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Creative solutions can bypass obstacles

APPOINTING RECEIVERS
Making international recoveries

CHINA & DUE DILIGENCE
Door closes on foreign investors

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Commercial Dispute Resolution

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April 2024

ESSENTIAL INTELLIGENCE:

Fraud, Asset Tracing & Recovery

Contributing Editor:
Keith Oliver
Peters & Peters

THE INTERNATIONAL ACADEMY OF FINANCIAL CRIME LITIGATORS

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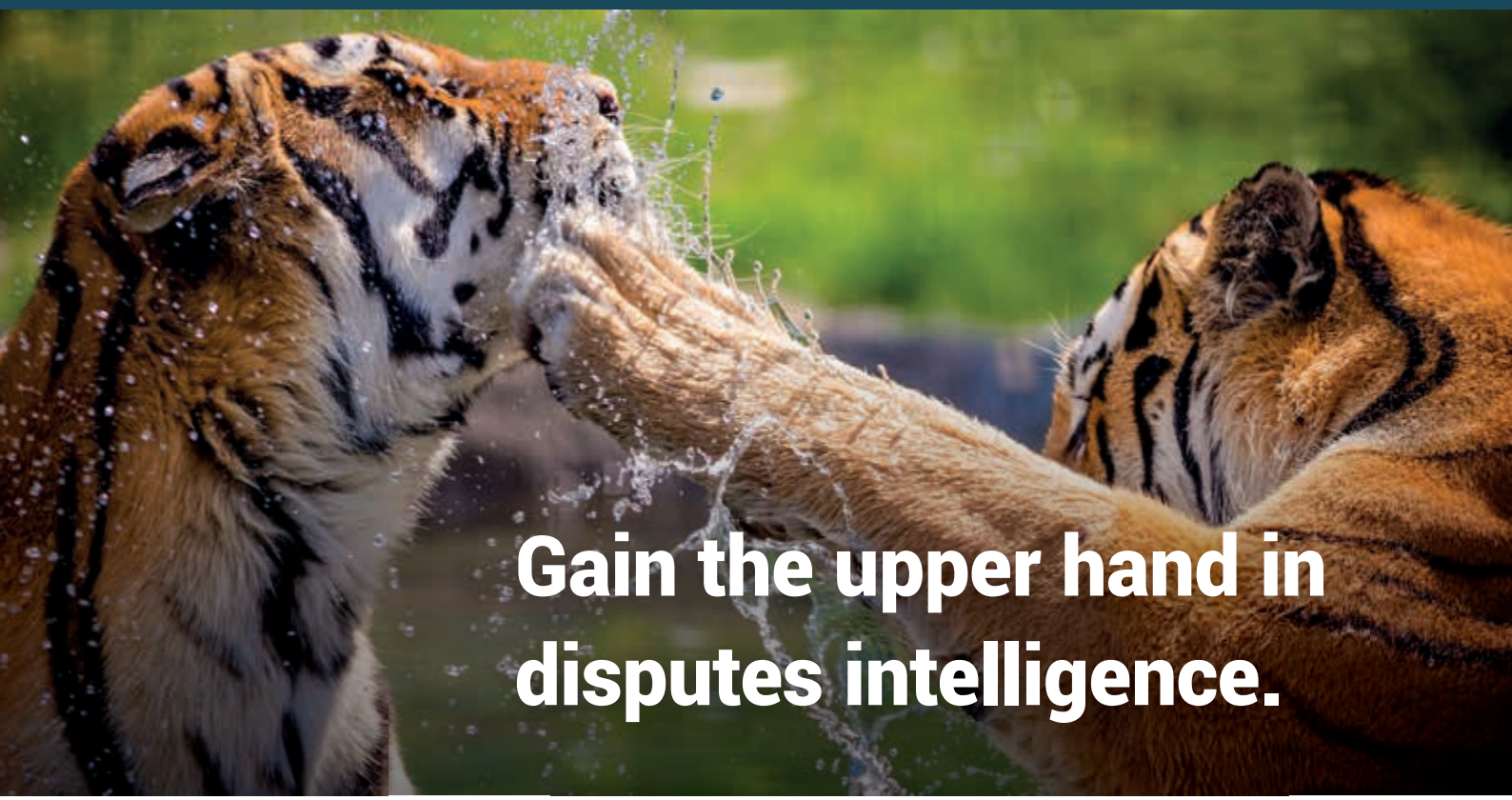

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FROM THE EDITOR

These are troubling times.

The air of tension and uncertainty pervading government policy and justice, which is chiefly a consequence of the grim conflicts in Ukraine and the Middle East, as well as the continued antipathy between China and the West, is in danger of being exacerbated by elections around the world, notably in the US, EU and UK.

The international legal sector is under ever-more pressure to provide the right advice, as the interlocking network of regulations, sanctions and political risks makes doing business internationally more and more difficult.

Keeping safe from fraud, and successfully securing justice and regaining control of lost assets is similarly becoming more complicated. Skill and knowhow at navigating these turbulent waters is at a premium, as is the ability to put legal questions in their commercial context.

This year's edition looks at the challenges posed by enforcing in some of these conflict-hit regions, and takes the usual country-by-country approach to comparing the regulatory regime.

Away from geopolitics, concerns around crypto-fraud remain as the cryptocurrency sector continues to battle with the question of whether and how to regulate in light of ongoing scandals.

There are also more traditional questions to consider, such as how best to use the courts to secure assets.

Thanks to **Keith Oliver** and **Peters & Peters** for supporting *CDR Essential Intelligence*, and to all of the contributors for their articles.

For more news and analysis of global developments in white-collar crime, please visit the CDR website.

Andrew Mizner
Editor
Commercial Dispute Resolution

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ESSENTIAL INTELLIGENCE:

Fraud, Asset Tracing & Recovery

EXPERT ANALYSIS CHAPTERS

JURISDICTION CHAPTERS

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

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PREFACE

It is with great pleasure that we welcome you to the fifth edition of *CDR Essential Intelligence: Fraud, Asset Tracing & Recovery*. Peters & Peters is delighted to serve again as the contributing editor to this comprehensive guide on the practice of global litigation in its titular, critical sphere.

The ever-changing international landscape continues to drive developments in this essential area. Previously, we were counting the cost of COVID-19; today, it is the respective conflicts in Ukraine and the Middle East which occupy the headlines.

Overall, global fraud statistics continue to rise, and security, whether personal or business-related, has been failing to keep pace. The world of 2024 is not simply less secure, but truly porous.

The airwaves are currently littered with the UK government's latest anti-fraud campaign (a three-word catchphrase, inevitably): STOP! THINK FRAUD. This is the government's latest attempt to tell the public what law-abiding citizens ought readily to appreciate – namely, we are all at risk of fraud.

Even the most astute and street-smart of individuals and business people can easily be duped by the unscrupulous scam artists that prey on our sensibilities and vulnerabilities. From false urgency, an official name, or an amazing holiday deal, fraudsters have developed a wide range of techniques that constantly evolve to offer genuine-sounding opportunities. The truth is that the ghost of Charles Ponzi is alive and well; we are all at risk, whether or not we choose to accept it. Last year, one in 17 adults in the UK were reported to be victims of fraud – likely a conservative estimate – which is around 2.6 million people.

Nasdaq's *Global Financial Crime Report* 2024 tells us banks made estimated losses of over $442 billion last year, while the loss to consumer scams was over $43.6 billion. Fraud respects no country boundaries, or even currencies, as cyberattacks, crypto scams, and the use of technology more generally have helped criminals to target assets. In PwC's most recent *Global Economic Crime and Fraud Survey*, two-thirds of technology, media and telecommunications companies had experienced fraud in the previous year. Cyberattacks rose by 38% in 2022 globally, compared to 2021; while in 2023, 67% of cyber-enabled scam losses were a result of business email compromise. The UK National Crime Agency has reported that, between April 2022 and March 2023, fraud contributed towards more than 40% of crime in England & Wales, the cost of which is estimated to be £6.8 billion . The less email-savvy are often the target, with 71% of wire fraud attempts made to people aged 55 or older.

However, all is not lost: our courts continue to encourage us all with their dedication. As the courts come to grips with the very latest in fraud and asset tracing, the judiciary has been keen to develop the tools of the law to safeguard and recover assets.

This publication gives a clear and comprehensive overview of the practice of fraud, asset tracing and recovery litigation in a number of countries around the world. It works 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, and a wide range of expert practitioners, barristers' chambers and forensic accountants. Their generous contributions to this project have established an invaluable holistic picture of the international legal response to fraud and asset misappropriation, which we hope will be useful for our readers both now and for many years to come.

Keith Oliver
Head of International
Peters & Peters

Russian assets: recovering the unrecoverable

In a time of war, chasing Russian defendants and assets may seem like a lost cause, but there are still options for those with a well-thought out, global strategy

Andrew Mizner
Commercial Dispute Resolution

Russia was uncooperative when it came to providing justice to foreign parties long before its invasion of Ukraine, but, since February 2022, there has been no hope of assistance for Western litigants.

For businesses and investors who have legitimate commercial disputes or who have been the victims of Russian-based fraudsters, the prospect of seeing their money again may seem like a remote possibility. So do they give up, or do they fight for what they are owed, even if it means a much longer and potentially costly process of recovery?

A history of non-co-operation

Russia may have signed the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments but it never ratified it, and the prospect of its courts acknowledging a judgment from the West seems remote.

"The practical reality is that, and this is something that was the case before the war in Ukraine, you're really, really going to struggle to enforce in Russia," says Theodore Elton of Brown Rudnick in London.

Claims brought directly in Russian courts by Western litigants are also going to receive short shrift. In March 2022, the government issued a list of "unfriendly countries", and in the same month, a district court ruled against an attempt by the owner of the Peppa Pig trademark to enforce its rights against an infringement, because, according to media reports, it came from one of those enemy states. The ruling was later overturned by an appeal court but, in May 2023, a law was passed by the government giving it the power to seize property owned by nationals of those unfriendly countries.

Similar problems have arisen in the past with Chinese courts ignoring Western proceedings and issuing judgments which contradict foreign courts. Faced with these obstacles, "you have to try and think creatively or, starting from that assumption, [ask] what else can we then do to mitigate that?" suggests Elton.

Worth the time?

"[If] you're contemplating a claim, or you've got a judgment against the Russian party, against assets that you know are in Russia, there's no value to pursuing those proceedings," says Elton, unless the party has some specific reason to believe the assets will be accessible.

After the outbreak of war, hundreds of commercial aircrafts which had been leased to Russian airlines were stranded after their contracts were terminated. Eventually, a deal was struck for the government to buy many of the aircrafts, but had the lessors taken action and been awarded the return of the planes, such a judgment would have been useless without Russian co-operation.

"Does that mean that you can't bring proceedings against a Russian party or there's no value to bringing proceedings against a Russian party? No. But you're going to have to have a different set of considerations. You will have to think [about] what assets it has got outside of Russia that we could enforce against," says Elton. "The reality is you might spend all of this money obtaining a judgment. But unless you can locate assets that are outside of Russia, you're just not going to have any luck."

In the same way that the shareholders of the former Yukos oil company spent years chasing Russian state-owned assets in countries such as India, the US and Italy to enforce their USD 50 billion arbitral award, so foreign litigants are best served pursuing assets owned abroad.

"Your ideal situation is one in which they've got assets within England and Wales that you have identified, or can use Norwich Pharmacal requests to try and identify at a very early stage. After that it's about looking for other friendly jurisdictions," continues Elton.

Offshore jurisdictions are a likely destination, as many businesses and high-net-worth individuals use them, but even then, the assets may be further obscured. "In the realm of customer due diligence, we see individuals, who are either already sanctioned or anticipate being subject to sanctions, actively taking measures to safeguard their assets," says investigative tracing specialist Bruno Mortier of BDO. "This often involves complex strategies to obfuscate ownership, such as transferring assets to third parties through sales or other less formal arrangements." For example, transferring them to a family member, such as a child, or into a trust. "It's always critical to understand the specific terms of these trusts to ascer-

tain who legally and practically control the trusts, and who stands to benefit," he adds.

Even then, a successful litigant will need to bring service against the Russian party. With Russian courts unlikely to be willing to effect service on behalf of their foreign counterparts, "you need to think about service by alternative means, at a very early stage," says Elton. "If you can overcome that, as with all litigation, it's going to take a long time. But I don't see any reason why that that couldn't be done. And then you try and enforce."

Asset identification

"Some of these assets are not as well hidden as everyone thinks," says Elton. Mortier and fellow investigators use virtual private networks (VPNs) to access websites within Russia, to the degree that Roskomnadzor, the Russian Federal Service for Supervision of Communications, Information Technology and Mass Media, will attempt to block VPNs from Russia from March 2024.

Thankfully for the investigators, "Russia is a data-rich environment, for the wealth of data through its public registries and databases, its property registers [and] court records," Mortier says.

More helpfully, "Russia is leaking data like a sieve," he adds. Almost every week there are data breaches from official websites "and this data, which is often sold, is also sometimes freely distributed on the internet or aggregated by professional data [providers]".

Latterly, Russia has been allowing companies which are the subject of sanctions to redact information in the official corporate registry, obscuring their ownership. So investigators combine official sources with more informal data from social media, such as VKontakte or Odnoklassniki. "They play a crucial role in asset tracing because you can mine these sites for insights into personal relationships, business connections [and] lifestyle indicators, and this can all lead to asset discovery. A picture of [someone's] son swimming in a pool in Spain may lead to an asset, so it's an interesting source for piecing together a more comprehensive picture of the target's network and influence," says Mortier.

"Persistence is the key, [as is] cross-referencing sources," he adds. "I'm always amazed at the amount of data that is available in breaches and what information is for sale."

Ensuring that the data is trustworthy is another matter. "Investigators must be aware of the potential for state involvement or interference which can pose additional challenges or operational security risks for you and your sources."

Foreign sources can help, such as patent filings that might give away the owner of a company or entity, and verifying email addresses, passport details, travel records, car ownership, rent payments, bank accounts and family members can build up a picture of who owns what, and where. Then the challenge is piecing together the puzzle.

Client-focused approach

These questions are better considered at an early stage. It can be easy to seize on a winnable case, without considering the impact of a long battle for enforcement.

"A tendency of lawyers is to jump on the merits of the case and say 'of course, you've got a great fraud claim, it looks brilliant on the merits'," says Elton, warning that "you have to have these practical considerations in mind at a very early stage".

Wider commercial implications, including the cost and time required, are also important. "Ideally you have an investigative plan informed by, and an alignment with, a legal strategy," says Mortier. "You have an investigative track that runs parallel to the legal track, and these two tracks inform each other. But in the end, the decision to trace assets in Russia, even when seizure is unlikely, depends on the client's objectives. In the end, each case will demand a customised approach."

With relations between Russia and the West unlikely to thaw for the foreseeable future, and with the Russian state and many within its borders continuing to act in bad faith, the availability of effective strategies and tools for securing justice will remain important to international parties for years to come. **CDR**

CHINA DUE DILIGENCE IN CRISIS

Bruno Mortier
BDO

China's data rich environment has become more difficult to access, moving away from data transparency in a broader trend. This development has disrupted access to the data we need and rely on for due diligence. At the same time, compliance with new laws and regulatory drivers in our respective local jurisdictions requires us to up our game when conducting: due diligence investigations on Chinese suppliers, employees, partners, and customers; Anti-Money Laundering (AML); or enforcing export controls.

Contextually, China's current downturn, deteriorating relations with the West, and the decoupling of companies with manufacturing operations in China do not make for an optimistic business climate.

Exacerbating this dire economic outlook is China's aim to "go dark", and its intent on obfuscating forced labour, human rights violations, weapons sales, military civil fusion companies, and malign investments. The business environment in China is increasingly opaque and hostile to foreign business, which has significant practical implications for due diligence, trade compliance, export controls, AML and third-party risk management.

This past year, China's regulatory and legal environment has become increasingly restrictive, with a slew of new and expanded espionage, cyber, privacy, and data transfer laws which have garnered significant media attention. In the autumn of 2022, China began geo-blocking many due diligence sources, and consequently these sources are only accessible via a Chinese IP address. Several of these sources also now mandate account creation with personal validation only permissible with a verified Chinese phone number. The number of due diligence sources affected by these changes appears to be steadily increasing.

Chinese authorities have also been clamping down on due diligence firms operating domestically. Reports from international sources reveal that staff members of due diligence firms have been arrested, interrogated, and subjected to an exit ban. Further media reports have described how Chinese authorities recently shut down the office of a local due diligence firm, with the staff currently detained. These actions have made China-based diligence firms increasingly hesitant to conduct in-depth due diligence investigations for fear of repercussions. The proverbial boots on the ground are treading more cautiously.

Recently, the United Kingdom, Australia, Canada, New Zealand, and Germany followed the lead of the US by implementing laws against forced labour

in the supply chain, pressuring global corporations to comply with such legislation. Combating forced labour is now an international priority, with companies trying to assess if goods were made wholly or in part using forced labour.

The mere mention of Xinjiang or "forced labour" in an email request for due diligence information is usually sufficient to garner a polite refusal from local analysts in China. As such, relying on someone in China to potentially risk breaking the law, to provide you with the actionable intelligence you might need, is not always an option. After all, discovering in court that what you see as legitimate due diligence has been interpreted as an act of espionage is not a risk you want to take.

It is important to remember that your Chinese supplier or business partner may be punished for cooperating with you. You will need to question the validity and reliability of the data provided by your supplier and remain skeptical about the replies in your compliance questionnaires. China has restrictive statutes which counter the effect of US policies and laws that require you to conduct due diligence, and as such, legal restrictions including Chinese anti-foreign sanctions laws may make it punishable for your supplier to fully cooperate with your due diligence efforts.

This ever-changing due diligence landscape also impedes traditional investigative due diligence assignments such as anti-counterfeit investigations, asset tracing and M&A due diligence.

When conducting investigations examining forced labour risk, Environmental, Social and Corporate Governance (ESG) compliance, and counterfeiting, analysts look in depth at the supply chains. A supply chain is the network of all contributors, resources, interactions, and activities involved in the lifecycle of a product or service, from its creation to its delivery. Analysts source information from numerous publicly available sources, such as corporate, commerce, trade, and tender databases, as well as reviewing any publicly available contracts and memoranda of understanding between companies. Sourcing data may include, but is not limited to: company websites; social media; and leaked data. The aim is to attain full visibility of the upstream and downstream supply chain. Depending on the assignment, satellite data may need to be pulled, and, in some cases, maritime, aviation and railway assets data can be relevant. Analysts work with all these data points to create a model of complex corporate structures, mapping out a chain of ownership hierarchies and related parties. The analysis of this data supports the recipient's process of assessing risks, making decisions, and taking subsequent action.

But how, in the current climate, can we access the data required to provide such a report, one that can reliably serve the recipients' due diligence or information needs?

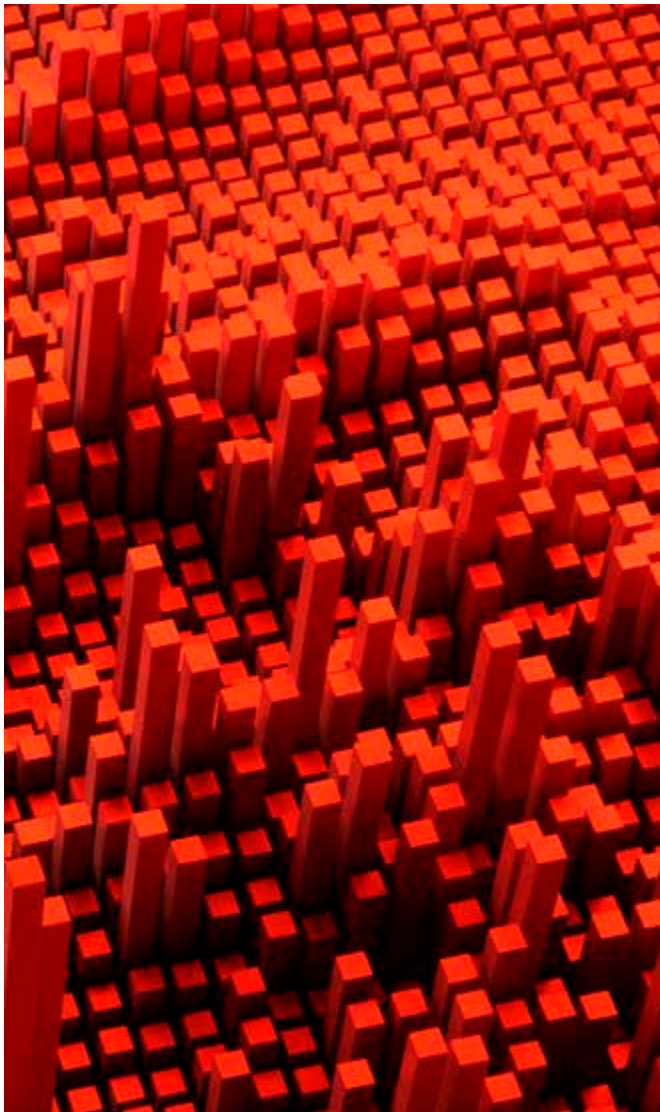
Fortunately, most of the Open-Source Intelligence (OSINT) research in China can still be conducted remotely. In the following section, we will outline three workarounds that enable us to bypass these data restrictions and continue to access all public sources in China. Does this mean you can afford not to visit and conduct an audit of your Chinese facilities onsite? No, you should always conduct an onsite inspection of your Chinese business partner if you can.

This article also highlights two key US-centric examples, namely identifying Military-Civil Fusion companies in China's military industrial complex using US Watchlists and forced labour as per the US Uyghur Forced Labor Prevention Act (UFLPA).

Why are these examples important? Even if you are not based in the US, if you want to understand how the West's relationship with China is developing, and what compliance challenges can be expected in your jurisdictions, these examples can act as a blueprint for you and your business.

China due diligence workarounds

Traditionally the first go-to place for analysts to obtain corporate information has been the National Enterprise Credit Information Publicity System (NECIPS), provincial-level registries, stock exchanges, and the Chinese Ministry of Commerce. These can be described as predominantly reliable primary sources.

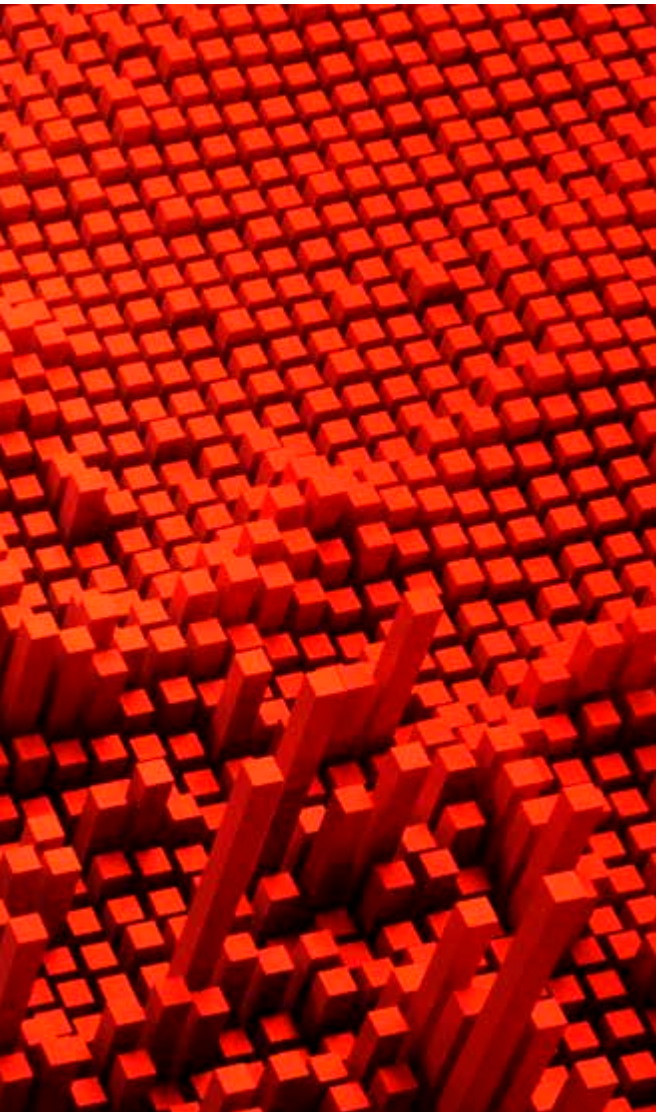


Third-party data brokers, using either an Application Programming Interface (API) feed or information scraped from NECIPS, are sometimes easier to access and navigate. When some of these third-party aggregators, such as QiChaCha, were becoming inaccessible, other data brokers popped up offering the same data sets, often with similar looking user interfaces. For analysts not using a Virtual Private Network (VPN), a viable solution is looking for a clone of the third party tool that you used to use.

Using a VPN provider that offers a Chinese IP address is essential for accessing geo-blocked sources. However, there are some caveats. Technically speaking, anyone can run a VPN service: all you need to do to become a VPN operator is rent a virtual private server, install Open VPN, and buy a domain name. Choosing the right VPN provider is not a straightforward process. Many are marketed using "Top 10 best VPN" clickbait and boast "stealth protection" and "total anonymity and privacy". However, this is greatly misleading. These sites are generally not neutral as they serve as affiliate marketing partners for VPN operators. Be mindful that the VPN service knows the real identity of the visitor and can be forced by government agencies to share their own user (meta)data. Governments have also been known to operate VPN services.

Please note that the use of a VPN can be identified by different means. This can be done via an IP blacklist of VPN providers, by analysing the number "port" that has been used by the VPN service, or by the protocol used (Open VPN, IPSec, WireGuard, L2TP, IKEv2). Looking at Russia, we see that Russia's communications oversight, Roskomnadzor, plans to fully block VPN services by March 2024 and already blocked 167 VPN services, mostly based on the VPN protocol that is in use. At this point in time, a range of VPN services make a Chinese IP address available; despite this, it is highly likely that the Chinese authorities are monitoring traffic and collecting metadata.

In addition to a VPN, a Chinese phone number is also essential for accessing sources that require validation. Since you are required to submit personal identifiers when you obtain a SIM card in China, depending on your threat model and the degree of confidentiality and operational security you need, this might not be an option. Another obstacle for long term use is that your SIM card may eventually expire, and you would need to be in China to acquire a new SIM card.



Military-Civil Fusion companies (军民融合)

In the US, different governmental agencies, including the Ministries of Commerce, Defense, the Treasury, and the Office of Foreign Assets Control (OFAC), produce watchlists with every regulatory action. Each of these agencies publish their own watchlists, and these are continuously updated, currently at a pace never seen before. There may also be some overlap between these watchlists that are managed by the different governmental agencies.

These lists are crucial in identifying whether a "private Chinese company" has any ties to a watchlisted company. Chinese Military-Civil Fusion companies are in essence private companies, not owned by the state, and support the military with dual-use goods developed for the private sector. Since neither the Chinese military (PLA) nor the state directly owns or controls these companies, a mere examination of the corporate structure regarding the entity's legal ownership and control would not necessarily produce insights about possible corporate risk. Public data can also provide insights on affiliations of Chinese companies with the military, but in order to do so, all affiliations of the company of interest must be mapped.

The first challenge is that the watchlists usually do not specify the name of the entity in Chinese characters. An English name of a Chinese company is generally arbitrary, with names varying based on the translation and transliteration of Chinese characters. If you're lucky, the company's unified social credit code, or company number, is listed in the watchlist, which is a good primary identifier. Further primary and secondary identifiers would need to be sourced in order to be certain that the correct Chinese company has been identified.

The next step is identifying if a watchlisted company has any connections to the entity under investigation. Contrary to the AML regime, beneficial owner percentages, for instance owning more than 25%, do not apply here. Since the Chinese government or military is not necessarily interested in control of the target, but rather funneling money, i.e., guiding investment to companies it deems strategically important, any percentage of ownership can be seen as relevant. Please note that Chinese individuals associated with watchlisted companies may also have roles or ownership stakes in western companies. Due to the nature of Chinese names, verifying if an individual of interest is the person you are profiling poses a significant challenge, in part due to the commonality of Chinese names. With over 1.42 billion citizens, China has the world's largest population but has one of the smallest surname pools, where about 1.2 billion people share 100 common surnames.

As we have seen with companies involved in forced labour, Chinese Military-Civil Fusion companies may also share a common address or geographical area, so cross-referencing an address may be of value in your research. This in turn leads us to examine our next issue: the identification of forced labour within supply chains.

Forced labour in supply chains

The issue of forced labour is a critical trade and foreign policy issue not limited specifically to China. However, in China, forced labour could be perceived as state policy. The 2023 Global Slavery Index (GSI) estimates that 5.8 million people were subject to modern slavery in China on any given day in 2021.

At the time of writing this article, the US Uyghur Forced Labor Prevention Act (UFLPA) Entity List was last updated September 27th, 2023. The UFLPA aims to address the issue of forced labour in the supply chain. As with Military-Civil Fusion companies, determining if your supplier shows up in the UFLPA entity list or in reports from NGOs or media requires access to Chinese public records. Correct identification and verification (ID&V) of your supplier is essential before name screening your suppliers against an entity list. You will also need to identify beneficial owners and related and affiliated companies in order to conduct additional screening. If companies along your upstream or downstream supply chain are identified as using forced labour, your entire supply chain is exposed and at risk.

In addition to verifying the company name and address as risk indicators, it is equally important to check whether your entity is in any way associated directly or indirectly with a prison camp or internment camp.

What does the future bring?

What does the future bring for the Chinese due diligence landscape? Bureaucratic environments such as China will continue to offer a wealth of data; however, overall transparency is likely to deteriorate further.

Regardless, trust is built on transparency. Performing sufficient and robust due diligence when doing business with China remains of ultimate importance in managing your risks. We should always pursue more information on Chinese entities, to gain a better understanding where risk and vulnerabilities lie, and in turn make our supply chains more resilient. CDR

BDO's Corporate Intelligence team forms part of the firm's Forensic Practice. The intelligence team frequently works in tandem with the adjacent Forensic Accounting Investigations and Forensic Technology teams. 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, Brand-IP investigations, 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.de

Bruno Mortier is responsible for Corporate Intelligence Services in BDO Germany's Forensic, Risk and Compliance department. Bruno began his career in Belgium's national police, the Gendarmerie, where he was also deployed on counterterrorism missions. Bruno is a Port Facility Security Officer (PFSO) according to the International Ship and Port Facility Security (ISPS) – Code. He is an expert in supply chain security with a focus on counterterrorism and loss prevention, and Open Source Intelligence relating to supply chains that have a tangent to the Russian Federation and the People's Republic of China.

His deep knowledge about global supply chains serves him when conducting OSINT-driven investigations regarding forced labour, arms trade, counterfeiting and money laundering.

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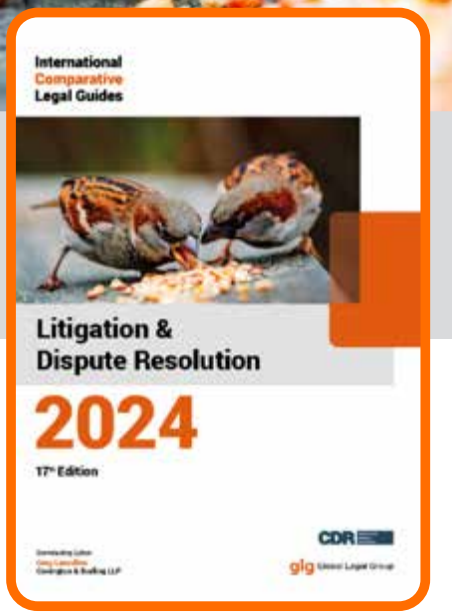

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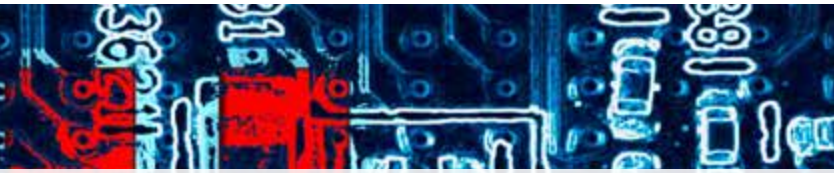


Cryptocurrency fraud and asset recovery

Syedur Rahman
Rahman Ravelli

Cryptocurrency and the use of blockchain has become increasingly popular in the commercial world in recent years, as more investors have come to view crypto as an asset of genuine value. We have seen 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 has been 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 $46,736. This means that Bitcoin's market capitalisation – the total value of all Bitcoin – is somewhere in the region of US $915 billion. This is lower than its highest-ever market capitalisation of US $1 trillion – and there has certainly been volatility in the crypto markets in the past 12 months. Nonetheless, cryptocurrency has still become an established asset. The law, however, has proved sluggish in its attempts to keep up with the use of cryptocurrency and the markets for it that have emerged.

Unfortunately, there is one aspect of cryptocurrency that is not attractive: 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 often 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 must 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 to 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.
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 – an issue which was significant in the case of *LMN v Bitflyer and others*, which I refer to later in this piece.

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.
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. However, 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

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 the 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 2019 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 brought 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.

The approach taken so far by courts

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 2020 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 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.
- The first time that a court has considered the *lex situs* (location) of Bitcoin.

The case of *Fetch AI Limited, Fetch AI Foundation PTE v Persons Unknown, Binance Holdings and Binance Markets (2021)* – which Rahman Ravelli also featured heavily in – was also notable. It was the first case to come before the courts where hackers had gained access to cryptocurrency accounts, traded the assets cheaply to a third party known to them and then sold them on at their proper value and taken the gains.

The case was also significant as London's High Court ordered the crypto exchange Binance to both identify those who carried out the hack and freeze their accounts. It is a case that debunks the idea that all crypto-assets activity can be conducted anonymously – and will assist many in the future who are attempting to regain what they lost to crypto-related crime.

Another recent development is the aforementioned High Court case of *LMN v Bitflyer and others (2022)*, which may prove to be of benefit to many who lose crypto assets to hackers. This is the first case to successfully use the new disclosure gateway which expanded the English courts' jurisdiction in order to make it easier to secure information orders against non-parties based overseas.

The case involved Rahman Ravelli applying to the High Court for Bankers Trust orders to be made against six exchanges based overseas, requiring them to disclose information that could help trace hackers who misappropriated crypto assets worth US $10.7 million. On 1 October 2022, the Civil Procedure Rules extended the jurisdictional gateways, which enabled English courts to give permission for claims and applications to be served outside of the jurisdiction of England and Wales – making it possible for Rahman Ravelli to serve the application on the overseas exchanges.

As a result, the High Court ordered the exchanges to provide the names of the account holders and a wide range of information about them, including bank account and payment card details, email and residential addresses and phone numbers – information that can be an immense help in tracking down those who have taken crypto assets and the assets themselves. The case sets an important precedent regarding the types of information that can be sought via a court order against those outside of the UK. Furthermore, when applying for this type of order, Mr Justice Butcher also made it clear what was necessary to bring such an application. It was essential for the applicant, LMN, to have a "good arguable case" in order to establish that there was a serious issue to be tried in proceedings against the wrongdoers.

Gary Jones v Persons Unknown and others (2022) is also worthy of note. In this case, Mr Jones obtained an order for delivery up of Bitcoin. Mr Jones fell victim to a large-scale cyber fraud, commonly referred to as a "pig butchering" scam. Here, wrongdoers convinced him to transfer 89.616 Bitcoin to a fraudulent investment platform promising significant returns. The High Court granted him a worldwide freezing injunction against defendants and claims were brought when the defendants had not filed a defence before the deadline. Mr Jones applied for summary judgment and sought to extend the injunctions that had been granted, in order to prevent further dissipation of his funds.

The court held that Mr Jones was entitled to both summary judgment against the defendants and an order for his assets (which were in Bitcoin) to be returned to him. In a ruling that may have relevance for many others in similar situations, the court granted permission for the order to be served by way of email and non-fungible token (NFT) airdrop.

Tulip Trading Ltd v Bitcoin Association for BSV and others (2022) was a case that saw Tulip, a Seychelles company, bring a claim for US $4.5 billion against the developers of four Bitcoin networks, alleging that they were obliged to help it recover the digital assets it had lost to hackers. However, the High Court determined that there was no good or arguable case that the developers, whose code is widely adopted and used, owed either fiduciary duties or a common

law duty of care to those who use that code to trade or store their crypto assets.

Due to this, the court set aside both an order from a lower court that had granted Tulip permission to serve a claim form out of the jurisdiction and the service of the claim form itself. However, Tulip then took the case to the Court of Appeal. The Court of Appeal overturned the High Court's decision, finding for the first time that developers of Bitcoin networks might owe fiduciary duties to Bitcoin owners. Tulip Trading's claim, and the key question of whether such duties exist, will now need to be determined at trial once the relevant facts have been established.

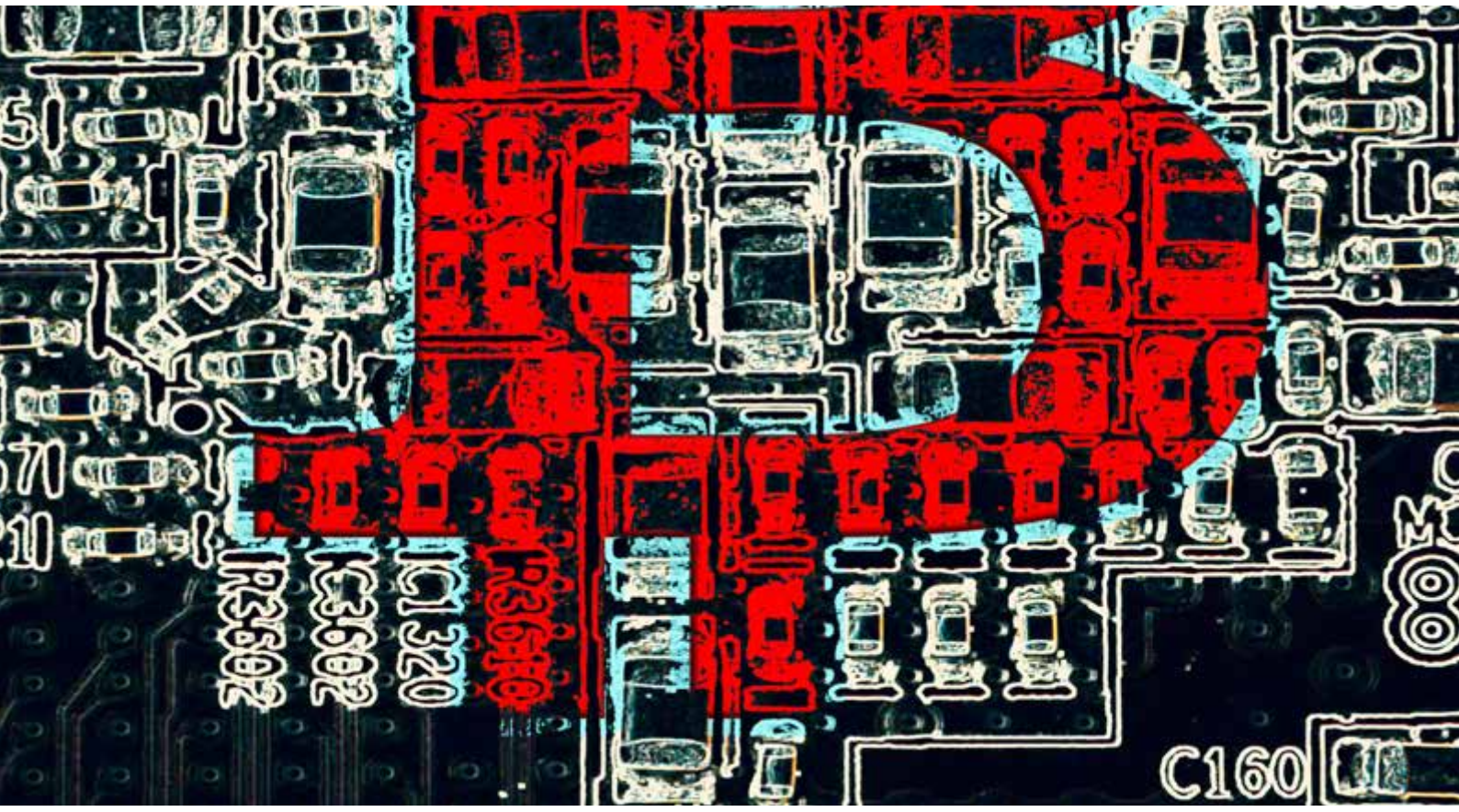
Conclusion

The world of cryptocurrency is constantly changing, which poses various challenges to those who are involved in it. The law is catching up with the developments surrounding cryptocurrency, even if it is doing so rather slowly.

The United States is an example of this progress. In October 2021, the US Department of the Treasury's Office of Foreign Assets Control (OFAC) published guidance emphasising the need for everyone involved with virtual currency to ensure they are complying with sanctions obligations. The same month saw the creation of the US's National Cryptocurrency Enforcement Team (NCET) to investigate and prosecute the use of cryptocurrency for criminal gain. Its remit includes ransomware use, money laundering, illegal or unregistered money services businesses, trading on "dark markets" and the tracing and recovery of assets lost through crypto-related criminal activity. Late 2022 saw two US senators introduce the Digital Asset Anti-Money Laundering Act of 2022, which, by late 2023, was gaining bipartisan support. If it became law, it would extend anti-money laundering and countering of terrorism financing requirements to cryptocurrency and digital assets. This move came after warnings from, among others, the US Treasury Department and Department of Justice that digital assets are increasingly popular with those involved in fraud, theft, money laundering and terrorist financing.

Efforts to regulate crypto assets have arguably become more relevant in the wake of the collapse of the FTX cryptocurrency exchange in November 2022. In the UK, HM Treasury and the Financial Conduct Authority (FCA) have made it clear that they believe that increased retail investors' ownership of crypto has come at a time when misleading advertising about such products has been on the rise and, crucially, when people's understanding of such products has been decreasing. This is perhaps best illustrated by FCA statistics, which show that 6,372 crypto-related scams were reported to it in 2021, compared to none in 2017. The FCA opened 759 cases about potential unregistered or scam crypto-asset businesses in the 2022–23 financial year – a 17% increase on the previous year.

It is a situation that has prompted action. The Financial Services and Markets Act 2023 introduced into the Financial Services and Markets Act 2000



(Financial Promotion) (Amendment) Order 2023 a definition of crypto assets (similar to the definition adopted by the EU in its Markets in Cryptoassets Regulation), and placed new obligations on crypto-asset providers to comply with the UK financial promotions regime.

Cryptocurrency is, therefore, attracting increasing attention from the authorities around the world. And, in our experience, judges in English courts are willing to show that they are prepared to adopt formidable tools to accommodate cryptocurrency fraud applications. Recent years have seen the courts applying trust law in cases involving cryptocurrency, and confirming that cryptocurrency can be considered property when the authorities are seeking to issue a property freezing order against individuals.

But while the law is now addressing some of the main issues surrounding cryptocurrency-related crime, those seeking to regain assets lost to it still face a battle. Much will 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. **CDR**

Syedur Rahman is a partner at Rahman Ravelli. His areas of expertise include cryptocurrency-related fraud, multi-jurisdictional asset tracing and recovery and white-collar crime. He represented clients in the landmark cryptocurrency asset recovery cases: *AA v Persons Unknown and Others*; *Ion Science Ltd and Duncan Johns v Persons Unknown*, *Binance Holdings Limited and Payward Limited*; *Fetch AI Limited v Persons Unknown*; and *LMN v Bitflyer and others*. 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 hosts seminars and speaks at international conferences.

Syed is proficient in both criminal and civil proceedings. The latest edition of *Chambers UK* notes that he is "keen to forge ground in fast-developing areas and is not put off by the complexities of crypto''. The 2022 edition of *The Legal 500* describes him as "without question one of the leading lawyers on cryptocurrency tracing and recovery''.

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This chapter examines the relationship between the English courts and international asset tracing, and looks at certain examples of civil or criminal tools that aid asset recovery. This is an ever-developing area, both legally and technologically, and the English courts have shown a willingness to adapt quickly and proactively to new asset classes, particularly cryptocurrency. Whilst these tools are well known and widely utilised, the manner in which they are used, and their efficiency will continue to evolve and develop.

Against this background, we look at some of the essential tools for international asset tracing, all of which are changing on an ongoing basis to meet both the advances in technology and the different classes of asset created by such advances. The following tools are examined:

1. mutual legal assistance;
2. unexplained wealth orders; and
3. Norwich Pharmacal orders.

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

It seems apparent that greater training and understanding on the broader technology, including capability and best practice in securing digital assets, are needed in order to assist the industry in tackling Cloud-based issues, such as Alexa recordings in the Cloud or information and records on the Blockchain. It is expected that such matters will become an increasing feature of insolvencies, and therefore problems surrounding the practical seizure and control of cryptoassets must be addressed.

Key concerns include:

- the lack of transparency in accounting as to the book balance and value of the cryptoassets of a business;

The English courts and international asset tracing

- 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 a rise in cross-border misconduct means that 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 to identify areas of interest. Regulators such as the Serious Fraud Office (SFO) and the courts are already recognising the usefulness of AI in investigating fraud, and this trend is sure to continue. As set out below, the past year has seen significant developments in the English courts' tools to aid with the process of asset tracing, particularly in relation to obtaining information from and about parties outside the jurisdiction.

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

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 (LOR), sometimes known as a *Commission Rogatoire*. 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. Its 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).

MLA requests and international co-operation following Brexit

The UK is no longer part of the European Investigation Order procedures (see https://www.gov.uk/guidance/european-investigation-orders-requests). Instead, MLA requests from EU Member States 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).

In practice, there is only a limited impact on much of the existing MLA framework with EU Member States. However, Europol no longer includes 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 LORs/letters rogatory. 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 MLA such as the above continue to be important after Brexit, as the Supreme Court made clear in *R (on the application of KBR, Inc.) v Director of the Serious Fraud Office* [2021] UKSC 2. In that case, the court considered the extraterritorial scope of the SFO's 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 section 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 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 section 2 notice.

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 SFO, the NCA, the Crown Prosecution Service, Her Majesty's 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, they 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 respondent, whether or not it complies with their 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 politically exposed person, 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 have 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 respondent 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 makes a false or misleading statement in its 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, the 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 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 the 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 the 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 and unused tool and so it is not yet possible to comment fully on their efficacy and efficiency. Further, it remains to be seen how and to what extent enforcement authorities will use this tool in asset recovery; however, it is anticipated that this developing tool will become far more commonplace in the world of asset recovery.

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 "mixed up" 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".

Uses

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 its 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. There is no need for causation or culpability in relation to the person, and the mere receipt of information may be enough to mean that they are mixed up in the wrongdoing (*Campaign Against Arms Trade v BAE Systems* [2007] EWHC 330). However, 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 it has 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 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 it 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. It is, however, important to note that the applicant does not need to show that it intends to bring proceedings, or that the information it seeks from the order is necessary to allow it to do so – it can seek the information simply to determine what to do, which may or may not include commencing proceedings.

Developments

On 1 October 2022 new changes came into force in relation to Practice Direction 6B, which deals with service out of the jurisdiction. Most significantly for the purposes of commercial disputes is the new jurisdictional gateway relating to third-party information orders such as Norwich Pharmacal or Bankers Trust Orders. The gateway (PD6B, 3.1(25)) provides as follows:

"*(25) A claim or application is made for disclosure in order to obtain information—*

(a) regarding:

(i) the true identity of a defendant or a potential defendant; and/or

(ii) what has become of the property of a claimant or applicant; and

(b) the claim or application is made for the purpose of proceedings already commenced or which, subject to the content of the information received, are intended to be commenced either by service in England and Wales or pursuant to CPR rule 6.32, 6.33 or 6.36."

Whilst permission of the court is still required, the gateway simplifies the process of obtaining information at an early stage of proceedings, particularly in fraud litigation where fraud victims need to establish where their money has gone and trace potential defendants. It should help significantly reduce the cost of the information gathering stage of the process.

This extends the ability of Claimants to rely on Norwich Pharmacal orders, in particular to obtain

information as to the identity of appropriate defendants or the location of property where those defendants and/or property are outside the jurisdiction and to address what was previously a difference in the approach of the caselaw depending on which of the Norwich Pharmacal and Bankers Trust jurisdictions a Claimant was able to utilise.

With certain limited exceptions, the weight of pre-existing authority is to the effect that there was no gateway within PD6B that permitted service out of the jurisdiction for a claim for a Norwich Pharmacal order, either as a free-standing claim or as a claim made in the same claim form as a claim against those responsible for an alleged fraud. Indeed, the limits of a Norwich Pharmacal order as a remedy have become more evident in recent years with a greater proliferation of cross-border fraud cases and, in particular, cryptocurrency fraud.

By contrast, with Bankers Trust orders, there was first instance authority that a court can permit service out. However: i) that was dependent on the "necessary and proper party" gateway (PD6, 3.1(3)) and so the claim had to be included in a claim against putative fraudsters who at that stage had not been identified; ii) there needed to be evidence of urgency; and iii) the Bankers Trust jurisdiction is only available in support of a proprietary claim so the claim must have been formulated in that way.

It appears that the gateway is intended to address this discrepancy and make service out available in all types of claims (i.e. not limited to proprietary claims to which the Bankers Trust jurisdiction applies).

Judicial comment has specifically referred to the application of the new gateway in litigation related to cryptoassets and the minutes of the Civil Procedure Rule Committee which approved the gateway state that:

> "*[t]he concern regarding the ability of the Courts to assist parties seeking to obtain information from non-parties where assets have been removed from the jurisdiction has been carefully considered. The issue has been particularly acute in cases where a party has needed to identify the destination of money or cryptoassets and the increasingly important context of ever advancing digital working.*"

As cryptocurrency is largely unregulated and cryptocurrency exchanges are often based outside the jurisdiction, a victim of cyber currency fraud was previously faced with a situation where they would need to bring a proprietary claim against "persons unknown" and then seek information disclosure orders against those who administer the relevant wallets when the only known contact details were the email addresses used to carry out the fraud. Practically, this could be a time-consuming, costly and ultimately futile process, given the speed at which cryptoassets can be moved.

With the new gateway, the court will be able to grant both Norwich Pharmacal orders and Bankers Trust orders against foreign respondents and so it should resolve the divergence in how the court has treated both types of order when dealing with service out situations and assist victims faced with a multi-jurisdictional fraud.

Even after a year, the full effect of how such orders of the court will be treated in practice still remains to be seen. A foreign respondent served with a Norwich Pharmacal or Bankers Trust application (or indeed the disclosure order itself) can choose to ignore the jurisdiction of the English courts and refuse to comply with the order. However, the reputational consequences of being in breach of an order of the English courts and/or the risk of contempt proceedings may be enough to incentivise compliance, particularly where the respondent has assets or does business within the UK.

Whilst much will depend on the identity of the foreign respondent in question and the likelihood of their compliance, the new gateway will significantly reduce the costs of getting to the stage at which a Claimant can make a judgment call about whether it is worth pursuing proceedings before the English courts or whether it would be more effective to seek relief in the jurisdiction in which the respondent is based.

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 that are 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. It will also be required to give certain undertakings to the court, including in damages. This means that it 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, 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).

Finally, it is important to consider whether the NPO should be accompanied by a gagging order, but it should be noted that the urgency has to be very extreme to justify such an order. Usually, the only real justification is a high risk of tipping off, which, in the case of NPOs against respectable institutions, will be difficult to establish.

Conclusion

The above tools have been selected as key examples of the those available before the English courts to aid asset recovery. They provide a formidable array of powers to assist in this regard and show the inevitable adaptation of the tools to the changing global asset scene and the courts' willingness to move appropriately to take into account these changes in international asset classes. CDR

Note

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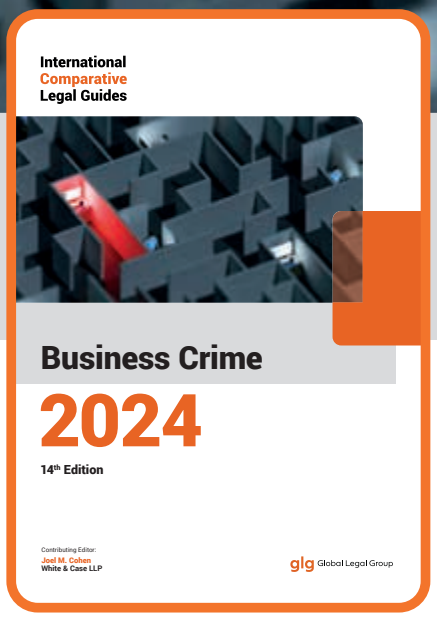

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Cutting through the complexities of NPLs in the Middle East: LESSONS FROM THE FRONT LINES

Yaser Dajani
Quantuma

Non-performing loans (NPLs) represent a significant challenge in financial markets worldwide. These are corporate loans that borrowers have failed to repay in accordance with the agreed terms, frequently leading to balance sheet write offs by lenders.

The high prevalence of NPLs can be a concerning issue for any financial market, given their potential to trigger financial instability, erode the profitability of banks and impede overall economic growth. Emerging markets, in particular, tend to grapple with elevated NPL ratios due to factors such as economic volatility, limited regulatory oversight, less maturity and sophistication in the sphere of lending practices, with weaker financial institutions standing behind the loans and the absence of *a well-functioning legal framework that enables NPLs to be resolved*. Consequently, managing and resolving NPLs in these markets can be a formidable task, often complicated by limited resources and infrastructure.

The Middle East has not been immune to the challenges posed by NPLs, reflecting the region's intri-

cate economic and cultural landscape. The surge in NPLs in the Middle East can be attributed to various factors, one of which is the fluctuation of interest rates. Higher interest rates can lead to increased borrowing costs, imposing significant challenges on businesses towards meeting their debt obligations.

Furthermore, the regulatory and legal framework governing lending practices and debt recovery varies across different countries within the Middle East. Over the past 10 years or so, legislators have sought to build on global best practice and apply this to the business and culture of the region. While there have been improvements in the regulatory landscape, inconsistencies in the application of law and regulations by the courts, regulators and lenders, alike, as well as a continually evolving oversight regime, can hinder effective NPL remedies.

Many countries in the Middle East are major exporters of oil, rendering their economies highly susceptible to fluctuations in global oil prices and other commodities. When oil prices experience declines, these nations often experience reduced government revenue, resulting in reduced spending and economic slowdowns. This economic turbulence increases the likelihood of loan defaults, contributing to the proliferation of NPLs.

Over the years, the Middle East has experienced various economic cycles, characterised by periods of recession and stagnation. These economic downturns have further exacerbated the NPL issue. The COVID-19 pandemic, in particular, aggravated the situation even more by: causing a dramatic and swift reduction in economic activity, particularly in some sectors; impacting numerous businesses; and leading to financial distress and the widespread closure of companies.

In more recent times, geopolitical tensions in the Middle East have added another layer of complexity to the region's NPL challenges. Instances of political uncertainty and regional instability have led to reduced economic activity, negatively impacting businesses. Moreover, the uncertainty created by these geopolitical factors can discourage foreign investments, result in economic challenges and, subsequently, cause a bigger NPL problem.

For a business, success would represent survival, an ongoing concern. Not only would this protect jobs and shareholder value, but indeed the enterprise's continued ability to trade and deliver returns would also provide the most effective way to repay debts and settle claims. However, when a turnaround process or restructuring fails to resuscitate a company, and when insolvency proceedings do not realise value for creditors, banks are faced with the difficult decision to initiate legal proceedings to recover debt. However, as we have seen, the process is time-consuming, complex and in most instances does not result in success if lenders do not put in place a robust recovery strategy. The process is further complicated when banks have no collateral or security in place, often relying on "personal guarantees".

Quantifying the region's NPL problem

NPLs represent a multifaceted issue in the Middle East, arising from diverse economic, regulatory, and geopolitical factors. Understanding the root causes and the unique challenges posed by NPLs is crucial for devising effective strategies to address them and facilitate debt recovery for creditors.

A critical element contributing to the rise of NPLs in the United Arab Emirates (UAE) in particular, when compared to other states in the region, has been the prevalence of loose lending practices. Among these practices is the "name lending" approach, whereby loans are extended to businesses primarily based on personal guarantees from shareholders and/or directors of the borrowers.

This and other practices have resulted in loans being granted to borrowers with a considerable risk of default that is difficult to forecast due to unforeseen economic triggers. Additionally, the situation is compounded by inadequate risk assessments by financial institutions, which fail to adequately gauge the potential risks associated with these loans.

Obtaining accurate and up-to-date data on NPLs in the Middle East poses a significant challenge due to limited information or public disclosure. Multilateral organisations that track economic indicators offer some insight into the scale of the NPL issue.

Kuwait has experienced a notable increase in its NPL to GDP ratio, surpassing the 10% mark. Similarly, the UAE grapples with one of the most substantial

NPL portfolios within the Gulf Cooperation Council (GCC). It initially rose from 6% in 2019 to 7.6% in 2020, primarily attributed to the economic disruptions triggered by the COVID-19 pandemic. Subsequently, there was a decrease in the NPL ratio to 6.2% in 2022, followed by a further reduction to 5.6% by Q3 2023.

Despite these improvements, the UAE still maintains the highest NPL ratio among the major countries in the GCC. For comparison, Saudi Arabia notably reported an NPL ratio of 1.8%, while Kuwait and Qatar reported ratios of 1.4% and 3.7% in 2022, respectively. In a broader context, the NPL ratio in the UK stands at approximately 1%, underscoring the disparity in NPL levels between these countries.

Corporate lending in Saudi Arabia vs. the UAE

As shown above, Saudi Arabia maintains a relatively low NPL ratio due to the country's robust and diversified economy, with a focus on industries such as oil, petrochemicals, construction and real estate, technology, finance and other sectors that have provided a stable foundation.

Saudi Arabia's central bank, Saudi Arabian Monetary Authority, is implementing a strong regulatory oversight framework and stringent legal enforcement measures, contributing to the stability of the banking sector. Conservative lending practices, strict credit assessments and risk management have effectively mitigated the risk of loan defaults.

