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International Fraud & Asset Tracing 2022

Contributing Editor
Simon Bushell
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2022

Chambers Global Practice Guides

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INTRODUCTION

Contributed by: *Simon Bushell, Gareth Keillor and Kevin Kilgour,* ***Seladore Legal***

Global Overview

It is with great pleasure that we introduce this latest edition of the Chambers *International Fraud & Asset Tracing* guide. This publication provides the latest legal know-how in relation to civil law fraud, causes of action, evidence gathering, worldwide freezing injunctions, third-party disclosure, damages principles and enforcement.

Fraud litigation can be a very wide label covering a variety of disputes, but all fraud cases involve a few key areas. Firstly, there is the importance of identifying and securing assets – fraudsters tend to be sophisticated in hiding and moving assets, often through different forms, and without regard for borders (indeed, often deliberately through multiple jurisdictions in order to try to mask their trail). Unless action is taken at an early stage to lock down those assets, there may well not be anything to fight about through litigation. It is no good having a judgment, but no assets to enforce against.

Secondly, there is the issue of identifying the right defendants. In cases where the identity of the wrongdoer is not known, this could mean identifying them through, for example, Norwich Pharmacal orders which require an innocent third party involved in a fraud (such as a bank) to provide documents or information. Although, there is also well-established jurisprudence of bringing claims against unknown persons, that is only useful if you have already secured the assets – otherwise, you are faced with a judgment against an unknown person and therefore no hope of enforcing your judgment. Identifying the right defendants can also mean working out which other parties might be possible defendants: are there individuals or corporates who assisted in the fraud – for example, banks making payments, or accountants involved in a transaction? Might there be arguments that the person who now has the assets holds them on trust for the victim of fraud?

Finally, there is gathering the evidence. That can involve the use of investigators or forensic accountants, but might also mean recourse to the courts – for example, through third-party disclosure orders, potentially in different jurisdictions to the one where the fraud occurred.

It is the job of the fraud litigator to pull all this together, and often to do so across a number of different jurisdictions and in a very compressed timeframe. For this reason, a guide such as this one will be of great value to practitioners in this space.

The Landscape for Fraud and Asset Tracing

The world is currently in a state of great uncertainty and turmoil as a result of, amongst other things, the effects of the pandemic and the Russian invasion of Ukraine. The global economy is still fragile, and this is all likely to lead to many fraud disputes and related asset-tracing work.

Furthermore, the unprecedented reaction of a number of Western countries to the Ukraine invasion through wide economic sanctions has the potential to significantly change the landscape for fraud litigators. Whilst the sanctions regime itself is primarily a criminal regime, it has brought into the public gaze the use of complex offshore structures, such as trusts and offshore companies, by individuals to hold assets. This has led to a media and political debate about these structures, as well as action against them.

For example, on 8 April 2022, the European Union introduced measures which prohibit EU trust and company service providers from pro-

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viding administration services to trusts and similar structures connected with (whether as settlors or beneficiaries) Russian nationals (although not if they are a national of or have residence in an EU member state). From 10 May 2022, the sanctions expand further and there is a prohibition on providing trustee or other fiduciary services to trusts and similar structures connected with Russian nationals.

This is an extremely wide-ranging move, which is not limited to sanctioned individuals, but applies to any trust structures connected with Russian nationals (albeit not including those living in the EU or with EU nationality). On the face of it, therefore, a trust would be caught even if it had no Russian beneficiaries, but had a Russian national settlor, who, many years ago, settled the trust (and in doing so divested himself of ownership interest). It seems inevitable that action such as this is likely to result in assets moving out of the EU to jurisdictions which are less likely to take such action. This transfer of assets may well result in litigation, because a large-scale movement of assets can often lead to things going wrong, but, for fraud lawyers, it also means that there might be a number of new jurisdictions in which they need to take an interest.

Furthermore, it is possible that there will be a more profound impact of sanctions. The way in which the sanctions have been implemented may mean that there is a concern about relying too heavily upon the mainstream Western banking and financial system, on the basis that to do so creates vulnerability. That may lead to the development of alternative systems: there is already anecdotal evidence that there has been a large flow of money from Russia to Dubai through cryptocurrency networks. Crypto obviously existed long before the sanctions were put in place, but the sanctions regimes may be a catalyst which increases the use of cryptocurrency networks as a means of fund transfer. It is therefore essential that fraud lawyers keep on top of these developing trends, and that courts adapt to them.

Convoy Collateral

In this regard, the decision of the UK Privy Council in Convoy Collateral v Broad Idea International is potentially very significant for fraud lawyers. It amounts to a restatement of the law in relation to freezing orders, one of the most powerful weapons in the toolkit of a common law fraud lawyer.

Strictly speaking, the case dealt with the question of whether it was possible for the BVI courts to grant standalone freezing orders against a party in aid of proceedings taking place outside the BVI. The BVI court had held in 2010 that it was possible (the so-called "Black Swan decision"), but the Court of Appeal in Convoy Collateral had overturned that decision. The Privy Council held that the Court of Appeal was wrong to do so. However, that was, to some extent, overtaken by events because the BVI House of Assembly had introduced a statutory basis for such freezing orders.

The more interesting point was about freezing orders and injunctions more generally. Lord Leggatt, who gave the leading decision, restated the law in relation to freezing orders and overturned the long-criticised decision in The Siskinawhich had held that the English courts had no power at common law to grant a freezing order unless it was ancillary to an accrued cause of action. Lord Leggatt stated that: “[t]he law took a wrong turning in The Siskina, and the sooner it returns to the proper path the better”.

Lord Leggatt went on to make clear that freezing orders, and other similar injunctions are an equitable remedy which have a degree of flexibility to keep up with changes in society, including the

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way in which business is done, and funds are moved. He stated that, in his view, "[I]t would be unjustifiable insularity for an English or other domestic court to put obstacles in the way of a claimant who wishes, with the court's aid, to enforce a foreign judgment against a defendant's assets".

Whilst this was a Privy Council decision, and therefore not strictly binding on the English courts, given the eminence of the Tribunal (involving six of the most senior English judges rather than the usual panel of five justices), it is inevitable that it will be given significant weight in the English courts. It will also be highly significant in common law jurisdictions across the world. It is therefore to be expected that the coming years will see further developments and flexibility in the development of freezing orders, and other weapons against fraudsters, in order to combat the acts of fraudsters.

An example of the flexible approach, and the speed with which courts can react, is shown in the case of Danisz v Person Unknown. An individual, Ms Danisz, invested circa GBP27,000 in Bitcoin through a website called Matic Markets Limited. In December 2021, she asked to withdraw her investments, but the request was refused. She became suspicious and commissioned an expert report which led her to conclude that Matic was a fraudulent operation. She then applied ex parte for a freezing order, which was granted on 5 January 2022 (only a month after she had first requested the money). The judge granted a worldwide freezing order, as well as a disclosure order, to help to identify the fraudsters, and reporting restrictions to prevent the fraudsters becoming aware of the injunction. In doing so, the judge noted that "this is a form of transaction whereby, at the click of a mouse, an asset can be dissipated". The speed with which the court granted the relief, and the recognition of the way in which modern-day fraudsters can whip assets away at a moment's notice, demonstrates how the courts are adapting and developing new tools for fraud practitioners.

We hope that this guide will prove useful to all clients and practitioners.

INTRODUCTION

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Seladore Legal is a disputes-only law firm specialising in major and complex litigation and arbitration, with a particular emphasis on multi-party, multi-jurisdictional disputes. By specialising solely in litigation, the firm minimises the prospect of commercial and legal conflicts of interest. Seladore Legal Limited is made up of experienced litigators who have previously worked at other top-tier UK, US and international law firms and who regularly act in significant commercial disputes across a range of different sectors.

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Simon Bushell is the senior partner at Seladore Legal, specialising in international commercial litigation and arbitration, including civil fraud and asset tracing. Simon has over 32 years' experience in high-stakes commercial litigation. He acts for a broad range of clients, including large corporates, private equity houses, financial institutions, banks and ultra-high net worth individuals, in addition to foreign government agencies and state-owned companies. He has undertaken investigations into complex, worldwide frauds, conspiracies and insolvencies, and has wide experience in co-ordinating parallel cross-border disputes and proceedings.

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AUSTRALIA

Law and Practice

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

In Australia, fraud is criminalised at a federal and state level, by:

- Parts 7.3–7.7 of the Criminal Code Act 1995 (Cth) (the "Criminal Code"); and
- the provisions of the criminal legislation in each state (Criminal Code 2002 (ACT) Part 3.3; Crimes Act 1900 (NSW) Part 4AA; Criminal Code Act 1913 (WA) Section 409; Criminal Code Act 1899 (Qld) Section 408C; Criminal Code Act 1924 (Tas) Section 253A; Criminal Code Act 1983 (NT) Section 227; Criminal Law Consolidation Act 1935 (SA) Section 139; Crimes Act 1958 (Vic) Sections 81–82).

There are many words used to define or capture the act of "fraud" in Australian law, including "dishonesty", "deception" or "moral turpitude".

Fraud prosecutions are both various and flexible in assisting victims. The main offences that arise in relation to fraud are:

- obtaining property by deception (Section 134.1(1) of the Criminal Code);
- obtaining a financial advantage by deception (Section 134.2 (1) of the Criminal Code);
- general dishonesty – obtaining a gain (Section 135.1(1) of the Criminal Code);
- general dishonesty – causing a loss (Section 135.1(3) of the Criminal Code); and
- general dishonesty – causing a loss to another (Section 135.1(5) of the Criminal Code).

Notably, in Nadinic v Drinkwater (2017) 94 NSWLR 518, Leeming JA summarised key concepts relevant to a claim of fraud in common law and in equity, as follows (at (22)): "For present purposes, it will suffice to distinguish the two senses in which 'fraud' is used in civil litigation which correspond to different meanings at law and in equity. The difference turns on the state of mind of the person said to have committed fraud. At common law, 'fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false'" – Derry v Peek (1889) 14 App Cas 337 at 374.

The contrast with equity was explained by Viscount Haldane LC in Nocton v Lord Ashburton [1914] AC 932 at 953–954: "[i]n Chancery the term 'fraud' thus came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction." His Lordship emphasised that a person who misconceived the extent of the obligation which a court of equity imposed upon him or her, "however innocently because of his ignorance", was taken to have violated an obligation which he was taken by the Court to have known, and with the result that the conduct was labelled fraudulent. He said of fraud in this sense at 954 that "what it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a court of conscience."

On a smaller scale, the Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010 (Cth)) (ACL), provides protections to consumers including, amongst other things, in respect of misleading and deceptive conduct. Since 1 July 2021, a consumer is defined as any person:

- who acquires goods or services for an amount not exceeding AUD100,000; or
- who, where the amount of goods or services exceeds AUD100,000, acquires the goods or services for personal, domestic or household use.

Section 18 of the ACL contains a general prohibition against a person/company, in trade or commerce, engaging in conduct that is misleading or deceptive, or likely to mislead or deceive. Additionally, Section 29(1)(d) of the ACL contains a specific prohibition against a person/company, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply of goods or services, making a false or misleading representation that a particular person has agreed to acquire goods or services. Although Section 29 uses "false or misleading" rather than "misleading or deceptive", the Australian courts have held that there is no material difference between the two phrases (ACCC v Dukemaster Pty Ltd [2009] FCA 682; ACCC v Coles Supermarkets Australia Pty Ltd (2014) 317 ALR 73) and claimants often plead breaches of both provisions.

Common law misrepresentation overlaps with the statutory provisions and is relevant in circumstances where the statutory provisions do not apply, including where the claims exceed the monetary limits stipulated. Common law misrepresentation involves: (i) the giving of false information by a party (or their agent) to an innocent party before a contract is made; and (ii) the statement inducing the innocent party to enter into a contract. A misrepresentation may be innocent, negligent or fraudulent with the crucial difference being whether the person making the statement believed the statement to be true at the time of making the statement.

1.2 Causes of Action after Receipt of a Bribe

The decision of the Supreme Court of the United Kingdom in FHR European Ventures LLP & Others v Cedar Capital Partners LLC [2014] UKSC 45 (FHR) resolved the debate in the UK surrounding the rightful owner of a bribe that has been paid to an agent. The Supreme Court unanimously held that where an agent accepts a bribe or secret commission, it is held on trust for the agent's principal who is entitled to a proprietary interest in the benefit. Whilst English law is not binding in Australian Courts, the decisions are nonetheless persuasive and we would expect the findings in the FHR case to apply equally in Australia.

The causes of action available to claimants whose agent has received a bribe include:

- "Mareva" or freezing orders, and proprietary injunctions to freeze the bribe/commission and their traceable proceeds;
- false accounting offences that exist at both the Commonwealth level and state/territory level;
- criminal actions for domestic bribery under Divisions 141 and 142 of the Criminal Code when Commonwealth public officials are involved, or under state and territory legislation which makes it a crime to bribe public officials and private individuals;
- criminal actions for bribery of foreign public officials under Section 70.2 of the Criminal Code; and
- claims for breach of fiduciary duty where an agent is the fiduciary of the principal.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

It is well established in Australia that a third party can breach a trust either by "knowing receipt" or "knowing assistance" (Barnes v Addy (1874) 9 Ch App 244 ("Barnes")). When either is established, this will create a constructive trust in favour of the claimant (Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89 ("Farah"); Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41).

Liability for knowing receipt is a category of constructive trusteeship which depends on the

defendant having received and become chargeable with trust property, and having knowledge of the breach before parting with the property (Barnes, 251–252).

Liability for knowing assistance is more complicated and, following the Australian High Court's decision in Farah, can be imposed if one of the following categories of knowledge can be established:

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

Further, the Farah decision has created uncertainty surrounding the requirement that the breach be one that amounts to a "dishonest and fraudulent design" in the context of "knowing assistance". Whereas the Western Australian Court of Appeal in Westpac Banking Corporation v Bell Group Ltd (No 3) [2012] WASCA 157 ("Bell") adopted a more relaxed test, the court in Hasler v Singtel Optus Pty Ltd ("Hasler"); Curtis v Singtel Optus Pty Ltd; Singtel Optus Pty Ltd v Almad Pty Ltd (2014) 87 NSWLR 609 clarified that the Bell decision did not intend to broaden the class of breaches of fiduciary duty in the context of "knowing assistance". Notwithstanding this, in Hasler, the court found that the relevant conduct was caught within the meaning of "dishonest and fraudulent design" on any view.

More recently, the Victorian Court of Appeal case, Harstedt Pty Ltd v Tomanek [2018] VSCA 84, has provided guidance as to the liability of parties who assist or facilitate another's fraudulent acts. In a case where a party has, by reason of a breach of fiduciary duty or fraudulent activity, received or otherwise profited from misappropriated funds, that party may become liable in the following ways:

- "knowing assistance" in the breach – where a person knowingly assists with a dishonest and fraudulent scheme;
- "knowing inducement" or immediate procurement of the breach – a third party may be liable as an accessory if they induce or otherwise procure fraudulent conduct or a breach of fiduciary duty;
- corporate alter ego – a company will be fully liable for the profits derived as a result of fraudulent conduct or the breach of fiduciary duty if the company is the wrongdoer's "corporate creature or vehicle"; and
- trustee de son tort – a party may be held liable as a "trustee de son tort" or "of his own wrong" where they are not a trustee but presume to act as a trustee and then commit a breach of trust or fraudulently profit from their position.

1.4 Limitation Periods

At the federal level, fraud offences have the following limitation periods:

- no time limitation for offences where the maximum imprisonment for a first offence exceeds six months;
- one year after the offence was committed for offences where the maximum imprisonment is six months or less;
- one year for offences where punishment is a pecuniary penalty and no imprisonment (Crimes Act 1914 (Cth) Section 15B).

At the state level, fraud extends the limitation period in relation to the causes of action available in the Australian jurisdiction to fraud victims, which depends on the cause of action itself (eg, tort, contract, etc) (Limitation of Actions Act 1958 (Vic) Section 27; Limitation of Actions Act

1974 (Qld) Section 38; Limitation Act 1985 (ACT) Section 33; Limitation Act 2005 (WA) Section 38; Limitation of Actions Act 1936 (SA) Section 25; Limitation Act 1974 (Tas) Section 32, Limitation Act 1981 (NT) Section 42; Limitation Act 1969 (NSW) Section 55).

For example, Section 55 of the Limitation Act 1969 (NSW) provides that the relevant limitation period for actions based on fraud or deceit, or actions where the identity of a person against whom a cause of action lies is fraudulently concealed, only starts running from when a "person having (either solely or with others) the cause of action first discovers, or may with reasonable diligence discover, the fraud, deceit or concealment".

1.5 Proprietary Claims against Property

Where the misappropriated property can be sufficiently identified (whether it be within mixed funds, property that is substituted for the original, or any proceeds from the sale of the property) and the claimant can establish a proprietary entitlement to that property via tracing rules, the court will exercise its equitable jurisdiction to recognise the proprietary claim and will grant an appropriate remedy in the circumstances. The exception to this is where the claimant seeks a remedy against a bona fide purchaser for value of the property without notice of the claimant's equitable interest.

