to his estate. Ms. Justice Dunne noted that there was a paucity of decisions on point. She concluded:

"We do live in a world of increasing world trade and globalisation... Whether one is talking of companies trading internationally or of individuals who have establishments in more than one jurisdiction, the fact of the matter is that businesses and individuals are infinitely more mobile than was

the case in 1770. I can see no reason of public policy for refusing to assist the trustee in bankruptcy in this case in the manner sought. On the contrary, it seems to me that it is to the benefit of the creditors of the bankrupt to facilitate the trustee in this case. One of the principal creditors of the bankrupt is Anglo Irish Bank Corporation Plc which is participating in the bankruptcy proceedings in the United States of America. There is no obvious disadvantage to the creditors in refusing to make an order in aid of the trustee in bankruptcy and on a practical basis, it would appear to be more appropriate to make such an order so that the property in this jurisdiction can be dealt with by the trustee in bankruptcy for the benefit of all of the creditors of the bankrupt."

Letters of Request

Letters of Request are a cross-jurisdictional mechanism whereby a court in, e.g., Ireland can request assistance from a court in another jurisdiction in obtaining documents and/or evidence, in support of proceedings.

Letters of Request have been used to great effect in the context of Irish conspiracy proceedings, in which neighbouring courts issued Letters of Request to the courts in Belize and the British Virgin Islands for assistance, resulting in the appointment of a receiver and the ultimate recovery of substantial assets (*Irish Bank Resolution Corporation Ltd. (in Special Liquidation) & Ors. v Quinn & Ors.* [2013] IEHC 388). The Evidence Regulation (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 (OJ L 174, 27.6.2001, p. 1)) applies in an EU context.

Enforcement of judgments

The Irish courts' attitude to the enforcement of foreign judgments is positive and facilitative. The enforcement of EU judgments is governed by the Brussels I Recast Regulation in respect of judgments or proceedings commenced after 10 January 2015; the Brussels I Regulation (44/2001) continues to apply to certain territories of Member States situate outside the EU. Ireland is also a party to the Lugano Convention 2007, relevant to certain EFTA Member States, and expects to be a party to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019, both by virtue of its EU membership.

In respect of third-country judgments, there are several multilateral treaties relevant to the recognition and enforcement of foreign judgments in Ireland. Only money judgments may be recognised and enforced at common law in Ireland and a party will generally apply for both recognition and execution if seeking the assistance of the Irish court. On the basis of respect and comity between international courts, provided the judgment is for a definite sum, is final and conclusive, and has been given by a court of competent jurisdiction, the court will generally recognise the judgment.

Grounds on which recognition and enforcement of such judgments may be refused include if Ireland is not considered to be the appropriate jurisdiction for recognition, if it is contrary to public policy, if the sums claimed have not been specifically determined, or if the court granting the judgment was not a court of competent jurisdiction (*Albaniabeg Ambient ShpK v Enel SpA* (2016) IEHC 139 and (2018) IECA 46; see also *Sporting Index Ltd. v O'Shea* (2015) IEHC 407).

Appointment of a receiver

The appointment of a receiver is also an effective cross-jurisdictional mechanism. (See also Section 2, Case triage: main stages, remedies.)

6 Technological Advancements and Their Influence

Technology is a key tool in asset recovery and machine learning systems are commonly now deployed in fraud and asset recovery litigation in Ireland both in terms of tracing assets and also managing the complex discovery exercises which tend to accompany such disputes. The Irish courts have been particularly progressive in this regard, and Ireland was the second jurisdiction globally after the US to approve the use of technology assisted review for making discovery (*Irish Bank Resolution Corporation Ltd. (in Special Liquidation) & Ors. v Quinn & Ors* [2013] IEHC 388). Ireland's Chief Justice is seeking to introduce technology more broadly in the courts system and it is common for documents to be presented electronically in complex litigation. The COVID-19 pandemic has certainly acted as a catalyst for the improved use of technology in the courts service, as discussed further below.

There is an emerging trend of international investigators seeking to promote intelligence software for asset recovery. As GDPR compliance is central to the effective deployment of such technology, data protection obligations must be the first port of call in assessing to what extent intelligence systems are likely to validly advance the asset recovery efforts without giving rise to data protection breaches, a consideration which comes into stark focus when dealing with cross-border asset recovery given the divergent data protection regimes in different jurisdictions and differing notions of data protection globally.

There is no doubt that the Irish courts view bitcoin and other virtual currencies as 'assets' and the Commercial Court has granted freezing orders in respect of cryptocurrency, including digital wallets: *Trafalgar Developments Ltd. & Ors. v Mazepin & Ors.* [2019] IEHC 7. The CAB has also been granted orders entitling it to seize bitcoin. We expect to see an increase in disputes involving virtual currencies as uptake increases in Ireland following the implementation of MLD5.

7 Recent Developments and Other Impacting Factors

Brexit

On 30 December 2020, the EU-UK Trade and Cooperation Agreement was signed, almost one year into the Transition Period following the UK's departure from the bloc. The move avoided a so-called 'hard' Brexit but left many uncertainties for the future of Ireland as the only EU country to share a land border with the UK. In leaving the EU, the UK effectively also left the Brussels I Recast Regulation and the Lugano Convention. Jurisdiction will now be decided by the Hague Choice of Court Convention 2005, which puts a heavy emphasis on exclusive jurisdiction clauses. The regime governing the enforcement of judgments issued prior to 1 January 2021 will still be enforceable in Ireland under the terms of the Brussels I Recast Directive. After this date, the position is less clear, but it is likely that the Hague Convention 2005 and the common law of both States will determine enforcement. All arrests made pursuant to a European Arrest Warrant prior to 31 December 2020 must still come before the UK extradition courts after which time the jurisdiction will lapse.

Ireland's common law legal system and adversarial court procedure make it a compelling jurisdiction for dispute resolution post-Brexit, given that the UK can no longer avail of the reciprocal arrangements for service, recognition and enforcement available under the EU Service Regulation and Brussels I Recast.

COVID-19

Legal systems across the world have struggled to keep up with the demands of the COVID-19 pandemic. A limited resultant benefit in Ireland has been the expedited passing of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, which allows for the electronic filing of court documents and gives every civil court the competence to sit remotely where the interests of justice allow. Business records are now admissible in court as evidence of the truth of the facts asserted, a significant exception to the hearsay rule. Statements of truth, akin to those available in the UK, may now be used in civil proceedings in place of sworn affidavits or statutory declarations to confirm a belief in the honesty of facts asserted. Statements of truth may be in electronic form, significantly modernising the current legal terrain. The courts have capitalised on these new powers with many remote and hybrid hearings already underway, such as IBRC (*In Special Liquidation) v Browne* [2021] IEHC 83.

Karyn Harty is an expert in asset recovery and fraud litigation. She has an in-depth knowledge of working with counsel in other jurisdictions, including civil law countries, as lead counsel, and securing orders and necessary sanctions in support of asset tracing including injunctions, the appointment of receivers and liquidators, findings of contempt of court, freezing orders and disclosure orders, including representing the plaintiffs in the leading cases *IBRC v Quinn & Ors* and *Trafalgar v Mazepin & Ors*.

Karyn is a member of the steering committee of the International Fraud Group and is also Co-Chair of the Forum on the International Enforcement of Judgments and Awards 2020/2021.

Karyn is well known as an e-discovery specialist and secured the first High Court approval for the use of Technology Assisted Review in inter party discovery.

karyn.harty@mccannfitzgerald.com

Audrey Byrne is an intelligent litigator and strategist who brings clear vision to the most complex of legal problems. Her practice focuses on complex commercial and taxation disputes and investigations, with a particular focus on international asset tracing, fraud and investigations. She frequently advises international clients (including foreign law firms) on cross-border issues and has a particular interest in white-collar crime compliance and contentious issues.

Audrey has unique experience in the Irish market of co-ordinating international litigation including fraud and asset tracing across multiple jurisdictions. Allied to this, she has extensive experience in dealing with regulatory bodies such as the Garda Bureau of Fraud Investigation and the Office of the Director of Corporate Enforcement.

audrey.byrne@mccannfitzgerald.com

With c. 600 people, including over 450 lawyers and professional staff, **McCann FitzGerald** is Ireland's premier law firm.

McCann FitzGerald offers expert, forward-thinking legal counsel to clients and practices Irish law from offices in Dublin, London, New York and Brussels. The firm's deep knowledge spans a range of industry sectors, tailoring solutions to fit your specific needs. McCann FitzGerald's clients are principally in the corporate, financial and business sectors, and it also advises government entities and many state bodies.

The firm is divided broadly into four main groupings of corporate, finance, dispute resolution and litigation and real estate (including construction). They also operate industry sector and specialist practice groups which comprise professionals from different groupings. In recognition of their market leading position, McCann FitzGerald was awarded "Dispute Resolution Firm of the Year 2020" by Benchmark Litigation Europe and named for successive years by the Financial Times as one of the Top 50 Innovative Lawyers in its most recent Innovative Lawyers Report. They have also been recognised by The Lawyer, International Financial Law Review and Chambers Europe as Irish "Law Firm of the Year" and Irish "Client Service Law Firm of the Year".

www.mccannfitzgerald.com

McCann FitzGerald

Japan

Hiroyuki Kanae
Anderson Mōri & Tomotsune

Hidetaka Miyake
Anderson Mōri & Tomotsune

Atsushi Nishitani
Anderson Mōri & Tomotsune

1 Important Legal Framework and Static Underpinnings to Fraud, Asset Tracing and Recovery Schemes

Japanese civil law permits the filing of an action for damages caused by fraud or tort, and provides a mechanism to enforce compulsory execution against the property of the wrongdoer based on a successful final and binding judgment. However, the legal proceedings can take a considerable amount of time, during which the assets of the defendant could be drained before compulsory execution could be carried out upon receipt of a favourable judgment. Therefore, preservation procedures, such as provisional seizure and provisional disposition, exist as a means to preserve the property of the wrongdoer and to prevent the dispersion and dissipation of that property.

1.1 Attachment

Attachment is recognised as a means to maintain the current status of property and to preserve that property for future compulsory execution, and may be allowed on selected appropriate property corresponding to the amount of a monetary claim from among the non-exempt property of the debtor that is the subject of the execution. When money is the subject of a fraud, it can be difficult to determine the location of that money. However, if, for example, the fraudulent act was a request to transfer money to a specific bank account, a claimant may be able to obtain a provisional attachment order and request that the bank account be frozen. Banks generally will not freeze their deposits without an attachment order issued by a court, so the attachment procedure should be followed.

1.2 Provisional injunction order

The provisional injunction order procedure is used to maintain the *status quo* of a specific property when a creditor has a claim against the debtor for that specific property, and when any change in the current physical or legal status of the property is likely to make it impossible or extremely difficult to enforce the claim in the future.

1.3 Requirements for preservation procedures

Preservation procedures require a *prima facie* showing of the existence of a right to be preserved. For example, attachment only applies to a claim for the payment of money. The existence of a claim for the payment of money will be obvious in cases of fraud and other illegal activities seeking recovery of money or property having value. However, a *prima facie* case of fraud requires a factual showing, for example, that the property invested by a creditor was not actually used for any intended investment or that the investment itself was fictitious. As an example, an individual solicited investments in a medical collections business, MRI International, Inc., but did not use the invested funds for the intended investment purposes. Further, a company, World Ocean Farm, raised funds for the purpose of investing in shrimp farming in the Philippines, but did not undertake any actual investment activity as described in the fundraising plan. In both cases, individuals were found liable for fraud.

In addition, attachment is appropriate when there is a likelihood that compulsory execution will not be possible or when significant difficulties will arise in implementing compulsory execution. The need for preservation will generally occur in cases in which there is a risk that the debtor's culpable assets could be quantitatively and qualitatively reduced due to destruction, waste, resale, concealment, or expropriation, or where the debtor's culpable assets would become unsuitable if sold in the form of disposition of real estate, or where it would be difficult to ascertain the debtor's culpable assets due to the debtor's escape or relocation.

1.4 Protection measures for debtors

In attachment proceedings, a temporary restraining order may be issued against the debtor based on a creditor's unilateral claim or based on a *prima facie* showing, which may avoid full confirmation of the claim. The issuance of a temporary restraining order may be a decisive blow to the debtor, so the court may require a security deposit from the creditor to protect against damage that the debtor may incur to preserve the civil claim. The existence of a claim is relatively clear in the case of a loan claim or a receivable arising from a sales contract. However, the existence of a claim is not necessarily clear in the case of a claim for damages arising from a tort, such as fraud. Accordingly, the security deposit for an order of provisional seizure, in which the claim for damages caused by a tort is a secured claim, is often made on the condition that a statutory bond of at least 30% of the claim is deposited with the relevant Legal Affairs Bureau. Thus, the preservation procedure and the subsequent proceedings require a considerable amount of funds.

2 Compulsory Execution Procedure After Obtaining a Judgment in a Civil Suit

A plaintiff (creditor) who has prevailed on a fraud claim in a civil suit may seize the real estate, personal property, bank deposits, and other monetary assets held by the defendant (debtor). In the case of a monetary claim for fraud, a declaration of provisional execution is usually attached to the judgment of the first instance and, therefore, it is possible to seize the defendant's property even before the judgment becomes final and binding. In those circumstances, if a provisional seizure order is obtained and placed on the defendant's property at an early stage, effective compulsory execution is possible because the property will be preserved. In the case of a tort claim, it is usually difficult to apply for compulsory execution against the defendant's property after obtaining a judgment.

2.1 Property disclosure order

The Civil Execution Law provides for an order requiring a debtor to disclose his/her assets. If the debtor violates the property disclosure order, he/she is subject to a fine. In practical terms, a property disclosure order is aimed at collecting claims using the pressure of the imposition of fines. Requirements for an order for the disclosure of property are as follows.

A creditor of a monetary claim who has an enforceable authenticated copy of a title of obligation may file a petition for an order requiring the debtor to disclose property when the creditor has made a *prima facie* showing that the debtor has been unable to receive full performance under the monetary claim or when the creditor has made a *prima facie* showing that he/she is unable to obtain full performance under the monetary claim even by implementing compulsory execution against known property (Article 197 of the

Civil Execution Law). Courts may prescribe a deadline for disclosure of information and impose an obligation on the debtor to make statements concerning his/her property (Article 197 of the Act). Failure to comply with a disclosure order by the court-imposed deadline without a reasonable basis to do so or without a sworn statement, or provision of a false statement in a sworn disclosure, is punishable by imprisonment with work for not more than six months or a fine of not more than JPY 500,000 (Article 213 of the Act). In practice, effective collection of monetary claims is often made by stressing the possibility of a petition for a property disclosure order and criminal sanctions.

3 Bankruptcy Petition

If a debtor does not make any payment toward a final and binding judgment, a judgment creditor may file a petition for the adjudication of bankruptcy against the debtor based on the creditor's claim. Upon rendering an adjudication order, a court-appointed trustee will have the power to investigate the debtor's property. If a debtor makes a false statement in connection with the investigation, the debtor would be in violation of bankruptcy law and would be subject to criminal punishment, which could be a powerful tool for collecting claims.

4 Case Triage: Main stage of fraud, asset tracing and recovery cases

As described above, if a plaintiff obtains a favourable judgment in a civil suit, the defendant's deposit account or other property may be subject to compulsory execution, and property may be seized. However, the location of a defendant's property may be impossible to ascertain, so it is important to initiate attachment or provisional injunction procedures against known property before filing a lawsuit.

4.1 Filing of a criminal complaint

A creditor must bear the legal costs incurred in bringing an action and obtaining judgment and compulsory execution. Therefore, in order to clarify the actual situation through investigation by the authorities, a creditor may commonly file a criminal complaint with the police to urge the authorities to investigate and to recover damages by having the police or the public prosecutor confiscate the property during the criminal procedure process.

If an investigation reveals fraud has been committed in violation of the Law on Punishment of Organized Crime, the investigating authorities may seize and confiscate funds collected by the criminal offender. Investigative bodies, such as the police and prosecutors, have the authority to compulsorily collect deposit information and other information from banks and other financial institutions, and thus, can arrest and prosecute criminal offenders, and confiscate property, when the evidence of fraud is clear.

In particular, the Law on Punishment of Organized Crime provides for the confiscation and collection of property derived from organised crime. Organised crime, pursuant to this law, includes not only illegal transactions, such as the sale of narcotics, but also organised fraud, such as solicitation and execution of fictitious investments, either inside or outside of Japan. Thus, in addition to seeking criminal prosecution of the offender who engaged in fraudulent solicitation, the investigative authorities may confiscate the proceeds from illegal acts. In addition, the investigating authorities may be required to distribute the proceeds based on the victim recovery benefit system.

Accordingly, recovery of overseas assets is difficult without the involvement of the law enforcement institutions. Therefore, if the whereabouts of foreign assets are known, it is important to prevent leakage of those assets by first executing the procedures for attachment and provisional disposition of foreign assets in collaboration with overseas lawyers at an early stage. Therefore, building an international network of lawyers is recommended.

5 Case Study

The World Ocean Farm case presents an example of international investment fraud. The wrongdoers stated that they ran a shrimp farm in the Philippines, the size of which was 450 times the width of Tokyo Dome. Potential investors were told that investments in the business would double in one year. Distribution of the investment funds was accomplished in the name of a limited liability partnership. The wrongdoers collected approximately JPY 85 billion from about 35,000 people. The investment turned out to be a large-scale Ponzi scheme. More than 10 company executives involved in the fraud were arrested and indicted, and the former chairman was sentenced to 14 years in prison on fraud charges. Although the victims suffered considerable damages, the Ponzi scheme left no significant property in Japan, and $40 million that had been concealed in United States financial insti-

tutions for money laundering was seized by the FBI. The Japanese and United States authorities negotiated the return of the seized funds, and a fund of USD 40,269,890 was returned to the victims (http://justice.gov/opa/pr/2010.May/10-crm-627.html).

For proceeds of organised crime, a framework of procedures, such as confiscation and return, within the international legal framework, such as the International Criminal Proceeds Transfer Prevention Act, is indispensable for recovery.

6 Parallel Proceedings: A combined civil and criminal approach

6.1 Standard non-parallel approach

In Japan, a combined civil and criminal approach is not often seen in practice, and there are few cases in which criminal and civil procedures are used concurrently to recover damages caused by fraud. Notably, there are no discovery procedures in civil proceedings in Japan. Thus, every plaintiff must individually collect evidence to prove fraud, and it is generally difficult to collect sufficient evidence to obtain a favourable civil judgment. Therefore, in many cases, a victim will file a complaint with law enforcement authorities before initiating a civil lawsuit, expecting that the whole picture of fraud will be revealed by the investigation by the authorities. In the meantime, a wrongdoer often reaches a settlement with the victim(s), and the damages caused by fraud are recovered through the wrongdoer's performance of obligations contained in the settlement.

In the case of corporate insider fraud, such as embezzlement of corporate assets by an officer or employee of a company, the company may be able to collect a considerable amount of evidence successfully by conducting an internal or independent fraud investigation. Even in such case, however, the company will often negotiate with the wrongdoer in an effort to recover the damages before filing a complaint with law enforcement authorities, and will determine whether to file a complaint with law enforcement authorities taking into account the status of voluntary damage recovery by the wrongdoer. If the public prosecutor or the police have already received a criminal complaint and commenced an investigation, the public prosecutor may drop the case if the criminal suspect and the victim(s) reach a settlement. Even after an investigation and an indictment, the public prosecutor may request a less severe penalty from the court if the defendant and the victim(s) reach a settlement.

A wrongdoer may be able to avoid criminal charges or a severe criminal penalty by reaching a settlement with victim(s). As such, it is often seen in practice that victim(s) recover considerable damages through out-of-court settlements in criminal proceedings.

7 Restitution Court Order

A restitution court order provides an approach similar to parallel criminal and civil proceedings in accordance with Chapter 7 of the Act on Measures Incidental to Criminal Procedures for Protecting Rights and Interests of Crime Victims. In this approach, a criminal court that has found a defendant guilty in a criminal trial continues to hear a claim for damages from victim(s), and may order the defendant to compensate the victim(s) for the damages. This proceeding resolves the issue of damages recovery summarily and promptly. However, a restitution court order is available only in a criminal case in which a person is killed or injured by an intentional criminal act, such as murder, so it cannot be used to recover damages caused by property offences, such as fraud.

8 Remission Payments Using Stolen and Misappropriated Property

A remission payment under the Act on Issuance of Remission Payments Using Stolen and Misappropriated Property can be used as a tool to recover damages caused by property offences, such as fraud. In particular, assets that have been confiscated (or property equivalent to the forcibly collected value of stolen and misappropriated property) in criminal trials of certain crimes, such as organised crimes or black-market lending cases, are stored in monetary form, and remission payments are made to victims. In this process, the criminal proceedings precede the administrative procedures in which the public prosecutors carry out remission payments. Therefore, this is not a true combined civil and criminal approach, but it has the similar effect of quick damage recovery.

9 Damage Recovery Benefit Distributed from Fund in Bank Accounts Used for Crimes

The Act on Damage Recovery Benefit Distributed from Fund in Bank Accounts Used for Crimes provides procedures for distribution of recovered damages from bank accounts used in cases of bank transfer or similar fraud. In order to achieve damage recovery for victims of these types of fraud, the procedures enable a financial institution to distribute damage recovery benefits from funds that are deposited in a bank account of the financial institution used for the fraud. Thus, a financial institution, upon notification by a victim(s), may take certain measures, including suspension of transactions in the bank accounts. Claims on the bank account will be extinguished after a public notice by the Deposit Insurance Corporation, and the remaining funds in the deposit amount will be distributed to the victim(s) as damage recovery benefits. No civil action will be required except for certain cases in which a party makes a claim to the deposit account. In addition, criminal procedures will not be required in this process.

10 Key Challenges

As mentioned above, under the current legal system in Japan, the most effective way to determine the whole picture of fraud is to influence law enforcement authorities, such as the public prosecutor, the police, or the Securities and Exchange Surveillance Commission, to commence governmental investigations. In practice, however, law enforcement officers will not officially accept a complaint from a victim unless the victim presents strong evidence to support the fraud allegations. Therefore, in the case of corporate insider fraud, such as those involving a company officer or employee, the company should conduct its own fraud investigation and collect strong evidence through in-depth investigative procedures, such as electronic data review, utilising digital forensics, in order to present evidence to law enforcement authorities.

In Japan, fraud investigations conducted by so-called "third-party committees" that are

independent from a company have become common practice in corporate crisis management. However, in order to maintain the strict independence of third-party committees, the Japan Federation of Bar Associations has issued guidelines for practitioners of these committees that restrict the committee's ability to share its evidence with the company. Thus, even if a third-party committee obtains strong evidence to prove fraudulent acts, it will generally be difficult for the company to use that evidence in its other crisis management actions, such as taking disciplinary action or seeking compensation for damages against a wrongdoer. The key challenge for companies is to conduct an objective and independent fact-finding exercise while establishing appropriate investigative structures that enable the company to continue effective corporate crisis management activities.

11 Cross-jurisdictional Mechanisms: Issues and solutions in recent times

In Japan, it is generally difficult in practice to recover assets concealed outside the territory of Japan without the involvement of governmental authorities.

The Act on Issuance of Remission Payments Using Stolen and Misappropriated Property sets out procedures for restoration payments using property transferred from abroad. Under those procedures, the Japanese government, under certain conditions, will restore the property subject to confiscation (or a collection of property of equivalent value) by a court or similar proceedings under the laws and regulations of a foreign country, and issue the restoration payments to a victim(s) using the property. In a famous black-market financing case concerning the *Goryokai* criminal organisation, the Japanese government restored property worth about JPY 2.9 billion transferred from Switzerland where the state government confiscated the wrongdoer's property. Then, the amount of money corresponding to the amount of damage suffered by the victims was paid as restoration payments.

In a cross-border Ponzi scheme investment fraud by a United States-based asset manager, MRI International, the Financial Services Agency issued an administrative action, but Japanese law enforcement authorities did not launch a criminal investigation. Some of the victims filed a civil suit against MRI seeking payment of a maturity reimbursement. In 2014, the Tokyo District Court ruled that the provision in the contract establishing exclusive jurisdiction in the State of Nevada was valid. However, the appellate court ruled in 2014 that the exclusive jurisdiction clause was invalid, and the Supreme Court dismissed and rejected MRI's appeal in 2015, thus clearing the way for the victims to hold MRI responsible in a Japanese court. In the meantime, victims conducted concurrent class actions in the United States for recovery of damages.

12 Technological Advances and Their Influences on Fraud, Asset Tracing and Recovery

In Japan, there have recently been two major incidents in the virtual currency (cryptographic asset) industry.

In the Mt. Gox incident, bitcoin worth about JPY 48 billion was lost in February 2014. In the same month, Mt. Gox filed for bankruptcy. The company's president was later arrested and charged with embezzling customers' accounts. He was not found guilty of embezzlement, but he was sentenced to two years and six months in prison, which was suspended for four years, for creating and using false private electronic records. With regard to recovery of damages, the subsequent steep rise in bitcoin prices created an extremely unusual situation in which the bankruptcy proceedings of Mt. Gox were moved to civil rehabilitation proceedings. Victims (creditors) could recover damages in the form of dividends in civil rehabilitation proceedings. In the wake of the Mt. Gox scandal, the Financial Services Agency revised the law to introduce a registration system for virtual currency exchange

operators, putting them under the supervision of the authorities for the first time anywhere in the world.