Corporate loans in Saudi Arabia operate under the principles of *Sharia* law, which prohibit interest. The loans are therefore secured by tangible assets, such as equity, land or properties. The *Ijarah* structure, as it is called, establishes a lessor–lessee relationship as opposed to the conventional creditor–debtor arrangement. This fundamental difference in lending results in a significantly lower NPL rate compared to the UAE.

While there is no comprehensive breakdown of the nationalities of corporate debtors in the UAE, the corporate landscape is highly international, with expatriate businesses and investors from various parts of the world participating in its dynamic economy. The NPL problem in the UAE is influenced by this diverse and multinational nature of its business environment.

Emirati-owned businesses play a significant role in the UAE's corporate landscape, and they require corporate debt for various purposes, including expansion, capital investment and working capital. However, many businesses in the UAE are owned by expatriates from various countries across the Middle East, Levant and the sub-continent, including Lebanon, Jordan, Egypt, Pakistan and India.

Banking regulations in the UAE

While many banks in the UAE provide *Sharia*-compliant financial products, the majority have adopted a more lenient approach to lending and offer non-*Sharia* facilities, the conventional borrowing seen in many other countries around the world. The absence of the *Ijarah* model has increased banks' vulnerability to financial losses in the event of borrower defaults.

Moreover, there is a notable lack of compliance with regulations set forth by the Central Bank. For instance, Circular No. 28/2010 provides specific guidelines for loan classification and provisioning. Its purpose is to ensure that banks operating in the UAE adhere to a uniform set of rules governing loans, their categorisation, and the associated provisioning requirements.

A fundamental element of Circular No. 28/2010 is the categorisation of loans into five distinct classes: normal; watch-list; sub-standard; doubtful; and loss loans. While this Circular offers a standard-

ised structure, it permits banks to establish more detailed internal grading systems so long as they are in harmony with the predefined five categories. The challenge this presents is that different financial institutions could, on the basis of their own internal definition, classify customers differently, and to a third party viewing only the determined headline class, the internal workings would be impenetrable. Consequently, this flexibility in implementation of the classification system has resulted in stark variations in practices among banks, with some institutions facing a more pronounced NPL challenge than others due to these operational and compliance discrepancies.

To determine the provisioning amounts, the circular specifies different percentages for each loan category. For example, normal loans require a general provision, while watch-list loans require a slightly higher provision. As loans deteriorate in quality, with sub-standard, doubtful, and loss loans, the required provisioning percentages increase significantly.

The circular defines NPL as any loan with a part of the contractual interest or principal payment not met on time. The number of days past due is non-cumulative, ensuring that recent payments can cure earlier contractual breaches. Provisioning calculations consider the net exposure amount, which is the outstanding loan balance minus the net realisable value of collateral.

Collateral is assigned discount factors based on its type and conditions. When the net collateral value exceeds the outstanding loan amount, banks are not required to make provisions, but they must continually assess the need for provisions. Because there are no tangible assets to secure the loans, banks have set aside significant provisions, leading to an increase in the NPL ratio.

Recovery of UAE Debt: complications and opportunities

Most companies with debt from UAE banks are currently insolvent, necessitating banks to pursue personal guarantees. However, the "guarantors", in many cases, are no longer domiciled in the UAE; they are spread across various jurisdictions, with many in India, Pakistan, Iraq, Iran, and a few other countries which are considered complex in nature in terms of pursuing recoveries. This represents a significant challenge. Dealing with the intricacies of NPLs demands a strategic approach to address debt recovery options to monetise NPLs that are, at face value, difficult to quantify.

In 2020, the UAE and India entered into an agreement allowing for the reciprocal enforcement of court judgments obtained in either country. While this development holds promise in theory, our practical experience suggests that the process is complex and time-intensive. It is also important to note that the UAE has not signed the UNCITRAL Model Law on Cross-Border Insolvency, which reduces options for and hampers cross-border debt recoveries.

While the Abu Dhabi Global Market (ADGM) and the Dubai International Financial Centre (DIFC), which are based on the common law system, have adopted the Model Law, demonstrating their dedication to streamlining international legal procedures, this only applies to local enforcement in the UAE. On the other hand, Saudi Arabia has joined the UNCITRAL community in 2023, signalling its commitment to facilitate cross-border debt recovery efforts.

A significant development in the UAE's legal landscape was the introduction of a new bankruptcy law in December 2023. While it remains uncertain how this law will practically unfold, based on our previous experience with federal regulations, we hope that it will enhance the platform to expedite local and international debt recovery efforts.

While the regulatory framework seems to be moving in the right direction in this regard, there is one recent change that creditors have not welcomed: the issuance of the Central Bank & Organization of Financial Institutions and Activities Law in January 2023. This could potentially have a significant impact on banks and the debt recovery landscape.

Specifically, Article 121 of the law requires banks to obtain guarantees for all types of facilities from businesses, and the value of those guarantees should match the borrowers' financial position as determined by the Central Bank. This is not a significant departure from an existing regulation, and seems to reinforce Circular No 28/2010 – we are told that even this Circular No. 28/2010 is being updated and a new circular should be published at some point in 2024.

There are two significant aspects in Article 121. Firstly, the Central Bank has the power to levy penalties on banks that fail to comply with the regulations related to guarantees. Secondly, and perhaps more crucially, if a licensed financial institution does not secure the necessary guarantees from a business, they are barred from being able to pursue legal actions in local courts for debt recovery.

The above scenario has left banks in a difficult position, as they are unable to retrieve value from insolvent businesses, nor can they enforce judgments in the UAE against guarantors. These are key drivers that have facilitated international, cross-border asset recovery in this industry.

How to maximise debt recovery outcome

The UAE's NPL portfolio is currently valued at around USD 22 billion. A significant portion of that debt, however, is potentially recoverable from guarantors in jurisdictions outside the UAE, assuming there are assets to pursue in international markets. Attracted by the size of the UAE market and the need to undertake cross-border debt recoveries, third-party investors and funders are now moving in at pace.

Banks today have compelling incentives to aggressively offload these NPLs and clean up their balance sheets. The results would bolster credit ratings, reduce capital requirements and, ultimately, boost their profitability.

However, banks are faced with complexities that sometimes prohibit them from being able to recover the full value. They have judgments against defunct companies and personal assets to enforce against that are dispersed across borders, but no proper intelligence to point them in the right direction. From experience, these assets are often located in enforcement-complex jurisdictions that many consider "out-of-reach", including offshore. While the recovery process is complex, it is not impossible.

The utilisation of third-party funding arrangements for the recovery of assets situated abroad has emerged as a pivotal development within the NPL landscape in the Middle East region over the last few years. Litigation funders provide a key role by

assuming a substantial share of the financial risk inherent in legal proceedings. This, in turn, incentivises creditors to actively pursue debt recovery endeavors, even in intricate cases, while circumventing the burden of initial expenditures.

Through their domain-specific legal proficiency (many third-party funders are run by lawyers) and their relationship with specialised advisors, this tripartite arrangement of funders, investigators and lawyers working together elevates the overall efficiency of the debt recovery process.

Litigation funders typically finance cases either by a full portfolio of non-performing loans or strategically choosing cases aligned with their risk appetite and recovery potential, as opposed to acquiring the debt by way of debt sale, which is not currently common practice in the region.

Their involvement can further expedite alternative dispute resolution methods and provide valuable assistance in cross-border transactions, relieving banks of the upfront cost of pursuing debtors, with contingent payments built into funding agreements. The cost efficiency of litigation funders positions them as valuable partners for banks and investigators in navigating the intricate landscape of NPL recovery. Through our first-hand experience, we have observed how external counsel, investigators and funders bring a blend of innovation and expertise to the table.

International cooperation and global legal strategies are accessible resources for asset discovery, especially when assets are dispersed across jurisdictions. Among the effective legal remedies that have proven invaluable are Section 1782 Discovery, Norwich Pharmacal Orders, Bankers Trust Orders, and Insolvency Proceedings, among others. These remedies enable the discovery and disclosure of information pertaining to corporate, financial and tangible assets to facilitate targeted recoveries.

Additionally, our forensic teams have nominated our own court-appointed liquidators to take control of companies and compel directors and third parties to furnish evidence and actionable intelligence, thereby facilitating the process of asset identification and recovery. Although creditors in the Middle East have historically underutilised these options, there is a growing trend towards their adoption. These activities are the core essence of asset tracing.

Looking at steps to combat dissipation, which is one of the biggest impediments when it comes to asset tracing, the use of forensic accounting techniques to follow the assets through complex international trails is vital to forensically examine disclosure made to us. In a recent case, we investigated and uncovered asset dissipation as part of our work in support of a worldwide freezing order. This included a fund flow analysis to trace the cash, and preparing a timeline of the dissipation to go after third parties to whom assets were transferred.

Our diverse team at Quantuma comprises investigators, forensic accountants, intelligence specialists, data experts and insolvency practitioners. Together, we bring a wealth of expertise, experience and advanced investigative techniques to the table, and have formed formidable relationships with banks and funders. We are adept at tracking intricate financial transactions, dismantling fraudulent schemes and deciphering complex corporate structures.

Final thoughts

In conclusion, the analysis discussed in this article highlights the intricate challenges posed by NPLs in the Middle East's financial landscape. The key takeaways include the region's susceptibility to economic volatility, regulatory inconsistencies and geopolitical tensions, all of which contribute to the proliferation of NPLs. Understanding the multifaceted nature of these challenges is crucial for stakeholders in the financial sector to devise effective strategies for managing and resolving NPLs. The emergence of third-party funders and the importance of advanced investigative techniques underscore the potential for innovative solutions in navigating the complexities of NPL recovery. Ultimately, addressing NPLs requires a coordinated effort, leveraging regulatory reforms, international cooperation, and specialised expertise to maximise debt recovery outcomes and foster financial stability in the region. CDR

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The procedural basis to appoint a Receiver and their tactical and practical value in international enforcement of judgments and awards

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Court Appointed Receivership ("Receivership") is a protective measure under English law aimed at the securement, preservation, and potential recovery of assets of a company, an individual, or both, which are subject to Court proceedings. The English Court has the jurisdiction to appoint a Court Appointed Receiver ("Receiver") in all cases where it is persuaded that it is just and convenient to do so. Indeed, the Court may appoint a Receiver at an interlocutory stage of proceedings, or upon its final order or determination.

The power of the High Court to appoint a Receiver is contained in Section 37 of The Senior Courts Act 1981, which also deals with the Courts' powers in respect of granting injunctions. The relevant statute is set out below:

Powers of High Court with respect to injunctions and receivers

"*(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.*

(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

(4) The power of the High Court to appoint a receiver by way of equitable execution shall operate in relation to all legal estates and interests in land; and that power—

(a) may be exercised in relation to an estate or interest in land whether or not a charge has been imposed on that land under section 1 of the Charging Orders Act 1979 for the purpose of enforcing the judgment, order or award in question; and

(b) shall be in addition to, and not in derogation of, any power of any court to appoint a receiver in proceedings for enforcing such a charge.

(5) Where an order under the said section 1 imposing a charge for the purpose of enforcing a judgment, order or award has been, or has effect as if, registered under section 6 of the Land Charges Act 1972, subsection (4) of the said section 6 (effect of non-registration of writs and orders registrable under that section) shall not apply to an order appointing a receiver made either—

(a) in proceedings for enforcing the charge; or

(b) by way of equitable execution of the judgment, order or award or, as the case may be, of so much of it as requires payment of moneys secured by the charge."

In practice, injunctions and Receiverships often work together, as we will identify, and develop, later in this piece.

The way the defendants' assets are held is likely to be key to any successful Receivership appointment, as "opaque" asset holding structures, in practice, have been found to render a worldwide freezing injunction as insufficient protection. As Robert Walker, J, said in the case of *International Credit and Investment Co. (Overseas) Limited vs Adham* [1998] BBC 134:

"*[I]t has become increasingly clear, as the English High Court regrettably has to deal more and more often with inter-*

national fraud, that the court will, on appropriate occasions, take drastic action and will not allow its orders to be evaded by the manipulation of shadowy, offshore trusts and companies formed in jurisdictions where secrecy is highly prized and official regulation is at a low level."

The English Court will proceed with caution when looking to appoint a Receiver, especially at an interlocutory stage of the proceedings. That said, the Court can, and will, intervene in appropriate circumstances.

A seminal case in which the Court were persuaded to appoint a Receiver in such circumstances is the case of *JSC BT bank v Ablyazov* [2010] EWCA Civ 1141 (a case in which the writer of this chapter ("writer") has particular knowledge, as he is the lead Receiver in that matter).

As Maurice Kay LJ said in the *Ablyazov* case:

"*[I]t is true that the appointment of a receiver is a very intrusive remedy. It is also expensive and not easily reversible. These considerations can, however, be ameliorated by an appropriately fortified undertaking in damages. A receivership order will no doubt be completely inappropriate in the ordinary, freezing order case where assets are constituted by money in bank accounts (in respect of which the relevant bank can be given notice) or by immovable property. The order will therefore only be appropriate in cases where an injunction is insufficient on its own. Such cases are only likely to arise where there is a measurable risk that, if it is not granted, a defendant will act in breach of the freezing order, or otherwise seek to ensure that his assets will not be available to satisfy any judgement, which may due course be given against him. If, therefore, the method by which defendant beneficially holds his assets is transparent, a receivership order may not be necessary. But if it is opaque and there is reasonable suspicion that such opacity will be used by a defendant to act in breach of a freezing order, it may well be the case that receivership order is appropriate.*"

Indeed, the dealing with assets in breach of world-wide freezing order can be a particularly good reason to grant a Receivership order. As Teare J said in *JSC BTA bank v Ablyazov* [2010] EWHC 1779 (Comm):

"*In a case where there is evidence that defendant has breached or is about to breach the terms of a freezing order the court may well conclude that the freezing order does not provide the claimant with adequate protection against the risk that defendants assets may be dissipated before judgement. It was suggested that such evidence is the only evidence capable of founding such a conclusion. I disagree. There may be other circumstances which show that the defendant cannot be trusted to obey the freezing order. In the present case, reliance is placed on the defendant's inadequate disclosure of his assets. In my judgement, inadequate disclosure may, depending on the circumstances of case, enable the court to conclude that a freeing order does not provide the claimant with adequate protection.*"

And as Popplewell J stated in the same case (*JSC BTA Bank v Ablyazov* [2013] EWHC 1979 (Comm)):

> "*Mr Abhyazov does not hold his assets in his own name. His modus operandi has been for a trusted associate to hold shares in a holding company, or on his behalf and, by that means, to control the shareholdings in a chain of other companies at the bottom of which chain is an operating business… The use of nominee companies registered in offshore jurisdictions in this way, makes it difficult to trace his assets. The structure enables Mr Abhyazov to instruct his nominee to dispose of an asset, or to transfer an asset from one offshore company controlled by the nominee to another also controlled by the nominee and in this way to make it difficult to identify the assets or for them to be available for enforcement.*"

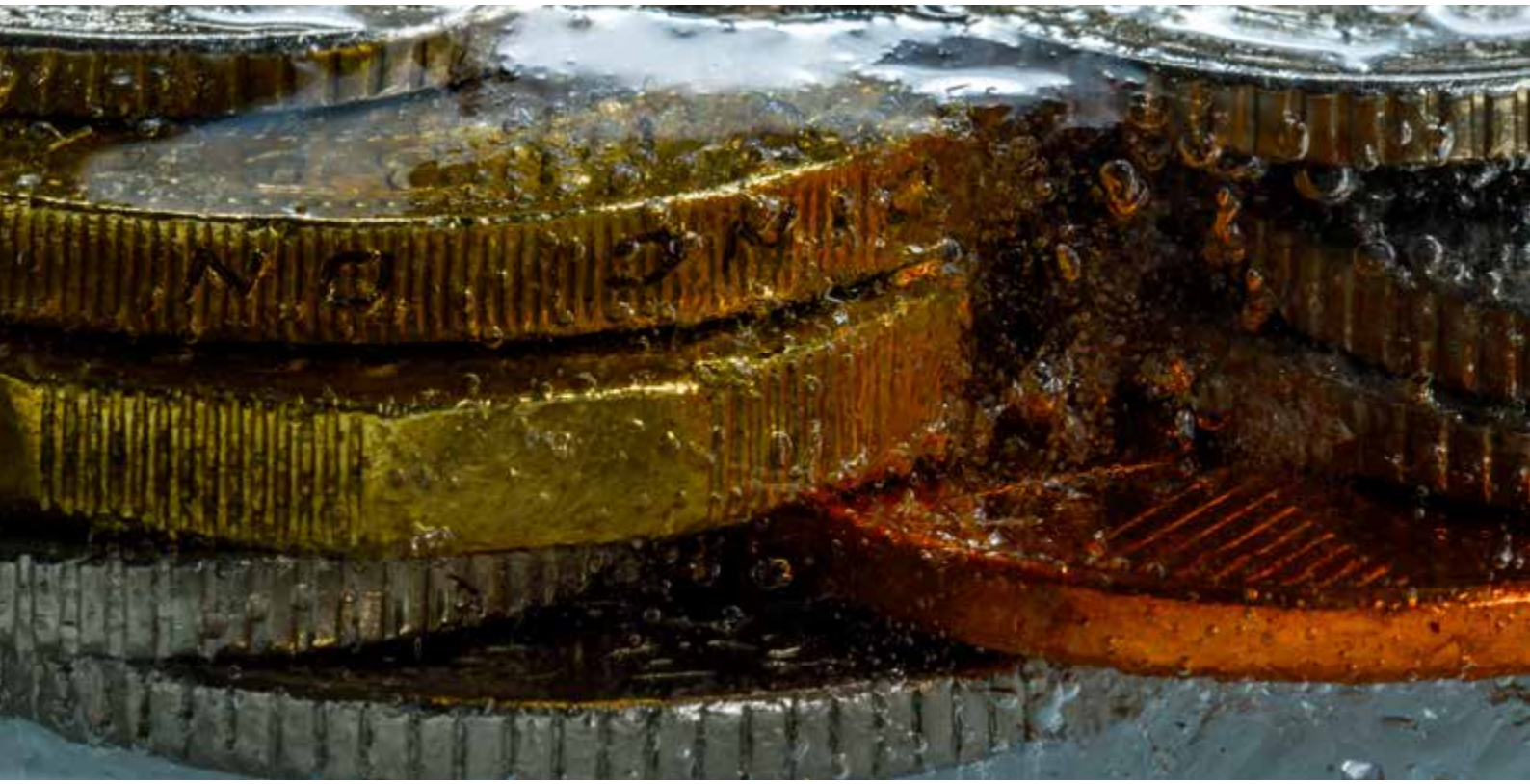
The Civil Procedure Rules ("CPR") and Practice Directions contain, at Part 69 ("CPR 69"), the Court's powers to appoint a Receiver, as well as other matters relevant to the appointment of the Receiver, and the discharge of their function.

CPR 69.2 sets out the Court's power to appoint a Receiver. It states that the Court may appoint a Receiver before proceedings have started, in existing proceedings, or on/after judgment. This wide range of points within the proceedings (and even before their commencement) reflects the flexibility and scope of the ability of the Court to appoint a Receiver. Indeed, the writer has been appointed in a recent matter before the BVI Court in advance of an arbitration being launched.

CPR 69.2 also states that the Receiver must be an individual (as opposed to a body corporate or partnership). This is analogous to the appointment of an individual in insolvency proceedings. However, that is where the analogy ends. There is no requirement or mandate for the Receiver to be a licensed insolvency practitioner, or indeed have any professional qualification. That said, in the writer's practical experience in acting as a Receiver, in several different onshore and offshore situations, there has repeatedly been a "best practice" submission to the Court to demonstrate the proposed individual's suitability and capability to perform the role. This has been established in the past by providing a full *curriculum vitae* demonstrating, *inter alia*, relevant case experience of the proposed individual, along with a reference letter from a solicitor, personally known to the individual, who can confirm to the Court that, in their view, the individual has the requisite expertise and capability to be appointed to the role. Therefore, whilst there is no need, or indeed any requirement, for the Receiver to be an insolvency practitioner, the skill set, experience and expertise of an insolvency practitioner often militates towards their suitability to be appointed.

CPR 69.3 states that the application for the appointment of a Receiver may be made without notice and must be supported by written evidence. In the writer's experience, this written evidence is tailored to the circumstances and requirements of the role which is being proposed. That said, as a bare minimum, it will include the expertise and capability statements detailed above, and will also likely set out the initial strategy proposed for the Receivership.

CPR 69.4 states that the order appointing the Receiver must be served, by the party who applied for it, on the person appointed as Receiver and, unless the Court orders otherwise, on every other party to the proceedings, and such other person(s) as the Court may direct. This essentially puts the Receivership on an "on notice" basis; this should be factored into the strategy, including, but not limited to, how the assets are secured, risk of nefarious dissipation, the general and overall anticipated reaction of the defendant, etc.



CPR 69.5 states that the Court may direct that before a Receiver begins to act, or within a specified time, the Receiver must either give such security as the Court may determine, or file and serve on all parties to the proceedings, providing evidence that they already have in force sufficient security to cover liability for any acts and omissions as Receiver. This is an important consideration, as the CPR goes on to state that the Court may terminate the appointment of the Receiver if they fail to give the security or satisfy the Court that the security is in force by the date specified. In the writer's practical experience, the security, which an insolvency practitioner ("IP") must have in place to perform their functions (indeed to allow that person to take and retain insolvency appointments) is invariably found to meet the requirements of the CPR. The IP's security, which is often referred to as "a Bond", must be in a manner and form approved by the Secretary of State (as defined in the Insolvency Practitioners Regulations 2005 (SI2005, number 524; as amended)). This Bond comprises two elements of cover: a general penalty sum often referred to as an enabling Bond in the sum of £250,000 (which is generally renewed every 12 months); and the specific penalty sum in respect of each appointment, generally for an amount no less than the estimated value of the estate to which the IP is appointed. The maximum amount of specific penalty sum cover for any one case is £5 million. Where the Court directs, additional cash or insurance-backed security may be required to be lodged, in a sum agreed by the Court (and bespoke to the facts and assets of the case).

Further sections of the CPR cover the Receiver's ability to apply for directions, the Receiver's remuneration and how it is calculated, and the requirement for the Receiver to prepare and serve accounts.

CPR 69.10 deals with the application for discharge of a Receiver, and states that the Receiver or any party may apply for the Receiver to be discharged on completion of their duties. The application note must be served on the person(s) who are required to be served under CPR 69.4 (the order appointing the Receiver). CPR 69.11 goes on to state that an order discharging or terminating the appointment of the Receiver may require the Receiver to pay to Court any money held by them, or specify the person to whom the Receiver must pay any money or transfer any assets still in their possession. CPR 69.11 also makes provisions for the discharge or cancellation of any guarantee given by the Receiver as security (and again, such order must be served on such person as required under CPR 69.4).

In practice, the appointment of a Receiver is a powerful, swift and effective intervention, which can be deployed successfully to protect value, both in interlocutory proceedings, and also post-judgment, to identify, secure, and ultimately realise assets in satisfaction of the judgment.

The Receivership order is a bespoke remedy, which allows the powers of the Receiver to be designed in order to give ultimate flexibility and resultant efficacy to the enforcement process. The Receiver is an officer of the Court, and in the exercise and discharge of their functions is often afforded considerable latitude in order to fulfill the objectives of the Receivership. There is therefore a best practice requirement in the planning stages of the Receivership to consider the powers that will be required for that particular Receivership situation, and to then persuade the Court to grant those powers. This is, in the writer's experience, always a fine and delicate balance. On the one hand, avoiding wide generic powers, which would render the Receivership unwieldy and open to legitimate early complaints that it is too invasive and draconian, and therefore should not be granted. On the other hand, not circumscribing the Receivership so narrowly as to render it ineffective and futile from day one.

Thought, care and precision in the design and wording of the Receivership powers is, in the writer's view, germane to the ultimate success of the Receivership. This requires deft and considered thought, which is invariably enhanced when those involved in the design have real, tacit expertise and experience in the field. Consideration should also be given in this design phase towards balancing those general "boiler plate" powers (e.g. to take all steps for the expedient recovery and preservation of assets, or the ability to bring and defend legal actions and proceedings) with specific powers (e.g. to request information assistance from specified third parties).

It should be noted that the Receivership, if granted in England and Wales, will only be effective in jurisdictions outside of England and Wales, to the extent that it is declared enforceable or recognised in that country or state. Whilst recognition of Receiverships in foreign jurisdictions often mirrors the procedures,

protocols and conventions for the recognition and enforcement of foreign judgments, a detailed analysis, jurisdiction by jurisdiction, is outside of the scope of this piece. In the writer's practical experience, an "English" Receivership appointment can, and will, be recognised in a wide range of jurisdictions around the world; both in common law and civil jurisdictions. Indeed, in the *Ablyazov* case, the Receivership was recognised in over 22 different jurisdictions, enabling asset recovery and/or access to critical information and documentation from those jurisdictions.

In conclusion, the appointment of a Receiver, whilst important and effective in the large and complex, billion dollar headline-grabbing global asset recovery cases, also has great utility, relevance, and expediency in less complicated, or indeed single-asset, situations. As previously stated, the bespoke nature of the Receivership appointment, combined with a finely tuned set of powers and crisp intervention strategy, can and will, in the writer's experience, lead to a swift and successful recovery. The application and use of a Receivership as a tactical and practical recovery tool in the international enforcement of judgment and awards is a powerful weapon in the litigator's armoury of recovery options, and its application and use is only constrained by the creativity and foresight of those designing how the intervention is deployed. **CDR**

interpath

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David Standish is a Managing Director, leading Interpath's market-leading Contentious Insolvency team. He has over 30 years' experience of working on some of the largest and most high-profile and complex matters. David is recognised as the leading practitioner in Receivership, and has pioneered the innovative use of this powerful process in numerous international and offshore situations. He regularly instructs lawyers in jurisdictions around the world, and lectures extensively on various aspects of contentious insolvency and asset recovery.

David has led a number of high-profile and complex bankruptcies, liquidations, Receiverships and Deceased Estates. By way of example, citing two current cases:

David is currently leading a Proceeds of Crime Receivership for the Serious Fraud Office in the UK in the largest UK confiscation order. In addition, he continues to lead the largest ever Receivership case in the UK (the *JSC BTA Bank vs Ablyazov* case), with alleged pre-judgment liabilities of circa $7 billion and assets (including significant financial services assets) spread internationally.

David works with talented lawyers across the world and his international experience truly spans the globe, including the jurisdictions of the US, Thailand, Russia, UAE, Cyprus, Latvia, Ukraine, BVI, St Vincent and the Grenadines, Barbados, The Marshall Islands Seychelles, Belize, Cayman, Germany, Switzerland, Luxemburg, Turkey, Jersey, Guernsey and others.

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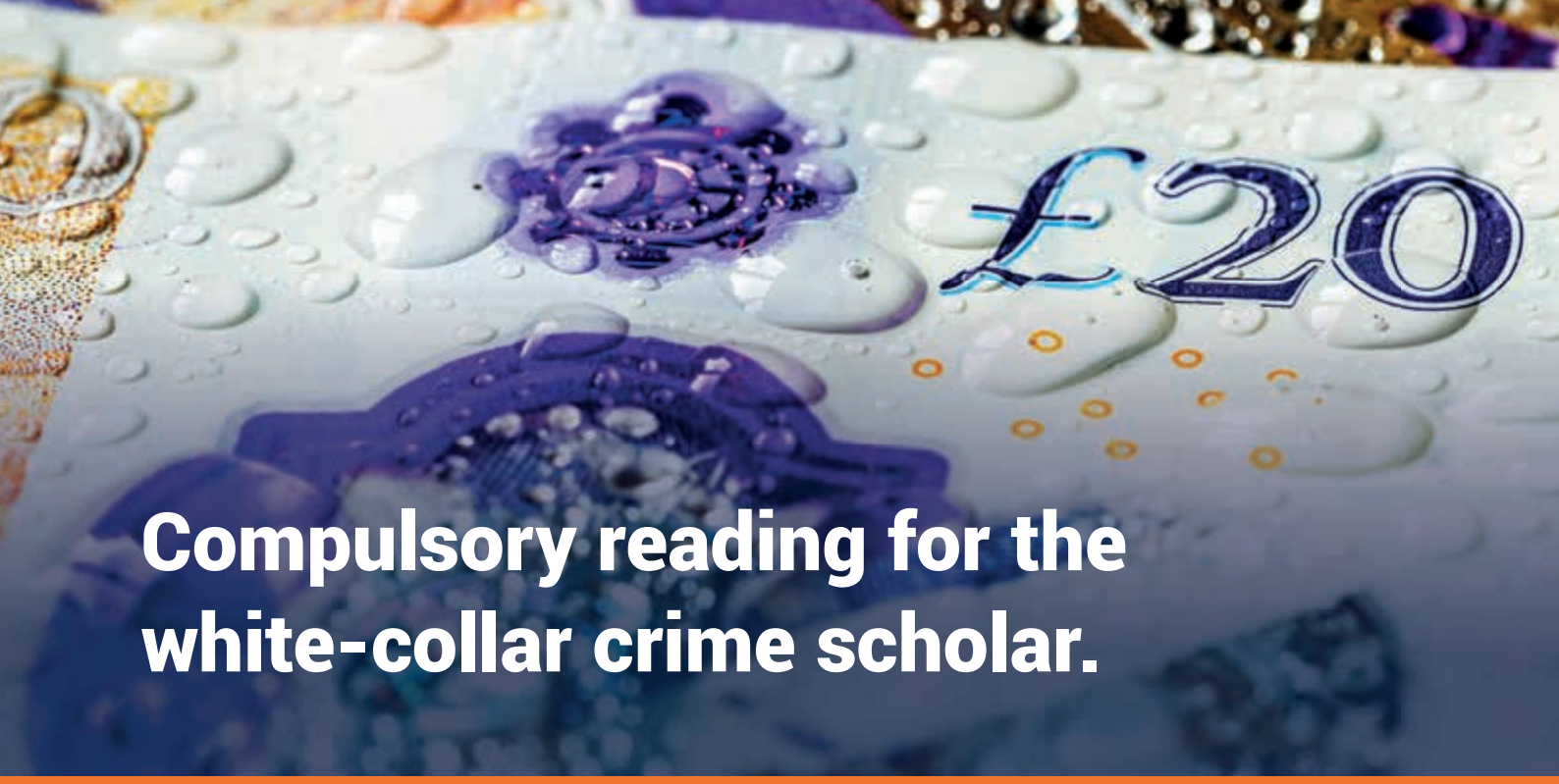

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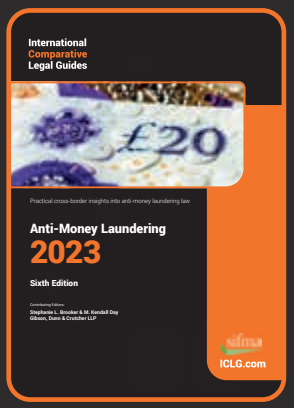

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Investigating a sovereign: the unique challenges

Readers of this publication will certainly be aware of two things when it comes to pursuing legal claims involving sovereign assets. Firstly, that claims against sovereigns are very common, and, secondly, that those sovereigns often do not want to pay up.

Indeed, sitting in the audience at a recent conference on sovereign enforcement, one of the panellists made the observation that, in his opinion, the number of sovereigns who intend to honour their debt obligations is as low as 5%.

Despite this, these awards are not meaningless, and recent years have seen a rise in the number of hedge funds moving into the sovereign debt market and commoditising these awards. By viewing these awards as tradeable assets and recognising them as an asset class which can offer very high returns on investment, they have opened up new opportunities for investigators in this field.

Whereas private clients can be personally or emotionally attached to the dispute in question, hedge funds are not burdened with the same baggage, and are simply looking for good investment returns. This opens up different possibilities for investigators, as pursuit of these funds present many unique challenges. Unlike in the enforcement of awards against private companies or individuals, in which more traditional asset tracing methods can be

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utilised, sovereign enforcement requires a combination of high-pressure tactics and multijurisdictional strategies, which force sovereign debtors to take a seat at the bargaining table and efficiently monetise judgments and arbitral awards.

However, these cases often prove, in equal measure, both fascinating and frustrating for investigators. They provide areas of complexity from a legal perspective far beyond a typical commercial dispute, and simply finding an asset is rarely enough. What about sovereign immunity doctrines in different countries? What are the exceptions to sovereign immunity? How can one go about piercing the corporate veil? What is an alter-ego argument?

We could go on and on. These questions often seem endless when dealing with asset tracing and recovery in a sovereign context, and it can be easy for an investigator to get bogged down in legalese and various points of law. Indeed, how can this not be the case when lawyers in different countries cannot agree on definitions of the word "enforcement" or "attachment", or even whether there is a difference between the two? Indeed, on a call last week for a current case, we listened to our client's US lawyers explain that they had received completely different opinions from four different Austrian law firms giving advice on this very point.

But how much legal knowledge does an investigator need?

Given the complexities involved, clearly some. The table below provides examples of conduct that has, and has not, been held to constitute commercial activity in the US:

Constitutes commercial activity	Does not constitute commercial activity
A State's issuance of bonds to US investors	A State's repayment of a loan to the IMF
A national space agency's obtaining and assertion of US patents	A provincial government's expropriation of a finance company's stake in a local company
A national airline's sale of tickets to US passengers	A State's expropriation of property of Jewish refugees in the wake of World War II
A defence ministry's purchase of military supplies	A Ministry of Agriculture's issuance of a licence for the export of rhesus monkeys to a US company
A State's art gallery's publication of books and advertising of exhibitions in the US	A State's imposition of taxes on an airline
Subcontracting a private company to conduct visa services within an embassy	Running an embassy

However, investigators are not lawyers and add real value to their clients and legal partners when focusing on our core investigative skills. It is important to remember that a little bit of knowledge is a dangerous thing; our role as investigators is not to advise on legal process, but to use our skills to support the legal strategy and reach an outcome for the client. This outcome is ultimately the recovery of funds, whether through available legal mechanisms or by getting the sovereign debtor back to the negotiation table.

In the context of sovereign enforcement, even more so than normal, communication is key

Working in tandem with legal counsel

In most matters, the best outcomes for clients are achieved through investigators and lawyers working closely together to develop, or support, an existing legal strategy. An experienced investigator will also be well-versed in working across a range of jurisdictions, and will have a good understanding of how best to support counsel in different legal systems.

Adapting to changing requirements

Investigations can evolve rapidly, and good investigators have the experience and know-how to be able to revise strategies and meet changing requirements at any point of their investigation. This can include, for example, an entirely new mandate from the client, deepening the client's understanding of a new issue using the existing investigative methodologies, or to tailor the agreed work product to fulfil a new purpose. This is particularly applicable to wide-ranging sovereign enforcement cases.

On a current case, we are working closely with our client and lawyers to identify assets, prove commercial usage, build alter-ego arguments and a variety of other requirements, in over 15 jurisdictions, in Europe and beyond. In some instances, we have built promising-looking arguments in a jurisdiction, before the vagaries of the local court system, political posturing, unexpected decisions by the local courts and other factors outside our control have necessitated either the complete abandonment of a particular workstream, or the rapid production of further evidence. In these situations, it is critical for investigators to quickly understand the changing requirements, to act with speed and efficiency, and to ensure that the necessary evidence is produced, and crucially, is usable in court.

Approaching a case and selecting which assets to target

As creditors quickly learn, securing court and arbitration awards is just the beginning, and enforcing those awards against sovereigns and state-owned enterprises (SOEs) is often the most significant hurdle in the recovery process. Most importantly, there are significant variations in the way sovereign immunity doctrines apply to sovereign and SOE assets in different jurisdictions. Therefore, a type of asset that is a good target for enforcement in one jurisdiction may be far from it in another jurisdiction.

Separately, in our experience, the likelihood that a sovereign debtor will try to evade paying the award is directly correlated with the award's size, and the national and international political consequences of a sovereign debtor failing to honour an award are often minimal.

Taking all these into account is an important factor for investigators at the beginning of a case. Whilst it is often critical to begin any sovereign asset trace by mapping a wide range of assets across multiple jurisdictions, it is often equally important to consider a more creative approach.

This is an area where investigators can add real value. Not only can we offer a good overall picture of a sovereign's global footprint and potential targets for enforcement, but we can also focus on more unusual asset classes. Below we give a snapshot of a few examples of asset classes that may be targeted, excluding the more obvious ones, which can form part of a more creative approach to enforcement.

Air traffic fees

K2 Integrity has extensive experience mapping the payment structures of the intergovernmental entity that manages air traffic operations for all EU Member States. This Belgium-headquartered organisation issues, collects, and processes aviation charges to aircraft operators accessing its members' air space through its central payment office Route Charges Office ("CRCO"). These charges fund air navigation facilities and "Air Traffic Management developments".

The 27 states frequently incorporate wholly-owned overseas SOEs to manage and collect this revenue, that can be identified by investigators. In a former case, K2 Integrity identified that one state disclosed the details of overseas bank accounts that directly collected the aviation charges, enabling our client law firm to pursue the strategy of freezing the accounts.

Transport networks

State-owned rail companies constitute useful entry points for investigators as railway lines often traverse national borders, while the trains themselves often have foreign stations as destinations. As state-owned railway companies typically operate commercial trains for profit, in our experience lawyers generally regard such companies as realistic targets for enforcement.

On previous projects, K2 Integrity has also mapped the corporate structures of state-owned rail networks across Eastern Europe and East Africa, with asset recovery as the ultimate objective.

For instance, as part of one former engagement, K2 Integrity identified a railroad between two African countries that was jointly owned by the two states through their respective state-owned railway companies. While we assessed it unlikely that courts in either state would authorise the seizure and recovery of the in-country assets of their joint venture partner, to avoid negatively impacting the joint venture or wider trade or diplomatic relations, we identified a further holding company for the venture incorporated overseas in the UK. The UK-incorporated company was ultimately owned by the two states (via state-owned railway companies), having been established in the late 19th century to manage the rail

transportation of minerals between the two. The UK company's directors included senior employees of both countries' state railway companies, while the UK company's annual accounts reported assets from the sale of the minerals and mineral royalties that were of interest to our client law firm.

The identification of the UK company highlights the importance of understanding geopolitical relationships, such as the UK's historical colonial control over East African trade networks, to broaden the scope of an investigation beyond a subject state's geographic neighbouring states.

Sovereign bonds

When a sovereign state issues a major bond offering to fundraise, the bond's literature identifies the intermediaries that temporarily hold the interest payments from the sovereign state in escrow accounts, before transferring the funds to bondholders over the bond's lifetime. When the bond matures, an intermediary known as the "fiscal agent" collects the principal from the sovereign state and holds it in escrow accounts before it is distributed among the bondholders. Bond literature enables an informed reader to deduce the exact dates on which repayments are made and the identity of the relevant intermediaries, namely the fiscal agent. In our experience, Eurobonds issued by European states often have London-based fiscal agents, and subsequently cite England and Wales as the presiding legal jurisdiction.

At maturation, bondholders also convert their bond certificates into cash or accounts via payment clearance systems, typically registered in Luxembourg. K2 Integrity has previously advised a law firm that subsequently froze bank accounts holding receivables belonging to a European state. This example shows that investigators should not just focus on asset-rich holding SOEs, but also include management companies that may collect receivables that are in transit to a state's bank accounts from an overseas jurisdiction.

The use of leverage

The list of asset classes of interest to enforcement could be extended further to include all manner of assets – from trademarks and patents, to property, sovereign debt and so on. However, the question of leverage is perhaps the key difference between sovereign asset traces and more standard enforcement against a private company or an individual.

And, indeed, an area where investigators can add real value.

Points of leverage are key to any sovereign asset tracing investigation and should be explored just as proficiently as high-value sovereign assets. When tracing sovereign assets, the objective is not necessarily to identify assets that can be seized, but assets that can be frozen – therefore, a strategy that has settlement in mind is key. Asset freezing helps paralyse operations, causes embarrassment, disrupts cashflows, and attracts unwanted scrutiny from the media, as well as international institutions and regulators. In other words, freezing assets assists in exerting pressure to induce a settlement.

For this reason, leverage assets are often worth more to the sovereign than the potential financial returns they promise to the enforcer. Even a temporary seizure or credible threat of execution can drive a sovereign to the bargaining table. Examples of this asset class include:

- overseas investments held through sovereign wealth funds;
- ships carrying valuable export products sold by SOEs; and
- receivables owed by foreign business counterparties and pending legal claims.

It is often essential that this information is gathered without alerting the sovereign, and this must be taken into account in any investigation.

To the same end, public relations can be a particularly effective tool for creating political unease for sovereigns, especially when it serves to inform prospective investors or business partners of the risks of doing business with, or in, the sovereign state in question.

By applying pressure globally through a combination of judicial proceedings and unexpected non-judicial channels, they can realise judgments and awards against foreign governments efficiently and profitably.

A good example of this is the case of Elliot Capital Management's (Elliot Capital) enforcement case following their purchase of Argentina's USD 80 million external debt after the state announced it would no longer service its bond repayments in 2001.

In order to collect the debt, Elliott Capital explored several avenues. The company tried to claim money deposited by the country's central bank in the US and Europe. It also sought to seize two satellite launch contracts between Argentina and Space X. Further, in 2007, the company learned that Argentina's presidential plane, the Tango 1, would travel to the US for scheduled maintenance and pilot training. They moved to get a court to keep the plane grounded after it landed, and to seize fuel money the pilots were expected to bring in cash. However, the Argentine government were warned of the move and cancelled the trip. In 2009, Argentina was preparing a stand at the world's largest book trade convention, the Frankfurt Book Fair. Rumours that assets could be seized forced Argentina to register its stand under a private individual rather than the state, and a showcase of

works of art requested by German curators was withheld given concerns they would be seized.

Elliot Capital had also been surveilling the ARA Libertad, a training ship owned by the Argentine navy, waiting for it to dock in a port where it would have a chance to enforce the bond collection. In 2012, the ARA Libertad docked in the port of Tema in Ghana with over 250 crew members on board participating in an annual training session. Elliott Capital persuaded a Ghanaian court to seize the ship. The move generated much media attention and, after two months, the ship was released.

In 2016, the Argentine government agreed to settle for USD 2.4 billion, believed to be the result of Elliott Capital having "relentlessly pursued Argentina in courts around the world".

This last point is key, and below is a selection of examples where K2 Integrity have targeted leverage assets to assist clients in the ultimate goal of recovering funds.

Targeting of commodities

Commodities are commonly seized or used as leverage in sovereign asset enforcement. For example, in a case K2 Integrity worked on against a European sovereign, the state was involved in offshore drilling projects with major multinational oil and gas companies. As one strategy, the London law firm we worked with initiated a discovery process, requesting information from each of these companies. This unnerved the companies in question, and in turn embarrassed the adverse sovereign, a factor which significantly contributed to the sovereign settling with our client.

Art is another commodity that has been used as leverage, particularly where the state has a large collection and is known to lend out artwork to galleries and museums globally. In the same case as above, K2 Integrity identified a collection which was to be shown in the Getty Center in LA, and obtained a valuation for the collection. Whilst the lawyers never pursued this vein of the enquiry, this intelligence provided the client with the option to seize the art, or to use the knowledge of the location and value of the collection to put pressure on the sovereign to negotiate.

Presidential planes

During 2019 and 2020 projects involving East African and Eastern European states, respectively, as respondents in international arbitration, K2 Integrity identified that their heads of state claimed to travel internationally in "presidential" state-owned jets, which were in fact borrowed on an *ad hoc* basis from other allied states or private businesses.

On the one hand, the fact that the jets were borrowed (by borrowing we do not refer to leasing or sub-leasing; to our knowledge, no money exchanged hands for the arrangement) meant that such high-profile and lucrative assets could not form part of a formal recovery strategy, as they were not owned by the relevant state. However, aviation experts advised K2 Integrity that the borrowed aircraft would not have the same immunity protections from temporary seizure or disruption, as they were not owned by the heads of state actively using them at the time.

The client was therefore receptive to the short-term strategy of seizing the aircraft at an opportune moment that would cause acute embarrassment for the head of state, such as at a prestigious international summit. In this regard, the aircrafts were valuable to the client as "leverage assets", as their strategic value greatly outweighed their market price.

Products critical to the operations of an SOE

In a case against a state-owned power company in the late-2010s, K2 Integrity was able to identify numerous instances of technical equipment being shipped from European ports to the ports of the country in question. This was particularly important as extensive research had identified that the state-owned power company did not own any assets outside its home state that were not encumbered by joint venture ownership.

Through a combination of field work and source enquiries, K2 Integrity identified that microchips crucial to the operation of the company's power plants were being shipped from Hamburg in Germany to the state-owned company's home ports, and crucially that ownership of these microchips was transferred to the SOE as soon as they were on board the vessel in Hamburg. By liaising with the authorities in Hamburg, our lawyers were able to freeze the shipment in Hamburg. Whilst the value of the microchips fell far short of the amount owed, a significant delay in their arrival would have disrupted the debtors' operations to such an extent that they swiftly returned to the negotiation table and agreed a settlement.

Conclusions

We hope that the above whistle-stop tour offers some insights into the important role played by investigators in sovereign asset enforcement, and how, despite the many difficulties of these cases, they are both great fun to work on, and very rewarding. They provide an excellent mental, as well as creative, challenge, and, when done well, provide great results for clients who often feel as if they are in a David and Goliath-style match up, with little chance of winning. CDR

K2 Integrity is the premier global risk advisory firm. We are dedicated to helping our clients mitigate risk, resolve disputes, and provide customised end-to-end solutions. Clients rely on our interdisciplinary teams that are supported by cutting-edge technology to safeguard their operations, reputations, and economic security. Together, our subject-matter experts have unparalleled deep industry experience and work with our clients in lockstep throughout each engagement. We specialise in financial crimes risk management, investigations, monitoring, cybersecurity, virtual asset advisory, ESG certification and compliance, national security and CFIUS, and training and certifications.

www.k2integrity.com

Tom Stanley is a Managing Director at K2 Integrity in London and head of the asset tracing practice. With extensive experience in litigation support, dispute resolution, and asset tracing, Tom assists private individuals and global organisations across a wide range of industries in locating assets ahead of litigation proceedings and in support of judgment enforcements.

Tom regularly advises clients in complex commercial disputes, including corporations and sovereign states facing fraud and asset recovery issues. He is an expert at analysing and utilising open source and public record information, as well as developing well-placed sources to solve disputes and support litigation proceedings.

He was educated at Exeter University, and holds a B.A. in English literature.

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Olena Morozovska is a senior director in K2 Integrity's Investigations and Disputes practice, based in London. Part of the asset tracing team, Olena's work focuses predominantly on complex cross-border asset tracing investigations. She assists clients with locating high-value assets in preparation for and during arbitration and litigation proceedings and in support of judgment enforcements. Olena also conducts multijurisdictional investigations relating to corruption, fraud, and reputational risk for clients across a wide range of industries, as well as providing clients with litigation support services.

Olena holds a M.A. (Oxon) in history from the University of Oxford and an M.Sc. in comparative politics from the London School of Economics. She is a native Russian and Ukrainian speaker.

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Alexander Stirling is a senior associate in K2 Integrity's Investigations and Disputes practice, based in London. He conducts investigative research on individuals, organisations, and other entities across multiple jurisdictions and industries to identify issues of potential concern for our clients, including incidents of malpractice, fraud, and conflicts of interest, among others. He provides pre-transactional and investment risk advisory services, much of which involves identifying and mitigating against issues related to sanctions compliance, political exposure, and broader reputational or compliance concerns. Alex specialises in asset tracing, particularly in support of corporate and investor-state disputes in Russia and the CIS region.

Alex has an M.A. in political analysis (Russia and Eastern Europe) from the University College London School of Slavonic and East European Studies, and a B.A. (Hons.) in Russian studies from the University of Bristol. He is fluent in Russian, and proficient in French and Polish.

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Bermuda

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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 Bermuda was settled, 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 to be taken in connection with such stages; in tandem with, or in advance of, other actions. For the purposes of this chapter, however, we will consider these stages in turn.

Investigation

In cases of 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 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 the effective service of documents in litigation), registered charges (note that registration is voluntary), winding-up notices, share capital information, the memorandum of association, the company's name (and any previous names), and its registration number. The Companies Act 1981 obliges companies to maintain registers of both the shareholders and the appointed directors and officers of that company, which must be kept at the company's registered office, and which are generally available for inspection by any member of the public. The Registrar of Companies launched an online company registry system in June 2021. This online registry allows the public to view all corporate registers maintained by the Registrar of Companies, and statutory filings and applications can also now be made online.

The Supreme 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 are 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 wrongdoing has occurred, it has the power to order third parties mixed up in the wrongdoing, albeit innocently, to provide documents or information which may identify the wrongdoer.

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 *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 HS & JE 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 partes* 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] Bda LR 38].

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 location and their 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 its 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 conversion, unjust enrichment, breach of contract, fraudulent misrepresentation or an action for breach of trust or fiduciary duty and are often brought together as concurrent causes of action [see *Ivanishvili and Ors v Credit Suisse Life (Bermuda) Ltd* [2022] Bda LR 28, a fraud-related claim brought by Credit Suisse Life customers which included claims for misrepresentation, breach of contract, breach of fiduciary duty and breach of statutory duty].

In circumstances where the vehicle used to perpetrate the wrongdoing is a Bermuda company, litigants may look to the Companies Act 1981 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."

The appointment of JPLs pending the winding up of a company is a discretionary measure available to the court, and the exercise of that discretion will ordinarily require there to be a good case for saying that a winding-up order will ultimately be made. [See *Raswant v Centaur Ventures Ltd & Ors* [2019] Bda LR 67.] A company should take a neutral position to a winding-up petition, including when an application is made on just and equitable grounds [see *Spanish Steps Holdings Ltd. v Point Investments Ltd.* [2021] Bda LR 97].

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 the Supreme Court 1985 (RSC) also provide for an application for the appointment of a receiver over property by way of equitable execution. The court needs to be 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. The jurisdiction is flexible; in a recent Supreme Court decision, it held, in the context of the enforcement of an arbitration award, that it was just and equitable to appoint receivers over the operating profit of a hotel in Panama, but not the revenues, due to concerns that may unduly impinge on existing hotel management at excessive cost [*Trump Panama Hotel Management LLC & Anor v Hotel TOC Inc & Ors* [2023] SC (Bda) 74 Civ].

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 supe-

rior 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 conflict 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 conflict 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, and bring actions against current or 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, which request 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] Bda LR 122.]

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] Bda LR 88].

IV Key challenges

From a practical perspective, concurrent criminal and civil proceedings in respect of the same set of facts can be difficult. When a criminal case is referred to the authorities, there can be a sense that the plaintiff/victim has lost control over the investigation or process which is left in the hands of a third party. Frustration may arise at a lack of progress or attention given to the issue. In a civil context, the plaintiff/victim maintains the control and can decide what steps to take; however, they also bear the burden of costs of taking those steps at the outset, and the breadth of search and seizure powers is more limited than the police's investigation powers.

V 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.

VI Using technology to aid asset recovery

More businesses have now developed business platforms and user interfaces for completely digital transactions. This produces a larger trail of information from which litigants can trace funds and assets.

Litigators are making increased use of artificial intelligence (**AI**) to assist in cases requiring complex evidence as to transactional activity and the trail of money. The tools being used range from discovery software, with AI facilitating searches and metadata extraction, to more specific tools which siphon information from the internet and publicly available sources to fit together pieces of the evidential puzzle, and predict the missing pieces when the full picture is not immediately clear. In addition to this, forensic

IT specialists are often drawn on to analyse data on servers and databases which may provide a picture as to who is communicating with each other, and what data has been extracted from servers.

VII Highlighting the influence of digital currencies: is this a game changer?

Bermuda's Digital Asset Business Act 2018 (**DABA**) marked the first time a legislature created a legal framework to regulate digital asset businesses. DABA's enactment has led to an increased number of entities moving to Bermuda to benefit from operating in a sophisticated regulatory environment, which in turn has created a virtuous cycle of higher market confidence and business activity.

Digital assets are susceptible to theft through the hacking of exchange wallets, personal wallets or any other methods of digital asset storage or transfer, as well as fraudulent entities that are designed to persuade retail investors, usually through advertisements, to participate in schemes that encourage investors to believe that they hold assets that are accruing value. DABA seeks to protect against that through various regulations, but that is not to say that these concerns are completely eliminated.

The Courts in Bermuda have not yet published any decisions relating to digital currencies, but with an increase in activity in the sector it is not expected to be far away. The interim remedies likely to be required in cases involving digital assets are: (1) worldwide freezing orders to restrain defendants (including "persons unknown") and third parties (for example, digital asset custodians/exchanges) from disposing of or dealing with assets in any way; and (2) *Bankers Trust* disclosure orders and/or potentially *Norwich Pharmacal* orders to compel any digital asset holding company that has been identified as the custodian of a wallet to disclose certain payment-related information about the account holders, including all of the "Know Your Customer" information they have in relation to those who control the wallets; and (3) service of Bermuda proceedings abroad.

Once the assets are identified, substantive claims are likely to seek compensation for restitution of unlawful gains and for the tort of conversion. If the ultimate beneficiaries can be identified, claims for deceit and restitution can be brought directly against these parties to recover the sums due and/or digital assets, plus interest and any expenses incurred in the recovery process (including legal fees).

VIII Recent developments and other impacting factors

The Personal Information Protection Act 2016 (**PIPA**) will come into force on 1 January 2025, after amendments were introduced in June 2023 to harmonise the PIPA with the Public Access to Information Act 2010. 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, PIPA and the safeguards it will require will assist in mitigating the risk against cybercrime to the ultimate benefit of Bermuda and its people. CDR

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.

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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.

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He is a member of the Bermuda branch of the Restructuring and Insolvency Specialists Association (**RISA**). He has been elected as a fellow of the American College of Trust and Estate Counsel (**ACTEC**) and is an elected member of the International Academy of Estate and Trust Law (**TIAETL**).

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I Executive summary

The British Virgin Islands (BVI) are 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 have 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 pace and complexity of the work before the BVI Courts continued uninterrupted throughout the COVID-19 pandemic. All hearings were conducted remotely for three years. Since the summer of 2023, in-person hearings have now returned, but the new digitally-led practices and procedures, which were introduced to combat the pandemic, look set to stay.

The BVI Courts continue to be at the leading-edge of significant and high-profile disputes, particularly in the crypto space. In doing so, they have continued to show their innovation and adaptability in the face of novel and complex issues. The BVI Courts and the financial services industry have also had to grapple with the introduction of increasingly severe sanction regimes against Russian-related entities. These have had a significant impact on the ability of sanctioned entities to continue to operate in the BVI, including to continue litigation.

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 with a dedicated Commercial Division. There is a strong local appeal court in the ECSC Court of Appeal, which is based in St Lucia and sits regularly in the BVI three times a year. It will also sit for urgent or heavyweight appeals outside of those scheduled sittings. 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 (BCA), the Insolvency Act 2003 (Insolvency Act) and related enactments. The BVI Court can also rely on provisions of the Eastern Caribbean Supreme Court (Virgin Islands) Act (Supreme Court Act) to incorporate historic powers of the English Court, as it has done in relation to the Court's ability to grant charging orders over shares in BVI companies.

The BVI Court has also recently enforced English law applicable on the settlement of the islands, including, specifically, the Fraudulent Conveyances Act 1571 (the "Statute of Elizabeth"). The ECSC Civil Procedure Rules were updated by the Revised Edition 2023, which came into effect on 31 July 2023, making extensive changes to the existing 2000 rules. The Commercial Division still has its own modified set of rules (from the base ECSC Civil Procedure Rules 2000 (EC CPR)) and its own Practice Direction, as well as a series of Practice Notes. A Commercial Court Guide remains under consideration.

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. A Stop Notice is a useful interim tool, requiring a party on whom it is served to give notice of any proposed dealings with specified shares, and a Stop Order prevents certain steps from being taken with respect to shares and/or monies held in court. These are often used but only take matters 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 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, and the Commercial Division has a well-established and effective Certificate of Urgency procedure for dealing with urgent cases.

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, often as part of enforcement action or in support of and in order to "police" a freezing injunction. The ECSC Court of Appeal has 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* [2018] BVIHCMAP 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, a BVI Court ordering committal may be of little concern, although such orders are, and have recently been made.

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 Bassatne* [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 and 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 a commonly used 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 on 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.

Various statutory claims may also be available. For example, to set aside transactions intended to defraud creditors, as mentioned, the Fraudulent Conveyances Act 1571 may be invoked, as well as section 81 the BVI's own Conveyancing and Law of Property Act 1961. In an insolvency context, various provisions of the Insolvency Act permit the challenge of transactions at or around the insolvency of a company, including transactions to connected persons and transactions at an undervalue. In the corporate context, 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 buyout 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 preservation and 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. Commonly, BVI scenarios are of a corporate nature; for example, where one shareholder has sought to exclude the other from the business/venture or where one stakeholder in a BVI company structure has transferred away valuable assets to the detriment of other stakeholders. In short, often a party will allege that he or she used to own, or have an interest in 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 rationale 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 as to the appropriate forum and avoiding parallel proceedings may arise early on.

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). The BVI Court has emphasised the flexibility of the *Norwich Pharmacal* jurisdiction, not only allowing prospective claimants to uncover the identity of an unknown wrongdoer, but also to obtain disclosure of information necessary to bring a claim or a "missing piece of the jigsaw". 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.

Where *Norwich Pharmacal* relief is sought, consideration is also given to other potential avenues by which documents may be obtained, for example, by: obtaining a letter of request from a foreign court which is seized of the dispute; or obtaining disclosure of documents which a person is entitled to by virtue of their position within a BVI company, i.e. as director or shareholder.

Injunctions

If proceedings are afoot in other jurisdictions, 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, there is a real risk of dissipation of assets against which a judgment may be enforced and it is just and convenient to do so.