There are complex apportionment and priority rules which exist for the proceeds of fraud that have been mixed with other funds. If the recipient purchases something valuable with misappropriated funds from a mixed account, the claimant may be entitled to claim to a charge on the asset purchased, provided the asset is identifiable (Re Oatway [1903] 2 Ch 356 applied recently in Re Renewable Energy Traders Pty Ltd (in liq) (ACN 140 736 849) [2019] 140 ACSR 466; [2019] FCA 1795). If the claimant's property is traced to a third party, whether the claimant has any proprietary claim depends on whether the third party was a bona fide purchaser of the property or a mere volunteer (Commonwealth Bank of Australia v Saleh & Ors [2007] NSWSC 903). The claimant may not claim against a bona fide purchaser for value, who had no notice of the existence of a prior interest.

On the other hand, where third parties receive property as volunteers, they may be liable as constructive trustees. In this case, the claimant and third party would share the property in proportion to their contributions (In re Diplock; Diplock v Wintle [1948] Ch 465 cited in Commonwealth Bank of Australia v Saleh & Ors [2007] NSWSC 903). In circumstances where the third party uses the claimant's money on improving its own assets, the claimant will not be entitled to any proportionate share in the increased value of the asset (In re Diplock; Diplock v Wintle [1948] Ch 465 cited in Commonwealth Bank of Australia v Saleh & Ors [2007] NSWSC 903).

1.6 Rules of Pre-action Conduct

There are no specific rules of pre-action conduct that apply prior to the commencement of fraud claims. However, jurisdictions do impose formalities that are to be completed prior to or at the time civil proceedings are commenced more generally.

Specifically, the Civil Dispute Resolution Act 2011 (Cth) (CDRA) requires applicants to file a "genuine steps statement", which sets out the steps taken by the parties to resolve the dispute or otherwise explain why no such steps have been taken (in the case of fraud claims, the urgency of the matter or anonymity of the fraudster may prevent the parties from taking "genuine steps" before commencing proceedings). The CDRA does not specify what will constitute genuine steps, as this will depend on

the parties' circumstances and the nature of the dispute.

A party that does not file a genuine steps statement, or that has not taken genuine steps to resolve a dispute, will not be prevented from commencing a claim in the Federal Court of Australia. However, the court may take this into account when exercising its powers, including its discretion to award costs.

Generally speaking, the courts of the states/territories do not impose similar formalities on prospective claimants.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Freezing orders can be obtained in each Australian jurisdiction to prevent the loss or dissipation of assets (Uniform Civil Procedure Rules 2005 (NSW) Part 25 Division 2; Uniform Civil Procedure Rules 1999 (Qld) Chapter 8 Part 2 Division 2; Uniform Civil Rules 2020 (SA) Chapter 10 Part 2 Division 5; Supreme Court Rules 1987 (NT) Regulation 37A.02; Rules of Supreme Court 1971 (WA) Order52A; Supreme Court Rules 2000 (Tas) Part 36 Division 1A; Court Procedure Rules 2006 (ACT) Part 2.9 Division 2.9.4 Sub-division 2.9.4.2; Supreme Court (General Civil Procedure) Rules 2015 (Vic) Order 37A.02).

Freezing orders may be obtained on an interim basis pending the outcome of a final hearing. The court has a discretion to grant a freezing order. In accordance with Part 25 Division 2 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR), in order to obtain a freezing order, the applicant must:

- show that there is a good arguable case against the wrongdoer;
- show that there is a real risk the wrongdoer is likely to dissipate the assets;
- where an order is sought against a third party, show that the third party is holding, using or is otherwise in possession of the asset; and
- address discretionary concerns, such as the form of the order and the value of the relevant assets.

Freezing orders are classified as "in personam" orders, meaning that their operation is concerned with individuals rather than with specific assets. This distinction is significant, as it means that orders are not limited to within Australia (that is, a "domestic freezing order"); rather, the orders may also deal with assets that are located overseas (ie, a "worldwide freezing order") provided that the court is satisfied that the order "is undoubtedly relevant to the exercise of the court's discretion to grant the order" (Deputy Commissioner of Taxation v Huang [2021] HCA 43 [30]).

There are also court fees associated with the granting of a freezing order. The court will not grant a freezing order without the applicant providing the usual undertakings as to damages (Frigo v Culhaci (1988) NSWCA 88; Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd (1981) 146 CLR 249), as in its absence if the proceedings were to fail, the respondents would have no remedy available to them. The court may require the applicant to make a payment to the court, or to give other security for the performance of the undertaking. It should also be noted that under Australian law, there is no need to give a cross-undertaking as to damages.

In the case where a substantive respondent does not comply with the freezing order, the efficacy of the order depends upon compliance by third parties. This is due to the fact that the effect of a freezing order is not confined to the parties, but extends to include a third party where a freezing order has also been made against them or notice of the order is given to the third party. In

the latter case, the third party is not bound by the order but will be guilty of contempt of court if it does anything to support the breach. Specifically, the third party may be penalised in the form of a committal, sequestration or fine. Similarly, where a defendant refuses or neglects to do any act within the time specified in this order for the doing of the act, or disobeys the order by doing an act which the order requires them to abstain from doing, they will also be liable to imprisonment, sequestration of property or other punishment.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

As outlined in Rules 25.12 and 25.13 of the UCPR, orders ancillary to a freezing order are available to assist in requiring a defendant to disclose their assets. The overarching objective of an ancillary order, similar to that of a freezing order, is to prevent events that would frustrate the court's processes. The most common form of order is that the respondent discloses the nature, location and details of their assets. By requesting that the defendant disclose the nature of their assets, this allows for the identification of third parties such as banks and financial intermediaries who have custody of the assets and enables notice of the order to be given to these parties to bind them to the order (Universal Music Pty Ltd v Sharman License Holdings Ltd (2005) 228 ALR 174, 181 [20]) ("Universal Music").

In the case where there is a failure on the part of the defendant to disclose their assets at all or in a timely fashion, leave is likely to be granted to cross-examine a deponent on an assets disclosure affidavit (Universal Music at 184 [28]).

Failure to comply with the requirements to give disclosure, or provision of false or misleading information, is likely to give rise to a charge of contempt. Penalties for a charge of contempt may include the sequestration of assets, the imposition of a fine or even imprisonment. In most cases, it is left up to the offended party to enforce contempt.

2.2 Preserving Evidence

There are several forms of key interim relief available to claimants in order to preserve evidence. The two common remedies available to the claimant are known as a freezing order (Mareva injunction) or a search order (Anton Piller order), both of which are sought on an ex parte basis.

Details of a freezing order and the requirements that must be met in order for such an order to be granted are outlined in section **1.7 Prevention of Defendants Dissipating or Secreting Assets**.

Additionally, a claimant may obtain a search order, in order to enter premises and inspect, remove or make copies of relevant documents or specified things in circumstances where it is feared that those documents or things might be destroyed or suppressed. The availability of search orders came after the decision in Anton Piller KG v Manufacturing Processes Ltd [1976] Ch 55. The key matters the court will take into consideration when determining whether or not to grant a search order include whether:

- there is a strong prima facie case;
- the damage suffered by the applicant is serious;
- the defendant is in clear possession of incriminating documents or items in general; and
- there is a real possibility that the defendant might destroy, or otherwise cause to be unavailable, important evidentiary material that is in the defendant's possession.

A claimant may also seek other forms of interim relief to preserve evidence. Specifically, these orders include detention, custody or preservation of property that is relevant to the proceedings by way of an interlocutory injunction or the appointment of a receiver.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

Before the commencement of proceedings, evidence may also be obtained through the application for pre-action discovery from relevant third parties. Specifically, a claimant is able to apply for a Norwich Pharmacal order (derived from the case of Norwich Pharmacal Co v Commissioners of Customs and Excise [1974] AC 133) if the court has determined that "the interests of justice are relevant to the exercise of the judicial discretion and in considering the interests of justice the judge must consider whether the applicant is left without an effective remedy, if the order sought is not made" (Re Pyne [1007] 1 Qd R 326, 331). Upon the successful grant of a Norwich Pharmacal order, the third party who is involved in a transaction must provide information to the claimant that would be relevant to a claim. This includes the identity of the wrongdoer. For example, by requiring the disclosure of relevant information, this order can be used to trace the disposition of money that has been obtained fraudulently.

Where an order permits that material evidence can be obtained from a third party, the material is only to be used with regard to the particular proceedings for which the order was made, and should not be used for other purposes without the permission of the court.

Subsequently, where a proceeding has already begun, a party to the proceedings can issue a subpoena to relevant third parties in order to produce documents to the court and/or attend court to give evidence. For the subpoena to be valid it must be issued for a legitimate forensic purpose and documents that are to be sought must be identified with a reasonable level of particularity. Where an order is made for a person to appear or disclose documents, a restriction on such material may arise by way of the privilege against self-incrimination (refer to section **6.1 Invoking the Privilege against Self-incrimination**).

2.4 Procedural Orders

An interlocutory application to obtain a freezing order or asset preservation order is typically sought on an ex parte basis, that is, without providing notice to the respondent, in order to avoid the frustration of a prospective court judgment, as a result of the dissipation of assets by the respondent (UCPR r 25.13).

In making an ex parte application, an applicant must demonstrate (in addition to the other factors required for the interlocutory order) that there is a risk that the respondent will either flee the jurisdiction, or dispose of or diminish the value of the assets, so that an eventual judgment is wholly or partly unsatisfied (UCPR r 25.14(4)).

2.5 Criminal Redress

The interplay between civil proceedings and a criminal prosecution is important because a fraud victim needs to take urgent steps to recover and prevent stolen assets being shifted, laundered or sent overseas, whilst pressing criminal charges against the perpetrator(s) of the crime. In Australia, recovery of assets via the commencement of civil proceedings does not prevent the pressing of criminal charges.

With the exception of urgent applications for relief, it is usual for civil recovery actions to be stayed pending the conclusion of criminal proceedings against a party charged with criminal offences arising out of the same or overlapping factual matters.

The decision in National Australia Bank Ltd v Human Group Pty Ltd [2019] NSWSC 1404 illustrates that courts are prepared to grant orders protecting plaintiffs from the risk of prejudice suffered by reason of a stay of civil proceedings. This is balanced with the risk of prejudice to the accused in the conduct of their defence at a criminal trial. Overall, and subject to the court's balancing of the aforementioned competing factors, fraud victims can, and ought to, take proactive steps in civil litigation to ascertain the whereabouts of, and recover, the misappropriated funds.

2.6 Judgment without Trial

Summary Judgment

A plaintiff may apply for a summary judgment to be heard on an ex parte basis, where there is evidence of the facts to substantiate the plaintiff's claim (UCPR r 13.1). Additionally, there must be evidence, rather than a mere opinion, to support the plaintiff's belief that the defendant has no defence to the claim or part thereof (Cosmos E-C Commerce Pty Ltd v Sue Bidwell & Associates Pty Ltd [2005] NSWCA 81 [47]). For instance, a defendant's failure to defend the claim may indicate that there appears to be no issue to be tried, as a result of the defendant failing to traverse the plaintiff's allegations. Ultimately, however, the granting of a summary judgment is an exercise of discretionary power by the court.

Onus of the Applicant

In New South Wales, Rule 19.4 of the Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015 (NSW) (regarding which rules are adopted in a uniform manner across the states and territories) requires that a solicitor, who seeks any interlocutory relief in an ex parte application, must disclose to the court all factual or legal matters that they are aware of, and that the solicitor has reasonable grounds to believe would support an argument against granting the relief, or limit its terms adversely to the client. Equivalent rules exist in each state/territory.

Default Judgment

A plaintiff may seek a court order for a default judgment within 28 days of serving a statement of claim on the defendant if no statement of defence has been filed by the defendant. A default judgment is an order that is made against the defendant, without the court having heard the matter, due to the defendant's failure to respond to the statement of claim.

2.7 Rules for Pleading Fraud

It is well established in Australia that a contention of fraud "should be pleaded specifically and with particularly" (Forrest v Australian Securities and Investments Commission (2012) 247 CLR 486; [2012] HCA 39 [26]).

In Nadinic v Drinkwater (2017) 94 NSWLR 518, the NSW Court of Appeal explored a number of key principles relevant to the meaning of "fraud" at law and equity, the availability of recession as a remedy for fraud and the procedural consequences of alleging and finding fraud. Noteworthy are the following with respect to pleading fraud as stated by Leeming JA at [45]–[49].

- A fraud allegation in the sense of deliberate falsehood or reckless indifference to the truth must be pleaded specifically and be particularised. This requires the party making the fraud allegation to "focus attention upon what it was that the person making the statement intended to convey by its making. And the pleading must make plain that it is alleged that the person who made the statement knew it to be false or was careless as to its truth or falsity" (citing Forrest v Australian Securities and Investments Commission (2012) 247 CLR 486; [2012] HCA 39 [26]).
- A finding of fraud is a serious one that mandates strict adherence to Section 140 of the

Evidence Act 1995 (NSW), which sets out the balance of probabilities standard in a civil proceeding. To reasonably satisfy a court in reaching a finding of fraud, a party must provide clear and cogent proof to support the allegation; "inexact proofs, indefinite testimony or indirect inferences" will not suffice (see Briginshaw v Briginshaw [1938] HCA 34).

- The seriousness of a finding of dishonesty or reckless indifference to the truth will ordinarily mean that it may not be made without providing an opportunity to the party against whom the allegation is made to deal with the criticism.
- A finding of fraud should be made clearly and the reasons for the finding must be well articulated. This is because "the seriousness of a finding of fraud, including statutory fraud, does not permit of other than a specific finding that the fraud, or the contravening conduct, has in fact occurred" (Sgro v Australian Associated Motor Insurers Ltd (2015) 91 NSWLR 325, 336 [54] per Beazley P).

2.8 Claims against "Unknown" Fraudsters

Depending on the type and level of insurance coverage maintained, a claimant may be able to seek compensation for loss suffered by reason of an "unknown" fraudster from their insurer.

There are various victim compensation schemes in Australia which may provide both corporations and individuals with a means of obtaining restitution in cases where the unknown identity of the fraudster(s) would otherwise leave them without redress (see R v David Michael Wills (Application by Woolworths Ltd) for a direction for compensation pursuant to Section 77B of the Victims Support and Rehabilitation Act 1996 (NSW) [2013] NSWDC 1; Victims Rights and Support Act 2013 (NSW); Victims of Crime (Financial Assistance) Act 2016 (ACT); Criminal Injuries Compensation Act 2003 (WA); Victims of Crime Financial Assistance Act 2009 (Qld); Victims of Crime Assistance Act 2006 (NT); Victims of Crime Compensation Act 1994 (Tas); Victims of Crime Assistance Act 1996 (Vic); Victims of Crime Act 2001 (SA)).

For example, under Section 97 of the Victims Rights and Support Act 2013 (NSW), an "aggrieved person", ie, someone who has sustained loss through or by reason of the relevant offence, can apply for a direction that compensation be paid out of the property of a person, which includes corporations, convicted of that offence.

The court's power to make the order is discretionary. Such power can be exercised suo moto, that is, on the court's initiative, or upon an application by or on behalf of an aggrieved person. Any amount granted by the court cannot exceed the maximum amount that, in its civil jurisdiction, the court is empowered to award in proceedings for debt recovery.

An aggrieved person can also commence civil proceedings against the offender and obtain damages, even if a direction for compensation is obtained; however, double recovery is not permitted (Civil Liability Act 2002 (NSW) Section 37(2); Civil Liability Act 2003 (Qld) Section 32B; Civil Liability Act 2002 (Tas) Section 43E(2); Civil Liability Act 2002 (WA) Section 5AM; Proportionate Liability Act 2005 (NT) Section 16(2); Civil Law (Wrongs) Act 2002 (ACT) Section 107I(2); Wrongs Act 1958 (Vic) Section 24AK(2); Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) Section 12).

2.9 Compelling Witnesses to Give Evidence

Upon the request of a party to proceedings, the court may issue a subpoena to compel a person to attend court to give evidence. Unless otherwise specified within the Uniform Evidence Acts,

every person is competent to give evidence; and a person who is competent to give evidence about a fact is compellable to give that evidence (pursuant to Section 12 of the Evidence Act 1995 (Cth)). There are limited exceptions that primarily relate to the State or persons in government positions, such as a member of a house of parliament.