In the Coincheck incident, about JPY 58 billion worth of virtual currency NEM was leaked in January 2018. Coincheck put the "private key" used for transactions, such as remittance of virtual currency, in a so-called hot wallet connected to the Internet. (Note: A wallet disconnected from the net is called a cold wallet.) The private key was allegedly stolen by an outside hacker through the Internet, and a large number of NEMs were stolen. The NEM Foundation, in cooperation with engineers, placed tracking mosaics on the stolen NEM wallets, keeping them under constant surveillance to prevent perpetrators from converting the stolen NEM into other currencies. However, even with this tracking method, if the perpetrator exchanged the NEM for another currency in the highly anonymous network called the Dark Web, identification of the perpetrator who stole the NEM would be extremely difficult. Because hacking from overseas was also raised as a possibility, administrative supervision and legislation in Japan alone could not adequately deal with the incident. The Financial Stability Board, which comprises financial supervisory authorities in major countries, started creating a "contact list" to help local authorities in charge of virtual currency administration in each country understand their responsibilities. In addition, in the event that any cybercrime actually occurs, a system must be established to identify the culprit through international cooperation among investigative authorities and engineers in each country, and to investigate and recover assets outside Japan.

13 Recent Developments and Other Impacting Factors

In Japan, with the revision of the Code of Criminal Procedure in May 2016, a Japanese version of plea bargaining was introduced in June 2018. Plea bargaining made it possible for Japanese public prosecutors to agree with suspects and defendants on measures favourable to them, such as suspension of prosecution, prosecution for lighter offences, and a request for a summary order, in exchange for cooperation in criminal investigations (Article 350 (2) of the Code of Criminal Procedure).

Applicable crimes include not only organised crimes related to drugs and weapons, but also a wide range of economic crimes, such as fraud, embezzlement, bribery and cartels.

The Japanese version of plea bargaining is characterised not by self-incrimination, but by cooperation in investigations relating to "crimes committed by others". Even a declaration by a person or a corporation of his/her/its own crime does not, by itself, satisfy the requirements of plea bargaining under the law. Plea bargaining requires cooperation in an investigation, such as testifying about, and/or submitting evidence of, "crimes committed by others".

Plea bargaining has been used in three cases in Japan. The first case involved bribery of a foreign public official in connection with the construction of a power plant in Thailand (Violation of the Unfair Competition Prevention Act). The parties reached a plea agreement in July 2018, and as a result of cooperating in an investigation into a crime committed by a former executive, the company and local employees escaped prosecution.

The second case involved Nissan President Carlos Ghosn's fabrication of financial statements (Violations of the Financial Securities and Exchange Law) (judicial transaction closed around November 2018). Certain executives cooperated in the investigation of Ghosn's crime, and were exempted from prosecution while Carlos Ghosn and Nissan were prosecuted.

The third case involved embezzlement of company funds by a representative director of an apparel company. In November 2019, a special investigation squad of the Tokyo District Public Prosecutors Office reached a plea deal with an employee who was ordered to commit fraud.

Hiroyuki Kanae graduated from Waseda University Law School (1976), Legal Training Institute of the Supreme Court of Japan (1979) and the University of Illinois at Urbana-Champaign, College of Law (1987). He is qualified in Japan (1976) and New York (1988). He has served as a corporate auditor of a premier international logistics company since 2012 and advises the management on corporate governance and legal matters surrounding the international business. He focuses on commercial litigation matters, including domestic and cross-border litigations involving major Japanese and foreign companies. He has been advising on the global asset recovery projects involving Japanese clients in USA, Asia and Europe. He has represented trustees in bankruptcy proceedings in Japan, in pursuing successful asset recovery in the United States.

hiroyuki.kanae@amt-law.com

Hidetaka Miyake served as a public prosecutor from 2000 to 2004. After being admitted as a Japan qualified attorney in 2004, he experienced private practice at a UK law firm. From 2010 to 2013, he served as a senior securities investigator at the Securities and Exchange Surveillance Commission. From 2013 to 2017, he served as a senior manager in a forensic accounting team of a Big Four accounting firm. Since joining Anderson Mōri & Tomotsune as an expert in crisis management in 2017, he has handled accounting fraud investigations for more than 10 Japanese listed companies. Since 2018, he has been advising a listed regional bank on crisis management and compliance issues in relation to its shared house loan scandal, which is one of the biggest recent corporate scandals in Japan.

hidetaka.miyake@amt-law.com

Atsushi Nishitani graduated from Tokyo University (1997), Legal Training Institute of the Supreme Court of Japan (2002) and University of California Berkeley School of Law (LL.M.) (2013). He is qualified as a lawyer in Japan (2002) and New York (2014), as well as a certified fraud examiner (2016). He handles crisis management and insolvency matters, including cross-border cases, with practical advice enhanced by his experience in Tokyo and New York at one of the largest Japanese trading corporations. During his career, he has engaged in fraud investigation and asset tracing/recovery including financial frauds and quality-test frauds as a member of investigation committees established by Japanese listed corporations. He is also vastly experienced with cross-border crisis management matters such as a financial fraud in China and a bribery case in Indonesia which triggered the US Foreign Corrupt Practices Act of 1977 (FCPA).

atsushi.nishitani@amt-law.com

Anderson Mōri & Tomotsune is a full-service law firm formed by the winning combination of three leading law firms in Japan: Anderson Mōri, one of the largest international firms in Japan which was best known for serving overseas companies doing business in Japan since the early 1950s; Tomotsune & Kimura, particularly well known for its expertise in international finance transactions; and Bingham Sakai Mimura Aizawa, a premier international insolvency/restructuring and crisis management firm.

We are proud of our long tradition of serving the international business and legal communities and our reputation as one of the largest full-service law firms in Japan. Our combined expertise enables us to deliver comprehensive advice on virtually all legal issues that may arise from a corporate transaction. The majority of our lawyers are bi-lingual and experienced with communicating, drafting and negotiating across borders and around the globe. We welcome the opportunity to work closely with clients and channel our resources towards our goal of achieving more together.

www.amt-law.com

ANDERSON MŌRI & TOMOTSUNE

Jersey

Marcus Pallot
Carey Olsen

Richard Holden
Carey Olsen

Daniel Johnstone
Carey Olsen

I Executive Summary

Jersey is a well-developed offshore financial services centre, jealously proud of its international white-listing and scrupulous to avoid becoming a treasure island into which fraudulent proceeds may be buried. Its historic independence from the UK and English law, but receptiveness to its influence, allows it judiciously to adopt, adapt and advance appropriate remedies despite a lack of historical domestic precedent for them, including to freeze assets and yield up information from its well-regulated financial services sector.

II Important Legal Framework and Statutory Underpinnings to Fraud, Asset Tracing and Recovery Schemes

Jersey's legal system is a hybrid, characterised by little statutory provision but with a receptive and adaptive approach to rules and remedies fashioned elsewhere in England and other offshore centres.

Jersey is not part of the UK, but was part of the French Duchy of Normandy which began its close association with the English crown when William of Normandy crossed the Channel to take it. As a result, English law was never formally transplanted into Jersey. Instead, Jersey law's roots lay historically in the law of the Duchy of Normandy, which was itself heavily influenced by the customary law of northern France. Jersey formally split from

Normandy in 1204 and as an island proceeded to develop its own insular law and institutions, including its own courts (now the Royal Court) and legislature (the States). It continued to look closely to Norman law as its principal influence, including Norman law writers of the 16th and 17th Centuries. Such writers remain authoritative, not least given the dearth of local written sources, as reasoned judgments were not given until the late 20th Century and the only truly local sources are two Island legal writers of the 17th Century and one of the early 20th Century (1940s) – all three still writing in French. The gaps between these writers, insular and peninsular, were filled (like Manx "breast law") by the know-how carried in the heads of the Island's advocates – limited to six in number – as to the practice of the Royal Court, giving the Island a truly customary as opposed to written law.

Jersey's modern legal framework underpinning fraud, asset tracing and recovery cases has evolved from this background under the particular impetus of two important phases. First, in the aftermath of the Second World War, French ceased to be the language of legal practice and the Royal Court reorganised into its modern shape by the Royal Court (Jersey) Law 1947. Secondly, in the 1980s, Jersey began its modern development as an international finance centre: by the 1980s, the last vestiges of French training of any advocates and thus judiciary had all but disappeared. As a result, the Royal Court and Jersey law began to resemble and adopt English approaches to issues, but retaining some characteristic procedures, the most important of which in fraud and asset tracing cases relate to the method of commencing proceedings and procedure for *ex parte* injunctions, described further below.

The Royal Court (Jersey) Law 1947 provides for the constitution of the Royal Court. It is presided over by a judge – the Bailiff, Deputy Bailiff or a Commissioner. Also sitting with the judge are (typically) two jurats, a characteristically Channel Island office. The jurats are permanent lay appointees to the court who rotate as do the judges between different matters. In addition to presiding over proceedings, the judge is the judge of law, including procedure and costs. The jurats are the judges of fact, damages and (in criminal matters) decide the sentence: if they are split, the presiding judge has a casting vote.

The Royal Court Rules 2004 ("RCR") are the current rules of civil procedure governing civil court processes. Unlike other English speaking offshore centres, Jersey has not adopted the CPR or rules based on them wholesale, although an overriding objective and revised summary judgment procedure were introduced in 2017. Nor are the RCR a comprehensive procedural code. Instead, the RCR reorganise the Jersey procedural approach by engrafting certain English procedural approaches on to (now largely forgotten) traditional Jersey approaches, together with Jersey-specific provisions. Subject to 2017 amendments, and judicial receptiveness to modern English CPR case law (even where there is no corresponding RCR), the RCR remain an amalgam of such traditional Jersey provisions, some of the RSC, and some of the CPR, with many gaps to be filled by practice and judicial development.

The Court of Appeal (Jersey) Law 1961 established a Court of Appeal, in place of appeal within the Royal Court to a larger bench. The Court of Appeal is modelled on the English Court of Appeal and sits in benches of three. It has no permanent judges but draws on a panel of judges from the Courts of Jersey, Guernsey and the Isle of Man, in addition to English and Scottish QCs. An appeal to the Court of Appeal is a review, generally on a point of law, and generally as of right from final judgments and with leave from interlocutories. Appeal from the Court of Appeal lies to the Privy Council, with leave: it is from Jersey's right of appeal to the Monarch in Council that the wider Judicial Committee of the Privy Council evolved.

As a result of the above, Jersey's procedure overall resembles the modern English procedure moving through key stages of pleading, discovery, exchange of written witness evidence and trial by the adversarial presentation of cases. It does not have as detailed a code of procedural or substantive law, not as developed a history of particular remedies and practices. However, it more than makes up for this by being unburdened with certain procedural histories or hidebound orthodoxies (such as the availability of equitable *versus* legal remedies, or jurisdictional limitations on injunctive relief), and has shown itself to be not only receptive but flexible in developing (principally) English remedies to ensure remedies are available for frauds, thus minimising the need for statutory intervention.

Apart from the Court itself, the principal statutes of importance to fraud and asset tracing cases are the Financial Services (Jersey) Law 1998 and Proceeds of Crime (Jersey) Law 1999, and regulations and orders enacted under them.

The Financial Services Law is the foundational law for Jersey's regulated financial sector. It is the presence and size of this sector – managing over £1 trillion of assets, with over £600 billion of assets in Jersey trusts, £365.5 billion in Jersey funds, and £137.8 billion on deposit in Jersey banks – which makes Jersey of particular interest as a jurisdiction in fraud and asset tracing cases.

The Financial Services Law requires financial services businesses to register with the Jersey Financial Services Commission, and the regulatory framework unsurprisingly requires thorough and systematic record keeping.

The Proceeds of Crime Law is primarily a criminal statute. It provides for confiscation orders (on sentencing in respect of the benefits of the crimes committed) and *saisies judiciaires* for the interim seizure and ultimate realisation of property in satisfaction of confiscation orders. It also establishes Jersey's Suspicious Activity Report ("SAR") regime and makes it an offence for those engaged in financial services businesses not to report reasonable grounds for suspicion of money laundering. The Money Laundering (Jersey) Order 2008 promulgated under it. It requires customer due diligence measures to be taken to verify customer identities and sources of funds placed with financial services businesses. In addition to their primary preventative functions aimed at criminal conduct, the Proceeds of Crime Law and Money Laundering Order are part of the background against which financial services businesses administering assets in Jersey operate. They can therefore provide important ingredients in civil fraud and recovery claims.

For instance, in *Nolan v Minerva* 2014 (2) JLR 117, the plaintiffs sued a financial services business for dishonestly assisting a fraudster by receiving the money he had defrauded into structures managed by that business. The Royal Court accepted that relevant circumstances in which the defendant's conduct was to be assessed included its obligations under the Financial Services and Proceeds of Crime Laws, extending to reporting and training obligations under the Proceeds of Crime Law, as a result of which regulated financial services businesses should be relatively astute at spotting or looking out for potentially fraudulent conduct.

III Case Triage: Main stages of fraud, asset tracing and recovery cases

Given Jersey's role as a jurisdiction holding other's assets, most fraud, asset tracing and recovery cases start with urgent applications for injunctions to freeze the assets, and/or further information in respect of them.

As noted above, a characteristic difference in procedure between Jersey and other jurisdictions is the method of commencing proceedings. Historically, all civil pleadings in the Royal Court had to be signed off by the Bailiff: the RCR now expressly provide that Advocates may do so where no immediate order is sought. However, the modern evolution is that proceedings may be commenced by a pleading, called an "*Order of Justice*", which not only pleads the case in the usual way but can also contain interlocutory orders. As a result, fraud cases may and usually are begun by lodging an order of justice for signature with an affidavit, skeleton and supporting evidence for an interlocutory application decided not only *ex parte* but also primarily on the papers, with often only a brief, informal appointment (if any) with the applicant's advocate rather than a fuller if *ex parte* hearing. Further, there tends not to be an interlocutory return date in respect of the application for interim relief; instead, the parties are summoned to a first call in a procedural list (this is the standard procedure whether the Order of Justice contains interim orders or not) and if the action is to be defended it proceeds to be pleaded out in the usual way. It is usually for the defendant to apply for discharge or variation of any injunctions or other orders granted, although this can be done on short (often 24–48 hours' notice to the plaintiff).

The duty of full and frank disclosure applies to *ex parte* applications in Jersey. Given that interlocutory injunctions, including freezing orders, may be ordered without a full *ex parte* or subsequent *inter partes* hearing, the duty is stringently enforced.

Freezing orders

Following English practice, injunctions formerly known as *Marevas* and now as freezing orders are available on similar principles to England's, whose case law remains important but not followed without question, which can be useful, as noted below.

The basic premise of such an order is that a defendant, or a third party who holds property for the defendant, be restrained from disposing of specific assets or an identifiable class of assets until the plaintiff's claim against them is resolved. It is by nature preservative. In order to obtain a freezing order, a plaintiff must:

i. show that he or she has a good, arguable case on the merits of the substantive action in support of which the order is sought;
ii. make full and frank disclosure of all facts and matters which it is material for the judge (the Bailiff or Deputy Bailiff in chambers) to know;
iii. provide particulars of the claim against the defendant including the grounds for that claim, the amount of that claim and fairly stating the points against that claim;
iv. state the grounds for belief that the defendant has assets within the jurisdiction;
v. explain why there is a risk of dissipation, such

a risk being more than merely the fact that the defendant resides outside of Jersey; and

vi. give an undertaking in damages.

The Royal Court first adopted this approach in 1985 (*Johnson Matthey Bankers Limited v Ayra Holdings Limited* [1985] JLR 208); it has been followed many times and most recently reaffirmed in (*Cornish v Brelade Bay Limited* [2019] JRC 091).

A "good, arguable case" does not require that a plaintiff show that they will inevitably win at trial should it come to that but merely that there is a substantial question in the dispute to be investigated. A risk of dissipation will be judged objectively and must go beyond merely that there are assets in the jurisdiction which could be dissipated and a plaintiff's expressions of fear that assets will be dissipated without evidence are unlikely to persuade the Court that a freezing order is justified.

A freezing order cannot, or at least should not, be used to give a plaintiff security for a claim nor to give it preference over a defendant's other creditors. Accordingly, if the defendant entity is facing insolvency, the matter of a freezing order will need to be approached with care. A freezing order should be understood not to protect a plaintiff's claim, though this is generally an incidental effect, so much as to prevent a defendant defeating a claim. This is in many cases a distinction without a difference, but it is important to bear in mind that the ordinary rules of insolvency will apply and a plaintiff cannot expect to receive a preferential claim simply because he or she has litigated to affirm it.

Norwich Pharmacals

There are no statutory third party or pre-action disclosure provisions in the RCR or elsewhere in Jersey law that would assist the plaintiff in a fraud or asset tracing case. However, *Norwich Pharmacal* relief, again following and taking its name from the classic English case on the subject, is readily available in Jersey. Given the holding and handling of assets by regulated entities who can be expected to comply with their record-keeping functions, the remedy has particular potential value where Jersey is engaged as a jurisdiction. To obtain a *Norwich Pharmacal* order, a plaintiff must demonstrate that:

i. there is a good arguable case that the plaintiff is the victim of wrongdoing;

ii. there is a reasonable suspicion that the third party, albeit innocently or otherwise, was mixed up in that wrongdoing; and

iii. it is in the interests of justice to order the third party to make disclosure.

Again, as with a freezing order, a "good, arguable case" does not require an air of inevitability surrounding a plaintiff's case. The second leg of the test, that there be a "reasonable suspicion" that the third party was involved in the wrongdoing is deliberately less stringent a test than is a "good, arguable case".

Whether or not disclosure is in the interests of justice is highly dependent on the facts of a given case and is essentially a balancing of interests by the Court. In general, most cases will involve considering the purpose for which the order is sought and the necessity of granting the plaintiff the relief sought. The range of purposes for which a *Norwich Pharmacal* order might be granted are wide, though the courts have made it clear that it should not be used as a substitute for or extension of the ordinary of process of discovery during litigation and certainly not as a means of widening the ambit of discovery when proceedings are taking place in a foreign jurisdiction.

That such an order should only be granted where it is necessary is not generally interpreted to be a very strict threshold. A plaintiff does not need to show that there is literally no other way for it to obtain the documents or information it seeks, but if there is a practical way for the plaintiff to obtain the same without the order, that will be a factor which weighs in favour of declining the plaintiff's application therefor.

Norwich Pharmacal orders are a routine part of Jersey law, and of a piece with its desire to avoid Jersey becoming a safe haven. They are often used prior to substantive proceedings, and in appropriate cases often at the same time as a freezing order, and similarly available to assist the formulation of a claim in proceedings outside Jersey. In cases where a *Norwich Pharmacal* order is directed to a third party which is not in league with the fraudster, such as a regulated financial services business, they usefully provide information while provoking a less hostile response than is traditional in litigation as those institutions are generally concerned only with ensuring that the scope of their obligations under any given order is clear and unequivocal.

Search and seizure *"Anton Piller"* orders

Search and seizure orders – again, following English practice, being the renamed *Anton Pillers* – are available in Jersey to allow those who obtain them to enter and search a defendant's premises in order to inspect and even seize documents and other material evidence. However, while freezing orders and *Norwich Pharmacals* are considered extreme remedies in law, in practice they are readily available, and given the high assurance that regulated financial services businesses will comply, they generally provide adequate protection and information to the plaintiff. Search and seizure orders are therefore extremely rare and practically unheard of in Jersey, although they are available (see e.g. *Nautech Services v CSS Limited* 2013 (1) JLR 462 (a trade secrets case), and the Court has issued a practice direction regarding the availability and form of such orders). As they so obviously interfere with a defendant's privacy and property, such relief is an extreme exercise of the Court's jurisdiction and thus they are not granted lightly. These orders are generally only used when there is a material risk that the defendant has evidence which will be destroyed or otherwise put beyond the reach of the plaintiff and that allowing such a thing to happen would cause a material injustice to the plaintiff in arguing its case.

The court will only grant an order if:

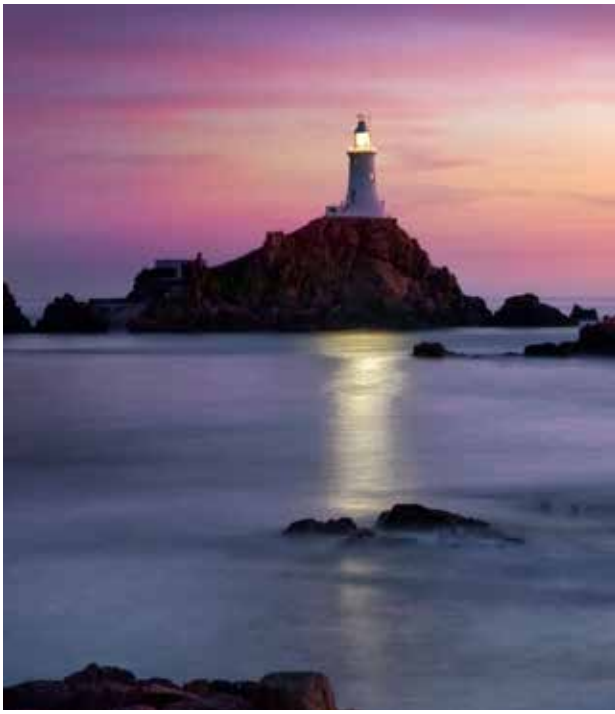
i. the plaintiff has an extremely strong *prima facie* case;
ii. the potential damage to the plaintiff will be very serious; and
iii. the evidence that the defendant has in its possession is very strong.

The above test is clearly framed to be a very high threshold. Whether or not it will be appropriate to grant such an order is highly specific to the facts and circumstance of any given case. The typical use of such an order, if there is such a thing, is to obtain files, hard drives and phones held by the defendant so that the plaintiff may take copies of the information and data stored therein before returning the originals to the defendant so that the plaintiff has the necessary evidence on hand to prove its case before the Court.

The above is a description of the orders most likely to be in contemplation when a plaintiff complains of being the victim of a fraud but it is by no means an exhaustive list of the relief available to a plaintiff in any particular circumstances.

Orders granted *ex parte* usually only become effective once the defendant or other party to whom the order is addressed has been given effective notice. Plaintiffs should thus consider the means by which such an order is to be served as it is often the case that defendants are located outside of Jersey and it is thus necessary to seek the Court's agreement to the means by which it is proposed that the orders be served.

Another important consideration is that any documents or information obtained in such orders generally come with the implied undertaking that a plaintiff will not use them for any



other purpose than in the litigation to which they specifically relate. As such, if it is intended that any documents recovered in Jersey would be used in any current or future proceedings in a foreign jurisdiction, consideration should be given to obtaining the Court's permission to do so from the outset as this will generally be necessary to avoid breaching this implied (and sometimes explicit) obligation.

IV Parallel Proceedings: A combined civil and criminal approach

Where a fraud that gives rise to a claim by a plaintiff has occurred, it will generally be in contemplation that a crime has also occurred. As such, there is always the prospect that there will be parallel criminal and civil proceedings in respect of the actions of the fraudster.

In Jersey, the prosecution of crime is the responsibility of the Attorney-General, assisted by the Crown Advocates and the Law Officers' Department. Although the Attorney-General may take the views of an alleged victim into account in deciding whether or not to prosecute an alleged crime, a victim can neither insist upon nor veto a prosecution.

Le criminal tient le civil is a maxim of Jersey law that usually means that on a given set of facts, a criminal prosecution should be allowed to take its course before civil proceedings are considered. This does not prevent a plaintiff from initiating proceedings, especially where it is necessary to do so in order to avoid a claim prescribing, nor does it prevent a plaintiff from obtaining interlocutory relief such as is described above where the relevant legal tests are met.

Under Jersey law, a conviction in a criminal generally requires proof beyond reasonable doubt whereas proof of a civil claim is normally only on the balance of probabilities. It follows that civil proceedings which rely on a set of facts which have secured a conviction will almost inevitably succeed. As such, having obtained the necessary interlocutory relief, a plaintiff in a civil fraud may find it easier to simply allow a fraudster to be prosecuted and convicted of their crime and then seek summary judgment rather than having to do anything so laborious as proving its claim.

V Key Challenges

As elsewhere, the principal challenge for Jersey is that in an increasingly globalised world frauds and movement of assets will be increasingly international and digitised. Jersey will likely be only part of the whole piece. This is not unfamiliar, however, in that Jersey firms and its Court are often engaged as part of a larger recovery effort internationally. However, while remedies will continue to be fashioned to evolve as do frauds, the methods of commission and camouflaging fraudulent activity will also evolve and necessarily be one step ahead of such pursuits. The bigger challenge is to obtain sufficient evidence to point to specific accounts or entities that appropriate applications can be targeted and made in time.

VI Cross-jurisdictional Mechanisms: Issues and solutions in recent times

As an international financial centre, fraud matters involving Jersey generally have a significant international element. For example, it is often the case that neither the fraud itself took place in Jersey nor are the proceeds actually located on the island but instead are owned in structures which involve Jersey companies and/or trusts, as discussed above. The courts of Jersey are alive to these realities and it can often be the case that the Jersey Court's role is limited to offering only ancillary relief to foreign courts. All of the interlocutory orders described above do not require that the substantive proceedings are brought in Jersey and all can be sought as being ancillary to foreign proceedings.