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 are held within two years of issuing proceedings, and some claims may be "expedited" to trial in a shorter time period, 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 several years to be determined, particularly where appeals against interlocutory orders are, commonly, 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. Until the recent revision of the EC CPR, permission was required from the BVI Court 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). The revisions made to Part 7 now provide that permission to serve out is not required for matters which fall within the gateways set out under EC CPR Part 7.3, and the claimant now simply files a certificate for service out of the jurisdiction. Thereafter, the burden falls on the served defendant to seek to set aside service out, which the Court may do on the basis that the claim did not in fact fall within the Part 7.3 gateways, and/or that it otherwise lacks jurisdiction in relation to the matter. Due to the international nature of fraud cases involving multiple jurisdictions, defendants will often seek to set aside service or 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). This is likely to continue, even with the rule changes.

Depending on the location of a defendant, and what service options are permissible in the defendant's jurisdiction, 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 outside the jurisdiction, and it may be necessary to seek alternate service. The Court will order alternative service where it is impractical to serve via the "usual" methods. In exceptional circumstances, orders dispensing with service may also be made.

Assuming that the claim proceeds, statements of case are exchanged by the parties, disclosure takes place, and witness statements from witnesses of fact are exchanged, as are expert reports (on matters of foreign law, or forgery, for instance). 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 if they are not complied with, for example, an application for security for costs, for payment into court or for specific disclosure. The recent rule changes also reflect greater encouragement towards alternative dispute resolution (ADR), with the introduction of Part 38A and judicial settlement conferences, whereby the judge acts as a facilitator towards settlement. The Part envisages the possibility of a settlement conference ordered by the judge in the case management phase, or with the consent of the parties at a trial or hearing.

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. On substantive disputes, a full written judg-

ment setting out the court's reasons for its decision will be given. Rights to appeal may lie to the Eastern Caribbean Court of Appeal and, in turn, to the Judicial Committee of the Privy Council. Final determination of the claim can take several years until rights of appeal are exhausted, but expedited trials and appeals are possible in cases of extreme urgency.

At the end of a fraud trial, the ultimate remedy may be simple. For instance, in the case of a dispute over ownership of 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 a money judgment, a whole new battle begins, i.e., 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, although, if the appropriate interim remedies are in place from the outset, final enforcement will usually be far less challenging.

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. Where there has been serious fraud or mismanagement in the conduct of a company's affairs, that may be a freestanding basis to wind up a company on just and equitable grounds, regardless of solvency.

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 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). Second, claims against former directors, which is defined broadly to include not only *de jure* directors, but *de facto* and shadow directors as well. Those claims will include claims for misfeasance, insolvent trading, and fraudulent trading. Third, 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, 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 (FIA) and the Financial Services Commission (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. In appropriate circumstances, where a BVI regulated entity is involved, the BVI Court may refer the matter to the FSC. In addition, 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 perpetrate 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 seen 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.

Of course, 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 sense of pride in 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).

On 4 October 2021, the Privy Council handed down its much-anticipated decision in *Convoy Collateral Ltd v Broad Idea International Ltd & Anr.* [2021] UKPC 24, in which a seven-member panel reviewed and revisited

the existing authorities on the *Mareva* jurisdiction, concluding that the BVI Court did have jurisdiction to grant freezing orders in support of foreign proceedings. The judgment provides essential guidance on the applicability of the relevant principles to the exercise of the *Mareva* jurisdiction. The Privy Council's analysis was subsequently affirmed by the ECSC Court of Appeal in two BVI appeals: *Multibank FX International Corporation v Von Der Heydt Invest SA* (BVIHCVAP2021/0009 (delivered 21 February 2023, unreported)); and *Svirsky and Donin v Oyekenoc and Tensigma Limited* (BVIHCMAP2021/0040BVIHCMAP2021/0046BVIHCMAP2022/0005 (delivered 8 November 2023)).

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 handed down judgment in the long-running jurisdiction challenge of *JSC MCC Eurochem & anr v Livingston & ors* [2020] UKPC 31, where it again re-affirmed the application of the *Spiliada* test. In so doing, it overturned the ECSC 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 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 (although it is worth noting that this has become increasingly difficult in Hong Kong SAR). Where available, that recognition 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.

Recognition of a foreign office-holder may be available on a limited basis under the common law, applying the principles of modified universalism. Separately, assistance is available to insolvency office holders from certain specific countries, under Part XIX of the Insolvency Act 2003. The Court of Appeal has now confirmed that assistance is not available for common law, meaning that office-holders from non-designated countries can only seek common law recognition. 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. Although not currently in force, and there is therefore not currently a broader concept of Model Law "recognition" for foreign office-holders in the BVI, industry consultation continues in relation to bringing these provisions into force.

VII Using technology to aid asset 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,

including enacting a COVID Emergency Practice Direction to address a number of practical difficulties posed by remote working and hearings. 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 for three years 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. Despite the end of pandemic restrictions and the return to in-person hearings in the autumn of 2023, the COVID Emergency Practice Direction remains in force.

VIII Highlighting the influence of digital currencies: is this a game changer?

The growth of digital assets has been significant in recent years; for the BVI, as a major economic centre, especially with the prevalence of asset holding companies, digital assets are now an important part of the economy. The BVI regulator, the FSC, has recognised crypto-focused funds, and the BVI government has indicated a crypto-friendly approach, which has led to the establishment of such businesses in the BVI, including several major crypto issuers, exchanges and funds.

The BVI is becoming a major player and ranks highly in terms of the number of initial coin offerings and crypto exchanges and hedge funds. In February 2023, the BVI legislature passed the Virtual Assets Service Providers Act, 2022 (the "VASP Act"), which seeks to ensure the BVI's continued compliance with international standards and to adhere to specific recommendations from the Financial Action Task Force in respect of virtual assets. Whilst the legislation and regulatory framework is now bedding in, this demonstrates the BVI's commitment to supporting the crypto industry and attracting more virtual asset businesses to the jurisdiction.

The BVI courts have taken a commercial and flexible approach to date, adopting the reasoning adopted by the English courts in recent decisions relating to issues over ownership, situs, etc. of crypto assets. However, the BVI Court has been dealing with crypto-related matters since at least 2014, when it dealt with issues relating to the fallout from the collapse of MT Gox, which was at the time one of the world's largest Bitcoin exchanges. The first reported judgment on the legal status of crypto assets in the BVI was in *Philip Smith and Jason Kardachi (as joint liquidators) v Torque Group Holdings Limited (in liquidation)* [2021] BVIHC(COM) 31. Mr Justice Wallbank held that crypto assets are to be treated as "property" at common law and as "assets" for the purposes of the BVI Insolvency Act. He also granted liquidators sanction to convert the company's crypto assets into USD or Tether (a stable coin tied to USD) due to the volatility of the cryptocurrency market and the potential adverse effect on the book value of the company.

In *ChainSwap Limited v Persons Unknown*, the BVI Court also granted a freezing order against persons unknown in respect of crypto assets misappropriated from BVI cross-chain bridge, ChainSwap. In that case, hackers had exploited vulnerabilities in

ChainSwap's open-source coding to redirect tokens to the hackers' wallets. The freezing order was granted by reference to the owners of those digital wallets. The BVI Court also traced the misappropriated tokens through the "mixer", Tornado Cash.

The BVI Court has also been adaptable in relation to rules of service of proceedings and injunctions, especially when little is known about respondents other than their digital wallet address. For instance, in *AQF v XIO & Ors* (BVIHC(COM) 2023/0239 (delivered 23 November 2023)), the Court granted alternative service by way of sending copies of the application papers by non-fungible token (NFT) airdrop to the digital wallet addresses of the respondents. In another case, the Court has also allowed service via Telegram Messenger, an instant messaging service used regularly in relation to digital assets.

A number of recent high-profile insolvencies have involved BVI entities and the BVI Courts. Several entities within the FTX Group are incorporated in the BVI and were included as part of the Group's Chapter 11 bankruptcy filing in November 2022. That includes Alameda Research Ltd, a holding company for, as well as being at the centre of, a significant portion of the FTX Group's corporate structure. Separately, in June 2022, the BVI Court appointed liquidators over the major cryptocurrency hedge fund, Three Arrows Capital (based in Singapore but incorporated in the BVI). Numerous other cases have come before the BVI courts relating to BVI crypto businesses involved in fraud and asset tracing. The courts have not hesitated to order freezing and proprietary injunctions and ancillary disclosure orders in relation to crypto assets when the interests of justice so require. BVI lawyers and insolvency practitioners are also becoming skilled at identifying wallet addresses, linking them to centralised exchanges, and taking steps to prevent the dissipation of digital assets. The growth and influence of digital currencies is indeed a significant change but, to date, the BVI's courts, lawyers and accountants have adapted well.

IX 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 interrelation with other jurisdictions. As noted above, various amendments to the EC CPR were brought in, with the Revised Edition coming into effect from 31 July 2023. In addition to the significant change to service out provisions in EC CPR Part 7, and the increased encouragement towards ADR through the introduction of EC CPR Part 38A and judicial settlement conferences, both mentioned above, there have also been changes to the Part 62 provisions concerning leave to appeal, as well as other less significant changes. The application of the revised rules is subject to transitional arrangements, which mean that they do not apply to pre-existing claims in which a trial date has been fixed, unless the trial is adjourned. An application to adjourn a trial will be treated as a pre-trial review, from which the new rules will apply; otherwise, the Court should fix a CMC in any claim for which no trial date has been fixed with the new rules applying from that CMC.

On 1 January 2023, a number of changes to the BVI Business Companies Act came into force. These amendments affect the information publicly available about BVI companies and the information BVI companies need to file, and they contain amendments to certain statutory regimes (voluntary liquidation and continuation) which are designed to prevent their abuse.

As a result of the amendments, BVI companies' registers of directors are now publicly available. BVI companies must also file an annual return, containing prescribed financial information, although that will not be available for public inspection. The amendments also provide a mechanism for, but do not introduce

or implement, a "Register of Persons with Significant Control". The BVI committed to introduce this register by 2023 to comply with an EU directive aimed at ensuring beneficial ownership information is publicly accessible. However, that process was delayed as a result of a judgment of the European Court of Justice in November 2022, which held that the EU directive was invalid and public access to beneficial ownership information constitutes a serious interference with the fundamental rights to respect for private life and to the protection of personal data. Although not of direct application to the BVI, the BVI government has indicated its intention to ensure that any public access does not infringe human rights. From recent announcements by both the BVI and UK governments, it seems that a commitment remains to implement, by Q4 2024 (and no later than Q2 2025), subject to a legitimate interest framework, a publicly accessible register of beneficial ownership consistent with the standards identified in the implementation review of the EU's Fifth Anti-Money Laundering Directive.

In changes to the voluntary liquidation regime, all voluntary liquidators must satisfy a new residency requirement. It is hoped that that change will increase accountability for the voluntary liquidation process.

Bearer shares, which have a long and controversial history, have finally been abolished completely. Any remaining bearer shares were automatically converted into registered shares.

The amendments introduced a requirement to give public notice, via the *BVI Gazette*, of a BVI company's intention to continue out to a foreign jurisdiction. In a number of cases, it has been alleged that the continuation regime has been used to try to avoid liability to creditors. The notice period may make that more difficult.

The amendments to the BCA also made fundamental changes to the rules and process relating to the dissolution of companies. There is no longer a distinction between strike off and dissolution, which now happen simultaneously. The power of the Registrar to restore companies was extended to dissolved companies and (in theory) restoration via this administrative (out of court) process was expanded. However, the court's power to restore dissolved companies was preserved, and in many cases, it is still necessary to make an application to court. One effect of the new rules is that many BVI companies, which had failed to pay annual fees or maintain a registered agent (for instance), were automatically dissolved at the end of June 2023. As such, BVI lawyers are receiving increased requests for assistance from clients who wish to restore BVI companies to the register.

On a related note, in *Svirsky and Donin v Oyekenoc and Tensigma Limited* (see above), the ECSC Court of Appeal recently held that a freezing injunction may be made against and in relation to a dissolved company (which technically does not exist after dissolution) and its assets, so long as there is a realistic prospect of the dissolved company being restored. In that case, the Court accepted that that there was a good arguable case that the dissolution of the company and transfers of its assets were part and parcel of a dissipatation scheme.

Separately, consultation continues on the Charging Order Act 2020, a particularly important piece of enforcement legislation for the BVI, and on changes to the Legal Profession Act 2015 which was last revised in 2020. CDR

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Richard has a track record of successfully representing clients before the BVI Commercial Court and the Eastern Caribbean Court of Appeal, and where appropriate negotiating favourable settlements to avoid litigation.

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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 a 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 SAAD Investments Company Limited* 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 closely related 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 for a small fee.
- The list of shareholders of resident companies is also available for public inspection (though not for the more commonly exempted companies).
- 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.

As such, despite the jurisdiction's somewhat romanticised reputation for secrecy, it is 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 registered office service providers (RO Providers) to exempted Cayman Islands companies. Each exempted company is required to use an RO Provider, and each RO Provider is subject to strict "know your customer" and anti-money laundering 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.

Where justified, 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]). 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 its 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 Islands 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. One of the grounds for the appointment of official liquidators is so that an

independent and thorough investigation can be undertaken. The appointment of liquidators strips the directors (who sometimes are the wrongdoers) of their power and brings in a partially retrospective moratorium (from the date the petition is presented) 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 without notice to the target company in order to secure the remaining assets, but the applicant must show some mismanagement, risk of dissipation of assets or destruction of documents.

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. These include statutory powers to call for documents and information about the company's business from certain persons (ss 103 and 138 of the Companies Act (2023 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]). As such, fishing expeditions for documents are not permitted.

In addition to their information-gathering powers, the official liquidators 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 other forms. Therefore, a preliminary assessment of the prospects of enforcement and recovery (as opposed to merely the 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; 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 the 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 will necessarily 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 has been revolutionised with the coming into force of the Private Funding of Legal Services Act 2020. This Act has abolished the offences of maintenance and champerty and, subject to certain requirements, has enabled 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. That being said, such innovative fee structures are not yet commonplace.

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 accustomed to 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 shown 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 prin-

ciples (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 Using technology to aid asset 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 in order to succeed.

In this regard, the Cayman Islands faces some of the same issues faced by other jurisdictions the world over: an explosion in the volume of digital information; and the proliferation of multiple private messaging services with end-to-end encryption that bypass traditional email, which would otherwise trace 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 the increasing sophistication of document-review artificial intelligence applications, which can enable drastic reductions in the manpower requirements for the (traditionally expensive) discovery stage of fraud litigation.

VIII Highlighting the influence of digital currencies: is this a game changer?

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 framework compliant with the tenets of the Financial Action Taskforce, for the supervision and regulation of virtual asset services businesses in the Cayman Islands; it can be expected that this 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.

Recent judgments in the English courts (e.g. *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 (Comm)

and *D'Aloia v Persons Unknown* [2022] EWHC 1723 (Ch)) demonstrate that the usual remedies available against fraudsters, such as freezing orders, *Norwich Pharmacal* orders and *Bankers Trust* orders, are also available in relation to fraud involving digital currencies under the common law and that substituted service solutions can be adopted where appropriate. Such decisions may be expected to be persuasive in the Cayman Islands.

Recent decisions, such as in *In the matter of Aubit International* (unreported, FSD No 271 of 2023 (DDJ), 19 October 2023), show the Court's willingness to appoint official liquidators over digital asset companies to undertake an investigation where there have been accusations of fraudulent conduct.

IX Recent developments and other impacting factors

The most immediate recent significant development is the coming into force in May 2021 of the Private Funding of Legal Services Act 2020. As well as doing away with the offences of maintenance and champerty, the Act has introduced 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.

In recent years, the Cayman Islands continued 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 since opened up the register for online access. The jurisdiction had previously committed to providing public access to beneficial ownership registers once such access is implemented by the EU Member States, which was expected to be in 2023. However, the recent ruling by the European Court of Justice (ECJ) in Joined Cases C-37/20 (*Luxembourg Business Registers*) and C-601/20 (*Sovim-which*) found public beneficial ownership registers to interfere with the right to private life and the protection of personal data. New amendments to the Beneficial Ownership regime – expected to come into force in 2024 – provide a mechanism for regulations to be passed providing public access to the beneficial owner register. However, no such regulations are anticipated until further analysis and consultation with the UK government is completed following the ECJ decision. CDR

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.

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I Executive summary

In recent years, we have increasingly received inquiries from foreign clients regarding the tracing and recovery of funds wrongfully remitted to the People's Republic of China (PRC) due to acts of fraud, especially those perpetrated over the internet. A typical example is that the fraudsters fabricate a transaction (e.g., the purchase of goods or shares), impersonate a key player in the transaction (e.g., director or manager of the victim, etc.), and request the victim to facilitate the transaction by remitting funds to certain accounts held with a PRC financial institution.

In this chapter, we will introduce the legal framework which victims of fraud may utilise to trace and recover assets in the PRC, with an emphasis on potentially relevant substantive remedies and useful procedural measures, causes of action, the interplay between civil and criminal proceedings, cross-border mechanisms, recent legal developments regarding cryptocurrencies and the potential liability of financial institutions.

II Important legal framework and statutory underpinnings to fraud, asset tracing, and recovery schemes

The legal landscape in the PRC pertinent to combatting fraud and protecting the rights of victims comprises a number of laws, such as the Civil Code, the Civil Procedure Law, the Criminal Law, the Criminal Procedure Law, the Administrative Law, the Company Law, the Securities Law, the Anti-Internet and Telecom Fraud Law, and the Anti-Money Laundering Law.

The PRC adopts a civil law system, so in general the court judgments have no binding force in adjudication. The PRC Supreme People's Court and the PRC Supreme People's Procuratorate can promulgate

interpretative rules (i.e., judicial interpretations) which have binding force on the judicial authorities involved in the application of laws and judicial activities. The central governmental ministries (e.g., the Ministry of Public Security) can also promulgate rules that the respective ministry and its local counterparts must follow in the administrative activities.

In addition, some bilateral or multilateral treaties (e.g., treaties on judicial mutual assistance or investment protection) to which the PRC is a party may also be relevant in certain circumstances.

Civil proceedings

A victim may initiate civil proceedings against the fraudster and/or relevant parties to seek the recovery of assets.

Procedural remedies/measures

A party may request the court to freeze the opposing party's assets, order that the opposing party take or cease certain actions, and/or order the opposing party to disclose certain documents solely in the requested party's possession. A party may also request the court to join relevant parties as co-defendants or necessary third parties to maximise the chances of recovery. Furthermore, a party may request the court to issue investigation orders to third parties, requesting them to disclose certain information or documents relevant and material to the resolution of the case.

In the context of a fraud, the victim may sue the fraudster, the fraudster's director(s), and/or managers, as well as the bank that handles the funds in the same proceeding, and request the court to: (i) freeze the identifiable assets of the relevant defendants; (ii) order that the bank retain the funds until the issuance of a judgment; (iii) order the bank to disclose certain documents that may be critical for investigating the fraud or establishing the defendants' liability; and (iv) order other third parties (e.g., police bureau(s)) to disclose information or documents relevant and material to the recovery.

Substantive remedies

There is no standalone fraud claim under PRC law. Rather, provisions relating to fraudulent conduct are found within different laws and administrative regulations. Recourse for victims of a fraud to trace and recover assets includes those generally available under the above-mentioned laws and regulations.

Under the PRC Civil Code, a victim of fraud may assert claims against the fraudster under various causes of actions, which are illustrated below:

- where the victim's assets have been wrongfully transferred to a PRC entity due to a fabricated transaction, the victim may request the company to return the assets under a claim of unjust enrichment;
- where the victim of fraud is induced to enter into a contract against its will, courts or arbitral tribunals will generally find the contract to be revocable at the option of the victim, and award the victim damages that may cover resale losses, production losses and operating losses, among others;
- where the victim of fraud is induced to negotiate a contract with the fraudster who has no real intention of entering into the contract (e.g., the fraudster's only purpose is to solicit certain information from the victim useful for the fraudster's other acts of fraud), courts or arbitral tribunals may also award the victim reliance damages (e.g., direct cost of disbursements); and
- where the fraud is perpetrated by a conspiracy involving multiple fraudsters, the victim may also request joint and several compensation. In particular, a third party who knowingly assists a perpetrator in carrying out a fraudulent act may bear joint and several liability with the perpetrator.

Under the PRC Company Law (as revised and effective July 1, 2024), if the fraud is perpetrated by the directors or officers of a company, the victim may initiate a civil action against the company, as well as the directors or officers, and claim for damages.

Under the PRC Securities Law, if an issuer or securities firm misrepresents or omits material information during the offering and issuance of securities or information disclosures that affect the investors' decision-making and harms their interests, such conduct may constitute "fraud" in a legal sense. The investors may report the conduct to the relevant authorities (e.g., China Securities Regulatory Commission, police bureaus, etc.) and/or initiate civil litigation against the wrongdoers. The wrongdoers and relevant responsible persons could be subject to administrative liability, such as penalties and revocation of their business licence, or civil liability, such as damage compensation.

Administrative proceedings

Procedural remedies/measures

Administrative proceedings consist of administrative review and administrative litigation. If the tracing and recovery of funds require assistance from administrative departments (e.g., police bureaus, the National Financial Regulatory Administration, SAFE, etc.), but they refuse to act, the victim may request the competent department to review the administrative department's decision. The victim may request the reviewing department to obtain relevant and material information from relevant third parties.

The victim may also initiate administrative litigation proceedings against the relevant administrative department, and apply for the same procedural remedies/measures applicable in civil litigation proceedings.

Substantive remedies

For legal violations of a public law nature (e.g., those under the Company Law or the Securities Law), the victim may also report the wrongdoer's conduct to the relevant authorities (e.g., State Administration for Market Regulation, China Securities Regulatory Commission). The wrongdoer and relevant responsible persons could be subject to administrative punishment, such as penalty, suspension of business, and revocation of business licences.

Criminal proceedings

Procedural remedies/measures

Criminal proceedings are mainly conducted by the police bureaus, the procuratorates, and the courts' criminal divisions. After a police bureau has accepted a matter reported by the victim, the bureau will initiate an investigation of the matter and attempt to trace the proceeds of the fraud. If the police bureau determines that the suspect has committed a crime, it will recommend the procuratorate to initiate a criminal prosecution against the suspect. If the procuratorate confirms that the evidence is sufficient to establish a crime, it will initiate the prosecution. The proceeds will be returned to the victim after the court has decided that they are indeed proceeds of the crime. On some occasions, the proceeds can be returned to the victim at the investigation and prosecution stage by the police bureaus and procuratorates, respectively.

In a criminal proceeding, the police bureau, the procuratorate, and the court generally have greater power and authority to investigate and gather information, to freeze relevant assets, and to restrict the activities of relevant persons or request cooperation by relevant third parties. This makes criminal proceedings a more effective means of asset tracing and recovery compared to civil proceedings. However, the victim may have limited access to and control of the criminal proceedings. The police bureau, the procuratorate, and the court are not generally obligated to share relevant information or materials with the victim. That said, the victim may initiate a civil action collateral to the criminal action to raise its claims for compensation and obtain access to the relevant information and materials obtained by the police bureau, the procuratorate, and the court.

Substantive remedies

The PRC Criminal Law provides for various criminal fraud offences, such as fraud, contract fraud, illegal taking of deposits from the public, fraudulent fundraising, and financial fraud. The remedies available to the victim are generally limited to a return of the property or compensation for the actual losses in criminal proceedings.

A party who knowingly assists in criminal fraud may become a joint defendant to the crime if there is common intent. Standalone criminal sanctions may apply where the party knowingly harbours, transfers, acquires, sells on behalf of others, or conceals by other means the proceeds or benefits derived from criminal fraud.

International negotiation and arbitration proceedings

In certain circumstances, a foreign victim of fraud may consider seeking recovery through an applicable bilateral or multilateral treaty; for example, if the victim believes that the relevant governmental authorities are not responsive to its legitimate requests for asset tracing, or it has been unfairly treated in the relevant administrative or judicial proceedings. The PRC has entered into bilateral treaties with many countries. Most of these treaties provide for standard obligations of a contracting state, such as fair and equitable treatment, full

protection and security, and national treatment, for the purpose of protecting an investor's "qualified investment" in that state. The victim may seek remedies, such as damages, if it can establish that the contracting state has breached the obligation(s) under the treaty or customary international laws. Attention should be paid to whether the victim's remittance of funds into the PRC may constitute a qualified investment under the applicable treaty. Disputes under the treaties are generally resolved via international arbitration under *ad hoc* arbitration proceedings or arbitration proceedings administered by ICSID.

III Case triage: main stages of fraud, asset tracing and recovery cases

Assume the following hypothetical email fraud: the victim – a company in the U.S. and the buyer in a sale of goods transaction – receives an email from a PRC fraudster pretending to be the director of the seller in the PRC. The fraudster asks the victim to transfer the payment of goods to an account other than that specified in the sales contract. The victim acts accordingly. The victim later discovers that the email was from the fraudster and the funds had been remitted to the PRC bank account of a PRC company that the victim has never heard of.

Below are general steps for tracing and recovering the company's assets under the PRC legal regime, and relevant legal tools introduced above.

Step 1: Evidence collection and preliminary analysis

The first step is to ascertain the facts of the case and to collect all relevant documentary evidence. In particular, statements should be prepared at this stage to be presented to the relevant entities, such as the receiving bank and relevant governmental authorities, explaining why the relevant entities should provide assistance under the applicable laws.

It is advisable for attorneys from the relevant jurisdictions to be engaged as early as possible to increase the chances that evidence can be effectively preserved, and strategies carefully formulated.

Step 2: Approach relevant entities, regulators, and organisations in the relevant jurisdictions

For cross-border frauds like the hypothetical case, parallel actions in the relevant jurisdictions are often necessary.

U.S.

The victim may immediately contact the U.S. local bank which remitted the funds to the PRC bank. Specifically, the victim may report the matter to the U.S. bank and ask the U.S. bank to immediately contact the PRC bank, requesting the latter to return or place a hold on the funds. The victim should also try to approach the supervising entities of the U.S. bank if there are clues indicating that the bank may have violated relevant rules on the remittance of the funds to the PRC bank.

The victim should also report the matter to the local police and see to what extent the police become involved. However, the actions of the local police may be limited in the case that the funds were remitted to another country such as the PRC. It is advisable for the victim to also seek advice from a local attorney on how to approach INTERPOL and request it to forward relevant requests (e.g., the return of funds, investigation of crimes, etc.) to its counterpart in the PRC (i.e., the International Cooperation Bureau of the PRC Ministry of Public Security), which shall review the request and decide to forward the same to the relevant local police bureaus.

PRC

The victim may immediately contact the recipient bank in the PRC and request it to return the funds held in the bank's receiving account, or at least retain the funds. In parallel, the victim may also contact the competent PRC police bureaus and request them to: (1) help persuade the bank to take the above-mentioned actions; and (2) accept the matter and initiate criminal investigations. That said, PRC police bureaus may hesitate to accept a matter such as the hypothetical case. They may generally consider the matter a foreign one, and only act if the matter has first been reported to the local police in the foreign country and referred by INTERPOL to the relevant PRC police bureaus. It is our experience that, in general, the local police bureaus take requests seriously and act accordingly if the requests are successfully forwarded to them by INTERPOL and then the International Cooperation Bureau of the PRC Ministry of Public Security.

It is also advisable for the victim to try to obtain relevant materials from the bank regarding the disposal of the funds as well as documents the PRC recipient provided to the bank justifying the acceptance of the funds. If, in the documents provided to the bank, the PRC recipient states that it has delivered the goods to the victim, the victim should carefully examine the documents to see if any faked contents can be identified on the face of the documents (e.g., bill of lading, commercial invoice, packing list, airway bill, shipping advice, letter of credit, etc.). The victim may also try to verify the authenticity of the relevant documents with related entities (e.g., shipping company, customs, etc.).

The victim may put pressure on the PRC bank to return the successfully intercepted funds if it can establish that the documents presented by the recipient to the PRC bank contain obviously faked content that should have been discovered. If the bank refuses to cooperate, the victim should also be prepared to report the matter and the bank's failure to relevant regulatory authorities such as the People's Bank of China, the National Financial Regulatory Administration, the State Administration of Foreign Exchange, etc. The regulators are generally responsive and willing to provide assistance.

Step 3: Plan and commence legal actions

The victim may further consider initiating legal action against the relevant entities, not necessarily limited to the identified fraudsters, if the actions taken in Steps 1 and 2 are not productive.

A combined civil, administrative, and/or criminal approach may also be necessary.

Civil proceedings

In the civil context, the victim may request the first-layer funds recipient(s) to return the funds on the basis of unjust enrichment; the victim may also join the subsequent layers funds recipient(s) as co-defendants if the funds can be identified as coming from the victim. The victim may also request the bank to compensate for the loss under tort claims if it can establish that the bank violated certain rules and regulations during its handling of the funds.

The victim may utilise the procedural remedies/measures introduced above to facilitate its asset tracing and recovery. For example, the victim: may request the court to freeze the funds at the bank; may request the court to order that the funds recipient, the fraudster, and/or the bank disclose certain information and documents material to the adjudication of the case; and may request the court to issue investigation orders to relevant third parties, such as the police bureau, requesting it to disclose certain information and documents material to the adjudication of the case. The obtained information may also be useful for parallel informal, administrative and/or criminal actions.

In particular, the victim should try to characterise the matter to be adjudicated in civil proceedings as a civil matter; otherwise, the court may forward the case to the local police bureau, or may suspend the proceedings pending the result of the criminal proceeding. Achieving this objective may sometimes be difficult, because the court might be hesitant to accept the case if it senses any criminal aspects. This is especially so when the recipient company or the fraudster does not show up. Without asking questions from and clarifying the issues with the recipient company or the fraudster, the court may not feel comfortable concluding that the issues are purely civil and independent from any criminal issues.

Administrative proceedings

As discussed above, the victim may seek assistance from relevant authorities such as police bureaus, the local counterparts of the People's Bank of China, the National Financial Regulatory Administration, the State Administration of Foreign Exchange, etc. If they refuse to respond to the victim's relevant requests, and if any of their decisions constitute an administrative action or inaction, the victim may appeal the decision through the administrative review procedure. If the victim cannot overturn the decision in such procedure, it may sue the relevant authorities via administrative litigation.

Criminal proceedings

If the police bureau accepts the matter, it may initiate a criminal investigation. If the bureau confirms that crimes have been committed and the perpetrators should be prosecuted, it will transfer the matter to the procuratorate and recommend criminal actions be instituted against the perpetrators. The procuratorate will then examine the matter independently and consider whether the evidence is sufficient to establish criminality, in which case it will file criminal charges. Victims have limited opportunity to participate in the criminal process. Neither the

police bureau nor the procuratorate will generally share their findings and relevant information or documents with the victim. The victim may have to wait until the court holds a hearing, at which the victim is entitled to attend and make statements.

If the court rules that the perpetrators have committed crimes, the court may order the defrauded funds to be returned to the victim (returned by the suspects or collected by the police bureau).

IV Parallel proceedings: a combined civil and criminal approach

PRC law contains detailed rules on the interplay between the civil and criminal actions. The key is to what extent the issues in the civil proceedings and those in the criminal proceedings are interrelated:

- **Concurrent parallel civil and criminal proceedings**. This typically occurs where the matter can be divided into civil and criminal matters independent from each other, or where the civil and criminal issues can be isolated from each other and the victim's interests can be better protected by the timely adjudication of the civil issues.
- **Civil proceeding suspended pending the result of the criminal proceeding**. This occurs where the adjudication of the issues in the civil proceeding is dependent on the outcome of the criminal proceeding.
- **Refusal to accept the civil claim**. A court will refuse to accept a civil claim where the issues in the civil proceeding and the criminal proceeding itself arise from the same matter, and either the court finds that the victim has been fully compensated through the criminal proceedings or determines the matter should first be handled by the police bureau.

V Key challenges

Key challenges usually concern access to information, willingness of the relevant entities to assist or cooperate, uncertainty of the competence of the relevant authorities, duration of legal proceedings, and identifying the fraudsters' assets for enforcement purposes.

Consider this hypothetical: in the early stages of asset tracing, the victim may not have enough information to characterise the nature of the matter and justify its requests for the return of the funds or assistance. The bank may need a decision from the court or the police bureau to return the funds. The police bureau may consider the request a civil matter and suggest the victim file a civil lawsuit. After the victim files a civil lawsuit against the recipient and identifiable fraudster, the defendants may not participate in the proceedings, and the court may refuse to accept the case, suspecting that it is a criminal matter. Instead, the court may forward the case to

the police bureau; however, there is no guarantee the police bureau will accept the matter for investigation. The police bureau may consider the request a foreign matter and require the victim to report it to local law enforcement in its home country and forward its request through INTERPOL.

Even if the court accepts the case, it may suspend the proceedings pending the outcome of the criminal proceeding. The civil and criminal proceedings may take years to complete, especially given the possibility of appeal. Even if the proceedings conclude favourably for the victim, there is no guarantee that the perpetrators have sufficient assets to satisfy a judgment. Though PRC courts have efficient means to discover available assets of the defendants or the suspects, the funds may have been divided into multiple tranches and transferred to unknown entities through many tiers of ownership, and may even have been expended or laundered. This could make the courts' tracing of assets extremely difficult.

To mitigate the effects of these challenges, victims should obtain assistance from relevant experts, such as lawyers, to carefully plan the tracing actions, including strategies for communications with relevant entities. Lawyers from the relevant jurisdictions should also work closely together to ensure each recovery action proceeds smoothly. In our experience, an early recovery can sometimes be achieved through effective

communication with the bank and the early involvement of the police bureau. Funds may be returned to the victim without the need of a court decision or the police bureau's acceptance of the case.

VI Coping with COVID-19

The effects of COVID-19 on the activities and the operation of the judicial and administrative departments in the PRC have generally been extinguished. Through dealing with the pandemic, relevant judicial and administrative departments have developed efficient electronic tools (e.g., online hearing platforms) for people to work and communicate online. This may greatly facilitate asset tracing and recovery on matters involving multiple cities. Working on online systems also ensures better record keeping for the relevant authorities.

VII Cross-jurisdictional mechanisms: issues and solutions in recent times

If the victim has filed a civil action overseas, it may be able to obtain injunctive relief from the foreign court. However, under the current PRC legal regime, injunctive relief issued by foreign courts cannot be enforced in the PRC. If the victim obtains a favourable judgment in a foreign court, the foreign judgment may need to be enforced by a PRC court on the basis of reciprocity, which does not guarantee that the judgment will be recognised and enforced.

If a civil action is commenced in the PRC and it is necessary to obtain certain material evidence in a foreign country, the victim may confer with attorneys in that country to see if the relevant foreign court may help order the relevant party to produce the evidence. For example, Section 1782 of Title 28 of the United States Code allows an "interested party" to proceedings administered by a "foreign or international tribunal" to seek U.S.-style discovery from a person or entity located in the United States. The U.S. Supreme Court has clarified that the term "tribunal" does not cover arbitral tribunals.

VIII Using technology to aid asset recovery

The development of legal artificial intelligence (AI) is flourishing around the world, including in China. Based on our communications with relevant practitioners in that field, we understand the current developments mainly focus on the following aspects: document/contract review; legal research; basic legal consulting; and evidence analysis.

While these AI products are still under development, we expect that the following use scenarios may facilitate asset tracing and recovery in the near future.

- AI products may help attorneys to quickly identify relevant documents and the underlying relationships among them. In particular, these products may discern the flows of funds among a large volume of remittance records.
- AI products may, based on their "understanding" of the matter, help identify patterns of fraud and suggest new search terms or issues for the attorneys to consider.
- AI products may, based on their access to online information, help identify potentially enforceable assets of the defendants in judicial proceedings, such as bank accounts, real estate, automobiles, accounts receivable under judgments and awards, etc.

We understand the courts are actively exploring the means to increase the efficiency of judicial proceedings by incorporating relevant AI-based tools, such as generative AIs based on large language models (LLM). With the incorporation of those tools, it is anticipated that the duration of judicial proceedings could be shortened.

IX Highlighting the influence of digital currencies: is this a game changer?

Cryptocurrencies are strictly regulated in the PRC. Previously, PRC courts had held that cryptocurren-

cies did not share the same legal status with official currencies. Certain transactions concerning cryptocurrencies had also been invalidated by PRC courts on the basis of violation of public order and morals. Certain plaintiffs' claims for the return or provision of cryptocurrencies were also rejected by the courts on the grounds that the transactions were illegal, and the plaintiffs should therefore assume the risk of incurring loss by engaging in such illegal transactions.

That said, the legal landscape is developing. On April 13, 2023, the PRC Supreme People's Court issued the *Minutes of the National Conference on Financial Trial in the Courts (consultation draft)* (the "**Draft**"). The Draft illustrates the following notable changes on previous judicial practice:

- Contracts stipulating payment for goods or services with a limited amount of cryptocurrency should generally be considered valid. Courts should generally support claims for cryptocurrencies or, if the cryptocurrencies cannot be provided, alternative claims for equivalent compensation. However, courts should find invalid contracts which stipulate that cryptocurrency is to be used as a recurring payment instrument for official currencies or goods in kind.
- Courts may order that a defendant transfer or return cryptocurrency to the plaintiff. If a court discovers that the cryptocurrency cannot be transferred or returned, the court may also provide guidance to the party on raising reasonable claims and encourage the parties to reach an agreement on the satisfying financial claims.
- At the enforcement stage, a court may regard the losing party's cryptocurrency as an enforceable asset, just as other conventional assets, such as cash or real estate.
- Courts should transfer a case to law enforcement if it finds evidence of criminal acts in the course of adjudicating a civil or commercial case involving cryptocurrency, such as illegal fundraising, illegally issuing securities, illegally offering tokens or coupons, or other crowd-related economic crimes.

The Draft remains unclear as to whether a plaintiff may request the court to freeze the defendant's cryptocurrencies during litigation proceedings. A prior court decision suggests such a possibility. In the case of (2022) Shan Cai Bao No. 166, the court froze five of the defendant's bank accounts and an "internet account" (with RMB 0.15 being frozen). While it was unclear if the court had actually frozen any cryptocurrencies, freezing currencies in an "internet account" suggests such a possibility.

The Draft has not been officially promulgated and, in any event, would not be binding if and when it is promulgated. Despite this, we expect most courts will follow the Draft's content and spirit in trying cases involving cryptocurrency.

X Recent developments and other impacting factors

In recent years, laws and regulations have become increasingly more specific on the obligations and

liabilities of financial institutions in the circumstances of fraud, especially telecommunication and internet fraud. Banks are required to exhibit independent and professional judgment in their customer due diligence and requests in many circumstances, rather than simply acting as a tool for customers to receive and dispose of funds.

In February 2021, the People's Bank of China and the State Administration of Foreign Exchange published the Guidelines on Anti-Money Laundering and Counter-Terrorist Financing for Banks' Cross-Border Operations (Trial). The guidelines provide relatively specific requirements on the banks' due diligence with respect to the receipt and disposal of cross-border funds. For example, the guidelines require banks to examine whether the customer's cross-border business needs, source or use of funds, frequency, nature and route of fund transfer are consistent with the customer's scope of production, operation and financial status, and whether the scale of funds for cross-border business is consistent with the customer's actual scale of operation and capital strength.

On September 2, 2022, the Standing Committee of the National People's Congress adopted the Anti-Internet and Telecom Fraud Law of the PRC, which took effect on December 1, 2022. The law further specifies requirements for banks to prevent telecommunications and internet fraud, such as establishing internal risk control systems, conducting due diligence on transactions, and monitoring and reporting suspicious accounts and transactions to relevant authorities.

Violation of such requirements may subject the bank to civil and administrative liabilities. Victims of fraud should pay special attention to the bank's compliance with the relevant requirements when formulating their asset tracing and recovery strategy, and may consider actions, such as: using the violations as leverage to push the bank to be cooperative in the tracing and recovery, or negotiate a settlement with the bank; reporting the violations to the bank's supervising entities; and instituting a civil claim for compensation against the bank. There are currently few judicial decisions concerning a financial institution's violation of these laws and regulations. It thus remains to be seen what role they will play in court rulings, as well as how and to what extent banks may be liable for the losses incurred by the victims. **CDR**

Han Kun is a leading full-service law firm in China. Over the years, Han Kun has been widely recognised as a leader in complex cross-border and domestic transactions and compliance matters.

Han Kun's main practice areas include private equity, mergers and acquisitions, international and domestic capital markets, investment funds, asset management, compliance, banking and finance, aviation finance, foreign direct investment, antitrust/competition, data protection, private client/wealth management, intellectual property, bankruptcy and restructuring and dispute resolution.

Han Kun have over 800 professionals located in Beijing, Shanghai, Shenzhen, Hong Kong, Haikou, Wuhan, Singapore and New York City.

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Andy (Ronghua) Liao is a partner at Han Kun's dispute resolution department, specialising in litigation and arbitration, cross-border dispute resolution, fraud, asset tracing and recovery, foreign judgment and award enforcement, restructuring and insolvency, and in particular he has accumulated abundant experiences in handling corporate disputes as well as investment and financing disputes of private equity funds and assets management institutions.

In the area of fraud, asset tracing and recovery, Andy is one of the few PRC lawyers widely recognised by the international legal community. Over the years, he has represented Han Kun to author the China chapters for several international publications on fraud and asset recovery, including the *Asset Tracing and Recovery* Review, *Chambers and Partners Global Practice Guides – International Fraud & Asset Tracing*, as well as this *CDR Essential Intelligence: Fraud, Asset Tracing & Recovery* publication, where Han Kun is the only law firm from China.

Andy has enormous knowledge and in-depth understanding in his specialised areas, and has represented a number of banks, companies and HNWIs from various jurisdictions, and successfully traced and recovered their huge amount of defrauded funds. He is the China member of ICC FraudNet, an international network under the auspices of ICC Commercial Crime Services, comprising independent lawyers who are the leading civil asset recovery specialists in each jurisdiction.

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Mr**. Wei Sun** began his legal practice in a well-known law firm in Shanghai in 2000 as an associate and partner. In 2007, he established Shanghai Young-Ben Law Firm as a founding partner, and served as a director and as the firm's managing partner. In 2010, he was admitted to practice in New York State, USA. In 2016, he was awarded as Chinese Leading Lawyer in International Practice by the All China Lawyers Association. In 2018, he was selected into the Talent Pool of China's 1,000 Lawyers for International Practice by the PRC Ministry of Justice. From 2019 to 2021, he was awarded as the CBLJ "The A List" – China's Elite 100 Lawyers for three consecutive years. He has also served as an independent director for certain listed companies and financial institutions. In 2022, he joined Han Kun Law Offices in Shanghai following a merger between Young-Ben and Han Kun.

Mr. Sun specialises in commercial dispute resolution and arbitration, finance, and equity investment. Mr. Sun has extensive experience in commercial litigation and arbitration. He has also been engaged as the leading litigator in resolving complex and high-end litigation and commercial arbitration cases, primarily involving disputes in relation to financial matters, equity investments, and international commerce, etc. He has provided comprehensive legal support to resolve China-based and cross-border disputes for a number of financial institutions, multinational enterprises, and renowned local enterprises.

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Before joining Han Kun, Mr. **Yuxian Zhao** worked in a leading international law firm, specialising in dispute resolution, as well as in the dispute resolution department of a leading PRC firm.

Mr. Zhao specialises in handling commercial dispute resolution cases concerning VC/PE investment and financing, mergers and acquisitions, internet and the "attention economy", pharmaceuticals, production and supply of industrial materials, complex machinery and equipment, beverage supply and brand-building, film making and investment, commercial leases, insurance, and financial products.

In terms of arbitration, Mr. Zhao has represented clients in disputes subject to arbitration under the rules of the CIETAC, SHIAC, HKIAC, ICC, SAC, and UNCITRAL. He has also advised on the annulment and enforcement of arbitral awards. Mr. Zhao is a member of the YSIAC Committee.

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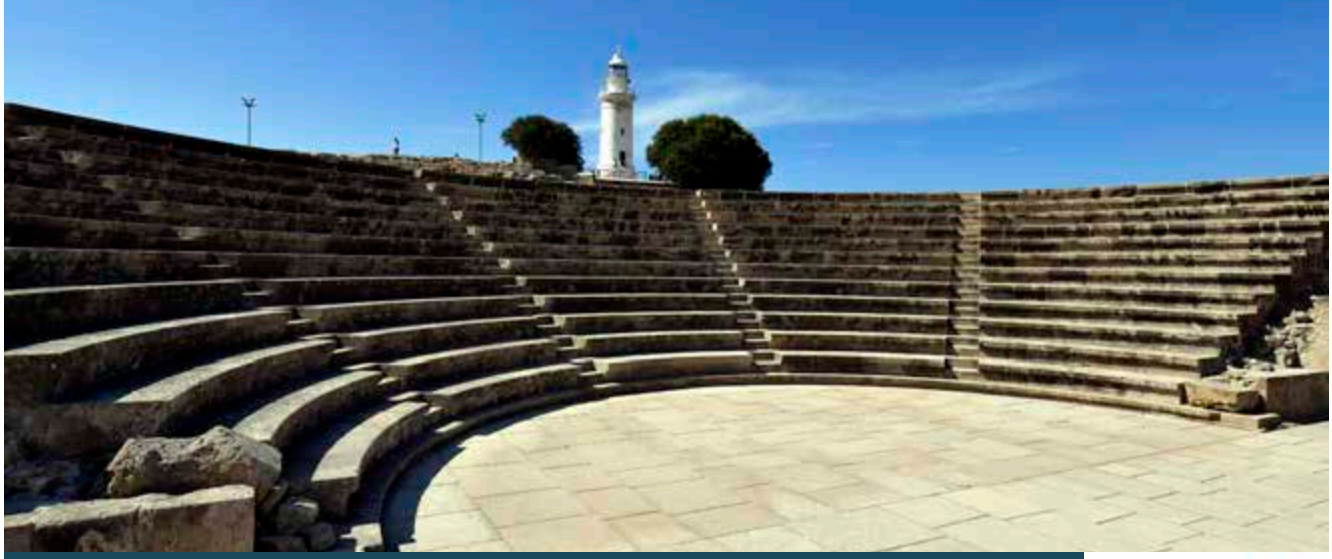

Cyprus

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I Executive summary

As one of the very few common law jurisdictions within the European Union, Cyprus has become well-established as a commercial, corporate and tech hub over the past few years. Due to its strategic location at the cross-roads of three continents, in combination with its legal system, which is based on common law but also benefits from various bilateral and multilateral treaties, Cyprus is a jurisdiction that can very often be found within complex corporate structures. This has naturally led to a rise in high-profile fraud claims, enforcement actions, cross-border insolvencies and asset-tracing exercises taking place in or through the country.

The main pitfall faced by litigants in Cyprus was often that of delay, something that has been actively targeted over the past number of years, and is expected to be absolved completely in the near future as a result of the extensive overhaul of the Cyprus legal system.

The latest major reforms of the legal system have sought to modernise processes and increase efficiency. In this spirit, a new electronic filing system has been adopted across the district courts and case allocation has been revamped, to allow for better and faster scheduling of hearing dates. At the same time, a new, comprehensive and contemporary set of Civil Procedure Rules (CPR), modelled after the English CPR, were adopted and put into force in 2023. Absolving delays is fully in line with the new CPR's overriding objective, and is expected to be actively targeted by judges across jurisdictions, a trend which we have already witnessed in the first few months since the adoption of the new CPR.

II Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

The Cyprus legal system

As a former British colony, Cyprus has a common law system that is rooted in the English legal system. The Cyprus Courts apply the principles of equity and are expected to follow common law, unless statute expressly provides otherwise. In fact, English authorities, whilst not, strictly speaking, binding on the Cyprus Courts, have persuasive value in Cyprus and are usually followed by the Supreme Court.

Many of the core statutes in Cyprus date back to its years as a British colony, and therefore mirror the respective statutes that were in effect in England up to 1960, or have codified longstanding common law principles such as that of civil liability. For example, the Cyprus ***Companies Law (Cap. 113)*** is based on, and despite various amendments, is still very similar to, the English ***Companies Act 1948***.

As of 2023, Cyprus has evolved from a two-tier Court system (comprising the first instance courts and the Supreme Court) to a three-tier system: first instance courts include district courts and specialist courts (which include the Military Court, Administrative Court, Rent Control Court, Family Court and Labour Court). The second tier is composed of the newly established Court of Appeal, which hears appeals of all first instance judgments (with limited exceptions). Finally, the Supreme Court and the Supreme Constitutional Court make up the third tier of the Cyprus Court system – the former hearing appeals from the Court of Appeal, and exercising other special powers conferred to it by statute (for example, the issuance of prerogative writs), and the latter hearing appeals referred by the Court of Appeal on Administrative Court judgments and matters of public law or other general public importance.

Reform of the Cyprus legal system

For the past few years, the Cyprus legal system has experienced radical reform, which is in the process of implementation. The past year, 2023, was indeed a year of major changes.

The new, extensive and fundamentally amended CPR – which were redrafted in the context of a project headed by Lord Dyson, and which have been largely modernised, in an effort to also be aligned with the CPR of England – were put into force in July (at a Court of Appeal level) and September (at all other levels) of 2023. All new cases filed in Cyprus are now adjudicated based upon the new CPR, and are subject to more structured and strict timeframes, to eliminate – to the extent possible – a buildup of further delays in the system.

Furthermore, over the next months, the implementation and establishment of the Commercial Court is also expected to take place, which is a welcome change in the fraud and asset recovery sphere. The Commercial Court will be composed of specialised judges, who will hear high-value commercial claims when the value of the claim exceeds EUR 2 million, such as disputes related to business transactions, commercial agency and disputes between regulated entities. In an effort to recognise and further support Cyprus' role as a jurisdiction in complex, cross-border transactions and disputes, the Commercial Court will also allow proceedings to be filed and to take place in the English language, should the parties request this.

In addition to the above, the Cyprus legal reforms have, further, been actively targeting the delays that have crippled the legal system in the past, by overhauling the case allocation system and showing less tolerance to unjustified adjournments and extensions of time. This ongoing effort has resulted in a major decrease of the backlog of pending cases over the past few years.

Recently, the Cyprus legal system has also largely embraced technology by adopting an e-justice platform, which now serves as the only means of filing new civil proceedings.

Important tools available in Cyprus for targeting fraud and in asset recovery exercises

The civil tort of fraud is codified in Cyprus under ***section 36*** of the ***Civil Wrongs Law (Cap. 148)***, and may be raised:

(i) when statements are made fraudulently;
(ii) for the purpose of defrauding a person;
(iii) who was in fact defrauded and has acted on the fraud; and
(iv) as a result, has suffered damage.

When several parties are involved in the wrongdoing, fraud is usually pleaded alongside the common law tort of conspiracy.

Arguably, the most useful tool in targeting fraud and undertaking asset tracing and recovery in, or through, Cyprus, is the wide jurisdiction of the Cyprus Courts to issue interim relief in the context of civil actions, pursuant to the provisions of ***section 32*** of the ***Courts of Justice Law (Law 14/1960)***. This jurisdiction is exercised when it is deemed just and reasonable, and the following conditions are met:

(i) a serious question arises to be tried at the hearing of the main proceedings;
(ii) it appears that the applicant has a probability to obtain a favourable judgment in the main proceedings;
(iii) there is a great risk that, if the relief is not given, it will be difficult or impossible to achieve justice at a later stage; and
(iv) the balance of convenience is in favour of the applicant.

Given the very wide jurisdiction of the Cyprus Courts, they may issue any interlocutory relief they deem just and reasonable, including (but not limited to):

(i) **Freezing orders**: The Cyprus Courts may issue freezing orders – also known as *Mareva* injunctions – with local or worldwide effect, against

the wrongdoers and/or third parties where there is evidence that they possess/control assets ultimately belonging to the wrongdoers (i.e. *Chabra* or Bankers Trust orders).

(ii) **Disclosure orders**: The Cyprus Courts may issue disclosure orders, including *Norwich Pharmacal* orders (see also "Pre-action discovery" below) and disclosure orders ancillary to freezing orders, whereby the respondent is ordered to disclose his assets in order to ensure compliance with the freezing order it supports.

(iii) **Appointment of an interim receiver**: The Cyprus Courts may appoint an interim receiver to take control of a wrongdoer's assets provided it is convinced that, given the nature of the assets or the actions of the wrongdoer, interim orders (such as freezing orders) will not be effective, and the appointment of the receiver is necessary to preserve the assets. An interim receiver may be appointed to hold, protect, preserve, and trace assets located or registered both within and outside the jurisdiction.

(iv) **Search orders**: A search, or *Anton Piller*, order allows the applicant's lawyers, a supervising lawyer, experts (if necessary) and other assisting personnel (if necessary) to search premises under the wrongdoer's control in order to locate and preserve evidence that is, or may be, relevant to the proceedings.

If there is an urgent need for interim relief or other reasons justifying the issuance of the interim relief without giving notice to the respondents (e.g. an immediate risk that the assets of the defendants may be dissipated), an application for interim injunctions may be filed on an *ex parte* (without notice) basis. *Ex parte* applications are usually examined by the court within a few days following their filing and provide an expedited means of securing interim relief where this is necessary.

Failure to comply with a court order constitutes contempt of court, and is punishable by imprisonment, confiscation of assets and/or payment of a fine.

Interim relief in Cyprus can be issued in the context of: substantive proceedings pending in Cyprus; in aid of foreign proceedings; and in aid of enforcement and recognition of foreign judgments.

Following the recent reforms to the Cyprus legal system and the adoption of the new CPR, the Cyprus Courts may now also issue free-standing injunctions, provided that (i) the respondent is in Cyprus, (ii) the asset in question (or the subject matter of the relief being sought) is in Cyprus, or (iii) there is another connection to Cyprus that renders the Cyprus Court the appropriate Court to decide on an application for such injunctions.

Pre-action discovery

Pre-action discovery has in many cases proven a useful tool in asset tracing and recovery. Under Cyprus law, pre-action discovery orders are available on the basis of the *Norwich Pharmacal* jurisdiction.

Norwich Pharmacal disclosure orders may be issued pre-action against innocent third parties, such as banks or local service providers acting as nominee shareholders or directors in Cyprus companies, for the purpose of identifying information held by them that would enable the applicant to raise proceedings against the ultimate wrongdoers.

In particular, a *Norwich Pharmacal* order may be issued against an innocent third party provided the following conditions are met:

(i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer (including a tort or a contractual wrongdoing);

(ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and

(iii) the person against whom the order is sought must:

- be involved in, so as to have facilitated, the wrongdoing; and
- be able or be likely able to provide the information necessary to enable the ultimate wrongdoer to be sued.

Norwich Pharmacal disclosure orders are usually requested alongside ancillary gagging orders, that are in force for a limited period of time, which prohibit the respondent from informing the wrongdoer of the disclosure proceedings.

However, the *Norwich Pharmacal* jurisdiction cannot be utilised when all that is being sought is to collect further evidence in support of a claim the party is already in a position to bring (i.e. "fishing" evidence).

"In aid" relief and rogatory proceedings (letters of request)

The Cyprus jurisdiction may also assist international fraud, asset tracing and recovery exercises through assistance to foreign procedures (where applicable) by the issuance of "in aid" relief or through rogatory requests (see section VI below).

III Case triage: main stages of fraud, asset tracing and recovery cases

When dealing with civil fraud cases, asset tracing and recovery, the steps to be taken will ultimately be tailored to the needs and desired outcomes of each plaintiff. Below we outline the general approach in raising and promoting proceedings, as well as following the issuance of a judgment.

Pre-action investigation

In complex fraud cases, particularly with an international element, there are some pre-action steps that are commonly followed which assist in the overall efforts to target the fraud, and to trace and recover assets.

One commonly utilised option is that of pre-action discovery, which is described above. Pre-action discovery proceedings are often raised against Cyprus banks through or in which the assets in question have been transferred, as well as Cyprus service providers or company officers who have information available that may assist in the general fraud investigation and/or asset tracing exercise.

As far as the investigation of a matter through pre-action discovery is either unhelpful or inapplicable, litigants may elect to gather information using publicly available resources or through private investigators.

In Cyprus, information regarding companies' officers and shareholders is publicly available in the records of the Registrar of Companies and Official Receiver. The Registrar of Companies may also provide information in relation to a company's financial statements (assuming these are filed in a timely manner).

Following the implementation of EU Directive 2018/843, the ***Prevention and Suppression of Money Laundering and Terrorist Financing Law (Law 188(I)/2007)*** was amended and provisions were included so that the register held by the Registrar of Companies and Official Receiver is required to hold information on the ultimate beneficial owners of companies and entities registered in Cyprus.

Finally, particularly in large-scale and complex cases, litigants may opt for the appointment of forensic investigators who have significant resources both locally and abroad, and can produce a report on the transactions that appear to have taken place (and the parties involved) based on evidence they are able to collect. This report is frequently then used as the basis for the proceedings to be raised.

Raising and promoting civil actions

Civil proceedings for fraud in Cyprus commence with the filing of a claim form, which sets out the parties to the proceedings and the prayer (i.e. relief being sought).

An application for interim relief may be sought together with, or following, the filing of civil proceedings. Popular types of interim relief sought in such contexts are outlined above.

Post-judgment relief

In civil proceedings, the Cyprus Courts may award various remedies, including (but not limited to):

(i) declarative judgments regarding the rights and/or liabilities of the parties;
(ii) general or special damages as compensation for losses or injuries suffered;
(iii) orders for restitution of gains or benefits acquired by the defendants;
(iv) injunctive relief; and
(v) specific performance orders.

Aside from *in personam* remedies, in appropriate cases the Cyprus Courts may issue tracing orders for the recovery of property owned by the plaintiff.

The Cyprus jurisdiction may also assist in cross-border enforcement. Pursuant to particular conventions/treaties and ***Regulation (EU) No. 1215/12 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters***, the Cyprus Courts may also issue relief

in aid for the enforcement of foreign judgments (see section VI below). This is also possible where bilateral/multilateral treaties to that effect are in force.

IV Parallel proceedings: a combined civil and criminal approach

Raising criminal proceedings in Cyprus

Criminal prosecution in Cyprus can either be initiated through the police or privately (i.e. directly by the victim):

(i) **Public prosecution**: Public prosecution may be initiated by filing an official complaint with the police. The complaint should be made in writing, and ideally be accompanied by all available supporting evidence to assist with the investigation. Following the filing of a complaint, the police will decide whether or not to investigate the complaint and potentially prosecute the wrongdoer.