A person ordered by the court to give evidence may be entitled to refuse answering questions on the basis of certain privileges, such as the privilege against self-incrimination or legal professional privilege.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Criminal Liability

Where the directing mind and will of the company commits an offence, the company, as a legal person, can be liable for the commission of the offence by virtue of the criminal directing mind and liability will be attributed to the company itself (Tesco Supermarkets v Nattrass [1972] AC 153; Mousell Brothers Ltd v London and North-Western Railway Co [1917] 2 KB 836). For instance, directors and managers, who are concerned with the company's management, can be regarded as the directing mind and will of the company to the extent that they control the company's operations. Consequently, the states of mind of these directors are regarded as that of the company itself (H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd [1957] 1 QB 159).

Sections 12.2 and 12.3 of the Criminal Code Act 1995 (Cth) have been enacted to impose liability on a company for both the physical elements and fault elements giving rise to the commission of crimes by a company's organ(s).

Civil Liability

Corporations are separate legal entities, such that the extent to which the owner or shareholders can be held liable for the deeds of a company is limited (Salomon v A Salomon & Co Ltd [1897] AC 22). However, the courts have been willing to pierce the corporate veil and impose liability on shareholders, directors and managers of a company, where the corporate structure has been used as a vehicle to commit fraud (Re Darby, ex parte Brougham [1911] 1 KB 95). Such liability can be fixed on directors, particularly in the context of sole director companies where the director is also the majority and/or controlling shareholder of the company (Australian Securities and Investments Commission v Caddick (2021) 395 ALR 481).

Professional advisors to a company may also be liable where their advice amounts to aiding, abetting, counselling, or procuring a contravention (Corporations Act 2001 (Cth) Section 79).

For instance, in the decision of ASIC v Somerville & Ors (2009) 77 NSWLR 110, a solicitor, who provided legal advice to company directors that amounted to phoenix activity, was found to be involved in the contravention through his advisory conduct.

3.2 Claims against Ultimate Beneficial Owners

Generally, a claim may be brought against the ultimate beneficial owner of a company where it can be shown that a company was set up as a sham and/or manifested the alter ego of a director, majority shareholder or other beneficial owner of the company, to perpetrate a fraud (Australian Securities and Investments Commission v Caddick (2021) 395 ALR 481; Ford (in his capacity as Commissioner for Fair Trad-

ing) v TLC Consulting Services Pty Ltd [2011] QSC 233; Artedomus (Aust) Pty Ltd v Del Casale (2006) 68 IPR 577; [2006] NSWSC 146; Smith v Hancock [1894] 2 Ch 377). There is no fixed test to determine when such a claim may succeed; rather, each case turns on its facts. Such a claim requires the piercing of the corporate veil, which courts have been willing to do if it can be shown that the "concept of separate corporate personality is sought to be used to defeat public convenience, or to justify wrong, or to protect fraud, or to defend crime" (Ace Property Holdings Pty Ltd v Australian Postal Corporation [2011] 1 Qd R 504; [2010] QCA 55 at [88]). It is also possible for the corporate veil to be pierced in instances where a court "can see that there is in fact or in law a partnership between companies in a group" (Pioneer Concrete Services Ltd v Yelnah Pty Ltd and Others (1986) 5 NSWLR 254, 267) or where there is "a finding by unrebutted inference that one of the reasons for the creation of the intervening company was to evade a legal or fiduciary obligation" (Pioneer Concrete Services Ltd v Yelnah Pty Ltd and Others (1986) 5 NSWLR 254, 267; Gilford Motor Company Ltd v Horne [1933] Ch 395).

For instance, in Australian Securities and Investments Commission v Caddick (2021) 395 ALR 481, the Federal Court of Australia found that a company had contravened Section 911A of the Corporations Act 2001 (Cth) by carrying on a financial services business and issuing a financial product in the absence of holding an Australian Financial Services licence. The Federal Court further held that the actions of the company were also attributable to the sole director, shareholder and secretary of the company. This was because the evidence established that the company was used as a sham to disguise the sole director's fraudulent Ponzi scheme; particularly given that the actions of the company were carried out at the sole director's behest, the sole director "took all the necessary steps, provided the advice and ran the scheme" and the funds provided by the company's investors "were not applied to the purchase of share portfolios on their behalf but were transferred to accounts in the name of or associated with (the sole director) and used to fund her lifestyle and/or... to repay investors who redeemed their investments in part or in whole" (Australian Securities and Investments Commission v Caddick (2021) 395 ALR 481, 554 [282]–[283]).

3.3 Shareholders' Claims against Fraudulent Directors

Shareholders, former shareholders, or persons entitled to be registered as members may with leave of the court bring a claim on behalf of the company against the directors, who exercise control over the company, through a statutory derivative action under Part 2F.1A of the Corporations Act 2001 (Cth). A statutory derivative action is brought by shareholders on behalf of the company for wrongs that have been done to the company by the directors, and where it is probable that the company itself will not bring proceedings. This may occur where the directors of a company will not pass a resolution that the company ought to bring proceedings against those directors for breaches of directors' duties. Prior to commencing a derivative action, the shareholders bringing the action must provide notice in writing to the company.

Furthermore, for a court to grant leave to shareholders to bring a derivative action, the court must be satisfied that the shareholders are acting in good faith, the proceedings are in the company's best interests, the company is unlikely to bring proceedings itself in relation to the fraudulent conduct of the directors, and that there is a serious question to be tried (Corporations Act 2001 (Cth) Section 237(2); Swansson v RA Pratt Properties Pty Ltd (2002) 42 ACSR 313; [2002] NSWSC 583). The best interests of a company are determined by considering the

type and nature of the company, such as where there is a closely held company, and where there would be a reasonable expectation of involvement in the management of the company.

Additionally, the court may consider whether a company is well resourced, and the effect that the derivative action will have on the company's business, such as whether the action would cause the company to cease trading, or to divert resources from its ordinary operations. There is also a rebuttable presumption that granting leave to bring a derivative action is not in the company's best interests, where the company has decided not to commence proceedings or has discontinued proceedings (Corporations Act 2001 (Cth) Section 237(3)(b)).

In considering whether to grant leave to shareholders of a company to commence a statutory derivative action, a court will also consider whether the shareholders have ratified or approved the misconduct of the directors (Corporations Act 2001 (Cth) Section 239).

Additionally, in some instances a statutory derivative action will not be available to shareholders, where the company is in liquidation (Smart Company Pty Ltd (In Liquidation) v Clipsal Australia Pty Ltd (No 6) [2011] FCA 419).

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

The courts have taken an expansive view in relation to fraud and misleading conduct/misrepresentation claims in Australia. Overseas parties may be joined to fraud claims in Australia where:

- the representation or conduct, although originating overseas, is received in Australia (Ramsey v Vogler [2000] NSWCA 260, [36]–[48]);
- part of the conduct occurs in Australia and part outside (Trade Practices Commission v Australian Meat Holdings Pty Ltd (1988) 83 ALR 299);
- the conduct overseas nonetheless involves instructing an agent to act in Australia (Bray v F Hoffman-La Roche Ltd (2002) 118 FCR 1); and
- the conduct overseas has a technology element that is capable of being accessed in Australia (Australian Competition & Consumer Commission v Hughes (t/a Crowded Planet) [2002] ATPR 41–863, 44, 792).

Joinder of Parties

Each state has different civil procedure legislation governing the joinder of parties, including foreign entities or individuals.

In New South Wales, Rule 6.24 of the UCPR provides the following.

"(1) If the court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, the court may order that the person be joined as a party;

(2) Without limiting subrule (1), in proceedings for the possession of land, the court may order that a person (not being a party to the proceedings) who is in possession of the whole or any part of the land (whether in person or by a tenant) be added as a defendant."

Additionally, individuals can apply to the court to be joined as a plaintiff or defendant (UCPR r 6.27) depending on the circumstances.

Extraterritorial Jurisdiction

Australian Courts may exercise extraterritorial jurisdiction if expressly provided by the law.

The Corporations Act 2001 (Cth) does not contain an express provision on extraterritorial application. However, Section 581 of the Corporations Act 2001 (Cth) mandates Australian courts to act as an aid of, or an auxiliary to, foreign courts of prescribed countries (see Corporations Regulations 2001 (Cth) reg 5.6.74) that have jurisdiction in external administration matters. Australian courts also have discretion to assist the courts of non-prescribed countries in external administration matters.

However, certain provisions of the Competition and Consumer Act 2010 (Cth) do have extraterritorial effect. For instance, Section 5(1) of the Competition and Consumer Act 2010 (Cth) states that certain provisions of legislation, including the ACL (save for Part 5-3), extends to the engaging of conduct outside Australia by bodies corporate incorporated or carrying on business within Australia, Australian citizens, or persons ordinarily resident within Australia.

In Valve Corporation v Australian Competition and Consumer Commission [2017] 351 ALR 584, the Federal Court found that the consumer guarantee regime in the ACL was applicable to a company that conducted its business in a foreign jurisdiction and where the proper law of the contract was also of a foreign jurisdiction. The Federal Court noted that Section 67(b) of the ACL expressly provides that the consumer guarantee regime applies to the conduct of foreign corporations in Australia, even if a law other than Australian law had been chosen to govern the contract for the supply of goods and services to a consumer. The Federal Court also found, inter alia, that despite the foreign corporation being incorporated outside of and not having a physical presence in Australia, the representations it made to its large base of Australian consumers through its online platform nonetheless amounted to the "supply of goods" (ie, computer software) within Australia, which meant that the foreign company "undoubtedly carried on a business in Australia" (Valve Corporation v Australian Competition and Consumer Commission [2017] 351 ALR 584, 607 [86]).

It should be noted that despite the express intention of Parliament for a legislation to have extraterritorial effect, this would neither deter a foreign party from objecting to the jurisdiction of Australian courts nor object to the enforcement of any judgment rendered by an Australian court.

Service of Writ out of the Jurisdiction

Service of originating process outside Australia is permitted by Part 11 and assisted by Part 11A of the UCPR.

Part 11A deals with the operation of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 ("Hague Convention"), providing a set of uniform rules concerning the service of Australian judicial documents in civil and commercial matters to parties to the Convention (other than Australia). The Hague Convention, which came into force in Australia on 1 November 2010, offers an alternative but not mandatory method of service of judicial documents outside Australia. The Trans-Tasman Proceedings Act 2010 (Cth) governs service in New Zealand.

5. ENFORCEMENT

5.1 Methods of Enforcement

In cases where the defendant fails to make a payment within the timeframe set by the court, or at all, the claimant may take steps to enforce the judgment.

Writ of Execution of Property

Pursuant to Section 106(1) (a) of the Civil Procedure Act 2005 (NSW), a writ for the levy of property is another form of enforcement whereby the sheriff's office is ordered by the court to seize and sell property owned by the judgment debtor. Property that can be seized includes:

- money, cheques, bonds, and securities;
- personal property in which the debtor has a beneficial interest;
- land (where the judgment is regarding more than AUD10,000).

It is important to note that there are a number of items protected from seizure under Australian law (for example, kitchen items, safety equipment, tools of trade to enable the debtor to earn an income).

The judgment debtor's property is bound to the sheriff's office from the time the writ is delivered to the sheriff and is valid for 12 months from the date of issue. The money that is obtained from the sale of the property is utilised to pay off the outstanding judgement debt.

Writ of Possession of Property

Similar to a writ for the levy of property, a writ for possession of property relates to the seizure by the sheriff's office of real property in cases where the proceeds from the sale of the personal property of the judgment debtor are insufficient to meet the outstanding judgment debt. The court must authorise the sheriff's office, which it will be reluctant to do (given the gravity of the process) if there are alternate means by which the debt could be satisfied.

Garnishee Orders

A garnishee order is commonly sought to enforce a judgment debt against a creditor to recover money from third parties, including employers, banks, other financial intermediaries, who hold money of the judgment debtor, such as the debtor's wages, bank account or others who owe the debtor money. Pursuant to Section 106(1) (b) of the Civil Procedure Act 2005 (NSW), the court can direct a third party who owes money to the judgment debtor to pay the judgment creditor directly. Notably, where a third party fails to comply with a garnishee order, the third party may become liable for a part, or the entirety, of the judgment debt.

Charging Orders

A charging order may be obtained to extend a charge over property, including land, shares in a company or money held in a financial institution (Civil Procedure Act 2005 (NSW) Section 126(1)). The judgment creditor may apply for a charging order pursuant to Section 106(1)(c) of the Civil Procedure Act 2005 (NSW).

A charging order operates to charge the property in favour of the judgment creditor to the extent that is necessary in order to satisfy the judgment. The debtor is restrained from selling, transferring or otherwise dealing with the property (Civil Procedure Act 2005 (NSW) Section 126(2)).

However, this type of order is narrow in scope and should therefore only be relied upon in cases where the debt faced is substantial and the debtor holds substantial assets.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

A party may refuse to provide information or produce documents that it may otherwise be required to disclose, if certain privileges apply, specifically the privilege against self-incrimination and the right to silence.

Self-incrimination

The privilege against self-incrimination is the right of an individual to refuse to answer any questions or produce any materials, if doing so "may tend to bring him into the peril and possibility of being convicted as a criminal" (Sorby v Commonwealth (1983) 152 CLR 281; (1983) 46 ALR 237, 241). This common law right is available to:

- individuals suspected of a crime;
- individuals questioned in civil proceedings; and
- people within non-curial context.

Section 128 of the Evidence Act 1995 (Cth) establishes the privilege against self-incrimination. Under this section, a witness is able to object to giving evidence if that evidence proves the witness (a) has committed an offence against or arising under an Australian law or a law of a foreign country or (b) is liable to a civil penalty.

Right to Silence

Differing from the privilege against self-incrimination is the right to silence. The right to silence protects a defendant from being obligated to testify against oneself, regardless of whether or not that testimony has the potential to be incriminating. Established by Section 17 of the Evidence Act 1995 (Cth), this statutory right provides that a "defendant is not competent to give evidence as a witness for the prosecution". It solely applies to criminal proceedings and ensures that a defendant cannot give evidence at their own trial unless they elect to during their own defence.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

A party may withhold documents that are subject to legal professional privilege. This privilege arises in relation to:

- communications between a lawyer and their client for the dominant purpose of providing or receiving legal advice; and
- a lawyer, their client and/or a third party for the purpose of conducting legal proceedings.

At common law and under Sections 118 and 119 of the Uniform Evidence Acts, such communications are protected from compulsory production in the context of court or similar proceedings.

However, as set out in Section 125 of the Evidence Act 1995 (Cth), privilege does not exist to assist a party in committing fraud. Section 125(1)(a) provides that privilege does not apply to: "...[a] communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty."

Thus, if there is commission of fraud or an abuse of power, privilege of such documents may no longer be relied on.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

A court may award exemplary damages in response to a defendant's tortious conduct, such as where it discloses a certain degree of fraud or malice (Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118). It is within the court's discretion to grant exemplary damages, and that discretion is usually exercised depending on the specific circumstances of each case (Gray v Motor Accidents Commission (1998) 196 CLR 1; (1998) 158 ALR 485, 491 [26]). Subject to any statutory prohibitions, such as Section

21 of the Civil Liability Act 2002 (NSW) which prohibits an award of exemplary, punitive and aggravated damages in personal injury claims founded in negligence, an award of exemplary damages may be justified where "the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights" (John D Mayne and Harvey McGregor, Mayne & McGregor on Damages (Sweet & Maxwell, 12th edition, 1961) 196).

This also includes deliberate, intentional, or reckless conduct of the defendant (Whitfeld v De Lauret & Co Ltd (1920) 29 CLR 71, 77 (Knox CJ); XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448; Lamb v Cotogno (1987) 164 CLR 1; Gray v Motor Accident Commission (1998) 196 CLR 1; (1998) 158 ALR 485). For instance, in the decision of Musca & Ors v Astle Corporation Pty Ltd & Anor (1988) 80 ALR 251, exemplary damages were awarded in a cause of action for deceit where the defendant's deceitful conduct was found to have exposed the plaintiff and her child to considerable risk, including unemployment by inducing her to leave an established job. Such conduct was considered to merit punishment by the court by way of exemplary damages.

Additionally, the quantum of exemplary damages may be reduced, where a compensatory award exceeds the benefit obtained by the defendant by reason of their tort (Musca & Ors v Astle Corporation Pty Ltd & Anor (1988) 80 ALR 251).

7.2 Laws to Protect "Banking Secrecy"

Common Law

Under the common law, a banker's duty to keep confidential certain affairs of their customers is dependent on the terms of the engagement as between the banker and its customer. This duty of confidentiality is usually an implied term of the contract between a banker and customer, although it may be express, and extends beyond the mere state of affairs of customers' bank accounts to any information derived from the banking relations of the bank and its customer. This includes any transactions that involve the customer's account. The duty is qualified by four exceptional circumstances, where it is permissible for a banker to disclose otherwise privileged information. These exceptions were enumerated by Bankes LJ in Tournier v National Provincial and Union Bank of England [1924] 1 KB 461. These circumstances include:

- where disclosure is under compulsion of law;
- where there is a duty to the public to disclose;
- where the bank's interests necessitate disclosure; and
- where the disclosure is in accordance with the customer's express or implied consent.