The Royal Court long ago confirmed *Mareva*/freezing relief was available from it as an interim

protection not only pending trial in Jersey, but also ancillary to actions proceeding in courts in other jurisdictions. In *Solvaluh Ltd v Match Investments Ltd* [1996] JLR 361, the Royal Court preferred Lord Nicholls' dissenting speech in *Mercedes-Benz AG. v Leiduck*, [1996] A.C. 284 and held such injunctions were permissible and available where appropriate. Ultimately, however, its decision was motivated less by the jurisprudence and more to avoid becoming known as a safe haven for fraudsters and others with liabilities they wished to evade, holding "*This is exactly the reputation which any financial centre strives to avoid and Jersey so far has avoided with success*". As a Court of original jurisdiction independent of any English legal history, the Royal Court was free to do so and not trammelled as were the majority in *Mercedes* in respect of Hong Kong legislation or the British Virgin Islands in *Broad Idea International Ltd v Convoy Collateral Ltd* (Eastern Carribbean Court of Appeal, 29.5.20).

VII Technological Advancements and their Influence on Fraud, Asset Tracing and Recovery

On the whole, Jersey's involvement in fraud cases arises from frauds committed elsewhere and the placement of the proceeds into Jersey's financial services sector, hence the preventative statutes and ready and familiar availability of the remedies described above. Frauds, including those committed digitally, will also likely remain committed elsewhere and the principal technological advancements relevant to Jersey asset tracing be data analytics upstream of Jersey, when the above remedies become useful to follow the next steps of the fraudster's getaway.

However, Jersey is succeeding in actively marketing itself as a fintech centre and base for cryptocurrency operations and there are numerous cryptocurrency-connected business concerns established on the island. The advantage for the fraudster of using cryptocurrencies is that the decentralised payment systems mean it is very difficult for transfers of cryptocurrencies to be halted and so by exchanging real money for the crypto kind and routing that through numerous wallets, it is easy to create a long trail for a victim to follow. On the other hand, all transactions recorded on a cryptocurrency's blockchain are publicly readable and, at the scale of the more popular cryptocurrencies, verifiable because all verified transactions are distributed throughout the decentralised network. As such, any transfer from one wallet to another can be openly traced. The difficulty is in identifying to whom any given wallet belongs, but where a Jersey financial services business is involved, traditional remedies are likely to be available or capable of being fashioned to assist the necessary identifications or fill in other gaps towards them. Equally, exchange into traditional currency will generally be traceable.

The status of cryptocurrencies under Jersey law has not yet reached the Royal Court. Nevertheless, we would not expect the relative novelty of cryptocurrencies to be beyond legal recognition and analysis given Jersey's track record and relative freedom judicially to fashion remedies as needed, not least given their recognition elsewhere as intangible property (e.g. Singapore in *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03).

VIII Recent Developments and Other Impacting Factors

The Taxation (Companies – Economic Substance) (Jersey) Law 2019 (came into force on 1 January 2019, to comply with requirements of the EU Code of Conduct Group and for Jersey to be white-listed, as it was from 12 March 2019. In short, tax resident companies carrying out relevant activities (including holding company businesses) are required to have board meetings in Jersey (and are expected to have the majority in Jersey), and other adequate activity in Jersey – such as the presence of employees, expenditure or premises or assets to which they have access.

In *Kea Investments Ltd v Watson*, [2021] JRC 009, the Royal Court declined to confirm an *arrêt entre mains* against the interests of a judgment debtor under a Jersey discretionary trust. The *arrêt entre mains* is a customary law enforcement mechanism, most often compared to a third-party debt or garnishee order but with wider application, capable of arresting or attaching any intangible movable property or chose in action. The judgment debtor had been found liable to the judgment creditor for various frauds by the English High Court. Although an interim arrest had been granted, the Court was plainly uncomfortable with a judgment creditor enjoying the interests of the beneficiary under the trust. Although the decision appears to turn on the Court's exercise of discretion rather than a point of principle, it stands out against the Court's general approach to assisting victims of fraud described elsewhere in this article and a set-back for such victims of a fraudster against with access to a well-resourced trust, but into which the victim cannot trace the proceeds of the fraud for whatever reason.

Marcus Pallot is partner and head of Carey Olsen's Jersey dispute resolution and litigation team. He has over 20 years' experience, advising local and international clients on financial services litigation, fraud and asset tracing, contentious regulatory and insolvency matters and general commercial and trusts litigation. He has been responsible for a number of innovative applications which have expanded the reach of Jersey's insolvency laws and has been involved in numerous other landmark cases in the Jersey courts. In particular, he is renowned for his ability to persuade the court to exercise its discretion to permit novel processes to be adopted as part of Jersey law so as best to serve the needs of his clients.

Marcus joined the firm in 2001, having previously practised as a Barrister in the Royal Navy. He was called to the English Bar at Middle Temple in 1997 and he was called to the Jersey Bar in 2004 and the BVI Bar in 2015.

marcus.pallot@careyolsen.com

Richard Holden is counsel and appears and acts in a broad range of commercial litigation matters, including: asset tracing, fraud and enforcement; contentious trust matters; shareholder, investor and funds disputes; contractual and commercial disputes; cross-border and international litigation (including Jersey law points arising in non-Jersey proceedings); and injunctions and other applications. He is an experienced international practitioner with trial and appellate advocacy experience. He practised at the London Bar, as a Barrister and Solicitor of the High Court of New Zealand, and was also admitted in New South Wales before being called as an Advocate of the Royal Court of Jersey.

Richard is the sole author of Offshore Civil Procedure, published by Sweet & Maxwell in conjunction with its "White Book", giving detailed commentary on civil court procedure and practice in Jersey, Guernsey and the Isle of Man. He is also a Visiting Professor at the Institute of Law, Jersey.

richard.holden@careyolsen.com

Daniel Johnstone is an associate in the dispute resolution and litigation team. During his training, he has gained experience in a wide variety of contentious areas including immigration and nationality law, criminal law and family law. His practice has also included public and administrative law and human rights.

Daniel joined Carey Olsen in 2018, having trained at a boutique firm in Glasgow, Scotland. He was admitted as a solicitor in Scotland in 2018. Daniel graduated with an LL.B. and a Diploma in Professional Legal Practice, both from the University of Edinburgh.

In addition to his legal practice, Daniel has also worked in research at the Edinburgh Centre for Professional Legal Studies, University of Edinburgh.

daniel.johnstone@careyolsen.com

Carey Olsen has one of the largest dispute resolution and litigation teams in the offshore world. We represent clients across the full spectrum of contentious and semi-contentious work.

We are recognised for our expertise in both international and domestic cases, including investment funds, corporate, commercial and civil disputes, banking, financial services and trusts litigation, fraud and asset tracing claims, restructuring and insolvency, regulatory investigations, employment disputes and advisory work.

From mediation to trial advocacy, we guide our clients through the full range of disputes, from multi-party, cross-jurisdictional corporate litigation to domestic claims before the local courts. We have also represented clients before the Privy Council. Many of our cases have established judicial precedents that are referred to in jurisdictions around the world.

We advise on the laws of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey and Jersey across a global network of nine international offices.

www.careyolsen.com

CAREY OLSEN

Luxembourg

Max Mailliet
E2M –
Etude Max Mailliet

Luxembourg, a country once known for its steel industry, has become an important worldwide financial centre, ranking among the top three EU financial centres; not bad for a country that has just over half a million inhabitants and where the capital city barely has 120,000 inhabitants overnight, which almost doubles during the day with workers streaming in from the countryside and the neighbouring countries of Belgium, France and Germany.

Given the size and importance of the financial sector, the Luxembourg government and parliament have always endeavoured to keep the relevant legislation at a state-of-the-art level. As a result, and to the contrary of what is usually expressed by public opinion, Luxembourg laws on money laundering are extremely strict and the prosecution of criminal offences related to money laundering is quite severe, especially with regard to non-compliance with AML regulations.

The official languages in Luxembourg are Luxembourgish (as a spoken language) and French and German as written/administrative languages. Judicial proceedings are usually conducted in French, but sometimes oral arguments are also presented in Luxembourgish or German. Judgments are always written in French. Written evidence in English is becoming more and more accepted in Court proceedings, without the need for translation, but not in every Court.

Usually, fraud cases are pursued through civil litigation, rather than criminal, for reasons of speed and efficiency. It is not unusual to use insolvency as a tool in fraud cases, as it opens alternative routes for engaging liabilities and/or recovering assets.

Important legal framework and statutory underpinning to fraud, asset tracing and recovery schemes

A Framework for criminal proceeding

1 General considerations

The criminal legislation is based on the original French criminal code (the *code pénal* as Napoleon had it adopted) and violations of the criminal law are divided into three categories, ranging from minor to criminal offences.

Since the law of 3 March 2010 on criminal liability of legal persons, legal persons such as companies are also criminally liable under Luxembourg law, this criminal liability applies to all types of criminal offences. In case a company

has been created for the sole purpose of committing a criminal offence or where, for certain specific offences, the company has been diverted from its object to commit the criminal offence, it may be dissolved by judgment of the criminal Courts.

Criminal proceedings are usually initiated by the State Prosecutor (*Procureur d'Etat*) either as a result of a criminal complaint, which has been filed with the State Prosecutor (*plainte pénale*) or with the Investigating Magistrate (*plainte pénale avec constitution de partie civile entre les mains du juge d'instruction*).

Such proceedings are very much in the hands of the authorities and the latter rarely take into account outside help. Access to the investigation files is also made as difficult as possible, as much for the perpetrators as for the victims. It is only when the investigation is at a very advanced stage that the victim and the perpetrator are granted access to the case file.

Furthermore, investigators rarely provide conclusive answers on the evolution of a case, as Luxembourg proceedings are subject to secrecy rules which are enforced quite tightly.

The State Prosecutor always has the right to decide whether prosecution is necessary and appropriate (*principe d'opportunité des poursuites*). However, if the State Prosecutor decides not to prosecute the case, this is not to be deemed as an acquittal, but simply an administrative decision. The victim, or any other third party that is able to prove that it has an interest to take action, can then still seize the criminal Courts directly, save for crimes.

The powers of the investigating authorities have become quite broad over time, and, especially, the bank secrecy rules cannot be upheld towards the criminal authorities.

For certain specific offences, such as, for instance, money laundering, the Investigating Magistrate may further order a bank to inform them if a suspect has or controls any accounts with that bank or order a bank to inform them about all the operations conducted or planned. The Investigating Magistrate may further request mutual assistance in legal matters from foreign authorities.

At the beginning of an investigation, the Investigating Magistrate will usually freeze the bank accounts and assets, which appear to have a connection with the offence under investigation in that they are potentially subject to be proceeds of such offence. The victim or any third parties having a legitimate right on the frozen accounts may require from the Courts (the *Chambre du Conseil*) the lifting of the freezing order, bearing in mind that such liftings are rarely granted.

Unfortunately, fraud proceedings in criminal matters are painfully slow in Luxembourg and, since the victim barely has access to the case file, they are not very attractive; the result being that practitioners mostly turn away from criminal proceedings unless there really is no other option.

2 Foreign requests for mutual judicial assistance in criminal matters

Foreign requests for mutual assistance in criminal matters are usually executed in a timely manner by Luxembourg authorities. The judicial remedies against mutual assistance available in Luxembourg have become, over time and through a number of modifications of legislation, very limited, in that the suspect is generally not informed of the existence of such request and its execution by the authorities, and the bank does not have the right to inform a suspect of the freezing of his account.

The general concept of this legislation, based on Luxembourg's strong intent to fulfil its international obligations, is that any judicial remedies against such foreign request should be undertaken in the country making the request, and not in Luxembourg.

Bona fide third parties to the investigation have the right to be informed of the existence of the request and have a judicial remedy available in order to protect their rights.

Any evidence collected under such request for judicial assistance in criminal matters may only be used, by the requesting State, in the proceedings for which the request has been made, but not in other types of proceedings.

The judicial assistance will not be granted if it relates to offences, which are qualified as "political" under Luxembourg law, or if it relates exclusively to offences against tax laws or foreign exchange rules or if the request violates essential interests of the country or is a risk to its sovereignty or national security.

However, the actual verification on this is virtually non-existent, as the means of control by Luxembourg jurisdictions are limited and legal remedies non-existent.

3 Confiscation

In national criminal proceedings, confiscation may be ordered over assets of any kind, including any revenue of these assets, as well as over assets which have substituted the assets mentioned before.

Any assets belonging to *bona fide* third parties will not be subject to confiscation but will be returned to them.

As far as foreign confiscation decisions are

concerned, they may be enforced in Luxembourg after having obtained an exequatur, which is awarded by way of national two-instance proceedings where the convict is heard. The exequatur may be refused for a number of reasons, such as, for example, political offences, or in case of a violation of the European Human Rights Convention, etc.

Third parties may claim their rights in the Luxembourg exequatur provisions, unless they already had the possibility to claim their rights during the foreign proceedings, but they did not do so.

4 Anti-money laundering framework

Luxembourg has one of the toughest anti-money laundering frameworks in place, and violations by professionals subject to AML rules are punished rather severely and with a lot of publicity.

5 Unexplained wealth orders

A recent law has introduced the concept of unexplained wealth orders into Luxembourg law.

They have quite a broad area of application and give the State Prosecutor substantial powers; however, they have not been tested much in case-law so far.

B Framework for civil remedies

1 Jurisdiction

The EU rules are applicable as far as jurisdiction is concerned. Luxembourg is also a party to a number of international conventions relating to jurisdiction, such as the Lugano Convention.

In cases where neither an international convention nor EU rules are applicable, the Luxembourg Courts generally have jurisdiction if the defendant resides in Luxembourg. Also, if a case is initiated by a Luxembourg resident against a foreign national who is not resident in the EU or a country with which Luxembourg has concluded an international convention, Luxembourg Courts will accept jurisdiction.

The Luxembourg Courts generally also accept jurisdiction clauses, even if agreed upon by two parties, that do not have any connection with Luxembourg.

The simple fact that part of the assets relevant to a Court case are located in Luxembourg will generally not be sufficient for the Luxembourg Courts to take jurisdiction over the entire case, unless the assets are immoveable property such as real estate. This principle does not, however, apply to conservatory measures for which the Luxembourg Courts will accept jurisdiction.

2 Court proceedings

Legal proceedings are generally initiated by a summons to appear (an *assignation,* which is a deed served by a bailiff, the *huissier*), which needs to fulfil some formal requirements to be valid. Further, it needs to contain a detailed description of the facts and of the exact relief sought; otherwise, it will be voided by the Courts for *obscuri libelli.*

Civil proceedings may either be of pure civil nature or of commercial nature.

Pure civil proceedings are in writing, meaning that the parties' lawyers exchange written submissions between them and, when the preliminary written phase is concluded, the Court will hear the parties during a short hearing, in which the Court may require further explanations. The cases are usually not pleaded again orally during these hearings (a full pleading is highly unusual), but certain points may be clarified. It is therefore usual for the parties to simply refer to their written submissions during such hearings. This makes these proceedings quite slow and burdensome.

In commercial proceedings (e.g. proceedings between two merchants (*commerçant*) or between

commercial companies, or proceedings brought by an individual against a merchant or a commercial company), first instance proceedings are subject to hearings where the parties present their oral arguments and the Court then renders a judgment, but the parties may also choose to conduct the proceedings in writing, in which case the procedure will be the same as for pure civil proceedings.

In appeal and in cassation, the proceedings will be only in writing.

Summary proceedings may be initiated by a claimant to seek interim relief, such as for the victim of a fraud to obtain a provisional allowance (if there are no contestations deemed to be serious), for a shareholder to suspend the effects of a general meeting of shareholders, to have a provisional administrator appointed for a company, a request for the appointment of a receiver over some assets (*séquestre*), to have an expert appointed to make technical findings, etc. Summary proceedings are usually reserved for urgent matters, but may still take some weeks if not months before a judgment is reached.

There are very limited possibilities to obtain *ex parte* orders, in case of serious urgency, but judges are quite reluctant to award such orders. Such *ex parte* orders may then be challenged in open court; the refusal to grant will also be challenged.

3 Conservatory measures

The Luxembourg Courts accept jurisdiction for conservatory measures if the assets are located in Luxembourg (i.e. physical assets, claims, or assets held in a bank account, such as cash or shares or any other type of asset held in any form of financial institution).

Conservatory measures may be undertaken under Luxembourg law by way of a *saisie-conservatoire*, a *saisie-arrêt*, or a *saisie sur salaire*.

A *saisie conservatoire* allows a claimant to seize the assets of his debtors on a provisional basis. It will only be granted where there is urgency and a debt that is due and payable. The *saisie conservatoire* is authorised by the President of the District Court upon *ex parte* application. The asset which has been seized by way of a *saisie conservatoire* may not be sold (and the claimant paid) until the claimant has obtained an enforceable judgment against his debtor and validated the *saisie conservatoire*. It is to be noted that in practice the *saisie conservatoire* is rarely used.

The *saisie-arrêt* is used far more often. It allows a creditor to seize assets of his debtor which are in the hands of a third party such as, for example, the debtor's bank account, or a debt owed by a third party to the debtor.

The *saisie-arrêt* is either made on the basis of an enforceable title (such as a final judgment or an authentic title), or upon authorisation by the President of the District Court, if the claimant has no enforceable title, but has a claim which is certain, liquidated and payable. Such authorisation may be requested *ex parte* and an order authorising the *saisie-arrêt* is delivered upon such application, if the conditions are fulfilled.

In both cases, the deed of *saisie-arrêt* will be served by way of a bailiff first to the third party having a debt against the debtor and then to the debtor.

From the moment of the service of the deed of *saisie-arrêt*, the third party will have to block payment of all amounts it owes to the seized debtor (i.e. in case of a bank account, the whole account will be frozen even if there are assets on the account in excess of the debt).

In case of a *saisie-arrêt* authorised by the President of the District Court only, after the *saisie-arrêt* has been served upon the debtor, and until the Court is seized regarding the merits of the *saisie-arrêt*, the debtor may, by way of summary proceedings, request from the President of the District Court to have the order authorising the *saisie-arrêt* reviewed *inter partes* and to have it retracted or to have the effects of the *saisie-arrêt* limited to the amount of the claim for which the *saisie-arrêt* has been effected (a *cantonnement*).

In order to obtain the transfer of the claim which has been seized (and request payment thereof), the creditor has to request validation of the *saisie-arrêt* before the Luxembourg Courts. If

the Luxembourg Courts have jurisdiction over the case on the merits, they will hand down a judgment on the merits and on the validation of the *saisie-arrêt*.

If the Luxembourg Courts do not have jurisdiction on the merits, they will allow the claimant time to seek a judgment from a foreign Court and to have it declared enforceable in Luxembourg.

It is only after the judgment validating the *saisie-arrêt* has become final that the claim in the hands of the third party will be transferred to the claimant (who may then seek payment from the third party); and that the claimant may seek the third party to disclose which funds or assets are held on behalf of the debtor. This is done by way of a summons addressed by the creditor to the third party, the *assignation en déclaration affirmative*. This summons will also, if the above conditions are fulfilled, lift bank secrecy. If the claimant has an enforceable title, the *assignation en déclaration affirmative* may however be served on the third party before the *saisie-arrêt* is validated.

Until this *assignation en déclaration affirmative* has been served, the creditor will not know whether his *saisie-arrêt* has been efficient, i.e. whether any assets have been frozen, especially where bank accounts are frozen, given bank secrecy, which is only lifted after this summons.

This entails that it only makes sense for a creditor to undertake a *saisie-arrêt* in the hands of a third party where the creditor is sure that there are assets. If the creditor does not know at which bank his creditor has an account, and whether there is any money in such account, the creditor could theoretically serve a deed of *saisie-arrêt* on a number of different banks, but the costs of such proceeding do rapidly become elevated thus rendering it unfeasible in practice.

A *saisie sur salaire* allows the claimant to seize a debtor's salary in the hands of the employer, where the claimant has a certain, liquidated and payable claim. Once the *saisie sur salaire* is validated, the debtor's employer will directly pay part of the salary (a minimum of the salary is protected against the *saisie* to allow the debtor to buy food and pay for his rent) to the creditor instead of the debtor.

4 Pre-trial discovery

Luxembourg law does not provide for a pre-trial discovery regime as one would know from the United States, but there is the possibility to obtain pre-trial communication of certain documents, in accordance with article 350 of the New Code of Civil Procedure, according to which a claimant, under certain very specific conditions, may seek to obtain documents from the defendant in a fraud case or any other third party. The conditions are as follows:

- the result of the case on the merits has to depend on the fact for which the conservation or the establishing of the evidence is requested;
- the motive for obtaining such evidence has to be legitimate;
- the requested measures have to be legally admissible;
- the request has to be made before any Court case on the merits is initiated (otherwise the request will be refused); and
- the claimant has to describe in detail what evidence is sought; he may not simply limit himself to requesting the production of all evidence related to a potential Court case.

The seeking of evidence for the mere purpose of appreciating the opportunity of initiating a Court case on the merits will not be sufficient for the disclosure order to be granted.

Such a disclosure request is initiated by way of summary proceedings held in front of the President of the District Court.

5 Register of beneficial owners

In 2019, Luxembourg introduced a register of beneficial owners, whereby a company has to disclose the name and address of any person having a beneficial interest higher than 25% in the company.

An important number of companies have still not filed the relevant information with the register, but most entities that are domiciled with a registered agent have.

The weakness of this register is that a number of

companies have circumvented the rules by issuing bonds convertible into shares, thus hiding the true beneficial owner as a creditor, and thereby avoiding publicising the information about them.

In our view this is a fraudulent manoeuvre, but it remains to be tested in Court.

All in all, this register constitues very small progress towards easier fraud investigations, even though its practical use still remains to be tested.

Case triage: main stages of fraud, asset tracing and recovery cases

Most fraud cases we deal with only have a partial Luxembourg element to them, which means that in these types of cases Luxembourg counsel only intervenes in a small part of the case, mostly to freeze assets or enforce a judgment against assets located in Luxembourg, or to find out information about assets held by a Luxembourg entity.

However, in our work as insolvency receivers, we regularly conduct fraud investigations ourselves.

Whatever the type of case, typically, what we would do first would be to check the documentation which is available at the Trade and Companies Register in relation to any entity involved in the fraud scheme, as well as the register of beneficial owners for these entities.

For the moment, the register of beneficial owners does not allow to retrieve the entities in which a person has an interest on the basis of that person's name, but it could be contemplated to try to obtain an injunction against the register, forcing the latter to run a search against the person in their register.

We would also run a verification on whether any of the persons and/or entities involved own any real estate in Luxembourg, even though access to this type of information has been rendered considerably more difficult with the arrival of GDPR. It is also possible to verify, on the basis of a Court order, whether a person is employed in Luxembourg or is paid a pension by the Luxembourg State.

At this stage, if there are the slightest thoughts that the perpetrators may have bank accounts in Luxembourg, we would seek a freezing order (*saisie-arrêt*) as described above.

If there is a very strong urgency in the case and a severe risk of disappearance of the funds, the best options would be to contact Luxembourg's Financial Intelligence Unit, with the goal of obtaining a provisional blockage of the funds held in Luxembourg to avoid any spoliation thereof, and then request civil conservatory measures on top.

Generally, any measure that we would seek would first be sought *ex parte*, and only upon refusal of an *ex parte* application, *inter partes*.

We would also contemplate using insolvency of a Luxembourg entity as a tool to recover assets or engage the liability of company officers (*de jure* or *de facto* ones). In that regard we should mention that the Luxembourg Commercial Courts have, so far at least, been pretty open to litigation funding in relation to insolvency proceedings, even though, in general, litigation funding is not yet fully established in Luxembourg.

Parallel proceedings: a combined civil and criminal approach

In Luxembourg, the introduction of criminal proceedings is generally only useful where the victim (or the civil complainant) has not gathered enough evidence to support a civil claim on its own and needs the help of the coercive tools of criminal law to obtain such evidence.

Criminal proceedings, especially in complex fraud cases, are usually slower than civil proceedings and the victim loses control of the proceedings, which lie entirely in the hands of the public authorities. The victim could introduce criminal proceedings directly before the Criminal Courts by way of a direct summons (*citation directe*), but there is no direct advantage of proceeding that way as the risks of a trial of criminal nature are not avoided (at civil level, the proof of the wrongdoing is much easier as the criteria are lower: the simplest wrongdoing (*culpa levissima*) will generally trigger civil liability).

Also, Luxembourg investigating authorities are very reluctant to use mutual legal assistance tools, for reasons that are, to be honest, not entirely clear today.

The biggest issue is, however, that criminal proceedings will automatically entail a stay on any civil proceedings related to the same facts.

Therefore, it makes little sense to initiate

criminal proceedings unless there is absolutely no other choice, as these would block the whole civil recovery for a long period of time.

In our practice, we almost totally refrain from filing criminal proceedings and put weight only on civil remedies, which can be useful enough.

Key challenges

1 Bank secrecy laws

One of the essential concepts of the Luxembourg financial sector is the professional secrecy obligation, which is applicable not only to banks but also to the professionals of the financial sector (PSF), and is, in essence, an obligation to keep all the information obtained by a bank or PSF relating to its client confidential.

The breach of this duty of confidentiality constitutes a criminal offence sanctioned by imprisonment from eight days to six months and a fine of €500 to €5,000.

The duty of confidentiality is provided for by article 41 of the law of 5 April 1993 on the financial sector, which imposes a duty of confidentiality on the professionals of the financial sector (including banks), their employees, managers, directors and even their liquidators.