(ii) **Private prosecution**: Unlike public prosecution, private prosecution has no state involvement and is initiated with the filing of private criminal proceedings in court by the private individual whose rights have been directly affected by the criminal acts of the accused. Private prosecution is limited to particular cases.

Parallel proceedings

In Cyprus, there is no specific restriction on furthering civil proceedings in parallel with, or in advance of, criminal proceedings concerning the same subject matter. Civil proceedings are promoted for restitution, whereas criminal proceedings are aimed at punishing the wrongdoer.

The promotion of parallel proceedings *per se* is not regarded as abusive or oppressive. However, if parallel proceedings are promoted to exert undue pressure on a defendant for an ulterior purpose, such as achieving a settlement in a civil dispute, that may be deemed abusive of the courts' powers and processes and may, in itself, constitute a criminal offence. Courts may refuse to entertain parallel proceedings with the same subject matter when those proceedings are found abusive.

Tracing and recovering illegal proceeds

Pursuant to the ***Prevention and Suppression of Money Laundering Activities Law (Law 188(I)/2007)***, the Unit for Combating Money Laundering (MOKAS) has the authority to trace and recover proceeds of crime and other related property.

It should be noted that confiscated property cannot be used to satisfy civil claims for damages.

V Key challenges

Delays

One of the most obvious challenges faced by litigants in Cyprus is that of delay. As noted above, this is being actively targeted by the ongoing reforms of the legal system, but the inevitable backlog of the past continues to burden the current system.

Civil actions in Cyprus were usually expected to be adjudicated in approximately three to five years after their filing. It remains to be seen how this projection will be altered after the implementation of the new CPR.

In fraud litigation, this difficulty is also overcome by making use of the courts' wide jurisdiction to issue interim relief, which can be pursued on an *ex parte* (without notice) basis and issued within a few days after filing. Where *ex parte* relief cannot be justified and the relevant application is heard on a by-summons (on notice) basis, interim relief is expected to be issued within three to 12 months from filing.

The limits of private prosecution

The core considerations in choosing between private and public prosecution are the following:

(i) **Investigative powers**: In public prosecution proceedings, the police have wide investigative powers including wide powers of arrest and search; they may also be assisted by counterparts abroad. Such powers include executing search warrants, apprehending and questioning suspects, and accessing a suspect's banking and communication records. On the other hand, in private prosecution such investigative powers will not be available to the complainant, who will need to rely on his own resources for investigating the crimes at hand.

(ii) **Impact**: Public prosecution proceedings are expected to have a stronger impact on the accused as they are subject to more severe sentencing and can lead to greater exposure of the accused, whereas private prosecutions are heard by the district courts who are confined to a maximum sentence of no more than five years' imprisonment and/or a maximum fine of €85,430, or both (unless the Attorney General consents to more).

(iii) **Pace and control**: A complainant will have no control over the procedure and the pace of public prosecution proceedings, whereas in private prosecution proceedings the procedure and pace of the procedure of the proceedings is controlled by the complainant.

(iv) **Cost**: The cost of public prosecution is borne by the state, whereas the cost of private prosecution is borne by the complainant.

In addition to the above, private criminal prosecution is not appropriate in all cases. In particular, cases involving serious crimes, complex cases, or cases in which the wrongdoer has disappeared or fled the jurisdiction, may be more appropriately dealt with by the police. For example, the police will usually be better equipped to apprehend and prosecute a suspect who has fled. Beyond the police, state authorities are usually able to rely on a network of international treaties for mutual cooperation between states, and have the power to control points of entry into, and exit out of, the country.

Serious offences that are subject to a sentence exceeding five years' imprisonment and/or a fine of €85,430 require permission from the Attorney General before being the subject matter of a private prosecution. This process tends to be slow and bureaucratic, and permission will not always be granted.

VI Cross-jurisdictional mechanisms: issues and solutions in recent times

Given the accessibility and overall cross-border approach to business and transactions worldwide, it is only natural that fraud would not be restricted by jurisdictional boundaries. As a result, accessibility to cross-border solutions and the ability to receive assistance from foreign courts is often key in fraud cases as well as asset tracing and recovery exercises.

Cyprus, being a Mediterranean business and tech hub, has found itself involved, in one way or another, in large-scale, international frauds. Hence, the existence of cross-jurisdictional mechanisms has been vital and, in fact, the availability thereof has only added to the popularity of the Cyprus Courts in this respect.

Enforceability of injunctive relief obtained in Cyprus

The jurisdiction to issue worldwide freezing orders was expressly recognised by the Supreme Court in the landmark case ***Seamark Consultancy Services Limited v Lasala (2007) 1 CLR 162*** and is frequently employed in disputes with an international dimension.

Worldwide injunctions act *in personam*, thereby prohibiting the respondent and any party with knowledge of the injunction from acting in breach thereof.

Injunctive relief in aid of foreign proceedings

Injunctive relief may be sought and issued in Cyprus in aid of foreign proceedings. In this respect, the principles governing interim relief in Cyprus generally apply (see section II above). Such relief may, for example, target assets related to the substantive dispute that are located in Cyprus and which need to be maintained pending the outcome of the substantive proceedings.

As a party to ***Regulation (EU) No. 1215/12 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*** and the ***Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters***, proceedings in the European Union, Denmark, Norway, Iceland, and Switzerland may be aided with injunctive relief issued in Cyprus.

Injunctive relief in aid of foreign arbitration and recognition of foreign arbitral awards

As a party to the ***United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards***, the Cyprus Courts have jurisdiction to recognise and enforce arbitral awards issued in various jurisdictions, including the United Kingdom, Russia, the USA, Switzerland, Denmark, Norway, Iceland, Ukraine, Belarus, China, and European Union countries.

In the course of proceedings for the recognition and enforcement of foreign arbitral awards in Cyprus, the Cyprus Courts may issue injunctive relief in aid thereof. Such relief may, for example, target the preservation (i.e. freezing) of assets that are located in Cyprus, pending the enforcement of the arbitral award in Cyprus.

In addition to the above, the Cyprus Courts have jurisdiction to issue interim orders at any time prior to or during an international commercial arbitration (***section 9*** of the ***International Commercial Arbitration Law (L. 101/87)***). An international commercial arbitration is defined as, *inter alia*, an arbitration between parties which have their place of business in different counties, or an arbitration taking place in a country outside the place of business of the parties to the arbitration.

Rogatory proceedings (letters of request)

Rogatory proceedings may be initiated directly abroad, with a view to obtaining information from people and entities in Cyprus. Whilst generally a cost-effective procedure, as the cost is borne by the state, the pace of rogatory proceedings is slow.

As a party to the ***Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters***, Cyprus accepts rogatory requests from a number of jurisdictions, including Denmark, France, Germany, Greece, China, India, Israel, Russia, Singapore, Switzerland, the United Kingdom and the USA.

Recognition and enforcement of foreign judgments in Cyprus

The ***Decisions of Foreign Courts (Recognition, Registration and Enforcement) Law of 2000 (Law 121(I)/2000)*** sets out the framework for the recognition and enforcement of foreign judgments issued by a court or tribunal of a foreign jurisdiction with which Cyprus has entered into a bilateral treaty for mutual recognition and enforcement. Furthermore, as noted

above, Cyprus is a party to, *inter alia*, ***Regulation (EU) No. 1215/12 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*** and the ***Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters***. In addition to these, certain judgments, even if issued by a jurisdiction with which Cyprus has no bilateral or multilateral treaty, and which is not a party to any convention to this end, may be recognisable and enforceable in Cyprus under the provisions of common law.

Hence, judgments issued in several foreign jurisdictions may be recognisable in Cyprus and thus enforceable within the Cyprus jurisdiction. This includes judgments issued in the European Union, Denmark, Norway, Iceland, and Switzerland, as well as judgments issued in, amongst others, Russia, the United Kingdom, China, Ukraine, Belarus and Serbia.

VII Using technology to aid asset recovery

As noted above, the Cyprus legal system has recently begun embracing technology through the adoption of the electronic justice system, e-Justice, which has transformed the new case records of the Courts across the island to electronic ones. Older cases continue to have physical records stored within the Courts.

With the advancement of AI across the globe, it is expected that investigators will have access to more information, more quickly. This is something that is naturally expected to also positively impact the work of lawyers in the fraud and asset recovery sphere.

VIII Highlighting the influence of digital currencies: is this a game changer?

Over the past few years, the broad tech, and particularly FinTech, space appears to have been going through a constant boom, from the rise of Bitcoin and cryptocurrencies generally in the early part of the previous decade, to the concept of decentralised finance through technology and to the more recent peak of interest in non-fungible tokens (NFTs). Inevitably, technology, being inextricably linked to our day-to-day lives, cannot leave the legal world untouched.

In the Cyprus broader financial landscape, FinTech noticeably affected the Forex industry, undoubtably contributing to its rise in popularity in Cyprus over the past two decades. Nowadays, the courts are not strangers to fraud claims between Forex companies or between them and their clients, something that would have been unfamiliar territory 15 years ago. The courts, lawyers and judges alike have grown accustomed to the concept and operations of the Forex industry relatively quickly, after its boom in Cyprus in the early 2010s.

Albeit still with some reservations, we are also seeing the concept of cryptocurrencies being embraced, or at least touched upon, in litigation. As the number of individuals investing in cryptocurrencies has rocketed over the past few years, the courts will inevitably have to embrace this idea as failure to do so could cripple the effectiveness of the current tools used in asset tracing and recovery. For example, an interim freezing order that cannot touch the respondent's crypto-wallet is likely to soon fail to serve its purpose. Likewise, the inability to enforce freezing orders against assets held in non-traditional banks, such as those without a physical presence that operate only online and through apps, may render such orders ineffective.

NFTs are a fairly new concept in the Cyprus legal sphere, but one cannot turn a blind eye to the flow of investments on a worldwide scale to digital assets of this nature. As with cryptocurrencies, wrongdoers may harbour a large portion of their worth in NFTs and non-fiat currencies, which unless targeted specifically through litigation, may allow fraudsters to reap the benefits of their wrongdoing by hiding in plain sight.

From a legislative and regulatory perspective, whilst the Cyprus Securities and Exchange Commission (CySec) has been actively monitoring the Forex industry to ensure compliance with local and EU law, it is struggling to keep pace with digital currencies. Having said this, since 2019, the ***Prevention and Suppression of Money Laundering and Terrorist Financing Law (Law 188(I)/2007)*** has undergone several amendments in order to keep up with this rapidly developing area and now recognises that cryptoassets are an "asset" and that dealings with cryptoassets may fall within the broader category of financial services, and regulates providers of services in relation to cryptoassets.

We remain hopeful that sooner rather than later, fraud litigation will also embrace digital assets and legislation, at both the local and European level, and will provide the tools that will defeat their use as a hinderance to asset tracing and recovery. CDR

A.G. Erotocritou LLC has firmly established itself as a "top tier" leading law firm in Cyprus, having cultivated an unrivalled reputation for excellence, with an impressive track record and an all-embracing legal service capability, underpinned by an acute sense of commercial awareness. The firm's achievements have been recognised and endorsed by selected international legal directories such as *Chambers and Partners*, *The Legal 500*, *IFLR* and *Who's Who Legal*. Amongst others, the firm has been recognised as "an exception in the Cyprus market where everyone does everything", a firm which "is always there for the client" and has "all the professionalism you would expect from a large international firm".

As a result of the firm's reputation and expertise, A.G. Erotocritou LLC is proud to count some of the largest international law firms, banking institutions and multinational corporations among our clients. On a domestic level, we are also advising some of the most prominent institutions and companies, as well as various local and international non-profitable associations.

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Andreas Erotocritou's practice focuses on cross-border litigation. He is specialised in various fields of commercial and corporate litigation, and is regularly involved in complex disputes with an international dimension. Andreas has vast experience in corporate fraud and asset recovery, shareholders' disputes, recognition and enforcement issues, as well as in corporate insolvency and restructuring. Andreas also has significant expertise in obtaining and defending interim injunctive relief in support of proceedings in Cyprus and elsewhere. He frequently acts as an expert witness in international disputes, and has opined on matters of Cyprus law in international arbitrations and court proceedings pending before foreign Courts. He is consistently ranked and recognised as a leading practitioner in the dispute resolution arena by all leading international directories. Andreas has authored numerous articles for publication on various topics relating to international cross-border litigation and arbitration.

Andreas is a Barrister of the Middle Temple, and a member of, amongst others, the Cyprus Bar Association, as well as a fellow of the International Academy of Financial Crime Litigators, and as of 2023, an officer of the Asset Recovery Committee of the International Bar Association (IBA).

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Elina Nikolaidou's practice is focused on commercial and corporate disputes with an international element. She has advised and represented various clients in disputes that concern high-value transactions and intricate financial fraud, which oftentimes entail complicated asset tracing exercises across a multiplicity of jurisdictions (either in parallel or separately). As a result, Elina has accumulated significant experience in collaborating with lawyers from several other jurisdictions (including England, CIS, USA, BVI, Marshall Islands and EU countries), and coordinating multi-jurisdictional legal teams based on an overall strategy, in exercises that include not only raising proceedings in Cyprus and undertaking the relevant asset tracing, but also the recognition and enforcement of foreign judgements, advice on the applicable law of the dispute in question or where injunctive relief is being sought in aid of foreign proceedings or the enforcement thereof in Cyprus. Elina is also a certified Insolvency Practitioner in Cyprus and has handled complex cross-border insolvencies from various standpoints, having acted for liquidators, officers, shareholders and creditors of insolvent entities, or on behalf of entities facing involuntary or abusive insolvency proceedings.

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I Executive summary

Fraud is a major risk to the global economy and a national security threat to the UK. UK Finance reported in its 2023 report that over £1.2 billion was lost through fraud in 2022, while Cifas's *Fraudscape* 2023 found that its member organisations recorded over 409,000 instances of fraud. Although admirable efforts have been made to recover such funds, the ratio of recovered assets to lost is exorbitantly skewed in favour of the latter. It is encouraging to see the government turn to this area and produce new legislation to strengthen the existing 'fight against economic crime' toolbox.

Our dependency on digital systems continues to gift opportunities to fraudsters, while new developments like generative AI and voice cloning technology have improved the fraudster's arsenal of tricks. Despite innovation in fraud protection by companies, and increased awareness of cybersecurity, limited gains have been made. These have, however, been ably assisted by the legal framework underpinning fraud, asset tracing and recovery cases in England & Wales, which continues to evolve to fight these challenges.

II Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

'*We must not make a scarecrow of the law,*
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch and not their terror.'
Measure for Measure
Act II, scene 1

Perhaps one of the less well-known of Shakespeare's plays, but in *Measure for Measure* we have one of the more powerful descriptions of the law across the Shakespearian canon. The law in this image is a commanding one, a deterrence to birds in a field like a scarecrow. However, the power of the law remains intact only if the birds continue to fear it. If the birds are now birds of prey which merely use the scarecrow as a perch, then the law has lost its power and is not enforced.

On a more global level, we have seen what can happen when states act like birds of prey and ignore the strictures of international law. When Ukraine took Russia to the International Court of Justice in 2022, the court ordered Russia to immediately suspend military action on 16 March 2022. The court has no mechanism to enforce its orders and Russia merely ignored it. On the other hand, the US, the UK and the EU have applied thorough, compre-

hensive sanctions against Russia and Russian companies and individuals, as well as those with significant interests in the country. The application of these regimes has been contested, but they continue to hold firm with more than €260 billion frozen according to the European Commission.

A potential bird of prey in this scenario is also the wealthy individual, the billionaire, or the large conglomerate, a multinational, say, which can bombard the courts with motions or has the resources to fight lengthy litigation. The possibility of 'lawfare' and the use of SLAPP lawsuits can, in effect, muzzle journalists, writers and smaller competitors who are unable to afford representation at this level. The UK's highly regarded legal system had led to 'libel tourism' in the past, which was addressed by the Defamation Act 2013, to ensure that the system was not abused. The Economic Crime and Corporate Transparency Act 2023 included an amendment which allows judges to dismiss a case attempting to silence those speaking about economic crime.

As long as the courts are feared and respected, their judgments and orders will be observed and followed. In the fraud, asset tracing and recovery process, it is the power of the courts in this country to make judgments, follow the assets and assume jurisdiction.

The English legal system is noted for its innovation that essentially launched the global methodology employed in this area today. Within the panoply of the lawyer's nuclear weapons includes a number of unique and powerful orders for relief. Anton Piller orders, named for the 1975 case, are now termed 'search orders' and were instrumental in sculpting the fraud recovery landscape worldwide.

The same can be said of Mareva injunctions, also from a 1975 case, which are now known as 'freezing orders' and are deployed to prohibit judgment debtors from frustrating judgments against them by dissipating their assets. With such tools at its disposal for nearly 50 years, the UK can send powerful messages to fraudsters with its long-arm jurisdictional reach. UK courts have become adept at adapting freezing orders to jurisdictional challenges, for example with anti-suit injunctions.

With the increasing globalisation of fraud matters, such devices are vital weapons that can be expertly deployed in the hunt for international fraudsters. Wherever they run, the English courts will be in hot pursuit.

Another key mechanism in the UK 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*' (section 241(2)(a) and (b)).

The broad nature of Part 5 is demonstrated in section 242(2)(b), which does not impose restrictions on 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.*'

POCA is arguably a vital instrument in the war on fraud. Importantly, this is not a static statute; it is receptive to change, to tackle the ever-evolving threat of fraud head-on. More recently, this was exemplified in the creation of unexplained wealth orders (UWOs) in the Criminal Finances Act 2017. UWOs are civil orders that shift the burden of proof by requiring individuals who are either politically exposed persons not in the European Economic Area or suspected of involvement in serious crime to explain how they obtained a particular property or asset (of a value in excess of £50,000), if it is reasonably believed that their legitimate known income would have been insufficient to finance that acquisition (section 362A(3)).

The UWO is an investigative tool only, and is not a power to recover assets in and of itself. Although trumpeted as an exciting new tool to combat financial crime, only five such orders have been granted (as of January 2024). The mixed success of UWOs was exemplified by the case of *National Crime Agency v Baker* [2020] EWHC 822 (Admin), in which UWOs were discharged by the High Court and a substantial costs order was made against the National Crime Agency. The UWO regime was consequently modified in Part II of the Economic Crime (Transparency and Enforcement) Act 2022 to include sidestepping the disproportionate income requirement and extending section 362A of POCA to include a specified responsible officer of the respondent, where the respondent is not an individual, to provide either a statement or documents.

In 2022, the government enacted the Economic Crime Act, which follows the legislative policy to extend the international jurisdiction of UK courts. Apart from UWOs, the Act also modified the UK sanctions regime and introduced registration and information requirements for overseas entities buying or holding property in the UK. The Economic Crime and Corporate Transparency Act 2023 strengthens the powers of law enforcement agencies, attempts to improve transparency with reforms of Companies House, makes it easier to prosecute corporations for certain financial crimes, and introduced the new failure to prevent fraud offence.

III Case triage: main stages of fraud, asset tracing and recovery cases

While 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 section IV below. Furthermore, a symbiotic and complementary 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 and evidence; and
4. enforcement and confiscation.

The first stage, "triage/preliminary case assessment", is an initial assessment to fact-find and gather intelligence, as well as to establish an investigation and tracing strategy. Part of designing a strategy will include identifying a preferred jurisdiction. Due to the wealth of court powers available under the civil system, England & Wales remains an (if not the) ideal jurisdiction.

Since exiting the EU, 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 had been used to claim jurisdiction over non-UK domiciled defendants, ceased 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 is in the process of establishing independent mechanisms that will aid its ability to carry out cross-jurisdictional enforcement. The UK is still able to do so under the common law, as well as under individual jurisdiction agreements. For example, 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.

The UK has applied to accede to the 2007 Lugano Convention, but the EU stated, in June 2021, that the bloc is '*not in a position to give its consent to invite the [UK] to accede*'. The UK subsequently passed a statutory instrument which provides that the UK will continue to apply the Lugano Convention rules to proceedings begun before the end of the implementation period, but it cannot dictate the approach of other Convention parties. In January 2024, the UK signed the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. This Convention seeks to provide a uniform approach in order to increase legal certainty with a global framework of common rules. Contracting parties, of which there are 29, including the EU and Ukraine, are required to recognise and enforce civil and commercial judgments within its scope. A few states, including the US, have signed but not ratified the Convention.

Litigation funding has transformed the legal landscape in many jurisdictions. The market for litigation funding in England & Wales has grown to become the second largest in the world, after the US. The global litigation funding market was valued at over $17 billion in 2022 by Swiss Re, while the assets of UK litigation funds reached £2.2 billion in 2021. Third-party litigation funding is now a well-established area in the UK, particularly in civil fraud and asset recovery cases. Litigation funding works through investors financing legal disputes in return for a percentage of any damages won. Litigation funding in the UK has grown exponentially since 2005 and the implementation of the *Arkin* cap.

In *Arkin v Borchard Lines Ltd and others* [2005] EWCA Civ 655, the Court of Appeal considered that, in the interests of justice, commercial funders should be liable for the costs of opposing parties only to the extent of their funding agreement, as funders would likely be deterred by the prospect of unlimited costs liability. This can help to level the playing field, giving under-resourced claimants greater access to justice. Recent cases have, however, queried the extent to which litigation funding can provide greater justice, particularly when issues of surety and after the event (ATE) insurance come into play. Under section 51 of the Senior Courts Act 1981, the courts have the power to determine by whom and to what extent costs should be paid. In *Davey v Money* [2019] EWHC 997 (Ch), the court decided not to apply the *Arkin* cap on the facts and emphasised the need for adequate adverse costs protection for both claimants and funders. ATE insurance policies have arisen to cover adverse costs risks.

Litigation funding in the UK faced turmoil last year after the Supreme Court ruled, in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28, that litigation funding agreements that entitled the funders to payment based on the amount of damages recovered should be seen as Damages-Based Agreements, which have their own regulatory regime. Thus, these agreements are only enforceable if they comply with the regulatory regime and cannot be used to fund opt-out collective proceedings before the Competition Appeal Tribunal. However, the Lord Chancellor announced in March

2024 that legislation will be introduced to restore the previous position, prior to the *PACCAR* case, in order that members of the public will once again be able to secure third-party funding for legal cases in the interest of access to justice.

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 (stage two, "evidence gathering") may involve working with forensic IT experts/accountants and regulatory agencies. It can, and most likely will, require information to be obtained from third parties (which may necessitate a range of civil disclosure orders, such as Norwich Pharmacal relief against banks or financial institutions).

Stage three, "securing the assets and evidence", uses the plethora of the UK courts' interim orders to protect evidence and assets that may become subject to litigation and enforcement.

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.

If an application is made without notice, the party is under a duty to make full and frank disclosure. Failure to do so can be fatal, and the courts have become stringent in assessing applications. The party must disclose all matters material to the application, whether facts or law, with materiality determined by the court as per *Brink's-Mat Ltd v Elcombe and others* [1988] 3 All ER 188.

Stage four, "enforcement and confiscation", is contingent on the effective implementation of the first three stages.

IV Parallel proceedings: a combined civil and criminal approach

In theory, 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 criminal or civil proceedings, or both.

Notwithstanding these difficulties, the advantages of a multi-pronged attack can be rewarding. 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. This is particularly important in cross-jurisdictional proceedings, as per section VI below.

For some economic crimes, prosecutions can also be brought in the UK, even if all the relevant criminal conduct occurred elsewhere. The best example of this is in the Bribery Act 2010. Section 12(2)(b) and (c) clarify that the Act applies if the '*person's acts or omissions done or made outside the United Kingdom would form part of us an offence if done or made in the United Kingdom*', but the person identified should have '*a close connection with the United Kingdom*'. The connection mentioned in section 12(2)(c) is explained in a closed list in section 12(4).

Resourcing remains a key barrier to a zero-tolerance approach to the international prosecution of financial crime, with just 1,753 officers and staff in the police force, according to ActionFraud, primarily focused on fraud, equalling 0.8% of the total police workforce. ActionFraud also reported for the 2020/21 period that outcomes were received for 6.8% of reports, and of these outcomes only 11.5% were judicial. For cybercrime in this same period, only 2% of outcomes were judicial, although 80% of reported fraud was cyber-enabled. 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.

There has been an increase in the use of private prosecutions. In *R v Zinga* [2014] EWCA Crim 52, the Lord Chief Justice opined 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) of the Prosecution of Offenders Act 1985. Proceedings will take place in the same manner as if they had been brought by the Crown, and are normally heard in a Magistrates' Court in a matter of weeks. Typically, these types of cases, depending on the evidence involved and whether funds or criminality have a foreign jurisdiction nexus, can take up to nine months to be resolved, which, although substantial, can be faster than both the traditional criminal and civil avenues.

Some have raised concerns that private prosecutions are merely a tool to be exploited by wealthy litigants who can pay for justice. Leading practitioners remain committed to securing a standardised approach in this area, particularly with the creation of the Code for Private Prosecutors established by the Private Prosecutors' Association, which is aimed at instituting guidance for best practice in this field.

Further guidance on the use of private prosecutions was introduced in October 2022 with the implementation of the Criminal Procedure (Amendment No.2) Rules. Under the rules, further requirements were instituted, including a list of circumstances under which the courts can refuse to issue a summons, a requirement for all summonses to identify the private prosecutor, and additional information requirements for those applying for costs orders. These additional requirements allowed for greater scrutiny on the process, as well as providing the courts with a more uniform and objective approach to issuing summonses. Although it is still early days, the rules may have provided a check on the sharp rise in private prosecutions seen recently. A number of legal bodies have also called on parliament to look into the issue of further safeguards in light of the Post Office Horizon scandal.

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 remain eager to offer redress for victims in a variety of inventive ways, sending the message that there is nowhere for fraudsters to hide in this jurisdiction.

V Key challenges

The process of investigating fraud and attempting to retrieve misappropriated funds can be hindered by different challenges. Information and timing are key. In order to trace assets effectively, extensive information-gathering exercises are conducted in order to secure leads on where assets may have been transferred (see section III above). This may be as simple as searching a public database, or more nuanced investigative tools may be used such as seeking court orders to gather the requisite information. However, such exercises may not be as simple as they sound. It takes time and resources to collect sufficient information for a case of this nature.

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 hindrances 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. These scenarios may both be seen in the increased theft of cryptocurrency, as well as the use of digital currencies to muddy the waters in economic crimes.

In section VII, we discuss how technology can be used to aid asset recovery, but in cases concerning hackers, cyber-theft, and ransomware, it is technology itself that is used to perpetrate the fraud and steal the assets or information. Tracing is often extremely difficult, requiring expertise in IT and digital security. Stolen information that is potentially damaging may be published, or offered for sale online, so speed in ascertaining the extent of the damage is necessary. Chainalysis reports that in 2023, victims of hacking attacks paid the perpetrators $1.1 billion to restore their computer systems or delete the stolen data. This is more than double what was paid in 2022, and marks a resurgence of ransomware groups mostly linked to Eastern Europe, former Soviet Republics and Russia. The victims of this crime included hospitals, schools, and major corporations. The case of the British Library, called "one of the worst cyber incidents in British history" by the previous CEO of the National Cyber Security Centre, highlights the danger of failing to invest in cybersecurity and the strength of ransomware groups to inflict serious damage, in what was a warning of their capabilities. The British Library refused to pay a £600,000 ransom, and was in the early stages of rebuilding its IT capabilities after more than three months.

VI 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 co-operation 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 co-ordination of recovery efforts. For example, offshore jurisdictions like the British Virgin Islands have historically had (wholly misconceived) reputations as alleged havens for illicit monies. This is in part due to secrecy provisions that conceal the true identities of beneficial ownership. However, a general shift in global attitudes towards promoting transparency and accountability occurred, prompting some British Overseas Territories (Anguilla, Bermuda, the Cayman Islands, the Falkland Islands, Montserrat, the Pitcairn Islands, St Helena, Ascension and Tristan da Cunha, and the Turks and Caicos Islands) to commit to introducing completely public ownership registers by the end of 2023. From the Panama Papers of 2016, the Paradise Papers of 2017 and the Pandora Papers of 2021, there is a general appetite from the fourth estate and the general public to tear down the walls of financial secrecy. However, competing rights regimes, such as the "right to be forgotten", can limit transparency.

Strong anti-money laundering mechanisms have been counterattacked by increasing emphasis on the right to privacy. In November 2022, the Court of Justice of the European Union invalidated a provision of the fifth EU Anti-Money Laundering (AML) Directive that guaranteed public access to information on companies' real owners in *WM and Sovim SA v Luxembourg Business Registers*. The fifth AML Direc-

tive had been hailed in 2018 as the most progressive of its time, as EU countries were required to open up their beneficial ownership registers to all members of the public. Open access to public registers has now been suspended in Ireland, Germany, Luxembourg, Belgium, the Netherlands and Austria on the basis of this ruling, a definite setback; further, the British Virgin Islands, and the Crown Dependencies of Jersey, Guernsey and the Isle of Man, all announced in December 2023 that they would no longer introduce public registers of beneficial ownership.

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 a further 18,000-plus offshore corporate entities. President 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 co-ordination.

Fraud is a truly global crime, and does not limit itself to one geographical or economic trading bloc. Understandably, the UK, with its sophisticated legal tools, is incredibly adept at pursuing fraudsters and their loot internationally.

As the UK has extended its jurisdictional reach, so too have the authorities increased their co-operation and co-ordination with other prosecutors globally. This trend of greater cross-border information sharing and investigations is likely to continue. The mutual legal assistance (MLA) framework, under which the UK may request the investigation or prosecution of criminal offences, is codified in the Crime (International Co-operation) Act 2003, as well as other bilateral and international treaties.

VII Using technology to aid asset recovery

The march of technology, which has raced forward with great momentum in recent years, has been supercharged by the pandemic. The civil fraud and asset recovery sphere is but one sector that has been affected by the progressive challenges and opportunities created by the technological response to the global health crisis. Despite ubiquitous social distancing mandates, in many ways it appeared as if the world had never been more connected. The success of virtual courtrooms has led to their inclusion in the Police, Crime, Sentencing and Courts Act as an essential vehicle for the administration of justice.

Although technology has been a gift to fraudsters, it can also be useful in following the money or finding the asset, as well as protecting individuals from potentially fraudulent activity. Artificial intelligence (AI) and machine learning are both highly effective tools for raising fraud alerts or detecting unusual patterns of behaviour or activity. Suspicious transfers can be flagged by AI before being temporarily blocked for review by a compliance team. Companies which handle a large number of transactions, such as a bank or securities exchange, are likely to use AI to analyse patterns, and can then identify fraud in real-time.

Technology can itself be investigated as a source, for example mobile devices, laptops or hard drives during a forensic investigation. Despite potential blackholes or an overabundance of data, as identified in section V, these investigations use extremely sophisticated tools for data capture, analysis and review, which can reveal relevant data quickly, despite large and unconventional data sets. Social media is also a helpful source when tracing assets. Following the accounts of the fraudster's acquaintances can lead to valuable intelligence on locations and assets. Assets may also be registered on the blockchain, such as cryptoassets like non-fungible tokens (NFTs).

In international litigation and, it might be argued now, in the domestic environment, a claimant faced with an elusive defendant can apply on evidence to the court for service to be effected using digital communications. Mr Justice Trower, with a stroke of his judicial pen, changed everything we have always understood about service of process in *D'Aloia v Person Unknown & Ors* [2022] EWHC 1723 (Ch), granting an order that permitted the service of proceedings by an NFT. An example of the English courts leading the way on protection for victims of crypto fraud, and second only to a similar order made by the New York Supreme Court in June 2022, a month earlier.

As the courts come to grips with the very latest in fraud and asset tracing, the judiciary has been keen to develop the tools of the law to safeguard and recover assets. In this herculean task, the common law has been particularly adept, with Lord Briggs clarifying, in December 2023 at the inaugural IBA Asset Recovery Conference in Vienna, that it is not a judge-made law,

as '*in reality it is you lawyers that do the blue sky thing, and persuade judges to follow them*'. In no area is this more evident than technological advancements, as lawyers need to be ahead of the curve and incite the courts to come up with a recovery methodology that is not just adaptable but truly organic. Can they describe a 'flux capacitor' of a DeLorean time machine?

VIII Highlighting the influence of digital currencies: is this a game changer?

In the UK, as of January 2021, all cryptocurrency firms, such as exchanges, advisors and professionals that either have a presence or market product, or provide services, within the UK market, must register with the Financial Conduct Authority (FCA). In 2021, the financial watchdog demanded that Binance, the world's largest cryptocurrency exchange, cease all regulated activities in the UK and, in October 2023, the exchange stopped accepting new UK customers. Furthermore, the FCA banned all crypto marketing by firms that were not authorised or registered with the FCA, and required that the adverts should include a clear risk warning. This was in response to their reports that cryptoassets fraud had risen from 1,619 scams in 2019 to 6,372 scams in 2021, while crypto ownership had more than doubled between 2021 and 2022 .

The Bank of England has warned that digital currencies could trigger a financial meltdown unless governments are prepared to formulate tough regulations. However, despite the Bank of England's fear that crypto '*will lead to the next financial crash*', the Treasury and the Bank have been consulting on whether to set up a UK central bank digital currency in 2030.

The English judiciary has taken a pre-eminent role in the attempt to curtail international cryptocurrency frauds. One of the factors that has fuelled the rise of this type of criminality is the lack of homogenised classification. The unprecedented publication of the LawTech Delivery Panel Legal *Statement on cryptoassets and smart contracts*, distributed by the UK Jurisdiction Taskforce in 2019, suggested 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 to cryptoassets, if cryptoassets are misappropriated, we can now use the standing tools we have for the recovery of '*traditional*' properties in the cryptosphere, across multiple borders. The former 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 judiciary in its attempt to create an organic and usable tool that applies existing mechanisms to 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 has led to increased cryptoasset certainty under English law, a welcome safety net in the wake of the drastic price fluctuations that have been seen in the past two years. In June 2021, bitcoin fell in value from $60,000 to $30,000 within two weeks, and the deputy governor of the Bank of England warned that the coin '*could theoretically or practically drop to zero*' in value. In March 2024, bitcoin began trading above $66,000, a dramatic return to levels not seen since 2021.

The increased popularity and resultant fiscal attractiveness of the product are also likely to make cryptocurrencies ever more appealing to fraudsters. Over the past year, practitioners have seen a surge in instructions on cryptocentric matters that have required a malleable skillset balancing legal knowledge with precise forensic tracing abilities. The scale of this task only increases when one looks at the plethora of jurisdictional issues that these matters present. It is therefore vital that a robust legal underpinning is in place to act as a disincentive for nefarious uses.

This was emphasised in the case of *Ion Science Ltd and Duncan Johns v Persons Unknown, Binance Holdings Limited and Payward Limited* [2020], where the court permitted disclosure orders to be made against cryptocurrency exchanges outside the jurisdiction of the court and against whom no claim was asserted. Meanwhile, the case of *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 solidified the status of the English courts as a leading jurisdiction for resolving crypto disputes and assisting victims of this manner of fraud. In the latter case, the applicants were able to get a bankers trust order against the cryptocurrency exchange located outside of England & Wales, as the *lex situ* of a cryptoasset has been determined by the courts to be the place where the person or company who owns the asset is domiciled.

One of the key elements in tracing cryptoassets is speed. In *Danisz v Persons Unknown* [2022] EWHC 280 (QB), Lane J stressed the urgency in crypto cases to follow the money before the assets were all dissipated and to stop further damage, granting a proprietary injunction against the defendants unknown and the exchange where the funds were traced to, as well as a worldwide freezing order against person unknown and a bankers trust disclosure order against the second defendant. Bankers trust orders in cases like these are vital. There are massive informational gaps when it comes to cryptocurrency, in part due to the anonymity provisions inherent to crypto's design, compounded by the fact that the system is decentralised and there is no third-party intermediary like a bank or another more traditional financial institution used to validate the transactions.

By attempting to enhance certainty amid the confusion, the English courts are sending a clear message that they are a global leader in this domain. Of course, legislation is also trying to keep pace, with the EU's new Markets in Crypto-Assets Regu-

lation (MiCAR) finalised in 2022. The UK, having observed the EU's approach to crypto, has now proposed that the industry fall within the ground rules set up for the existing financial services framework. Greater regulatory clarity will be beneficial for consumers, businesses, and the courts alike.

IX Recent developments and other impacting factors

As a jurisdiction, England & Wales have always been, and will remain, a vital player at the epicentre of the fight against global crime. Despite the effects of sanctions against Russian players, and the lingering effects of the pandemic, the fraud and asset recovery sectors continue to move from strength to strength.

Signing the Hague Convention of 2019, although falling short of the capabilities of the Lugano Convention, will continue to encourage foreign litigants to turn to the English courts. The flexibility of the common law rules of jurisdiction, allowing the UK to consolidate claims against multiple defendants in a single forum, has been one of the attractions of London as a venue for complex multi-party proceedings. Fraud is rarely hampered by geographical boundaries, and international co-operation is vital if there is to be a modicum of hope of repatriating misappropriated funds that have been 'stashed' overseas.

The continued success of the courts to attract foreign litigants can be seen in Portland's *Commercial Courts Report* 2023, which states that 78 countries were represented in cases, while 60% of litigants were not from the UK, the highest proportion and number of international litigants ever recorded. With an increase of 11% in the number of judgments handed down, and a 23% increase in the number of litigants, any fears that Brexit would continue to affect the attractiveness of the UK legal system seem to have been misplaced. The report indicates that 15.3% of litigants were from the EU, the highest proportion since 2018; however, this was the first time that an EU Member State did not feature in the top five litigant nationalities. The UK, Russia and the US continue to dominate the top three positions, and were joined by India and Singapore for the first time. Despite the UK's sanctions regime, the number of Russian litigants increased by 41%; however, the invasion has definitely impacted Ukraine's access to UK courts, with no Ukrainian litigants in the Commercial Courts since July 2021.

The trust shown in the UK court system by both foreign and local litigants is evidenced by their appreciation of its reliable results, lack of government interference due to its independence, and stability. The courts have certainly recovered from 2022, and are likely to increase their attractiveness with greater jurisdictional certainty from the Hague Convention.

The government's recent legislative focus on economic crime, as a sidebar to the implementation of sanctions against Russian individuals and companies after the invasion of Ukraine, led to both the Economic Crime Act 2022 and the Economic Crime and Corporate Transparency Act 2023. The former shone a light on London's reputation as a laundromat for global dirty money; the latter seeks to fight this allegation with reform of Companies House powers, enhanced verification requirements for company ownership and control, and additional power to seize and recover cryptoassets.

Despite the fraudsters' attempts, the law in England & Wales continues to stand firm as a scarecrow in a field, to return to Shakespeare's initial quotation, and we are assured that the courts and judicial system are equal to the task to continually evolve to protect law and justice. CDR

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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 US, 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.

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Guernsey

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I 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 that 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 or 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 exist 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. These modern rules are passed by an elected government (the States of Guernsey) or more fundamental rules that also need to be approved by the King of England through his 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 King'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 based upon English legislation that states it to be binding on the Channel Islands – usually international laws such as immigration shipping and various international conventions.

Civil remedies and tools

As stated above, common law practitioners in the area of fraud and asset recovery will find Guernsey's overall law familiar, but there are some unique and useful differences. As far as civil fraud is concerned, the causes of action and remedies are for the most part drawn from modern legislation and jurisprudence.

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 (of both local and foreign companies).

So, what are the main weapons in the legal arsenal for tracing and recovering the proceeds of fraud? There is, of course, 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 the well-recognised tools of asset tracing that originate from the English courts available to them, 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 disclose 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 or her assets have long since left Guernsey. However, under an *arrêt conservatoire*, HM Sheriff can physically seize and lock down the property that is 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. 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 realty/real estate, 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 (the 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 that 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, the 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 regime 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, in the form of a suspicious activity report (SAR). 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 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 that 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.

There have been important amendments to the Civil Forfeiture Law, which are discussed in the section on recent developments below.

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 that 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, or 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 publicly 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 himself 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 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 that 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 POCL, made upon sentencing a convicted fraudster. If a victim has not commenced, 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 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 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. Although, please note the amendments to the Civil Forfeiture Law as discussed in the section on recent developments below.

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 of 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 of those jurisdictions. Modern fraud is "a patron of many countries but a citizen of 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 that may be held in the possession of a relatively innocent third party, but that nevertheless, in law, belong to the victim.

So far as international conventions are concerned, and arising from Guernsey's position 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, the 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 of the "Big Four" accountancy firms (together with many others) have offices established in Guernsey.

VIII Highlighting the influence of digital currencies: is this a game changer?

Although cryptocurrency is by no means new, it has certainly seen a greater uptake over the years – particularly with the surge in value of certain currencies over the last couple of years. As with the increased popularity of any data-based product, particularly one

such as cryptocurrency, which is largely unregulated, this has attracted the attention of cyber criminals. Cryptocurrency has long been viewed with scepticism and mistrust by regulators and law enforcement agencies in reputable jurisdictions, given its potential to be used for money laundering. The speed at which cryptocurrency can change hands in an unregulated environment has proved beneficial to fraudsters.

Nowadays, blockchain technology utilised by cryptocurrencies purports to create safeguards against fraud, due to its non-centralised nature. Transactions are checked and verified by an array of different computer systems that are not on the same network, which makes it very difficult for fraudsters to manipulate or falsify data. Also, blockchain technology provides a permanent record of transactions, making it easier to trace currency movements.

However, blockchain technology is not impenetrable to fraudsters, and one risk is what is known in the industry as a "51% attack". This occurs when a person or organisation gains control of more than 50% of a blockchain's "hashing power" (i.e., the combined computational power of the cryptocurrency network). The malicious attacker then has the ability to block the confirmation of new transactions or change the ordering of new ones – in other words, the attacker can rewrite sections of the blockchain and reverse their own transactions so that the same cryptocurrency can be used twice or more (known as double-spending).

Cryptocurrencies are also used by fraudsters and scammers as bait, by creating sham currencies and propping the value by speculative investment. This attracts more investors and the price continues to increase, until it finally crashes – by which time the fraudster has cashed out and fled. The traditional tools of asset recovery have struggled to keep up with the fast-paced world of cryptocurrency, although there are indications that it is catching up.

In the decision of *Ion Science Ltd and Duncan Johns v Persons Unknown, Binance Holdings Limited and Payward Limited* [2019], the English High Court was prepared to grant a worldwide freezing order against the unknown fraudsters who had stolen and dissipated cryptocurrencies through various exchanges, together with a disclosure order against the cryptocurrency exchanges to identify the fraudsters. This had been the first time an English court had ordered such disclosure from a cryptocurrency exchange located outside the UK. Although this has not yet been considered by the Guernsey courts, it is expected that the English decision would be persuasive.

Guernsey has yet to see any material cases arise from the fraudulent use/transfer of digital assets but the industry itself continues to develop with funds being established with digital asset bases. As the jurisprudence develops worldwide in terms of the ability to investigate, freeze and recover misappropriated assets, it is expected that the Royal Court will continue to adopt suitable persuasive case law from other common law jurisdictions to ensure victims are protected.

IX Recent developments and other impacting factors

Litigation funding

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.

Insolvency

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. The changes came into force on 1 January 2023 and 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 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.

Civil Forfeiture Law

Late last year, the States of Guernsey passed the Forfeiture of Money etc. in Civil Proceedings (Bail-

iwick of Guernsey) (Amendment) Ordinance, 2022, which made significant amendments to the Civil Forfeiture Law and the regime for SARs in Guernsey. Those amendments came into force on 31 January 2023.

Under the previous regime in Guernsey, and unlike its English counterpart, there was no mechanism under the POCL whereby the authorities are deemed to consent to a transaction if they take no action within a certain period (as in England). The upshot was that there was the possibility that funds could be effectively "frozen" if a SAR was lodged and the authorities did not provide consent to the funds being accessed by their owners or a third party.

In stark contrast to the English regime where the responsibility of taking action (and quickly) falls squarely on the authorities' shoulders, the Guernsey authorities could simply refuse to provide their consent and then do nothing more. The customer (whose funds are the subject of the SAR) was then left with the choice of bringing a "private law action" against the financial institution holding the funds, which usually involved the customer having to prove that the funds were not the proceeds of crime.

The amendments to the Civil Forfeiture Law provide a mechanism for the authorities to apply to the court for a forfeiture order in respect of monies the subject of a SAR where certain requirements are met, in particular that a request for consent to deal with the monies has been refused by the authorities over 12 months ago. The customer then has opportunity to satisfy the court (on the balance of probabilities) that the monies are not (in whole or part) the proceeds of unlawful conduct.

The amendments should make life easier for the authorities, who previously had to bear the onus of proof in civil forfeiture applications, and who often struggled in obtaining the evidence to provide that monies were the proceeds of unlawful conduct. The reverse burden of proof under the amendments puts the onus on the customer to demonstrate the source of their assets – given they are the ones with access to the information and documents to do so. Of course, this is provided that the customer appears at court to oppose the forfeiture application. If they do not, the amendments provide that the court shall make the forfeiture order.

The amendments may also be welcomed by financial institutions where monies are held in limbo following a SAR being filed, unless a customer rings a private law action.

However, it will need to be seen if, how widely and in what circumstances the authorities will decide to use the new regime under the amendments. CDR

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.

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John obtained an LL.B. (Hons) at Hull University in 1972.

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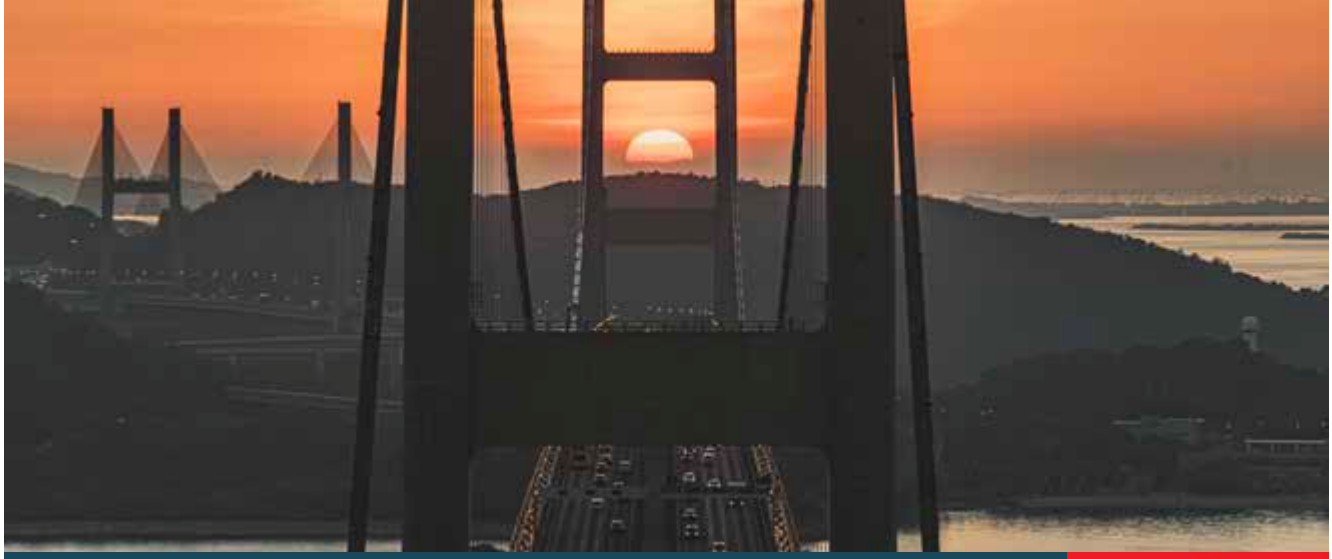

Hong Kong

Dorothy Siron
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I Executive summary

Hong Kong, officially the Hong Kong Special Administrative Region of the People's Republic of China ("**HK**" and "**HKSAR**" interchangeably, and separately, the People's Republic of China as "**PRC**"), serves as a dominant gateway to and from PRC, maintaining its portal as a competitive international financial platform and a forward-looking hub for old and new businesses alike, as well as for financial investments.

Maintaining its ease of access, with such institutional framework, HK continues to be a hotbed haven for fraud and financial crime. We shall discuss hereunder how victims of white-collar crime may seek redress under HK's legal structure.

II Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

HK runs a common law legal system supplemented by statutes and rules of equity. After HK's handover from Britain to PRC on 1 July 1997, judgments of the English courts, albeit non-binding, are persuasive among HK courts if they do not contravene local legislation. However, pre-handover Privy Council decisions remain binding.

Criminal proceedings

The Department of Justice ("**DoJ**") controls criminal prosecution in HK. The courts will only assume extraterritorial jurisdiction if "a substantial measure of the activities constituting a crime" happened in HK (*HKSAR v Krieger* [2014] 3 HKLRD 404). For certain dishonesty offences (including fraud), a person may be guilty of those offences "if any of the events which are relevant events in relation to the offence occurred in Hong Kong" (sections 2 and 3, Criminal Jurisdiction Ordinance (Cap. 461)).

Major dishonesty offences include:

- **Theft Ordinance (Cap. 210):**

(i) Theft (sections 2 and 9).
(ii) Fraud (section 16A).
(iii) Deception offences, such as obtaining property or pecuniary advantage by deception (sections 17 and 18 respectively).
(iv) False accounting (section 19).
(v) False statements by company directors, etc. (section 21).
(vi) Suppression, etc. of documents (section 22).
(vii) Handling stolen goods (section 24).
(viii) Common law offence of cheating the public revenue (section 34).

- **Crimes Ordinance (Cap. 200):**

(ix) Technology crimes, such as destroying or damaging property (e.g. by altering or erasing data) (section 60) and accessing a computer with criminal or dishonest intent (section 161).

(x) Forgery and false instruments, such as forgery (section 71) and copying, using, using a copy of, or possessing a false instrument (sections 72, 73, 74 and 75 respectively).
(xi) Offence of conspiracy (section 159A).
(xii) Common law conspiracy to defraud (section 159E(2)).
(xiii) Attempting to commit an offence (section 159G).

- **Criminal Procedure Ordinance (Cap. 221):**

(xiv) Aiders, abettors and accessories (section 89).

There are also additional offences found in legislation, such as the Telecommunications Ordinance (Cap. 106), Inland Revenue Ordinance (Cap. 112), Securities and Futures Ordinance (Cap. 571) ("**SFO**") and Companies Ordinance (Cap. 622).

Civil proceedings

For general civil proceedings, the limitation period does not run until the plaintiff discovers the fraud, concealment or mistake or could with reasonable diligence have discovered it (section 26(1), Limitation Ordinance (Cap. 347)).

Despite the absence of a class action regime, representative proceedings and joinders of parties of relevant proceedings are available. Victims may be able to mount a civil case using causes of action such as the following:

Constructive trusts including knowing receipt and dishonest assistance

The fraudster or any other recipient knowingly holding the swindled assets can be held accountable as a constructive trustee of the victim in equity without the existence of trust or fiduciary duty.

Conversely, if the recipient has actual knowledge that the assets beneficially transferred to them are in breach of trust or fiduciary duty rendering it unconscionable for the recipient to retain the same, victims may sue them for knowing receipt/unconscionable receipt. A third party may be liable for dishonest assistance if they have dishonestly procured, induced or assisted that breach contrary to normally acceptable standards of honest conduct.

An innocent recipient without the culpable knowledge may need to return the assets unless they are a "*bona fide* purchaser for value without notice" of a prior equitable interest or breach of trust.

Unjust enrichment (money had and received)

Victims may claim that the fraudster was enriched at the expense of the victim in unjust circumstances, such as where there is a "total failure of consideration" or a mistake of fact or law.

The defence of "change of position" is available to a person whose position has changed in such a way that it would be inequitable to require the person to make restitution in part or in full. Reliance on enrichment was held not to be a necessary component of such defence in *Credit One Finance Limited v Yeung Kwok Chi & Others* [2020] HKCFI 2450.

A recipient may raise a "conduit pipe" defence if they can show that they are merely an innocent conduit pipe, through which payment to the ultimate recipient was effected, and they did not receive any benefits. The court will distinguish whether their receipt and transmission of funds is obligatory or voluntary as held in *Akbank T.A.S. v Mainford Ltd & Ors* [2020] HKCFI 396.

Fraudulent misrepresentation

Where a fraudster (i) made a false representation of fact, (ii) knowing it to be false, or without actual belief in or being reckless as to its truth, (iii) and the victim relied on the representation just as the fraudster intended to, and (iv) suffered loss as a result, the victim may bring a tortious claim of deceit based on fraudulent misrepresentation.

Bribery

In civil actions, a bribe refers to the payment of a secret commission where a person knowingly gives an advantage to the agent of the principal with whom they are dealing, without disclosing such payment to the principal with whom they are dealing. If the bribed agent consequently persuades their principal into an unfavourable transaction or into a transaction which the principal would otherwise not have entered into, they, together with the briber, may be liable for the loss suffered by the principal in a fraud claim.

Unlawful interference or inducing breach of contract

The tort of procuring a breach of contract as established in *Lumley v Gye* [1853] EWHC QB J73 and cited in *Palmer Birch v Lloyd* [2018] EWHC 2316 (TCC) is discussed in the HK Court of Final Appeal case of *Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd* [2020] HKCFA 32.

Provided that (i) there is a breach of an existing contract, (ii) a shareholder, director, or controller has intended to and indeed participated in the breach of the contract, (iii) resulting in the creditor's loss,

this tort action should allow the creditor to bypass the "privity of contract" requirement and the rarely granted piercing of the corporate veil to go after the shadow director(s) and ultimate owner/controller instead of the debtor company. It must be cautioned that this "piercing of the corporate veil" has a very high threshold and the courts do not find favour with this claim very often as they say that commercial persons and entities make their own contracts according to commercial values and requirements.

Tort of conspiracy

Without being required to prove actual damage, a victim may bring a tortious claim of conspiracy where two or more persons intend to damage or have damaged their interests as a result of fraudulent behaviour following an agreement.

Relief and orders in civil proceedings for discovery, tracing and freezing of assets (including cryptoassets)

Disclosure against third parties

Norwich Pharmacal Order ("NPO")

This is an order for disclosure of documents and information against a third party, a bank or cryptocurrency exchange, for instance, who becomes involved in the tortious or wrongful acts of others. Such disclosure would allow the victim to trace information or assets with the aim of identifying fraudsters. Recent cases have involved making NPO applications against cryptocurrency exchanges to obtain cryptocurrency information regarding source and destination, fraudsters' information, wallet addresses, etc.

The court may also grant a "gagging order" to prevent the subject of the NPO from informing anyone of the disclosure and/or an "anonymity order" for non-disclosure of the identity of the parties in the proceedings.

Bankers Trust Order

A Bankers Trust Order is essentially an NPO against banks or professional advisers, directing them to provide information that may be protected by confidentiality. Such orders are used in cases where the victim claims to have a proprietary interest in the assets being traced. Disclosure has been extended by the HK courts to the discovery of bank books, records and other documents including bank statements and account opening forms.

Bankers' Records Order

Any party to legal proceedings may apply to the court for an order to inspect and take copies of a bank's records for materials germane to an issue to be tried between the parties (section 21, Evidence Ordinance (Cap. 8) ("**EO**")).

Disclosure against wrongdoers

Pre-action discovery

HK courts may allow a pre-action discovery application against a suspected wrongdoer who is likely to become a party to subsequent proceedings and may have in its possession, custody or power any documents directly relating to matters in question connected to the action.

Examination of judgment debtors

A judgment debtor can be ordered to appear before the court to disclose the whereabouts and details of their assets (Order 48 or Order 49B, Rules of the High Court (Cap. 4A) ("**RHC**")).

Prohibition order preventing judgment debtors from leaving HK

In order to prevent the obstruction or delay of the satisfaction of a judgment or order, a victim who has obtained a favourable judgment or order may apply to the court for a prohibition order to prevent a judgment debtor who is about to leave HK, or who may be planning to leave HK to avoid court proceedings, from departing (Order 44A, RHC). This is a draconian method and the applicant must satisfy the court that the debtor is seeking to abscond. Once granted, the prohibition order usually lasts for one month and is renewable on further application to the court.

Preservation of assets and information

Mareva Injunction

A *Mareva* Injunction is a freezing order to prevent a fraudster from dealing with, moving, disposing of, or dissipating assets pending trial and/or final judgment. Banks served with the injunction are bound to freeze the relevant accounts.

The applicant must show that:

(i) the applicant has a "good arguable case" on its claim against the respondent;

(ii) the respondent has assets within HK (a domestic *Mareva* Injunction) and/or outside HK (a worldwide *Mareva* Injunction);

(iii) there is a real risk of unjustified dissipation or removal of those assets by the respondent; and

(iv) the balance of convenience is in favour of granting the injunction.

A *Chabra* injunction may also be made targeting a third party against whom the victim has no direct cause of action. Such person is usually the trustee or nominee of the wrongdoer's assets. To invoke the court's *Chabra* jurisdiction, an applicant has to show good reason that either (i) the third party is holding or in control of assets that the defendant beneficially owned, or (ii) the third party is amenable to some process, ultimately enforceable by the court, which the third party may be obliged to contribute to the funds or property of the defendant to help satisfy the claimant's judgment against the defendant (*XY, LLC v Jesse Chu* [2016] HKEC 2630; *Dingway Investment Ltd v China City Construction & Development Co, (Hong Kong) Ltd* [2022] HKCFI 2314).

A hearing for such interim relief may be obtained at short notice on application to the courts. Applications must include any relevant affidavits and evidence. The hearing is heard *ex parte* (i.e. without the opposing party) and requires the applicant's full and frank disclosure. The applicant is also likely to be required to compensate for any losses or damage suffered by the respondent and indemnify innocent third parties if the final judgment is in favour of the respondent. The applicant may as well be required to put up security by way of a bond or deposit.

The court may order ancillary disclosure orders, receivership, appointment of a provisional liquidator, and detention, custody, preservation and inspection of the property. Non-compliance with court orders may constitute contempt of court, which can lead to a committal order, fines and imprisonment.

Interim attachment of property

Where a defendant 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 victim may apply to the court for an order that the fraudster furnishes security which would be enough to satisfy any judgment that may be given against the fraudster (Order 44A, RHC). However, this is rarely sought given the availability of the more powerful *Mareva* Injunction.