Additionally, there may be a concurrent equitable duty to maintain confidentiality, where existing customers expect that information that they provide to a bank is protected by law. Arguably, this is a more robust basis for the duty of confidentiality, as it does not rely on the existence of a contract. By comparison, the contractual basis requires a court's determination that such a duty can be implied in the contract. This distinction between the equitable and contractual bases is reinforced by the fact that parties are free to insert express provisions that are inconsistent with the general duty of confidentiality.

Statutory Duty of Confidentiality

From a privacy perspective, a banker is restrained from disclosing personal information, unless the customer has consented to the disclosure, the disclosure is required by law, or the disclosure is reasonably necessary for the enforcement of the criminal law, or of a law imposing a pecuni-

ary penalty, or for the protection of the public revenue (Privacy Act 1988 (Cth) Section 14).

Statutory Requirements to Disclose

In certain circumstances, the duty of confidentiality may be negated in order to facilitate the production of evidence under statutory instruments.

For instance, a banker may be required to disclose evidence in relation to a fraud claim under Section 28 of the Australian Crime Commission Act 2002 (Cth). Additionally, under Section 213 of the Proceeds of Crime Act 2002 (Cth) a financial institution may be required to provide information or documents to an "authorised officer", as defined in Section 338 of the Proceeds of Crime Act 2002 (Cth), to determine any of the following information:

- whether an account has been held by a specified person;
- the balance of the account;
- whether a particular individual is a signatory to an account;
- details of transactions on an account;
- the details of any related accounts;
- determining whether a stored value card was issued to a specified person;
- the details of transactions made using this card; or
- whether a transaction was conducted by the financial institution on behalf of the specified person.

The "officers" who may request the information outlined above include a member or employee of the Australian Police Force, the Integrity Commissioner, Chief Executive Officer of the Australian Crime Commission, and staff member of the Australian Crime Commission (Proceeds of Crime Act 2002 (Cth) Section 213(3)).

Furthermore, under Section 40 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth), a "reporting entity" must report any suspicious matter to the CEO of the Australian Transaction Reports and Analysis Centre (AUSTRAC). Section 62 of the Banking Act 1959 (Cth) also requires an Authorised Deposit-taking Institution (ADI) to provide information to the Australian Prudential Regulatory Authority (APRA) in respect of the ADI or any member of a group of bodies corporate of which the ADI is a member. Additionally, the Australian Securities & Investments Commission (ASIC) may require a bank to produce specified books relating to the affairs of the bank under Section 30 of the Australian Securities and Investments Commission Act 2001 (Cth). Under Section 77A of the Bankruptcy Act 1966 (Cth), a trustee in bankruptcy may require a banker to provide to the trustee (or another), specified accounts, deeds, or documentation.

7.3 Crypto-assets

Classification as "Property"

There has yet to be an Australian court decision that classifies crypto-assets as constituting "property". Nonetheless, crypto-assets are legally recognised under Australian taxation laws and company laws. For instance, ASIC considers that the legal status of cryptocurrency is influenced by the structure of the Initial Coin Offering (ICO), and the rights that attach to the tokens. Consequently, tokens of cryptocurrency may be regarded as "financial product(s)" under the Corporations Act 2001 (Cth), such as in the form of managed investment schemes, securities, and derivatives. The implications of this classification are that the cryptocurrency will be subject to disclosure, registration, licensing, and conduct obligations as required under the Act.

For income tax purposes, the Australian Tax Office views Bitcoin and analogous cryptocurrencies as assets, which can be held or traded. For instance, an isolated transaction involving the sale of cryptocurrency may result in the cryp-

tocurrency being treated as a capital gains tax asset.

Meanwhile, a state district court has held that a cryptocurrency investment account is sufficiently secure to constitute an investment for the purposes of security for legal costs (Hague v Cordiner (No 2) [2020] NSWDC 23). This court considered that the volatility of cryptocurrency could be addressed by requiring the claimant to notify the defendant's solicitors of any drop below the secured amount. This decision suggests that Australian laws are moving towards regarding cryptocurrency as property in the future.

Freezing Orders

Australian Courts have granted freezing orders in respect of cryptocurrency, where there is a real risk that the cryptocurrency may be destroyed, resulting in the diminution of its value. For instance, in Chen v Blockchain Global Ltd; Abel v Blockchain Global Limited (2022) VSC 92, the court referred to freezing orders having been made over all the defendant's assets, including a digital wallet holding bitcoin. In granting the freezing order, the court considered that there was a serious question to be tried in relation to whether or not the defendant had defrauded the plaintiffs. Additionally, the court considered that the prospective destruction of the bitcoin would vitiate a final judgment.

In Australian Securities and Investments Commission (ASIC) v A One Multi Services Pty Ltd [2021] FCA 1297, Derrington J of the Federal Court considered that since cryptocurrency is extremely liquid and easily transferrable the assets may be dissipated in a manner that is difficult to trace, unless an individual with the power of a receiver is appointed to recover them.

Fraud Involving Crypto-assets

The volatility of the value of cryptocurrency hinders the ability to trace its value in cases of fraud, as it may not be possible to maintain records identifying the fundamental value of the cryptocurrency.

Nonetheless, there are Commonwealth laws which impose mandatory reporting obligations in relation to suspicious transfers of cryptocurrency. The legal status of a "Digital Currency Exchange Register" within Sections 5 and 76B of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (the AML/CTF Act) means that the exchange and transfer of cryptocurrency is subject to the Anti-Money Laundering/Counter-Terrorism Financing Rules Instrument 2007 (No 1) (Cth) (the AML/CTF Rules), which was created pursuant to Section 229 of the AML/CTF Act. For instance, under Section 41(2) of the AML/CTF Act, a reporting entity is required to report suspicious matters to the Australian Transaction Reports and Analysis Centre. Additionally, Rule 18.2 of the AML/CTF Rules stipulates the content that is required to be included in a suspicious matter report that involves digital currency.

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Trends and Developments

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International Fraud and Asset Tracing in Australia

The trends and developments in relation to fraud and asset tracing in Australia have come to the fore in recent years in light of certain significant and complex fraud cases, as well as the rapid evolution and use of technology. Overall, the Australian legal landscape has proven to be well suited to the pursuit of fraud claims and the tracing of assets. That being said, the Federal Government continues to tighten measures in relation to the provision of financial services, with a view to protecting consumers and "mum and dad" investors, particularly in light of the rise of "finfluencers". The Government is also considering reforms to Australia's anti-money laundering and counter-terror finance regime in an attempt to mitigate the risk of criminal money laundering within the jurisdiction.

The collapse of Forum Finance Pty Limited ("Forum Finance") and its related entities has demonstrated the far-reaching nature of the freezing orders available under Section 23 of the Federal Court of Australia Act 1976 (Cth) and Rule 7.32 of the Federal Court Rules 2011 (Cth). Forum Finance and its related entities were founded as an IT services group focusing on providing office printers and copiers, accounts payable and paperless document systems. From a distance, the business appeared to be operating successfully, with many major prime corporates as clients. However, underneath the facade, large flows of funds were obtained from banks including Commonwealth Bank, Westpac Banking Corporation Limited ("Westpac"), and Sumitomo Mitsui, based on forged customer invoices.

Following Westpac's investigations and discovery of a financial fraud of over AUD250 million by Forum Finance and its related entities, Forum Finance's director, Mr Basile Papadimitriou ("Mr Papas"), fled to Greece in an attempt to avoid prosecution last year. Earlier this year, despite Mr Papas' fleeing to Greece, Westpac successfully obtained extensive freezing orders over the Australian and worldwide assets of Mr Papas; Mr Papas' business associate, Mr Vincenzo Frank Tesoriero; Mr Papas' girlfriend, Ms Louise Agostino; and various entities related to Mr Papas and Mr Tesoriero. Further to these extensive freezing orders, the court also granted Westpac permission to commence proceedings in Greece to enforce the Australian court's freezing orders insofar as the provision of information by Mr Papas was concerned. This is because Mr Papas was situated in Greece such that only the Greek courts could compel him to provide the information sought by Westpac in respect of his assets.

In the insolvency context, the Corporations Act 2001 (Cth) ("Corporations Act") provides for insolvency practitioners to publically examine directors, officers or other relevant individuals who may be able to give information about a corporation's examinable affairs. Often, the evidence adduced at these examinations forms the basis for claims brought by the insolvency practitioners, usually liquidators, including in respect of fraud.

The High Court of Australia's recent decision in Walton & Anor v ACN 004 410 833 Limited (formerly Arrium Limited) (in Liquidation) & Ors [2022] HCA 3 ("Walton") has significantly expanded the scope of eligible applicants who may apply for

examination summonses. Under Section 596A of the Corporations Act, an eligible applicant may apply to the court to summon a director or officer of a company in liquidation to be examined in relation to the corporation's examinable affairs. An "eligible applicant" is defined in the Corporations Act to mean one of the following.

- The Australian Securities and Investments Commission (ASIC).
- A liquidator or provisional liquidator of the corporation.
- An administrator of a corporation, or an administrator of a deed of company arrangement executed by the corporation.
- A restructuring practitioner for the corporation.
- A restructuring practitioner for a restructuring plan by the corporation.
- A person authorised in writing by ASIC to make:
  (a) an application under Part 5, Division 1 of the Corporations Act; or
  (b) such an application in relation to the corporation.

In Walton, the shareholders argued that they should be given the status of an "eligible applicant" as they wished to understand the "true nature of Arrium's business". The shareholders also advised ASIC that they wished to seek orders for examination to determine whether any claims might be brought against the company, its directors or its auditor. Whilst the shareholders originally considered whether a derivative action was possible, this notion was abandoned and the shareholders accepted that they were not claiming against the company as creditors, and that any recovery by them against third parties would not improve the position of the company's other creditors.

The New South Wales Court of Appeal held that the examination summonses were an abuse of power as they were sought for a private purpose, for the benefit of a limited group, rather than for the ultimate benefit of the company, its contributories or its creditors. A majority in the High Court of Australia overturned the New South Wales Court of Appeal's decision, finding that:

- the purpose of Section 596A is to facilitate the administration or enforcement of law concerning the public dealings of a company and its officers; and
- the power to obtain summons under Section 596A is a "right" and the courts ought to grant the summonses sought if the criteria are met, unless there is evidence of an abuse of process.

The High Court's broader interpretation of "eligible applicant" under Section 596A increases the risk to directors and officers of a company being examined. The decision also opens the door for shareholders and class-action litigation funders to use Section 596A to investigate the merits of a class action, even if the liquidators do not intend to pursue the directors and/or officers.

Recent fraud cases have confirmed the extent to which federal authorities will co-operate to assist with uncovering crimes. The discovery and subsequent convictions emerging out of the Plutus Payroll Australia Pty Ltd ("Plutus") scheme involved months of co-operation between the Australian Federal Police (AFP) and Australia Taxation Office (ATO) to piece together the crime syndicate.

Plutus operated a payroll administration service. Under Australian taxation law, Plutus was expected to withhold and remit "Pay As You Go" (PAYG) payments to the ATO on account of income tax. To avoid paying these amounts to the ATO, the conspirators set up several second-tier companies into which they placed unrelated "straw" directors. Plutus then transferred payroll

funds to the second-tier companies, from where it would pay the clients' payroll but forward only part of the PAYG contribution to the ATO. Plutus would then issue fraudulent invoices to the second-tier company to siphon out the funds. Each time the ATO attempted to recover the outstanding PAYG contributions, the conspirators would wind up the second-tier company and set up a new company with a different "straw" director, making it difficult for the ATO to recover the outstanding taxation liabilities.

The scheme was complex as it involved multiple entities over the years, and the operation to locate the conspirators involved a large-scale taskforce consisting of members from both the AFP and the ATO. The operation resulted in multiple convictions and, last year, the key conspirator was ultimately sentenced to seven years and six months in jail.

Since the introduction of Australia's AML/CTF regime in 2006, technology has evolved significantly, allowing more complex crimes to emerge and existing protective measures to become insufficient. In the latest report by the Federal Senate Legal Constitutional Affairs References Committee (the "Committee") released on 30 March 2022, the Committee was critical of the current regime, which is primarily governed by the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (the "AML/CTF Act") and supporting instruments. With the ongoing sanctions that have been imposed upon Russian nationals worldwide following the Russia-Ukraine war, the Committee noted that there was serious concern as to whether Australia's current AML/CTF regime was adequate.

Amongst the Committee's criticisms was the regime's lack of regulation over designated non-financial service providers (DNFS) such as lawyers, real estate agents, accountants and company service providers. For example, Australian lawyers do not currently have reporting obligations under existing AML/CTF laws in respect of clients, on the basis that such reporting would be a breach of legal professional privilege. Australia is one of three states out of the 39 member states in the Financial Action Task Force (an intergovernmental organisation founded to combat money laundering) who have not to date enacted regulations in relation to DNFS, the risk being that Australia may become increasingly vulnerable to criminal money laundering.

The Committee recommended, amongst other things, the establishment of a beneficial ownership register to provide more transparency to company structures. The Australian Government is in the process of modernising Australia's company registry to enable the development of a beneficial ownership register, although it is not clear when this register will become operational.

In order to conduct a financial services business in Australia, the individual/business must hold an Australian Financial Services (AFS) licence, unless there is an exemption allowed under Section 911A of the Corporations Act. The key obligations of an AFS licensee are set out in Section 912A of the Corporations Act. Whilst ASIC maintains a register of AFS licensees, cases involving unregistered AFS licensees are still prevalent.

In the recent case of ASIC v Melissa Caddick and Maliver Pty Limited [2021] FCA 1443, the Federal Court of Australia found that both Ms Caddick and Maliver Pty Limited ("Maliver") operated a financial services business for a number of years without an AFS licence in contravention of Section 911A of the Corporations Act.

After considering the evidence before it, the court held that all of Maliver's actions were undertaken or performed at the relevant times at the instigation of, and jointly with, Ms Caddick based on the following conclusions:

- Ms Caddick was the sole director and guiding mind of Maliver and was intimately involved in its day-to-day operations;
- Ms Caddick was the person who made representations on behalf of Maliver to investors;
- key correspondence from or on behalf of Maliver was signed by Ms Caddick; and
- Ms Caddick advised on and assisted in the establishment of self-managed superannuation funds and their subsequent administration and assisted in the establishment of a bank account through which moneys were transferred to Maliver.

In that regard, the court considered that Maliver was merely a vehicle by which Ms Caddick operated her fraud. Ultimately, the court held that to the extent that Maliver was conducting a financial services business without holding an AFS licence in breach of section 911A, Ms Caddick also carried on a financial services business without holding an AFS licence in breach of section 911A.

On the topic of AFS licences, ASIC has recently introduced guidelines to regulate "finfluencers", ie, content creators who talk about money, shares, budgeting and investing on social media platforms. Whilst some "finfluencers" genuinely wish to empower people to become more financially literate, there are also those who prey upon the vulnerable. "Pump and dump" scams, often involving the "finfluencer" promising significant returns of a specific share to increase trading, have become rife on social media. As more people buy the shares, having been "influenced" to do so, their value is artificially inflated. The "finfluencer" than sells his or her stake, causing the share value to crash and investors to be left with shares of minimal or no value.

ASIC's new guidelines make clear that "finfluencers" must have an AFS licence, and unlicensed "finfluencers" could face up to five years' jail time or fines of more than AUD1 million if they discuss money, budgeting, shares and/or investing without an AFS licence. ASIC has also warned influencers who earn money through affiliate links which direct readers to online brokers that such conduct could constitute provision of a financial service, thereby requiring an AFS licence.

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

There are different variants of fraud in criminal and civil law.

Criminal Law

Fraud

Fraud is committed by anyone "who by deceiving another about material facts causes the other person to do, tolerate, or omit an act which causes a financial or other material loss to the other person or to a third person and who has the intention to thereby gain an unlawful material benefit for himself, herself or a third person" (Section 146 Austrian Criminal Code).

If fraud results in damages of more than EUR5,000 or is committed, for example, by using false documents or data, it is categorised as aggravated fraud and entails a higher punishment. Another limit is EUR300,000, which increases the punishment even more.

Special rules apply to fraudulent misuse of data processing (Section 148a), wrongfully obtaining services (Section 149), insurance fraud (Section 151) and misuse of funds (Section 153b Austrian Criminal Code).

Offences of dishonesty and misappropriation

The offence of dishonesty is committed by "any person who knowingly abuses his or her authority to dispose of property of another or to engage another thus causing a financial detriment to the other person." A "person abuses his authority if the person violates rules that serve to protect the economic interests of the other person" (Section 153 Austrian Criminal Code). This offence is committed, for example, by a manager abusing the company's assets to the disadvantage of the company.

The offence of misappropriation is committed by any "person who applies property that was entrusted to the person to his or her own use or to the use of a third person with the intention to gain an illegitimate material benefit from himself, herself, or a third person" (Section 133 Austrian Criminal Code).