This article also provides that the wilful violation of the professional secrecy obligation constitutes the offence of breach of professional secrecy incriminated by article 458 of the Luxembourg criminal code, which essentially determines the duty of confidentiality of doctors, pharmacists and lawyers.

As a result, the duty of confidentiality of professionals of the financial sector is of the same substance as that of the latter professions.

The duty of confidentiality can only be overridden in very limited circumstances, such as:

- where there is a statutory provision (even prior to the law of 5 April 1993) authorising the revealing of confidential information;
- *vis-à-vis* national or international authorities in charge of prudential supervision if they are acting within their legal framework, and only if they are also bound by a duty of confidentiality;
- where the professional of the financial sector has to defend his interest in a Court case for his own cause;
- where a professional of the financial sector is called as a witness by a Court;
- *vis-à-vis* criminal authorities (such as an Investigating Magistrate who may require the professional of the financial sector to provide evidence on movements or owner of bank accounts concerned by an investigation);
- in case of money laundering, professionals of the financial sector are compelled, by law, to make a suspicious transaction report to the Public Prosecutor if they suspect money laundering; and
- in case of a *saisie-arrêt* that has been validated, the professional of the financial sector is obliged to disclose the information on his client against whom the *saisie-arrêt* has been validated.

However, the client's authorisation does not allow the professional to disclose confidential information subject to its duty of confidentiality.

Finally, Luxembourg has started to sign a number of bilateral non-double taxation treaties with other countries based on the OECD model convention and which contain provisions on automatic exchange of information in tax matters. A law was also introduced in 2012 authorising the Luxembourg tax authorities to collect information from the entities holding them (including banks). Basically, this means that the duty of confidentiality may be lifted in tax matters, if the originating Member State concluded a non-double taxation treaty with Luxembourg based on the above model treaty.

2 Securitisation vehicles

In my recent experience, the biggest challenge we face in Luxembourg is securitisation vehicles, which have now come up a number of times in fraud cases.

As per Luxembourg law, securitisation vehicles are quite opaque and are only subject to outside regulation if they offer their shares to the public, which is rarely the case. Also, an investor into a securitisation vehicle is not allowed to petition for insolvency of the vehicle, and some vehicles even cut off any rights of the investors to seek a judgment against such vehicle, which opens the door to fraud.

We have seen cases where such vehicles are set up and functioning as a form of investment fund. Even if these unregulated securitisation vehicles are often reserved for qualified investors, there are no real control mechanisms in place, which can result in shares ending up in the wrong hands.

This is, in our view, a result of the legislation for securitisation vehicles being too lax and definitely in need of being verified and/or secured for investors, as the fraud cases in relation to these vehicles keep on piling up.

Cross-jurisdictional mechanisms: issues and solutions in recent times

Mutual legal assistance in criminal matters has become much more effective recently, as Luxembourg law has eliminated all forms of

appeal, with the result that nowadays mutual assistance is granted almost automatically, with very little review by the courts as to whether the conditions are fulfilled.

Technological advancements and their influence on fraud, asset tracing and recovery

While Luxembourg brands itself as a favourable environment for startups (and we do have a substantial number of Fintech companies), when it comes to combatting fraud, Luxembourg unfortunately lags a bit behind, especially at the level of the authorities, where there is some room for technological progress.

At the private sector level, one can certainly feel an important evolution in the use of technology; however, things are rendered a tad complicated by Luxembourg's multilingual environment: the day-to-day language is Luxembourgish, which is technology-resistant, while the official languages are German and French. Add to that, that English is used regularly in business, as well as the fact that Luxembourg has substantial expat communities from other countries that speak languages other than the four above, you have the right recipe for making it very difficult to use any technology that is not language-neutral.

Recent developments and other impacting factors

The most important recent development certainly is the register of beneficial owners.

As described above, it allows for any person to look up the beneficial owner of a Luxembourg company, even anonymously. Luxembourg has moved to full transparency as you can see.

There is, however, a number of caveats to this.

So far it is not possible to do a reverse search through the database of the register, i.e. to find companies of which a specific person is the beneficial owner.

It could, however, be contemplated to try and obtain an injunction against the register in order to force the latter to disclose the names of the companies that a person has a beneficial interest in.

To the best knowledge of the author, this has not been tried so far, but should definitely be an avenue to explore.

Max Mailliet specialises in litigation with a focus on fraud and asset tracing, white-collar crime, commercial and shareholder litigation and high-profile insolvencies.

Prior to opening his own firm, E2M, in 2008, Max was an associate in the litigation and corporate law departments of a major Luxembourg law firm. With his team, Max specialises in litigating complex fraud cases in front of the Luxembourg Courts, including cases with an international element. Max and his team also regularly represent institutional clients in litigation related to financial matters, such as disputes between investment funds, between funds and their service providers, or between shareholders, in which Max has a very extensive experience.

Max is regularly appointed by the Luxembourg Courts as insolvency receiver or liquidator in complex insolvency cases including multi-jurisdictional issues and asset recovery.

Max is also a lecturer in Luxembourg insolvency law. He is the Luxembourg exclusive representative to the ICC's FraudNet, a network of lawyers specialised in fraud and asset tracing.

Max studied at Robert Schuman University in Strasbourg and the London School of Economics and Political Science.

max.mailliet@e2m.lu

Singapore

Lee Bik Wei
Allen & Gledhill

Lee May Ling
Allen & Gledhill

I Executive Summary

Singapore has positioned itself as one of the leading centres, especially in Asia, for banking and financial services. A corollary to this is the increased risk of fraud, particularly with the growing prevalence of digital transactions. Over the years, Singapore has made efforts to improve its regulatory framework and introduce harsher penalties for fraud-related offences. See for example the Serious Crimes and Counter-Terrorism (Miscellaneous Amendments) Act 2018, which increased the penalties under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act for, *inter alia*, the failure to report suspicious transactions. This will be discussed in detail in the last section.

This chapter will first outline the mechanisms through which victims of fraud may seek recourse, before exploring the reasons underlying the rising rates of fraud in Singapore. We consider both civil and criminal actions in this chapter.

II Important Legal Framework and Statutory Underpinnings to Fraud, Asset Tracing and Recovery Schemes

In Singapore, both civil and criminal actions (which give rise to different remedies) can be pursued against the perpetrator(s) of fraud. Civil proceedings are initiated by the victim, whereas criminal proceedings are generally initiated by the Attorney General's Chambers (AGC) (save for in the limited case of private prosecutions). This section outlines the statutory framework and tools used in civil and criminal proceedings to pursue fraud claims.

Civil actions

The common causes of action commenced against perpetrator(s) of fraud in civil actions include:

(1) tort of deceit or fraudulent misrepresentation;
(2) breach of duty (fiduciary or otherwise);
(3) unjust enrichment; and
(4) tort of conversion.

Person(s) who have assisted the main perpetrator, or have received or helped transmit the proceeds of fraud, can also be joined as defend-

ants in civil actions. The common causes of action relied upon here include:

(1) conspiracy;
(2) dishonest assistance; and
(3) knowing receipt.

In such proceedings, matters concerning evidence, identification and seizure of assets often arise. General tools which victims rely on include: (i) *Mareva* injunctions; (ii) *Anton Piller* orders; and (iii) discovery orders. We explain these briefly below.

Mareva injunction

In civil claims involving allegations of fraud, a plaintiff will commonly consider whether it might be possible to seize and secure assets or the proceeds of fraud via court proceedings. This is most commonly done by way of taking out an application for a *Mareva* injunction, also known as freezing order. Such an application is usually taken out on an *ex parte* basis at the same time as commencement of the civil proceedings, so as to ensure that the defendant does not have advance notice of the proceedings and does not have time to dissipate his assets. The reasons for taking out an *ex parte* application must be set out clearly in the supporting affidavit. Even so, in an *ex parte* application, the Singapore Court's Rules of Court require that the plaintiff/applicant notify the other party a minimum of two hours before the hearing, except in cases of extreme urgency or with the leave of court.

The threshold to meet before the court will grant a *Mareva* injunction is high. There are also further considerations where one is seeking an injunction with extraterritorial effect.

The court may grant a domestic *Mareva* injunction (i.e. over assets held in Singapore) where the following conditions are met:

(1) there is a valid cause of action over which the court has jurisdiction, that the *Mareva* injunction is collateral to;
(2) there is a good arguable case on the merits of the plaintiff's claim;
(3) 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
(4) there is a real risk that the defendant will dissipate their assets to frustrate the enforcement of an anticipated judgment by the court.

It bears mentioning that even where the plaintiff alleges fraud by the defendant, this does not necessarily satisfy the last requirement that there is a real risk of dissipation by the defendant. The Singapore courts have held that while a well-substantiated allegation of dishonesty will often be relevant in assessing the risk of dissipation, the court will still examine the nature of dishonesty alleged and the strength of evidence in support. A good arguable case of dishonesty in itself was insufficient to show that there was a real risk of dissipation.

An extraterritorial *Mareva* injunction (i.e., over assets held outside of Singapore) can be granted by the court if the same conditions as a domestic *Mareva* injunction are present. However, the circumstances that will be required to show that an injunction is necessary will likely be more exacting in the case of a worldwide *Mareva* injunction. The plaintiff/applicant must show that the defendant has assets outside the court's jurisdiction. If the defendant has assets both within and outside the court's jurisdiction, it must be shown that there are insufficient assets within the court's jurisdiction to satisfy the plaintiff's claim.

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 (for loss sustained by the defendant and third parties as a result of the *Mareva* injunction) that the court may make (if any). To support this undertaking, the plaintiff may be required to:

(1) make a payment into court;
(2) provide a bond by an insurance company that has a place of business in Singapore;
(3) provide a written guarantee from a bank that has a place of business in Singapore; or
(4) 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.

In an *ex parte* application for a *Mareva* injunction, the plaintiff is required to provide 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. A *Mareva* injunction granted in the absence of full and frank disclosure by the applicant is liable to be set aside.

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.

Anton Piller orders

To obtain evidence for the purpose of proving a claim of fraud, a plaintiff may apply to search premises and seize evidence by way of an *Anton*

Piller order, also known as a search order. As with a *Mareva* injunction, this is usually done on an *ex parte* basis at the same time as commencement of the civil proceedings, so as to ensure that the defendant does not have advance notice of the proceedings and does not have time to destroy evidence. Given the intrusive nature of an *Anton Piller* order, the threshold that must be met to obtain an *Anton Piller* order is naturally a high one.

An *Anton Piller* order may, in general, be granted if the following conditions are met:

(1) there is an extremely strong *prima facie* case of a civil cause of action;
(2) the potential or actual damage to the plaintiff, which the plaintiff faces if the *Anton Piller* order is not granted, is serious;
(3) there is clear evidence that the defendant has incriminating documents or items in their possession; and
(4) there is a real risk that the defendant may destroy the above documents or items before an application *inter partes* can be made, i.e. where the application is served on the defendant and both sets of solicitors attend the application hearing.

However, 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* order not being granted) outweighs the prospective harm that the defendant faces (as a result of the order being granted).

Similarly, as part of the application for an *Anton Piller* order, the plaintiff must pay damages sustained by the defendant as a result of the *Anton Piller* order if so ordered by the court. The plaintiff must also undertake to comply with an order for damages that the court makes in connection with a finding (if any) 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.

To support this undertaking, the plaintiff may be required to take actions similar to those in an application for a *Mareva* injunction, such as making a payment into court or providing a bond or guarantee. The plaintiff is similarly required to make full and frank disclosure in an application for an *Anton Piller* order.

Pre-action disclosure

Where evidence needed for a civil suit lies with a third party (rather than the defendant), pre-action disclosure may be necessary. Pre-action disclosure can take place in various forms: third-party discovery; third-party interrogatories; or a *Bankers Trust* order.

A prospective plaintiff may apply for a *Norwich Pharmacal* order, i.e. pre-action disclosure orders for the purpose of identifying potential defendant(s), so termed after *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, which can either take the form of third-party discovery of documents or third-party interrogatories. In Singapore, the principles on which the court may grant such orders are found in Order 24, rule 6(5) and Order 26A, rule 1(5) of the Rules of Court, respectively.

The following conditions must be met:

(1) the third party had facilitated the wrongdoing, though such facilitation may be innocent;
(2) there is a reasonable *prima facie* case of wrongdoing by the unidentified perpetrator(s); and
(3) 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.

Where the third party is a bank, an application can be made for a *Bankers Trust* order to assist the applicant in a potential tracing claim. The banking secrecy rules in the Banking Act may be overridden where the victim can demonstrate that there is a substantive right to disclosure, by virtue of s 175 of the Evidence Act, see also *Wee Soon Kim Anthony v UBS AG* [2003] 2 SLR(R) 91 at [20]. Generally, the applicant must show the same conditions have been met as required for a *Norwich Pharmacal* order. However, it has been argued that a higher threshold should apply for a *Bankers Trust* order, requiring that the applicant show a *compelling* (rather than reasonable) *prima facie* case of fraud. This has not been decided upon by the Singapore courts.

Civil remedies

There are generally two types of remedies a victim may be awarded where fraud has occurred: personal remedies; and proprietary remedies. A personal remedy results in a debt owed personally by the defendant to the plaintiff. Where the assets of the defendant are insufficient to satisfy the claim, the debt owed to the plaintiff will rank equally with the debts owed to the defendant's other unsecured creditors in the event of the defendant's bankruptcy. In contrast, a proprietary remedy results in a claim to a specific property (or its traceable substitutes) which has passed to the defendant. Proprietary remedies are generally preferred by victims of fraud as this allows them to trace the

property into the hands of downstream recipients, which is a common occurrence in fraud cases.

In *Standard Chartered Bank v Sin Chong Hua Electric & Trading Pte Ltd & Ors*, when the fraud was discovered by the plaintiff bank, the perpetrators had already dispersed the money into other accounts, including that of the second and fourth defendants. The court held that the plaintiff bank nevertheless retained an equitable proprietary interest entitling it to trace the proceeds into the defendants' bank accounts.

Whether a proprietary remedy is available will turn on the facts of the case and the cause(s) of action being pursued. The above section has previously highlighted the common causes of action pursued in Singapore in respect of fraud. Amongst these, proprietary remedies (usually a constructive trust) have been awarded for:

(a) breach of fiduciary duty;
(b) breach of trust;
(c) knowing receipt; and
(d) dishonest assistance.

Criminal actions

Where fraud has occurred, this may potentially constitute one (or more) of the various offences set out in the Penal Code (Cap 224, 2008 Rev Ed; see e.g., Sections 403, 405, 407, 409, 411, 415, 421-424A, 463, 468 and 477A), the Companies Act ((Cap 50, 2006 Rev Ed) Sections 157, 401, 402 and 406), and the Income Tax Act ((Cap 134, 2014 Rev Ed) Sections 96 and 96A). New Penal Code offences relating to fraud were first introduced in 2019 and came into effect on 1 January 2020. While there is little case law on these new provisions, it is expected that these provisions will make it easier to bring perpetrators of fraud to task. This will be discussed further below; see Section VIII.

There is no limitation period or time bar in respect of criminal offences in Singapore. The police possess broad powers of investigation in Singapore under the Criminal Procedure Code, including powers of search and seizure, which they can use to investigate the alleged fraud.

Corporate governance reforms

Statutory reforms in Singapore have also sought to reduce fraud by increasing independence and monitoring of corporate governance boards. The 2018 Code of Corporate Governance (Monetary Authority of Singapore, 6 August 2018) sets out certain threshold requirements for, *inter alia*, board composition. For instance, the 2018 Code requires a majority of the Board to be independent (Provision 2.2) where the Chairman is not independent – "independent" being defined as, *inter alia*, having no relationship with the company, its related corporations, its substantial shareholders or its officers that could interfere, or be reasonably perceived to interfere, with the exercise of the director's independent business judgment in the best interests of the company – reflecting a higher threshold than the 2012 Code which only required half the Board to be independent in such a situation (Monetary Authority of Singapore, 2 May 2012 at Guideline 2.2).

III Case Triage: Main stages of fraud, asset tracing and recovery cases

When fraud is first brought to the attention of the victim, which may be through avenues such as whistleblowing, the external authorities or internal audits, the victim will usually commence

an investigative process to find out, *inter alia*, who perpetrated the fraud, when the fraud was carried out and where the monies have been dissipated to.

The victim may choose to file a police report at this stage. After the filing of a police report, the police will likely ask the victim to attend a police interview and take his statement. Investigations into fraud are usually conducted by the Commercial Affairs Department (CAD) of the Singapore Police Force. The CAD has powers to, *inter alia*, seize property (including monies in bank accounts) under the Criminal Procedure Code. 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. Should bank accounts be frozen pursuant to police investigations, the CAD may apply to court for an order to return the recovered sums (if any) to the victims.

The victim may also commence civil proceedings in an attempt to recover the misappropriated sums. The victim may concurrently apply to court for injunctive relief in order to freeze the assets of the defendant and/or to obtain more information on the location of his assets. See above at Section II for more information on the available mechanisms.

After judgment has been obtained, there are various modes of enforcement available to the victim should the defendant fail to comply. Often, a successful claimant will apply for a garnishee order against the defendant's bank account, which compels the bank to pay the claimant out of the defendant's bank account. Another common manner of enforcement is to apply for a writ of execution in order to attach property of the defendant and effects its sale.

IV Parallel Proceedings: A combined civil and criminal approach

Parallel proceedings for fraud occur fairly frequently in Singapore. This is because criminal proceedings do not give the victim any monetary compensation for the fraud (unless a compensation order is made by the court). In addition, as mentioned above, criminal proceedings are independently spearheaded by the AGC and the victim does not have control over such proceedings.

There is no obligation on the police to reveal information obtained in the investigative process to the victim, even if such information would assist the victim's civil claim. For these reasons,

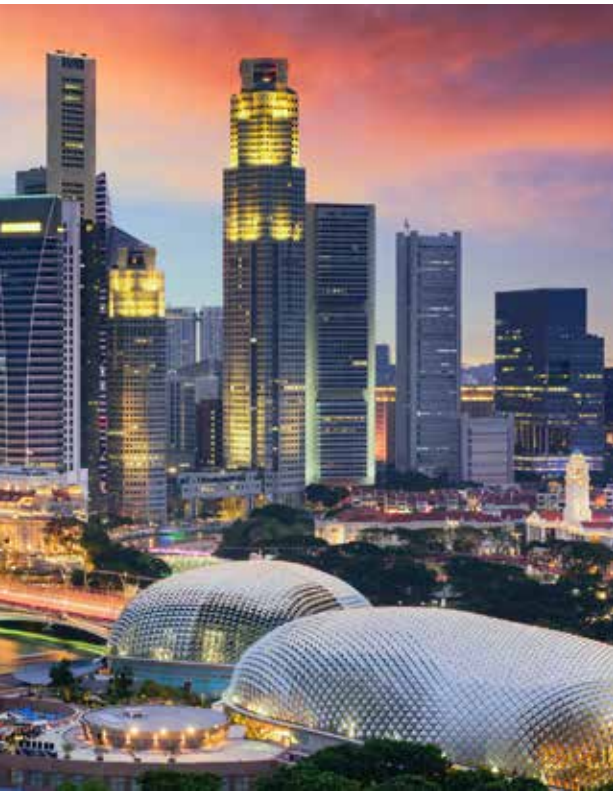
victims of fraud of substantial amounts typically choose to also pursue civil action against the perpetrators to recover the losses suffered.

A victim may choose to file a magistrate's complaint with the State Courts of Singapore, 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). The AGC may still choose to take over the conduct of proceedings or discontinue the prosecution.

V Key Challenges

Cyber fraud

Based on the statistics from the Singapore Police Force, cyber fraud in Singapore has become more prevalent, with online scams seeing a significant increase during the COVID-19 pandemic (see for example: Singapore Police Force, *Mid-Year Crime Statistics for January to June 2020*, 26 August 2020). In particular, with the increase in cyber fraud, e-commerce scams and banking-related phishing scams have become a particular concern for the Singapore Police Force. The Anti-Scam Centre, which was set up within Singapore's CAD in June 2019 as a centralised unit to tackle fraud, has seized more than 6,100 bank accounts and recovered 40.8% of the total amount scammed since its



incorporation through strong collaboration with banks, Fintech companies, telecommunication companies and online marketplaces. As cyber fraud is particularly challenging to solve because of the borderless nature of the Internet, the Singapore Police Force also works closely with foreign law enforcement agencies to monitor and share information on emerging scams.

VI Cross-jurisdictional Mechanisms: Issues and solutions in recent times

Cross-jurisdictional issues may arise where the aid of Singapore courts is sought to trace assets in respect of fraud committed abroad. In the same vein, legal proceedings commenced locally may also require foreign assistance to trace assets dissipated overseas. It is apposite to highlight that tracing is not a claim nor remedy but only a process which identifies an asset as substitute for the original asset that belongs to a claimant.

Tracing of assets in aid of foreign proceedings

Singapore's apex court has held that the court's power to order pre-action disclosure under the Supreme Court of Judicature Act does not extend to pre-action disclosure in aid of proceedings beyond Singapore. Given that pre-action disclosure is often required for the purposes of tracing and following a victim's money, this may present foreign parties with further challenges in seeking to trace their misappropriated assets into Singapore.

However, pre-action disclosure may be granted where there is sufficient nexus to Singapore. There will be a nexus to Singapore where, for instance, there is a likely prospect of subsequent proceedings being commenced in Singapore. It has also been argued that the court may have the inherent jurisdiction to order pre-action discovery in aid of foreign proceedings even if such power does not exist under the Rules of Court. However, this has not been decided.

As for *Mareva* injunctions, the current position is that the Singapore courts have the power to grant a *Mareva* injunction in aid of foreign proceedings under s 4(10) of the Civil Law Act where it is "*just or convenient*" if the following pre-requisites are met:

(1) the plaintiff has a reasonable accrued cause of action against the defendant that is recognised or justiciable in a Singapore court, i.e., a claim for substantive relief which the court has jurisdiction to grant and a claim that can be tried by the court;
(2) the Singapore court has *in personam* jurisdiction over the defendants in respect of the Singapore action;
(3) there are assets within the territorial jurisdiction of Singapore which could be the subject of a *Mareva* injunction; and
(4) substantive proceedings are brought in Singapore against the defendant, although these proceedings might be stayed by the Singapore Court in favour of proceedings elsewhere.

Complications may also arise where multiple jurisdictions are involved, making it challenging to determine the proper forum in which a claim should be heard. In international frauds where money is quickly transferred from one country to another, it may be especially challenging to identify the place of "ultimate enrichment" for the purposes of determining the applicable law ('*lex causae*').

In respect of criminal proceedings initiated abroad, overseas authorities can first contact the Suspicious Transaction Reporting Office (STRO), which is Singapore's Financial Intelligence Unit. This will allow the STRO to liaise with its global counterparts and provide information to assist in the matter. For tracing assets, a request for mutual legal assistance (MLA) may be made to the International Affairs Division department of AGC. Under the Mutual Legal Assistance in Criminal

Matters Act (MACMA), AGC will provide assistance in tracing in accordance with the provisions and requirements set out in MACMA.

Some specific tracing mechanisms that can be ordered in aid of foreign criminal proceedings under MACMA are:

(1) taking of evidence before a Singapore magistrate for use in criminal proceedings pending in the court of a foreign country;
(2) production orders directed at financial institutions or persons if there are reasonable grounds for suspecting that the perpetrator has carried out or benefited from a foreign offence; and
(3) execution of searches and seizures to collect evidence, if there are reasonable grounds for believing that the thing is relevant to a criminal matter and is located in Singapore.

Enforcement of judgments granted abroad

Under the Reciprocal Enforcement of Commonwealth Judgments Act (RECJA) and the Reciprocal Enforcement of Foreign Judgments Act (REFJA), judgments made by the superior courts of certain countries may be registered and enforced directly in Singapore if certain requirements are met. Currently, the REFJA and RECJA cover 11 jurisdictions, namely, the United Kingdom, Australia, Hong Kong, New Zealand, Sri Lanka, Malaysia, India (except the State of Jammu and Kashmir), Pakistan, Brunei Darussalam, Papua New Guinea and Windward Islands. 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 as 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:

(1) for a definite sum of money;
(2) final and conclusive; and
(3) the foreign court has jurisdiction in the context of conflicts of law.

If a foreign judgment was obtained by fraud, the Singapore courts would be entitled to refuse enforcement of the judgment in Singapore under the RECJA, REFJA and common law.

VII Technological Advancements and Their Influence on Fraud, Asset Tracing and Recovery

The anonymity of cryptocurrency transactions has made cryptocurrency a prime vehicle for fraud and a target of fraud. Numerous advisories have been issued by Singapore's public authorities, including the Monetary Authority of Singapore (MAS) and the CAD in this regard.

In a bid to address these risks, the Singapore Parliament passed the Payment Services Act 2019, which came into force on 28 January 2020 and introduced a regulatory framework for digital payment token services such as cryptocurrency exchanges. While this regulatory framework chiefly relates to money laundering and terrorism financing (as opposed to user protection), this nevertheless represents a significant step forward by subjecting cryptocurrencies to more stringent oversight. The Payment Services Act has also extended the scope of regulations (previously under the Payment Systems (Oversight) Act) by recognising various forms of e-money such as e-wallets (Payment Services Act 2019 (No. 2 of 2019) at section 2, defining "e-money").