Anton Piller Order

This is a search and seizure order to preserve documents. It requires a fraudster to let the victim enter their premises, search for and remove documents relevant to the victim's case.

The applicant must demonstrate (i) a strong *prima facie* claim (i.e. a strong claim upon initial examination), (ii) a real risk of destruction or removal of evidence by the opposing party to the serious detriment of the applicant's interests, and that (iii) the execution of the Anton Piller Order to the opposing party is proportional to the perceived threat to the applicant's rights. Although an HK Anton Piller Order in respect of evidence abroad is theoretically possible, the better option would be to apply directly to the court in the jurisdiction where the evidence is located to ensure enforceability of the same.

Receivership

In certain circumstances, an application for court-appointed receivers in aid of property preservation and/or judgment execution can also be made when it appears just and convenient in the eyes of the court.

Due to its draconian nature, in addition to the stringent requirements required in an injunction applica-

tion (i.e. there is a serious question to be tried (the claim must not be frivolous or vexatious, and must have a prospect of success) and the balance of convenience lies in favour of granting such application), the court will also consider (i) whether there is no effective protective regime available and whether such protection should be given towards preserving the *status quo* (e.g. is an injunction not adequate to protect a plaintiff), and (ii) whether there is a risk of damage to the assets if the appointment of a receiver is made (especially in the case of a company) and whether it could be adequately compensated by a cross-undertaking in damages (*Cenky Ltd v Zealot & Co Ltd* [2008] 1 HKLRD 386; applied in *JSC BTA Bank v Mukhtar Kabulovich Ablyazov* [2014] 5 HKC 209).

III Case triage: main stages of fraud, asset tracing and recovery cases

In a case of cyber fraud or email fraud, it is recommended that victims take the following steps promptly.

Step 1: Contacting regulators and financial institutions

Victims should file an online report for cyber fraud victims with the Cyber Security and Technology Crime Bureau and also contact their own local bank. They should also approach the bank and the police in both the fraudster's home jurisdiction and any jurisdictions to which the money has been transferred.

Once a party has been defrauded, there is much advantage to be gained from reporting the fraud online via the police's e-Report Centre at the earliest opportunity. The police can then require the relevant financial institutions receiving fraudulent assets to try and block any attempts to transfer or withdraw the assets by applying for a court restraint order to freeze accounts suspected of dealing in the proceeds of crime (section 15, Organised and Serious Crimes Ordinance (Cap. 455) ("**OSCO**")).

The police may assist in recovering stolen funds or even carry out the recovery process themselves. However, victims cannot request that the police do so nor should they rely on the police to help them recover their funds, as any such relief can only be obtained via a private citizen's court application under civil proceedings. The police are only involved in trying to catch and prosecute the fraudsters and are not in a position to retrieve stolen funds for the victim. The victim must then engage a lawyer and apply for relief through the courts, as described above, in order to trace and freeze the funds. The victim will therefore incur legal fees.

In view of this, victims should proactively contact both their own bank and the recipient banks regarding the fraud and potential criminal consequences of transferring funds which they know or suspect are the proceeds of crime. Financial institutions may then file Suspicious Transaction Reports with the Joint Financial Intelligence Unit ("**JFIU**"), alerting the police to investigate and apply for a court restraint order.

At the time of writing, the police are still able to issue a Letter of No Consent under the No Consent Regime created by sections 25 and 25A of OSCO, as confirmed under the recent Court of Appeal judgment of *Tam Sze Leung & Ors v Commissioner of Police* [2023] HKCA 537 (note that the Letter of No Consent regime was previously ruled unconstitutional by a lower court judgment). Such letter informed financial institutions that the police do not consent to their handling or dealing with the concerned assets. The Court of Appeal further clarified that this regime does not depend on the source of a bank's suspicion, and it is irrelevant whether the police first contacted the bank or *vice versa*. In practice, financial institutions would often rely on their internal bank mandates to stop further dealings with the bank account(s) once they receive information about the fraud.

More recently, the statutory power of the Securities and Futures Commission ("**SFC**") to issue Restriction Notices ("**RN**") under sections 204 and 205 of the SFO to freeze assets in share trading accounts with SFC-licensed corporations pursuant to section 207(e) of the SFO is also being upheld, which is an effective mechanism for the SFC to prevent dissipation of assets at the preliminary investigation stage (*Tam Sze Leung and others v Secretary for Justice and Another* [2022] HKCFI 2330).

Step 2: Preliminary case assessment, gathering evidence and seeking global assistance

Although the onus is on the plaintiff to prove fraud on the balance of probability (i.e., the event is more likely than not to have taken place) in civil actions, cogent evidence must be provided to the court, along with distinct pleadings and particulars, to demonstrate and establish that the fraud did take place.

The victim should ensure that there are identifiable assets/property in HK which may be seized and establish the relationship between the identified assets/property and the defendants, especially when the assets/property are held by third parties (e.g. banks, cryptocurrency exchanges, etc.).

The victim may make use of publicly available information on the official online databases of the Companies Registry (for particulars of an HK-registered company), Business Registration Office (for basic information of all HK-registered businesses), Land Registry (for the registered owner of a local address), and Official Receiver's Office (for records of bankruptcy, individual voluntary arrangement and compulsory winding-up) to conduct preliminary searches against the fraudster to find out more background information before commencing any legal suit.

The victim may engage lawyers, forensic accountants, private investigators, and third-party databases in the different jurisdictions to which the misappropriated assets may have flowed. It also helps to understand at an early stage the appropriate legal forum (and its appropriate court), remedies available and ease of enforceability of judgments and orders in other juris-

dictions. The victim may also consider applying for relief and orders for the tracing and freezing of assets in the HK courts, as well as any overseas courts if the defrauded funds may have been transferred abroad.

Step 3: Commencing civil proceedings

Cyber frauds are often cross-jurisdictional and involve foreign parties (including parties in Mainland China in this context). In the case of the defrauding company being an HK-incorporated company, the issuance of proceedings and the service process remain fairly simple. If, on the other hand, the defrauding company is a foreign company or individual, the plaintiff must also obtain the HK court's leave to serve pleadings and orders out of HK (Order 11, RHC) and be prepared to resist any jurisdictional challenges. The plaintiff may apply for substituted service if, for example, the defendants evade services or cannot be identified.

In the past, we have discovered that most fraudsters are HK-incorporated companies, with directors and shareholders who originate from overseas, from jurisdictions like PRC, where it would be hard to locate and issue proceedings against such individuals.

Our strategy always remains "To Follow the Money" so once a recipient bank is identified, proceedings can begin in the HK courts, with applications for a *Mareva* Injunction to be issued against the named defendants. Once such orders are obtained, the recipient bank is served with all relevant court *Mareva* Injunction Orders and hence the bank account will be frozen to prevent further dissipation of assets.

For the foreign defendant, the plaintiff must obtain leave to serve the proceedings outside of HK so that any application for further court orders and for an eventual Default Judgment can be obtained, prior to obtaining the required Execution of the Judgment by way of Garnishee Proceedings, which, if successful, would allow the bank to return the stolen/defrauded funds to the plaintiff. It then becomes ancillary as to whether or not the plaintiff still wishes to pursue the overseas defendant any further after the funds have been returned.

HK is a party to the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (the "**Hague Service Convention**"), which governs the transmission of legal documents to be served abroad between its 79 contracting states. For non-contracting parties, diplomatic service via letters of request is generally used. For service of process between Mainland China and HK, the Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and HKSAR courts entered into force on 30 March 1999.

Interim relief and interlocutory applications

As mentioned above, various orders and methods of relief – for example *Mareva* Injunctions – are available to restrain fraudsters from dealing with, moving or further dissipating or disposing of assets. In terms of proceeding to a conclusion of the action, in the event that the case is uncontested, which it often is, the plaintiff may also seek a swift determination of the proceedings by one of the following two ways:

(i) Default Judgment

If the defendant(s) does not participate in the civil proceedings and fails to file an acknowledgment of service or a defence, the plaintiff can file an application for a Default Judgment (judgment without a trial) against the defendant(s).

(ii) Summary Judgment

The plaintiff can also file an application for a Summary Judgment of the case. This requires affidavit evidence and a hearing in chambers. The "fraud exception rule" was removed on 1 December 2021, enabling the plaintiff of a claim based on an allegation of fraud to apply for a Summary Judgment on the grounds that the defendant does not have a defence (i.e., lack of reasonable grounds, concrete evidence or arguable issues). The plaintiff would launch such an application if the defendant has come into the proceedings and a Default Judgment is not possible.

Proprietary or personal remedies

At the start of the proceedings, the plaintiff will need to decide whether it seeks proprietary or personal remedies as this will affect the path to recovery of their assets.

(i) Proprietary remedies

If a proprietary claim over the defrauded funds is sought, the plaintiff may need to take out an injunction through the courts and must show that the funds sitting in the account are the specific funds transferred from the plaintiff's account, and hence the plaintiff establishes a proprietary injunction and later obtains a proprietary judgment which would declare that the funds concerned have always belonged to the plaintiff so that the plaintiff will enjoy priority among other victims and creditors and be entitled to a proprietary claim over the funds. This is unlikely

to be possible without first obtaining a proprietary injunction as the flow of money would need to be evidenced to the court granting the injunction.

(ii) Personal remedies

In the event that the plaintiff does not obtain a proprietary injunction from the court due to either the humble size of the defrauded amount or the economy of funds available in legal costs expenditure, and the plaintiff does not obtain any injunction from the court, then even armed with a Default Judgment, the plaintiff can only execute on the judgment via the normal execution process using, for example, a Garnishee Order. In so doing, the plaintiff remains vulnerable to competing claims from other creditors and must process their claim with despatch in order to try and beat the queue of other creditors, if any. In some cases, the plaintiff may not fully recover the defrauded monies and may need to share them with other victims.

Step 4: Trials, enforcing judgments and recovering assets

There are a variety of methods for enforcing judgments, such as Garnishee Proceedings (directing the bank to pay the money in a bank account directly over to the plaintiff after a successful judgment), charging orders (imposing a charge over land/real estate, securities and funds in court, though further action would have to be taken to realise those assets), writs of *fieri facias* (for goods and chattels), receivership, bankruptcy or winding-up proceedings, writs of sequestration and orders for committal.

Whilst the strategy for regaining possession of defrauded funds is a well-trodden path, there have been recent developments in HK surrounding certain previously used methods. One of these is what is known as the Vesting Order. These orders recognise 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 has been 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 was granted. This is to be differentiated from a judgment creditor seeking to enforce a judgment and for all intents and purposes the money would then be treated as the victim's money.

This is a developing area where there are divergent opinions in the judiciary:

(i) Vesting Orders under section 52 of the Trustee Ordinance (Cap. 29)

HKCFI ruled in *800 Columbia Project Company LLC v Chengfang Trade Limited and Another* [2020] HKCFI 1293 (24 June 2020) that the court's jurisdiction under section 52 to grant a Vesting Order should not be invoked to favour victims of fraud as it purposively envisages Vesting Orders to be made upon a change in the trusteeship, but not situations in which a person becomes a constructive trustee under a court declaration.

However, the court in *Wismettac Asian Foods, Inc. v United Top Properties Limited and others* [2020] HKCFI 1504 (10 July 2020), a case in which I was involved, granted a Vesting Order and ruled that section 52, when 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. *Wismettac* was followed by two HKCFI cases: *Star Therapeutics, Inc v Leabon Technology (HK) Limited and another* [2021] HKCFI 1715 and *Lexcom Informationssysteme GmbH v Hongkong Joyee Holdings Co., Limited and others* [2021] HKCFI 3389. More recently, some clarity was helpfully provided in another HKCFI case of *Hypertec Systems Inc. v Yifim Limited and another* [2022] HKCFI 482, where the court made clear that (by affirming *Wismettac*) two conditions must be satisfied: (i) the funds in the bank account can be proved to be representing the victim's monies or traceable proceeds; and (ii) it is expedient to grant such order (i.e. it would be difficult or impossible to deal with those monies or proceeds without such order).

(ii) Section 25A of the High Court Ordinance ("HCO")

Preferring the reasoning in *800 Columbia Project Company LLC*, HKCFI in *Tokic, D.O.O. v Hongkong Shui Fat Trading Ltd.* [2020] HKCFI 1822 (4 August 2020) considered that section 25A of the HCO was an alternative to Garnishee Proceedings which empowered the court to order the execution of the conveyance, contract or other document if the defendant neglected or refused to execute the same or could not be located.

Benefits and difficulties of the legal system

HK courts have shown an increasing willingness to assist victims of cyber fraud, notably by granting declaratory relief to victims at the interlocutory stage of proceedings, without cases going to a trial.

In *Skandinaviska Enskilda Banken SA v Hongkong Liling Trading Ltd* [2018] HKCFI 2676, HKCFI granted a Default Judgment along with a declaration that the defendants held the funds on a proprietary constructive trust for the victim of email fraud. 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".

It was stressed in *Milestone Electric Inc. v Meihoukang Trading Co Limited* [2020] HKCFI 2542 that the court will scrutinise the application for default closely and will be cautious when declaring the defendant holds funds as a constructive trustee. The plaintiff must demonstrate that the assets claimed are traceable from the original sum transferred by the plaintiff.

However, the whole process takes time and requires the victims' prompt action and willingness to incur legal costs in the recovery. Given how easy it is to incorporate a private limited company and open bank accounts, HK banks should exercise more stringent risk assessment of the information they collect and the individuals whom they allow to open bank accounts, whether under an individual's name or corporate accounts, failing which, HK will continue to remain an attractive jurisdiction for potential money launderers.

IV Parallel proceedings

A combined civil and criminal approach may occur frequently in HK; however, at the discretion of the police.

Victims have no control over the conduct of the investigation or the prosecution and cannot propose the relief they desire. The police also do not share the results of the investigation with the public and hence victims of the fraud cannot rely on this as a resource for their civil claims. Nor will the police be at liberty to command that the recipient bank return the defrauded funds to the victim plaintiff.

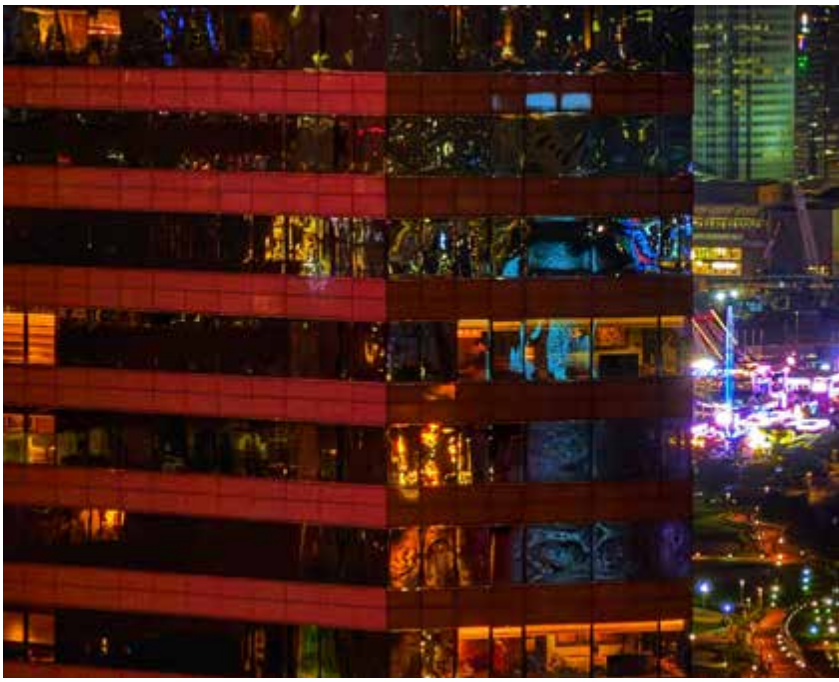
Private prosecution is available to individuals for cases involving public interest but is rarely used given DoJ's power to take over cases and the heavy burden on the victims to prove their case beyond reasonable doubt.

V Key challenges

Urgency and uncertainty of outcome

Fraudsters often layer illegitimate transactions into cross-border remittances. Victims must pursue remedies to recover assets by gathering evidence, tracing assets and making appropriate court applications in time, and cannot rely solely on the police. Still, no one can guarantee the type of relief and the chance of recovery.

For example, victims may encounter difficulty in contacting banks. Before any injunction order is granted by the HK court and/or any action is taken by the authorities, unless the banks notice or are notified of the transaction involving the proceeds of crime making them legally obliged to file a Suspicious Transaction Report with the police, banks tend to carry out their duty to honour any instructions to transfer funds out of a bank account in compliance with their contractual duties and secrecy obligations owed to their customers according to their bank mandates. It can be time-consuming for the victim to communicate the details of fraud to the right personnel and to persuade them to take action. At the same time, a recipient bank is unable to do, or reluctant to do, anything to stop further transfers of the monies promptly unless the victim has obtained a court injunction prohibiting any dealing or transfer of the money standing in the recipient bank account as the recipient bank owes a separate duty to the account holder under their bank mandate. It is often difficult to recover the defrauded monies that have already been transferred out of the jurisdiction and one must enlist lawyers in the onward jurisdictions to try and assist with the tracing and recovery within their legal systems.



Unavailability of third-party litigation funding

Every step in the recovery process incurs costs, but unfortunately, to date, maintenance and champerty still remain unavailable in HK, except for limited applications in, for example, arbitration and insolvency proceedings sought by liquidators under the "outcome related fee structures for arbitration" mechanism under Part 10B of the Arbitration Ordinance. Arrangements regarding litigation funding, contingency fees and conditional fees, as things stand, have been considered contrary to HK public policy. Therefore, even if the victim wins the case, there is no guarantee that they will recover all, or even any, of their money and legal costs expended, since the defendant in cybercrime is likely to have

absconded long before the civil claim is commenced and will not comply with the court judgment or any order for costs.

VI Cross-jurisdictional mechanisms – issues and solutions in recent times

Most cases of fraud now span multiple jurisdictions and require the cooperation of cross-border litigators to trace and arrest the funds promptly. With its status as an international financial centre and the ease with which companies are formed, HK has inevitably become an epicentre for the transit of the proceeds of crime.

Criminal proceedings

HK has maintained bilateral agreements with 31 jurisdictions (21 of which are currently in force as of 24 September 2021) and a handful of multilateral agreements (e.g. the *International Convention for the Suppression of the Financing of Terrorism 1999*, the *United Nations Convention against Transnational Organized Crime 2000*, and the *United Nations Convention against Corruption 2003*) for reciprocal judicial assistance. In the absence of such agreements, cooperation may still be possible if the requesting jurisdiction can provide a reciprocity undertaking.

Regarding police cooperation on the exchange of information in the detection of crime, HK is a member of the Egmont Group of Financial Intelligence Units, which is an international organisation consisting of 174 members aimed at deterring and combatting transnational money laundering and terrorist financing.

Requests for mutual legal assistance in criminal matters to adduce evidence in prosecution are dealt with under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525). The types of legal assistance available include:

(i) taking of evidence and production of things;
(ii) search and seizure;
(iii) production of materials;
(iv) transfer of persons to assist criminal matters;
(v) confiscation of proceeds of crime; and
(vi) service or certification of documents.

Parts VIII and VIIIA of the EO also provide that HKCFI 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 be issued to an overseas court to assist in obtaining evidence for criminal proceedings in HK.

A series of agreements separately govern mutual legal assistance between Mainland China and HK.

Civil proceedings

HK is a contracting party to the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* ("**Hague Evidence Convention**"), which provides a mechanism for the 66 contracting states to obtain evidence located overseas by issuing a letter of request. Part VIII of the EO and Orders 39 and 70 of RHC are the domestic rules that empower the HK courts to obtain evidence for civil proceedings in overseas courts within the statutory framework. A letter of request from a non-contracting state may still be recognised but is still subject to statutory limitations in the EO and Order 70.

HK and Mainland China separately entered into the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the courts of the Mainland and the HKSAR, which came into force on 1 March 2017. Recently, the HK government also announced that the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap. 645) will come into force on 29 January 2024, where the former requirement that parties must have agreed to the exclusive jurisdiction of a HK or PRC court will be removed. Once in force, it would expand the categories and the scope of enforceable PRC judgments in HK, which reconfirms the unique status of HK for resolving PRC-connected disputes.

Foreign victims may also freeze and realise proceeds of fraud in HK by section 21M of the HCO, under which, despite the absence of local substantive proceedings, specified HK courts have the jurisdiction to grant standalone interim relief in aid of foreign proceedings that have been or are to be commenced in a foreign place and can give rise to a judgment which may be enforced in HK. The court will also consider the case before the foreign court and the risk of dissipation of the HK assets.

VII Using technology to aid asset recovery

The legal sector is progressively welcoming the use of technology, artificial intelligence ("**AI**") and machine learning, also known as "Legal Tech". Examples are e-bundling, e-signing, AI transcription and translation,

AI analysis, video conferencing and legal office management. Legal Tech is efficient, cost-effective and accurate when it comes to organising information, data analysis, document automation, and project and workflow management.

Below are some local Legal Tech developments:

(i) the HK-based Zegal 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;

(ii) the University of Hong Kong has developed an "HKU AI Lawyer: Sentencing Predictor for Drug Trafficking", which generates an estimated term of imprisonment and suggests case precedents based on the user's answers to four questions; and

(iii) LawMiner is an AI-powered platform developed by an HK-based company for legal market insights such as sentencing patterns and distribution of damages.

However, HK still runs a paper-based legal system without completely embracing big data, which explains why there are few examples of technology being used by the local legal sector to aid fraud, asset tracing and recovery.

In light of the electronic filing systems implemented by several other jurisdictions, including: Singapore; the United Kingdom ("**UK**"); and New South Wales, Australia, the HK Judiciary has rolled out the Integrated Case Management System ("**iCMS**") for electronic filing of civil action proceedings in the Hong Kong District Court ("**HKDC**") and related electronic payments since July 2022. Registered users can send and receive case-specific court documents to and from the e-Courts, to search or inspect filed documents and other case-related information held by the e-Courts. It is expected the iCMS will be implemented at other levels of courts in phases.

While the HK courts have become more open to different modes of substituted service, e-service is nonetheless not expressly prescribed in HK's civil procedural rules, and it relies on the lawyers to make such application:

(i) In *Hwang Joon Sang and another v Golden Electronics Inc and others* [2020] HKCFI 1233, HKCFI unprecedently allowed the plaintiffs to serve documents on the defendants using an online data room under Order 62 rule 5(1)(d) of RHC.

(ii) In *Zhuhai Gotech Intelligent Technology Co Ltd v Persons Unknown* (HCZZ 10/2020), HKCFI granted a substituted service order allowing the court documents, including an interlocutory injunction, to be served out of HK via Facebook Messenger. The defendants were unknown persons who operated several Facebook groups and pages and had allegedly passed off satellite television subscription services provided by the plaintiffs. This is a useful tool against persons who evade service or cannot be identified.

(iii) In *A v R1 and R2* [2022] HKCFI 3012, another case in which I was involved, the HKCFI ordered the respondents to supply documents by way of disclosure to the plaintiff in electronic or digital versions wherever possible pursuant to a *Norwich Pharmacal* Order.

Accessibility to court

The judiciary has been holding remote hearings for suitable civil cases by telephone and video-conferencing facilities ("**VCF**"), if it sees fit. Guidance notes and technical specifications about, for example, the preparation and submission of e-bundles have been issued for court users.

If the VCF application is granted, the witness will give evidence in a neutral venue which has no connection with the witness, the party calling that witness or that party's legal representatives, and with the attendance of a local lawyer instructed by the other party. The court may reject late VCF applications if the parties lack time to agree on the neutral venue and prepare for the remote testimony.

Parties of High Court proceedings are not required to collect judgments in person, as the judgments will be sent by ordinary post to the parties and uploaded onto the judiciary's website, usually on the same day, to maintain open justice.

The Legal Cloud Initiative and online dispute resolution ("ODR")

The backlog of court cases has driven people to consider alternative dispute resolution. Under the DoJ-funded Legal Cloud Initiative, the Electronic Business Related Arbitration and Mediation ("**eBRAM**") platform is developing an ODR and deal-making centre, which employs technologies such as the blockchain, smart contracts and AI.

It is expected that the growing maturity of the Legal Cloud Initiative and its potential cooperation with courts and arbitral institutions in other jurisdictions, especially through the "Guangdong-Hong Kong-Macao Greater Bay Area" Plan and the Belt and Road Initiative, will enhance HK's status as an international dispute resolution centre.

VIII Highlighting the influence of digital currencies: Is this a game changer?

The advancement of technology *vs* the difficulties of asset traceability

The pandemic has made people more prone to all types of fraud and cybercrime due to increased internet usage. HK saw a near-50% surge of technology-related crimes in the first half of 2023. Tracing assets is made more difficult due to the advancement of technology.

Immediate payment services

The Faster Payment System ("**FPS**") is a real-time payment system allowing for immediate transfer of funds from bank to bank, registered stored value facilities and e-wallets. However, soon after the launch of the FPS in September 2018, fraud cases involving the FPS cropped up as a result of fraudsters stealing personal and bank account information of victims to open up fake e-wallets which were subsequently used to steal money from those victims' bank accounts.

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 is immediate and irreversible. Therefore, once your money is gone, it can be very difficult to recover it.

Crypto tokens

The number of cases of fraud related to virtual assets has also risen. The SFC and the police logged 3,415 virtual-asset-related crime cases in 2023, amounting to losses of over HKD4.4 billion, almost triple the amount since 2021.

HK has been attempting to balance supporting financial technology (FinTech) and protecting investors. The Hong Kong Monetary Authority ("**HKMA**") defines cryptocurrencies as "virtual commodities" instead of legal tender and is considering regulating payment-related stablecoins. Stablecoins are cryptoassets that aim to maintain a stable value in relation to a specific asset or basket of assets (e.g. fiat currencies, exchange-trade commodities, etc.), as defined in HKMA's *Conclusion of Discussion Paper on Crypto-assets and Stablecoins* in January 2023. The SFC, which regulates the securities and futures markets, has issued statements warning investors about the heightened risk of fraud when investing in crypto tokens and the SFC's possible lack of jurisdiction if the risks "have no nexus with HK or do not provide trading services for crypto tokens which are 'securities' or 'futures contracts'".

On 31 October 2022, the Hong Kong Financial Services and the Treasury Bureau published the Policy Declaration on the Development of Virtual Assets in Hong Kong ("**Policy Declaration**") which clarified the government's stance and policy guidelines on the development of the virtual asset industry. Among others, tokenised assets (i.e. asset-backed tokens) will be treated as existing financial instruments similarly in terms of regulatory status, but if the process of tokenisation involves additional features that make it "complex", such tokens will be treated as a "complex product" and distribution will be restricted to professional investors only. Plans are also revealed to tokenise the government green bond for subscription by institutional investors.

A new licensing regime, which requires "virtual asset exchanges" to be licensed with the SFC and comply with Anti-Money Laundering and Counter-Terrorist Financing ("**AML/CTF**") obligations before providing services to professional investors came into force on 1 June 2023, with a one-year transitional period until 31 May 2024, where all centralised virtual asset trading platforms ("**VATPs**") must be licensed by the SFC to carry on business in HK or to actively market to HK. Subject to certain investor protection mechanisms being in place, licensed VATPs will be able to provide services to retail investors. The SFC has so far licensed only two crypto exchanges: OSL Digital Securities Limited; and Hash Blockchain Limited.

Has the law kept up with these advancements or is it lagging behind?

Contrary to popular belief that the crypto world is lawless due to the decentralised and anonymous nature of blockchain and the lightning transaction speed, the built-in decentralised distributed ledgers are publicly accessible and unalterable, exposing the trace of the embezzled funds and fraudsters. Lucky victims may be able to rely on the know-your-client ("**KYC**") information possessed by the crypto exchanges to identify the fraudster where the relevant transactions were carried out.

HK courts are ready to combat digital fraud using traditional tracing and recovery tools:

(i) In *Cheung Ka Ho Cyril v Securities and Futures Commission* [2020] HKCFI 270, HKCFI upheld the SFC's investigative powers to seize smartphones by including them in the interpretation of the statutory definition of "records and documents". Section 183 of SFO also allows the SFC to compel

disclosure of passwords to access the seized smartphones. While regulators must still respect legal professional privilege (including legal advice privilege and litigation privilege) and privacy and are restricted to only seek information relevant to the investigation or as set out in the warrant, this legal development enables regulators to share such information with foreign authorities to help with cases outside the SFC's jurisdiction.

(ii) In *Nico Constantijn Antonius Samara v Stive Jean Paul Dan* [2019] HKCFI 2718, HKCFI categorised cryptocurrencies as property and granted a *Mareva* Injunction, freezing bitcoins. More recently, proprietary remedies were granted by the HKCFI in the same action ([2022] HKCFI 1254) such that the victim could recover the misappropriated bitcoins, sale proceeds and any fruits to be derived therefrom. This is the very first case in HK that appears to suggest that cryptoassets such as bitcoins constitute property protected under HK law, consistent with other common law jurisdictions.

IX Recent developments and other impacting factors

"e-HKD" as Central Bank Digital Currency ("CBDC")

In 2021, HKMA started exploring the prospect of issuing a retail "e-HKD" as the region's CBDC, which is the e-version of the local fiat currency. The introduction of CBDCs may present regulatory concerns regarding data privacy, AML/KYC and cybersecurity. On 30 October 2023, the HKMA released the "e-HKD Pilot Programme Phase 1 Report" to discuss assessments and findings of various pilot schemes conducted across categories such as offline payments, tokenised deposits, etc.

Non-fungible tokens ("NFTs")

NFTs are unique and non-interchangeable crypto assets stored on a blockchain – from the NFT art piece "Everydays: the First 5000 Days" auctioned at USD69.3 million to the NFT selfie collection of a 22-year-old Indonesian student who made over USD1 million. The NFT bubble may, however, burst at any time, with their value evaporating overnight. Some may also see the NFT market as an innovative vehicle for fraud, money laundering and terrorist financing. One may simply generate NFT images, steal or make up an identity, and trade the NFTs using cryptocurrencies on a server in a jurisdiction with little international law enforcement cooperation. In the HK Fintech Week 2022, HK government launched NFT tickets to serve as proof of attendance for the attendees where digital badge and memento are offered using blockchain technology to celebrate their participation.

AI

HK has been actively addressing the legal and regulatory aspects of AI to harness its benefits, whilst ensuring ethical use and the safeguarding of individual's rights. In August 2021, the Office of the Privacy Commissioner for Personal Data ("**PCPD**") issued the Guidance on the Ethical Development and Use of Artificial Intelligence to promote understanding and compliance with Personal Data (Privacy) Ordinance (Cap. 486) ("**PDPO**"), in light of the challenges to privacy and data protection brought upon by the potential ethical implications of AI. Whilst non-compliance with the aforementioned Guidance is not unlawful *per se*, there would be a presumed breach of the PDPO against the party concerned in any court proceedings before the Administrative Appeals Board, a magistrate, or a court.

With regard to the potential infringement of intellectual property ("**IP**") rights by AI systems, the HK government will be conducting consultations, and while there have been no reported cases in HK concerning AI-generated IP rights, the HK courts may follow the UK approach in *Thaler v Comptroller-General of Patents* [2021] EWCA Civ 1374 as a persuasive precedent that an AI machine cannot be named as the inventor of a patent and a natural person would be required to be the inventor and an owner of other IP rights.

Legal and corporate governance developments to watch out for

Hong Kong National Security Law ("HKNSL")

HKNSL was promulgated in HK on 30 June 2020 as a locally applicable national law. There is a lack of local case precedents or interpretations that clearly define terms such as "state secrets", "intelligence", "national security" and "unlawful disclosure". While certain HK judges are designated to handle HKNSL cases, the Office for Safeguarding National Security of the Central People's Government has jurisdiction over certain cases and the Standing Committee of the National People's Congress has the power to interpret HKNSL (Articles 55 and 65, HKNSL).

HKNSL has wide extraterritorial reach and applies to:

(i) offences thereunder committed in HK by any person (Article 36, HKNSL);

(ii) an HK permanent resident or an incorporated or unincorporated body such as a company or an organisation set up in HK if the person or the body commits an HKNSL offence outside HK (Article 37, HKNSL); and

(iii) offences thereunder committed against HK from outside HK by a person who is not an HK permanent resident (Article 38, HKNSL).

As of September 2023, more than 150 people had been charged with national security offences (including sedition provisions of the Crimes Ordinance (Cap. 200)) since the HKNSL came into force, and 30 of them have been convicted or are awaiting sentencing under the HKNSL.

E-contract and e-signing

The pandemic has popularised the application of

e-contract and e-signing. The Electronic Transactions Ordinance (Cap. 553), which is modelled on the UNCITRAL Model Law on Electronic Commerce, is ready to give legal recognition of electronic records and signatures which fulfil the statutory requirements.

United Nations Convention on Contracts for the International Sale of Goods ("CISG")

CISG is set to be implemented in HK through the locally enacted Sale of Goods (United Nations Convention) Ordinance (Cap. 641) on 1 December 2022. CISG concerns international commercial sales of goods and provides its 94 contracting parties with neutral uniform rules regarding "the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract" (Article 4, CISG). Sales of goods between Mainland China and HK are expected to be governed by a separate arrangement.

Crisis directors

Without it being a legal requirement, businesses may consider appointing independent professionals as crisis directors who advise the board of risks and strategies by assessing financial and operational matters such as lodging fraud claims and completing the sale of a subsidiary with their timely expertise and appropriate control of the business. CDR

Dorothy Siron joins the law firm of Stephenson Harwood as a Partner in their Asset Recovery and Dispute Resolution practice. She was formally a Co-Managing Partner of Zhong Lun Law Firm LLP, and has a wealth of experience in asset recovery and commercial litigation. Dorothy has been recognised as a Recognized Lawyer by *Who's Who Legal* in Asset Recovery in 2022 and 2023, as well as in Commercial Litigation in 2023, and is the sole winner of the Client Choice Award for Investigations for 2024.

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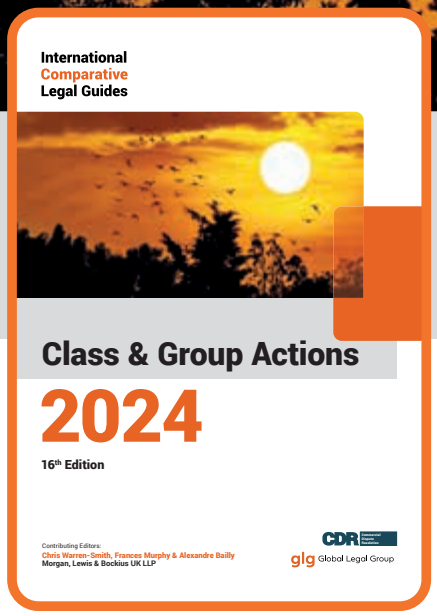

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I Executive summary

India relies on a multipronged statutory framework to tackle the menace of financial frauds. Indian laws have evolved over time to keep pace with the changing nature of financial frauds and provide victims with civil and criminal remedies against such financial frauds. Pertinently, victims of financial frauds can pursue civil and criminal remedies simultaneously and do not need to choose one remedy over another.

To avail remedies available under civil law, victims can approach a framework of civil courts established to deal with commercial and civil cases involving financial frauds. While considering a civil case stemming from financial frauds, civil courts have the powers to issue summons, call for information regarding the assets (along with any details of any encumbrances) and attach such assets during the pendency of civil proceedings so that the rights in relation to such assets are protected while the case is finally decided. If the case is decided in favour of the victim of such a fraud, the law provides for a mechanism to attach the assets of the perpetrator of the fraud and liquidate the same to recover the amounts due to the victim.

In matters involving financial frauds, growing technological access across India also has increased potential opportunities of successfully tracing assets generated/diverted by fraud and ensuring its subsequent recovery. Indian law has been amended to establish statutory obligations on several virtual service providers, currency exchanges (including exchanges dealing with virtual digital assets), financial service providers, custodian wallet providers, *etc.*, with the objective of preventing frauds, and enabling asset tracing processes and subsequent recovery of such assets.

II Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

Historically, Indian law has contemplated civil and criminal consequences for those perpetrating financial frauds and provided avenues to victims of financial crimes to trace assets and recover the same. However, over the course of the last few years, Indian lawmakers have introduced several statutes and laws with a specific focus towards ensuring that perpetrators of financial fraud cannot enjoy the ill-gotten fruits of their fraud.

While dealing with a case involving fraud, the Hon'ble Supreme Court of India defined "*fraud*". In the case of *Dr. Vimla v. Delhi Administration* (AIR 1963 SC 1572), the Supreme Court of India defined fraud as:

> "*[B]y fraud is meant an intention to deceive; whether it be from any expectation of advantage to the party himself or from the ill will towards the other is immaterial.*"

Over time the courts have provided several definitions for fraud. However, the consistent position that emerges from a holistic reading of such judgments is that fraud primarily involves the following ingredients: (i) deceit; and (ii) injury to the person deceived. While the scope of fraud under civil law and criminal law are largely similar, there are several distinctions in the ingredients and standards of proof required to establish a criminal case (beyond reasonable doubt) and a civil case (preponderance of probabilities), and also the consequences of each are different.

Criminal law framework to deal with financial frauds

Indian Penal Code, 1860 (IPC)

The IPC is the overarching criminal legislation in India setting out the details of offences under Indian law and punishments for such offences, including punishments for those found guilty of committing fraud and cheating. While the IPC is the substantive law that identifies criminal offences in India and the punishments attributable against such offences, the procedure to be followed by law enforcement agencies and the criminal courts in dealing with such matters is specified in the Code of Criminal Procedure, 1973 (**CRPC**).

In relation to provisions of the IPC relevant to financial fraud, the definitions of terms such as "*wrongful gain*", "*wrongful loss*" and "*fraudulently*" are found in Sections 23 and 25 of the IPC. Sections 206 and 207 set out the punishment in the form of imprisonment (up to two years) and/or fine for "*fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution*" and "*fraudulent claim to property to prevent its seizure as forfeited or in execution*".

While the above provisions of the IPC referred above help set up the base for criminal prosecution in cases involving financial frauds, the specific provisions contained in Sections 420, 421, 422, 423 and 424 of the IPC set out the ingredients of the offence and scope of punishment to be meted to perpetrators of financial frauds. Section 420 of the IPC deals with the offence of "*cheating and dishonestly inducing delivery of property*" and states that offenders may be sentenced to up to seven years' imprisonment and/or fine. Similarly, Sections 421–424 deal with offences involving "*fraudulent deeds and dispositions of property*" and state that offenders might face imprisonment of up to two years and/or a fine.

While law enforcement agencies investigate and prosecute offences under the IPC, the CRPC provides the procedural framework to be followed to carry out such investigations and arms such law enforcement agencies with the power to summon information/documents, attach movable and immovable properties, arrest suspects, summon witnesses, interrogate persons involved in the matter and initiate appropriate prosecution proceedings before the courts.

Therefore, while dealing with cases of financial frauds, under Section 91 of the CRPC, law enforcement agencies have powers to summon information, documents and any material in possession of any person (individual or juristic entities) and such persons are compelled by law to provide the information/document/material in the possession of such persons, which includes information regarding assets/bank accounts/other financial assets of persons accused of financial fraud. Once the information is available with such investigating agency, in terms of Section 102 of the CRPC, the investigating agency can proceed to attach the movable and immovable assets (including properties, bank accounts, jewellery, cash, personal valuables, *etc.*) and once the said assets are attached, such assets can only be removed from the clutches of attachment by way of orders of the criminal courts. Therefore, this can be an effective form of tracing and recovering assets diverted by a scheme of financial fraud.

However, search and seizure of one's assets has the potential to violate one's privacy, especially when the assets in question are digital devices wherein sensitive information and data is also stored, which may or may not be pertinent for the purposes of investigation. Accordingly, the Hon'ble Supreme Court of India has taken cognisance of the unfettered seizure of digital devices during investigation and issued notice to the Central Government to formulate guidelines for search and seizure, and investigations. Till such time, the Central Government has undertaken that the existing CBI Manual for investigations would be followed in so far as conducting investigations is concerned. The Supreme Court had also circulated the Interim Guidelines for Seizure of Devices proposed by the petitioner in the matter, to the Central Government. The said Interim Guidelines propose to streamline the search and seizure of the digital devices and that such exercise ought not to be a reckless action by the investigating agency but a reasoned decision, wherein the agency would require a preliminary screening by an independent authority of only such devices which have been found

at the investigation site, and that reasons for seizing the same would be recorded. Per the guidelines, electronic devices can only be seized with a judicial warrant. Emergency seizures are an exception, and reasons must be recorded for not obtaining a judicial warrant and material illegally seized from electronic devices cannot be used as evidence in any court of law. It is our view that if the guidelines are issued by the Central Government/judiciary, in addition to striking a balance between right to privacy and the requirements of investigation, it would make the investigation process time efficient and prevent investigative agencies from spending considerable resources in such screening.

Prevention of Money Laundering Act, 2002 (PMLA) and Fugitive Economic Offenders Act, 2018 (FEOA)

The PMLA was enacted in 2002 as part of India's global commitment to fight financial crimes and money laundering by criminal enterprises/endeavours. Under the PMLA, a specialised law enforcement/investigative agency has been constituted to enforce the provisions of the Enforcement Directorate (**ED**). Although the PMLA was enacted in 2002, recently, the enforcement of the provisions of the PMLA and matters being investigated by the ED under the PMLA has seen a massive upward tick. Briefly, Section 3 of the PMLA provides that any person who is knowingly involved (directly or indirectly) in any activity relating to proceeds of crime would be guilty of money laundering.

The ED is tasked with the responsibility of investigating cases of money laundering and tracing "*proceeds of crime*" – *i.e.* assets acquired with money generated by committing a financial crime. Once the ED traces the said "*proceeds of crime*" linked to the commissioning of a financial crime and has reasons to believe that any property is linked to such "*proceeds of crime*", under Section 5 of the PMLA, the ED has the power to provisionally attach said property. There are special tribunals constituted under the PMLA which deal with cases pertaining to the attachment of properties under the PMLA and unless a case is made out for de-attachment of such properties, the special tribunals proceed to confirm the attachment of such properties in terms of Section 8 of the PMLA.

The PMLA provides discretionary powers to the ED *vis-à-vis* investigation, seizure, attachment and confiscation of assets once discovered that they are proceeds of crime and were involved in the offence of money laundering under Section 3 of the PMLA. An order for provisional attachment may be passed by ED officials under Section 5 of the PMLA in case they have reasons to believe that such assets are "*proceeds of crime*". The provisional attachment is confirmed by the adjudicating authority established under the PMLA if it is also satisfied that the attachment was rightful (Section 8 of the PMLA). Such powers of the ED have recently received the Hon'ble Supreme Court of India's assent of being constitutionally valid in the decision of *Vijay Madanlal Choudhary v. Union of India and Others*, 2022 SCC OnLine SC 929.

Since the investigation conducted by ED centres around identifying a money trail and the manner in which proceeds of crime have changed hands, the Central Government's amendment to the PMLA in this regard is instrumental. By way of a notification dated 3 May 2023, the Central Government included chartered accountants, company secretaries, and cost and works accountants, who enter into certain specified transactions on behalf of their clients, shall now be brought within the purview of the PMLA and would be also "reporting entities" under said Act. This not only adds additional obligations to such professional to ensure that money

laundering through financial transactions and by such agents of clients is reduced, but also imposes an obligation upon professionals which are closest to any perpetrator engaging in an economic crime, to closely scrutinise the transactions for any suspicious conduct. It also prevents professionals such as chartered accountants and company secretaries of companies to facilitate and make way for money to be laundered by companies and/or individuals since they have been brought within the purview of the PMLA themselves. The Central Government regularly notifies activities which are brought within the purview of activities carried out by person carrying on designated business or profession, as stipulated under the PMLA. Although brought in, such notification is pending challenge before the High Court of Delhi, and awaiting decision on such challenge.

The ambit of the PMLA is not restricted to reporting entities being banks and financial institutions, nor being designated for professionals and has in fact been expanded by way of judicial intervention. Recently, the High Court of Delhi has held that *PayPal* would be subject to the provisions under the PMLA applicable to reporting entities since it is a payment system within the meaning prescribed to such term under the PMLA. The arguments stated by *PayPal* were that it was merely a payment aggregator which was providing a payment platform for the merchant and consumers to interact and transact, without being directly involved in the handling of such payment amount and thus, it was not liable to be brought within the PMLA framework, did not find favour with the Court. The Court took a wider interpretation of the payment systems under the PMLA so as to include payment aggregators and the same accurately reflects the tone of the legislature, executive and the judiciary when the enforcement of PMLA provisions are concerned.

In addition to the provisions of the PMLA, recently there were some cases of massive financial frauds which rocked the banking systems of India, and subsequent to such frauds being unearthed, the key accused of such frauds found ways to escape the jurisdiction of India. Therefore, to deal with such cases, the FEOA was enacted. The FEOA deals with economic offences involving amounts of INR 100 Crore and gives the authorities extraterritorial jurisdiction to confiscate properties situated outside the jurisdiction of India. It is pertinent to note that once a property is confiscated (unlike attachment), the authorities have the right to liquidate such properties to realise the proceeds from sale of the same.

It is interesting to note that in cases involving serious financial crimes, the ED now adopts a two-pronged attack: proceedings under the PMLA; along with proceedings under the FEOA, with the objective of tracing and recovering assets which are beyond the Indian jurisdiction. Enforcement proceedings initiated against individuals including *Vijay Mallaya*, *Nirav Modi* and *Mehul Choksi* included asset recovery from foreign jurisdictions as well.

Once an offender is declared as a Fugitive Economic Offender under Section 4 of the FEOA, his assets may be attached under Section 5 of the FEOA, including those which are beyond the Indian jurisdiction. The ED (and other investigating agencies) can apply to the local courts for issuing a "*Letters Rogatory*" to the courts of the jurisdiction where such assets are to be attached and give effect to the attachment orders issued under the PMLA or FEOA. The assets so recovered by the ED are often utilised to return them to banks and financial institutions that were also defrauded by accused persons.

Companies Act, 2013 (Companies Act)

The Companies Act covers provisions relating to corporate fraud under Section 477 and provides that any person who is found to be guilty of fraud involving an amount of at least INR 10 million or 1% of the turnover of the company shall be punishable with imprisonment and a fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.

Under Section 211, the Companies Act also establishes the Serious Fraud Investigations Office (**SFIO**) to investigate frauds relating to a company, with a bar on any other investigating authority to interfere. Section 212 of the Companies Act empowers the SFIO to investigate, arrest and prosecute any company or its personnel while dealing with cases of corporate fraud. This has also received judicial recognition wherein the High Court of Delhi has held that a parallel probe by a separate agency into the affairs of a company is not permissible in case the SFIO has initiated investigation in the same. Once the SFIO concludes that fraud has taken place and due to such fraud, any personnel of

the company or any other person or entity has taken undue advantage or benefit, the Central Government can approach the relevant Indian tribunal for, *inter alia*, appropriate orders regarding disgorgement of an asset, property, or cash. However, the possibility of an investigation being instituted by any other agency against the company in any other offence under any other law has not been eliminated, as indicated by the statute itself.

To illustrate the powers of investigation into a financial fraud and asset tracing by the SFIO, in one such recent case of corporate fraud, the SFIO carried out an investigation on one of the largest company frauds by the personnel of one of India's largest infrastructure and housing finance companies (**IL&FS**), and for the basis of its report, the Ministry of Corporate Affairs (**MCA**) approached the National Company Law Tribunal (**NCLT**), seeking relevant orders including disclosure of movable and immovable assets and properties of the perpetrators and directions for restraining such persons from creating charge or alienating them and further, attachment of such properties and handover to the MCA.

Further, Section 213 of the Companies Act also provides for making an application before the appropriate tribunal for conducting an investigation into a company's affairs where circumstances suggest, *inter alia*, the business of the company is being conducted with intent to defraud.

Apart from the abovementioned legal frameworks wherein state authorities investigate fraud and trace the laundered assets, parties can also enforce their rights against other parties through the below-mentioned civil remedies. It is pertinent to note that victims of financial fraud stand a better chance of retrieval of financial assets through civil remedies. Investigating agencies prosecuting perpetrators of fraud under the criminal law regime do not necessarily prioritise the individual rights of the victims of the fraud but focus on bringing the perpetrators to justice and ensuring that such preparators do not enjoy the benefits/assets of their crime. However, civil law remedies can be used to protect the individual financial rights of the victims and target retrieval of the financial assets lost to such fraud.

Civil Framework

Indian Contract Act, 1872 (Contract Act)

Section 17 of the Contract Act deals with contracts entered into between parties wherein consent of one party has been obtained by "*fraud*". Such contracts are voidable at the option of the party upon whom such fraud has been committed (Section 19 of the Contract Act). In such a case, the defrauded party will have the following remedies: (i) recession of the contract; (ii) restoration to the *status quo ante*, *i.e.* to be put back to the same place as was prevalent prior to the fraud being played; or (iii) filing a suit for recovery of the defrauded sums and damages for any loss suffered pursuant to such fraud.

Any victim of financial fraud stemming from a contractual relationship can approach the civil courts seeking compensation and damages as a consequence of fraud played upon such a person by the counterparty and also have the option to request the court to direct the perpetrator of such a fraud to present before the court the details of all the assets belonging to such person and proceed to attach such properties. If the victim of such fraud is successful, the courts have the power to direct compensation, damages, liquidation of attached assets, *etc.*, to compensate the victim.

Transfer of Property Act, 1882 (TOPA)

The Indian legal regime specifically protects the rights of the creditors under a transfer (including a decree-holder) under the TOPA. Section 53 of the TOPA provides that every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

In such a case, the creditor will have the right to annul the transfer on account of fraud and further recover damages from the defrauder for any loss suffered. One exception to the above is that commission of fraud shall not impair the rights of a transferee who has transferred the property in good faith and for consideration. Therefore, such disputes can be complex if the property obtained from fraud is sold to an innocent and *bona fide* third party, but courts have the power to order commensurate compensation to the victim of such a fraud as well. Recently, the Madras High Court had held a transfer to be fraudulent wherein a gift deed was executed by a mother to a son transferring immovable property wherein there was an apprehension of recovery proceedings being initiated. Such a transfer was held to be fraudulent, and the attachment of the property as directed by an arbitral tribunal was held to be valid. The recovery of assets by way of attachment was upheld by a court even though the same been transferred fraudulently.

Code of Civil Procedure, 1908 (CPC)

Besides specifying the procedure for instituting suits (including those for damages in case of fraud, *etc.*), CPC also provides the remedy of filing an application before an appropriate court for setting aside a sale (during execution of a decree) on the ground of irregularity or fraud (see Order XXI, Rule 90 of CPC). However, to obtain such a relief the applicant must demonstrate that he has sustained substantial injury by reason of such irregularity or fraud. Apart from the abovementioned statutes, specific provisions to deal with fraud have also been provided under the Partnership Act, 1932, Limited Liability Partnership Act, 2008, and the Negotiable Instruments Act, 1881.

Insolvency and Bankruptcy Code, 2016 (IBC)

Indian law also provides for remedies against fraud even during the corporate insolvency resolution process (**CIRP**). In an attempt to maximise the value of the corporate debtor and tracing and recovering the value of assets which the corporate debtor has been deprived of, the appropriate authority, upon an avoidance application being filed by the resolution professional, will direct the erstwhile management to make contributions to the CIRP or liquidation process. Experts may be appointed to investigate fraudulent applications and based on their reports, an application may be filed before the NCLT for recovery of the value of assets lost due to such fraudulent activities. The Courts and Tribunals have repeatedly held that such avoidance applications can survive even after the resolution plan for resolution of the debts of a company is approved, which would demonstrate that the fraudulent conduct of any parties is not buried with a change in management of a company. One such noteworthy development occurred recently when the Delhi High Court's division bench was asked to rule on the legality of continuing applications filed to prevent preferential, undervalued, fraudulent, and extortionate transactions after the CIRP under the Code was successfully completed. The case was *Tata Steel BSL Limited v. Venus Recruiters Private Limited*.

IBC also specifies that where any officer of the corporate debtor makes a false representation or commits any fraud for the purpose of obtaining the consent of the creditors of the corporate debtor to an agreement with reference to the affairs of the corporate debtor, he shall be punishable with imprisonment or a fine, or with both (Section 73 of IBC).

Other statutes

Several other statutes, rules and regulations have been passed by the legislature to tackle the issue of fraud and tracing of assets leading to their recovery and include the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, Prohibition of Benami Property Transactions Act, 1988, Foreign Exchange Management (Overseas Investment) Regulations, 2022, *etc.* Additionally, the income tax authorities as well as the Department of Revenue Intelligence also possess powers to attach

and recover assets in order to recover amounts from tax evasions and trade-based money laundering, *etc.*

Notably, the Securities Exchange Board of India (**SEBI**) was established under the SEBI Act, 1992, in order to regulate the securities market. SEBI's corporate governance measures are aimed at prohibiting fraudulent trade practices. The Prohibition of Fraudulent and Unfair Trade Practices (**FUTP**) Regulation was introduced to protect investors from fraudulent and unfair trade practices. The rules prohibit, *inter alia*, (i) buying, selling or otherwise dealing in securities in a fraudulent manner, and (ii) indulgence by any person in a "*manipulative*", "*fraudulent*" or "*unfair trade practice*" in securities markets. To enforce these rules, SEBI has been given the power to order investigation by an investigation authority as specified in the FUTP Rules. Further, under the SEBI Act, 1992, it is stated that SEBI has powers to issue directions which it exercises to order the disgorgement of assets upon the violators.

III Case triage: main stages of fraud, asset tracing and recovery cases

From a criminal law perspective

a. Preliminary enquiry by an investigative agency upon receipt of a complaint and formal registration of a criminal case.

b. Investigation into the alleged fraud and unearthing the extent of delinquency and involvement of perpetrators, examination of the accused and witnesses and evidence gathering.
c. Attachment/freezing of assets identified by investigative authorities as by-products of financial fraud.
d. Upon conclusion of investigation, the investigative authorities are required to prepare a report or "*charge-sheet*" setting out the criminal case against the perpetrators of fraud before the jurisdictional criminal court.
e. Trial before the criminal court can be divided into four stages: (i) cognisance of charge-sheet by the criminal court; (ii) examination of evidence presented by the prosecuting agency and cross-examination of witnesses and/or the accused; (iii) arguments on behalf of the prosecuting agency and accused; and (iv) judgment of acquittal/conviction by the criminal court and in cases of conviction – a decision on the punishment to be given to the convicted.

From a civil law perspective

a. Investigation and information gathering, including using all accessible public databases to identify information about the assets of the perpetrators of financial fraud.
b. Initiation of a civil case before the civil court seeking compensation/damages/restitution as well as requesting the civil court to pass relevant orders attaching the assets of the perpetrators of fraud.
c. Using the provisions of CPC to request assistance of the civil court to identify assets of the perpetrators of fraud and seeking attachment of such properties.
d. A civil court is required to examine the evidence submitted by both parties and pass a decree basis the same.
e. Execution of decree by the victims against the perpetrators – in case of a decree being passed in their favour by the civil court and securing payment through liquidation of attached assets or otherwise, if required.

The primary challenge faced by victims of fraud is lacking information about the assets and/or whereabouts of the accused persons. The criminal law machinery is more adept at identifying assets and whereabouts of perpetrators since they have several powers available with them to do so. In civil cases, victims can rely on publicly available information and private investigation to identify assets of the perpetrators, but this can be challenging since Indian law does not provide for any mechanism for discovery and/or asset tracing prior to initiation of a lawsuit.

IV Parallel proceedings: a combined civil and criminal approach

Indian laws and courts do not impose a bar on any person initiating and pursuing civil and criminal proceedings simultaneously. In case of a fraud being committed upon any person, they may employ a

combined approach and seek assistance of criminal investigative authorities as well as initiate civil proceedings, including a civil/commercial suit for recovery of their dues and assets.

While Indian law provides the victims of fraud to pursue civil and criminal proceedings simultaneously, through several decisions, courts have held that while civil and criminal proceedings can be simultaneously pursued, persons should not be permitted to turn a purely commercial issue into a criminal case to gain leverage. Therefore, it is important that criminal cases and civil cases are prepared in a way that clearly identify the ingredients of the criminal offence in the criminal filings and the requirements to maintain a civil case in civil filings.

V Cross-jurisdictional mechanisms: issues and solutions in recent times

Fraud and cases of asset laundering are not limited to a single jurisdiction and go beyond the contours of one single country as the assets that are often misappropriated are parked in multiple jurisdictions. In cases of fraud spread across different jurisdictions, Indian law provides a framework under CPC and the CRPC (*i.e.* both civil and criminal procedures) to facilitate the investigation beyond the territory of India to decide on the cross-border issues.

In addition to the above, criminal laws such as the PMLA and FEOA have extraterritorial jurisdiction and confer powers on authorities and courts to take necessary action to attach and retrieve properties which are outside the jurisdiction of India.

India has also entered into Mutual Legal Assistance treaties with several countries to facilitate the exchange of information between investigating authorities across jurisdictions. Further, under the provisions of CPC, courts in India also have the power to request a court in a foreign jurisdiction to provide information/documents/access to a witness located in a jurisdiction falling within the purview of the foreign court. Such requests are communicated through diplomatic channels and can form the basis of tracing assets and retrieving them when such assets are located outside India.

International cooperation among enforcement agencies goes a long way in aiding the tracing and prosecution of cases. To illustrate, one such instance is the "*Satyam Scam*" committed in India in 2009. The former senior officials at the company had forged invoices and receipts that led to an escalation in the share prices. While the shares of Satyam Computers were primarily traded in the Indian stock market, its depository based in America also traded in the New York Stock Exchange. The Indian law enforcement agencies received reports, assistance and cooperation from the U.S. Securities and Exchange Commission (**SEC**), which in turn helped unearth the company's fraudulent accounting practices in India.