Untenable representation of financial information on companies

Offences involving false statements include the offence of untenable representation of fundamental information concerning certain corporations and the offence of untenable accounts of auditors, committed by a decision-maker or auditor who falsely or incompletely represents, in an untenable manner, the financial position of a company, including in their audit report (Sections 163a, 163b Austrian Criminal Code).

Corruption

Offences involving corruption include:

- passive bribery, by any "person being an office bearer or adjudicator who demands or accepts a promise of benefit for himself, herself, or a third person in return for the unlawful execution or omission of official duties" (Section 304 Austrian Criminal Code);
- acceptance of undue advantages, by "an office bearer or adjudicator who demands a benefit for himself, herself, or a third person, or accepts the promise of an undue advantage in return for the lawful execution or omission of official duties" (Section 305 Austrian Criminal Code);
- acceptance of benefits for the purpose of interference, committed by any "person being an office bearer or adjudicator who, except in cases under Sections 304 or 305, demands a benefit for himself, herself, or for a third person, or accepts the promise of an undue advantage intending that his or her role as

an office bearer be influenced" (Section 306 Austrian Criminal Code); and
- acceptance of gifts by persons in authority, by any "person who accepts a more than minor financial or other material benefit that was offered for the execution of authority to dispose of the property of another or to engage another, where that authority was granted by law, official order, or legal transaction, and who breaches his or her duty by not transferring the benefit" (Section 153a Austrian Criminal Code).

A person who makes or offers an illicit advantage commits the offence of active bribery (Section 307 Austrian Criminal Code) or giving undue advantages (Section 307a Austrian Criminal Code) or of creating undue advantages for the purpose of interference (Section 307b Austrian Criminal Code).

Conspiracy and criminal association

Conspiracy is a crime only in connection with felonies such as murder or kidnapping (Section 277 Austrian Criminal Code). A mere conspiracy to commit a fraud is not punishable – if it does not qualify as a criminal association, ie, a longer-term affiliation of more than two persons with the aim that one or more of its members commit a crime (Section 278 Austrian Criminal Code).

Civil Law

Civil law fraud

Someone induced to enter a contract by deception may challenge the contract and/or recover damages from the person who deceived such person (Sections 870, 874 Austrian Civil Code). "Deception" means intentionally misleading by making false statements, preventing the injured person from knowing the true facts, or failing to provide the required information.

Damages for making false statements

Apart from deceit, liability for false statements (information, advice, recommendations, etc) is only incurred if the false statements cause a breach of main or secondary contractual obligations or if the false information is given against better knowledge (Sections 1295, 1300 Austrian Civil Code).

Damages due to violation of criminal law norms

If someone commits a crime, any injured person may make a claim for damages provided that the criminal norm violated protects their interests (Section 1311 Austrian Civil Code).

1.2 Causes of Action after Receipt of a Bribe

An agent who accepts bribes and does not act in the interest of the principal but, rather, in their own interest, may be guilty of the offence of dishonesty, misappropriation, fraud or – as an office bearer – bribery (see **1.1 General Characteristics of Fraud Claims**).

Criminal law aside, accepting bribes is illegal under civil law. An agent may not accept benefits from third parties in connection with the principal's affairs without the consent of the principal (Section 1013 Austrian Civil Code). If an agent violates this prohibition, the principal can enforce surrender of the benefit (Section 1009 Austrian Civil Code). Additionally, the principal may make a claim for damages against the agent and any third party who paid the bribe (Sections 1012, 1295 Austrian Civil Code).

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Civil Law

Several tortfeasors co-operating jointly and intentionally are jointly and severally liable for the resulting damage (Section 1302 Austrian Civil Code). This also applies to assistants and insti-

gators. The prerequisite is that they have made some contribution toward causing the damage (even if only psychological, eg, by helping plan the fraud).

A person who receives fraudulently obtained assets without having made a causal contribution to the fraud itself may be subject to a claim for restitution under property law or the law of unjust enrichment (see **6. Privileges**) but not to a claim for damage resulting from the fraud.

Criminal Law

An immediate perpetrator and any person directing another, or contributing in any other way to the commission of an offence, is presumed to have committed that offence. Each offender is punished according to such person's individual culpability (Sections 12, 13 Austrian Criminal Code).

Any person who receives fraudulently obtained assets may be charged with:

- the offence of fencing, committed by any "person who aids the perpetrator of an offence against the property of another after that offence in concealing or utilising any thing obtained through that offence" and by "any person who purchases, takes possession or procures such a thing" (Section 164 Austrian Criminal Code); or
- the offence of money laundering, committed by:
  (a) any person who converts or transfers to another person any assets that are the proceeds of certain offences, including aggravated and commercial fraud, aggravated dishonesty and misappropriation and bribery, with the intent to hide or conceal their illegal origin or to assist another person involved in such criminal activity to escape the legal consequences of their act and by any person who hides or conceals the origin of any assets that are the proceeds of certain offences;
  - any person who hides or conceals the origin of any assets that are the proceeds of the specific offences mentioned above; or
  - any person who knowingly acquires, possesses, transforms, transfers to a third person or in any other form utilises any assets that are the proceeds of one of the specific offences (Section 165 Austrian Criminal Code).

1.4 Limitation Periods

Limitation Periods for Civil Law Claims

Periods of 30 and three years

As a rule, the limitation period is 30 years but through numerous exceptions, most claims are subject to a shorter period of three years. The statute of limitations period generally commences when a right could have first been exercised.

Claims for damages

Time-wise, there are two restrictions to bringing damage claims.

First, there is the "subjective" limitation period. This starts with knowledge of the damage and the identity of the party that caused the damage (Section 1489 Austrian Civil Code) and ends after three years, unless the damage was caused by a crime above a certain threshold in severity (such as aggravated fraud or commercial fraud, see **1.1 General Characteristics of Fraud Claims**). In this case, a 30-year period applies (Section 1489 Austrian Civil Code).

Independent of any knowledge by the victim, after 30 years, any compensation claim is time-barred.

According to settled case law, the 30-year period applies only to the perpetrator but not to third parties who are liable for other person's actions. However, according to recent case law,

a company can be held liable for the conduct of its director for up to 30 years if such conduct is attributable to the company under the Act on Responsibility of Legal Entities (*Verbandsverantwortlichkeitsgesetz*) (Austrian Supreme Court 6 Ob 239/20w).

Claims for unjust enrichment

Claims for unjust enrichment are subject to the 30-year limitation period. It starts on the day of the unjust enrichment.

Limitation Periods for Criminal Law Claims

The statute for criminal liability depends on the level of the penalty (Section 57 Austrian Criminal Code). For felonies such as murder, there is no statute of limitations. For crimes like fraud, the statute of limitations is, for example:

- ten years for aggravated fraud or dishonesty causing damage of more than EUR300,000, or bribery involving payment of more than EUR50,000;
- five years for aggravated fraud committed by using falsified documents or causing damage of EUR5,000–300,000, or bribery involving payments of between EUR5,000–50,000; and
- one year for "normal" fraud causing damage of less than EUR5,000.

The period commences with completion of the offence.

1.5 Proprietary Claims against Property

In circumstances where a claimant seeks recovery of property misappropriated or fraudulently induced to be transferred, the following rules apply.

Civil Law

Where a transfer of ownership is induced through deception, the transfer is voidable. Section 870 Austrian Civil Code provides that the contract is deemed void ab initio, and the transfer is ineffective. The victim can claim the return of the property in rem, which primes competing insolvency creditors.

However, third parties can acquire a fraudulently obtained item in good faith from a fraudster (Section 367 Austrian Civil Code). In such a case, the victim is left with a claim for damages and/or unjust enrichment against the fraudster, a claim in personam which does not take precedence in insolvency.

If a fraudster benefits from the fraudulently obtained thing (sells it at a profit, earns interest, etc), the victim can claim for surrender of these benefits based on unjust enrichment (claim in personam).

If the fraudulently obtained things are mixed with other fungible assets of the fraudster (eg, similar goods in a warehouse or money in an account), the victim loses ownership of its individual things (Section 370 Austrian Civil Code).

However, if the victim's assets can be distinguished from the fraudster's assets (eg, in a warehouse) and quantity ownership is identifiable in this distinguishable unit, the claim (in rem with precedence in insolvency) may lie for a separate share in the mixed assets ("quantum vindication", Sections 371, 415 Austrian Civil Code).

On the other hand, if a fraudster has sold the goods or if the money becomes part of the general account from which payments are made, the victim no longer has a claim in rem, but only a claim for unjust enrichment and/or damages (claim in personam).

Criminal Law

Subsidiary to a victim's claims, profits from fraud (and other criminal acts) are subject to forfeiture under criminal law. According to Section 20

Austrian Criminal Code, any "assets acquired for or through an offence are to be forfeited to the court [...]. Forfeiture also extends to any benefits and replacement value of assets that are to be forfeited."

1.6 Rules of Pre-action Conduct

There is no general prerequisite to filing a lawsuit. Nevertheless, it is standard practice to send a demand letter to the potential defendant requesting restitution. If the potential defendant immediately complies upon receipt of the lawsuit or does not dispute the claim, the successful plaintiff risks bearing the costs for the (unnecessary) proceedings.

In some cases, alternative dispute resolution mechanisms are foreseen as a prerequisite to filing a lawsuit. These exceptions are, however, not relevant for victims of fraud; they relate, for example, to disputes between members of professional groups subject to a code of conduct (eg, lawyers or medical doctors) or to specific types of claims (eg, against a landlord).

1.7 Prevention of Defendants Dissipating or Secreting Assets

There are different instruments available in civil and criminal law.

Civil Law

Request for injunctive relief

The Enforcement Act provides for injunctive relief to prevent frustration of future enforcement (Section 378 et seq).

A creditor can apply for a preliminary injunction together with its claim (without extra court fees), or prior to initiation of formal legal proceedings, during such proceedings and – if foreign courts have jurisdiction – independently from legal proceedings in Austria. The court fees for such an independent injunction request are 50% of the court fees for a lawsuit.

Available injunctions

The Enforcement Act distinguishes between preliminary injunctions for securing monetary claims, securing other claims or rights.

Injunctions for securing monetary claims are available for: orders to deposit monies at court, freeze orders affecting movable and immovable assets, and orders against third-party debtors (ie, debtors of the defendant) enjoining them not to pay the defendant. By order against the applicable bank, bank accounts can also be frozen (Section 379 paragraph 3 Enforcement Act).

Effects and sanctions

Freeze orders regarding immovable assets are registered in the land register and have an in rem effect. Freeze orders regarding movable assets do not have an in rem effect. If the debtor or a third party against whom the order is directed violates an injunction, the court may impose fines or, in extreme cases, order imprisonment (Section 355 Enforcement Act).

Requirements

Injunctive relief for the purpose of securing monetary claims requires that the judgment would have to be enforced in a state where enforcement is not secured neither international agreements or by European Union law or that the debtor is likely to frustrate or significantly obstruct enforcement by damaging, hiding or removing assets (Section 379 paragraph 2 Enforcement Act). Austrian courts require that the particular conduct of a party indicates a strong and concrete likelihood in this regard.

Damages

If the relief sought is ultimately rejected and the defendant suffers damage as a result of an interim injunction, the claimant is strictly liable for the damages caused by the injunction. A court may grant an injunction under the condition of

a security for this possibility (Sections 390, 394 Enforcement Act).

Criminal Law

A victim can secure claims by filing a criminal complaint. Provided the public prosecutor starts criminal proceedings, the victim can join these proceedings as a party. The private parties have the right to request securing and seizure, among other things, for the purpose of securing private law claims or to secure forfeiture. These measures may be ordered in the form of a temporary establishment of the power of disposition over items, the prohibition to surrender, to pawn or sell items, real estate or other assets (Sections 109, 110 Criminal Procedure Code).

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

Civil Law

Procedures to require a debtor to give disclosure of their assets are only available in enforcement proceedings, if enforcement on movable property or an inquiry with social security (see next paragraph) were unsuccessful (Sections 47, 48 Enforcement Act).

In enforcement proceedings, certain third parties may also be requested to disclose assets of the debtor, in particular, social security agencies regarding salaries and other types of income (Section 295 Enforcement Act), banks regarding the debtor's account and other third-party debtors (Section 294 Enforcement Act). For a request to a bank, the creditor does not have to provide an account number but only the name of the bank. The creditor may request information from a list of banks at which they suspect the debtor holds an account. Case law allows the creditor to provide a list of 12 banks; beyond that number, the request could be dismissed as an impermissible suspicion seizure. A list of 12 banks certainly covers the most important players in the banking market.

Moreover, a creditor may claim rendering of accounts in respect of certain transactions. For example, a principal may claim rendering of accounts from their agent (Section 1012 Austrian Civil Code). However, this action does not serve to secure claims, but rather, to quantify monetary claims, and the court reaches the final decision on this question in "normal" civil proceedings.

Criminal Law

Criminal law provides the disclosure of information contained in the registry of bank accounts and disclosure of information about bank accounts and bank transactions (Section 116 Criminal Procedure Code). Such an inquiry has to be made by the public prosecutor and approved by the competent criminal court. It is permissible if it appears necessary to enquire about criminal offences above a certain level of severity (such as fraud with damages of more than EUR5,000).

2.2 Preserving Evidence

Quick preservation of evidence is often critical to enforce claims in fraud cases. In Austria, while civil proceedings provide some measures to preserve evidence, criminal proceedings are considerably more effective.

No Pre-trial Discovery

Under Austrian procedural rules, the taking of evidence is regarded as a sovereign act, only performed by the courts. There is no pre-trial discovery by the parties to obtain disclosure from the opposing party or from third parties, or to preserve evidence.

Search by Parties

Austrian law does not allow parties to conduct physical searches at a defendant's residence or place of business. If such searches were to be undertaken without the defendant's consent, they would trigger criminal liability.

(Pre-trial) Evidence Preservation

Where there is a risk that evidence might be lost, the use of evidence might be impaired, or if for any other reason the current condition of evidence needs to be determined, a party may request the initiation of pre-trial preservation proceedings (*Beweissicherung*). Evidence preservation can also be requested during a trial.

Evidence protection proceedings are similar in speed and scope to interim injunction proceedings. Evidence protection orders can be issued ex parte where risk is imminent (periculum in mora). The court may only take those steps that are necessary to preserve the evidence – eg, to perform and document a visual inspection of physical evidence, or hear a material witness – for later use in court proceedings.

The evidence to be preserved must be freely accessible; evidence preservation proceedings do not provide any coercive measures that could force the opponent or any third party to co-operate.

Evidence preservation is not available for documents. There is no controlling case law on whether electronic evidence and hard drives – which are often central pieces of evidence in cases of fraud – qualify as documents.

Where evidence preservation is not available – eg, for documents, or where the evidence is in the hands of an unco-operative third party or opponent – Austrian case law allows interim injunctions for the same purpose (see **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**).

Available Measures in Criminal Proceedings

The public prosecutor may (upon authorisation by the criminal court) order house searches and the securing or seizure of objects (including letters and other documents) that might serve as evidence or to secure civil claims, the monitoring of a suspect's communication, etc.

Any person injured by a criminal offence is entitled to access to the criminal file and to make use of such evidence in subsequent civil proceedings. However, for purposes of a criminal investigation in its early (pre-trial) stage, access to files is often subject to certain restrictions.

Suppression of Evidence Is a Criminal Offence

Suppression of any type of evidence that may potentially be subject to disclosure in foreseeable civil, criminal or administrative proceedings is a criminal offence (Section 295 Austrian Criminal Code). Accordingly, as soon as it becomes clear that certain evidence is intended for use in such proceedings, the holder is forbidden to undertake any action that could make such evidence unavailable. This does not apply where the holder has all the rights to the evidence (ie, is the unencumbered sole owner).

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

General Principles of Obtaining Evidence from Third Parties

In Austrian civil proceedings, it is each party's responsibility to produce the evidence necessary to support its case. There are only a few circumstances in which the opposing party or third parties may be obliged to disclose evidence upon one party's request. Since a request for third-party disclosure of documents (see next paragraph) must be made during the main pro-

ceedings, it will always come to the immediate attention of the opposing party.

While third parties can be ordered by the court to provide documents, it is even more difficult to obtain access to other forms of evidence from third parties.

Obtaining disclosure of documents from third parties during ongoing proceedings

In ongoing civil proceedings, a party may request the court to order a third party to provide a specific document if:

- substantive law requires the third party to produce the document; or
- the document qualifies as a "joint deed" of the third party and the party requesting disclosure (eg, a contract).

The requesting party must:

- substantiate that the document is in the possession of the third party; and
- accurately describe the contents of the document.

The court may exercise coercive means should a third party fail to comply with a relevant court order. This is noteworthy because a party's failure to comply with a production order does not trigger any coercive measures. The only consequence if a party to the proceedings fails to produce documents as ordered is the risk of a potentially adverse inference being drawn when the court weighs the availability of the evidence.