Only one civil action has been heard in Singapore's courts involving bitcoin to date – *B2C2 Ltd v Quoine* – albeit in the context of breach of contract and trust, rather than fraud (*Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20). The impact of cryptocurrencies on asset tracing and fraud recovery still remains to be seen, given that these developments are still relatively nascent in Singapore.

More generally, technological advancements mean that a vast amount of financial services and transactions are now conducted digitally, often via automated transactions. MAS has sought to address this by releasing Technology Risk Management Guidelines (2019), which provide certain procedures financial institutions must follow to reduce the risk of fraud. Such procedures include multi-factor authentication and end-to-end encryption. Recognising the increasing need for a financial sector-wider regulatory approach to address the emerging risks and challenges that impact the financial sector, MAS has also announced its intention to introduce a new omnibus Act for the financial sector. In particular, MAS has announced its intention to include in this new Act provisions for the regulation of virtual asset service providers and requirements on technology risk management (*Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20).

VIII Recent Developments and other Impacting Factors

Unlike other jurisdictions which may have legislation specific to fraud (see, for example, the United Kingdom's Fraud Act 2006), offences involving fraud or dishonesty are currently statutorily encapsulated in various provisions

in, *inter alia*, the Penal Code (see for example, section 411(1) which criminalises receiving or retaining any property where there is knowledge that the property was obtained "through an offence involving fraud or dishonesty"), the Companies Act and the Income Tax Act. As of 1 January 2020, however, a new offence of fraud which was adapted from the UK Fraud Act 2006 and an additional offence of obtaining services fraudulently have been added to the Penal Code (section 424A; see also the new offence of obtaining services fraudulently under section 420A).

These amendments have brought fraud legislation more in line with current world developments, as fraud today often involves highly complex and novel patterns. Under the previous regime, the provision of "cheating" required that there was a victim which relied on the deception. The new offence of fraud has done away with the requirement that there be an identifiable victim, focusing instead on the intent of the offender. In complex online scams, it may be near impossible to illustrate "reliance" by the victim. This enactment was motivated in part by the LIBOR-fixing scandal, which Parliament recognised as one instance in which it would have been "very difficult to show that the victims relied upon the fraudulent representations of the bank employees who manipulated LIBOR" (*Singapore Parliamentary Debates, Official Report* (6 May 2019) vol 94 at 3.55pm).

The amendments have also clarified the scope of jurisdiction that courts possess over certain offences committed abroad. A new Schedule has been added to the Penal Code, which lists the specified offences over which the Singapore courts will have jurisdiction if the requirements under the new section 4B are met. Under section 4B, the court will have jurisdiction over the specified offence (i) where any physical element of the offence occurs in Singapore, or (ii) where a fault element of the offence involves an intention to make a gain or cause a loss or exposure to a risk of loss or to cause harm to any person in body, mind, reputation or property, and that gain, loss or harm occurs in Singapore. Specified offences under the Schedule include dishonest misappropriation of property, receiving stolen property and cheating. In other words, even where fraud is perpetrated overseas, the court may still possess jurisdiction so long as the harm occurs in Singapore and/or a relevant act occurs in Singapore. These amendments were specifically made with targeting multi-jurisdictional fraud in mind.

Further, the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA) (Cap. 65A) was amended in 2018 to increase the penalties for money laundering offences, failure to report suspicious transactions and tipping off (Serious Crimes and Counter-Terrorism (Miscellaneous Amendments) Act 2018 (No. 51 of 2018)). A new offence has also been added to criminalise the possession of any property reasonably suspected of being or representing any benefit of criminal conduct, if the person fails to account satisfactorily how the person came by the property. These provisions came into force in 2019.

Lee Bik Wei is the Deputy Head of the Firm's White-Collar & Investigations Practice. She regularly advises clients on white-collar, regulatory and compliance and corporate governance matters, as well as regulatory and corporate investigations. These include matters involving criminal breach of trust, corruption, anti-money laundering, market misconduct, mutual legal assistance matters, and employee misconduct, fraud, and corporate governance-related issues.

Her main areas of practice also encompass commercial litigation and international arbitration. She has substantial experience in a range of areas including cross-border joint venture disputes, corporate disputes such as shareholder and/or directors' disputes, property and trust, and contentious employment disputes.

Bik Wei's clients include local companies and multinational corporations, both private and listed, and trust companies. Bik Wei is also proficient in Mandarin and regularly advises Chinese clients. She joined the Firm in 2008 and has been a Partner since 2015.

lee.bikwei@allenandgledhill.com

Lee May Ling has an established background in general and commercial litigation. She has acted in a broad spectrum of cases, including employment disputes, misconduct and fraud cases, company and shareholder disputes, estate disputes and corporate governance matters.

Her practice focuses on white-collar crime and investigations. She has developed particular expertise in advising multinational conglomerates as well as small and medium-sized enterprises in this sphere. This includes assisting them with navigating anti-fraud, corruption and money-laundering laws, conducting internal investigations into misconduct, fraud and harassment, as well as advising companies on dealing with authorities on regulatory issues, police investigations, and dawn raids.

May Ling graduated with First Class Honours from King's College London and also has an LL.M. in Commercial Law.

lee.mayling@allenandgledhill.com

Allen & Gledhill is an award-winning full-service South-east Asian law firm providing legal services to a wide range of premier clients, including local and multinational corporations and financial institutions. The Firm is consistently ranked as a market leader in Singapore and South-east Asia, having been involved in a number of challenging, complex and significant deals, many of which are the first of its kind. The Firm's reputation for high-quality advice is regularly affirmed by the strong rankings in leading publications, and by the various awards and accolades. With a growing network of associate firms and offices, it is well placed to advise clients on their business interests in Singapore and beyond, on matters involving South-east Asia and the Asian region. With offices in Singapore, Myanmar and Vietnam, its associate firm, Rahmat Lim & Partners in Malaysia, and its alliance firm Soemadipradja & Taher in Indonesia, Allen & Gledhill has over 600 lawyers in its network across the region.

www.allenandgledhill.com

ALLEN & GLEDHILL

Spain

Héctor Sbert
Lawants

Maria de Mulder
Lawants

In the last 25 years, Spain has gone through a major modernisation effort of its judicial system. This has particularly benefitted the field of asset tracing and recovery. Indeed, the Spanish legislature has been well aware of the importance of this particular area to ensure the respect of the constitutional right to an effective legal protection. Thus, Spain has developed a powerful system of asset tracing and recovery, particularly in comparison to other jurisdictions of the same continental legal tradition, which includes compelling tools like debtor's assets disclosure orders and even electronic tracing and freezing of the debtor's bank accounts.

On the other hand, Spain is an important MLA player, both issuing and receiving numerous requests for international judicial cooperation in asset tracing and recovery. This results from the fact that Spain is – in addition to being a member of the European Union – a party to the main conventions with relevance in this matter.

However, some practical challenges still remain, in order to take full advantage of the existing legal instruments in the field of asset tracing and recovery.

I Important Legal Framework and Statutory Underpinning to Fraud, Asset Tracing and Recovery Schemes

1. Criminal proceedings

1.1. Elements covered by the system of asset tracing and recovery

Asset tracing and recovery in Spanish criminal proceedings includes the following elements:

1.1.1. Asset tracing and recovery necessary to cover civil liabilities derived from crime

According to Spanish law, civil liabilities derived from crime cover all or some of the following items, depending on the circumstances: (i) the restitution of the defrauded assets; (ii) the repair of the damage; and (iii) the compensation of the material and moral damages.

Asset tracing and recovery in this respect consist of a civil action that Spanish law allows to exercise in the criminal proceedings itself, both by the Public Prosecutor's Office and by the victim, or by the party that has been economically harmed by the crime.

This aspect of criminal asset tracing and recovery employs the same means as those

foreseen in civil proceedings and which we will study in further detail below:

- The debtor's asset disclosure obligation.
- The Court's official asset tracing methods, usually through electronic means.
- The mandatory cooperation from third parties, including banks and the Spanish tax authorities.

1.1.2. The tracing of the assets used to commit the crime and the profits resulting from it, for the purpose of their confiscation

The tracing of assets related to criminal activity is considered an effective formula to counteract the progressive proliferation of increasingly complex illegal behaviours (large scams, tax offences, activities related to corruption), many of them carried out by organised groups, whose activities on many occasions have cross-border implications.

For this purpose, Spain (along with an increasing number of jurisdictions), following the guidelines established by the international fora that have addressed these issues, has developed a comprehensive regulation, both preventive and punitive, on money laundering. This is complemented with the criminal characterisation of various conducts that threaten the socio-economic interests of modern societies, as well as with the establishment of new criminal investigation techniques and various legal instruments aimed at international cooperation in the seizure and confiscation of benefits derived from criminal activities.

1.1.3. Asset confiscation

Under Spanish law, the confiscation of assets is possible in the case of intentional crimes, or when the assets belong to a person convicted for, among others, one of the crimes included in the following list:

- Computer-related crimes.
- Criminal fraud and crimes against the socio-economic order, in cases of criminal continuity and recidivism.
- Offences related to fraudulent insolvencies.
- Crimes against intellectual or industrial property.
- Corruption among private parties.
- Handling of stolen goods.
- Money laundering.
- Tax and Social Security offences.
- Bribery crimes.
- Embezzlement crimes.
- Offences committed within a criminal organisation or group.

On the other hand, for the purposes of confiscation, the Court must determine that the assets derive from criminal activity, although it will suffice if the convicted person does **not** prove their effective **lawful** origin.

Furthermore, it is noteworthy that Non-Conviction Based Confiscation is also available.

1.1.4. The Asset Recovery and Management Office

Confiscation frequently occurs through the intervention of the Asset Recovery and Management Office (ORGA, as per its Spanish acronym). This is an administrative body under the Ministry of Justice whose tasks are the tracing, recovery, conservation, management and realisation of assets in connection with criminal activities.

The mission of the ORGA is threefold: first, it is an instrument for the tracing of assets related to criminal activity; second, it has the necessary technical and legal means to manage and realise the seized assets; and third and mainly, it constitutes the appropriate channel for MLA with similar Offices in other jurisdictions, so as to ensure asset tracing and recovery, regardless of where the offenders may have placed those assets.

The ORGA only acts by virtue of a judicial order, either acting "*ex officio*" or at the request of a party, including the Spanish Public Prosecutor's Office.

In turn, when necessary, the ORGA may request the collaboration of any public and private entities, which will be obliged to cooperate in accordance with its specific regulations.

The product of the realisation of the assets will be applied to cover the costs and expenses caused in the conservation of the assets and in the procedure of realisation of the same. The remaining part will be affected to the payment of civil liabilities and legal costs declared in the procedure.

1.2. The role of the Public Prosecutor's Office in Spanish criminal proceedings

Spanish criminal proceedings are divided into two phases: the investigation phase; and, where appropriate, the oral trial phase.

The first phase is directed by an investigating Judge, who, "*ex officio*" or at the request of a party, (a) determines the investigative steps to be carried out, (b) establishes the necessary personal or economic precautionary measures and, at the end of the investigation, (c) decides whether to close the case or to commence the trial phase – which will be handled by a different Court – to decide on the merits of the case.

Notwithstanding the participation of the victim and of the (economically) injured party in the criminal proceedings (which will be analysed below), the Public Prosecutor's Office has,

according to Spanish law, the obligation to exercise all the criminal actions that it deems appropriate, regardless of whether or not the victim has appeared in the proceedings.

Likewise, Spanish law expressly indicates that civil action must be brought together with criminal action by the Public Prosecutor's Office, unless the victim has waived his right to compensation.

On the other hand, the determination and precautionary freezing of sufficient assets to cover the payment of all and any civil liabilities derived from crime constitutes another of the missions of the investigative phase of the criminal proceedings.

The processing of judicial proceedings aimed at this objective is carried out by applying the appropriate economic precautionary measures to cover all the corresponding economic liabilities, including costs and fines.

The Spanish General Public Prosecutor's Office has recalled the importance of the procedural activity to be carried out in relation to this matter and the need to adopt, from the beginning of the investigation, the precautionary measures necessary for the economic and social protection of the victim.

Thus, it is an obligation of the Public Prosecutor to promote before the investigating Court the exhaustive asset tracing of the debtor to ensure the payment of all and any civil liabilities.

Likewise, both the Courts and the Public Prosecutor have the obligation to activate the ORGA's intervention when appropriate.

1.3. The participation of the victim and of the economically harmed party in Spanish criminal proceedings

Although the "natural" accusing party in Spanish criminal proceedings is the Public Prosecutor's Office, the victim and the economically harmed party can also – and in fact do so in a large majority of cases – actively intervene in such proceedings.

Thus, except in cases where the investigations are declared secret, both the victim and/or the party seeking economic compensation are empowered to intervene in the proceedings on an equal footing with the other parties, including the Public Prosecutor's Office. The victim is thus allowed to obtain full knowledge of the actions and to propose all kinds of investigative measures, as well as to request any precautionary measures of a personal and economic nature, including the tracing and the freezing of assets sufficient to cover the hypothetical civil liability derived from crime, or the confiscation of such assets, where appropriate.

2. Civil Proceedings

In Spanish law, the conditions for criminalising a situation of fraud are strict and are those established in the Criminal Code and the jurisprudence interpreting it.

In this respect, it must be noted that the application of criminal law is governed under Spanish law by the principle of minimum intervention ("*ultima ratio*").

Therefore, on many occasions, a fraud situation can be channelled more easily through civil proceedings, which generally also tend to proceed more swiftly and quickly than criminal ones, especially in cases of particular complexity.

2.1. Asset tracing tools

Spanish civil proceedings are particularly well equipped to carry out an extensive tracing of the assets of the debtor.

As noted above, such means of asset tracing and recovery are also foreseen in criminal proceedings regarding assets necessary to cover the civil liabilities derived from crime.

The tools for asset tracing and recovery available to the claimant are therefore the following:

2.1.1. The debtor's asset disclosure obligation

Unless the claimant provides the Court with a list of assets of the debtor, enough to cover the due amount, the Court will automatically request the debtor to disclose such assets, specifying any charges and liens, and, in the case of real property, if occupied, the name of the occupants and their rights in the property.

The disclosure order must include the penalties, such as contempt of Court measures, that could be imposed if the debtor: does not submit the list of assets; includes assets belonging to others; excludes assets; or does not disclose any existing charges and encumbrances.

Contempt of Court instruments consist mainly in the offence named "enforcement frustration" in the Spanish Criminal Code applicable when the asset disclosure is untruthful, causing a delay or obstacle in the enforcement proceedings, or the debtor does not submit the disclosure of assets.

On the other hand, the list of assets will always be considered incomplete in the case that the debtor possesses assets owned by third parties and does not justify the right in the assets and the conditions of such possession.

The offence of enforcement frustration is punishable with: imprisonment of three months to one year or a fine (natural person); and fine of six months to two years (legal person). The same penalty is imposed for the serious disobedience

offence, another crime that may come into consideration in the case of non-disclosure by the debtor.

Finally, the Court may also impose periodic fines on the debtor who does not duly disclose his assets.

2.1.2. The Court's tracing powers and third parties' obligation to provide information

At the request of any claimant unable to designate assets of the debtor for enough to cover the due amount, the Court will request financial entities, agencies and public registries, as well as other natural and legal entities, to provide a list of assets of the debtor according to their records.

In this sense, it is worth mentioning the "Neutral Judicial Point", an instrument of electronic access that centralises the asset information of any person linked in a number of different ways to Spain (see paragraph VII).

The collaboration of private and public persons, including financial entities and public bodies, is particularly relevant given that bank secrecy and tax secrecy are not applied in Spain to prevent asset tracing. Both banks and tax authorities have the obligation to cooperate with Courts during enforcement and cannot refuse to facilitate the financial information of the debtor at their disposal. Likewise, any third party who has a relationship with the debtor (employers, clients, etc.) is obliged to collaborate with the Court, providing information on the debtor as requested.

2.1.3. Periodic coercive fines

As in the case of the debtor's disclosure order, the obligation of third parties to provide information on the debtor is reinforced by the potential application by the Court of periodic coercive fines to those who refuse to provide the information at their disposal.

II Case Triage: Main stages of fraud, asset tracing and recovery cases

1. Pre-litigation

1.1. Strategy

Prior to initiating any judicial action, it is necessary to first determine the best strategy in the specific case, be it civil or criminal.

As we have previously indicated, Spanish criminal proceedings allow the participation of the victim and of the party economically harmed by the crime, in virtually identical terms to those of the Public Prosecutor. However, as the requirements for the success of a criminal action are strict, in many cases, it may be advisable to file a civil action instead.

On the other hand, criminal justice faces an increasing workload that causes investigations to

last longer than civil proceedings. Civil declaratory proceedings in the first instance in Spain can last approximately a year-and-a-half, although times vary greatly depending on the workload of each specific Court.

The determination of the proper strategy may also cover the analysis of potential actions against the directors of a legal entity, or the possibility to file for forced insolvency proceedings against the debtor, provided that the requirements for such specific proceedings are met.

1.2. Pre-litigation asset tracing possibilities

The pre-procedural phase includes the solvency investigation of the debtor, as well as some asset tracing.

In Spain, for example, the Real Property Registry contains information about the owner and the existing liens in relation to all real property in Spain.

Access to the Real Property Registry is public, provided it is based on a legitimate interest, which is applicable in the cases of solvency analysis or assessment of the legal situation of a specific property, among others. Information from the Real Property Registry can be obtained online at an affordable price.

On the other hand, the Companies Registry is also a good source of information on companies and other legal entities with compulsory registration in said Registry (cooperatives, economic interest groups, branches of foreign companies, etc.)

Access to the Companies Registry is also free and contains information on the annual financial statements (mandatory deposit), the identity of the directors, the founding partners, the registered office, etc.

Finally, vehicles and other moveable assets are also easily traceable via the corresponding public registries covering the ownership and the existing liens on such assets.

2. During the proceedings

2.1. Preparatory litigation inquiries

Although in Spain, a civil law jurisdiction, there is no institution similar to the common law "discovery", there is the possibility of preparing a trial requesting the exhibition of certain documents necessary to prepare the lawsuit and that are exclusively in the possession of the other party.

2.2. Provisional measures

Asset tracing tools can also be used (with the exception of the debtor's disclosure order) to locate assets that allow the enforcement of

precautionary measures ordered by a Court.

Among these precautionary measures, applicable to both civil and criminal proceedings, are the preventive seizure, the administration or judicial management of productive assets, the precautionary registration of the existence of a claim regarding a registrable asset, the deposit of moveable or personal property, the formation of inventories of assets, the intervention and deposit of income obtained through an activity that is considered illegal, etc.

3. Enforcement

The phase during which, by excellence, the discussed asset tracing tools are predominantly used.

The lack of assets that may be subject to a freezing or seizure order allows the creditor to open mandatory insolvency proceedings against the debtor. The insolvency proceedings allow, in addition to the rest of its inherent purposes, to determine the potential personal liability of the directors of the legal entity in the causation of the insolvency, which could force such directors to cover the deficit of the insolvency estate with their personal assets.

III Parallel Proceedings: A combined civil and criminal approach

The victim of criminal fraud has three possibilities: (1) to start a criminal and a civil action within the same criminal proceedings; (2) to start a criminal action in the criminal proceedings and reserve its civil action for a subsequent civil

proceedings; and (3) to start a civil action within the criminal proceedings, provided that another party (typically, the Public Prosecutor) pursues a criminal action in the same proceedings.

However, it is generally not possible for the victim to follow parallel civil and criminal proceedings based on the same facts, if the facts that form the basis of the criminal proceedings can have a decisive influence on the resolution of the civil lawsuit. In such situations, the civil proceedings will be stayed at the time the first instance judgment has to be rendered, pending the outcome of the criminal process. This situation is known as "criminal prejudiciality".

In any case, the possibility of following parallel criminal and civil proceedings does not make much sense under Spanish law, for the simple reason that, as previously noted, Spanish criminal proceedings allow the use of all asset tracing tools available in civil proceedings, as well as the intervention of the ORGA the use of precautionary measures of an economic nature, necessary to ensure the availability of the debtor's assets during the course of the proceedings. In addition, as also mentioned above, Spanish law allows for a broad participation of the victim in criminal proceedings, on practically equal footing to the Public Prosecutor's Office.

IV Key Challenges

One of the most distinctive elements of the Spanish justice system is the adoption, in the last 25 years, as part of a modernisation effort, of multiple instruments of asset tracing and recovery that, in many cases, go far beyond those existing in other civil law jurisdictions.

One of those instruments is the generalisation of the obligation of third parties to provide information to enforcement Courts. This includes financial entities and tax authorities.

In addition, it can be said that the implementation of electronic tools (see paragraph VII) is one of the elements that has mostly contributed to the success of asset tracing and asset recovery in Spain.

Another relevant aspect has been the introduction of the debtor's asset disclosure obligation, accompanied by the contempt of Court and coercive instruments discussed above.

However, it is fair to say that there still is a lack of vigour on the part of Spanish Courts in ensuring compliance with the debtor's disclosure obligation, as well as in the actual enforcement of the mentioned contempt of Court and coercive tools.

Undoubtedly, one of the key challenges of asset tracing and asset recovery in Spain is, therefore, ensuring the adequate collaboration by the debtor, especially in those settings where the Court's investigation and the collaboration of third parties are not capable of bringing results to the asset tracing efforts.

In this respect, the recent evolution of civil and criminal case law in Spain allows us to be reasonably optimistic regarding the increase in the weight that the Courts are attributing to the effective cooperation of the debtor in asset tracing and recovery, in order to obtain information that only the debtor can bring to the procedure.

V Cross-jurisdictional Mechanisms: Issues and solutions in recent times

1. Criminal proceedings

1.1. International law

Spain has ratified the following international agreements that establish mechanisms for MLA, within the scope of each Convention, regarding very significant matters such as information sharing, taking of evidence (even bank, financial or commercial records), freezing of assets and evidence, asset recovery, confiscation and disposal of confiscated proceeds of crime or property, among others:

- United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, made in Vienna on 20 December 1988.
- International Convention for the Suppression of the Financing of Terrorism,

made in New York on 9 December 1999.

- United Nations Convention against Transnational Organised Crime, made in New York on 15 November 2000.
- United Nations Convention against Corruption, made in New York on 31 October 2003.
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, made in Strasbourg on 8 November 1990.
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, made in Warsaw on 16 May 2005.

1.2. EU Law

Spanish Act no. 23/2014, of 20 November 2014, on mutual recognition of criminal judgments in the European Union, has merged into one single piece of national legislation of all existing European mechanisms of mutual recognition of criminal judgments.

Among other matters, the Act regulates, in cross-border cases within the EU:

(i) the preventive freezing of those assets subject to a subsequent confiscation order or to be used as evidence in Court;

(ii) the enforcement of judicial confiscation orders, that can be sent simultaneously to several EU countries if there were doubts with regard to the location of the assets; and

(iii) the transmission and enforcement of the European Evidence Warrant (EEW), to obtain objects, documents or data for use as evidence in criminal proceedings, including information on assets.

Mutual recognition of criminal decisions in the EU and international coopearation regarding freezing and confiscation of assets have been clearly reinforced by the creation of the ORGA and its coordination with its counterparts in other countries. The ORGA may exchange information with other State entities with specific competences on asset tracing and recovery, when appropriate and in the exercise of their duties.

2. Civil proceedings

2.1. International law

2.1.1. The Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters

Spain is a party to this well-known Convention that regulates international cooperation on the taking of evidence in civil or commercial matters through designated central authorities.

This Convention allows data to be obtained on asset tracing, though the particular information mechanisms requested must be compatible with the applicable law of the requested State.

2.1.2. Convention on International Interests in Mobile Equipment and its Protocol on matters specific to aircraft equipment, signed at Cape Town on 16 November 2001 ("Cape Town Convention")

Spain is also a party to the Cape Town Convention. The Convention is complemented with three Protocols, but only the Protocol on matters specific to aircraft equipment entered into force in Spain on 1 March 2016. The EU has also ratified both the Convention and the said Protocol.

The content of the Cape Town Convention is very broad, but it should be noted that it establishes specific measures for the identification, tracing and recovery of certain mobile equipment. It allows to take possession or control of any such equipment, to sell or grant a lease and/or to collect or receive any income or profits arising from the management or use of the same. It also enables the de-registration of an aircraft and the export and recovery, via cross-border physical transfer, of such aircraft.

2.2. EU Law

Among others, key EU regulations regarding asset tracing are the following:

2.2.1. 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

This Regulation establishes procedures for judicial mutual assistance and cooperation within the EU (it replaces in the EU, except Denmark, the Hague Convention of 18 March 1970) in the taking of evidence in civil or commercial matters.

It includes 10 forms regarding the specific steps of the procedures, which are mainly based on the European Judicial Network in civil and commercial matters (EJN) and the European e-Justice Portal, which allow cross-border contact and telematic access.

2.2.2. Regulation (EU) no. 655/2014 of the European Parliament and the Council of 15 May 2014 establishing a European Account Preservation Order (EAPO) procedure to facilitate cross-border debt recovery in civil and commercial matters

The EAPO allows the freezing of funds deposited in the bank account of a debtor in another EU country(ies), except in Denmark, through a quick procedure and the use of nine forms established in the Commission Implementing Regulation (EU) 2016/1823 of 10 October 2016.

It is applicable in civil and commercial matters, with a few certain exceptions referring to particular subjects or protected bank accounts.