The most recent of such initiatives would be the pilot partnership between the Organization for Economic Cooperation and Development (**OECD**) which has been introduced with a view to extending cooperation and collaborating with OECD for investigation in tax and financial crime-related matters in the South Asian Region. The vision for this initiative was to develop common reporting standards and share insights on the various aspects investigating tax and financial crimes which have cross-border connections. OECD regularly engages in such partnerships to offer valuable insights into the investigation of tax and financial crimes to the enforcement and investigative agencies, the latest one being conducted in India.

VI Using technology to aid asset recovery

With the advancement of technology, the use of artificial intelligence, data analytics and machine learning have all proven to be useful tools in preventing and detecting financial frauds across the globe. Using data analytics and forensic evidence tools have made enforcement agencies' tasks easier and reduced dependency on physical forms of evidence or eyewitnesses to trace crimes. Enforcement agencies use several cyber forensic tools which help them to analyse and retrieve data from hard drives, accelerating the process of decrypting password-protected files, examining mobile phones/SIM cards/memory cards, *etc.*, as well as acquire and analyse data from GPS devices. These tools go a long way in aiding enforcement agencies to track transactions that may be encrypted, or under the garb of blockchain transactions made using digital currencies, to evade taxes or for money laundering.

India has been making advancements in this sphere and is a part of the Egmont Group, which is a global group of Financial Intelligence Units (**FIUs**) of 166 countries. The Indian FIU is the official central body set up for receiving, analysing and processing information relating to suspected financial transactions. It maintains a database of information by mandating banks and other reporting entities to make annual disclosures relating to several financial aspects, such as Cross Border Wire Transfer Report, Cash Transaction Report, Suspicious Transaction Report, *etc.* The FIU has also set up a Strategic Analysis Lab (**SAL**), which is responsible for collecting sample studies on various reports that have been submitted by the reporting entities and identify if there are any gaps in the compliance of the required rules. Through the establishment of SAL, the FIUs are able to conduct routine operational analysis, which have also aided the agency in identifying several fraudulent schemes using virtual currencies. One of the most talked about initiatives by FIU India is the FINnet 2.0, which is a platform created using artificial intelligence with a view to streamline the process of data collection, processing and dissemination, which is uploaded by reporting entities. Such data is then analysed by the FIU to identify any suspicious/fraudulent transactions which would require enforcement action or interference. The latest use of

artificial intelligence named i-Rise (Regulatory Intelligence Solution for Entities) in Project FINnet 2.0 is with the objective of facilitating the processing and analysing the data that is gathered by the uploaded data on the portal, not only adding efficiency to the data keeping mechanism but also providing a first layer of filtration to identify any transactions which may not fit the ideal pigeon hole of clean transactions, which may then be scrutinised by the concerned agency in a more user friendly and efficient format.

The ED, the Income Tax Department and the Central Bureau of Investigation (**CBI**) have also collectively been investigating over 3,300 accounts which were suspected of being associated with illegal activities, based on the information it received from the Indian FIU. For instance, several crypto exchange platforms were trying to evade tax in some way. The tax agencies closely monitored the accounts and activities of the exchange platform and discovered a total tax liability of several Crores, calculated on a preliminary basis by the exchanges themselves. The tax authorities were successfully able to recover the said amount from five different exchanges, in five different inspections, without any material seizures.

Another instance of the watchdog effectively conducting an investigation and using its powers is the case of India-based Digital Currency Exchange Platform WazirX. The ED was investigating the exchange platform over suspected violations of Foreign Exchange Regulations. This investigation was done in light of the suspicion that the platform was being used for diverting sums of money abroad, by purchasing crypto assets. The ED froze the assets of the exchange platform until the investigation was carried out. Later, WazirX succeeded in getting permission to use its accounts again from the ED, after cooperating with the agency during the investigation. A similar probe has been initiated by the ED against an Ed-tech Platform in India – Byju's for violations of foreign exchange law violations. Since this is a very recent violation, there is yet to be a formal complaint by the ED and the matter is at the stage of show cause notice.

VII Highlighting the influence of digital currencies: is this a game changer?

The legal status of virtual currencies in India continues to remain a grey area. While the government has not yet clarified as to whether crypto assets are a legal tender or not, the government did announce that it will tax persons who gain profits from trading in cryptocurrency or other virtual digital assets. The lack of a single body in India to regulate the space of virtual assets combined with the increased transactions and trading in cryptocurrency has contributed to a significant increase in illegal activities using such assets.

Despite these challenges, the Indian enforcement agencies have been able to keep a check on these activities and recovered the amount which was unlawfully laundered to other countries or evaded from tax liability. The use of digital forensics and blockchain analysis aid these investigators to trace transactions and illegal activities by offenders.

The Indian Computer Emergency Response Team (**CERT-in**) issued guidelines on 28 April 2022 pursuant to Section 70B(6) of the Information Technology Act, 2000 (**IT Act**). These directions impose a mandate on virtual service providers, virtual currency exchanges and custodian wallet providers to maintain all information received by them under the Know Your Customer (**KYC**) Guidelines.

This is a positive step towards ensuring tracing back of transactions in case of illegal activities or fraud, as they are required to maintain data of financial records for a period of five years, which will ensure cybersecurity in payments and financial markets for citizens. They are also mandated to report any attack or malicious activities in their systems, servers, networks software that relate to big data, blockchain, virtual assets within six hours of becoming aware about such incidents. Furthermore, Schedule III of the Companies Act has been amended in 2021, and now mandates companies to disclose all assets and investments held by them in cryptocurrency. Such disclosure requirements aid in tracing the assets in case of any fraud or illegal activity and promote transparency.

As recently as March 2023, Indian regulators imposed the requirement of mandatory recordkeeping, KYC and related compliances under the PMLA upon exchanges and entities dealing with virtual digital assets such as cryptocurrencies. The move has been hailed as being progressive and reflects progress on the part of regulators to accept virtual digital assets as part of the financial ecosystem and demonstrates that regulators are moving away from their initial attempts to ban cryptocurrencies in India. This approach increases accountability amongst those dealing with virtual digital assets such as cryptocurrency and also enhances the ability of investigating agencies to conduct more effective asset tracing exercises while dealing with financial frauds involving cryptocurrencies and other similar virtual digital assets.

VIII Recent developments and other impacting factors

Economic offences can often cause a huge loss of public funds, and as such, Indian courts have termed economic offences as a separate class of offences requiring greater scrutiny and restraint during adjudication. Further, obtaining bail in such offences has become increasingly difficult. Under the PMLA, recent judicial pronouncements have upheld the stringent twin conditions for bail which essentially requires an accused to prove that he is not guilty of the offence at the *prima facie* stage of bail.

Further automation and digitisation of payments and digital currencies have emerged as double-edged swords. While such developments have eased up consumer experiences, they also make it easier for the fraudsters to launch attacks and in high volumes. Keeping up with the changes happening in the financial sector and growing frauds, regulators such as the Apex bank in India (the **Reserve Bank of India**, or **RBI**) have launched regulations to tighten the noose. For instance, a document called Payments Vision 2025 has been released by RBI, which lays down the roadmap envisioning the goals it seeks to accomplish in the digital payments and banking sector in India by 2025. This entails implementing an alternative mode of authenticating payments in light of several malpractices and the risks surrounding a one-time-password based authentication system, linking credit cards and credit-related services of banking products to the Unified Payments Interface for transparency, *etc.* Further to RBI's Digital Vision 2025, one public sector bank in India, Punjab National Bank, has rolled out an offline IVR-based facility that allows its consumers to make UPI-based payments without connecting to the internet, with the vision of providing secured transfer of funds and

without the high-risk exposure of data fraud or financial frauds.

The RBI has also taken note of the possibility of frauds that can take place in cross-border transactions and thus, has introduced Payment Aggregators – Cross Border Framework on 31 October 2023, which directly brings within its purview such entities which facilitate cross-border payment transactions for import and export of permissible goods and services in online mode. The obligation case upon such payment aggregators is to strengthen their diligence mechanism so as to verify the identities of the buyers/sellers transacting through such payment aggregators. This initiative, although nascent, has the potential to monitor cross-border frauds through online modes. Furthermore, the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules 2019 were upheld as valid by the Hon'ble Supreme Court of India in *Lalit Kumar Jain v. Union of India*. This decision is significant because it allows creditors to initiate insolvency proceedings against personal guarantors to businesses.

India hosted the G20 summit in 2023. The Prime Minister of India said that the G20 countries can work together to combat corruption to a great extent and that law enforcement agencies have agreed to work together informally to stop criminals from taking advantage of legal loopholes to cross borders. While The Prime Minister expressed his appreciation for the action-oriented high-level principles on three key areas: bolstering asset recovery mechanisms; improving the integrity and efficacy of anti-corruption authorities; and cooperating with law enforcement through information sharing. According to the Prime Minister, the G20 should lead by example by accelerating the return of foreign assets through the use of non-conviction-based seizures. The increasing reliance on digitisation and stringent legal enforcement will shape investigations into fraud and asset tracing in the coming years in India. CDR

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I Executive summary

Ireland has a unique legal system as the last remaining English-speaking common law jurisdiction within the EU, with the benefit of the Brussels Recast enforcement regime. Ireland also has a vibrant legal services market due to the significant multi-national presence – being a small open economy with an attractive corporate tax rate, while also being within the European Union (**EU**) – giving the Irish courts a depth of experience of complex cross-border litigation. The Irish courts are well-regarded internationally, and there is a strong regime in Ireland for fraud and asset recovery, with the Irish courts willing to make new law if it does justice in a case.

II Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

Ireland is a common law jurisdiction with a written constitution which also benefits from EU law, including the Brussels Recast. This framework is well-suited to complex fraud cases. Common law jurisdictions offer flexibility to do justice where required, including through worldwide freezing injunctions and wide-ranging disclosure orders to identify assets and wrongdoers. Given that financial fraud is rarely limited to one jurisdiction and fraudsters do not tend to voluntarily repay stolen money, cross-border enforcement mechanisms are critical. The Brussels Recast allows automatic recognition of an Irish judgment in other Member States, obviating the need to apply in each EU jurisdiction for recognition.

Criminal framework

There is no mechanism for financial compensation of victims in criminal law proceedings, although Ireland has a very effective Criminal Assets Bureau, which identifies, pursues and recovers unexplained wealth. Legislating for the alarming rise in economic crime is a priority of the Programme for Government. There is growing legislation in this area, with the Government commissioning a report (**the Hamilton Report**), published in 2020, which made recommendations for legislative changes to combat economic crime. Many new legislative developments centre on strengthening the power of regulatory bodies to investigate and enforce the law.

The Hamilton Report recommended new measures to improve Ireland's white-collar crime regime and tackle corruption, and it is a priority of the current Government to enact these. Many steps are already in place. For example, under the Competition (Amendment) Act 2022, new surveillance powers have been given to the Competition and Consumer Protection Commission (**CCPC**) and ComReg; Ireland's consumer protection and competition regulator, and communications regulator, respectively. New powers to enhance and strengthen the investigation and enforcement abilities of Ireland's Corporate Enforcement Authority (**CEA**) are also planned under the Companies (Corporate Governance, Enforcement and Regulatory Provisions) Bill.

In addition, the Government has identified as a priority, in the spring 2024 legislative session, the publication of the Garda Síochána (Powers) Bill, which will give new powers to Ireland's police force, the CCPC and the CEA, including the power to require persons to disclose the password to devices when a search warrant is being executed.

The existing Criminal Justice (Theft and Fraud Offences) Act 2001 covers most economic crime offences, including theft, deception, handling and possession of stolen property, forgery and false accounting. This includes offences relating to misappropriation by public officials and fraud impacting the financial interests of the EU.

The Criminal Justice (Corruption Offences) Act 2018 introduced an array of new criminal offences relating to corruption, which extend to corrupt practices within corporate structures, allowing a corporate body to be held liable for the corrupt actions of, *inter alia*, any of its directors, managers, secretary, employees, agents or subsidiaries. Its provisions extend beyond Ireland's borders, asserting extraterritorial jurisdiction over certain corrupt acts committed abroad by Irish entities or nationals.

The rise of cybercrime has prompted specific legislative responses, such as the Criminal Justice (Offences Relating to Information Systems) Act 2017, which targets hacking and other cyber offences. This aligns Irish law with 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), and underscores the importance of a harmonised approach to cybercrime across Member States.

Criminal offences are prosecuted by the Director of Public Prosecutions (the **DPP**), although summary criminal offences may be prosecuted by other statutory bodies, including the CEA.

Company law framework

Ireland has a strong corporate law regime, with increasing focus on the responsibilities of corporate officers to ensure compliance. The Companies Act 2014 includes offences such as: the falsification of company books and documents; making false statements to auditors; and the destruction of company books or documents to defeat the law. Summary company offences are ordinarily prosecuted by the CEA, while more serious offences are referred to the DPP for prosecution.

The Companies Act further provides that company directors can be held personally liable for company debts resulting from reckless or fraudulent trading. It also sets out the consequences for making untrue statements in prospectuses, among other offences.

Enforcement agencies

Ireland has dedicated enforcement agencies which investigate and prosecute fraud and similar crimes, with more resources being provided for these agencies in recent years following the Hamilton Report.

Ireland's national police force, An Garda Síochána, has a dedicated unit, the Garda National Economic Crime Bureau (**GNECB**), tasked with the investigation of serious and complex economic crimes including fraud, and provides support and assistance to local and regional investigations relating to fraud offences. With the increase in incidents of cross-border fraud and money laundering, the GNECB often works with enforcement agencies from other jurisdictions.

The Criminal Assets Bureau (**CAB**) is an independent body established under the Criminal Assets Bureau Act 1996, and has extensive powers over assets which are the proceeds of criminal conduct. It is an investigative authority rather than a prosecutor, and has many investigative powers, including to obtain search warrants. CAB can also apply to the Irish High Court without notice to freeze and seize assets which it shows are the proceeds of criminal activity on the civil standard of proof.

The CEA investigates and enforces corporate law in Ireland. The CEA was established on 7 July 2022 (replacing the Office of the Director of Corporate Enforcement), and has already brought a number of summary prosecutions and referred a number of indictable offences to the DPP. These have included cross-jurisdictional cases.

Anti-money laundering

Ireland's money laundering regime derives from EU directives. The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended) provides offences relating to money laundering in and

outside of Ireland, and sets out the preventive measures businesses must take to combat the risk of money laundering. The Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021 has amended the 2010 Act, while also transposing the Fifth Anti-Money Laundering Directive (MLD5) (EU) 2018/843 into national law. It has enhanced anti-money laundering obligations for individuals in high-risk sectors, including virtual asset service providers (**VASPs**), and mandates strict customer due diligence (**CDD**) protocols to those sectors. The 2021 Act further increased CCD requirements for high-risk third countries.

Reporting obligations

It is an offence in Ireland to fail without reasonable excuse to notify the appropriate authority of information which you know or believe to be of material assistance in preventing the commission, or in securing the successful prosecution, of a relevant offence, including fraud, bribery or certain corporate offences (Section 19 of the Criminal Justice Act 2011). The offence applies to companies and individuals. A company which fails to report a suspected fraud risks criminal liability.

The threshold for reporting is low, and need not meet an evidential standard. This low-threshold requirement for reporting offences is complemented by the Protected Disclosures (Amendment) Act 2022, which offers enhanced protection for whistleblowers.

Civil law remedies

The courts have jurisdiction to grant a broad range of measures to safeguard against the unlawful dissipation of assets. Measures include scope to obtain discovery, orders compelling disclosure and interim freezing orders, with failure to comply resulting in contempt of court.

The courts can compel disclosure from third parties either in the context of existing proceedings (non-party discovery) or with a view to commencing proceedings (Norwich Pharmacal orders).

The discovery procedures available in Ireland are comparatively very strong and effective at uncovering relevant documents and evidence. Ireland's test for determining whether a document is "relevant" under a discovery order is the old common law *Peruvian Guano* test, which means that not only must the producing party disclose documents that may advance its or its opponent's case, but it also must disclose documents which may lead to a "train of enquiry" having either of those consequences. These discovery procedures are a very useful tool in unravelling a fraud.

The courts have jurisdiction to appoint a receiver over assets connected with a fraud to preserve the assets on an interim basis and prevent their dissipation. The courts have recently clarified that where a receiver is appointed, they have an entitlement to obtain documents, such as bank statements, from third parties. These measures are discussed in more detail below.

III Case triage: main stages of fraud, asset tracing and recovery cases

Fraud, asset tracing, and recovery cases typically follow a multi-stage process that begins with the detection and reporting of fraud. This is followed by a preliminary assessment and the decision on whether to pursue a civil, criminal, or combined approach.

Initial investigation

The discovery of fraudulent activity within an organisation triggers a multifaceted response. An internal investigation is often the first step, which will shape the next stages. The initial investigations, while primarily internal, could lead to regulatory sanctions and/or criminal prosecution, often culminating in civil litigation to recoup losses and safeguard stakeholders' interests. The preservation of evidence and documents is critical at this early stage. Issues such as data protection will need to be carefully navigated, as does legal privilege.

The Protected Disclosures (Amendment) Act 2022 introduces an additional layer of complexity, particularly when the investigation involves whistleblowers. Organisations must tread carefully, ensuring their compliance with the 2022 Act and avoiding conduct that could be deemed to be penalisation.

An organisation should also be cognisant as to whether any reporting obligations arise (see above). A report pursuant to Section 19 of the Criminal Justice Act 2011 may result in a comprehensive investigation by the GNECB, and may lead to criminal proceedings or action by a regulator such as the Central Bank of Ireland.

Emergency relief

Depending on the circumstances of the suspected fraud, a party can immediately seek to secure any assets at risk through court orders, such as freezing orders or injunctions. This is a critical step to prevent the dissipation of assets before they can be recovered. The courts may grant such relief on an *ex parte* basis, and impose reporting restrictions where necessary.

Remedies available for asset recovery

Ireland offers a range of legal remedies for organisations seeking to trace and recover misappropriated assets. Injunctive relief is a particularly powerful tool, with Irish courts holding broad jurisdiction to grant such reliefs where necessary. Important remedies available include:

i. **Mareva injunctions**
"Mareva" injunctions effectively freeze assets where they are and prevent any party having notice of the order from dissipating the assets, and are often accompanied by ancillary orders, such as orders requiring the disclosure of assets. They are often sought *ex parte*, and reporting restrictions can be imposed where required. European Account Preservation Orders may also be available as an alternative to Mareva injunctions.

ii. **Anton Piller orders**
Anton Piller orders enable entry into premises to search for evidence if there is an urgent fear that the defendant is trying to destroy evidence of wrongdoing. Failure to comply can result in a defendant being found in contempt of court. It is a remedy sparingly used, and there is a high standard of proof (i.e. a very strong *prima facie* case and real risk of destruction of the evidence).

iii. **Third-party disclosure**
For victims of fraud to be able to police freezing orders or recover losses in a fraud case, the assistance of third parties is often required to trace and find assets held by or on behalf of the perpetrators of the fraud.
In particular, the availability of financial disclosure from third-party financial institutions can be crucial in chasing assets (often) across multiple jurisdictions. Bank statements can provide valuable information as to where funds have been transferred, which can include evidence of other accounts, or the names of other individuals involved in the fraud. They can also provide a chain for any tracing claim. There can be difficulties obtaining disclosure from banks, even where court orders have been made, as banks can have concerns regarding the privacy of customers and General Data Protection Regulation (**GDPR**). Furthermore, if a plaintiff is dealing with banks outside the EU, they may not recognise an Irish court order without an order of recognition of the court in the jurisdiction in which the bank or financial institution is based.

iv. **Norwich Pharmacal orders**
Norwich Pharmacal orders compel third parties to disclose information that may identify wrongdoers. Traditionally, the courts would only grant relief confined to the identity of a wrongdoer, rather than information concerning the commission of the wrong (*Megaleasing UK Ltd and ors v*

Barrett and ors [1993] ILRM 497). However, recent case law has seen a departure from this approach, and the court's jurisdiction may, based on the facts of the particular case relating to fraud, be extended to compel disclosure of the minimum information necessary for the plaintiff to issue proceedings on foot of the fraud, rather than the material required to prove the proceedings (*Electricity Supply Board & anor v Richmond Homes & anor* [2023] IEHC 571).

v. **The appointment of a receiver**

The Irish courts have the jurisdiction to appoint a receiver by way of equitable execution over assets connected with a fraud, either on an interim basis to preserve assets and prevent their dissipation (often accompanied with other relief such as a Mareva injunction) or post-judgment to recover losses suffered by the plaintiff arising from the fraud. The courts may grant receivers with a broad range of powers to take control of the assets of the defendant and, where judgment has been granted, to sell those assets and apply the proceeds to discharge the judgment in favour of the plaintiff.

In performing those functions, a receiver may be entitled to apply to the court for relief to assist them in carrying out their functions. A recent case has clarified that receivers are entitled to disclosure regarding assets, including the ability to seek disclosure from third parties' banks.

IV Parallel proceedings: a combined civil and criminal approach

Civil and criminal proceedings are separate in Ireland. If a victim of fraud wants to recover their losses, they must issue separate civil proceedings. Access to criminal files is not available. While it is often in a victim's interest to report to the authorities, this will result in a criminal investigation, which can result in civil proceedings being stayed pending the outcome of any criminal proceedings. Private prosecutions are only available in very limited circumstances, and the DPP must take over the prosecution.

V Key challenges

Concurrent civil and criminal proceedings

A parallel criminal investigation can be challenging for a fraud plaintiff. The criminal authorities may initiate investigations while asset recovery steps are underway. As referred to above, Section 19 of the Criminal Justice Act 2011 requires the reporting of certain offences, including bribery, to the authorities. There is a no automatic stay of civil trials in Ireland pending the conclusion of related criminal trials, but if a civil trial may prejudice the accused, or to witnesses, then the civil trial will be stayed: *Quinn v Irish Bank Resolution Corporation Limited (in Special Liquidation) & Ors* [2015] IEHC 634, where civil proceedings were stayed a number of times pending the criminal trial of the former head of Anglo Irish Bank.

It is possible, notwithstanding a concurrent criminal investigation, to commence civil proceedings and seek emergency relief.

The commencement of a criminal investigation in Ireland may also be of benefit. As referred to above, the GNECB is a well-resourced agency that has good connections to other international financial intelligence units worldwide as part of the Egmont Group. The GNECB can also invoke Mutual Legal Assistance to obtain assistance in investigations from foreign authorities.

Data protection

The Irish Data Protection Commission (**IDPC**), which enforces the GDPR, has prosecuted a number of private investigators instructed by financial services and insurance firms in recent years for unlawful methods used to access and process personal data. For example, in 2014, a firm of private investigators and its two directors were convicted of unlawfully accessing personal data from a Government department. Third parties may be reluctant to provide evidence voluntarily in a fraud or asset recovery case out of a concern for breaching GDPR rights.

Third-party litigation funding

Third-party litigation funding is generally prohibited in Ireland, amidst some exceptions with the prohibition on maintenance and champerty still part of Irish law. Ireland's law in this area may change, as explored further below.

VI Cross-jurisdictional mechanisms: issues and solutions in recent times

In recent years, there has been a marked increase in international fraud. Cross-jurisdictional mechanisms for identifying and enforcing against assets are more important than ever.

The Irish courts have been flexible in facilitating the enforcement of foreign judgments and the rendering of assistance in the taking of evidence in Ireland. The attitude of the courts was aptly summarised by Noonan J in *Neal R Cutler, MD v Azur Pharma International III Ltd and Others* [2015] IEHC 355:

"*It seems to me that the starting point in an application such as this is that the court will use its best endeavours to give effect to a request for assistance from the courts of another jurisdiction.*"

Ireland is party to the EU instruments facilitating the recognition of judgments and cross-jurisdictional assistance, such as the Brussels Recast Convention and the Taking of Evidence (Recast) Regulation.

The flexibility of the Irish courts in this area is illustrated by the case *Mount Capital Fund Ltd (in Liquidation) and Others v Companies Act* [2012] IEHC 97. There, an application was brought *ex parte* on behalf of liquidators appointed in the British Virgin Islands (**BVI**) seeking discovery of documents and assistance regarding the recovery of assets. The Irish High Court held that it had inherent jurisdiction to give recognition to insol-

vency proceedings from jurisdictions outside the EU. The Court held that a legitimate purpose had been demonstrated and that there was equivalence between the law of the BVI and Ireland in relation to corporate insolvency law. The Court recognised the orders made by the BVI Court and gave the liquidators liberty to apply to the Irish High Court to summon persons in Ireland for examination and other relief.

Letters rogatory

Ireland is not a party to the Hague Convention on the *Taking of Evidence Abroad in Civil or* Commercial Matters; so, where proceedings are outside the EU and are civil, parties are limited to the letters rogatory procedure for obtaining evidence. However, letters rogatory are available to parties seeking oral evidence and ancillary documents from witnesses in Ireland for use in foreign legal proceedings. Letters rogatory may not be used to purely discover relevant documents – *Sabretech v. Shannon Aerospace* [1999] 2 I.R. 468.

Taking of Evidence (Recast) Regulation (EU) 2020/1783

If evidence sought is in respect of proceedings in another Member State, the Taking of Evidence (Recast) Regulation is an effective and efficient method of obtaining evidence across Member States of the EU. Under the Taking of Evidence (Recast) Regulation, a Member State court can request another Member State court for the examination of a witness and production of documents if permitted. Requests are transmitted through a decentralised IT system and must be acknowledged within seven days by the court. The receiving court must act without delay and at the latest within 90 days. The requesting court can request the provision of teleconferencing.

The civil or commercial proceedings in question must have commenced or be contemplated, and the request can only be for evidence that a party intends to use in those proceedings. Evidence obtained under the Taking of Evidence Recast Regulation cannot be used for any purpose other than the litigation for which it was obtained.

VII Using technology to aid asset recovery

The Irish courts have been very receptive to using artificial intelligence to streamline litigation processes, and this bodes well for the future use of AI to obtain evidence for use in civil proceedings. Ireland was only the second jurisdiction globally, after the US, where a court sanctioned a discovery review utilising predictive coding – *Irish Bank Resolution Corporation Ltd and Others v Quinn and Others* [2015] IEHC 175.

Technology is playing an ever-increasing role in international asset recovery, with computer assisted learning and other analytics in common use in Ireland for investigations and fraud litigation. 2023 was very much the year of AI and more specifically the year of the large language model (**LLM**), with models such as OpenAI's ChatGPT 4 leading to eDiscovery companies rolling out their own integrated LLM offerings. In Ireland, domestic companies such as TrialView have employed AI in trial preparation technology, and many forensic investigation firms have also begun integrating AI into their platforms.

VIII Highlighting the influence of digital currencies: is this a game changer?

The rise of cryptocurrency has had significant implications for asset recovery. On the one hand, the facilitation of peer-to-peer decentralised transfers means that parties may remain relatively anonymous in their transactions, hampering asset recovery efforts. On the other, the immutable and public nature of the blockchain has made it simpler to trace transactions along the blockchain.

The Irish courts treat cryptocurrency as an asset and have granted disclosure orders in relation to crypto wallets – *Trafalgar Developments Ltd v Mazepin* [2019] IEHC 7. In a case involving the global firm Coinbase Europe Limited (No. 2021/348P), an American businessperson used a cryptographic tracing firm to track down bitcoin stolen from his account. He discovered that the bitcoin ended up in a Coinbase account hosted in Ireland. He applied to the Irish court successfully for a Norwich Pharmacal Order, which required Coinbase to disclose within five days all information it held that would identify or assist in identifying the person(s) who owned or had access to the relevant account, including the names, email addresses, telephone numbers and IP addresses associated with the account.

The Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021 transposed the EU's Fifth Anti-Money Laundering Direc-

tive (MLD5) (EU) 2018/843 into Irish law. This Act, among other things, extends AML obligations to VASPs, including crypto exchanges and wallet custodians. The Recast Funds Transfer Regulation (Regulation (EU) 2023/1113) also came into force in June 2023 and provides for the traceability of transactions in crypto assets which are conducted through an intermediary or service provider.

While these developments will undoubtedly prove helpful in the investigation and recovery of misappropriated assets, challenges in enforcing against cryptocurrency remain, including that if the private key to a crypto wallet is "cold stored" on an external storage device with no connection to the internet, or indeed sometimes a simple piece of paper with the public and private keys written on it, it may prove very difficult to recover the assets.

IX Recent developments and other impacting factors

Third-party litigation funding

In Ireland, the funding of litigation by parties with no legitimate interest in the underlying proceedings is prohibited under the old rules of champerty and maintenance. That is about to change, with litigation funding soon to be permitted for those disputes. The Irish Law Reform Commission (**LRC**) is working on a report on litigation funding, and the recently enacted Representative Actions Act 2023, which allows designated bodies to bring class actions on behalf of claimants, is likely to give rise to reform as regards the funding of claims.

There is already scope for some litigation funding within the current rules in Ireland by victims of fraud. In *Atlas GP Ltd v Kelly* [2022] IEHC 443, it was held that local residents pooling resources to fund a legal challenge to a development in their area had a legitimate interest in the underlying claim. Similarly, it is possible that fraud victims pooling funds would also be held to fall within the exception.

"After the event" insurance policies have been held to be permitted in Ireland – *Green Clean Waste Management Ltd* [2014] IEHC 314.

Expanded Norwich Pharmacal jurisdiction

A significant development in Irish law in recent years has been the expansion of the Norwich Pharmacal jurisdiction beyond information merely identifying a wrongdoer. As referred to above, the jurisdiction was extended in the *Electricity Supply Board* in cases of fraud to include the minimum information which is necessary to comply with the obligation to sufficiently plead a case of fraud. That case concerned the alleged requesting and receipt of improper payments in exchange for preferential treatment in the form of immediate or expedited completion of works. The Court ordered that the defendants provide the date and amount of each relevant payment. This is a significant judgment, because it was previously thought that in Ireland only information identifying the alleged wrongdoer (such as names and IP addresses) could be required. It will consequently be easier in the future for victims of fraud to obtain information from third parties, which is necessary to plead their claim.

Sanctions

The sanctions imposed on Russia in the wake of its invasion of Ukraine in February 2022 and the freezing of the assets of sanctioned entities has been a significant development in the world of asset recovery. Recovery against frozen assets may now require a derogation from the Central Bank of Ireland (Council Regulation (EU) No 269/2014). If a company goes into liquidation, then the court may hold that the presumption of control of the sanctioned entity for the purposes of Council Regulation (EU) No 269/2014 is rebutted – *GTLK Europe DAC v Companies Act 2014* [2023] IEHC 486.

Another effect of the sanctions was to spur some sanctioned (or soon-to-be sanctioned) entities to engage in transactions to place assets beyond the reach of creditors. Asset recovery practitioners have had to litigate to ask the court to look behind these transfers and where necessary pierce corporate veils. For example, in the *ex tempore* judgment *GTLK v Companies Act 2014*, handed down on 19 December 2023, it was held that certain Pledge Agreements entered into in favour of GTLK's parent company were, among other things, "fraudulent conveyances" within the meaning of the Irish Land and Conveyancing Law Reform Act 2009.

Personal Liability for Directors and Senior Executives

A new office was formed in Ireland in 2022, named the CEA, which has been termed Ireland's "white collar FBI". A key rubric guiding the CEA is individual accountability. In recent years, there has been a trend

in Ireland towards holding directors and senior executives to account when frauds and misappropriations occur. The Central Bank (Individual Accountability Framework) Act 2023 established enhanced fitness and probity requirements for senior executives of entities regulated by the Central Bank of Ireland such as credit institutions, which are partly now in force and will continue to roll out through 2025 to include non-executive directors. The increasing willingness of the courts to hold directors to account is illustrated by *Powers v Greymountain Management LTD* [2022] IEHC 599, where a college student was persuaded to become a director of a company. Unknown to him, the company was a vehicle for a fraudulent scheme. Although the college student was not aware of the fraud, the court held him, along with another, to be personally liable to the claimant fraud victim due to his dereliction of duties as a director. **CDR**

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Jersey

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I Executive summary

Jersey is a well-developed offshore financial services centre, jealously proud of its international whitelisting 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, the roots of Jersey law 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 (such as 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 was 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 this time, 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, while 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 UK Civil Procedure Rules 1998 ("CPR") or rules based on them wholesale, although an overriding objective and revised summary judgment procedure were both introduced in 2017. Nor are the RCR a comprehensive procedural code. Instead, the RCR has reorganised the Jersey procedural approach by grafting certain English procedural approaches onto (now largely forgotten) traditional Jersey approaches, together with Jersey-specific provisions. Subject to the 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 the 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 KCs. 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 interlocutory orders. 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, nor 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 £1.1 trillion of assets in Jersey trusts, £440.2 billion in Jersey funds, and £131.5 billion on deposit in Jersey banks – which makes Jersey of particular interest as a jurisdiction in fraud and asset tracing cases (see https://www.jerseyfinance.je and https://www.jerseyfsc.org). 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 recordkeeping.

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 was 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 2022, two new provisions in the Proceeds of Crime Law came into force (Amendment No. 5 and No. 7) introducing liability for bodies corporate (specifically, limited liability partnerships, separate limited partnerships and incorporated limited partnerships), and a new offence for a regulated financial services business failing to prevent money laundering by one of its associates. In 2023, the scope of the Proceeds of Crime Law and the Money Laundering Order were broadened in order to align Jersey's regime more closely with Financial Action Task Force Recommendations. Carrying out financial services activities in Jersey may bring an entity in scope of the new requirements, and some entities which were previously able to rely on exemptions from registration under Jersey's AML/CFT regime will no longer be exempt. In-scope entities and individuals will need to register with the JFSC, and will be required to adopt AML/CFT policies and procedures.

In addition to their primary preventative functions aimed at criminal conduct, the Proceeds of Crime Law and Money Laundering Order are part of the back-

ground 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 others' 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 be (and usually are) begun by lodging an order of justice for signature with an affidavit, skeleton argument 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 *Mareva* and now as freezing orders are available on similar principles to those of England, 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 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 he or she 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; 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 from 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 Pharmacal orders

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 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 him or her to obtain the documents or information he or she 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 are

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 Piller* orders – 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 Pharmacal* orders 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 his or her case.

The court will only grant an order if:

- the plaintiff has an extremely strong *prima facie* case;
- the potential damage to the plaintiff will be very serious; and
- the evidence that the defendant has in his or her 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 circumstances 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 his or her 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 en état 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 tried. 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 claim generally requires proof beyond reasonable doubt, whereas proof in a civil claim is normally only on the balance of probabilities. It follows that civil proceedings which rely on a set of facts that 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 his or her 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 frauds do, the methods of commission and camouflaging of 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, so 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 that *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 *Solvalub 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 that 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 until the Privy Council finally ruled otherwise in *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24.

VII Using technology to aid asset 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 will 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) that are capable of being held on constructive trust (*ByBit Fintech Ltd v Ho Kai Xin and others* [2023] SGHC 199).

VIII Highlighting the influence of digital currencies: is this a game changer?

Jersey is fast becoming an established market for fintechs and professional investment firms being home to a number of token issuers, global payment platforms and fintech-focused investment funds. Jersey recognised cryptocurrencies as a separate asset class long before the "ICO Craze" of 2017, when the island's regulator, the JFSC licensed the world's first Bitcoin-focused, regulated fund. From that point onwards, the island has seen a surge in exchange vehicles, token issuers and fintech funds choosing Jersey.

To date, Jersey has not sought to introduce any fintech-specific legislation. The JFSC has sought to cater for fintech businesses within the existing regulatory framework until such time as there is a global consensus on how to regulate aspects of the fintech ecosystem. For example, if the fintech service involves the provision of a financial service, it will fall to be regulated within Jersey's financial services regime under the Financial Services (Jersey) Law 1998 (unless an applicable exemption is available). Similarly, the sale of Bitcoin or other crypto or digital tokens *per se* is not regulated by a specific securities law or commodities law in Jersey. Rather, transactions relating to digital assets and cryptocurrencies are treated as a "sensitive activity" under the JFSC's Sound Business Practice Policy and traditional AML and other regulatory oversight applies.

IX 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 whitelisted, 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 (they are expected to have the majority in Jersey) and other adequate activity in Jersey – such as the presence of employees, expenditure, 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 chapter and is a setback for such victims of a fraudster with access to a well-resourced trust, into which the victim cannot trace the proceeds of the fraud for whatever reason.

In *Fang and others v His Majesty's Attorney General (Jersey)* [2023] UKPC 21, the Privy Council found that a *saisie judiciaire* has no geographical limits and can extend to property outside of Jersey in circumstances where the persons who own that property are subject to the jurisdiction of the Jersey courts (this case involved a discretionary Jersey trust with a holding company incorporated in the British Virgin Islands holding the underlying assets which were situated in Singapore). This case also confirmed that the foreign state requesting assistance does not become party to proceedings as a consequence of it requesting assistance and subsequently providing information to the Jersey court. As a result, the foreign state is therefore not liable for any associated adverse costs order. The case also confirmed that it is possible to assign a charge over property subject to a *saisie judiciaire* to a third party, and that the court's permission is not always required; however, in cases of uncertainty, the judgment suggests that it would be prudent to seek a variation of the *saisie judiciaire* from the court. **CDR**

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Liechtenstein

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I Executive summary

While the enforceability of foreign judgments is very limited and as a civil law jurisdiction, Liechtenstein is not familiar with information-gathering tools such as discovery and disclosure procedures known to many common law jurisdictions, Liechtenstein law nevertheless provides for a number of legal tools that, if deployed the right way, may prove very effective in fraud, asset tracing and recovery cases. Apart from injunctive relief as an important tool in the context of asset tracing and recovery matters, criminal proceedings can also prove useful, in particular for the purposes of gathering information and the preservation of assets for later enforcement. Also, Liechtenstein has a well-established and highly developed court system and due to Liechtenstein's highly international financial sector, Liechtenstein courts are experienced in handling cross-border disputes, which is also important in asset tracing and recovery matters.

II Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

There are a number of tools available under Liechtenstein law that are important in the context of asset tracing and recovery:

A. Injunctive relief

In many asset tracing and asset recovery cases, time is of the essence. Therefore, often the first step is to apply for injunctive relief in order to preserve assets and secure future enforcement. In Liechtenstein, injunctive relief is available to prevent irreparable damage or a change in circumstances that might frustrate or significantly complicate enforcement of a claim or right at a later stage. In such cases, injunctive relief can be granted in the form of conservatory measures in order to preserve the matter in dispute or otherwise secure future enforcement pending conclusion of the main proceedings, for example, by

means of freezing orders, attachments or restraint orders.

Applications for injunctive relief can be made prior to the initiation of a lawsuit, together with a statement of claim initiating a lawsuit, or during a pending lawsuit whenever the need arises. In the application, the applicant needs to show a *prima facie* case (e.g., a claim the enforcement of which needs to be secured, supported by *prima facie* evidence), show reasons justifying injunctive relief (i.e., a risk of irreparable damage or irreversible change in circumstances), and specify the injunctive measure sought. While most foreign judgments are not enforceable in Liechtenstein, they may be used as *prima facie* evidence for the existence of a claim and, therefore, often prove very useful in practice when it comes to injunctive relief.

In urgent cases, injunctive relief is usually granted by the court within 24 to 72 hours upon receipt of the application if the court concludes that the requirements are fulfilled. Where circumstances are even more urgent, super-provisional measures can be ordered, which are valid for two days and cease automatically at the end of this period unless the applicant files an application for injunctive relief with the court.

It is in the court's discretion to decide whether the circumstances of the case require that injunctive relief be granted on an *ex parte* basis or whether the respondent should be heard in advance. Injunctive relief is usually granted on an *ex parte* basis in cases of great urgency or where there is a risk that the effectiveness of the relief would otherwise be impaired. On the other hand, the respondent is usually heard in advance if the court has doubts that the requirements for injunctive relief are fulfilled. If injunctive relief is granted on an *ex parte* basis, the respondent can subsequently seek to have the injunctive measure set aside.

Liechtenstein statutory law does not explicitly restrict injunctive relief to assets located in Liechtenstein. Thus, injunctive measures can be ordered with respect to assets outside the jurisdiction. It is then a question of the laws applicable in the jurisdictions where the relevant assets are located as to whether an order from a Liechtenstein court will be recognised there.

As a rule, injunctive measures can only be imposed on the applicant's counterparty. However, injunctive relief can also be ordered against third parties to the extent that the relief relates to a relationship (contractual or otherwise) between a third party and the applicant's counterparty. For example, a third party who is a debtor or who holds assets of the applicant's counterparty can be ordered not to settle the respective debt or not to dispose of the respective assets.

Court orders granting injunctive relief are immediately enforceable against their addressees and will be enforced by the Liechtenstein enforcement authorities in case of non-compliance. Non-compliance with an injunction can be punished by the court with a fine or imprisonment upon application by the party who applied for the injunctive relief.

B. Ordinary civil proceedings

As mentioned, most foreign judgments are not enforceable in Liechtenstein. Thus, even if there is a foreign judgment in favour of a damaged party, the damaged party will, in most cases, nevertheless have to initiate fresh proceedings in Liechtenstein in order to enforce against assets located in Liechtenstein. Notably, Liechtenstein courts assume jurisdiction over any defendant who holds assets in Liechtenstein.

As a rule, a lawsuit is initiated by means of a written statement of claim, which is to be filed with the District Court. In the statement of claim, the claimant must clearly identify the parties, their procedural roles (i.e., claimant or defendant), their representatives (if any) and the subject matter of the lawsuit. The statement of claim must contain a pleading of the facts on which the claim is based, indicate the evidence on which the claimant intends to rely and specify the remedy sought.

There are a number of legal grounds under substantive Liechtenstein law that are of particular relevance in the context of asset tracing and asset recovery:

- As a matter of Liechtenstein civil law, a person who has suffered financial damage can seek compensation from the person who unlawfully and culpably caused the damage.
- Further, a person who has been deceived or coerced by his counterparty into the conclusion of a contract can challenge the contract and request the modification or cancellation of the contract and seek the restitution of the alienated assets on the basis of unjust enrichment, or he can leave the contract unchallenged and seek compensation for the resulted damage.

- Where a debtor has sought to put assets out of the reach of his creditors by transferring the assets to a third party (for example, a foundation or a trust), the creditor may seek to challenge such transfer on the basis that the transfer was abusive or made gratuitously, or the creditor may seek to hold the third party liable on the basis of the concept of piercing the corporate veil.

C. Enforcement of a foreign judgment or arbitral award

Liechtenstein has entered into bilateral treaties with Switzerland and the Republic of Austria on the recognition and enforcement of judgments in civil matters. Further, Liechtenstein has ratified the Hague Convention on Child Support. Therefore, judgments of foreign courts that fall within the ambit of these treaties are directly enforceable in Liechtenstein (subject to the fulfilment of the conditions stipulated in these treaties). In addition, Liechtenstein is a party to the New York Convention. Therefore, foreign arbitral awards are enforceable in Liechtenstein subject to the fulfilment of the conditions stipulated in the New York Convention.

D. Criminal proceedings

Last but not least, criminal complaints have become an important instrument of asset tracing and recovery in Liechtenstein in recent years. A person who has suffered financial damage as a result of a criminal offence (e.g., fraud or embezzlement) can file a criminal complaint with the Liechtenstein prosecution authorities and seek the initiation of a criminal investigation and then join the investigation as a private party in order to seek compensation for the damage suffered.

A private party in criminal proceedings has a number of procedural rights (e.g., the right to inspect the court files or the right to request the taking of evidence) and can submit evidence in support of the investigation. In case of a conviction, the court may award compensation for damages to the private party if it concludes that sufficient grounds can be established based on the findings in the criminal proceedings. If the criminal court concludes that such grounds cannot be sufficiently established, the private party is referred to the civil courts in order to pursue the civil claim there (i.e., the private party is then required to file a civil action). Importantly, a civil claim does not become time-barred as long as an application for compensation in criminal proceedings is pending (i.e., an application for compensation in criminal proceedings has the effect of suspending the limitation period).

Further, in the course of a criminal investigation, investigative measures can be imposed by the Liechtenstein District Court. Amongst others, the seizure of documents from financial intermediaries (e.g., banks, trust service providers, asset managers or insurance companies) and the freezing of assets in order to secure forfeiture are of particular relevance in cases of asset tracing and recovery, in that they assist a creditor in gaining information and prevent further dispositions of assets.

III Case triage: main stages of fraud, asset tracing and recovery cases

The stages of fraud, asset tracing and asset recovery cases largely depend on the circumstances of the particular case.

Many fraud, asset tracing and asset recovery cases involving Liechtenstein are international in nature, with the parties and assets being spread across a number of jurisdictions. Often, litigation is already pending in other jurisdictions before steps are initiated in Liechtenstein (for example, because it only comes to light in the litigation abroad that assets are held in Liechtenstein). In such cases, it is important to make sure that the steps taken in the various jurisdictions are properly aligned. For instance, where litigation is pending in another jurisdiction and it is to be expected that a judgment of the foreign court or a foreign arbitral award will be enforceable in Liechtenstein, it may make sense to merely apply for injunctive relief in Liechtenstein in order to secure the enforcement of the foreign judgment or award and then proceed with enforcement proceedings in Liechtenstein once the foreign judgment or award is handed down. By contrast, where the judgment will not be enforceable in Liechtenstein (as is often the case), it may still make sense to run parallel cases in Liechtenstein and abroad because, even though the foreign judgment will not be enforceable in Liechtenstein, the foreign proceedings may prove a useful source of information, which can then help pursuing the case in Liechtenstein.

Often, creditors have difficulties gathering information. In such cases, it may make sense for a creditor to try to initiate criminal proceedings and then join the investigation as a private party, as the prosecution authorities have means to obtain information that private parties do not have, and they also have the power to freeze assets.

IV Parallel proceedings: a combined civil and criminal approach

Under Liechtenstein law, it is possible to pursue civil and criminal proceedings in parallel, and such approach may make particular sense where only limited information and evidence is available. Often, information becomes available in the course of criminal proceedings that can later be used to pursue a civil claim against the debtor. In addition, the prosecution authorities have the possibility to freeze assets, thereby preventing further dispositions of assets.

The advantage of criminal proceedings is that information can be obtained and assets can be secured at moderate cost. Also, criminal proceedings may put pressure on a debtor and prompt the debtor to enter into a settlement. The downside of

criminal proceedings is that once a criminal investigation is ongoing, the creditor does not have full control anymore and the prosecution authorities may take steps that are not in the creditor's interest. Also, where civil and criminal proceedings are pending, it is likely that the civil courts will stay the civil proceedings until the criminal proceedings are concluded. This can lead to considerable delay because criminal proceedings can take several years to be concluded. Therefore, the decision as to whether or not to pursue criminal proceedings in parallel to civil proceedings takes careful consideration.

V Key challenges

The major difficulty in handling fraud, asset tracing and asset recovery cases in Liechtenstein is lack of information. Liechtenstein civil procedure law does not provide for the discovery and disclosure procedures known in other (in particular, common law) jurisdictions, and the possibilities to obtain information are therefore relatively limited. That said, there are a number of registers in Liechtenstein that can prove useful in this regard.

A. Commercial Register

The Commercial Register (*Handelsregister*) contains useful information on a number of types of legal entities registered in Liechtenstein. In particular, all legal entities that are established under Liechtenstein law and pursue commercial activities must be registered with the Commercial Register, and most types of legal entities must be registered with the Commercial Register regardless of whether or not they pursue commercial activities. However, there are certain (practically important) exemptions to this rule. Most significantly, Liechtenstein foundations do not have to be registered with the Commercial Register unless they are charitable or pursue commercial activities. Therefore, the vast majority of Liechtenstein private foundations are not registered with the Commercial Register. In principle, Liechtenstein trusts must also be registered with the Commercial Register. An exception exists if the trust deed or a certified copy thereof is deposited with the Commercial Register, in which case the trust is not registered while the trust deed is not open to the public either.

The Commercial Register contains, amongst other things, information on a legal entity's statutory capital, its purpose and its directors. Furthermore, all stock companies (*Aktiengesellschaften*), limited liability companies (*Gesellschaften mit beschränkter Haftung*) and establishments (*Anstalten*) are required to file their annual financial statements with the Commercial Register. On the other hand, the Commercial Register does not contain information on the shareholders of a company, except in the case of limited liability companies (which are not very common in Liechtenstein). The Commercial Register is public and can be inspected by anyone without the need to show any specific legal interest.

B. Beneficial Ownership Register

The Beneficial Ownership Register (maintained by the Office of Justice) was introduced in order to implement the EU Money Laundering Directives in Liechtenstein. It contains information on the "beneficial owners" (within the meaning of Liechtenstein anti-money laundering legislation) of all legal entities established in Liechtenstein. Unlike the Commercial Register, the Beneficial Ownership Register is not open to the public. In principle, it may only be inspected by interested persons if they can show that inspection is required for the purpose of combatting money laundering or terrorism financing or if they are beneficial owners of such entity.

VI Cross-jurisdictional mechanisms: issues and solutions in recent times

As already mentioned, Liechtenstein has entered into treaties on the mutual recognition and enforcement of judgments in civil matters with Switzerland and the Republic of Austria. Further, Liechtenstein is a party to the Hague Convention on Child Support and the New York Convention. Apart from that, it is worth mentioning in the context of civil proceedings that Liechtenstein is a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention), which enables the provision of legal assistance upon the request of a foreign court. It should also be noted that service of court documents on the state's territory is an official act under Liechtenstein law that is exclusively reserved to Liechtenstein authorities.

In terms of criminal matters, Liechtenstein heavily relies on mutual legal assistance. International mutual legal assistance in criminal matters is primarily governed by international and bilateral treaties, *inter alia*, the European Convention on Mutual Assistance in Criminal Matters, the European Convention on Extradition and the European Convention on the Transfer of Proceedings in Crim-

inal Matters. Further, the provisions of the Schengen Convention dealing with mutual legal assistance in criminal matters are also applicable in Liechtenstein. In addition, Liechtenstein has concluded bilateral treaties in criminal matters with a number of countries such as Austria, Belgium, Germany, Switzerland and the United States of America. In the absence of a treaty, the prerequisites for the provision of mutual legal assistance in criminal matters are set forth in the Liechtenstein Mutual Legal Assistance in Criminal Matters Act.

Aside from information deficiencies, costs may also be a hurdle. Claimants in civil proceedings who are resident or domiciled abroad may be ordered to post security for costs, which can be significant, depending on the amount in dispute and the complexity of the case.

VII Using technology to aid asset recovery

The Liechtenstein Government recently decided to set up its own cybersecurity unit in order to assist businesses with the development of security concepts and specific specialist information. Banks in particular have placed a special focus on cybersecurity in order to prevent the interception of sensitive data and the initiation of transactions by attackers.

In addition, the Liechtenstein National Police has also set up its own cybercrime unit in order to tackle cybercrime more effectively and implement new forms of digital forensics.

Furthermore, Liechtenstein is a party to the Budapest Convention on Cybercrime.

VIII Highlighting the influence of digital currencies: is this a game changer?

In January 2020, the Token and TT Service Provider Act came into force in Liechtenstein, which provides for the civil law classification of the legal nature and effect of tokens. This law is to be applied if tokens are generated or issued by a trustworthy technology (TT) service provider domiciled or resident in Liechtenstein, or the parties to a transaction concerning tokens expressly declare its provisions to be applicable. In those cases, Liechtenstein deems the token to be an asset located in Liechtenstein.

On the regulatory side, it bears noting that since the introduction of the Token and TT Service Provider Act, virtual asset service providers are subject to the Liechtenstein Due Diligence Act. As a consequence, the Liechtenstein Financial Intelligence Unit (FIU) records a drastic increase in the number of submitted suspicious activity reports (accounting for approximately 41% of the total number of reports), with the reports relating to various categories of suspicions such as unauthorised access to wallets, fraud schemes, identity theft and exposure of transaction participants to Darknet markets.

In addition, the Liechtenstein Criminal Procedure Code was amended in 2021, introducing the possibility of freezing virtual assets by way of transferring the same to a wallet maintained by the Liechtenstein Police. By the introduction of these provisions, the legislator wanted to effectively curtail fraudsters' access to misappropriated virtual assets or virtual assets acquired with misappropriated fiat assets, respectively, in order to secure the same for forfeiture. The law also provides for the possibility of liquidating frozen virtual assets prematurely if there is a risk of unforeseeable price losses in view of the assets' high volatility.

IX Recent developments and other impacting factors

In recent years, Liechtenstein authorities have put a special focus and emphasis on their proclaimed policy to protect Liechtenstein's financial sector and meet international standards, in particular by seeking to create a coherent system for the effective prosecution and sanctioning of money laundering and terrorism financing.

In this context, the increasingly expanded Due Diligence Act is of major importance. Persons subject to the Liechtenstein Due Diligence Act (e.g., banks, asset managers, insurance companies, investment firms or professional providers of fiduciary services) are obliged to take the necessary measures to combat money laundering and are required, amongst other things, to report to the FIU any suspicion of money laundering, a predicate offence to money laundering, organised crime or the financing of terrorism. Therefore, investigations in relation to the suspicion of any kind of predicate offence abroad can trigger a reporting obligation in Liechtenstein if assets relating to these investigations are held in Liechtenstein. Violations of such reporting obligation on the part of the financial intermediary are punishable. CDR

Schurti Partners Attorneys at Law Ltd advises and represents private and corporate clients in asset tracing and recovery cases as well as in white-collar crime matters before the Liechtenstein courts and authorities. Over several decades, the firm has handled some of the most delicate and high-profile cases in these fields in Liechtenstein. Due to the firm's close working relationships with leading foreign firms and barristers specialised in the field of asset tracing and recovery as well as in white-collar crime law, Schurti Partners is regularly retained to co-ordinate the overall strategy and actions in multi-jurisdictional cases. Since fraud as well as asset tracing and recovery issues are frequently linked to various jurisdictions, it is of huge benefit that Schurti Partners' experts are trained and qualified in different common and civil law jurisdictions.

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I Executive summary

Consistent with trends around the world, fraud and financial scams in Malaysia are on the rise, with the Securities Commission of Malaysia and the Commercial Crimes Investigation Department of the Royal Malaysian Police both confirming a steep increase from 2020 to date. With the advent of technology in this rapidly evolving digital age, fraudsters are becoming more sophisticated, leveraging on the latest technological trends and easy access to data, creating the perfect storm.

The dangers of fraud were addressed by the Deputy Prime Minister, Datuk Seri Fadillah Yusof, when he stated that "*financial fraud and scams pose a significant risk to our nation, where the direct impact of organised financial crime can lead to substantial financial losses*".

In light of this serious and pervasive trend, this article will address the options available to victims of fraud and the potential steps that may be taken to trace and recover those assets.

II Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

In Malaysia, victims of fraud and financial scams may obtain redress and compensation through the courts, with civil remedies such as damages, injunctive relief, tracing orders and restitution. In addition, victims of such criminal activity may also seek redress through the criminal justice system, where in certain circumstances statutory restitution remedies such as the revesting or restoring of property or funds to its original owner are available.

Civil remedies

Pre-action discovery

Central to a fraud litigation is the preservation of the fraudster or defendant's assets , as well as obtaining timely disclosure of the details of the alleged wrongdoings from the fraudster or defendant's banks.

Prior to the commencement of any action, a plaintiff may apply for a disclosure order for documents and/or information relating to the bank accounts of the fraudsters and/or their associates against the fraudster's banks or other third-party banks involved (who are usually not parties to the fraud claim) to aid a plaintiff's effort to trace the flow of funds, identify the recipients of the tainted funds, and pursue the necessary proprietary claims.

This disclosure order is known as a Bankers Trust Order: per the case of *Tey Por Yee & Anor v Protasco Bhd & Ors* [2020] 5 CLJ 216 (adopting the *Bankers Trust Co v Shapira and Others* [1980] 1 WLR 1274). Such an Order is made pursuant to Order 24 Rule 7A of the Rules of Court 2012, section 134 of the Financial Services Act 2013, and section 7(2) of the Bankers'

Books (Evidence) Act 1949. The Order made enables the applicant plaintiff to trace the money that forms part of their claim against the fraudster. A disclosure order against a bank that is not party to the proceedings on an *ex parte* basis is permitted under section 7(2) of the Bankers' Books (Evidence) Act 1949. The disclosure order would also apply to computerised and digital forms of banker's books.

Such a disclosure Order granted by the Court is an exception to the statutory duty of secrecy under section 133 (1) of the Financial Services Act 2013 ("**FSA**"), which prohibits the bank or its officers from disclosing any document or information relating to the affairs or account of any customer to another person.

Therefore, when the bank is served with a third-party disclosure Order, it may legally disclose the information and/or documents relating to its customers' bank accounts sought by the plaintiff. The bank will not be in breach of its banking secrecy obligations, because any disclosure for the purpose of "*compliance with a court order made by a court not lower than a Sessions Court*" is one of the permitted disclosures under section 134 and Schedule 11 of the FSA.

On the contrary, if the bank fails, refuses or neglects to comply with the disclosure Order, it may run the risk of being cited for contempt of Court for breaching the Order to which the bank is a party.

In addition, in the event of any uncertainty as to the identity of the fraudster or any other wrongdoer, a plaintiff may also apply to the Court for what is known as a Norwich Pharmacal Order to seek to obtain documents from a third party to identify the fraudster and/or any wrongdoer: per the case *First Malaysia Finance Bhd v Dato' Mohd Fathi bin Haji Ahmad* [1993] 3 CLJ 329 adopting *Norwich Pharmacal Co & Ors v Commissioners of Customs and Excise* [1973] 2 All ER 943. Order 24 Rule 7A of the Rules of Court 2012 sets out the procedure for the application of this order. The following is required for the order to be granted:

(a) The list of documents sought and their relevance.
(b) Sufficient facts showing the relevant party to be in possession, power or custody of the documents.
(c) Sufficient facts showing the likelihood of the potential fraudster to be named as defendant in legal action.

The legal test for a third-party discovery application, both for a Bankers Trust Order and a Norwich Pharmacal Order, is that the plaintiff must show a *prima facie* case of wrongdoings against the defendant, and that the documents and/or information sought will be relevant to the fraud claim. The Courts will not allow a plaintiff to go on a fishing expedition to look for evidence in support of a claim.