These rules of disclosure are also fully applicable to so-called "objects of information" (*Auskunftssachen*), ie, with no written manifestation of thoughts, such as a sound recording. They are not, however, applicable to "objects of visual inspection" (*Augenscheinsgegenstand*), ie, objects that do not represent thoughts, such as a disk or hard drive (see next paragraph).

Preserving evidence in the hands of third parties

Evidence other than documents that is in the hands of third parties can be preserved by way of an interim injunction. The scope is, however, quite restrictive. Such interim injunction is only available where the third party has an obligation to the opposing party (eg, an obligation to deliver the evidence to the opposing party). The interim injunction may not interfere with any rights the third party may have or require the third party to undertake any acts. Where evidence preservation is available (eg, for physical evidence, see **2.2 Preserving Evidence**), evidence preservation rules take priority.

The use of preserved evidence requires that there is an enforceable claim against the third party under substantive law.

Criminal investigations

If there is a suspicion of criminal conduct, discovery may also be obtained by initiating a criminal investigation. Evidence, particularly in the form of documents, obtained by the criminal authorities (eg, through house searches) may be used in civil proceedings. Any (potential) victim of a criminal offence, as well as third parties with qualified legal interest, may be granted access to the contents of a criminal file.

2.4 Procedural Orders

Ex Parte Orders

As a general principle, the intended defendant has a right to be heard before any procedural orders regarding evidence are issued. Ex parte orders can, however, be obtained in limited cases in which the applicant is able to substantiate that there is an imminent risk that the evidence will otherwise be suppressed, destroyed or impaired (periculum in mora).

Evidence preservation

Evidence preservation orders can be obtained ex parte, ie, without notice to the respondent, where the applicant substantiates that there is imminent risk (periculum in mora), ie, that the evidence will otherwise not be available for reasons outside of the applicant's sphere. In such cases, the court may issue the evidence preservation order without hearing the respondent. It may, moreover, order that the evidence be preserved/taken before the order is served on the respondent.

Where respondents are not heard before the order is issued, they have the right to be heard in the appeal proceedings.

Interim injunctions

Upon request of the applicant, injunctive relief can also be awarded ex parte. The respondent will not be heard to avoid frustration of the intended – interim – enforcement act.

If injunctive relief is granted ex parte, the respondent has a full right to be heard upon challenge (*Widerspruch*); such proceedings do not, however, suspend the enforceability of the interim injunction.

If the respondent raises an appeal, the court may, upon application, suspend the effect of the interim injunction if the damage to the applicant is "not disproportionate" and otherwise the purpose of the appeal would be frustrated.

Applicants face a no-fault damage claim if the claim in the main proceedings fails or the applicant fails to initiate main proceedings within the deadline set by the court, or if the interim injunction turns out to be unjustified for any reason. Moreover, the court may issue a penalty if the application was frivolous.

Value of Evidence Obtained Ex Parte

If evidence was preserved/obtained without the intended defendant's participation – eg, if a visual inspection is undertaken in the absence of the defendant – the value of the evidence will generally be considerably lower, which the court must weigh.

2.5 Criminal Redress

Private Party Joinder (Privatbeteiligung)

Besides filing a claim for damages in a civil court, an injured party that is the victim of a criminal offence from which it has suffered damages, can join the criminal proceedings as a private party (Section 65 paragraph 2 Austrian Code of Criminal Proceedings).

A request for a victim's accession through private joinder can be submitted to the prosecution authority or the police and – after an indictment – to the criminal court.

During court proceedings, a criminal court may award damages if:

- the perpetrator is found guilty;
- taking evidence regarding the private joinder does not substantially delay the proceedings; and
- the amount of the claim can easily be assessed by the court.

In practice, this is a timely and cost-effective way to seek redress. While a private joinder is pending in criminal proceedings, civil claims will not be time-barred if the civil lawsuit is swiftly (ie, without delay) submitted to the civil court once the criminal proceedings have been terminated or where the court failed to award damages. If suspicion of a criminal offence arises in ongoing civil proceedings, the civil court may order an interruption of the proceedings until the criminal proceedings have been terminated (Section 191 Austrian Code of Civil Proceedings). However,

this is subject to the prerequisite that the investigation and conclusion of the criminal proceedings are likely to have a decisive influence on the decision of the civil proceedings. Under case law, the interruption of the civil proceedings is regarded as an exception to the ordinary course of conduct.

2.6 Judgment without Trial

Civil Proceedings

Default judgment

When a statement of claim is initially filed with an Austrian court, the court will, if it has jurisdiction, serve the statement of claim on the defendant together with an order to respond within four weeks (regional courts) or to attend the preparatory hearing (district courts). If a defendant fails to respond within the deadline or to attend the hearing, the court must issue a default judgment based on the allegations in the statement of claim if requested by the plaintiff, provided process was duly served on the defendant.

The defendant may file a challenge (*Widerspruch*) within two weeks, or an appeal within four weeks of service of the default judgment. Otherwise, the default judgment becomes fully enforceable.

Default judgments can also be obtained through failure of one of the parties to respond at a later stage of the proceedings. This, however, is rare.

Failure of defendant to duly argue its case

Provided the defendant has, at a minimum, filed a response to the statement of claim (regional courts) or participated in the preparatory hearing (district courts), the court may not award a claim merely on the basis of the plaintiff's allegations, ie, without a trial. It must base the judgment on the available evidence, applying its own legal assessment.

Burden of proof

Substantive burdens of proof and allegations govern which party – plaintiff or defendant – must allege and prove which elements of the relevant claim. The initial burden of proof is typically on the party wishing to rely on the fact it seeks to establish.

Criminal Proceedings

A criminal judgment may be issued in the absence of the defendant only if:

- the charge is a misdemeanour (threat of punishment not exceeding three years' imprisonment);
- the defendant has been questioned on the charge before trial, ie, in the course of the criminal investigations; and
- the defendant has been personally served with the summons to the trial.

2.7 Rules for Pleading Fraud

Professional Ethics Rules for Filing Criminal Complaints

Under Austrian professional ethics rules, lawyers may not allege criminal acts or (threaten to) file a criminal complaint without having conscientiously reviewed the facts and legal aspects. Accordingly, when informed by clients of a criminal act such as fraud, the lawyer is required to review plausibility. It will often be necessary to make certain simple queries. Additionally, criminal complaints may not be filed where to do so would be disproportionate to the claims being pursued.

Civil and Criminal Liability for Libel and Defamation

Allegations of criminal acts such as fraud may also trigger civil liability for libel or defamation of business reputation. The injured party can also request (interim) injunctive relief. If the statement is made in public, the injured party can demand that the allegation is publicly withdrawn.

Moreover, defamation can trigger criminal liability under various offences, depending on whether:

- the allegation qualifies as a false accusation, where the injured party is at risk of official prosecution (Section 297 Austrian Criminal Code, up to five years' imprisonment);
- the false allegation damages or jeopardises the credit or professional life of the injured party (damage to credit under Section 152 Austrian Criminal Code, up to six months' imprisonment); or
- the false allegation is made publicly and degrades the other person in public opinion (defamation under Section 111 Austrian Criminal Code, up to six months' imprisonment).

2.8 Claims against "Unknown" Fraudsters

In civil proceedings it is not possible to file claims against "unknown parties".

Criminal complaints, on the other hand, can be filed against "unknown" suspects.

2.9 Compelling Witnesses to Give Evidence

Compelling Witness Testimony in Civil Proceedings

Compelling appearance in court

Under Austrian civil procedural rules, parties cannot be compelled to subject themselves to an examination by the court. Their failure to do so is, however, taken into consideration by the court when weighing the evidence.

Witnesses domiciled in Austria are obliged to respond to a witness summons. If a summons has been duly served on a witness, but that witness fails to appear without an excuse, the court must issue a further summons and impose a fine. If the witness fails to appear at the next hearing, the court must double the fine (maximum EUR2,000), issue further summons for another hearing and order that the witness be brought to court by the police.

These consequences must already be specified in the initial summons; the templates used by the Austrian courts include this admonition.

The court may also order a witness to pay costs incurred by their failure to appear (eg, if a further hearing becomes necessary solely for that witness' testimony). The witness is also liable under civil law for damages incurred.

Compelling testimony

If the witness appears but refuses to respond to questions without justification, the court can issue a fine of up to EUR100,000 per order or even imprisonment of up to six weeks.

The law defines a multi-step procedure before issuing a fine in a hearing, in order to ensure that the witness is entirely aware that they do not have the right to refuse testimony and that the witness has been duly heard. Imprisonment is very rare.

Compelling Witness Testimony in Criminal Proceedings

In criminal proceedings, the provisions concerning witnesses are identical to those of civil proceedings, apart from (i) witnesses may be fined up to EUR10,000 or face imprisonment for up to six weeks for unjustified refusal to testify; and (ii) the defendant may be placed on the alert list and arrested to be brought before the court if they fail to appear for questioning or for the trial.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Attribution of Knowledge and Unlawful Acts to the Company under Civil Law

Unlawful and culpable acts undertaken by officers of a limited liability company or stock corporation (managing directors, members of the supervisory board and "representatives") are attributed to the company they represent, provided these acts were undertaken in the performance of their duties to the company. An objective connection suffices. Accordingly, any fraudulent acts perpetrated by such officers and representatives are attributable to the company.

Any knowledge of managing directors/members of the management board is directly attributed to the company, regardless of where such knowledge was obtained and whether they have single or collective powers of representation or decision. Only knowledge obtained by supervisory board members and other "representatives" in the context of their official function is attributed to the company.

Attribution of Unlawful Acts to the Company under Criminal Law

Austrian criminal law is historically based on the general principle that only humans – and not legal fictional persons – are capable of criminal acts. Since 2006, the Act on the Responsibility of Legal Entities (*Verbandsverantwortlichkeitsgesetz*) has provided that legal entities are criminally liable if "decision makers" are guilty of a criminal act:

- that was undertaken for the benefit of the company; or
- that violated obligations incumbent on the company.

"Decision makers" include:

- managing directors/members of the management board;
- holders of powers of procura;
- members of the supervisory board; and
- other persons with a decisive influence on the management of the company.

In comparison, the liability of other staff is much reduced. In their case, the prosecution authority must show, among other things, the absence of a robust compliance system.

The public prosecutor must consider the conduct of the corporation before and after the alleged offence. A robust compliance system along with full co-operation of the legal entity might provide sufficient reason for the prosecutor to terminate the criminal proceedings without imposing a fine. In addition, an employer's directives requiring employees to adhere to the law are recognised as a mitigating factor for sentencing purposes.

3.2 Claims against Ultimate Beneficial Owners

The (direct or indirect) shareholders of a stock corporation and of a company with limited liability are generally not personally liable for the acts or liabilities of the company.

Piercing the "Corporate Veil"

The "corporate veil" is, however, pierced in the following – exceptional and rare – circumstances:

- material undercapitalisation – where a company is manifestly and clearly undercapitalised to the extent that the failure of the

company is highly probable, the shareholders may become liable for that company's debts;
- where the personal assets of the shareholder(s) and of the company are so co-mingled that they cannot be separated (generally only in cases with a single shareholder);
- where a shareholder acts as a factual or "shadow" director and decisively interferes with the management of the company, especially if this causes insolvency; or
- where critical assets are withdrawn or business opportunities are appropriated by shareholders in such a way that insolvency results.

Accordingly, where a shareholder acts as a "shadow" director of the company perpetrating the fraud, for example, or where the company was initially established (and materially underfinanced) specifically in order to perpetrate fraud, there is a possibility that the shareholders will be held liable for victims' claims under civil and corporate law.

3.3 Shareholders' Claims against Fraudulent Directors

Derivative Actions for Damages

The general rule is that fraudulent directors are liable for damages incurred by the company only to the company itself, and not to shareholders. This includes any damage in the value of the company that results in "reflexive" damage to the value of the shares in the company. Such claims are pursued directly by the company.

Limited liability company

Shareholders of an Austrian company can bring a specific form of derivative action: if a limited liability company (GmbH) refuses to pursue claims against the officers, shareholders holding a minority share of at least 10% or over EUR700,000 can directly enforce such damages claims themselves on behalf of the company. In other words, the claimants must request payment to the company and directly to the claimants, themselves.

Stock corporations

There is no corresponding actio pro socio for stock corporations (AG). Claims on behalf of the stock corporation can only be brought by the company itself, if enforcement of such claims is decided with a simple majority in the general assembly or is demanded by a minority of 5% respective 10%.

Further minority rights

These rights are accompanied by further minority rights, such as the right to demand appointment of special auditors, the right to block waivers or settlement of claims against directors and the right to enforce dismissal of supervisory board members or managing directors for cause.

Direct Harm to Shareholders

Where the directors harm the shareholders directly – and not just by reducing the value of their participation in the company – the shareholders may directly hold the officers liable; the case law on this is developing. Cases include violation of "protective laws" (*Schutzgesetze*) such as financial disclosure requirements, embezzlement or fraud.

Recently, many such claims have been based on money laundering. However, case law currently gives no guidance defining the circumstances in which money laundering creates a legal basis for a civil damage claim by victims of the predicate offence.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

Civil Proceedings

General

In domestic cases, the jurisdiction of Austrian courts is determined by the Law on Jurisdiction (*Jurisdiktionsnorm*). In most international cases, the jurisdiction of Austrian courts is determined by Regulation (EU) No 1215/2012 (the recast Brussels Regulation).

These provisions establish the jurisdiction of all types of courts. Whether a specific court is competent to hear a case may also depend on other factors such as the type of dispute (eg, to establish the competence of the commercial courts to hear a case).

Establishing jurisdiction

The general rule is that Austrian courts have jurisdiction if the defendant has its seat in Austria. In addition, numerous other factors are considered to establish the jurisdiction of Austrian courts, including:

- whether Austria is the place of performance of a contract;
- the place where the damage occurred; or
- if the dispute relates to real estate located in Austria.

Directly after receiving the claim, the court must determine and verify its jurisdiction a limine, even before service of the claim on the defendant. If the court lacks jurisdiction, the claim is dismissed immediately. Following service of the claim, the (overseas) defendant may bring dispositive motions based, eg, on procedural grounds such as failure of jurisdiction or improper venue.

Service abroad

A party that is located outside Austria can be served either in accordance with Regulation (EC) No 1393/2007 on the service of judicial and extrajudicial documents in civil or commercial matters (within the European Union), or in accordance with the Hague Convention for Service of Process or bilateral treaties containing provisions on the service of documents (outside the European Union).

Austrian law also provides supplementary rules, according to which, service of documents is allowed by means of postal service in a number of states. Otherwise, service is effected through diplomatic channels (ie, embassies or consulates).

Criminal Proceedings

Offences committed abroad are subject to Austrian criminal law if:

- the offence is also punishable under the law in the location of the offence;
- the offender is Austrian or is arrested in Austria and cannot be extradited; and
- none of the exceptions in Section 65 paragraph 4 of the Austrian Criminal Code apply.

Austrian jurisdiction also applies for certain offences of significant importance, regardless of the criminal law in the location of the offence, eg, corruption, economic espionage, terrorism and particular other major crimes, criminal offences, and offences against an Austrian government official (Section 64 Austrian Criminal Code).

The power of the Austrian criminal authorities ends at the Austrian border. Therefore, Austrian authorities and courts rely heavily on international co-operation for the enforcement of their authority outside the country. In the area of co-operation within the EU, for example, the Federal Law on Judicial Co-operation in Criminal Matters

with the Member States of the European Union (EU-JZG) stipulates extensive possibilities for cross-border enforcement and the execution of orders freezing property or evidence.

5. ENFORCEMENT

5.1 Methods of Enforcement

Enforcement Proceedings

Austrian enforcement proceedings are bifurcated into two steps: (i) authorisation proceedings (*Exekutionsbewilligung*), and (ii) the actual enforcement (*Exekutionsvollzug*). Both fall within the competence of the enforcement court.

Once a creditor has obtained an enforceable title, it can apply for enforcement at the competent district court (*Bezirksgericht*) at the debtor's domicile. If the debtor has no domicile in Austria, the court where the asset that is the subject of the enforcement has jurisdiction (in the case of garnishment orders – at the third-party's domicile). The court where immovable property is registered always has jurisdiction for enforcement pertaining to immovable property.

The application for enforcement is done by means of official standard forms. The court of enforcement will only examine the formal requirements based upon the application and – if it is satisfied that all formal requirements are met – will authorise enforcement by means of a court order.

In Austria, actual enforcement, ie, implementation of the enforcement measures, also falls within the competence of the court and its officers. There is no private enforcement.