The application for the EAPO can be submitted before the enforcement order of payment is rendered, but reasonable evidence in relation to the real risk that justifies the seizure of the debtor's account must always be provided.

The EAPO is enforceable without the need of a procedure for recognition or a declaration of enforceability and it is carried out without informing the debtor, although the debtor could challenge or appeal the order, and the limits regarding non-seizable amounts must always be respected.

The enforcement of the EAPO in Spain is greatly assisted by the existence of the "Neutral Judicial Point", which enables Spanish Courts to issue electronic freezing orders (ECCV, as per their Spanish acronym) of monies deposited in the accounts of all Spanish banks, as discussed hereafter.

VI Technological Advancements and Their Influence on Fraud, Asset Tracing and Recovery

1. Collaboration with the Spanish Tax Agency – the "Neutral Judicial Point"

The Neutral Judicial Point (*Punto Neutro Judicial* – PNJ), which aims to improve the management of enforcement procedures, is an intranet directed by the IT Department of the General Council of the Judiciary.

Through an agile and reliable online consultation, it allows Spanish Courts to obtain up-to-date information concerning all natural and legal persons available to the Spanish Tax Agency, the Spanish Social Security, the Cadastre, the National Statistics Institute, the Property and Company Registries, the General Directorate of Vehicles, the Public State Employment Service, the National Police Force and other public entities.

Thus, the PNJ allows the Courts to trace assets mentioned in such databases and to proceed to issue freezing orders allowing the Court to recover such assets.

With regard to the information that the Spanish Tax Agency can provide through the Neutral Judicial Point, it comprises bank accounts, as well as information on sales and purchases of the debtor (provided the latter performs a commercial activity). In the event this information is insufficient, additional information may also be required through the Court directly to third parties in compliance with the requirements of personal data protection.

2. Electronic freezing orders

An ECCV is a software application of the Neutral Judicial Point. It is the result of an agreement between the General Council of the Judiciary,

the Spanish Private Banking Association, the Spanish Confederation of Savings Banks and the National Union of Credit Cooperatives.

The ECCV has greatly increased the effectiveness of freezing orders as it allows, through a quick and easy intranet consultation, to obtain information of current bank accounts held with any Spanish bank (not fixed-term deposit or any other bank deposit). It also allows to directly seize money from the account or accounts up to the claimed amount and to transfer the money to the Court's bank account.

Neither the bank nor the debtor is informed beforehand of the amounts seized or transferred to the Court's account. In addition, the ECCV will repeat automatically its search where the first or subsequent seizure orders were not sufficient to cover the amounts of the enforcement.

Finally, the system also allows the seizure of tax credits (i.e., of amounts owed by the Spanish tax authorities to the debtor).

VII Recent Developments and Other Impacting Factors: the Registry of Beneficial Ownership

According to Spanish law, the beneficial owner means:

a. the natural person on whose behalf a business relationship will be established or transactions will be conducted; or
b. the natural person who ultimately owns or controls, directly or indirectly, a percentage greater than 25% of the capital or voting rights in that legal entity, or who otherwise exercises control over the management of a legal entity, other than a company listed on a regulated market that is subject to disclosure requirements consistent with EU legislation or subject to equivalent international standards which ensure that the information regarding the beneficial owner is transparent.

In Spain, the transposition of the IV anti-money laundering Directive has led to:

(i) new forms for the annual financial statements, which include the obligation to provide information on the beneficial ownership of the entities that need to file such financial statements in the Company Registry (commercial companies, economic interest groups, subsidiaries of foreign entities, etc.); and
(ii) the creation of the telematic Registry of Beneficial Ownerships ("RETIR", as per its Spanish acronym), which provides information on the beneficial ownership of the entities that are registered in the Company Registry. The RETIR is interconnected with other European national registries through the Business Registers Interconnection System ("BRIS").

The RETIR was launched to provide information to authorities that collaborate in the prevention of money laundering or terrorist financing, such as the General Council of the Judiciary, the General Public Prosecutor's Office, the State Court of Auditors, the Bank of Spain, the Spanish Securities and Exchange Commission and others.

Subsequently, the V Directive established the obligation to create national registries of beneficial owners in each EU Member State and also that these registries should be accessible to the general public. The V Directive also refers to the possibility of complementary information systems. The deadline for the transposition of the V Directive was 10 January 2020.

However, in Spain, the RETIR has not yet been developed as required by the V Directive because it only provides information on the beneficial ownership of legal entities obliged to file annual financial statements with the Company Registry; thus, it does not offer information in relation to all the legal entities referred to in the Directive (referred to a broad concept that includes other legal entities as foundations, associations, etc.). In addition, the RETIR refers to the beneficial owner at the time the annual financial statements were submitted (based on the information provided for the approval of the annual accounts, when the shareholders of the companies must be identified). Finally, the RETIR does not ensure access to the general public, but only to the above-mentioned authorities.

In relation to complementary information systems, the Database of Beneficial Ownership of the General Council of Notaries is highly relevant. It was created on 24 March 2012 and includes beneficial ownership information on the basis of the data submitted by Notaries who authorise the public deeds of diverse legal entities and their underlying transactions.

The access to this database is also limited to the judicial, tax and administrative authorities that prevent money laundering and other entities established by law.

A challenge to be faced is therefore the accessibility of the RETIR to the general public and its coverage of all legal entities affected by the V Directive.

Héctor Sbert, Partner at Lawants, is a Spanish commercial litigator specialised in international enforcement, distressed debt settlement, asset tracing and contentious insolvency. He is co-founder of Lawants and head of the Dispute Resolution Department.

Héctor Sbert's Ph.D. thesis dealt with a Spanish and comparative analysis of civil remedies for asset tracing and recovery. He has developed a strong practice in the enforcement of national and foreign judgments, arbitral awards and other enforceable titles, insolvency-related litigation (on behalf of both creditors and debtors), directors' liabilities – related or not to insolvency proceedings – and assistance to foreign officeholders in the protection of insolvent estates.

hector.sbert@lawsants.com

Maria de Mulder, Senior Associate at Lawants, is a Spanish Attorney specialising in litigation, international law and insolvency law, with extensive experience advising international and national clients in prelitigation strategies, negotiations and judicial and arbitral proceedings, which usually include a foreign component and analysis of comparative law.

maria.demulder@lawants.com

Lawants is a one-stop boutique based in Barcelona, Spain, providing legal and tax services to foreign investors doing business in Spain. Its main areas of practice are corporate, tax, litigation and insolvency. We render our services in several languages: English; Spanish; Italian; French; German; and Russian.

www.lawants.com

LAWANTS

Switzerland

Dr. Claudia Götz Staehelin
Kellerhals Carrard

Dr. Florian Baumann
Kellerhals Carrard

Dr. Omar Abo Youssef
Kellerhals Carrard

1 Important Legal Framework and Statutory Underpinnings to Fraud, Asset Tracing and Recovery Schemes

1.1. Legal background

The Swiss legal system belongs to the tradition of civil law. Thus, its primary legal framework is established in written statutes. Whilst the common law rule of binding precedent is not present in Switzerland, judicial decisions do play an important role within the legal framework. Judicial opinions and interpretations of the law that have been confirmed in multiple rulings over time indeed may be viewed as legal precedent. In addition, the view of legal scholars is often taken into consideration in the application and interpretation of the codified law and established precedents.

Whilst the Swiss procedural rules are regulated at a federal level, the cantons retain the autonomy to organise their judiciary. They are free in the organisation of their courts, but must fulfil the requirements set forth within federal law. Cantons are required to provide courts of two instances, a court of first instance as well as a court of appeal, within their judiciary system, and are further granted the power to establish specialised courts, e.g. commercial courts that may serve as the court of first and sole instance for commercial disputes in that canton. The cantons Zurich, Bern, St-Gallen, and Aargau have enacted commercial courts. Additionally, many cantons have other specialised courts for labour and tenant disputes.

The cantons further remain autonomous in how they choose to compose their courts. Switzerland does not have a jury system; any remnants of a similar system within the cantons were ceased with the introduction of the Federal Criminal

Procedure Code (CPC) of 2011.

Disputes that pertain to fraud, asset tracing and recovery may be addressed either in civil litigation, i.e. in civil courts or, in the cantons that have established specialised commercial courts, in said commercial courts (see section 1.2). These disputes may further be addressed within criminal proceedings that may take place at either the cantonal or federal courts (see section 1.3).

1.2. Civil litigation

a) Civil proceedings in general

Civil litigants in Switzerland may enact civil tort law, which allows the plaintiff to seek recovery or compensation of the damages that they have incurred through unlawful and, in particular, criminal acts of the defendant. The plaintiff is entitled to compensation of its negative interest, i.e. to be put back in the situation in which it would have found itself if the loss-causing event had not occurred.

To begin a Swiss civil proceeding, a claimant must normally initiate a pre-suit conciliation hearing. The aim of such pre-suit conciliation hearing is to reach an agreement between the parties. If the parties cannot agree, the claimant may file a written claim with the courts.

Within Swiss civil proceedings there is the option for the defendant to extend the liability by bringing the claim against them to a third party by "notice of litigation". Whilst there are no class action suits in Switzerland, there is the possibility of joinder claims that are admissible if two or more claims subjectable to the same type of proceedings are in the same matter and raise a common question of either law or fact.

The parties are free within the submission of their briefs to evaluate what they deem to be relevant evidence and facts of the case and are not bound by any general pre-trial disclosure regulations. The claimant filing the suit is expected to submit all the facts and evidence supporting their claim from the beginning of the proceedings. Accordingly, the defendant will then be given the opportunity to either refute the claimant's facts or submit their own facts and evidence. Both parties must submit all evidence available to them without delay, i.e. generally with their initial briefs. Each party must submit proof to support the facts of their claim or defence. The courts are given broad discretion in the evaluation of the evidence submitted and will declare which evidence is admissible in the form of a procedural order.

Witnesses and experts, if they are called to provide testimony, are not subjected to cross-examination, but the parties have a right to make statements on the questions put forth by the court and may put forth their own questions. Privately commissioned expert opinions as well as affidavits do not qualify as evidence under the Swiss Civil Procedure Code (CivPC); however, since the courts may freely assess the evidence submitted, they are often not rejected entirely but rather merely given the influence of that of a party pleading.

Within Swiss civil litigation, persons who are called upon to provide testimony or evidence within civil proceedings have a duty to cooperate and provide testimony, unless they are prohibited from doing so by confidentiality obligations (professions with statutory confidentiality, e.g. doctors, lawyers) or may refuse due to the threat of self-incrimination or the relationship with one of the parties of the proceeding. Contacting and preparing witnesses is generally not allowed within Swiss litigation proceedings.

Whilst Switzerland does not have the principle of contempt of court *per se*, indifference or lack of cooperation with the courts may lead to unfavourable conjecture with the court.

Before the court reaches its ruling, the parties may give a final opening to provide statements on the evidence submitted to the courts. In most civil proceedings, the courts are bound by the principle of party presentation, and may not go beyond the facts brought forth by the parties.

Within the final judgment, the court decides on the costs of the proceeding and the obligation to bear such costs. Under Swiss civil procedure law, the party that does not prevail before the court must bear the costs of the proceedings and the legal cost of the prevailing party as set by the court. Punitive damages as such are not awarded or recognised within Swiss law.

b) Injunctive relief / attachment proceedings

Beyond the ordinary procedures, Swiss civil law additionally provides for injunctive and interim relief within civil litigation and allows for the enforcement of a court ruling in favour of the claimant.

The remedy that is utilised the most is the so called "attachment" proceeding. In order for a petition of attachment to be granted by the court, the petitioner must fulfil the following three main requisites:

- firstly, the petitioner must have a *prima facie* claim, i.e. the petitioner must credibly show that such claim exists;
- secondly, the petitioner must identify assets which are located within Switzerland; and
- lastly, the petitioner bases the request on valid grounds meriting an attachment.

In most cases, petitioners base their petition

of attachment on the ground of the defendant's lack of a domicile or registered office in Switzerland, respectively. A petitioner may further base the petition on a ruling that was passed in the petitioner's favour against the defendant or on a certificate of unpaid debt from the defendant.

If the petition is filed on the grounds that the defendant lacks a domicile or registered office in Switzerland, the petitioner must show a sufficient nexus between the claim put forth and Switzerland.

The requirement of a nexus to Switzerland is usually fulfilled when one of the parties has its domicile in Switzerland, the place of execution or performance of the contract is in Switzerland, or in the case of a tort claim, the unlawful act took place in Switzerland or the harmful result of that act transpired in Switzerland.

The Swiss attachment degree is an *in rem* order and may only seize property located within Switzerland that was identified by the petitioner. The attachment order may extend to claims that the defendant holds against a third party, provided that said third party also has their domicile or registered office within Switzerland.

1.3. Criminal proceedings

a) Seizure and forfeiture of illegal proceeds

In accordance with art. 70 para. 1 of the Swiss Criminal Code (SCC), the court orders the forfeiture of assets that have been acquired through the commission of a criminal offence, unless the assets are to be passed on to the person harmed for the purpose of restoring the prior lawful position. Thus, in case of fraud or other criminal offences against financial interests, the forfeiture operates in favour of the victim.

The forfeiture extends to assets that have a natural and adequate causal link to the criminal offence. However, they do not necessarily have to be the direct and immediate consequence of the offence. For example, income from legal transactions that have been concluded based on bribery can also be forfeited. Also, it is undisputed that surrogates of assets acquired through a criminal offence can be forfeited as well.

It is an issue of controversy whether the amount to be recovered in forfeiture and compensation claims should be determined on a net or gross basis. For generally prohibited activities (e.g., drug trafficking), gross calculations apply, whereas for acts that are permitted in principle, but are only tortious in specific instances (e.g., a contract that has been obtained based on corruption), net calculations are used, i.e. the production costs are deducted.

Law enforcement authorities may order the provisional seizure of assets if they are likely to be returned to the persons harmed, to be forfeited or to serve to enforce the compensation claim (art. 263 para. 1 lit. c and d CPC, art. 71 para. 3 SCC). The provisional seizure of assets, which may be requested by victims of fraud or other criminal activities, is regularly a very effective and efficient tool for recovering assets. In particular, it is noteworthy that in criminal proceedings, and only in criminal proceedings, any assets resulting directly or indirectly (surrogates) from a criminal offence will be used to compensate the person harmed to the exclusion of all other creditors pursuing the civil route. These preferential rights should be kept in mind when deciding on whether to seek recovery by way of criminal or civil proceedings.

If the assets which are subject to forfeiture no longer exist, e.g., because they have been consumed or disposed of, the court will order a compensation claim for the same amount (art. 71 para. 1 SCC). The compensation claim may be enforced in any assets, including assets which may have been legally acquired. However, the seizure of unrelated assets does not accord the State preferential rights in the enforcement of the equivalent claim (art. 71 para. 3 SCC), which can be awarded to the person harmed (Art. 73 SCC).

As forfeiture and compensation claims involve objective measures and not penalties, these sanctions are applied regardless of the criminal liability or conviction of a particular person, provided however that all objective and subjective elements of the underlying offence can be proven.

Another efficient way to obtain a *de facto* freezing

of assets consists of giving a reasoned written notice to the bank where the assets are deposited indicating the risk for the bank of being held criminally and civilly liable in the event it allows the assets to be withdrawn and/or transferred. In view of the fact that Swiss law criminalises money laundering (see art. 305*bis* SCC), the bank faces not only a civil but also a criminal liability risk in this regard. This will usually prompt it to comply with the freezing request. Furthermore, in cases of suspicion of money laundering or another felony, the bank must notify the Money Laundering Reporting Office (MROS), which in turn involves the criminal authorities if a reasonable suspicion exists. Thus, the victim's interest in recovering his or her assets is also protected by the criminal provision of money laundering.

In addition to the freezing of assets, victims of fraud and other financial misconduct can request that the prosecutor orders the seizure of an accused's or a third party's bank documents in order to be able to establish the paper trail. The prosecutor will order such seizure if it is expected that the bank documents are relevant as evidence for proving the crime or the existence of criminal proceeds (art. 263 para. 1 lit. a CPC).

It is noteworthy that in criminal proceedings the state attorney will *ex officio* establish the relevant facts and, in particular, seek and freeze criminally acquired assets in favour of the person harmed regardless of whether these assets are still held by the accused or have meanwhile been transferred to a third party (*in rem* forfeiture). In civil proceedings, the burden of proof lies with the plaintiff and a civil attachment requires that the plaintiff establishes a *prima facie* claim and clearly indicates where the assets to be attached are located (no search arrest). If the assets are no longer there, e.g. on the bank account of the offender, the attachment will fail without the plaintiff being informed on whether and where the assets have been transferred. This should also be kept in mind when deciding on whether to take the criminal or civil route.

b) Pursuing civil compensation claims in criminal proceedings

Under Swiss law, victims of fraud and other financial offences have the possibility to assert their civil claims in the course of the criminal proceedings conducted against the accused (so-called adhesion claims; see art. 122 para. 1 CPC). They are thus not obliged to bring a separate civil action, but shall be spared the burden of conducting two separate proceedings.

In this context, it is important to note that the Swiss Criminal Procedure Code differentiates between the person suffering harm and the private claimant. The person suffering harm is defined as either the person whose rights have been directly violated by the offence (art. 115 para. 1 CPC) or the person entitled to file a criminal complaint (art. 115 para. 2 CPC).

The private claimant is defined as a person suffering harm who expressly declares that he or she wishes to participate in the criminal proceedings as a criminal or civil claimant (art. 118 para. 1 CPC). The role of a private claimant therefore requires explicit confirmation that he or she wishes to act either as a criminal or civil claimant, or both, within the proceedings whilst the role of a person suffering harm is granted *ex lege*.

The person suffering harm may do either or both of the following (art. 119 para. 2 CPC):

- request the prosecution and punishment of the person responsible for the offence (a criminal complaint); and/or
- file private law claims based on the offence (a civil claim).

The degree of participation the person suffering harm wishes to take within the proceedings is at his or her discretion. He or she may further extend his or her participation, e.g. from that of a solely civil claimant to that of a criminal and civil claimant or *vice versa*, within the course of the proceedings.

The person suffering harm who declares he or she wishes to join the proceedings as a private claimant is viewed to be an official party to the proceedings alongside the accused, and, once the stage of the main hearings have begun, the public prosecutor (art. 104 para. 1 CPC).

The private claimant therefore enjoys all rights

provided to a party within criminal proceedings. These include, but are not limited to, the right to be heard and inspect the files (art. 107 CPC), the right to file submissions to the prosecutor and/or the court (art. 109 and art. 346 CPC), the right to appoint a legal counsel (art. 127 CPC), the right to participate in the taking of evidence (art. 147 CPC) and the right to appeal (art. 382 CPC).

Civil claims which are filed in the course of the criminal proceedings are subject to special procedural rules: with the declaration of the person suffering harm to participate in the criminal proceedings as a civil claimant, the civil claim becomes pending as of that point. The quantification and statement of the grounds on which the civil claims rely must be specified in the party submissions at the public court hearing at the latest (art. 123 para. 2 CPC).

The criminal court's jurisdiction over the civil claims is established by its jurisdiction over the criminal proceedings. The prayers for relief which the private claimant may submit have their basis in civil law and would without the connection to the criminal proceedings be customarily submitted to civil courts.

The criminal court decides on pending civil claims in the event that it:

- convicts the accused; or
- acquits the accused and the court is in a position to make a decision (art. 126 para. 1 CPC).

The civil claim shall be referred to civil proceedings in the following circumstances (art. 126 para. 2 CPC):

- the criminal proceedings are abandoned or concluded by means of a summary penalty order procedure;
- the private claimant has failed to justify or quantify the claim sufficiently;
- the private claimant has failed to lodge a security in respect of the claim; or
- the accused has been acquitted but the court is not in a position to make a decision on the civil claim.

If a full assessment of the civil claim would cause unreasonable expense and inconvenience to the criminal court, it may make a decision over whether the merits of the civil claim are given and refer it to civil proceedings for quantification (art. 126 para. 3 CPC).

1.4. Enforcement of foreign judgments

According to Swiss law, foreign judgments or orders are required to be recognised and affirmed to be enforceable by a Swiss Court under exequatur proceedings before they may be enforced in Switzerland.

The regulation of the requirements for the recognition and enforcement of the foreign judgments is regulated within the Federal Act on Private International Law (PILA; see art. 25-27). Switzerland further has ratified the Convention on Jurisdiction and the Recognition of Judgements in Civil and Commercial Matter of October 30, 2007 ("Lugano Convention"). Art. 32 of the Lugano Convention defines judgment as "*any judgment given by a court or tribunal of a State bound by this Convention, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court*". Subsequently, interim orders of another court, e.g. worldwide freezing orders, are included within the definition of a judgment according to the Lugano Convention and thus may be recognised and enforced within Switzerland.

The Federal Supreme Court has opted this view, but declared that the defendant must be given the opportunity to seek the discharge or adaption of the freezing order.

A foreign judgment may be declared enforceable based on the Lugano Convention if the judgment is deemed enforceable within the state of the judgment's origin, and if the following documents set out in art. 53 *et seqq.* of the Lugano Convention are submitted:

- a copy of the judgment that meets the conditions necessary to establish its authenticity;
- a certificate issued by the court or the competent authority where the judgment was given; and
- a certified translation of the aforementioned documents.

1.5. Outcome of legal action

Within civil litigation, if successful, the claimant acquires a settlement or judgment in his or her favour. If the defendant's assets have been successfully attached, the claimant may then pursue enforcement action against those assets within the scope of the Federal Act on Debt Collection and Bankruptcy.

In the course of criminal proceedings, multiple results may be possible. If the accused has accepted responsibility for the offence in the preliminary proceedings or if his or her responsibility has otherwise been satisfactorily established, the public prosecutor often issues a summary penalty order. In this case, if the accused has accepted the civil claims of the private claimant, this will be recorded in the summary penalty order. Otherwise, the claims are referred to civil proceedings. The proceedings further may be concluded through simplified proceedings in which the accused is required to acknowledge his or her unlawful conduct as well as, if only in principle, the civil claims in exchange for a milder sentence. Finally, criminal proceedings may be conducted

through ordinary trial procedure. In this instance, the criminal court will either decide on pending civil claims or refer them to civil proceedings. In addition, the court or the prosecution may order the restitution of the proceeds of the crime to the person suffering harm, the forfeiture or a compensation claim.

2 Case Triage: Main stages of fraud, asset tracing, and recovery cases

2.1. Preliminary steps

When mapping out the legal strategy it is of course essential to have a clear understanding of all of the facts available and keep the objectives of the client in the centre of focus. This in particular includes establishing whether multi-jurisdictional efforts need to be made, and if so, to coordinate the action to be taken with the client's legal counsel in other jurisdictions to establish the most effective legal strategy.

Strategic considerations will often begin by determining in which jurisdictions recoverable assets are located and what measures would be required in the respective jurisdictions to seize and forfeit said assets or to assist in the proceedings in other jurisdictions where there are recoverable assets. For example, if the defendant holds assets mainly in Switzerland, a priority could be made towards filing for interim or injunctive relief, with a potential request for an attachment order for relevant assets. However, if substantial assets are held abroad in one or various jurisdictions, the focus would be on having any judgments pertaining to assets of the defendant, e.g. a worldwide freezing order, recognised and enforced in Switzerland.

2.2. Legal action in Switzerland

If it is established that fraud assets are located in Switzerland, and thus it is the most prudent decision to pursue legal action in Switzerland, the next step is to establish which steps are the most efficient and to achieve the required results.

When initiating civil attachment proceedings, it is important to keep in mind that the successful attachment of the defendant's assets may establish Swiss jurisdiction within civil proceedings. However, the claimant is free to prosecute the attachment in another jurisdiction. Thus, if it were to be more prudent to file claims against the defendant in another jurisdiction, the plaintiff should prepare to be ready to file such claim within the timeframe which Swiss law prescribes for the timely prosecution of an attachment order.

Where the claimant has different options as to where to litigate their claim, the unique benefits and disadvantages of each legal system available should be weighed to establish under which jurisdiction the claimant were to have the best procedural options at their disposal.

As explained above, the claimant may further consider taking the necessary steps to initiate criminal proceedings if the necessary requirements for criminal procedure are met. One of the key requirements is that sufficient evidence is available in order for the public prosecutor to open a case and that Swiss jurisdiction can be established. The claimant should thus ensure that they have sufficient evidence to back their claim and/or suspicions, and especially enough evi-

dence to convince the prosecuting authorities.

If the claimant is able to gather the sufficient amount of evidence and public prosecutor consequently opens criminal proceedings, the claimant then has the benefit of the powers given to the criminal prosecution to compel the disclosure of information and documents and to seize or freeze assets. These benefits are accompanied by the disadvantage that during criminal proceedings, whilst the claimant may have the role of a party, however, they shall not have any control over the time frame or decisions made within the criminal proceedings.

3 Parallel Proceedings: A combined civil and criminal approach

As stated above in section 1, Swiss law allows for parallel criminal and civil proceedings in the same matter.

The specific case at hand should determine whether victims of fraud and other financial misconduct shall file a criminal complaint or bring a civil action, or both. The question whether a criminal complaint shall be filed is often dependent on the amount of information or evidence available to the plaintiff prior to the commencement of civil proceedings. In cases of lack of evidence, criminal proceedings can assist the plaintiff in obtaining disclosure of valuable information for their claim such as bank documents as well as the freezing of assets. Where a criminal complaint is filed, it has to be assessed whether it is prudent to not only participate in the criminal proceedings as a criminal complainant, but also to assert civil claims in the course of the criminal proceedings instead of bringing a separate civil action. In this context, it is important to note that filing civil claims within criminal proceedings invokes *lis pendens* and thus would prevent the plaintiff from filing his or her claims in a separate civil proceeding.