Preservation of Land

A party who has been defrauded of any title or interest in land ought to also apply to lodge a private caveat under section 323 of the National Land Code to protect the party's claim over the land, and to preserve the land ownership in its existing state until the dispute on the title or interest in the land between the competing parties is settled in court.

A caveator must show caveatable interest to lodge a private caveat on a piece of land. Caveatable interest would refer to any registrable title or interest claim in the land itself.

A private caveat will lapse at the expiry of six years from the registration, unless it is extended by way of a court order.

Anton Pillar Order

Where there is concern that a defendant would hide or destroy any incriminating evidence that is relevant to the plaintiff's claim, the plaintiff may apply for an injunction requiring the defendant to permit the plaintiff to enter the defendant's premises to enable an inspection, seizure and removal of documents and records relating to the plaintiff's claim to preserve these documents and records. This type of injunction is better known as an Anton Piller order.

The requirements for such an Order, which is granted *ex parte*, are as follows:

(a) An extremely strong *prima facie* case.
(b) Damage or potential damage must be very serious.
(c) Evidence of the possession of the documents and the real possibility of it being destroyed if any forewarning is given before an *inter partes* hearing (per *Arthur Anderson Co v Interfood Sdn Bhd* [2005] 2 CLJ 889).

Interlocutory Injunction

The two common types of injunctions sought by the plaintiff in dealing with fraud cases are:

(1) a Mareva injunction (which freezes the monies in the defendant's bank account(s)); and
(2) a prohibitory or proprietary injunction (which prohibits the defendant from disposing of their assets).

Mareva Injunction

A Mareva Injunction prevents a defendant who is alleged to have committed fraud from dissipating their assets, particularly liquid assets such as monies held in banks, where there is a risk that they would undertake such a course of action: *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97. The Mareva Injunction Order will be deemed breached if the defendant moved or disposed of their assets.

In order to protect the monies from being dissipated, a Mareva injunction Order will be served on the banks so that the banks are obliged to freeze the accounts of the defendant. The Mareva Injunction Order is binding on third parties such as the banks and non-compliance will exposed the third parties served to contempt of court proceedings. A Mareva Injunction Order is usually prayed together with an order compelling the defendant to file an affidavit to disclose all of their assets within Malaysia and outside of Malaysia.

Order 29 Rule 1 of the Rules of Court 2012 governs the granting of injunctions, including a Mareva Injunction.

The requirements for the granting of a Mareva injunction are as follows:

(a) A good arguable case against the defendant.
(b) A real risk of dissipation of assets before judgment.
(c) The assets are within jurisdiction.
(d) Living expenses and legal costs for the defendant are provided for.
(e) The balance of convenience is in favour of the granting of the order.

Moreover, especially regarding (c) above, Mareva Injunctions can also be served to foreign banks: *Metrowangsa Asset Management Sdn Bhd & Anor v Ahmad B Hj Hassan & Ors* [2005] 1 MLJ 654; and *Customs and Tax Administration of The Kingdom of Denmark v Saling Capital Ltd & Ors and Other Appeals* [2021] 7 CLJ 857.

Prohibitory or proprietary injunction

Another form of interlocutory injunctive relief is the prohibitory or proprietary injunction. Victims of fraud may obtain this form of interim relief if they are not able to establish the requisite element of risk of dissipation or there is no real risk of dissipation of assets: per *Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v Persons Unknown & Anor* [2021] 7 MLJ 178. Per the decision of the Malaysian Court of Appeal in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah* [1995] 1 MLJ 193 (adopting Lord Diplock's decision in the *locus classicus* authority of *American Cynamid v Ethicon Limited* [1975] AC 396), the requirements are:

(a) A *bona fide* serious issue to be tried.
(b) The balance of convenience is in favour of the granting of the order.
(c) Damages are not an adequate remedy.

While an injunction is sought and ordered against the defendant, the subject matter of the injunction (especially a Mareva injunction) is often the monies, shares or other assets held in a bank. In these circumstances, the plaintiff will extend a copy of the injunctive Order to the bank in question as an additional precautionary measure to prevent any disposal of assets pending the conclusion of fraud trial.

Once the bank becomes aware of the terms of the injunction, the bank owes the Court a duty to take reasonable care to ensure compliance of the Order by its customer (see the UK House of Lords decision of *Customs and Excise Commissioners v Barclays Bank plc* [2006] 3 WLR 1).

In this regard, it is imperative to take note of the Malaysian Federal Court decision of *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401, which held that any failure, refusal and/or omission to give effect

to a Mareva Injunction Order would be tantamount to an interference with the due administration of justice, which may give rise to a finding of contempt of Court.

Therefore, if a bank notified of the injunction knowingly assist in or allow a breach of a Mareva Injunction Order, for example by failing to stop the withdrawal of funds by its customer from his bank account during the lifespan of the injunction, it may be found guilty of contempt of Court.

Criminal Remedies

On the criminal enforcement side, a party that has been defrauded or fallen victim to any business crimes can and should, parallel with any civil remedies, lodge the reports with the relevant law enforcement authorities or agencies, which can include, depending on the type of offence:

- The Commercial Crimes Investigation Department ("CCID") of the Royal Malaysian Police – for white-collar crimes, as well as offences under the Penal Code such as cheating, criminal breach of trust, embezzlement, forgery, etc.
- The Malaysian Anti-Corruption Commission ("MACC") – for bribery and corruption offences, and abuse or misuse of office/position under the Malaysian Anti-Corruption Commission Act 2009.
- The Central Bank of Malaysia/Bank Negara Malaysia ("BNM") – for money laundering offences under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLA"), as well as offences such as illegal deposit taking, and unlicenced business activities under the Financial Services Act 2013 and the Islamic Financial Services Act 2013.
- The Companies Commission of Malaysia ("CCM") – for offences such as a breach of directors' duties and breach of disclosure obligations, as well as falsification of accounts and related offences under the Companies Act 2016.
- The Securities Commission ("SC") – for offences such as insider trading and market manipulation, regulation of digital currency or cryptocurrency and other offences under the Capital Markets and Services Act 2007.

Prosecution of criminal cases are usually brought by the Attorney General's Chambers, whilst certain regulatory and enforcement authorities may also have their own prosecutorial powers.

III Case triage: main stages of fraud, asset tracing and recovery cases

Victims of fraud and financial scams must act quickly to secure and preserve their position to maximise their chances of recovery. This means that once fraud is detected or discovered, immediate action must be taken to:

(1) Limit or stop any further likelihood or possibility of loss and damage.

This would include:

- Firstly, to secure internal financial, communication and IT records and processes. This will also include identifying likely personnel involved in the impugned transaction.
- Secondly, where there are funds in banks and financial institutions involved, immediate notice should be given to the banks and financial institutions of the fraud and scam involved, and to request that the accounts concerned be frozen pending further civil and criminal proceedings. Whilst such a private notice does not have compelling legal effect, it serves to put the bank on immediate notice of the fraud or scam. Similarly, if real property is involved, a private caveat can be lodged to protect the victim's claim to the property.

In the recent case of *Nemonia Investments Ltd v AmBank Islamic Berhad & 3 Ors* [2023] 8 AMR 201, the Malaysian High Court held that a bank must not ignore a notice of a fraudulent transaction being received, although the banks may have no relationship with the party which sent the notice. Banks are expected to investigate the validity of such notice and take immediate protective steps, which may include freezing the account, pending the outcome of investigations.

- Thirdly, and simultaneously with the above, the relevant reports must be made to the enforcement agencies indicated in Part II above.

(2) Fact finding and evidence gathering:
Once the funds and assets have been secured, the next step is to consider that there is sufficient evidence to support the filing of a legal suit for recovery. This may include working with forensic IT experts, investigators, solicitors and accountants to ensure that evidence is available and admissible for any court action contemplated.

(3) Legal recovery process and interim relief options:
This step is an evaluation of legal strategy for recovery, including where to sue for recovery (for instance in cross-border cyber-crimes, the jurisdiction where the assets have been transferred to), who to sue (where fraudsters may have absconded or cannot be found, or where third parties have come into possession of the assets), as well as any further interim relief required, such as Norwich Pharmacal Orders, Anton Pillar Orders and Mareva Injunction Orders, pending the final determination of the claim.

IV Parallel proceedings: a combined civil and criminal approach

Civil proceedings are instituted by parties as a means of recovery of the funds and assets of the plaintiff that have been defrauded, whilst criminal prosecutions are undertaken by the state to protect society, punish offenders and rehabilitate criminals. The object of criminal prosecution is not to compensate or seek financial recovery of losses for the complainant or victim.

Generally, once a report is lodged, the investigation and prosecutorial decisions will be out of the complainant's hands. Whilst the result of such prosecution and ultimately a conviction will not automatically lead to a recovery of the assets or funds defrauded for the party defrauded, the lodgment and commencement of criminal proceedings may assist a party defrauded for instance:

(a) By affording an alternative immediate form of asset freezing or interim forfeiture security on the funds or assets involved. Thus, for example:
- in money laundering investigations, sections 45 and 51 of AMLA allows the investigating authority, in the course of an investigation to freeze or seize any movable or immovable property, including funds in a financial institution; or
- in relation to real property assets, the enforcement agencies can also apply under section 319 of the National Land Code to lodge a registrar's caveat on the property to prevent any dealings on the property pending the investigation of the matter.

(b) Investigation bodies have additional powers beyond that of a private litigant in fact finding and evidence gathering, including powers of search and arrest, and also to seek extradition of fugitive fraudsters from a foreign country, as well as powers to conduct searches and dawn raids. In certain cases involving cross-border funds and assets, the enforcement authorities will be able to work with foreign enforcement agencies on overseas asset recovery initiatives.

(c) In certain cases, a victim may also seek some form of recovery where criminal investigation and enforcement had commenced. For instance, under section 58(2) of AMLA, a party may also make a claim for the seized property if they hold an encumbrance on the property as a purchaser in good faith for valuable consideration.

On the other hand, where any property has been seized under AMLA, and so long as such seizure remains in force, section 54 (1) of AMLA prohibits any

dealing by any party in respect of such property, except any dealing effected under AMLA. Thus, a party may find that their civil claim may be subject to the prohibition of dealing as a result of an investigation launched.

V Key challenges

Some key challenges faced by victims of fraud in pursuing asset recovery include:

(a) Funding issues, particularly in relation to the tracing of movement of funds cross-border, as well as the cost-benefit of pursuing litigation, including resources for cross-border litigation where recovery may not be guaranteed.

(b) The evolution of crypto fraud, particularly the opaque, pseudo-anonymous nature and ease and speed of transferring of crypto assets worldwide. In many cases, where crypto fraud is discovered, the funds would have been transferred across multiple jurisdictions, and the identity of fraudsters may be difficult if not impossible to trace, leading to a tedious and expensive evidence gathering process to support a civil claim.

VI Cross-jurisdictional mechanisms: issues and solutions in recent times

The jurisdiction of the Malaysian Court to grant of a worldwide Mareva Injunction Order to restrain the dealing of assets both within and outside Malaysia has been recognised since 2005 in the High Court case of *Metrowangsa Asset Management Sdn Bhd & Anor. v Ahmad b Hj Hassan & Ors* [2005] 1 MLJ 654. In 2006, the Court of Appeal in *Khidmas Capital Sdn Bhd & Anor. v NRB Holdings Ltd and other appeals* [2006] 4 MLJ 194 affirmed the Malaysian Court's jurisdiction to grant a worldwide Mareva Injunction, as there were sufficient grounds to fear that the appellant would dissipate assets that it owned across the globe to frustrate any judgment that the respondent may obtain.

More recently, the Malaysian Court has also recognised that it has jurisdiction to grant a "Spartacus Order" to trace the unknown defendant fraudster, and had ordered the grant of a proprietary as well as Mareva Injunction to freeze the assets of the fraudster: *Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v Persons Unknown & Anor* [2021] 7 MLJ 178; it remains unknown how effective such orders are in a cross-jurisdictional or multi-jurisdictional situation.

VII Using technology to aid asset recovery

With globalisation and growth of the digital economy, it is inevitable that parties pursuing asset recovery must increasingly rely on forensic experts with artificial intelligence expertise to trace and recover defrauded assets.

In the legal sphere, there is also increasing recognition and use of electronic communication in place of traditional communication. In 2020, the Rules of Courts was amended to recognise service "by means of electronic communication in accordance with any practice direction issued for that purpose". This amendment will be exercised in accordance with any practice direction issued. That being said, the term "electronic communication" was not defined in the amendment. Therefore, we may need the Courts to determine in future cases as to whether this method of service includes service via email, instant messaging applications or perhaps social media platforms.

Meanwhile, the Courts have themselves, also sought to recognise the use of electronic communication. This is seen in the case of *30 Maple Sdn Bhd v Noor Farah Kamilah Binti Che Ibrahim* (Kuala Lumpur High Court Suit No: WA-22IP-50-12/2017), where the Intellectual Property High Court granted an application to serve a Writ and Statement of Claim via email and WhatsApp messenger after it could not locate the defendant at her last known address.

VIII Highlighting the influence of digital currencies: is this a game changer?

As with most countries worldwide, cryptocurrencies such as Bitcoin, Ethereum, Dogecoin and such are not recognised as legal tender in Malaysia: per a statement by Bank Negara Malaysia issued on 3 January 2014, which also cautioned users of the risks

associated with the usage of such digital currency.

Under the Capital Markets And Services (Prescription Of Securities) (Digital Currency And Digital Token) Order 2019, a digital currency which is "(a) traded in a place or on a facility where offers to sell, purchase, or exchange of, the digital currency are regularly made or accepted; (b) a person expects a return in any form from the trading, conversion or redemption of the digital currency or the appreciation in the value of the digital currency; and (c) is not issued or guaranteed by any government body or central banks" is prescribed as securities for the purposes of the securities laws.

The monitoring and regulatory oversight of the offering and trading of digital currency in Malaysia is thus undertaken by the Securities Commission. The Securities Commission has issued its Guidelines on Digital Assets, which sets out the requirements relating to fundraising activity through digital token offering, operationalisation of initial exchange offering (IEO) platforms, and provision of digital asset custody.

With the regulatory oversight in place, only recognised market operators which have been registered with the Securities Commission can establish and operate digital asset exchanges in Malaysia. Operators who flout these rules have been met with enforcement action, and in 2021 the Securities Commission announced that it had initiated enforcement action against Binance, one of the largest cryptocurrency exchange operators in the world, for illegally operating a Digital Asset Exchange in Malaysia.

IX Recent developments and other impacting factors

With the growth of global connectivity and the digital economy, together with the increasing sophistication of scammers and exploitation of emerging technologies, cyber scams, crypto frauds such as phishing, spoofing, business email compromise (BEC) and hacking are growing crime problems throughout the world, and Malaysia is not spared from the impact of these cybercrimes. In the last 10 years, there has been a proliferation of such cyber-criminal cases, leading to billions of Ringgit losses. In October 2022, the Malaysian Government set up the National Scam Response Centre (NSRC) for victims to report online financial scams.

NSRC is a joint effort between the National Anti-Financial Crime Centre (NFCC), the Royal Malaysian Police, Bank Negara Malaysia (BNM), and the Malaysian Communications and Multimedia Commission (MCMC), as well as financial institutions and the telecommunications industry, and operates as a centralised operation centre to coordinate a quick response to online financial scams. The NSRC aims to collate various resources and experts to ensure more effective tracing of stolen funds and enforcement actions against criminals involved, ultimately to deter scams faster and with more efficiency.

Education and awareness form the frontline defence against such cyber scams.

Businesses can no longer treat cybersecurity training as optional modules, but must make such trainings part of their standard mandatory protocol. Similarly, as time is of the essence when dealing with fraud and cyber scams, organisation must have proper standard procedures and protocol established to deal with such threats.

On the legal front, business must ensure that its business contracts and agreements have sufficient safeguards on cyber security breaches and losses caused by fraud and cyber-crimes. CDR

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I Executive summary

Global fraud has skyrocketed in 2023. Scams, in particular, are growing rapidly with the increase of real-time payments and the use of cryptocurrency, with Singapore being no stranger to this – it has been reported that between August 2022 and 2023, scammers stole an estimated of S$1.4 trillion globally, with victims in Singapore losing the most money on average. However, the majority of the fraudsters behind such scams are based outside of Singapore, and in some cases, in locations that are completely unknown – limiting what local law enforcement can do and making the recovery of assets an uphill task.

In the face of such an unprecedented and evolving threat of fraud, Singapore, as with other jurisdictions, has had to respond rapidly on multiple fronts to strengthen enforcement against the perpetrators. Apart from enhancing Singapore's legislative framework to increase regulatory oversight of the cryptocurrency industry, the Singapore Courts have also responded with ground-breaking decisions introducing novel tools to assist victims of fraud in their efforts to urgently locate, freeze and recover assets from fraudsters.

In this chapter, we discuss the options that fraud victims have in respect of asset tracing and recovery, and the potential challenges they may face in Singapore.

II Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

In fraud cases, it is imperative to act urgently to prevent fraudsters from disposing of or diminishing the value of the stolen assets. In recent years, it is not uncommon that such stolen assets take the form of cryptocurrency or NFTs. As cryptocurrency and NFTs are "*susceptible to being transferred by the click of a*

button, through digital wallets that may be completely anonymous and untraceable to the owner, and can be easily dissipated and hidden in cyberspace" (as opined by the Singapore High Court in *CLM v CLN and ors* [2022] SGHC 46 ("***CLM***")), this heightens the need for tools to locate and freeze such assets pending any judgment being obtained against the fraudster.

In Singapore, the Courts have the power, pursuant to section 18(2) read with paragraph 5 of the First Schedule of the Supreme Court of Judicature Act 1969 ("**SCJA**") and section 4(10) of the Civil Law Act 1909, to grant injunctions, disclosure and search orders in aid of a claimant. In the context of fraud and asset tracing, such orders would commonly be granted on an interim basis, and under the right circumstances, on an urgent basis without notice to the respondent or even before the originating process is issued.

In particular, the Courts can grant a proprietary injunction, which is aimed at preserving property over which a claimant has a claim and which allows the claimant to reclaim its ownership or possession of the property if it is ultimately successful in its claim against the wrongdoer.

The Courts also have at their disposal the power to grant a freezing injunction which aims to freeze the assets of the defendant either domestically or worldwide, without limitation to the stolen assets. Famously described as one of the "nuclear weapons" of civil litigation, a claimant seeking a freezing order would have to show that there is a real risk that the defendant would dissipate his assets to frustrate the enforcement of an anticipated judgment of the Court, which requires proof on a much more exacting standard than when seeking an interim proprietary injunction (which requires demonstrating that the balance of convenience lies in favour of granting the injunction).

The difficulty in obtaining such injunction orders is compounded in a case where the actual identity of the fraudster is unknown and where the stolen asset, particularly cryptocurrency, has been routed through various channels, such as digital wallets and crypto exchanges, by the fraudster in an attempt to hamper tracing efforts, rendering the location of the asset unknown.

In such a situation, ancillary disclosure orders can be granted by the Courts to assist the claimant in locating the property, and in the case of a freezing injunction, to assist the claimant in determining the existence, nature and location of the defendant's assets, clarifying questions of title concerning the assets, and identifying the parties involved in the fraud as well as third parties to whom notice of the injunction should be given. A search order can also be sought to enable a claimant to enter the defendant's premises to search for, inspect and seize documents and materials to prevent the destruction of incriminating evidence.

A combination of these orders targeted at locating, preserving and recovering stolen assets were granted in two decisions of the Singapore High Court involving cryptocurrency and an NFT, in which the Court confirmed (for the first time, and following

suit from other jurisdictions such as the UK and Malaysia) that civil proceedings can be commenced against unknown persons and injunctions obtained against them in order to prohibit the unknown persons from disposing of or diminishing the value of the stolen assets.

In *CLM*, an American entrepreneur discovered that Ethereum and Bitcoin with a value of over US$7 million had been stolen from him and then dissipated through a series of digital wallets, which the Court observed as having appeared to have been "*created solely for the purpose of frustrating the [claimant's] tracing and recovery efforts, and which had either no or negligible transactions other than the deposit and withdrawal of the Stolen Cryptocurrency Assets*".

The claimant commenced proceedings against the persons unknown, and sought both a proprietary injunction and a worldwide freezing order to prohibit them from dealing with, disposing of, or diminishing the value of the stolen assets. In addition, the claimant sought ancillary disclosure orders against two operators of crypto exchanges for, among other things, information and documents collected by the crypto exchanges in relation to the owners of the accounts which received the stolen cryptocurrency. The Court granted the proprietary injunction and worldwide freezing order, the first of its kind granted in Singapore against the assets of persons unknown, as well as the ancillary disclosure orders.

In the decision of *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 ("***CHEFPIERRE***") released just several months later, the claimant brought an urgent application to Court for, among other things, an interim proprietary injunction prohibiting the defendant from dealing with an NFT, as well as permission to serve the Court

papers on the defendant via Twitter, Discord, and the defendant's cryptocurrency wallet address. The defendant's identity was not known to the claimant, but went by the pseudonym "chefpierre.eth".

The Court held that while the forms in the Rules of Court 2021 in relation to commencing claims in Singapore require that the name and identification of a defendant be stated, so long as the description of the defendant is sufficiently certain to identify the persons falling within or outside of that description, strict compliance with the formality requirements in this respect was not required. In any case, even if the requirement for the defendant to be named was a strict one, the description of the defendant in *CHEFPIERRE* was such that the Court would waive any such non-compliance with the Rules of Court 2021.

The Court in *CHEFPIERRE* therefore allowed the claimant's application for permission to effect service via the various online platforms. In doing so, the Court clarified that it had the power to allow substituted service out of jurisdiction under the Rules of Court 2021, while also affirming previous Singapore decisions allowing substituted service to be effected *via* online platforms. This demonstrates the Singapore Courts' willingness to afford flexibility to claimants in commencing proceedings against fraudsters who may have an unknown identity or physical location, which is a critical tool in aid of recovery efforts against fraudsters.

In addition to the above, section 18(2) read with paragraph 12 of the First Schedule of the SCJA permits the Singapore Courts to grant a *Norwich Pharmacal* order against third parties, requiring those third parties to disclose documents or information to the claimant to assist the claimant in identifying the person or persons who may be liable to the claimant.

The same statutory provisions also permit the Court to grant a *Bankers Trust* order. The purpose of a *Bankers Trust* order is to obtain disclosure of information from third parties, and are typically utilised in claims for fraud where a claimant seeks confidential documents from a bank (or, in recent cases, crypto exchanges) to support a proprietary claim to trace assets.

In this regard, while changes to the English civil procedure rules (in particular, the addition of paragraph 3.1(25) to Practice Direction 6B of the UK Civil Procedure Rules 1998) and subsequent English High Court decisions have confirmed that *Norwich Pharmacal* and *Bankers Trust* orders can be served on entities (such as crypto exchanges) outside the jurisdiction (see, for example, *LMN v Bitflyer Holdings Inc. and others* [2022] EWHC 2954), the Singapore Courts have yet to rule on this. In *CLM*, for example, this issue did not arise as although *Bankers Trust* orders were sought against two crypto exchanges incorporated overseas, these defendants also had operations in Singapore. Further, the Court declined to consider whether a *Bankers Trust* order should be granted, as the crypto exchanges were already parties to the proceedings, and therefore were not non-parties. It would, however, be likely for the Singapore Courts to adopt a similar, more permissive stance to issuing (and permitting service of) *Norwich Pharmacal* and *Bankers Trust* orders to third parties overseas, particularly when such third parties are increasingly based outside the jurisdiction. In this regard, the Rules of Court 2021 that came into operation on 1 April 2022 have adopted an expanded approach in permitting service of orders out of jurisdiction, and the Court would consider "*if the application is for the production of documents or information (i) to identify potential parties to proceedings before the commencement of those proceedings in Singapore; (ii) to enable tracing of property before the commencement of proceedings in Singapore relating to the property*" (paragraph 63(3)(u), Supreme Court Practice Directions 2021, which is similarly worded to paragraph 3.1(25) of the Practice Direction 6B of the UK Civil Procedure Rules 1998).

The cases of *CLM* and *CHIEFPIERRE* demonstrate that the Singapore Courts are willing to recognise that there is at least a serious question to be tried or a good arguable case that crypto assets are property and can be the subject of interim proprietary injunctions. More recently, in the case of *Bybit Fintech Ltd v Ho Kai Xin and Ors* [2023] SGHC 199 ("***Bybit***"), the Singapore Courts have taken a step further, and in granting summary judgment to the claimant, determined that crypto assets are choses in action and therefore property capable of being held in trust. In *Bybit*, the Court declared a constructive trust over the crypto asset (USDT), and held that the claimant (from whom the first defendant had transferred quantities of USDT to addresses secretly owned and controlled by her) was the legal and beneficial owner of the USDT – paving the way for victims of cryptocurrency fraud to avail themselves of proprietary remedies before the Singapore Courts.

III Case triage: main stages of fraud, asset tracing and recovery cases

Time is always of the essence in fraud, asset tracing and recovery cases. The first step is to ensure that as much information and evidence is gathered in respect of the fraud in order to formulate a legal and asset recovery strategy. This must be done swiftly and decisively as fraudsters look to erase or hide evidence of their wrongdoing and avoid being identified. It is therefore important to involve technical experts at an early stage to deploy technological tools to assist in evidence gathering and recovery, as well as to pick up on trails left behind by the fraudsters that may yield useful information and evidence.

As a second step, the claimant should decide on the jurisdiction(s) where the claim should be brought against the wrongdoer, and how this impacts the claimant in obtaining injunction, search and/or disclosure orders. Where the fraud is cross-border in nature, it is especially critical for the claimant to have an appreciation of how the legal mechanisms available in various jurisdictions can complement one another.

Where multiple jurisdictions are available, it would also be necessary to consider the question of whether proceedings should be commenced concurrently in each of the available jurisdictions, or whether it would be more advantageous to commence proceedings in one main jurisdiction, and thereafter enforcing the orders obtained in that jurisdiction in the other available jurisdictions.

In this regard, it is worth noting that the Singapore Courts are widely supportive of foreign proceedings and have broad powers to grant interim relief in aid of such proceedings. In practice, the Singapore Courts are also generally willing to give effect to injunctions or other orders obtained outside Singapore, by granting similar orders to that effect.

For instance, the Singapore Courts can grant freezing injunctions in aid of foreign proceedings so as to assist the claimant in ensuring that if he is successful in those proceedings, he would have assets in Singapore over which to enforce the foreign judgment. In *Bi Xiaoqiong v China Medical Technologies, Inc (in liquidation) and anor* [2019] 2 SLR 595, the Court held that its power to do so is subject to at least two conditions: that the Court has *in personam* jurisdiction over the defendant; and the claimant has a reasonable accrued cause of action against the defendant in Singapore. Importantly, there is no requirement that the Singapore proceedings have to terminate in a judgment rendered by the Court that issued the injunction, and the freezing injunction can be granted even where the Singapore proceedings are stayed in favour of foreign proceedings.

Following this decision, provisions were introduced in 2022 to the Singapore Civil Law Act 1909 to enable the General Division of the High Court of Singapore to grant any type of interim relief (as long as it also has the power to grant such relief in proceedings within its own jurisdiction) in aid of foreign Court proceedings, *even if* there are no substantive proceedings in Singapore. This is commonly known as "free-standing" interim relief. With these amendments, the Court's powers to grant relief in aid of foreign Court proceedings appear to have been broadened markedly. However, as there are yet to be any reported decisions of the Singapore Courts on these new provisions, how the Courts will exercise this power (particularly as the amended provisions still permit the Court to refuse to grant relief if it considers that its lack of jurisdiction over the subject matter of the proceedings would make it inappropriate to do so) remains untested.

Further, by amendments to the Reciprocal Enforcement of Foreign Judgments Act 1959 ("**REFJA**"), which came into effect in 2019, foreign interlocutory orders such as freezing orders and foreign non-money judgments obtained in foreign gazetted territories can be enforced in Singapore. Such amendments plug a long-standing gap as freezing orders (not being "final and conclusive" judgments) were not previously capable of enforcement under the Act. At the moment, these amendments apply only to judgments from the superior courts of Hong Kong that are registrable under the REFJA. With the recent repeal of the Reciprocal Enforcement of Commonwealth Judgments Act 1921 on 1 March 2023, Singapore's legal framework for the statutory recognition and enforcement of foreign judgments in civil proceedings is now streamlined and consolidated such that

foreign judgments issued by stipulated courts from the Australia, Brunei, India, Malaysia, New Zealand, Pakistan, Papua New Guinea, Sri Lanka, the United Kingdom, and the Windward Islands and are also registrable under the REFJA. Currently, only money judgments that are final and conclusive as between the parties to the judgments from these Courts are registrable under the REFJA, but it is expected that this will be expanded to be in line with judgments from Hong Kong.

Once proceedings are commenced, the third step involves obtaining the relevant injunctions, search orders and/or disclosure orders as elaborated on in the previous section. In this regard, claimants must be mindful that injunctions obtained in Singapore are usually accompanied by undertakings. For instance, before a worldwide freezing injunction is granted by the Singapore Courts, it is usual that the claimant undertakes to seek permission before (1) enforcing that injunction any other jurisdiction, or (2) starting proceedings against the defendant in any other jurisdiction.

More information about the wrongdoer and the wrongdoer's assets will often be obtained at this stage. It is critical to reassess the overall legal and asset tracing strategy as new information becomes available to ensure efficacy and efficiency in the conduct of legal proceedings.

For instance, the claimant may be able to identify other wrongdoers against whom recourse could be had. This may necessitate further parties being added to existing legal proceedings, either as defendants or parties against whom further orders need to be sought. Indeed, this was the case in *CLM*, where as a result of the claimant's further investigations and disclosure by the second and third defendants, the claimant identified two other persons who were involved in the transfer of assets which were traceable to the crypto assets which were the subject matter of the claim, and proceeded to join them as fourth and fifth defendants in the Singapore proceedings.

Where the legal and asset tracing strategy is conducted effectively, this may result in the wrongdoer being more amenable to enter into a settlement on terms favourable to the claimant. This usually results in significant time and costs savings for the claimant. Where there is no settlement of the dispute, the proceedings will either proceed to trial (if the defendant contests the proceedings), or a judgment will be entered in default (if the defendant does not contest the proceedings).

Once a judgment is obtained against the defendants, the fourth step is to execute the judgment against the assets of the defendants can be taken. We discuss the key challenges in this regard under Section V below.

In cases where the defendants are unable to satisfy its debts (including a judgment debt), the claimant may consider commencing insolvency or bankruptcy proceedings the defendants, which could aid in maximising recovery. In that regard, it is worth noting that in the recent decision of *Loh Cheng Lee Aaron and another v Hodlnaut Pte Ltd (Zhu Juntao and others, non-parties)* [2023] SGHC 323 ("***Hodlnaut***"), the Singapore Courts clarified that a company's obligation to repay cryptocurrency to its creditors counts as debts owed by the company, and is relevant to determining whether the company is insolvent for purposes of commencing winding up proceedings against the company (*i.e.*, that the company was unable to pay its debts). By this decision, it is now clear that creditors can, under section 125(2)(c) of the Insolvency, Restructuring and Dissolution Act 2018 commence insolvency proceedings without needing to first obtain a court judgment for a liquidated sum of money denominated in fiat currency, by proving that the company is unable to pay all its debts (including its liabilities denominated in cryptocurrencies) as they fall due.

IV Parallel proceedings: a combined civil and criminal approach

While it is possible to pursue parallel civil and criminal proceedings against fraudsters in Singapore, from an asset recovery perspective, civil proceedings play a more impactful role. This is a function of the different intended purposes and outcomes of criminal and civil proceedings – criminal proceedings are aimed at deterrence and/or criminal punishment, while the objective of civil proceedings is to provide compensation and/or recovery of assets to the claimant.

For example, in a recent decision on a disposal inquiry in *Lim Tien Hou William v Ling Kok Hua* [2023] SGHC 18, the Singapore High Court determined that in a contest between two individuals who were both victims of cryptocurrency fraud, the stolen asset should be returned to the party who was the lawful possessor of the asset at the point of seizure. In reaching this decision, the Court clarified that its ruling was based on provisions of the Criminal Procedure Code, and had no effect on a Civil Court. Parties are thus free to commence civil proceedings to assert their rights.

Defendants in civil proceedings may also try to use the fact that they are subject to criminal proceedings as a means to delay the civil proceedings brought against them. This was precisely the scenario in the Singapore High Court case of *Debenho Pte Ltd and or v Envy Global Trading Pte Ltd and Ng Yu Zhi* [2022] SGHC 7. Mr. Ng Yu Zhi ("**NYZ**") sought a stay of civil proceedings brought against him for, among other things, fraudulent misrepresentation, on the basis that he also faced criminal charges arising out of the same facts (alleged fraud surrounding an investment scheme involving physical nickel trading). Two of the criminal cheating charges brought against NYZ were in respect of the claimants in the civil suit. NYZ argued, among other things, that he enjoys the right of silence and the privilege against self-incrimination, both of which will be infringed if the civil suit is not stayed, and he would suffer prejudice if the civil suit is not stayed because of the burden of having to prepare for both sets of proceedings concurrently.

The High Court dismissed the stay application because it was insufficient for NYZ to simply invoke his right of silence and privilege against self-incrimination, both of which are not automatically engaged merely because he has been called upon to defend himself in a civil action. NYZ failed to show how requiring him to defendant himself in the civil suit will give rise to a real (and not just notional) danger of prejudice. In particular, the High Court held that section 134(2) of the Evidence Act 1997 precludes any incriminating answers that NYZ may give under cross-examination in the civil suit from being proved against him in the criminal trial.

However, claimants should bear in mind the possibility of such arguments being deployed by wrongdoers to delay civil proceedings against them, especially where the wrongdoer is able to show a real danger of prejudice.

V Key challenges

A longstanding challenge faced by claimants who are victims of fraud and seeking to recover stolen assets is the lack of information. This is especially when a wide array of tools is now available to fraudsters to mask their identity and location, as well as to move stolen assets quickly and seamlessly, making asset tracing and recovery efforts against the wrongdoer a costly and time-consuming exercise for the claimant.

That said, in the context of crypto fraud, identifying the last known location of the stolen crypto assets is relatively straightforward. This is because common crypto assets such as Bitcoin and Ether utilise decentralised blockchains ledgers which are public information.

The challenge lies instead in accessing the crypto assets. The transfer of and access to crypto assets are controlled by a set of digital keys and addresses. While the transferor is able to transfer crypto assets to any public address, the transferee must have a unique private key to access the crypto assets received. Private keys can be kept in custodial wallets (e.g., with a crypto exchange) or in non-custodial wallets (where one stores one's own private keys). Both types of wallets can be either hot (connected to the internet) or cold (disconnected from the internet).

Where the defendant or the third party (or crypto exchange) in possession of the wallet is known, the private keys can be obtained through discovery. Claimants need to be aware that the third party/crypto exchange might not cooperate, and that they may have to adopt other strategies to exert pressure on the platforms to comply with such court orders. Where crypto assets are controlled by overseas exchanges, it may be possible for the court to order that they be transferred into the court's control in order to facilitate with future enforcement. In *Joseph Keen Shing Law v Persons Unknown & Huobi Global Limited* [2023] 1 WLUK 577, the claimant obtained a worldwide freezing order and a default judgment against the fraudsters. While Huobi had not permitted the fraudsters to access the accounts (and Huobi had indicated its intention to cooperate with any order made) the English Court considered that that "*may not necessarily occur and continue to be the case, and of course the court has no control over any of the relevant defendants, all of whom are based exclusively outside the jurisdiction of this court*". The Court thus ordered the transfer of the funds subject of the worldwide freezing order into the jurisdiction, and Huobi to convert the crypto assets to fiat currency and credit them to the claimant's solicitors, or to credit the crypto assets to the claimant's solicitors who will convert them into fiat currency (to be onwards transferred into the client account or to the court's office).

Where the crypto asset is associated with keys kept in a cold wallet, claimants may need to explore utilising technology to aid asset recovery (see discussion under Section VII below).

VI Cross-jurisdictional mechanisms: issues and solutions in recent times

Fraud and asset tracing are increasingly cross-border in nature. The fraud is either in itself cross-border, or the asset stolen is usually moved overseas. Therefore, as discussed above, it is critical to devise a multi-jurisdictional strategy in fraud and asset tracing which involves identifying the potential jurisdictions

involved, the various positions each jurisdiction takes in respect of injunction and disclosure orders, and whether enforcement of such orders granted by a foreign Court poses a challenge.

The challenges that arise from cross-border fraud and asset tracing are nonetheless alleviated by the Singapore Courts' willingness to recognise and grant relief in support of foreign proceedings, making Singapore an attractive jurisdiction for claimants to consider when coming up with their legal and asset tracing strategy.

VII Using technology to aid asset recovery

One big obstacle claimants often face in asset recovery of crypto assets is when the fraudsters have transferred the crypto assets into a cold wallet (*i.e.*, a device that is disconnected from the internet). In this regard, the media recently reported that the Singapore High Court, in an unreported decision granted a worldwide freezing order in the form of an NFT. The order was tokenised and minted as a Soulbound NFT and permanently attached to the cold wallets in question. Soulbound NFTs are a type of NFTs that are tied to the wallet in question and cannot be transferred or traded. They serve as a warning to third parties who may transact with the wallet in the future that the wallet is involved in a hacking incident. The party who obtained the order also designed a process to keep watch on the funds leaving the wallets (which would most likely be how the fraudsters would eventually seek to extract value from the crypto assets). This process would track and alert exchanges if transactions were made out of the cold wallet. In cases where the exchanges are cooperative, the claimant would have been able to prevent a further dissipation of assets. On the case management front, it has often been discussed that a potential claimant would likely have to work with technical experts to preserve as much technical evidence as possible as most fraud today would involve some digital or technical aspect. Fraudsters would also not shy away from using tools readily at their disposal to hide their identity and location, and the location of the stolen assets.

Artificial intelligence ("**AI**") has been touted as one of the new tools to be deployed in asset tracing. AI may be able to complete in seconds what may take a human months or years to do, and has been used in systems designed to trigger alerts when transactions that have a high risk of being fraudulent are detected, or in systems touted as being able to trace, within a very short period of time, communication between email addresses belonging to persons of interest and their bank accounts. The fact that AI is able to process voluminous and complex data autonomously to identify trends and patterns without (or with very minimal) human intervention is a significant benefit that claimants should take advantage of.

Nonetheless, there remains a question as to how reliable AI results are. In the long-drawn litigation in the UK in *Bates v Post Office Ltd (No 6: Horizon Issues) Technical Appendix* [2019] EWHC 3408 (QB), an IT system had detected unexplained discrepancies in various accounts. That led to successful private prosecution of more than 900 ex-employees for theft, false accounting and/or fraud. The system was later found to contain software bugs, errors and defects "*far larger number than ought to have been present in the system if* [the system] *were to be considered sufficiently robust such that they were extremely unlikely to be considered the cause of shortfalls in branches*". Serious doubts were then raised in respect of the reliability of such evidence. It therefore remains to be seen the extent to which AI can reliably assist in asset tracing and recovery.

VIII Highlighting the influence of digital currencies: is this a game changer?

While the general steps to be taken in respect of fraud concerning cryptocurrencies and tokens are similar to traditional assets, they give rise to different legal issues due to the unique nature of crypto assets.

The Singapore Court has recently conclusively clarified that digital currencies are considered "property" in the eyes of the law. Prior to this, the Singapore Courts (and the courts in many other jurisdictions) had only opined on this issue on an interim basis.

To provide some context, it has been long regarded that there are principally two categories of property: (a) a "chose in possession" (referring to physical assets, which digital currencies, such as Bitcoin, are not); and (b) a "chose in action". This categorisation arises out of a dissenting English Judge's finding made in 1885 (*Colonial Bank v Whinney* [1885] 30 Ch.D 261).

We consider a hypothetical example of one depositing monies with a bank. Prior to the deposit, the monies exist in the form of physical cash, which is a "chose in possession". Once the monies are deposited, they no longer have a physical presence, and they are a "chose in action" (where the proprietary right arises from the fact that action can be taken against the bank to enforce your rights in the monies deposited).

Unlike monies deposited with a bank, cryptocurrencies reside on the blockchain (which are pockets of data replicated across the network). In the case of a decentralised network, there is no particular issuer (*i.e.*, nothing equivalent to a central bank). Strictly speaking, therefore, there is no one against whom an action can be taken to enforce the rights in the crypto asset.

What about the digital wallets opened with crypto exchanges? Do they not operate similarly to banks? What is in the digital wallet, however, is not the cryptocurrency itself, but the private keys allowing one to access or control the cryptocurrency residing on the blockchain. It is therefore not necessarily the case that a proprietary right arises against the crypto exchanges in respect of cryptocurrency residing on the blockchain simply because the crypto exchanges hold digital wallets. Further, not all cryptocurrencies are stored with crypto exchanges; many choose to create cold wallets for added security.

As stated in Section II above, the Singapore High Court has found that crypto assets (such as stolen Bitcoin, Ethereum, and NFT) are property. In *Bybit*, the Singapore High Court highlighted two strong reasons for this: first, cryptocurrency has generally been considered as "moveable property" in the Rules of Court 2021; and second, cryptocurrencies fall within the classic *Ainsworth* definition of property (namely, that it must be "*definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability*"). The Singapore High Court went on to find that crypto assets can be classified as "choses in action", one of the two recognised categories of property.

That said, it should be noted that cryptocurrencies are unlikely to be treated in exactly the same manner as state-issued fiat-currency – in particular, a claim for crypto assets may be treated as a claim for property that can result in traditional monetary

damages in the event of a failure to deliver up, but not a liquidated claim in and of itself. This is because in a previous unreported decision *Algorand Foundation Ltd v Three Arrows Capital Pte Ltd* (HC/CWU 246/2022), the Singapore Court found that a debt denominated in stable coin is not a money debt capable of forming the subject matter of a statutory demand. Similarly, in *Hodlnaut*, the Singapore Court declined to hold that "*cryptocurrency should be treated as money in the general sense*" as this was not a question that was necessary to decide the case, remarking that there has not "*been any acceptance in any major commercial jurisdiction of cryptocurrency as being equivalent to a daily medium of exchange, which would call for similar treatment in Singapore*".

IX Recent developments and other impacting factors

Singapore is in the epicentre of combatting commercial fraud, cyber scams and crypto fraud. Other than civil proceedings which have been discussed above, industry-specific efforts have been made to curb such fraud and scams.

For instance, following a widespread SMS phishing attack impersonating a bank in Singapore in 2021 that resulted in $13.7 million lost in days by at least 790 victims, the Association of Banks in Singapore Standing Committee on Fraud worked with the Monetary Authority of Singapore ("**MAS**") and Singapore Police Force to coordinate the industry's continuous anti-scam efforts in the banking industry. Recently, in October 2023, MAS and the Infocomm Media Development Authority published a joint consultation paper proposing a Shared Responsibility Framework for phishing scams, which assigns duties on financial institutions and telecommunication companies to mitigate such scams, and requires payouts to victims should such duties be breached.

Legislatively, regulations are continually being introduced to address cryptocurrency frauds. One example is the Singapore Payment Services Act 2019 that was amended in 2021 in a bid to strengthen the laws that govern digital payment tokens. In particular, the scope of the Act was expanded to confer on MAS powers to regulate service providers of digital payment tokens ("**DPTs**") that facilitate the use of DPTs for payments, and may not possess the moneys or DPTs involved (termed as Virtual Assets Service Providers, or "**VASPs**").

The Financial Services and Markets Bill was also introduced in 2022 to build upon and enhance the existing regulation of VASPs. Recognising the need to mitigate the risk of regulatory arbitrage (where no single jurisdiction has sufficient regulatory hold over a specific VASP due to the internet and the digital nature of its business), such VASPs which provide digital token services outside of Singapore are now regulated as a new class of financial institution, with licensing and ongoing requirements to ensure that MAS has adequate supervisory oversight over them.

While such regulatory steps have been taken in a bid to deter and prevent fraud before it can even take root, ultimately, civil remedies are still the main means to counter the effects of fraud.

The above discussion demonstrates that while the landscape of fraud has been irretrievably altered, Singapore (both on the part of the Courts and the regulators) continues to rapidly evolve to adapt to these changes, offering new and novel tools to victims of fraud to equip them to face these challenges head on. CDR

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Wendy has consistently been recommended in legal publications and is widely recognised as one of the top enforcement / asset recovery practitioners in Singapore; with sources noting she is "*a phenomenal and utterly compelling advocate who is in a class of her own*", and "*a first-class advocate, with the unparalleled ability to cut through numerous complex facts, extract the winning arguments, and to convey them effectively, with absolute charm and ease*".

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I Executive summary

Switzerland is a small but, nevertheless, very important banking country and commodity trading hub. It is thus not surprising that Switzerland is also a prominent jurisdiction for national and transnational asset recovery disputes. Swiss law enforcement authorities are committed to investigate money laundering, and to assist crime victims in the recovery of criminally obtained assets.

To achieve this goal, Swiss law recognises very effective criminal and civil law mechanisms for the seizure and confiscation of illegally obtained assets, which are applied both in domestic and international cases. The advantage of the criminal law approach is that assets obtained in violation of criminal law can be seized by the investigating authorities *ex officio* through coercive measures, not only from the perpetrator/direct beneficiary but also along the paper trail from third parties who benefited from the offence, and can be confiscated for the privileged satisfaction of the victim. Such coercive measures are not available under civil law. So-called civil "attachment" proceedings are therefore only successful if the claimant has clear indications of where the illegally obtained assets are located. The advantage of the civil law approach, however, can be that the claimant remains in control of the proceedings, and out-of-court settlements with the other party regarding the type and scope of compensation are therefore more likely than in criminal proceedings.

II Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

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 may indeed 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 ceased upon 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 "Civil litigation" below). These disputes may further be addressed within criminal proceedings that may take place at either the cantonal or federal courts (see "Criminal proceedings" below). The civil and the criminal route may be combined in parallel proceedings (see "parallel proceedings" below).

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 he or she has 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 Swiss civil proceedings, 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 his or her 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 his or her 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 his or her 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 same influence as 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 their relationship with one of the parties to the proceedings. 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 proceedings 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 so-called "attachment" proceedings. 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 grounds of the defendant's lack of a domicile or registered office in Switzerland. 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 its domicile or registered office within Switzerland.

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, d and e CPC). 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 only, 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), which can be awarded to the person harmed (art. 73 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. 263 para. 1 lit. e CPC).

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 to the bank of being held criminally and civilly liable in the event that 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 the bank documents are expected to be 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 contrast, 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. in the bank account of the offender, the attachment will fail without the plaintiff being informed as to 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 practice, these adhesion claims are very common, especially as the state attorney establishes the facts *ex officio* in criminal proceedings, whereas in civil proceedings the parties have to investigate and present the facts.

In this context, it is important to note that the CPC differentiates between the person suffering harm and the so-called "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 and/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*.

In the latter case, 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 that he or she wishes to join the proceedings as a private claimant is deemed 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 (arts 109 and 346 CPC), the right to appoint 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, at the latest, prior to the court hearing within the deadline set by the court (art. 123 para. 2 CPC). However, in a recent judgment, however, the Federal Supreme Court explicitly left the question open whether and when the conclusions of the civil claim must be quantified and reasoned in order to interrupt the limitation period. Thus, the statute of limitations must be kept in mind, especially in the case of long-lasting criminal proceedings.

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 a 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).

However, the civil claim filed in the criminal case will be referred to separate civil proceedings in the following circumstances (art. 126 para. 2 CPC):

- the criminal proceedings are abandoned;
- the criminal proceedings are 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).

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 requirements for the recognition and enforcement of foreign judgments are regulated within the Federal Act on Private International Law (PILA; see arts 25–27). Switzerland further has ratified the Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters of 30 October 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.

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 enforce-

ment 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, the public prosecutor may decide on the civil claim, if the accused recognised the civil claims or if their assessment is possible without further evidence and the amount does not exceed CHF 30,000. If the amount is over CHF 30,000 – and 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 may further 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 an 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.

III Case triage: main stages of fraud, asset tracing, and recovery cases

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 includes, in particular, establishing whether multi-jurisdictional efforts need to be made and, if so, coordinating 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. 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 in order 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 would be more prudent to file claims against the defendant in another jurisdiction, the plaintiff should be ready to file such claim within the timeframe that Swiss law prescribes for the timely prosecution of an attachment order.

Where the claimant has different options as to where to litigate his or her claim, the unique benefits and disadvantages of each legal system available should be weighed, to establish under which jurisdiction the claimant would have the best procedural options at his or her 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. Key requirements are 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 he or she has sufficient evidence to back his or her claim and/or suspicions, and especially enough evidence to convince the prosecuting authorities.

If the claimant is able to gather the sufficient amount of evidence and the 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, although the claimant may have the role of a party, he or she shall not have any control over the timeframe or decisions made within the criminal proceedings.

IV Parallel proceedings: a combined civil and criminal approach

As stated above in section I, 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 as to 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 his or her 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 not only to 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 separate civil proceedings.

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.

V 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. Within pending proceedings, a civil court may order the defendant or third parties to disclose specific documents relevant to the case, but this remains an exception. However, if a party requests the opposing side to produce a document, non-compliance with such request may lead to an unfavourable inference by 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. Interim or injunctive relief in Switzerland, however, does not grant the same provisions to the claimant as such foreign orders. A claimant who seeks recognition in Switzerland will most likely pursue a declaration of bare enforceability from a court as the sole remedy.

In sum, 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 his or her favour and have assets traced and confiscated to serve as his or her compensation.

VI 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 the commission of 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 in relation to the serving of documents and 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, where such production constitutes a purely procedural act of such party.

Finally, based on the respective application, the competent federal departments may grant an exception to art. 271 SCC and allow direct cooperation with a foreign authority if it is 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 1 March 1954, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965, and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 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 I 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 the European Convention on Mutual Assistance in Criminal Matters of 20 April 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 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.

VII Using technology to aid asset recovery

The steady advancement of technology comes with the advancement and adaptation of the tactics used by fraudsters. With the ever-increasing amount 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 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. Artificial intelligence may also be used by banks to flag unusual patterns in transactions and block transfers. In general terms, however, the improvement in technology has increased the difficulty in tracing unlawfully acquired assets, and the engagement of companies specialising in international asset recovery has become more commonplace.

In law enforcement, the Swiss Federal Police have established specialised cybercrime divisions, with certain cantonal police departments (e.g. Zurich) following suit. On an international scale, cooperation in the fight against cybercrime is further aided through the Convention on Cybercrime (the Budapest Convention) and the coordination channels of the European Union Agency for Criminal Justice Cooperation (Eurojust).

VIII Highlighting the influence of digital currencies: is this a game changer?

Cryptocurrency is not a game changer; it is widely accepted that cryptocurrency can be seized and confiscated, pursuant to art. 263 para. 1 CPC in conjunction with art. 70 SCC, although it does not represent a physical object but rather encrypted, machine-readable information, i.e. data. The term "assets" as used in art. 70 SCC is to be interpreted broadly and includes non-physical objects such as claims or other rights. Data constitute confiscatable assets if they can be sold for a consideration, which is the case with cryptocurrency. Thus, cryptocurrency is in principle a suitable object for seizure and confiscation in criminal proceedings.

However, the seizure of cryptocurrency raises a variety of practical problems. First of all, the criminal authorities need access to the cryptographic key in order to access the cryptocurrency. Second, it is also necessary to gain access to the password-protected wallet. The discovery of a wallet alone does not guarantee power of disposal over cryptocurrency.

In addition, it is possible that the person concerned does not store the cryptocurrency himself, but has it managed in a special web wallet by a commercial service provider. In this case, the difficulty lies in the fact that the private keys, which enable the power of disposal over the assets, are not stored with the accused, but with a provider.

Another challenge is that after gaining knowledge of the private keys, the criminal authority must ensure that the accused person can no longer dispose of the seized object. This requires the immediate transfer of the virtual currency to a state wallet, i.e. independent infrastructure for the secure storage of cryptocurrency.

In practice, criminal authorities may become aware of the existence of "tainted" cryptocurrency as a result of interrogations, a house search or the analysis of other seized documents such as (email/WhatsApp) correspondence or transcripts of phone conversations. Whilst third parties such as specialised vault providers may be obliged to disclose additional information, this is, in view of the privilege against self-incrimination, not the case with the accused person. Thus, the latter is in principle not obliged to disclose any holdings in cryptocurrency, the private key or its location, nor the password to the wallet.

However, under certain circumstances, the accused may commit the offence of money laundering in the sense of art. 305*bis* SCC if he or she not only refuses to provide information but actively uses or transfers the cryptocurrency in order to avoid its confiscation.

The realisation of seized cryptocurrency is similarly associated with difficulties. In this regard, the Federal Supreme Court recently ruled (Judgment of 18 October 2021, 1B_59/2021) that seized assets with an exchange and market price can in principle be realised immediately. However, according to the Federal Supreme Court, early and complete realisation can have a negative effect on the realisable proceeds, especially in the case of large crypto holdings. In such cases, the prosecution authorities must proceed with adequate care and, where necessary, involve an external expert.

IX Recent developments and other impacting factors

Funds derived from criminal activities are often commingled in a bank account with funds derived from lawful activities. The extent to which such commingled funds may be forfeited and, even more importantly, qualified as an object of money laundering, has always been the subject of controversy.

In a landmark decision of 1 June 2021 (6B_379/2020), the Federal Supreme Court confirmed the so-called "sediment theory". It means that in the case of withdrawals from a commingled asset or bank account, there can be no money laundering provided these withdrawals do not exceed the legal portion of the account, with the consequence that the tainted "sediment" remains untouched and thus can still be secured and confiscated by the criminal authorities.

The "sediment theory" allows it to be argued that, e.g. in case of a company having profited from corruption or other criminal activities, payments to shareholders, employees, organs and suppliers do not constitute money laundering provided the tainted "sediment" on the profiting account remains unattained and can still be confiscated.

In March 2021, the Federal Parliament passed the revision of the Anti-Money Laundering Act (AMLA) to take account of international standards and the recommendations of the Financial Action Task Force (FATF). The revised law entered into force on 1 January 2023. It entails extended due diligence obligations for financial institutions: the identity of the beneficial owner (e.g. of a bank deposit) must now be *verified* (not only *established* as before) and customer data must be regularly updated for *all clients* (not only for *PEPs* as before). Furthermore, the revised law abolishes the current time limit of 20 working days for the processing of a report by Money Laundering Reporting Office (MROS) and, in return, provides for a right of the financial intermediary according to which he or she may terminate the reported business relationship if the MROS does not inform him or her within 40 working days that the reported information will be transmitted to a prosecution authority. Based on the Federal Act on the Implementation of International Sanctions (Embargo Act, EmbA), Switzerland, adopting European sanctions, has frozen financial assets worth CHF 7.5 billion against sanctioned Russian politics and oligarchs. It is an issue of controversy whether and under what conditions such seized assets could ultimately be confiscated and used for Ukraine's recovery. On

23 November 2022, the Federal Council adopted further sanctions against Russia in response Russia's military aggression against Ukraine. The Federal Council is thus adopting, in principle, the latest measures adopted by the European Union (EU) as part of its eighth package of sanctions. The measures include, *inter alia*, a new ban on the provision of legal services to the Russian government and to Russian companies, as well as on holding seats on the boards of certain Russian state-owned companies. The Federal Council has ensured, nevertheless, that access to Swiss law shall be preserved and that the rule of law shall be fully guaranteed. This was the Federal Council's condition for adopting the new ban. However, it remains that there is a strong tension between the ban on legal advisory services and the right to an effective legal remedy. The new ban will cause a substantial uncertainty for legal advisors as to what services are still allowed or indeed prohibited.

On 1 January 2024, several selective amendments to criminal procedure law came into force, which are particularly aimed at increasing the efficiency of criminal prosecution. These improvements should also work in favour of asset recovery efforts of the injured party. **CDR**

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Executive summary

Despite historical perception to the contrary, the UAE legal landscape in fact provides for a broad range of tools for tackling fraud. Both common law and civil law jurisdictions co-exist in the UAE, and proceedings in both are often conducted in parallel. Civil and criminal statutes and measures often overlap and can also be used in conjunction with each other. Parties with more limited options in one jurisdiction, depending on the particular case, may have more success in another.

Moreover, the country is becoming increasingly plugged into the international frameworks for judicial co-operation and cross-border dispute resolution. There has been continued progress with greater reciprocity of enforcement between the UAE courts and foreign jurisdictions, the development of the UAE's extradition processes, and its participation in INTERPOL's "Red Notice" system.

The growth of digital assets in the UAE – including their regulation and trading – is one of the fastest in any market anywhere in the world. The legal sector has not lagged behind either, with the Dubai International Financial Centre ("DIFC") Courts passing judgment in one of the first cryptocurrency disputes to reach a full evidentiary hearing (*Gate Mena v Tabarak Investment Capital Limited*). Technology, including artificial intelligence ("AI"), has also been increasingly co-opted in the recovery of assets.

The regulation of digital assets falls within the remit of various long-standing regulatory bodies, including the UAE Securities and Commodities Authority ("SCA"), the UAE Central Bank, and the Abu Dhabi Financial Services Regulatory Authority ("FSRA"), the Dubai Financial Services Authority ("DFSA") as well as very recently established new regulators such as the Dubai Virtual Asset Regulatory Authority ("VARA"), whose detailed rules were published in 2023. Regardless of the length of their tenure, these institutions all place a common emphasis on greater transparency

and reporting, including the development of "whistle-blowing" regimes. These themes are expected to be expanded on and developed in the years to come.

II Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

Criminal legislation

UAE criminal law penalises fraud and other similar economic crimes. Federal Law No. 31 of 2021 on the Issuance of the Crimes and Penalties Law (as amended) ("Penal Code") makes several references to fraud, including fraudulent misrepresentation.