Enforcement Measures

Austrian law provides a number of enforcement measures and allows the creditor to choose which enforcement measures will be implemented. The creditor may also combine several measures, if this is appropriate. The law provides for certain bundles of enforcement measures for monetary claims: a "small bundle" (movable goods and securities, attachment of salary, affidavit), which applies unless the creditor opts out, and an "extended bundle" (additionally all further assets and any other receivables). If the latter is chosen, an enforcement administrator – similar to an insolvency receiver – is appointed, whose function it is to enforce against all available assets until the creditor has achieved full satisfaction. For higher-value claims, creditors may choose to request an administrator.

Only those enforcement measures listed in the Enforcement Act are available. Furthermore, certain enforcement measures are only available for certain types of claims. The available enforcement measures are categorised according to whether they serve to enforce (i) the monetary claims or (ii) the specific actions of the debtor.

Enforcement of monetary claims

Monetary claims can be enforced by means of measures directed against immovable property, movable property, claims of the debtor against third parties, or rights such as intellectual property.

Immovable property is real estate, including the buildings on it, unless these are non-permanent structures. The predominant enforcement measures available are:

- establishment of lien;
- foreclosure; and
- administration.

Movable property refers to all objects that can be moved from one place to another without damage:

- attachment and auction; and

• surrender of specific property.

The monetary claims of the debtor against third parties are, in most cases, claims against the banks holding accounts of the debtor and attachment of earnings (salary or wages) of the debtor. For these cases, the creditor is not obliged to name a specific bank account or name the employer, instead the court will order the bank or request the social security agencies to provide this information.

Attachment and collection

This measure consists of two orders:

- one, forbidding the third-party debtor to make payment to the debtor (prohibition of payment); and
- another, forbidding the debtor to dispose of their claim against the third-party debtor (prohibition of disposal).

The collection (and then transfer to the creditor) is generally effected by bank transfer.

Rights or intangible assets of the debtor may also be the subject of enforcement proceedings. The most common cases are intellectual property or shares in companies.

Enforcement of non-monetary claims

Non-monetary claims are, in general, specific actions that the debtor is obliged to undertake (or cease and desist from).

- Substitution – this measure obliges the debtor to undertake an act within a specified time. If the debtor fails to do so, the creditor may have this act performed by another person and request enforcement of the costs incurred as a monetary claim.
- Penalisation – if the act can only be performed by the debtor or the debtor violates its obligation to cease and desist, the court will first threaten and can then impose penalties in the form of fines or imprisonment.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

Civil Proceedings

Oral testimony

In Austrian civil proceedings, the principle of the privilege against self-incrimination is well established. As a party to the proceedings, the defendant cannot be forced to testify.

In so far as the defendant refuses to answer questions without sufficient reason (eg, to protect themselves or family members from criminal prosecution), the court may take this refusal into account in its decision-making process, carefully considering all the circumstances.

Document production in the proceedings

In civil proceedings, a party may be ordered by the court to produce evidence at its disposal, if the court considers such evidence material, on the court's own initiative (this rarely occurs) or upon request by the other party.

The party ordered to produce a piece of evidence is entitled to object to the order in order to protect:

- family affairs;
- the party's duty of preserving honour;
- itself or third parties from criminal prosecution;
- legal privilege; or
- business secrets.

However, the party may not refuse to produce the requested evidence if:

- it previously referred to the piece of evidence (mostly documents) in the proceedings;
- substantive law requires the requested party to produce the evidence (this also applies to evidence in the possession of third parties); or
- the evidence is in the form of a document and may be considered to be of joint use with respect to both parties (eg, a contract) – this also applies to evidence in the possession of third parties if the piece of evidence is of joint use with respect to the third party and either party to the litigation.

If a party does not comply with the court order to produce, no enforcement is available. The court will consider the refusal in its assessment of evidence and adverse inferences may be drawn by the court as finder-of-fact.

Criminal Proceedings

Accused individuals or companies have a right to avoid self-incrimination. In the case of a corporation, the managers (persons in charge) as well as the employees suspected of having committed an offence are treated as if accused and can rely on the right to avoid self-incrimination.

It is forbidden to use coercive measures (or promises or misleading statements) to induce the accused to make a statement (Section 7 paragraph 2 Austrian Code of Criminal Proceedings). According to Section 166 of the Austrian Code of Criminal Proceedings, forced testimony is classed as prohibited evidence and is therefore deemed null and void.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

Civil Proceedings

Discovery

There are no (pre-trial) discovery proceedings. Taking evidence is considered a sovereign task of the court and is conducted exclusively by the court at the request of the parties. A party may be ordered by the court to produce evidence at its disposal. The prerequisites for an order to produce documents upon request are:

- the requesting party can present plausible reasons for the allegation that the document is in the possession of the other party;
- the requesting party either provides a copy of the document it is requesting (to be produced in the original) or can accurately and fully describe the content of the document (it is not permissible to request a category of documents); and
- the requesting party must state which facts it expects to prove with the requested document.

Legal privilege

Austria recognises the concept of legal privilege. Members of legal professions – particularly attorneys-at-law – must refuse to testify with respect to any one of their mandates before any authority unless released by their client. Neither the party nor its counsel can be forced to produce client-attorney work product. At least in theory, no adverse inferences may be drawn by the court from such a refusal. Client-attorney correspondence and attorney work product are protected by legal privilege irrespective of where such documents are located. In practice, parties often feel compelled to waive their privilege, to avoid the impression that there is something being improperly hidden.

Criminal Proceedings

Attorney work product and attorney-client communications are protected in several ways. Attorneys (and a small number of other professionals) have a legal duty of confidentiality and a right to refuse to give evidence (Section 157 Austrian Code of Criminal Proceedings). The duty may not be circumvented. This prohibits the seizure of attorney documents and the information con-

tained therein at the attorney's premises and, since 2016, also at the premises of clients under suspicion, or accused, in criminal proceedings. Attorney-client confidentiality only extends to (i) the attorney's work product, and (ii) attorney-client communications created for the purpose of defending the client; not to previously existing evidence.

Concerning the seizure of attorney documents at the attorney's premises, any person subject to or present during such action may object to the implementation of the measure. In that case, documents and data carriers must be sealed and presented to a court, which must decide promptly whether the evidence is protected by attorney-client confidentiality (Section 112 Austrian Code of Criminal Proceedings).

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

The concept of punitive damages is foreign to Austrian law (as it is to many other continental European jurisdictions). Punitive damages, if contained in a foreign judgment, may be considered to be against public policy and may therefore be unenforceable in Austria.

7.2 Laws to Protect "Banking Secrecy"

Banking Secrecy in Austria

The Austrian banking secrecy obligation is strict. The statutory obligation contained in Section 38 of the Austrian Banking Act prohibits credit institutions, their shareholders, members of the credit institutions' corporate bodies, employees and all other individuals acting on behalf of the credit institution from disclosing, or making use of, secret information that has been entrusted or made accessible to the institution solely due to the institution's business relationship with the customer.

Consequently, persons subject to banking secrecy are obliged not to disclose, or make use of, secret information most specifically related to customers' names and account information like balances or transactions. Once the obligation is established, it may only be disregarded under certain conditions, particularly when there is a specific legal justification for doing so or the client provides express written consent prior to any disclosure.

Exemptions

The obligation to maintain banking secrecy does not apply, inter alia, if the bank's customer explicitly agrees in writing that certain confidential data may be disclosed, or if there is a legal justification that requires disclosure. Such customer's waiver of the secrecy obligation requires the explicit prior written consent of the client. Thus, a general consent contained in the general terms and conditions of the bank is not deemed to be sufficient.

In addition, Section 38, paragraph 2 of the Austrian Banking Act contains a list of exemptions when otherwise-protected information can be disclosed. Inter alia, this applies:

- vis-à-vis public prosecutors (with regard to basic account information) and the criminal courts (with regard to basic and extensive account information) in connection with criminal proceedings; or by the fiscal authorities in connection with initiated criminal proceedings for intentional fiscal offences, excluding fiscal misdemeanours;
- in the case of disclosure obligations in connection with anti-money laundering provisions (eg, according to Section 41 paragraphs 1, 2 Austrian Banking Act); and

- in the case of obligations to provide information to the Austrian Financial Market Authority pursuant to the provisions of the Austrian Securities Supervision Act 2007 and the Austrian Stock Exchange Act.

The list of exemptions in Section 38, paragraph 2 of the Austrian Banking Act is not exhaustive. Additional exemptions to the banking secrecy obligation may also be made exceptionally on a case-by-case basis by considering and weighing the interests of the credit institution (or also, of a third person) in disclosing the secret, against the customer's interests in keeping the secret.

7.3 Crypto-assets

The Austrian criminal law understands the concept of property as the totality of all economically significant and arithmetically ascertainable values. Crypto-assets are regarded as such values and, accordingly, are treated as property. As a consequence, crypto-assets are potential objects involved in criminal offences protecting the property.

In the past, crypto-assets had faced some protection issues: some offences included in the Austrian Criminal Code protect only physical things, an unlawful "taking away" of crypto-assets as non-physical objects could not be punished as theft (Section 127 Austrian Criminal Code). Moreover, the legal definition of "non-cash means of payment" (Section 74 Austrian Criminal Code) did not specifically encompass crypto-assets as such. This issue has been solved as of 2021, through the implementation of the Directive (EU) 2019/713 on combating fraud and counterfeiting of non-cash means of payment: the definition of non-cash means of payment (Section 74 Austrian Criminal Code) has now been extended to include virtual currencies. Since implementation, crypto-assets are covered by the provision as non-cash means of payment effective as of December 2021. Thus, the taking away of crypto-assets is covered by the offences utilising non-cash means of payment (Section 241a et seq Austrian Criminal Code).

The Austrian criminal law understands cryptocurrencies as digital means of payment to which the subject has access solely through the use of electronic keys, thus cryptocurrencies are regarded as data. According to Section 112 of the Criminal Procedure Code, the public prosecutor's office is entitled to seize data.

KNOETZL is Austria's first large-scale dispute resolution powerhouse dedicated to prevailing in high-profile cases. KNOETZL's diverse expertise encompasses civil, commercial, sovereign, corporate and fraud litigation, focusing significantly on liability claims, corporate banking (including M&A, financing and joint venture disputes), insurance and financial derivatives cases, investor protection, digital transformation, data protection and social media, business and political crime, asset-tracing and provisional measures, such as freezing orders and attachments, in the domestic and international contexts, and in enforcement of foreign judgments and arbitral awards. The firm's practice covers international commercial arbitration, investment protection, arbitration-related court proceedings and mediation, and KNOETZL is well regarded for its disputes work at the intersection of civil and criminal matters. Elite international law firms, corporate decision-makers and general counsel frequently turn to KNOETZL to act as their Austrian disputes counsel.

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BRITISH VIRGIN ISLANDS

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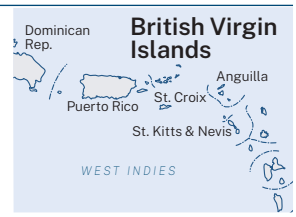

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

As in English common law, while fraud is not itself a tort, it may be a necessary ingredient in other torts – eg, fraudulent misrepresentation or unlawful means conspiracy. The term "fraud" encompasses a variety of actions which must each have the key element of dishonesty.

Proof of intent and dishonesty are key ingredients to any fraud claim. The dishonesty test applicable in the British Virgin Islands (BVI) is an objective one. The defendant's knowledge of the transaction must have been such as to render his participation contrary to normally acceptable standards of honest conduct.

In the Privy Council decision of Barlow Clowes International Limited v Eurotrust International Ltd [2006] 1 WLR 1476, the court confirmed that the test for dishonesty was objective. This case was followed in the BVI decision of Akai Holdings v Brimlow Investments (BVIHCV 2006/0134).

More recently, in the UK decision in Ivy v Genting Casinos (UK) Ltd [2017] UKSC 67, the court clarified that the test is objective and confirmed the end of any subjective test.

The common causes of action available for pursuance in instances of fraud are:

- deceit;
- *receipt-based liability – personal claims:*
  - (a) unjust enrichment;
  - (b) conversion;
  - (c) knowing receipt;
- *receipt-based liability – proprietary claims:*
  - (a) breach of fiduciary duty;
  - (b) constructive trust claims (for misappropriation of assets);
  - (c) conspiracy;
  - (d) bribery;
- dishonest assistance;
- fraudulent misrepresentation.

Fraudulent Misrepresentation

An action for fraudulent misrepresentation in the BVI has its roots in the English common law tort of deceit. Therefore, for fraud to be established, it is necessary to prove the absence of an honest belief in the truth of the relevant representation, which in summary means that the maker of the statement made it knowingly, recklessly or without belief in its truth (Derry v Peek (1889) 14 App Cas 337).

The relevant elements for pleading fraudulent misrepresentation are:

- the defendant made a false representation of fact to the claimant;
- the defendant knew that the representation was false, or alternatively, he was reckless as to whether it was true or false;
- the defendant intended that the claimant should act in reliance on the statement; and
- the claimant acted in reliance on the representation and, as a consequence, suffered loss.

Where a claim for fraudulent misrepresentation has been made, the person against whom an allegation of fraudulent misstatement is made would be able to defeat such a claim if he is able to prove that there was at all times from the making of the statement an honest belief by him that what he was saying was true.

Deceit

If the fraudulent misrepresentation was such that a victim was induced to pay money or hand over assets, then in addition to a claim for fraudulent misrepresentation, a tortious claim for deceit may also accrue. The victim will in these cir-

cumstances be entitled to seek compensatory damages.

Bribery

The tort of bribery is a long-recognised form of malfeasance in BVI common law. A victim of bribery will be able to bring a cause of action against a fraudster where the fraudster pays secret commissions to the victim's (as principal) agent and where the principal has no knowledge of the payment. The victim of a bribe will not be required to show that the payment actually induced its agent to act in any particular way which is not in the interests of the principal – this inducement will be presumed.

Misappropriation of Assets

The cause of action of misappropriation of assets is most commonly seen in the context of directors of BVI companies. If, therefore, such a director is shown to have misapplied company assets, or has otherwise acted for an improper purpose or not in the best interests of the company and/or dishonestly, that director will then be in breach of his fiduciary duties, and this will enable the company to pursue a claim against the offending director.

Dishonest Assistance and Knowing Receipt

The key element of the tort of "knowing receipt" is the presence of a fiduciary relationship. Once such a relationship exists, if any person accepts payment of money or receipt of assets in the knowledge that the provision of those items was done in breach of trust or in breach of a fiduciary duty, then the recipient with knowledge of the breach will be liable in "knowing receipt".

Similarly, a person who knowingly assists in a breach of trust or fiduciary duty could be liable for "dishonest assistance".

Conspiracy

This cause of action may be pursued where at least two persons combine to cause loss to a third party (the victim), and a claim in unlawful means conspiracy may be pursued where the combination involves unlawful activity which was intended to injure and which causes loss to the victim.

The statutory provisions which enable fraudulent actions to be pursued are as follows.

- In relation to the conveyance of property made with intent to defraud creditors, any person who has been impacted by such a conveyance will be able to commence proceedings to rescind that transaction pursuant to Section 81 of the BVI Conveyancing and Law of Property Act.
- Additionally, under Section 155 of the BVI Insolvency Act, a liquidator could bring an action against the former directors of a BVI company if he can show that the directors continued to transact business when the company was insolvent. This is referred to in the BVI Insolvency Act as "fraudulent trading".

Although not a cause of action, a proprietary claim for breach of constructive trust often arises in circumstances where there has been a breach of fiduciary duty or some other form of receipt-based liability. It is a flexible remedy, which arises by operation of law and aims at retrieving money which was wrongly taken from a victim.

1.2 Causes of Action after Receipt of a Bribe

In summary, the BVI common law position is that an agent who receives a bribe will hold the proceeds of the bribe as constructive trustee for its principal, and the principal will be treated as the true owner of the property in question.

Depending on the circumstances of the case, there are a number of causes of action that will be available to a principal who has been the victim of fraud perpetrated by its agent, who accepted a bribe and/or a secret commission. These include:

- unlawful means conspiracy; and
- dishonest assistance.

The key elements of bribery are that the agent receives a promise of payment or a payment of commission or receives some other form of inducement by a third party, and that "transaction" is not disclosed to the agent's principal.

A principal who intends to rely on a bribe in bringing an action against an agent will therefore only need to show that his agent received a payment in his capacity as agent of the principal and that that payment or other inducement was not disclosed to him, the principal. The victim of the bribe will also need to demonstrate that he has suffered some loss for which damages are payable, as a result of the bribe.

There is no requirement as a matter of BVI law to show that the persons involved in the bribery scheme believed what they were doing was wrong, nor is it a requirement to show that the agent was influenced by the bribe. There is also no requirement to show that the third party was making the payments in order to induce the agent to act in a particular manner.

Where an agent receives a bribe, the receipt of that bribe will more likely than not engage the agent's fiduciary duties which it owes to its principal, and the mere fact of receipt of the bribe will inevitably mean that there has been a breach of those duties.

Such a breach would entitle the principal to damages, equitable compensation, an account of profits, and a constructive trust over the bribe, as well as over any yields from the bribe.