Pursuing a combined civil and criminal approach may be advisable in cases where the determination of the civil claim and/or its quantification proves to be complex and can thus be better resolved through civil litigation. However, there may also be cases where criminal proceedings are sufficient to trace and ensure the recovery of the assets. This is especially the case where assets have been provisionally seized by the prosecution in order to be returned to the injured person or to serve to enforce the compensation claim awarded to the injured person.

4 Key Challenges

As mentioned above, certain challenges may arise when pursuing claims within Swiss civil proceedings. In particular, there is no cross-examination of witnesses within proceedings, nor is there the principle of general discovery or disclosure prior to proceedings. Whilst within pending proceedings a civil court may order the defendant or third parties to disclose specific documents relevant to the case, this remains an exception. However, if a party requests the opposing side to produce a document, the non-compliance with such request may lead to an unfavourable inference with the court.

Another limitation within civil proceedings in Switzerland is that any attachment orders issued within Switzerland are of an *in rem* nature, with the consequence that only assets within Swiss territory may be seized or frozen.

On the other hand, and as stated above, worldwide freezing orders may be recognised under the Lugano Convention in Switzerland. The interim or injunctive relief in Switzerland, however, does not grant the same provisions to the claimant as such foreign orders. A claimant which seeks recognition in Switzerland will most likely pursue a declaration of bare enforceability from a court as the sole remedy.

All in all, if the possibility is given to litigate the claim under a further jurisdiction, the legal mechanisms provided to the claimant in said jurisdiction should be evaluated to determine whether they may be preferable to the claimant than those provided for in Switzerland.

That being said, many of the hindrances within civil proceedings may be alleviated through pursuing claims within criminal proceedings. Within criminal proceedings, the injured party or plaintiff is far more likely to be able to have the defendant or third parties, e.g. the defendant's bank, forced to disclose information in their favour and have assets traced and confiscated to serve as their compensation.

5 Cross-jurisdictional Mechanisms: Issues and solutions in recent times

Large-scale fraud regularly operates on an international level. Thus, asset tracing and recovery often needs to be conducted within a multi-jurisdictional context.

As a caveat, practitioners should first take note of the blocking statute of art. 271 SCC. This criminal law provision prohibits to commit acts on behalf of a foreign state which from a Swiss perspective would fall within the competence of a public official. Thus, the collection of evidence for foreign proceedings, to the extent it is characterised as an official act under Swiss law, would be deemed unlawful and in violation of art. 271 SCC. This applies in particular to any processes of serving documents, the taking of witness interviews or statements but also to the gathering of information and evidence for or upon request of a foreign authority. In contrast, the prohibition does not apply to the voluntary production of evidence in foreign proceedings which a party has in its possession or control and which constitute pure procedural act of such party. Finally, based on a respective application, the competent federal departments may grant an exception to art. 271 SCC and allow the direct cooperation with a foreign authority if deemed in the interest of the applicant. Such authorisations have been granted, e.g., in order to allow Swiss banks to cooperate in the US Department of Justice (DOJ) programme to settle the tax dispute between the Swiss banks and the USA.

In civil proceedings, cross-jurisdictional judicial assistance, in particular, serving persons with judicial documents and the obtainment of evidence within foreign jurisdictions, is regulated through the titular Hague Conventions. The Convention on Civil Procedure of March 1 1954, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of November 15 1965, and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of March 18 1970 are particularly noteworthy. The same procedure and regulations derived from the conventions are applicable when foreign proceedings require Swiss assistance. For the recognition and enforcement of foreign judgments, see section 1.4 above.

As for criminal proceedings, any international coordination or cooperation needed is regulated within the unilateral Federal Act on International Mutual Assistance in Criminal Matters (IMAC). In addition, as is the case in civil matters, there are various bi- and multilateral treaties, such as, e.g., the European Convention on Mutual Assistance in Criminal Matters of April 20 1959. The main goal of such international cooperation is usually the gathering of information from or the freezing and restitution of illegally acquired assets held by Swiss banks.

In addition, in the case of so-called failed states, the Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (FIAA) allows the precautionary freezing and repatriation of illicitly acquired assets even where, due to the total or substantial collapse of the judicial system of the relevant state, the ordinary channels of mutual assistance in criminal matters are not successful.

6 Technological Advancements and Their Influence on Fraud, Asset Tracing and Recovery

The steady advancement of technology comes with the advancement and adaptation of the tactics used by fraudsters. With the ever-growing increase of data being stored digitally, this simultaneously allows for potential data breaches, giving

fraudsters potential access to bank accounts, digital currency, electronic devices, or even access to personal information.

This has led to more specialised approaches within law enforcement and increased security within the private sector. Banks, in particular, through necessity have been required to improve their security technologies to safeguard their customers from fraud. The improvement in technology has also increased the difficulty in tracing the unlawfully acquired assets and the engagement of companies specialising in international asset recovery has become more common place.

In law enforcement, the Swiss Federal Police (FedPol) has established specialised cybercrime divisions with certain cantonal police departments following suit (e.g. Zurich). On an international scale, the cooperation against cybercrime is further aided through the Convention on Cybercrime (the "*Budapest Convention*"), and the coordination channels of EuroJust.

7 Recent Developments and Other Impacting Factors

7.1. Information rights of Swiss or foreign bankruptcy officers

In the decision BGE 5A_126/2020, the Federal Supreme Court specified the duty of an agent, respectively a Swiss bank, to provide information to the Swiss or foreign administration of a bankrupt estate. The issue at stake was whether and to what extent domestic and foreign insolvency office holders are entitled to obtain documents from a Swiss bank with which a debtor held accounts for the purpose of assessing a civil claim against a bank, the bank itself thereby collecting pre-trial evidence.

The Federal Supreme Court confirmed the lower court's view that in such cases the bank could not invoke the banking secrecy and thus refuse to provide information. It specified that the bank may only refuse to provide information or surrender documents to the estate if it was also not obliged to surrender them to the bankrupt principal. Only purely internal documents are not covered by such duty to surrender.

The decision is of particular interest in light of the new cross-border insolvency recognition provisions, in force since January 1, 2019. The new law allows foreign insolvency officeholders, under certain conditions, to be authorised by the competent Swiss court to act directly in Switzerland rather than through a local liquidator appointed in Swiss ancillary bankruptcy proceedings. This will include the gathering of information and documents from Swiss banks as concretised in the referenced decision of the Federal Supreme Court.

7.2. Criminal seizure of commingled assets

Funds derived from fraud are often commingled on a bank account with funds derived from licit activities. It has always been an issue of controversy to what extent such commingled funds could be forfeited and, even more important, qualified as an object of money laundering. In a decision of May 2019, the Federal Supreme Court rejected the so-called "total contamination theory" according to which the whole commingled account could be forfeited and, consequently, any withdrawal from such account would qualify as money laundering. It held that such theory was overly radical. However, the Federal Supreme Court did not decide whether, in the absence of such total contamination, the tainted funds would, metaphorically speaking, float on top ("oil film theory") or sink to the bottom of the commingled account ("sediment theory"). The first theory has the consequence that pending an investigation the commingled account remains fully blocked by the "oil film" of tainted funds. The second theory, however, allows that the untainted part of the account may be disposed of provided that the tainted sediment remains untouched. We note that recent legal literature seems to clearly favour the sediment theory for reasons of both proportionality and legal certainty. From an asset recovery perspective, the sediment theory seems acceptable since, in any case, the tainted sediment of a commingled account must remain forfeitable in favour of the damaged party or the state as the case may be.

Dr. Claudia Götz Staehelin, head of the Kellerhals Carrard Investigation practice group, is a litigation and investigation partner and specialises in international dispute resolution, as well as internal investigations across various industries. She advises her clients in compliance, internal investigations, cross-border proceedings, international mutual legal assistance and data privacy, and supports her clients in dispute resolution crisis management. Claudia combines investigation and dispute resolution expertise with significant business experience. Before joining the firm, Claudia was the head of litigation at Novartis, where she led large multijurisdictional disputes and investigations and advised senior management on company litigation risks, as well as on financial and reputational impact.

claudia.goetz@kellerhals-carrard.ch

Dr. Florian Baumann, head of the Kellerhals Carrard White-Collar Crime practice group, graduated from the University of Zurich (*Juris Doctor* and Master of Laws) and is admitted to all Swiss courts. He wrote his doctoral thesis on the confiscation of illicit proceeds and completed postgraduate studies at the Collège d'Europe in Bruges with the H.E.E. His practice focuses on cases involving both criminal and civil law. He represents clients in multinational asset recovery cases, criminal and administrative legal assistance proceedings and internal investigations. He advises banks and other financial intermediaries on compliance issues, including representation in administrative investigations or compliance-related litigation. He lectures on forfeiture and money laundering at the MAS Economic Crime Investigation at the University of Luzern and has contributed to the *Basel Commentaries* on the Swiss Criminal and Swiss Criminal Procedure Codes, and on international criminal law.

florian.baumann@kellerhals-carrard.ch

Dr. Omar Abo Youssef is a counsel in Kellerhals Carrard's White-Collar Crime practice group. He graduated from the University of Zurich (*Juris Doctor* and Master of Laws) and Geneva (Certificate of Transnational Law) and is admitted to all Swiss courts. He lectures in criminal law and criminal procedural law at the University of Zurich and is chairman of the Schulthess Conference on White-Collar Crime. Omar specialises in complex criminal, regulatory and civil litigation matters, with a special focus on white-collar crime, international assistance in criminal matters and asset recovery. Omar has authored numerous publications on matters of criminal law, criminal procedural law, international criminal law and international assistance in criminal matters, including the chapters on tax offences and enforcement of criminal judgments in the Basel Commentaries on Swiss tax law and on international criminal law.

omar.aboyoussef@kellerhals-carrard.ch

Kellerhals Carrard employs more than 200 professionals, with offices in Basel, Bern, Lausanne, Lugano, Sion, Zürich and Geneva, as well as representation offices in Shanghai and Tokyo. The law firm is one of the largest in Switzerland and boasts a rich tradition going back to 1885.

Kellerhals Carrard's Internal Investigation and White-Collar Crime Department has extensive experience in conducting internal investigations, providing advice and court representation for a wide variety of business crime matters; our specialists have led major international legal assistance matters and related commercial litigation, as well as asset-tracing and recovery matters. Our continually expanding Internal Investigation Team has experience in the investigation of a broad range of legal and regulatory matters, including bribery and corruption, fraud, violation of banking and capital market rules, disclosure and accounting issues, competition and antitrust, and executive and internal misconduct. Kellerhals Carrard's compliance specialists have broad experience in advising companies within various industries on the proper measures to address compliance deficiencies, including in the areas of bribery and corruption, fraud, money laundering and insider trading.

www.kellerhals-carrard.ch

Kellerhals Carrard

United States

Joe Wielebinski
Winstead PC

Toby Galloway
Winstead PC

Matthias Kleinsasser
Winstead PC

Fraud, asset tracing and recovery always present challenges. Fortunately, in the U.S., the process is less problematic because we have the benefit of:

- established common law and statutory law designed to protect against fraud;
- well-developed case law interpreting the law;
- a well-trained and educated judiciary;
- adherence to the Rule of Law;
- effective criminal law enforcement authorities that assist with the pursuit of criminal wrongdoing; and
- a legal system that protects the parties' rights while providing effective relief to victims of fraud and other illegalities.

The system is not perfect, and there are often limitations or restrictions that make the pursuit of fraud difficult, time-consuming and expensive. Nevertheless, the U.S. legal system is admired as one of the most effective for combatting fraud. The intent of this article is to give the reader a better understanding of the U.S. legal framework relating to fraud, asset tracing and recovery.

I Important Legal Framework and Statutory Underpinnings to Fraud, Asset Tracing and Recovery Schemes

The U.S. has federal jurisdictions and 50 states, plus the District of Columbia, Puerto Rico, and other districts and territories. In addition to consulting federal law, one must analyse the laws of the various other jurisdictions that could apply. The state and local systems are beyond the scope of this chapter, but one should review applicable state laws for any helpful claims or remedies.

A Fraud Causes of Action

1 Common Law Fraud

The most basic fraud claim is common-law fraud. Common law, or judge-made law, is the body of law in the United States derived from judicial precedent, as opposed to legal codes and statutes. The United States traces its common law history to England. In general, common-law fraud occurs when a party makes a false representation of fact to another party who relies on the representation and is injured as a result. (See, e.g., *Vicki v. Koninklijke Philips Elecs.*, N.V., 85 A.3d 725, 773 (Del. Ch. 2014) (citing Delaware law); Cromer Fin. v. Berger, 137 F. Supp. 2d 452, 494 (S.D.N.Y. 2001) (citing New York law).) The representation must be material and the injured party must be unaware of its falsity. (See, e.g., *Strategic Diversity, Inc. v. Alchemix Corp.*, 666 F.3d 1197, 1210 n.3 (9th Cir. 2012) (citing Arizona law).) Less commonly, a claim may exist based on fraud by non-disclosure, which occurs when a party fails to disclose material facts which the non-disclosing party has a legal duty to disclose. The injured party must rely on the non-disclosure and be injured as a result. (See, e.g., *Bombardier Aero. Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 219-20 (Tex. 2019) (citing Texas law); *Wallingford Shopping, L.L.C. v. Lowe's Home Ctrs., Inc.*, No. 98 Civ. 8462 (AGS), 2001 U.S. Dist. LEXIS 896, *43-44, 2001 WL 96373 (S.D.N.Y. Feb. 5, 2001) (citing Connecticut law).)

2 Statutory Fraud

U.S. federal and state laws contain various types of statutory fraud. These statutes were enacted to address fraud committed in the course of a particular type of transaction (e.g., securities fraud or real estate fraud).

a) Securities Fraud:

The most significant securities fraud statutes are found in the Securities Act of 1933 (the "Securities Act") (15 U.S.C. §§ 77a *et seq.*) and the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. §§ 78a *et seq.*). The U.S. Securities and Exchange Commission ("SEC") has supplemented the anti-fraud provisions of the Securities Act and the Exchange Act with its own rules, which also provide causes of action. For example, SEC Rule 10b-5, codified at 17 C.F.R. § 240.10b-5, supplements Section 10(b) of the Securities Exchange of 1934. For example, Section 17(a) of the Securities Act prohibits offering or selling securities using a device, scheme, or artifice to defraud (15 U.S.C. § 77q(a)(1)), while SEC Rule 10b-5 makes it unlawful to make an untrue statement of material fact in connection with the purchase or sale of a security (17 C.F.R. § 240.10b-5). Some causes of action in securities laws provide a private right of action, meaning that a private party may bring suit based on the statute. SEC Rule 10b-5 is one example. Other causes of action are available only to the government; e.g., claims under Section 17 of the Securities Act. (See *SEC v. Pocklington*, No. EDCV 18-701 JGB, 2018 U.S. Dist. LEXIS 227362, *42, 2018 WL 6843663 (C.D. Cal. Sept. 10, 2018) (stating that no implied private right of action exists for Section 17(a) claims).) In addition to the federal securities laws, states have adopted their own securities regulations known as "blue sky laws", many of which allow private rights of action for injured parties. (See, e.g., Tex. Civ. Stat., Title 19, Art. 581-1 *et seq.*)

b) Other Types of Statutory Fraud:

States have enacted numerous statutes addressing fraud in various contexts. For example, Section 27.01 of the Texas Business & Commerce Code provides a cause of action and exemplary damages for a person injured by fraud in a real estate or stock transaction. All states have laws prohibiting the use of deceptive trade practices, including fraud. (See, e.g., Cal. Bus. and Prof. Code §§ 17500 *et seq.*; 2019 Minn. Stat., Chapter 352D, § 325D.44 *et seq.*) Also, Title 18 of the U.S. Code, as well as the statutes of each state, make the commission of fraud a criminal offence in many contexts. (For example, using the mail to commit fraud is prohibited by 18 U.S.C. § 1341.)

c) Fraudulent Transfer Law:

The U.S. has a well-developed body of law permitting creditors to recover fraudulent transfers of money and other property. Most states have adopted the Uniform Fraudulent Transfer Act ("UFTA"), with minor differences existing between the statutes enacted by the states. (See, e.g., Tex. Bus. & Com. Code §§ 24.001 *et seq.* (setting forth Texas's version of the Uniform Fraudulent Transfer Act).) The U.S. Bankruptcy Code also contains provisions allowing for recovery of fraudulently transferred property, which are generally similar to the UFTA (11 U.S.C. § 548).

The UFTA allows for recovery of two types of fraudulent transfers. The first type – transfers made with actual intent to hinder, delay, or defraud a creditor – are commonly

referred to as actual fraudulent transfers (see, e.g., Tex. Bus. & Com. Code § 24.005(a)(1)). Despite the name, fraudulent intent is not required so long as the transfer was at least intended to hinder or delay a creditor's collection efforts. Fraud is, by definition, secretive. The UFTA provides a non-exclusive list of factors (so-called "badges of fraud") the court may consider in determining whether a transfer was made with fraudulent intent (e.g., that the transfer was concealed) (Tex. Bus. & Com. Code § 24.005(b)). The second type of recoverable transfer is commonly referred to as a constructively fraudulent transfer. Constructively fraudulent transfers need not involve actual fraud, but merely require that the transferor received less than reasonably equivalent value for the property transferred. In addition, constructive fraudulent transfer law has a solvency element: the transfer must have been made while the transferor was insolvent, undercapitalised, or unable to pay its debts as they became due. (See, e.g ., Tex. Bus. & Com. Code §§ 24.005(a)(2), 24.006(a).) Constructive fraudulent transfer law protects creditors by discouraging a party with limited assets from transferring those assets away for less than reasonably equivalent value.

A creditor with a fraudulent transfer claim may sue both the initial transferee of the transferred property and any subsequent transferee. But a subsequent transferee who took the property in good faith and in exchange for value is immune from a fraudulent transfer suit. (Tex. Bus. & Com. Code § 24.009(b).) In this way, U.S. fraudulent transfer law balances protecting a creditor's right to recover property and protecting innocent third parties who took property without knowledge of the fraudulent transfer.

B Tools for Practitioners

1 Discovery

Practitioners seeking to trace and recover assets can use the extensive discovery process allowed in American litigation. Litigants may serve requests for production of documents, demand that adversaries answer sworn interrogatories, and depose witnesses. (See, e.g., Fed. R. Civ. P. 30-34.) Third parties may be compelled by subpoena to provide testimony or produce documents. (See, e.g., Fed. R. Civ. P. 45.) Some U.S. jurisdictions permit pre-suit discovery from third parties. But the U.S. lacks a uniform streamlined process such as the Norwich Pharmacal orders allowed in the U.K., which permit the requesting party to obtain a court order requiring a third party to disclose information or preserve assets or documents. The permissible scope of discovery is broad. Once a lawsuit has been filed and the defendant has appeared, the plaintiff can generally obtain discovery regarding any non-privileged matter that is relevant to a party's claims or defences and proportional to the needs of the case. Information need not be admissible in evidence to be discoverable. (See, e.g., Fed. R. Civ. P. 26(b)(1).) Courts in the U.S. also generally prefer disputes to be resolved after discovery has been conducted, meaning that a plaintiff need not obtain and plead most of its evidence when it files its initial complaint. Some U.S. jurisdictions do require that certain claims be pled with particularity, including fraud claims. (See, e.g., Fed. R. Civ. P. 9(b).) For these reasons, the discovery process may be the most potent tool for practitioners to uncover concealed assets. In limited circumstances, a party may conduct discovery prior to filing a lawsuit, though the extent to which pre-suit discovery is allowed varies significantly between U.S. jurisdictions. For example, Texas Rule of Civil Procedure 202 permits pre-suit discovery to investigate a potential claim, while Illinois Supreme Court Rule 224 generally allows pre-suit discovery only to identify potential defendants.

2 Injunctive Relief

A party concerned that someone may take steps to shelter or conceal assets should consider requesting injunctive relief. An injunction is an equitable remedy under which a court orders

the enjoined party to refrain from certain acts. Temporary injunctions (also called preliminary injunctions) operate to preserve the *status quo* until a case can proceed to trial. Temporary restraining orders remain in place for only a brief period (e.g., 14 days) until a request for a temporary injunction can be heard. Permanent injunctions permanently require the enjoined party to refrain from engaging in certain conduct.

A temporary injunction can serve as an important remedy for a party who suspects that another party is fraudulently transferring assets. The party should apply to the court for a temporary injunction preventing the other party from disposing of property without court permission. Although temporary restraining orders can often be obtained on an *ex parte* basis, temporary injunctions typically require an extended hearing on the following elements: (1) proof of an underlying cause of action (e.g., actual fraudulent transfer); (2) a probable right to recover on the underlying claim; (3) probable, imminent, and irreparable harm to the applicant if the injunction is not granted; (4) the injury that will occur if the injunction is not granted outweighs any harm that will result from granting the injunction; and (5) a showing that the injunction serves the public interest. (*Paulsson Geophysical Servs. v. Sigmar*, 529 F.3d 303, 309 (5th Cir. 2008); *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).) An injury is irreparable if the applicant cannot be made whole with an award of damages against the enjoined party (*Butnaru*, 84 S.W.3d at 204). If the enjoined party violates the injunction, it may be held in contempt of court and be subject to criminal and/or civil liability.

3 Receiverships

A more drastic equitable remedy is a court-appointed receiver. Under U.S. law, a receiver is a custodian who takes control of a business or enterprise, generally to preserve its value. Both federal and state courts may appoint receivers and litigants may file applications seeking their appointment. (See, e.g., Fed. R. Civ. P. 66 (providing that an action in federal court in which the appointment of a receiver is sought is governed by the Federal Rules of Civil Procedure); *Brill & Harrington Invs. v. Vernon Savs. & Loan Ass'n*, 787 F. Supp. 250, 253 (D.D.C. 1992) (considering several factors in appointing a receiver, such as fraudulent conduct on the defendant's part and imminent danger of property being lost, concealed, or diminished in value); Tex. Civ. Prac. & Rem. Code § 64.001(a) (permitting a Texas court to appoint a receiver in several situations, including for an insolvent corporation or a corporation in imminent danger of insolvency, and further permitting a receiver to be appointed under the rules of equity).) The scope of a receiver's powers is established by court order, meaning that most courts have broad discretion to tailor a receiver's powers to a particular situation. (See, e.g., Fed. R. Civ. P. 66 (providing that an action in federal court in which the appointment of a receiver is sought is governed by the Federal Rules of Civil Procedure); *Brill & Harrington Invs. v. Vernon Savs. & Loan Ass'n*, 787 F. Supp. 250, 253 (D.D.C. 1992) (considering several factors in appointing a receiver, such as fraudulent conduct on the defendant's part and imminent danger of property being lost, concealed, or diminished in value); Tex. Civ. Prac. & Rem. Code § 64.001(a) (permitting a Texas court to appoint a receiver in several situations, including for an insolvent corporation or a corporation in imminent danger of insolvency, and further permitting a receiver to be appointed under the rules of equity).) Typically, courts are inclined to appoint receivers only when the person running a business has engaged in fraud or the value of the business is in serious jeopardy.

Receiverships are potent mechanisms to unwind complex fraud schemes affecting numerous individuals. For an example, see the SEC's receivership set up to unwind the Stanford International Bank, Ltd. multi-billion dollar Ponzi scheme. See *Securities and Exchange Commission v. Stanford Int'l Bank, Ltd. et al.*, Case No. 3:09-cv-0298-N (N.D. Tex.). A detailed

description of this receivership is beyond the scope of this article, but the receivership litigation has resulted in multiple opinions from the U.S. Court of Appeals for the Fifth Circuit and the Texas Supreme Court on the subject of Texas Uniform Fraudulent Transfer Act. As of October 31, 2020, the receiver had recovered approximately $698.2 million in funds before deducting fees and expenses. See Docket No. 3036. Additional information is available on the case docket, the dockets of related lawsuits, and at http://stanfordfinancialreceivership.com/.

4 Involuntary Bankruptcy

Involuntary bankruptcy may be an intriguing possibility for a party seeking to recover assets. Most bankruptcies in the U.S. are voluntarily filed by the debtor. Section 303 of the U.S. Bankruptcy Code, however, permits a bankruptcy to be filed by one or more creditors holding claims that are not contingent as to liability or subject to *bona fide* dispute. (See 11 U.S.C. 303(b). A single creditor may file an involuntary bankruptcy proceeding if the creditor's claim exceeds $16,750; otherwise, three creditors with combined claims in the amount of $16,750 or more must sign the bankruptcy petition. *Id.* The minimum claim amount is periodically adjusted upward by the U.S. Congress when the Bankruptcy Code is amended.) If the bankruptcy is contested by the debtor, the court will hold a trial to determine whether an order for relief should be entered (meaning that the case will proceed) or the case should be dismissed (11 U.S.C. § 303(h)).