For fraud practitioners, the most salient provisions are in Book 2, Title 8, Chapter 2, covering fraud in commercial transactions. Article 451 imposes a prison sentence of up to two years or fine of up to AED 20,000 in the following terms:

> "Any person who unlawfully appropriates for himself or for another person movable property, or who obtains a benefit or document or a signature on the said document, or a revocation or alteration of the document, by seeking fraudulent method or by false pretence or capacity so as to deceive the victim and induce him to surrendering such document, shall be liable to a jail sentence or a fine. The same penalty shall be imposed against any person who disposes of a real estate or movable property, knowing that he is neither the owner nor having the right to dispose of the same, or that he has previously disposed of the same or concluded a contract on the same, and which may inflict damage to a third party."

Attempted fraud is also penalised in the same Article.

Also of note are the offences of embezzlement in a public office (Article 260) or in respect of telecommunication services (Article 444), and the crimes of breach of trust in Articles 453 to 455. Fraud involving written instruments is covered by Article 452; criminal deceit is penalised at Article 176.

Related offences are also found outside the Penal Code. For example, Federal Law No. 34 of 2021 concerning the Fight Against Rumours and Cybercrime ("Cybercrime Law") criminalises hacking-related offences (Articles 2-4, 12), compromising personal and governmental data (Articles 6-7, 13), misappropriation of secret information (Article 9), online/email fraud (Article 11, 17), forgery of electronic documents (Article 14), defrauding through compromising electronic payments (Article 15) and tampering with digital evidence (Article 18), among other offences. A general offence of cyber fraud is also contained in Article 40 which provides:

> "Everyone who unduly seizes for himself or for others movable property, benefit, document or signature of such document, by adoption of a fraudulent manner, using false name or impersonating oneself through the information network, electronic information system or information technology method shall be sentenced to detention for a period of not less than one year and/or to pay fine of not less than (250,000) two hundred fifty thousand Dirhams and not more than (1,000,000) one million Dirhams."

Whilst the Penal Code provides for a scheme of confiscation of the proceeds of crime generally (in Article 83), the Cybercrime Law provides for a separate confiscation scheme (in Article 56) in respect of proceeds of cybercrimes (which is for the benefit of the State but expressly without prejudice to the rights of third parties impacted by those offences) following conviction. To the extent that a harsher penalty is applicable for the same conduct under the Penal Code, the provisions of the Penal Code shall prevail over those of the Cybercrime Law.

Civil legislation

Victims of fraud can pursue claims for civil damages. Typically, the criminal conviction is used as the basis for substantiating the civil claim. A civil claim can therefore either follow a criminal conviction, or be pursued in parallel with a criminal complaint; in the latter instance, the civil claim will be stayed pending determination of the criminal action.

Further, once a criminal conviction for fraud has been secured, the victim may apply to the first instance criminal court for a temporary award of damages on a summary (immediate) basis to be paid by the defendant pending a claim against him in the civil courts. The maximum amount that the criminal courts are permitted to award a victim under Articles 425 and 426 of the Penal Code is, however, relatively low (i.e., limited to AED 20,000 (c. USD 5,400).

Through Dubai Law No. 37 of 2009 on the Procedures for the Recovery of Public Property and Illicitly Collected Money, there is a penalty of imprisonment of up to 20 years (depending on the amount defrauded) for criminals who refuse to return the proceeds of their crime in relation to offences committed in Dubai.

More importantly, under Law No. 37, victims of fraud also have standing to seek restitution of the proceeds of crime. This applies to both public and private funds.

Civil claims are usually brought under the general provisions of Federal Law No. 5 of 1985 on the Civil Transactions Law of the United Arab Emirates State (as amended) ("Civil Code") from Articles 282 *et seq.*, which stipulate that any harm or tort committed on someone shall render the actor liable to compensate the victim.

Fraud practitioners may alternatively prefer to pursue a solely civil recovery strategy. For example, through claims under the torts of unjust enrichment and unjust expropriation, which are found in Book 1, Part 4 (Acts conferring a benefit) of the Civil Code, and which provide for restitution and compensation.

Specific orders

The Public Prosecutors in each of the seven Emirates of the UAE have powers that can aid the investigation of fraud. For instance, the Public Prosecution can apply for a travel ban to stop a suspect leaving the UAE, including an order to surrender any passports held. The civil courts can also impose "precautionary attachments" akin to freezing orders, either before or after criminal and/or civil proceedings have commenced. Once an order for payment has been made by any UAE court, the execution judges and their teams assist judgment creditors with recovery, e.g., by writing to the major banks through the UAE Central Bank to ascertain whether the judgment debtor hold accounts with them, making enquiries with the local stock exchanges and the land and vehicles departments.

The Abu Dhabi Global Market ("ADGM") and DIFC

The UAE is a civil law jurisdiction and does not differentiate between the legal and equitable ownership of property, other than in the very limited ambit of the UAE Trust Law (Federal Law No. 19 of 2020). However, two "islands of common law" exist within the UAE in the form of offshore financial free zones, namely the DIFC and the ADGM, which apply their own civil and commercial laws. The courts of these two jurisdictions can deploy the full panoply of civil tools that common law practitioners are familiar with, including search, freezing and other injunctive orders, all of which can (in theory) be enforced outside of the territory of the relevant free zone. Examples of key cases are given in the section on cross-jurisdictional mechanisms below.

Neither the DIFC or the ADGM have their own separate criminal law regimes; both jurisdictions are subject to UAE federal criminal laws, such as the Penal Code and the Cybercrime Law discussed earlier in this chapter.

In all, the UAE legal regime provides ample tools for aiding the pursuit of fraudsters and the recovery of stolen assets. The UAE authorities are one of the foremost users of INTERPOL's "Red Notice" scheme, and there are several instances of their detaining and extraditing suspects in response to foreign Red Notices.

III Case triage

UAE criminal proceedings

In criminal proceedings, the UAE's Public Prosecutor possesses wide-ranging powers and discretion to take any necessary steps to investigate matters and conduct the tracing of assets. The Public Prosecutor collects the necessary information and evidence and may seize or freeze assets. The Public Prosecutor may also enlist the assistance of other bodies if required, such as the UAE Central Bank or financial institutions. Such powers are also exercisable against third parties and the criminal courts may also summon witnesses to provide evidence.

Even if confiscation is not required by law, upon issuing its decision, the criminal court may order the confiscation of assets derived from the criminal activity (Article 83 of the Penal Code). Where proceeds of crime have been wholly or partially converted into or combined with other lawfully obtained property, the proceeds or crime or an equivalent amount may nevertheless be confiscated (Article 83 of the Penal Code).

UAE civil proceedings

Information of both a personal and commercial nature is strictly guarded in the UAE. When it comes to obtaining documents and information, a court order would be required to request or compel disclosure of such information from third parties. The court may mandate an expert to carry out an independent investigation of the facts and prepare a report for the court setting out their findings. The expert is empowered through the court's mandate to require delivery of information and documents from parties (including third parties) in supremacy to the UAE's secrecy laws and may request to inspect a party's premises, possessions, objects, data, or any other physical or electronic records. Technically, penalties (by way of fines) can be imposed on any parties which refuse to comply with the expert's directions, though this is not guaranteed in practice. The court is also entitled from an evidential perspective to draw adverse conclusions from a failure to comply.

Whilst civil proceedings in the UAE are predominantly based on written submissions and it is not the norm for witness evidence to be heard, under recent amendments to the UAE Civil Evidence Law (Federal Law No. 35 of 2022 Promulgating the Law of Evidence in Civil and Commercial Transactions), a party may request the court to summon a witness to appear before the court and answer questions. If a witness refuses to appear, the court may in certain circumstances impose a fine of between AED 1,000 and AED 10,000 (Article 74).

Federal Law No. 42 of 2022 Promulgating the Civil Procedures Law ("Civil Procedures Law") permits the attachment of assets belonging to any debtor and a creditor may apply to the court for such an order, which can be imposed over real estate or any movable property of the debtor, including assets physically in the custody of third parties (such as bank accounts or safety deposit boxes). Attachments may also be granted in respect of a company's trade licence which prevents it from winding up, restructuring or phoenixing in an effort to dissipate/hide assets.

It is not possible to request summary judgment under UAE law and it is therefore more difficult to obtain a civil court judgment without a full trial. However, if the defendant fails to attend trial without a valid excuse, the court may issue judgment in default. Once judgment has been entered, interim attachment orders may be crystallised through execution procedures or further attachment orders over real estate or movable property may be granted. If a debtor fails to comply with a final judgment or any final order for payment, then the creditor may apply to the court for a detention order against the debtor. In certain circumstances, a travel ban may also be requested against the debtor.

DIFC and ADGM

The DIFC and ADGM courts are civil courts which benefit from a broader range of investigatory powers akin to those of other common law jurisdictions. It is the claimant itself who must lead the investigation and tracing activities and seek to persuade the court to exercise its powers in support of this process.

Provided the necessary jurisdiction can be established, a claimant can seek a preservation order from the DIFC and ADGM courts where there is a concern that evidence may be destroyed. Possession orders, known in England and Wales as *Anton Piller* orders,

effectively provide the right to search premises and seize evidence without prior warning. Freezing orders, sometimes also known as *Mareva* injunctions, can be used to freeze a debtor's assets in order to prevent them from being taken abroad or dissipated, as well as to compel the debtor to provide documents and information about the assets, including their location. *Norwich Pharmacal* orders can be sought against innocent third parties to compel them to provide relevant documents and information, although an application supported by strong evidence will be required for them to be granted.

A party who disregards any DIFC or ADGM court order would be in contempt of court and may be subject to sanctions. Although the DIFC and ADGM courts do not have criminal jurisdiction, matters of contempt can be referred to the Public Prosecutor, and there are recent examples of this having been done (e.g. in *(1) Lateef (2) Lukman v (1) Liyela (2) Liyani* [2020] DIFC ARB 017 (24 March 2022), where the DIFC court found, for the first time, both the individual and corporate defendants guilty of contempt and referred them to the Attorney General of Dubai for investigation and prosecution, and in *Gulf Wings FZE v A And K Trading Limited and (1) Mr Kamel Abou Aly (2) Mr Ahmed Abouhashima* [2022] DIFC CA 014 (22 December 2022) where the Court also imposed a fine of USD 100,000 for the Defendants' contempt).

IV Parallel proceedings: a combined civil and criminal approach

Both the Penal Code and Federal Law No. 38 of 2022 on the Issuance of the Criminal Procedure Law ("Criminal Procedure Code"), provide a framework for the overlap between civil and criminal proceedings in the UAE.

The Penal Code makes clear that there are no time limitations for civil actions arising from or connected to fraud or bribery offences (Articles 270 and 286), and there exists provisions for victims of fraud to apply for a temporary award of damages pending the resolution of a civil claim against the defendant.

The Criminal Procedure Code allows for a civil lawsuit which arises out of the facts of a criminal case to be filed before the criminal court in certain circumstances, and later referred if necessary to the civil courts by the criminal court (Articles 23 and 27). As discussed above, civil claims are frequently brought under the general provisions of Articles 282 *et seq.* of the Civil Code.

Any civil lawsuit filed in the civil court is suspended until a final judgment is issued in the related criminal case (Article 29 of the Criminal Procedure Code). To preserve the position of the parties in the civil case, urgent interim remedies, such as "precautionary attachments" akin to freezing orders or travel bans, can be sought. A civil claim will not preclude the issuance of a criminal sentence in the matter (Article 344 of the Criminal Procedure Code).

Private prosecutions by non-state actors are not permitted under UAE law.

V Key challenges

The legal framework in the UAE is comprised of an intricate web of federal laws which are applied in the national courts, along with Emirate-specific legislation, as well as separate laws appliable within various freezones, and two common law jurisdictions (the DIFC and ADGM) which have their own courts. Some of these difficulties may be alleviated if the recent consultation by the Government of Dubai, regarding the expansion of the jurisdiction of the DIFC Courts to all the freezones within the Emirate of Dubai (which is discussed in more detail below) is enacted. Nevertheless, the differences between these separate jurisdictions have historically hindered asset tracing efforts, for example through the lack of standardisation of company registries which provide different levels of information relating to companies. Indeed, it is often difficult to obtain the trade licence of a company and to ascertain who the beneficial owner is, which is further compounded by strict privacy rules in the UAE. However, in an effort to alleviate such difficulties, the UAE introduced Federal Decree-Law No. 37 of 2021 on the Commercial Register, which introduced the concept of a centralised companies register for all businesses operating in the UAE, except the DIFC and ADGM. This seeks to unite the records of the separate commercial registers of each Department of Economic Development ("DED") within each of the seven Emirates, and standardise the level of information required to be recorded in each DED's commercial register. The combined records are maintained by the Ministry of Economy as a separate Economic Register. Similarly, a central UBO Register was also established in 2021. Whilst documents and information from these Registers are not publicly available, they are readily available to the authorities and should, in theory, be made available to investigative experts mandated by the courts in civil cases.

The remedies available to claimants between the onshore UAE courts and the DIFC and ADGM courts differ, and claimants should be aware that they may encounter challenges in the onshore UAE courts which are less familiar with the full gamut of interim measures and relief available under common law (and which are available in the DIFC and ADGM). The scope of the DIFC courts as a conduit jurisdiction to the onshore Dubai courts has also been reduced. Previously, foreign parties often sought to ratify foreign judgments in the DIFC court for onward enforcement in the onshore Dubai courts, despite there being no assets in the DIFC. Parties previously sought to follow this process in order to circumvent the Dubai onshore courts' scrutiny of the underlying merits of the foreign judgment when considering its enforceability. In 2016, the Joint Judi-

cial Tribunal was established to act as an arbiter of conflicts of jurisdiction between the DIFC courts and the onshore Dubai courts. The general view now is that where there is no *nexus* between the assets and the DIFC the creditor must go directly to the UAE onshore courts, which may prove challenging for creditors who are not familiar with them and/or do not speak Arabic (though on 1 January 2023 English was introduced as a further official language of the UAE onshore courts). The ADGM has gone even further and expressly stated that it cannot be used as a conduit jurisdiction. The recent DIFC Court of Appeal decision in *(1) Sandra Holding Ltd and another v Fawzi Musaed Al Saleh and others* [2023] DIFC CA 003 has also further narrowed the scope of the DIFC Courts to grant interim relief in support of foreign proceedings, as further discussed below.

Another key challenge may be that, with technological advancement, comes new and more sophisticated forms of fraud, which are sometimes difficult to respond to and address in sufficient time by both victims and the authorities. Some notable examples of this include the proliferation of SIM card swap fraud as well as fraud committed in respect of cryptocurrencies which can very easily and very quickly be transferred across the world to unknown third parties, making asset tracing a laborious and challenging process, and asset recovery even more so. Whilst Federal Decree Law No. 34 of 2021 on Combatting Rumours and Cybercrimes seeks to tackle such types of fraud, the speed with which new types of fraud are committed continues to pose a challenge for law enforcement.

VI Cross-jurisdictional mechanisms: issues and solutions in recent times

Criminal mechanisms

As noted above, the UAE is a user of the INTERPOL "Red Notice" system and has a developed system for co-operating on international criminal matters under various bilateral and multilateral treaty arrangements. The scope of the UAE's assistance (at a federal level, but by implication at the emirate level too) is set out in the 2020 Guide to The International Judicial Cooperation in Criminal Matters (Surrender of Persons and Things – Judicial Assistance) issued by the UAE Ministry of Justice (https://www.moj.gov.ae/Content/Userfiles/Assets/Documents/ce11fada.pdf).

Civil mechanisms

In cross-border fraud and asset tracing cases, parties may need to request the assistance of overseas courts with investigating and applying interim remedies. To do so, a party would need to obtain a court order from the civil court requiring the UAE Ministry of Justice to make a request for mutual legal assistance from the Ministry of Justice/courts of the foreign jurisdiction. However, such requests would predominantly be limited to those countries with whom the UAE has a mutual legal assistance treaty or other countries where the principle of reciprocity is applied. The UAE is a signatory to certain international conventions which contain provisions dealing with asset recovery, such as the United Nations Convention against Corruption, the United Nations Convention against Transnational Organised Crime and the Riyadh Arab Agreement for Judicial Cooperation.

Perhaps the most fruitful civil mechanisms are those offered by the DIFC and ADGM courts, the courts of the respective offshore financial free zones. There, the key tools are freezing orders and other injunctive relief as well as disclosure orders (including those akin to the US 1783 production orders). In *United States Securities and Exchange Commission v Wintercap SA & Others* [2019] DIFC-CFI-003, the DIFC courts affirmed their jurisdiction and willingness to grant freezing orders in aid of foreign proceedings, even in the absence of an underlying claim in the DIFC (in that case, a freezing order was obtained by the US financial regulator, the SEC, over assets in both the DIFC and "onshore" Dubai outside of the DIFC, in aid of an interim worldwide freezing order granted by the US District Court in Massachusetts).

In *Childescu v Gheorghiu and ors* [2019] DIFC CFI 074, the DIFC courts made a freezing order upon the application of a wealthy businesswoman and investor in support of her civil claim (seeking over USD 30 million) in the Cypriot courts against her former advisors, their associates and five companies affiliated with the other defendants. However, the ambit of the DIFC courts' jurisdiction does have limits. In *Akhmedova v Akhmedov* [2018] DIFC CA 003, for instance, the Court of Appeal held that the courts were not conferred jurisdiction by their own Judicial Authority Law, over a third party to a foreign judgment against whom enforcement was sought, which would have required a piercing of the corporate veil.

In *(1) Sandra Holding Ltd and another v Fawzi Musaed Al Saleh and others* [2023] DIFC CA 003, the DIFC Court of

Appeal set aside a freezing order against the respondents granted in support of proceedings in Kuwait, holding that injunctive relief could be granted in support of foreign proceedings only if the Courts had jurisdiction over the respondents under one or more of the statutory gateways set out in the Judicial Authority Law (Dubai Law No. 12 of 2004 as amended), thereby overturning the Courts' previous jurisdiction in *Jones and others v Jones* [2022] DIFC CFI 043. Both the courts of the offshore financial free zones and the "onshore" courts can enforce judgments and orders rendered by foreign courts under certain conditions. Whilst the overall enforcement framework is beyond the scope of this chapter, the key issue is usually one of reciprocity, with the UAE courts keen to ensure (as a matter of foreign law expert evidence or international agreement) that the rendering court would enforce a UAE judgment or order if presented before it (please see the "Recent Developments" section below).

VII Using technology to aid asset recovery

The UAE has implemented a National Artificial Intelligence Strategy 2031 with the purpose of positioning itself as a global leader in AI. As part of this push, in the last twelve months, the creator of ChatGPT, OpenAI, has partnered with a Abu Dhabi based tech company to drive AI models in areas including financial services, energy, healthcare and public services. This forms part of an approach that aims to have an integrated AI program across various vital areas of work and life in the UAE.

This is just one example of the steps being taken to ensure the UAE maintains its status as a leading global jurisdiction for AI technology. This tech-led approach will inevitably feed into the advancements being seen globally by practitioners in the asset recovery field, as document and/or data heavy tasks are being reduced in complexity and speed by the development by a variety of modern tools. One example receiving attention in the region is the platform that enables a search of banks around the globe to see if they have ever communicated with (and not blacklisted) an individual email address. This has potentially far-reaching consequences for those attempting to identify undeclared bank accounts. Another is the ability of certain providers to provide forensic analysis of blockchains to identify or trace certain transactions. While these signs are good, as technology develops so will criminal behaviour and ingenuity. However, the gap appears to be closing and the UAE is at the forefront of the technology behind it.

VIII Highlighting the influence of digital currencies: is this a game-changer?

The UAE has placed itself at the forefront of digital currency development and their influence in the region is enormous and continues to grow.

The ADGM was one of the first jurisdictions to publish a framework for digital assets (including digital currency) when the FRSA published its extensive regulations in 2018.

There followed federal legislation governing the whole UAE in 2020–22, with the SCA passing Decision No. 23 of 2020 Concerning Crypto Assets Activities Regulation and the UAE Central Bank publishing its Stored Value Facilities Regulation. In December 2022, the UAE issued Cabinet Decision No. 111 of 2022 on the Regulation of Virtual Assets and their Service, requiring anyone wishing to conduct virtual asset activities in onshore UAE to first obtain approval and a licence from the SCA or a local licensing authority. On 12 February 2023, the UAE Central Bank launched its Financial Infrastructure Transformation Programme ("FIT") which proposed the launch of the Central Bank Digital Currency ("CDBC") for both cross-border payments and domestic usage. The first phases of implementation subsequently commenced in March 2023.

At an emirate level, in 2022, Dubai passed Law No. 4 of 2022 on the Regulation of Virtual Assets, creating the VARA, and the DIFC implemented its Crypto Token regime. On 7 February 2023, VARA published its Virtual Assets and Related Activities Regulations 2023. The Regulations set out the framework governing cryptocurrencies in Dubai (excluding the DIFC), including the general and specific supervision and enforcement powers of VARA. VARA continues to develop the regulatory framework. In August, VARA published a revised Custody Services Rulebook, which enables Virtual Asset Service Providers ("VASPs") licensed to provide custody services also to provide staking services to their customers from the same legal entity without the need for a separate licence. In September, VARA published a revised Virtual Asset Issuance Rulebook, which introduced new rules for "stablecoins". These rules apply to all stablecoins except those which reference the United

Arab Emirates Dirham, which remain under the sole and exclusive regulation of the UAE Central Bank.

As to the take-up of digital currencies in the region, the Telecommunications and Digital Government Regulatory Authority Digital Lifestyle report published in 2022 found that 11.4% of UAE residents have invested in cryptocurrencies, placing the region 10th globally in terms of investments in cryptocurrencies, with Kraken, crypto.com, Bybit and Binance all operating in the region. However, this rising popularity is also fuelling a rise in fraud. For example, in June, the Dubai Criminal Court fined fraudsters AED 321,000 each for promising huge returns on investments to 180 UAE nationals that they did not deliver. In July, the US sentenced a Nigerian citizen who had been extradited from the UAE to eight years in prison following a multi-million-dollar fraud and successfully recovered 151 bitcoins.

The UAE has taken a number of steps to combat cryptocurrency fraud, and to ensure its efficient prosecution. The first step is the development of the regulatory framework, including a specialist regulator in Dubai (VARA), with an extensive remit to oversee and enforce compliance with its regulations by those to whom it grants licences. Regulators in the UAE are also being proactive in highlighting potential pitfalls to consumers. For example, the SCA has added entity names and Twitter accounts to its list of alerts for falsely claiming to be regulated by the SCA. Similarly, in the DIFC, the DFSA has sent alerts about fraudulent crypto assets falsely claiming to be regulated by the DFSA. Warnings urging caution and vigilance when investing in virtual asset trading also appear before certain films at UAE cinemas.

In addition to policing compliance with licences, the Cybercrime Law also introduced new criminal offences of dealing in cryptocurrencies that are not recognised in the UAE, and operating in the digital assets space without a licence (Articles 41 and 48 of the Cybercrime Law). Persons who contravene those provisions are subject to a penalty of detention and/or a fine between AED 20,000 and AED 500,000.

The Dubai Police has set up a dedicated Virtual Assets Crime Division tasked with investigating and prosecuting breaches of these laws.

In terms of jurisprudence, the region is also leading the way in considering some of the key issues that will govern disputes concerning cryptocurrencies in the years to come. In 2022, the DIFC courts issued a judgment in the case of *(1) Gate Mena DMCC (2) Huobi Mena FZE v (1) Tabarak Investment Capital Limited (2) Christian Thurner*, one of the first cryptocurrency litigation disputes in the region and one of the few reported cases anywhere in the world. It addresses issues such as the safe transfer of cryptocurrency between buyer and seller and the obligations owed by a custodian of cryptocurrency. This case gave rise to various other interesting questions such as the nature of Bitcoins and whether cryptocurrencies are considered commodities, currencies, properties or something entirely different, and the appropriate time to value Bitcoins. That case has been granted permission to appeal on eight grounds, with the appeal listed for hearing on 15–17 January 2024.

This case was heard in the DIFC courts' Technology and Construction Division (the first occasion the Division was utilised for a technology-related dispute). Any future such matters, however, will be heard in the DIFC courts' specialist Digital Economy Court, which was launched in 2023 with its own procedural rules designed to consolidate knowledge and resolve issues specific to disputes concerning cryptocurrencies.

IX Recent developments and other impacting factors

Given the region's significant investment in developing the digital asset regulatory ecosystem, we expect that there will continue to be a battle in this sector between fraudsters on the one hand, and regulators, legislators and fraud practitioners on the other hand, with innovations and evolution on all sides. In addition to this, we have identified the following three key factors which will impact fraud and asset recovery cases in the region in the next 12 months.

VARA to levy fines

Having granted firms time to comply with its licensing requirements, VARA has signalled its intention to begin enforcing compliance from 17 November 2023. From that date, firms that have not applied for the necessary licences, or whose business operations fall outside the scope of their licence will be the subject of fines. Unconfirmed reports are that a dozen firms will be fined as VARA looks to set out its stall as a regulator with genuine teeth.

Consultation to expand the reach of the DIFC Court's jurisdiction

As the legal landscape in the UAE continues to evolve, the Dubai Government is considering introducing a new legal framework for companies operating in Dubai's Free Zones (outside the DIFC). Two proposed systems are under evaluation:

1. Hybrid System – DIFC Courts having jurisdiction with UAE laws as default:
   Under this framework, the DIFC Courts would be responsible for overseeing civil and commercial disputes within the Free Zone where a company operates. UAE laws will be applicable by default to the dispute. However, for matters concerning litigation procedures and evidentiary rules, the DIFC laws will take precedence. This means that while disputes would be adjudicated by the DIFC Courts, the foundational laws of the UAE would influence guide the decisions in court cases.
2. Standalone System – Extended Jurisdiction of DIFC to Selected Free Zones:
   Under this system, the entire legal framework of DIFC's civil and commercial laws (excluding licensing regulations) would extend to the selected Free Zone. This would mean that companies in

these zones would function entirely under DIFC Laws and regulations (company law, bankruptcy law, employment law, etc.), with the DIFC Courts handling all respective disputes.

In the context of fraud and digital assets this will have several important ramifications. Under the hybrid system, disputes would involve common law disclosure rules (as well as evidentiary rules) which would be a significant change from the civil code system. It will also focus additional attention on the ultimate outcome of the *Sandra Holdings* case and the DIFC Court's freezing order jurisdiction, and potentially increase the volume of disputes that are handled by the DIFC Digital Economy Court, which includes its specialist rules and processes for dealing with digital asset disputes.

Corporate income tax cases

UAE Federal Decree-Law No. 47 of 2022 on Taxation of Corporations and Businesses will see businesses become subject to UAE corporate tax from the beginning of their first financial year that starts on or after 1 June 2023. The UAE has already established, in 2021, a separate court specialising in money laundering and tax evasion applicable to entities operating in Abu Dhabi. As we move into the latter half of the financial year, we expect to see more and more scrutiny of financial reporting in this area. CDR

Charles Russell Speechlys

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Sara acts in complex commercial litigation in the DIFC and the ADGM courts in the UAE and the English High Court, as well as arbitration matters before local and international centres.

Sara handles a range of commercial disputes, often involving cross-border issues, with a focus on shareholder and partnership disputes, financial services disputes, fraud, asset tracing and both civil and criminal recovery actions, contentious insolvency matters, regulatory investigations, ancillary relief matters including third-party disclosure orders, worldwide freezing orders and enforcement matters.

Sara is one of few lawyers ranked in *Who's Who: Asset Tracing and Recovery UAE* consecutively from 2018–2023. She is the current Co-Chair of the IBA Asset Recovery Committee which was launched in 2023 and a founding member of IWIRC Dubai which is launching in 2023. Sara previously worked for public prosecution agencies in both Australia (Commonwealth Director of Public Prosecutions) and the UK (SFO).

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In tandem, Max has a burgeoning practice in Public and Administrative Law disputes, with a particular focus on Judicial Review and assisting colleagues in a wide variety of sectors including competition, environmental and planning, foreign governments, immigration, pensions and tax, and public inquiries and inquests. He is an active member of both the Young Lawyers Committee of the Commonwealth Lawyers Association and the ACROSS Fraud Network. He is also a member of ALBA, the Constitutional and Administrative Law Bar Association.

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In *The Legal 500* (UAE Dispute Resolution: Arbitration and International Litigation), Peter was recommended as a "Rising Star" in 2020, 2021 and 2022, and was described as "notable" in 2019. He was included in the inaugural *Legal 500 Arbitration Powerlist Middle East* (2022).

Peter is admitted to practise in England and Wales (barrister), DIFC (Part 1 and Part 2 registered), and the Emirate of Dubai. He has appeared before the ADGM Court of First Instance and has rights of audience at the Astana International Financial Centre Court (2019).

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I Executive summary

Asset tracing and recovery cases in the United States can arise in various contexts but are most commonly seen in cases involving fraud, insolvency and enforcement of judgments. Victims of fraud in the United States can look to both law enforcement and private actions for compensation. Cross-border fraud victims, both United States citizens and non-citizens, may pursue civil actions in the United States courts if the fraudulent conduct – or the persons or entities spearheading the fraud – are sufficiently connected to the United States. Enforcement of foreign judgments is, generally speaking, relatively straightforward in the United States. States like New York, as an example, provide among the most generous enforcement regimes worldwide. Finally, the broad-ranging discovery practices available in the United States, while viewed with more than a little anxiety by most non-United States courts, lawyers and litigants, provide a powerful tool for claimants seeking to recover assets.

II Important legal framework and statutory underpinnings to fraud, asset tracing, and recovery schemes

The United States is a federal republic, in which power is divided between the governments of the 50 states and the federal government of the United States. Each of the 50 states has its own laws, regulations and court system. The Federal government has also enacted statutory and regulatory schemes which apply to all 50 states and supersede any conflicting state law or regulatory schemes.

There are 94 federal judicial districts in the United States, organised into 12 regional circuits. Legal issues not expressly addressed by statute are, in both state and federal courts, resolved by recourse to common law – precedent that has developed through historical written judicial opinions that define legal norms and establish binding precedent. Louisiana, with its roots in the French and Spanish civil codes,

as opposed to the English common law, is the one notable exception. Both federal and state courts offer a sophisticated, independent and skilled judiciary.

Both the federal and state courts offer a multitude of resources to fraud victims, offering myriad causes of action to seek recovery or compensation from fraudsters and/or their aiders and abettors. In choosing whether to proceed before a federal or state court, litigants must be aware that federal courts have exclusive jurisdiction over certain claims; for example, claims arising under the United States Bankruptcy Code, which must be adjudicated in federal court. In addition to substantive remedies, both federal and state courts offer important provisional remedies such as attachment and seizure orders, injunctive relief (such as account freezes), and other types of equitable remedies.

Both the federal and state courts allow broad oral and documentary discovery (disclosure) and effective judgment enforcement mechanisms for foreign awards. Significantly, United States courts, and certain state and federal authorities within the United States, will allow U.S.-style discovery to assist foreign courts, authorities and civil parties. Parties to foreign cases can also obtain United States discovery and provisional remedies that secure U.S.-based assets pending the outcome of the foreign proceeding.

III Legal rights and remedies

1 Civil and criminal remedies

a) Common-law claims

Several common-law claims are available to fraud victims to recover stolen or misappropriated assets. Common-law claims are derived from state law, and thus vary somewhat from one state to another; however, the key elements to the claims enumerated below are broadly similar across the United States.

Fraud

The elements of a common law fraud claim are (1) a misrepresentation or a material omission of fact, (2) which was false and known to be false by the defendant (scienter), (3) made for the purpose of inducing the other party to rely upon it (intent to defraud), (4) justifiable reliance of victim on the misrepresentation or material omission, and (5) injury. Despite some minor variations, these elements are nearly constant from jurisdiction to jurisdiction. Under both federal and state law, fraud must be pleaded with particularity, though there is usually an exception for information solely within the wrongdoer's knowledge (i.e., intent).

The limitation periods for fraud claims vary across the 50 states, but in most cases will be tolled until the victim discovers, or should have discovered, the fraud.

Aiding and abetting fraud

A fraud victim can assert an aiding and abetting claim against those that assisted the perpetrator. In order to assert a claim for aiding and abetting common-law fraud, a litigant must allege: (1) the existence of a fraud; (2) the defendant's knowledge of the fraud; and (3) the defendant's substantial assistance in advancing the fraud's commission.

Like fraud, aiding and abetting fraud must be pleaded with particularity. Damages for aiding and abetting fraud are similar to those for fraud.

Civil conspiracy

Conspiracy is a concept closely related to aiding and abetting, and is available in some jurisdictions. Claims for conspiracy and aiding and abetting are predicated on the presence of concerted wrongful action. The primary difference is that a conspiracy generally requires an agreement and an overt act causing damage, while aiding and abetting need not be based upon an agreement, but only assistance. In addition, certain jurisdictions do not recognise the tort of civil conspiracy: while the tort exists in California, in certain other states, such as New York, no such cause of action exists.

Conversion

Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property at the time of the conversion; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages.

The statute of limitations for conversion is generally three years, though the limitations periods differ from state to state.

Unjust enrichment and money had and received

These equitable claims are available when one party has unfairly benefited at another's expense. The elements for a claim of unjust enrichment are:

(1) receipt of a benefit; (2) retention of the benefit at the expense of another; and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money.

A claim for money had and received has similar elements.

Unjust enrichment and money had and received are often asserted as catch-all claims or when conduct does not fall squarely within a cause of action listed above but a wrong has clearly been committed and needs to be redressed. These claims are restorative in nature, and punitive damages are generally not available.

The statute of limitations for these claims varies; for example, in California it is three years, and in New York it is six years.

Duty-based claims

If it can be established that the defendant has a duty to the plaintiff (e.g., fiduciary duty, duty of care, etc.), other claims, such as: breach of fiduciary duty; aiding and abetting breach of fiduciary duty; negligence; and gross negligence, may arise. For most of these claims, the elements are a breach of a duty and a resulting injury. For negligence, there must also be causation – the breach must have been the proximate cause of the aggrieved party's damages.

b) Statutory claims

Racketeer Influenced and Corrupt Organizations Act

The Racketeer Influenced and Corrupt Organizations Act (RICO) provides criminal and civil remedies for victims of organised crime and other criminal schemes. RICO claims must meet stringent technical requirements that are beyond the scope of this chapter. It is worth noting, however, that although a criminal scheme may underpin a civil RICO action, a prior criminal conviction is not a necessary element of a civil RICO claim. Accordingly, a plaintiff in a civil RICO case can establish a claim by a preponderance of the evidence, rather than the higher "beyond a reasonable doubt" standard that applies in the criminal context. With the chance to recover treble damages, costs and attorneys' fees, civil RICO actions hold obvious appeal for plaintiffs; however, litigants should be cautioned that courts are skeptical of attempts to shoe-horn ordinary business disputes into RICO. RICO applies to long-term patterns of criminal activity, not to "every fraudulent commercial transaction" as the Fifth Circuit Court of Appeals set forth in *Calcasieu Marin National Bank v. Grant*, 943 F.2d 1453, 1463 (5th Cir. 1991). Many courts require a plaintiff in a civil RICO action to file a RICO case statement that will be treated as an extension of the complaint. The RICO case statement requires the pattern of racketeering activity to be described in detail.

To recover under RICO, a foreign entity will have to show that it suffered injury to its business or property in the United States.

Fraudulent conveyance

Most states have adopted and incorporated into statute the Uniform Fraudulent Transfer Act (UFTA). The purpose of the Act is to prevent debtors from putting assets outside of the reach of creditors and to allow creditors to retrieve property fraudulently transferred from third parties. Under the UFTA, when transfers that render the debtor insolvent or undercapitalised are made without fair consideration, those transfers are considered constructively fraudulent and can be unwound. Alternatively, an aggrieved creditor may demonstrate the transferor's "intent to defraud, hinder, delay either present or future creditors". As a general matter, intent is difficult to prove, and in cases of fraud, a creditor may demonstrate fraudulent intent through "badges of fraud" – circumstances commonly associated with fraudulent transfers. Among such circumstances are:

a. a close relationship between the parties;
b. a questionable transfer not in the usual course of business;
c. inadequacy of the consideration;
d. the transferor's knowledge of the creditor's claim and the inability to pay it; and
e. retention of control of the property by the transferor after the conveyance.

A transfer made with actual intent to defraud may be unwound regardless of whether fair consideration was provided. In most jurisdictions, the statute of limitations for such a claim is four years.

2 Banking and money laundering

Bank fraud and money laundering are crimes in the United States. Depending on the nature of the crime, an investigation can be commenced by federal authorities, state authorities, or both. Recent legislation – the Anti-Money Laundering Act of 2020 (AMLA) – is

designed to help ferret out money laundering activity. Some of the AMLA's key features are its expanded rewards and protections for whistle-blowers, its establishment of a federal "beneficial ownership" registry to shine light on those who directly or indirectly control shell companies, and its introduction of new Bank Secrecy Act violations and increased penalties. The whistle-blower provisions are also meant to spur internal compliance officers of financial institutions to use information they obtain in their official capacities to pursue whistle-blower rewards. The discretion to file criminal charges for money laundering, of course, remains with law enforcement authorities; however, the AMLA's measures will presumably lead to the increased exposure of money laundering schemes in the United States and the prosecution of those who facilitate such schemes.

Criminal penalties for bank fraud and money laundering are provided by statute and may be imposed by a court if the defendant is convicted of the crimes. Penalties may include fines, incarceration, probation and community service. They often do not involve any recovery for victims. Even in cases in which restitution to the victims is available, restitution may not fully compensate the victims for their losses.

As a result, victims of bank fraud or money laundering may seek recourse through civil claims. In the United States, civil claims may proceed in conjunction with, or in the absence of, criminal charges. The burden of proof is lower in civil litigation, meaning that a civil claim may succeed even if criminal charges do not result in a conviction.

3 Insolvency

Many fraudulent enterprises are exposed when they become insolvent. Under United States law, when a person or entity is insolvent (as that term is defined in the United States Bankruptcy Code), it may file a petition for bankruptcy protection. Litigants should be aware that once in bankruptcy, the insolvent person or entity – the "debtor" – is protected by an automatic stay, which halts all actions against the debtor and its property. The automatic stay is meant to further the Bankruptcy Code's goal of the fair, orderly treatment of creditors by preventing a rush to seize the property of the debtor's estate. Most fraud-related bankruptcy proceedings are liquidations under Chapter 7 (rather than reorganisations under Chapter 11) in which a trustee is assigned to marshal the estate's assets and distribute the proceeds thereof to creditors equitably and in order of priority set forth in the Bankruptcy Code. Members of similarly situated creditor groups are to be treated equally. Secured creditors are given a higher priority under the Bankruptcy Code and are paid first. Equity holders of the debtor are given a lower priority and are usually paid last. Liquidations are administered under the United States Bankruptcy Code, Chapter 11 USC §101 *et seq*. However, if the bankrupt entity is a securities brokerage, there are additional procedures, and the Securities Investor Protection Corporation (SIPC) plays a role. In instances of bankrupt brokerages – for example, Bernard L Madoff Investment Securities and Lehman Brothers – SIPC advances brokerage customers up to US$500,000 to compensate them for their loss. The provisions of the Securities Investor Protection Act (SIPA) also add a special layer of protections. For example, under SIPA, the brokerage's customers are compensated for their losses before other creditors.

A trustee may use claw-back provisions of the Bankruptcy Code and the UFTA (discussed above) to unwind a fraudulent debtor's transactions. For example, under Chapter 11 USC § 547, a trustee may claw back any transfers the debtor made within the look-back period of 90 days before the bankruptcy filing as "preferences". If transfers were made to the debtor's insiders, the look-back period is extended to one year before the bankruptcy. The trustee can also unwind transactions from the debtor to any party within two years of the bankruptcy if the debtor made those transfers with the intent to defraud his or her creditors. In Ponzi scheme cases, intent to defraud is presumed. A trustee also has the ability to recover fraudulently transferred assets from further transferees down the line; provided, however, that such transferees are not *bona fide* purchasers for value.

Claw-back provisions under the UFTA are also available and provide for a four-year look-back period.

In SIPA cases, a trustee's efforts are financed by SIPC so that the failed brokerage's customers can recoup all recovered property. In bankruptcy cases, however, the trustee's efforts often need to be financed. If there are sufficient assets available to claw back, the trustee may: (i) proceed on a contingency basis and be paid from the recoveries; (ii) obtain financing from a litigation funder; or (iii) proceed with financing provided by creditors or other stakeholders. In this way, it is possible for a creditor or group of creditors to obtain some level of control in the recovery process.

4 Arbitration

The Federal Arbitration Act (FAA) generally governs the question of whether an arbitration clause is valid and enforceable. If the agreement to arbitrate and the applicable rules are silent on the question of arbitrability, the question is properly raised before the courts. However, even in the context of fraud, valid contractual provisions, including arbitration clauses, will be enforced. Indeed, as a matter of substantive federal law, an arbitration provision is severable from a contract and will remain enforceable even if the balance of the contract is not.

Where parties provide or incorporate rules providing that the question of arbitrability will be decided by the arbitral tribunal, that tribunal will have exclusive jurisdiction to determine its own jurisdiction. The arbitral tribunal's ruling on these issues will be final and may be refused only on the grounds set forth in Article V of the New York Convention. The question of whether an arbitration clause exists, however, may be reserved for the courts.

5 California Penal Code Section 496

California Penal Code Section 496(c) provides a private right of action for "any person who has been injured" by a wrongdoer's knowing receipt of stolen property. A prevailing plaintiff can recover three times the amount of actual damages, costs of suit and reasonable attorney's fees. In *Bell v. Feibush*, 212 Cal. App. 4th 1041 (2013), the California Court of Appeals reiterated the availability of treble damages to an injured party and held that a criminal conviction under Section 496 for receipt of stolen property was not a prerequisite to recovery of treble damages. The court also held that an act constituting theft also included theft by false pretences. The statute of limitations for a Section 496 claim is three years.

IV Case triage: main states of fraud, asset tracing and recovery cases

1 Filing the complaint

The first stage of any asset recovery case, not just in the United States but in virtually any jurisdiction, is investigation and the marshalling of evidence, usually with the assistance of forensic accountants, private investigators and other service providers. Strategic use of the Hague Evidence Convention by foreign (i.e., non-United States) litigants can be made to obtain broad pre-complaint discovery in certain cases. Complaints in the United States are, generally speaking, more straightforward and require less detail or evidentiary grounding than in most civil and many common-law jurisdictions. Most United States jurisdictions require only that a complaint be sufficiently detailed to provide notice to defendants of the claims against them. Fraud cases require a heightened degree of particularity of pleading, but there is no requirement that each and every fact alleged in a complaint be grounded in documentary proof. Allegations may be based on information and belief so long as they are reasonably grounded in fact and are made in good faith.

2 Dispositive motions

The most commonly used dispositive motions – i.e., motions that would eliminate a claim or claims from a case – in United States state and federal courts are motions to dismiss and motions for summary judgment.

There are several bases for motions to dismiss under the Federal Rules of Civil Procedure (FRCP), and many states have adopted substantially similar or identical procedural rules. Rule 12 of the FRCP enumerates these bases, including lack of subject-matter jurisdiction, lack of personal jurisdiction, improper venue, insufficient process, insufficient service of process, failure to state a claim, and failure to join a necessary party. These are gating issues, and

an infirmity in any of these areas should prevent a case or a claim from moving forward and must, with some exceptions, be raised at the beginning of a case.

Motions for summary judgment are typically made after the close of discovery. In a summary judgment motion, the movant seeks judgment on the merits of the case before trial. Summary judgment is properly sought when there is no genuine dispute as to any material fact, and only questions of law remain to be decided. If the court finds that, based on the evidence presented by the movant, any disputed material fact continues to exist, it will deny the motion for summary judgment, and the case will proceed to trial, where those remaining questions of fact can be adjudicated.

3 Discovery

The next stage of litigation is discovery (disclosure). The United States takes a uniquely broad approach to discovery, which is unique as compared to other jurisdictions. Subject to certain limitations (such as recognised privileges and proportionality), under both federal and state law, a party to a United States action may seek discovery from parties to the litigation and from third parties as long as the information sought is relevant to the claims in the litigation. The evidentiary admissibility of information sought in discovery is not a requirement.

Where a litigant seeks discovery from another party, that litigant may serve document requests, interrogatories or notice a deposition (or all of the above). None of these procedures requires leave of the court, and the information received through this disclosure does not become part of the official court record unless it is later offered into evidence. The recipient of the discovery requests may object to certain disclosures on the grounds that the material sought is irrelevant, overly burdensome to obtain or protected by a privilege.

Seeking discovery, both documentary and testimonial, from third parties within the United States is also possible through the court's subpoena powers. A party's attorney may issue a subpoena without leave of the court. Like a party to the action, a third party may object to the subpoena, although courts tend to lower the bar on issues of burden and proportionality with respect to third parties.

4 The trial

Cases may be tried to a judge or jury. In a case where money damages are sought, litigants have the right to a jury trial. In a case where equitable relief (e.g., an injunction) is sought, there is no right to a jury trial, and in almost all such cases a judge is the trier of fact. A trial typically starts with opening arguments in which each party lays out its case. Witnesses, through which evidence is introduced, are called by each side to testify. Each party has the right to cross-examine any witness called by another party. After all of the witnesses have been called, each party may give a closing argument based on the evidence received by the court during the trial. A decision is thereafter rendered either by the judge or the jury. While judge and jury decisions are both appealable, jury verdicts are more difficult to overturn.

As a practical matter, the vast majority of cases do not proceed to trial. Trial can be long, costly and unpredictable. Therefore, even where both parties' motions for summary judgment are denied, the parties often determine that certainty of settlement is preferable to the vagaries of trial.

5 Pre-judgment restraint of assets

Many United States jurisdictions provide a mechanism to secure assets pending the outcome of a dispute, though the procedure to do so varies somewhat from state to state. These "pre-judgment attachments" are court orders that place a lien on the defendant's property within the state, and temporarily restrain the defendant from dissipating assets. This increases the likelihood of enforcing the plaintiff's eventual judgment.

Though United States law does not provide for a worldwide asset freeze like a *Mareva* injunction, a federal court may use Federal Rule of Civil Procedure 64 to issue injunctive relief, including the freezing of assets, by incorporating the procedures of the state in which the property is located, provided that the state allows for pre-judgment attachment.

Pre-judgment attachment applications may be brought *ex parte* or on notice. If brought *ex parte*, the plaintiff must move to confirm within a certain amount of time after the levy. After the court renders its decision on an application for an order of attachment, the plaintiff delivers it to the sheriff, who carries out the levy. The physical seizure of assets is uncommon; the defendant, after being served with the order and all the required papers, typically holds the property on the sheriff's behalf.

Most jurisdictions require the plaintiff to post a bond in support of a pre-judgment attachment. The bond acts as security against costs and damages that may be sustained if the defendant wins on the merits,

as well as attorney's fees. The statute sets forth a minimum, but courts typically require a bond equal to or greater than the amount to be attached.

6 Post-judgment restraint of assets

After the plaintiff obtains a judgment (whether locally or in a foreign court), enforcement against the debtor's assets is fairly straightforward. Classically, this is done through a writ of execution, directing a sheriff or marshal to levy on any non-exempt personal or real property in which the judgment debtor has an interest in that jurisdiction, and then sell the property for the benefit of the judgment creditor. Delivery of the writ of execution to the sheriff automatically creates a lien on the judgment debtor's personal property. For real property, the local county clerk must docket the judgment. For property in the possession of third parties, like bank accounts, the sheriff delivers the execution to the garnishee.

For an added layer of protection, as soon as judgment is entered, the plaintiff can serve a restraining notice on anyone the plaintiff believes may have relevant information about the judgment debtor's assets, income or financial affairs. Upon service, the restraining notice prevents the recipient from transferring, selling, assigning or interfering with the restrained property.

Another method of post-judgment enforcement is a turnover order. Obtained by motion in the underlying case, a turnover order compels the judgment debtor to turn over property to the judgment creditor. A plaintiff can also obtain a turnover judgment against a third-party, compelling that party to turn over the debtor's property in its possession. However, a turnover judgment must be obtained through a separate summary proceeding. Turnover orders are used in cases where the property is not readily accessible, or if it is located outside of the state. Otherwise, it is easier to rely on the writ of execution.

A party may also obtain evidence in the United States in aid of a foreign proceeding, as discussed below.

V Parallel proceedings: a combined criminal and civil approach

Parallel civil and criminal proceedings are not common in the United States. While there are no categorical restrictions precluding civil cases from advancing in parallel with or prior to criminal proceedings concerning the same subject matter, civil cases may be judicially stayed or postponed in favour of criminal proceedings. As a result, managing parallel civil and criminal proceedings may present certain challenges. For example, a witness's assertion of Fifth Amendment privileges against self-incrimination can delay civil proceedings, especially before the resolution of criminal proceedings. In scenarios where simultaneous adjudication is impossible, civil proceedings would likely be delayed while criminal proceedings are resolved.

Nevertheless, civil litigants should neither delay commencing civil proceedings in anticipation of a possible stay nor rely on the outcome of the criminal case. Not only could such a delay result in the statute of limitations expiring, but also, if the debtor is ordered to pay restitution in the criminal proceedings, there is no guarantee that victims will be fully compensated or receive as much as they would through their own civil litigation. Note that, given the differences in burden of proof, it is possible that a civil claim can succeed where a criminal prosecution has failed.

VI Key challenges

The United States differs from other jurisdictions in various respects. And while many of those differences present litigants with significant benefits, there are some challenges as well.

For example, proceedings are open in most instances (some exceptions are matrimonial and guardianship cases). United States courts generally disfavour filings under seal, and a party seeking to prevent a filing from being open to the public must typically first obtain the court's permission to file under seal with a showing of good cause. Even when a court grants a party permission to file under seal, the case docket is open, allowing the public to see certain details, like the type of filing, the name of the document, and the date on which it was filed.

In the United Sates, attorney fees are not recoverable in most cases. This can have a significant impact on the value proposition of bringing a claim. It can also force a defendant into an early settlement, even when the defendant does not view the case as meritorious.

All parties are subject to discovery, and United States discovery rules allow for discovery that is broader and more far-reaching than the limited disclosure provisions found in most other jurisdictions. While that may be a positive for plaintiffs in that discovery can provide broad insight into

the defendant's affairs, it may present a significant challenge for defendants taking a narrow view of relevancy. Efforts to narrow the scope of discovery can become an expensive battleground for litigants. Defendants also have difficulty getting cases dismissed on jurisdictional grounds, which, in the United States is subject to an expansive standard. However, the strategy of choosing not to participate is, generally speaking, not advisable, as default judgments are easily enforced in the United States.

First instance judgments rendered in the United States or abroad are enforceable, regardless of whether an appeal is pending. This requires the judgment debtor to secure a supersedeas bond to avoid enforcement efforts, which is a costly endeavor, especially when the judgment is sizeable.

VII Cross-jurisdictional mechanisms: issues and solutions in recent times

1 Collection of evidence in support of proceedings abroad

A party may petition the United States federal district courts for discovery in aid of litigation before "foreign and international tribunals" under Section 1782 of title 28 of the United States Code.

Section 1782 requests can be initiated in one of two ways:

a. a letter rogatory issued from a non-United States tribunal may be delivered directly to the district court (usually included as part of an application prepared by a party or other interested person); or
b. a party or other interested person may make an application, without a letter rogatory, directly to the district court. To obtain discovery under 28 USC §1782, an application must satisfy three threshold requirements:
   - the target of the requested discovery is a person "found" in the federal judicial district;
   - eligible proceedings exist (or are within reasonable contemplation) before a foreign tribunal and the applicant's discovery request is for use in aid of those proceedings; and
   - the applicant is interested in those proceedings.

Provided these three conditions are met, a district court is authorised – but not required – to order discovery.

For a deposition request, a person's mere physical presence in the district can be sufficient to compel his or her deposition. For document discovery, there is a split of federal authority as to whether courts are empowered to require disclosure of documents located outside the United States, even when the person from whom discovery is sought is located in the relevant federal judicial district. A business will likely be "found" in a district for purposes of Section 1782 if the business would be subject to personal jurisdiction in that district by virtue of its systematic and continuous activities there, even if its headquarters or place of incorporation are located elsewhere.

Another option for discovery for both domestic and foreign actions is Rule 69(2) of the FRCP. Rule 69(2) of the FRCP allows parties in possession of a valid money judgment (foreign or domestic) to take discovery under the FRCP from "any person" in aid of the judgment or execution. This is an extremely powerful and straightforward tool that allows for broad discovery against any party that might have evidence relevant to the tracing and discovery of assets in the context where there is no pending foreign proceeding because the action has been concluded and a favourable judgment obtained.

2 Enforcement of judgments granted abroad in relation to fraud claims

Foreign money judgments are broadly enforceable in the United States. It is best to bring the action in a jurisdiction where the judgment creditor believes assets are located, because once recognised by the United States court, a foreign money judgment may be enforced with the same full faith and credit as a domestic judgment issued in that jurisdiction. Thus, enforcement of the judgment and recovery of the assets can follow if the United States court has jurisdiction over those assets or over the judgment debtor.

Most states have adopted the 1962 Uniform Foreign Money Judgments Recognition Act (the 1962 Act), which was updated in 2005 as the Uniform Foreign-Country Money Judgments Recognition Act (the 2005 Act).

For a foreign country judgment to be recognised, it must – generally speaking – be "final, conclusive, and enforceable". Under N.Y.C.P.L.R. § 5303, a foreign judgment "is conclusive between the parties to the extent that it grants or denies a sum of money". The enforceability of a judgment is also dependent on the proper exercise of personal jurisdiction by the foreign court over the defendant.

IX Recent developments and other impacting factors

On June 22, 2023, in *Ashot Egiazaryan v. Vitaly Ivanovich Smagin, et al.*, the United States Supreme Court held that a non-resident plaintiff suffered a domestic injury for the purposes of bringing a civil claim under the Racketeer Influenced and Corrupt Organization Act ("**RICO**"), even though the actions causing the injury largely took place outside the United States and the victim was a Russian national. The case involved the defendant's attempt to foil enforcement of a foreign arbitral award in California by moving assets to a series of offshore entities. This decision resolves a split between the Third and Ninth Circuits on the one hand, and the Seventh Circuit on the other, the latter of which applied a strict domestic residency requirement for RICO injuries to intangible property. In so holding, the United States Supreme Court found that the question of "domesticity" required a fact-intensive inquiry, focused not just on the question of residency or locus of action, but in the totality of the circumstances involved.

In 2014, Vitaly Smagin ("Smagin") obtained an US$84 million-dollar arbitral award against Ashot Yegiazaryan (*Yegiazaryan v. Smagin*, 143 U.S. 1900 (2023) ("*Yegiazaryan*"). To collect, Smagin filed an enforcement action in the Central District Court of California under the N.Y. Convention on the Recognition and Enforcement of Arbitral Awards. The California court issued a temporary protective order, followed by a preliminary injunction to freeze Yeghiazaryan's assets in California (*see generally*, 9 U.S.C. §§ 201-208). In May 2015, Yegiazaryan obtained a US$198 million dollar settlement in May 2015. To avoid the District Court's asset freeze and obstruct the collection of the award, Yegiazaryan, among other things, concealed money in several offshore shell companies (*Yegiazaryan*, 143 U.S. at 1907). Smagin then sued in the Central District of California, alleging that Yeghiazaryan had engaged in a pattern of criminal activity to prevent collection of Smagin's judgment, in violation of §1964(c) of the RICO Act. The District Court dismissed Smagin's complaint for failure to allege a "domestic injury", reasoning that the alleged scheme was aimed at evading a foreign arbitral award owed to a foreign creditor (*Smagin v. Compagnie Monegasque De Banque*, 2:20-cv-11236-RGK-PLA, 2021 U.S. Dist. Lexis 101176, *1 (C.D. Cal. May 5, 2021) (*citing RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325 (2016))).

The Ninth Circuit reversed, finding that the case did indeed involve a domestic injury, because Smagin's efforts to collect on a California judgment against a California resident were foiled by a pattern of racketeering which largely "occurred in, or was targeted at, California" and was designed to subvert collection of a California judgment (*Smagin v. Yegiazaryan*, 37 F.4th 562, 2022 U.S. App. Lexis 16014, *11-13 (Jun. 10, 2022)).

In addressing the question of the injury's "domesticity", the United States Supreme Court directed "courts to look to the circumstances surrounding the injury to see if those circumstances sufficiently ground the injury in the United States" (*Yegiazaryan*, 143 U.S. at 1910). The Court found that Yegiazaryan's injurious conduct was sufficiently grounded in the United States to be a "domestic injury", because his actions were devised and executed towards L.A. County, California to frustrate the enforcement of Smagin's California judgment.

This decision could have a significant impact on a number of cases in matters involving a "domestic injury" requirement – not just limited to the RICO context. CDR

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Tatiana Markel focuses her practice on bankruptcy-related litigation, with an emphasis on cross-border investigations to trace and recover misappropriated assets.

Tatiana has played a key role in representing the SIPA Trustee in the liquidation of Bernard L. Madoff Investment Securities LLC. She has worked to unravel the global maze of interconnected parties, including financial institutions, by litigating complex issues, implementing unique legal theories and using international discovery methods to recover assets. Her team's efforts have led to the recovery of more than US$14.5 billion in assets from Madoff's decades-old Ponzi scheme – the largest financial crime in United States history.

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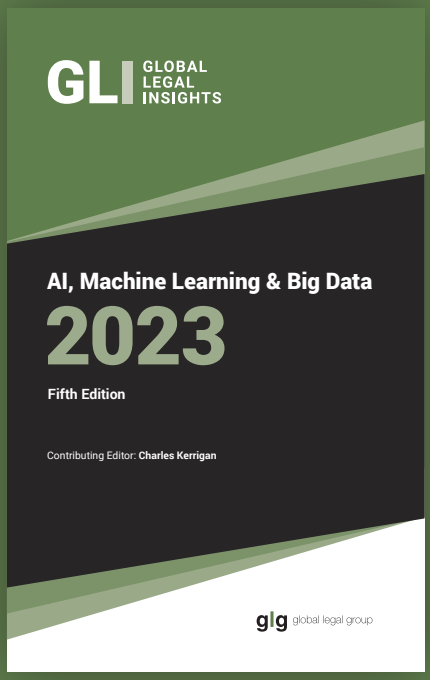

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