Filing an involuntary bankruptcy is a serious act and a petitioning creditor may be subject to damages and sanctions (including exemplary damages) if the petition is dismissed or filed in bad faith (11 U.S.C. § 303(i)). For a good faith creditor concerned about preserving or recovering assets, however, an involuntary bankruptcy has significant advantages. The debtor must prepare schedules of assets and liabilities and disclose pre-bankruptcy transfers of property, with all of these disclosures being signed under penalty of perjury (11 U.S.C. § 521(a)). If the court approves, the creditor may examine the debtor or third parties under oath and obtain production of documents to determine what happened to the debtor's assets. These examinations are referred to as Rule 2004 examinations, so named because they are authorised under Rule 2004 of the Federal Rules of Bankruptcy Procedure. These examinations are commonly granted and have been approvingly referred to as "fishing expeditions". Bankruptcy courts take fraudulent representations and omissions made in the course of a bankruptcy seriously and Title 18 of the U.S. Code makes bankruptcy fraud a federal crime. (See, e.g., 18 U.S.C. § 157.) A bankruptcy trustee may file suit to recover fraudulently transferred property under Section 548 of the Bankruptcy Code (11 U.S.C. § 548; see also 11 U.S.C. § 544(b), which authorises the trustee to file suit based on state fraudulent transfer law to the extent a creditor could otherwise bring such a suit outside of the bankruptcy). Accordingly, under appropriate circumstances, involuntary bankruptcies can provide significant advantages to parties seeking to recover fraudulently transferred assets. For an example of a creditor successfully using an involuntary bankruptcy proceeding to enforce a judgment in light of alleged fraudulent transfers, see *In re Acis Capital Mgmt.*, L.P., 2019 Bankr. LEXIS 292 (Bankr. N.D. Tex. Jan. 31, 2019) (confirming involuntary chapter 11 plan) (full docket available at Case No. 18-30264). In October 2019, Highland Capital Management, L.P., an entity affiliated with, but adverse to, the Acis Capital Management debtors, filed its own Chapter 11 bankruptcy proceeding. See Case No. 19-34054-sgj11 (Bankr. N.D. Tex.).

5 Assistance to Foreign Tribunals (28 U.S.C. § 1782):

Section 1782 of Title 28 of the U.S. Code permits a U.S. District Court to order a person to provide testimony or produce documents to assist a foreign tribunal. The order may be issued upon request by the foreign tribunal or upon application of an interested party. Section 1782 is an important tool for litigants in non-U.S. proceedings to obtain testimony and information from persons located within the U.S.

II Case Triage: Main Stages of Fraud, Asset Tracing and Recovery Cases

The following is a general guide to typical stages of a U.S. proceeding based on a defendant's fraudulent conduct:

A Pre-Suit Investigation

One should conduct as much pre-suit investigation as possible before filing suit. Frequently, only limited information can be obtained before filing. But at a minimum, a party should search public records (e.g., prior court filings, lien searches), which are accessible online. Internet searches and review of public social media accounts frequently turn up significant information that can later be used during lawsuit discovery to uncover fraudulent conduct or

hidden assets. Parties may also consider hiring a private investigator or paying an internet asset search provider if the fees are reasonable. If the applicable jurisdiction allows for pre-suit discovery, those tools should also be considered. However, because many jurisdictions limit pre-suit discovery, the party should balance whether tipping off the suspected fraudster by requesting pre-suit discovery can be justified by the anticipated benefit from such discovery.

When considering what steps to take before filing suit, timing is critical. A party who suspects that its adversary is fraudulently transferring assets generally cannot afford to take a leisurely approach to litigation, particularly when assets can easily be moved. In such circumstances, a party should consider moving immediately for a temporary restraining order and temporary injunction to preserve the *status quo*.

B The Lawsuit

A "traditional" lawsuit is the most commonly commenced proceeding, but receivership and involuntary bankruptcy proceedings can also be considered. If the defendant fails to appear in the lawsuit, the plaintiff should move for default judgment. (See, e.g., Fed. R. Civ. P. 55.) If the defendant does file an answer, the parties then generally proceed to serve discovery. The broad scope of discovery, and the various discovery tools available in the U.S., are an excellent means to uncover fraud. If the plaintiff believes that money has gone missing and can obtain financial records, the plaintiff should consider retaining a forensic accountant to determine if funds were fraudulently transferred.

C Judgment Enforcement

U.S. courts almost never permit a party to recover assets prior to a judgment being obtained. A party may obtain a temporary injunction preventing a defendant from transferring or disposing of assets. But a temporary injunction order is intended only to preserve the *status quo* prior to trial, not to permit a plaintiff to seize assets. Once a judgment has been obtained, however, the plaintiff is generally free to enforce it against whatever property it can locate belonging to the defendant. A defendant who wishes to appeal the judgment may be able to forestall enforcement while the appeal is pending. (See, e.g., Fed. R. App. P. 8.) If the defendant does not appeal, if the judgment is not stayed pending appeal, or if an appeal is ultimately resolved in the plaintiff's favour, the plaintiff faces a daunting task: identifying assets sufficient to satisfy its claims. The plaintiff will usually serve post-judgment discovery requests to identify assets. Or, in some jurisdictions, the plaintiff may request an examination of the defendant, in which the defendant is required to submit to examination regarding the availability of assets to satisfy the judgment. Once the plaintiff has located assets, it can proceed to enforce its judgment against them, depending on the type of assets identified. Frequently, discovery will uncover fraudulent transfers by the defendant. In such case, the plaintiff can sue to recover the transfers.

III Parallel Proceedings: A Combined Civil and Criminal Approach

Parallel civil and criminal proceedings have proliferated in recent decades in the U.S. The U.S. Supreme Court acknowledged 50 years ago that parallel civil and criminal proceedings are proper and constitutional (*United States v. Kordel*, 397 U.S. 1, 11 (1970)). Such proceedings routinely arise where one federal agency has civil regulatory authority over a particular category of fraud (e.g., the SEC (securities fraud), Commodity Futures Trading Commission (commodities fraud), Federal Trade Commission (consumer fraud)), while the Department of Justice has concurrent criminal jurisdiction over the same subject.

These complex situations raise a host of issues under the U.S. Constitution and other federal law. For example, invocation of the Fifth Amendment's privilege against self-incrimination has vastly different repercussions in the criminal context – where no adverse inference may be drawn from the invocation – *versus* the civil context – where an adverse inference can be drawn. (See, e.g., *Baxter v. Palmigiano*, 425 U.S. 308 (1976).)

A What Are the Benefits/Difficulties of a Combined Approach?

Parallel proceedings in which a private litigant seeks asset recovery while a government agency simultaneously pursues the fraudsters are also relatively common. These situations raise similar challenges and opportunities as in the parallel regulatory civil and criminal prosecutions.

One issue that may arise in such situations is where a stay of the civil proceeding is sought pending the criminal prosecution. If a plaintiff sues for fraud, and the government contemporaneously prosecutes the defendant for a crime arising from overlapping conduct, either the

defendant or the government may move for a stay. Issuance of a stay will obviously delay any efforts to recover assets through the civil action.

If the defendant seeks a stay, he will argue that the civil action should be stayed until the criminal proceeding is concluded so that he does not have to choose between testifying (and thereby potentially waiving his Fifth Amendment privilege in the criminal case) and invoking the Fifth Amendment (thereby giving rise to an adverse inference in the civil action). If the government seeks a stay of the civil case, it will argue that the criminal defendant should not be permitted to avail himself of the more liberal civil discovery procedures for use in the criminal case.

These questions are highly fact-specific and courts do not automatically grant a stay on the request of either party. Generally speaking, the more the conduct at issue in the civil and criminal proceedings overlaps, the likelier it is that a stay will be granted. Courts also consider prejudice to the parties, delay, the public interest, and other relevant factors.

B Civil and Criminal Asset Recovery

There are a number of potential remedies in the civil context. The primary remedies in the criminal context (apart from incarceration) are asset forfeiture and restitution orders. The following is a brief overview of various civil and criminal remedies.

Federal Rule of Civil Procedure 64 authorises remedies relating to the seizure of persons or property – including arrest, attachment, garnishment, replevin, sequestration, and other similar remedies – to secure satisfaction of a potential judgment to be entered in the civil action (Fed. R. Civ. P. 64; *HMG Prop. Investors, Inc. v. Parque Indus. Rio Canas, Inc.*, 847 F.2d 908, 913 (1st Cir. 1988)). Obtaining these prejudgment remedies creates considerable leverage.

Other aggressive prejudgment relief includes temporary restraining orders and preliminary injunctions against further activity, freezing assets to prevent dissipation of investor proceeds, and receiverships. (See Fed. R. Civ. P. 64-66; 28 U.S.C. § 3103 ("Receivership").) A receiver is a person or entity appointed by a court to hold property that is subject to a dispute, whether the dispute concerns ownership or rights in the property or claims against the property's owner that might be satisfied from the property. A receiver is obligated to manage the property, to conserve it, and to prevent its waste. The receiver is authorised to receive rents and other income from the property, to collect debts, to bring or defend actions related to it, and to receive a fee for doing so. A receiver is subject to court supervision and responsible to the court for carrying out all orders regarding the property.

Asset freezes, orders appointing receivers, and related court orders may be enforced through civil or criminal contempt. Criminal contempt must be prosecuted by the government or the court, not the private plaintiff. Therefore, it is less useful as a method of recovery than civil contempt. Criminal contempt, unlike civil, involves punishment such as incarceration or fines for doing something prohibited by a court order. Civil contempt typically involves the failure to do something required by a court order. In civil contempt, the remedy is designed to be compensatory, not punitive. So, if a defendant dissipates assets or refuses to tender property to the receiver, the plaintiff or receiver can compel compliance by showing, by clear and convincing evidence, that the defendant violated an order and is therefore in contempt. If the contemnor does not purge the contempt, he may be incarcerated pending compliance with the court order.

In criminal cases, the primary means of asset recovery are forfeiture and restitution. Criminal forfeiture is the taking of real or personal property by the government due to its relationship to criminal activity, such as when the property is used in the commission of a crime or was obtained through criminal activity. Civil forfeiture is similar to criminal forfeiture except it is

brought against the property itself as an *in rem* action.

Restitution means payment by an offender to the victim for the harm caused by the defendant's misconduct. Courts are empowered (and often required) to order convicted criminals to pay restitution.

There are considerable disadvantages to relying on criminal remedies in asset recovery. First, the criminal authorities may not prosecute the offence. Of course, the victim may assist the government and encourage prosecution, but there are no guarantees. If the government does prosecute, it bears the burden of proving guilt beyond a reasonable doubt, a much higher burden than the preponderance-of-the-evidence standard in civil cases. Finally, the government will have to distribute the assets seized or restitution paid. In practice, this may take many years. Because of these disadvantages, judgment creditors and other victims of fraud should almost always pursue their own asset recovery in the U.S. through civil proceedings.

C How Does the U.S. View Private Prosecutions?

Private prosecutions, meaning criminal prosecutions conducted by private attorneys or laymen, have long been disfavoured in the U.S., to the point of extinction. This stands in contrast to the U.K., where private prosecutions have flourished in recent years. Indeed, the U.S. has not permitted private prosecutions in over 150 years except in exceedingly rare and unusual circumstances. For instance, a federal district court may appoint a private attorney to prosecute a criminal contempt of court if the executive branch refuses to prosecute. (*Young v. United States ex Rel. Vuitton Et Fils, S.A.*, 481 U.S. 787 (1987).) In practice, this situation is extremely uncommon and not susceptible to prediction or planning. Federal statutes confer the exclusive power to prosecute crimes in the name of the U.S. on the Attorney General and his delegates. (See 28 U.S.C. §§ 516, 519; *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case").) Thus, private prosecutions are not a realistic option for asset recovery.

IV Key Challenges

Among the key challenges is the cost to pursue and recover assets from fraudsters. Cost can be an impediment to deserving victims and must be managed whenever fraud and asset recovery are being pursued. In addition, there are challenges in exporting recovery efforts outside the U.S. In many "less established" jurisdictions, there is an *ad hoc* and lengthy process for judgment enforcement, discovery is limited or unavailable and the recovery of assets is chaotic and unpredictable. Some jurisdictions do not have the necessary legal framework, experienced and trained judiciary or respect for the Rule of Law to facilitate the recovery of assets for fraud victims. While the concept of a Model Law for cross-border insolvencies undertaken by UNCITRAL has been successful, recent UNCITRAL meetings have focused on the need for a Model Law for asset recovery. Although this is commendable, it may take many years to implement.

Other challenges unique to the U.S. are outlined below:

A Attorneys' Fees

Unlike many jurisdictions, the default rule in the U.S. is that each party bears its own attorneys' fees. This is not to say that attorneys' fees are never recoverable in U.S. litigation if a statute so provides. (See, e.g., Tex. Civ. Prac. & Rem. Code § 38.001 (providing for recovery of attorneys' fees in certain types of cases, such as breach of contract cases).) Parties to a contract are also free to specify how attorneys' fees should be allocated in light of a dispute. Without a contractual or statutory basis for fees, however, each party must pay its own fees. Mounting attorneys' fees can prove to be

- a significant hurdle for a plaintiff pursuing a lawsuit and attempting to enforce a judgment.

B Tracing Commingled Proceeds

One of the difficulties frequently faced by a party attempting to recover fraudulently transferred funds is how to identify those funds when they are commingled with other money in a bank account. U.S. courts have applied several tests to address this issue, with the most widely applied test being the lowest intermediate balance rule. This test assumes that the owner of a bank account preserves fraudulently obtained money for the benefit of defrauded victims. Funds from other sources are presumed to be withdrawn first. Only if the balance of the account drops below the amount of fraudulently obtained funds are the victims' funds presumed to be gone. (See *Blackhawk Network, Inc. v. Alco Stores, Inc.* (*In re Alco Stores, Inc.*), 536 B.R. 383, 414 (Bankr. N.D. Tex. 2015) (explaining application of lowest intermediate balance rule).) An additional problem arises if funds are spent and new funds are subsequently deposited. Courts are split on whether victims' funds can be replenished.

C Exemptions

A common obstacle to judgment recovery in the U.S. against an individual person (as opposed to an entity) is state property exemption laws. The United States Bankruptcy Code also contains federal exemptions for debtors filing for bankruptcy which differ from state exemptions, which debtors filing bankruptcy in some (but not all states) can choose to use (11 U.S.C. § 522(d)). The goal of exempt property laws is to ensure that creditors do not leave individual debtors destitute. The breadth of exemptions varies significantly by state, with states such as Texas providing robust protection with respect to real property used as a domicile and other states providing only a limited homestead exemption. (Compare Tex. Prop. Code § 41.001 with Ark. Code, Chapter §§, § 16-66-210.) In addition, some states wholly exempt retirement accounts, certain life insurance policies, annuities, and other financial instruments, meaning that a plaintiff facing a debtor that has properly structured his or her limited assets may be out of luck. In most states, a transfer of an exempt asset cannot constitute a fraudulent transfer because the UFTA (in effect in most U.S. jurisdictions) excludes exempt assets from its scope. (See, e.g., Tex. Bus. & Com. Code § 24.002(2).)

V Cross-jurisdictional Mechanisms: Issues and Solutions in Recent Times

Obtaining assistance in the U.S. on cross-jurisdictional matters involving fraud and asset recovery can be challenging even for the experienced practitioner. This is not because of the lack of available tools or an unwillingness to assist, but rather determining what mechanisms are available and best suited for your situation. The online resources of the U.S. Department of Justice and Department of State are an excellent starting point. (See, e.g., U.S. Asset Recovery Tools & Procedures: A Practical Guides for International Cooperation (2017).)

The insolvency process can be one of the most effective tools to combat fraud (Brun, Jean-Pierce and Silver, Molly.2020. Going for Broke: Insolvency Tools to Support Cross-Border Asset Recovery in Corruption Cases. Stolen Assets Recovery series. Washington, DC: World Bank doc: 10.1596/978-1-4648-1439-9). As such, it is appropriate to discuss Chapter 15 of the U.S. Bankruptcy Code, which addresses cross-border insolvencies. Chapter 15 is designed to promote cooperation between the U.S. courts and parties of interest and the courts and other competent authorities of foreign countries involved in cross-border insolvency cases while providing for the fair and efficient administration of cross-border bankruptcies (11 U.S.C. § 1501. See Chapter 15 – Bankruptcy Basics: Ancillary and Other Cross-Border Cases (www.uscourts.gov)).

A Chapter 15 case is commenced by a "foreign representative" filing a petition for recognition of a "foreign proceeding" (11 U.S.C. § 1504). The U.S. court is authorised to grant preliminary relief upon the filing of the petition for recognition (11 U.S.C. § 1519). Upon the recognition of a foreign main proceeding, the automatic stay and other important provisions of the Bankruptcy Code take effect within the U.S. The foreign representative is also authorised to operate the debtor's business in the ordinary course (11 U.S.C. § 1520).

Chapter 15 is the principal means for a foreign representative to access U.S. federal and state courts (11 U.S.C. § 1509). Upon recognition, a foreign representative may seek additional relief from the bankruptcy court or from other state and federal courts and is authorised to initiate a full (as opposed to ancillary) bankruptcy case (11 U.S.C. §§ 1509, 1511). In addition, the representative is authorised to participate as a party in interest in a pending U.S. bankruptcy and to intervene in any other U.S. case where the debtor is a party (11 U.S.C. §§ 1512, 1524).

Chapter 15's use has increased since its adoption and there is now an established body of case law. Moreover, more countries have adopted some corollary of the Model Law on which Chapter 15 is based. Importantly, Chapter 15 is being used more frequently in cross-border fraud and corruption cases. Accordingly, Chapter 15 must be considered as a formidable weapon in appropriate fraud, asset tracing and recovery efforts.

VI Technological Advancements and Their Influence on Fraud, Asset Tracing and Recovery

While there is no substitute for hard work, technology can be vitally important in pursuing claims for fraud. A party may obtain up to date information regarding assets and individuals from public and non-public databases. Comprehensive online resources include BlackBookOnline.info, Accurint.com and TLO.com. Social media has become a useful tool for investigators to find out what might otherwise be considered private information from numerous sites like Facebook, LinkedIn, Twitter and Instagram.

Various products and providers offer assistance in managing data and discovery, which can often involve millions of documents. Technologies like Greylist Trace (greylisttrace.com), while new, appear promising and can provide information on banking relationships that help to focus investigative resources. Technology will continue to play an important, and indeed, critical role in fraud, asset tracing and recovery in the future.

Conversely, technology is being used more and more by fraudsters, often making recovery more difficult and challenging. The best example is the fast-paced developments regarding cybercrimes and fraud involving cryptocurrencies.

VII Recent Developments and Other Impacting Factors

One development that is getting attention is the extra-territorial application of U.S. law, especially as it relates to avoidance actions. The Second Circuit Court of Appeals recently addressed this issue in the context of the Madoff Ponzi scheme (*In re Picard*, 917 F.3d 85 (2d Cir. 2019)). In declining to rule that the presumption against extra-territoriality was applicable, the Court determined that the Trustee could recover a domestic transfer to foreign transferees (so-called "feeder funds") under the avoidance powers of the Bankruptcy Code (*RJR Nabisco, Inc. v. European Cmty.*, 136 S.Ct. 2090, 2100 (2016) ("absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application")). As the Court noted, under a contrary ruling, fraudsters would enjoy an easy way to protect their ill-gotten gains (*Id.* at 26-27). When this ruling is combined with a prior decision in Madoff on the extra-territorial application of the automatic stay (*Van der Hahn, D. and*

Wielebinski, J.; *Extraterritoriality Arguments Ruled Extraneous: Second Circuit Permits Trustee to Recover Fraudulent Transfers from Foreign Recipients, International Bar Association. Insolvency and Restructuring International*, Vol. 13 No. 2, September 2019), it may be a harbinger of future expansion of the reach of the Bankruptcy Code in international fraud cases (*Picard v. Maxam Absolute Return Fund, L.P.*, 474 B.R. 76, 84-85 (2012)).

The Stanford International Bank, Ltd. receivership (see Section I.B.3 above) has resulted in multiple opinions from the U.S. Court of Appeals for the Fifth Circuit and the Texas Supreme Court on the scope of the Texas Uniform Fraudulent Transfer Act ("TUFTA"). Most recently, the Fifth Circuit held, after certifying the question to the Texas Supreme Court, that a defendant in a fraudulent transfer suit must have conducted a diligent investigation designed to uncover potentially fraudulent conduct to be able to rely on TUFTA's good faith affirmative defence. The court rejected the defendants' argument that they were excused from investigating fraudulent conduct if such an investigation would have been futile. See *Janvey v. GMAG, L.L.C.*, 977 F.3d 422 (5th Cir. 2020). For a detailed analysis of the Fifth Circuit's opinion, see Joe Wielebinski and Matthias Kleinsasser, *Ponzi Ruling Complicates Texas Fraudulent Transfer Litigation* (Nov. 16, 2020), available at https://www.law360.com/articles/1329314.

A major development that is likely to affect fraud and asset recovery during 2021 is the ongoing COVID-19 pandemic. The ultimate scale of the pandemic's impact on the global economy remains to be seen. So far, the economic turmoil from the pandemic has not exposed fraudulent schemes on the level of the 2008 economic crisis (e.g., Bernie Madoff and Stanford Financial), but periods of economic strife frequently result in underlying fraud being discovered. As billionaire investor Warren Buffett famously stated: "Only when the tide goes out do you discover who's been swimming naked." In addition, government relief programmes intended to mitigate the economic effects of COVID-19 shutdowns, such as U.S. Paycheck Protection Program loans, may prove tempting to fraudsters. For example, the U.S. Department of Justice has already charged dozens of persons for taking money from the Paycheck Protection Program using forged documents, false certifications, and other fraudulent conduct. See Stacy Cowley, "Spotting $62 Million in Alleged P.P.P. Fraud Was the Easy Part", New York Times (August 28, 2020, updated December 2, 2020), available at https://www.nytimes.com/2020/08/28/business/ppp-small-business-fraud-coronavirus.html.

Finally, the commencement of the Joseph Biden/Kamala Harris administration is likely to result in increased enforcement by the SEC and other regulators. In general, the Trump/Pence administration oversaw a decrease in enforcement actions by federal regulators. For example, a National Public Radio analysis determined that the SEC brought the fewest insider trading cases in 2019 since 1996. See https://www.npr.org/2020/08/14/901862355/under-trump-sec-enforcement-of-insider-trading-dropped-to-lowest-point-in-decade. It is anticipated that this trend will be reversed under the Biden/Harris administration.

Joe Wielebinski is a member of Winstead's Business Restructuring/Bankruptcy practice group. For more than 30 years, his practice has concentrated on bankruptcy, creditors' rights and financial restructuring, and he is active throughout the United States in a variety of complex restructuring, insolvency and bankruptcy matters and related litigation. Joe has represented numerous victims in matters involving complex financial fraud, theft, money laundering and other white-collar crimes. He has also served as a Federal District Court receiver at the request of the SEC in cases involving national and cross-border fraud schemes. Consistently ranked by Chambers USA as a 'Leader in Their Field' since 2005, Joe is a frequent speaker and a prolific author on a broad range of topics involving corporate reorganisation, insolvency, financial restructuring, fraud, asset recovery and cross-border insolvencies. Joe is the Executive Director Emeritus of ICC-FraudNet and member of its Advisory Board. He is a member of the International Bar Association, International Association for Asset Recovery, American Bankruptcy Institute, Turnaround Management Association and recently served on the Law360 Editorial Advisory Board.

jwielebinski@winstead.com

Toby Galloway is co-chair of Winstead's Securities Litigation & Enforcement practice group. He practices in the areas of white-collar defence, governmental and internal investigations, and complex securities and commercial litigation. Toby previously served as an attorney with the United States Securities and Exchange Commission for over 11 years. During his last four years at the SEC, Toby was the chief trial counsel for the Commission's Fort Worth Regional Office. Toby routinely practices before federal and state securities regulators, and self-regulatory organisations. He also represents clients before the DOJ and other regulatory and law enforcement agencies. Toby represents public companies, audit committees and special committees, hedge funds, private equity funds, asset managers, broker-dealers, registered investment advisers, accountants and lawyers, and other institutions in government and internal investigations, securities law enforcement, and litigation. A longtime member of the American Bar Association, he serves on the ABA regional white-collar criminal justice sub-committee.

tgalloway@winstead.com

Matthias Kleinsasser is a member of Winstead's Business Litigation, White-Collar Defense and Business Restructuring/Bankruptcy practice groups. He regularly represents officers, directors, and other clients involved in private securities litigation, as well as in investigations brought by regulatory agencies such as the Securities and Exchange Commission and the FDIC. Matthias diligently represents clients in almost any kind of contested matter, be it a state court receivership, class action, AAA arbitration, inverse condemnation suit, or other dispute. He also frequently advises firm transactional clients with respect to contract negotiations and business disputes, particularly in the technology and healthcare fields. Matthias has significant fraudulent transfer litigation experience. He has advised foreign clients on asset recovery procedures under US law, as well as represented debtors, creditors, and trustees in virtually all aspects of business bankruptcy proceedings, including contested asset sales and debtor-in-possession financing.

mkleinsasser@winstead.com

WINSTEAD
ATTORNEYS

Winstead is a national business law firm with nearly 300 attorneys who serve as trusted advisors to emerging, mid-market and large companies, both public and private. The Winstead team provides a range of core legal services that are critical to our clients achieving their business goals. Winstead's business transactions and litigation practices serve key industries including airlines, financial services, healthcare, higher education, investment management/private funds, life sciences, real estate, and sports business.

www.winstead.com