If damages are to be claimed, the principal would need to show that it has suffered loss.

As regards a claim for unlawful means conspiracy, in order for the principal to be able to file such a claim, the following key ingredients would need to be present:

- there must have been a combination of or agreement between the agent and the bribing third party;
- there must have been an intention of the agent to injure the principal;
- the unlawful acts carried out pursuant to the combination or agreement was a means of injuring the principal;
- the unlawful acts caused the principal to suffer loss.

If a claim for dishonest assistance is to be pursued, the principal would need to establish:

- that there has been a breach of trust or fiduciary duty;
- procurement of or assistance in that breach by the agent; and
- dishonesty on the part of the agent.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Parties who assist or facilitate fraudulent acts may face claims for dishonest assistance, knowing receipt and a claim for conspiracy by unlawful means.

In order to make out a case of dishonest assistance, one has to demonstrate that:

- there has been a removal of the claimant's assets in breach of trust or fiduciary duty;

- the defendant assisted in that breach of trust or breach of fiduciary duty;
- the defendant was dishonest; and
- there has been resulting loss to the claimant.

The test for "dishonesty" in this context is also objective: "Was the conduct of the defendant dishonest by the standards of an ordinary honest person in his or her position?"

Ordinarily, to make out a claim for knowing receipt, the claimant must demonstrate that:

- the assets were disposed of in breach of trust or fiduciary duty;
- the recipient beneficially received the assets which are traceable as representing the claimant's own assets; and
- the recipient's state of knowledge at the time of receipt was such that it is unconscionable for him to retain the benefit, ie, that the defendant knows that the assets are traceable to a breach of trust or breach of fiduciary duty.

Although the cause of action is based on the defendant having received the funds, the claim is not defeated if the defendant has not retained the funds. If he has not retained the funds, not only are the proceeds of the funds traceable, but the claimant has a personal remedy against that knowing recipient.

To make out a conspiracy claim, one must demonstrate the following.

- There was an agreement between two or more parties to injure another. It is important to note that a company can conspire with its directors.
- The parties acted in concert pursuant to the agreement. The courts have held that concerted action can be passive or active but must be more than just facilitation.
- The claimant suffered loss as a result of the actions of the defendants.

In unlawful means conspiracy, the claimant does not need to demonstrate that the conspirators' sole or predominant purpose was to injure another person. It is sufficient to show merely that they had an intention to do so, that is, it was one of the defendant's purposes. The intention to cause injury will be satisfied where conspiracy is aimed or directed at another person, or it can be reasonably foreseen that the conspiracy may injure that person.

Dishonest assistance, knowing receipt and unlawful means conspiracy claims may arise in circumstances where:

- BVI companies are used as conduits to receive money as part of an international fraud;
- public bodies receive bribes to award commercial contracts; and
- third parties receive misappropriated company funds with knowledge that these funds were transferred in breach of fiduciary duty.

1.4 Limitation Periods

The limitation period in fraud claims begins to run from the date of the knowledge of the victim. The key provisions are contained in the Limitation Act of the BVI, and this Act prescribes the limitation period on different classes of actions.

Where fraud is alleged, the limitation of the particular class of action as prescribed in the Act applies, save that the period of limitation runs from the date on which the fraud was discovered.

There are a few exceptions to this general principle.

- Section 19(1)(a) – which provides that no period of limitation shall apply to an action by a beneficiary under a trust, being an action in respect of any fraud or fraudulent breach of trust to which the trustee was a party, or privy to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.
- Section 19(2) – which provides that an action by a beneficiary to recover trust property, or in respect of any breach of trust, shall not be brought after six years from the date on which the right of action accrued.
- Section 25 – which provides that no action shall be brought to recover or enforce any charge against or set aside any transaction affecting any property which in the case of fraud was purchased for valuable consideration by a person who was not a party to the fraud, and did not at the time of the purchase know or have reason to believe that any fraud had been committed, where the action is based upon the fraud of the defendant or his agent. The period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable due diligence have discovered it.

1.5 Proprietary Claims against Property

The equitable principle of constructive trusteeship would enable the victim of fraud to assert rights against property that represents converted proceeds of fraud. These proceeds would also be "ring-fenced" from the wrongdoer's personal assets available to satisfy its unsecured creditors in an insolvent liquidation procedure.

As a matter of BVI law, it is possible to recover funds that represent proceeds of fraud that have been mixed with other funds. The BVI position is the same as the position in England and Wales where, if the victim's money is money which has been mixed with money of other innocents, the innocents will be ranked pari passu,and they will each receive a distribution equivalent to the proportion of their contribution.

However, where the victim's funds are mixed with the funds of the fraudster, it will be for the fraudster to distinguish his funds from the victim's funds. If he fails to do so, then the victim of the fraud will be able to rely on whichever of the following presumptions is more advantageous, depending on the circumstances of the case. This approach was established in the case of Re Tilley's Will Trust [1967] Ch 1179.

The alternative presumptions available to the victim are as follows.

- Where withdrawals from the mixed fund have been dissipated, it is presumed that the wrongdoer spent their own money first and that the withdrawals were from the wrongdoer's share of the mixed fund (Re Hallett's Estate (1880) 13 Ch D 696). Although this is the usual presumption, there is some flexibility here since this presumption could be disadvantageous to the victim.
- Where some withdrawals from the mixed fund were not dissipated but, were, for instance, used to purchase an asset, and the remainder of the fund which would have been sufficient to meet the victim's claim was subsequently dissipated, it will be presumed that the fraudster spent the claimant's money first, so that the claimant can trace into the purchased asset (Re Oatway [1903] 2 Ch 356).

The case of Foskett v Mckeown [2001] 1 AC 102 is instructive regarding how the BVI courts will treat misappropriated assets which are later successfully invested before the recovery by the victim. In summary, in that case, the beneficiaries of misappropriated trust funds were able to trace their trust property through a mixed fund of money and into assets acquired from it, being

an insurance policy. From there, they were able to trace into the proceeds of the policy such that the payout on the policy to its beneficiaries (the children of the deceased fraudster) entitled the victims to a portion of the payout.

1.6 Rules of Pre-action Conduct

There are no pre-action protocols applicable in the BVI as obtain in other jurisdictions, such as the United Kingdom.

1.7 Prevention of Defendants Dissipating or Secreting Assets

The most common relief for an applicant who seeks to prevent a response from dissipating assets, with a view to avoiding the consequences of a judgment, is to secure a freezing injunction.

In order to succeed in an application for a freezing injunction, the applicant will need to show:

- that there is a good arguable case against the respondent;
- that the refusal of an injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied; and
- that it is just and convenient for the injunction to be granted.

If it is determined that the freezing injunction would not provide the level of protection intended, then a receiver may be appointed to "hold the ring" and preserve the assets which are at stake pending trial.

It is important to note however that if there is no danger to property or assets and no fact is in evidence which shows the necessity or expediency of appointing a receiver, then a receiver will not be appointed.

In order to satisfy the court that a receiver should be appointed, the applicant must at least meet the threshold which is required for obtaining a freezing injunction.

The grant of a freezing injunction would operate in rem such that all persons with notice of the injunction would be prohibited from facilitating its breach.

The court-filing fees payable on an application for a freezing injunction would not exceed USD1,500. If a transcript of the proceedings is required, depending on the complexity of the application and therefore the length of the hearing, the cost of the transcript could range between USD250 and USD1,750.

All freezing injunctions are granted under cover of a penal notice, and a respondent or any other person with knowledge of the injunction who does anything which assists or permits the respondents to the application to breach the terms of the injunction may be held in contempt of court, imprisoned, fined or have their assets seized.

An applicant for a freezing injunction will be required to provide a standard undertaking to compensate the respondent for any loss which is later determined to have been wrongfully suffered as a result of the order.

If a respondent to an injunction wishes for the undertaking given by the applicant to be fortified, then that respondent must place evidence before the court as to the worthlessness of the undertaking if it is not fortified.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

CPR Rule 17 gives the court jurisdiction to order the disclosure, by a party who is the subject of a

freezing order, details about the location of relevant property and assets which are or may be the subject of the freezing order.

In practice, the freezing order would be granted ex parte, and would contain an order for ancillary disclosure. The respondent will be required to provide this disclosure within a specified period of being served with the order.

Since this disclosure is ordered within the freezing order and since all freezing injunctions are granted under cover of a penal notice, each respondent, or any other person over whom the court has jurisdiction, who is made aware of the injunction is bound by its terms. If any such person therefore facilitates the breach of the injunction, then that person may be held in contempt of court, imprisoned, fined or have their assets seized.

An applicant will be required to give an undertaking to compensate the respondent in damages if that respondent later suffers loss as a result of the grant of the injunction and the provision of the ancillary disclosure.

2.2 Preserving Evidence

CPR Rule 17(1)(c) and (h) outlines the court's powers and procedures in relation to the preservation of evidence.

The court has jurisdiction to grant an interim order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of detention, custody or preservation of relevant property.

Separately, CPR Rule 28 details the duties of disclosure and inspection of documents, and requires that any document which is relevant to the issues in a claim must be disclosed to the adverse party in the claim, whether or not that document is helpful or harmful to the disclosing party's case.

Where a document to be disclosed is withheld without cause, the disclosing party will not be able to rely on that document at trial, and the adversely affected party could use that non-disclosure to seek the strike-out of a particular aspect of the disclosing party's case.

A party to whom documents have been disclosed pursuant to CPR Rule 28 may also request physical inspection of any such document. Such a request must be in writing, and the party to whom the request is made must arrange for the requested documents to be available for inspection not more than seven days after the request for inspection has been received.

There is no requirement in this context for a cross-undertaking in damages to be given.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

Norwich Pharmacal disclosure orders are available in the BVI to an applicant who considers that there might be a claim against an intended respondent, but the claim cannot be sufficiently particularised without first obtaining some information.

The BVI courts' jurisdiction to order Norwich Pharmacal disclosure is grounded in common law and is a process by which an innocent third party who has become innocently mixed up in some wrongdoing, through no fault of its own, is ordered to give disclosure.

In the BVI, these orders are most commonly sought against third-party registered agents. Under BVI law, all BVI companies are required to have licensed registered agents who are responsible for maintaining certain records and for facilitating the statutory filings of such com-

panies. They are also the local means through which BVI companies are served at a physical location.

An applicant for a Norwich Pharmacal disclosure order must establish that a wrong has been committed against it; that the respondent (ie, the registered agent) has become mixed up in the wrongdoing; and that the registered agent is likely to have information and/or documents which would be of assistance to the applicant.

Once these threshold requirements are met, it is still at the discretion of the court whether to grant the relief sought. The court will be reluctant to grant the relief sought if there is another means by which the information could be obtained without prejudicing any impending claim to be brought by the applicant.

The rationale for seeking this form of relief is to enable the applicant to gather sufficient information to enable it to formulate a claim against the ultimate wrongdoers.

These types of applications are typically brought on an ex parte basis and under seal and gag. This means that the respondent registered agent is, at the time of the application, prohibited from notifying any person (save for their lawyers) of the existence of the application. The parties to the claim are also typically anonymised to prevent any tipping off. In addition, the documents disclosed are to be used for the limited purpose of assisting an applicant with identifying the wrongdoers and the formulation of a claim. If the documents are to be used for ancillary purposes, then the court would need to give permission for this.

2.4 Procedural Orders

A litigant can seek ex parte protective relief from the BVI court, based on the common law principles that govern the grant of the relief and/or the relevant civil procedure rules of the BVI. Typically, relief such as a Norwich Pharmacal order, or a freezing order or other injunction, are granted ex parte. Further, Part 17 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (CPR) lists the types of protective relief that are available, and gives the court discretion to grant them ex parte. The court will, however, need to be satisfied that there are good reasons for not giving notice.

Generally, where a party obtains relief ex parte, he will be required to provide the court will full and frank disclosure and provide an undertaking in damages.

2.5 Criminal Redress

Unless a perpetrator is present in the jurisdiction, victims of a fraud will seldom seek redress via the criminal process. This is largely due to the offshore nature of the jurisdiction and the potential jurisdictional challenges that would arise from a criminal claim. The BVI Criminal Code, Part XIV lists a number of offences relating to property that may be helpful to a victim of fraud. They include false accounting and false statements by company directors. There is also provision for officers of a company to be liable for certain offences committed by the company.

The commencement of criminal proceedings does not impact the ability to commence civil proceedings. However, any remedies obtained in criminal proceedings will impact any remedies that can be pursued in civil proceedings.

2.6 Judgment without Trial

In the BVI, there are two avenues by which a judgment can be obtained without the need for a full trial. The first is to obtain judgment in default and the second is to obtain summary judgment.

Default Judgment

CPR Rule 12 governs the procedure for obtaining judgments in default and the category of cases in which this redress is available. The prerequisites to obtaining judgment in default are:

- the defendant must have failed to file an acknowledgment of services within the prescribed period in which they fail to give notice of an intention to defend the claim brought against them; or
- the defendant must have failed to file a defence within the period prescribed in the CPR.

There are a few categories of claims in respect of which default judgment cannot be obtained. These are:

- claims in probate proceedings;
- claims brought by way of a fixed-date claim form; or
- admiralty claims in rem.

Permission to seek to obtain judgment in default is required in the following instances:

- where the claim is contemplated against a minor or patient, being a person who by reason of mental disorder within the meaning of the relevant mental health legislation in the BVI is incapable of managing his or her own affairs;
- where the claim is contemplated against the State, insofar as issues of state immunity arise; and
- where the claim is contemplated against a diplomat who failed to acknowledge service, and where that diplomat enjoys immunity from civil jurisdiction.

The procedure for obtaining such default judgment is that a request for entry of judgment in default must be filed in the form prescribed by the CPR. Once the request is made, it must be served on the defendant. The request, once made, must also include interest for the period claimed and fixed costs unless the court assesses the costs. Any application for the assessment of costs must be on notice to the defendant.

Once a claimant obtains judgment in default, unless the defendant then applies for and is successful in setting aside the default judgment, the only matters on which a defendant may be heard are:

- the assessment of damages, once specific requirements are met;
- an application concerning a default judgment where the remedy ordered is not money or the delivery of goods;
- costs;
- enforcement of the judgment; and
- the time of payment of the judgment debt.

Summary Judgment

CPR 15 sets out the requirements and governs the procedure for obtaining summary judgment.

A defendant can seek summary judgment against a claimant where the claimant has no real prospect of succeeding with the claim or the issue, and a claimant can seek summary judgement against a defendant where the defendant has no real prospect of successfully defending the claim or issue.

As in the case of requests for entry of default judgment, summary judgment is not available in specific categories of claims. These are as follows.

- Admiralty proceedings in rem.
- Probate proceedings.
- Proceedings by way of a fixed-date claim form.
- Proceedings for:

(a) claims against the Crown;
(b) defamation;
(c) false imprisonment;
(d) malicious imprisonment; and
(e) redress under the Constitution.

Notice of an application for summary judgment must be served on the respondent to that application not less than 14 days before the hearing of the application, and the notice must identify the issues which the court would be asked to address at the hearing.

Affidavit evidence must be filed in support of a summary judgment application, and this evidence and the application must be served on all respondents to the application, not less than 14 days before the hearing of the application.

If a respondent to the application intends to challenge the application and rely on evidence in support of their challenge, then that evidence must be filed and copies served on the applicant and any other respondent to the application, at least seven days before the hearing.

If the result of the summary judgment application is that the proceedings are not brought to an end, that hearing must be treated as a case management conference.

2.7 Rules for Pleading Fraud

There are no special rules in the Eastern Caribbean Supreme Court Civil Procedure Rules for pleading fraud. Nonetheless, the BVI courts follow the principle in Derry v Peak (1889) 14 App Cas 337 that any party seeking to avail itself of the provision will need to plead and prove fraud. The courts will need cogent evidence to be satisfied that the fraud has been made out. In AO Alfa Bank v Kipford Venture Ltd BVIHCOM2020/0219, 14 December 2021, the BVI court adopted the guiding principles when pleading fraud as set out in Bullen & Leake & Jacobs' Precedents of Pleading as applicable to the BVI, as follows.

- It is the duty of counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it.
- A claimant is required specifically to set out in his particulars of claim any allegation of fraud, details of any misrepresentation, details of all breaches of trust and notice or knowledge of facts.
- The facts must be so stated as to show distinctly that fraud is charged. Where any inference of fraud or dishonesty is alleged, the party must list the facts based on which the inference is alleged, and the question is whether, based on the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence.

2.8 Claims against "Unknown" Fraudsters

It is possible to bring claims against persons unknown in the BVI. However, the claimant will be required to describe the alleged wrongdoer with sufficient specificity to allow the defendant to be identified and served. Claimants are expected to provide information such as email addresses, wallet address in the cryptocurrency context, profile or user names on particular platforms, or other means of similar identification.

2.9 Compelling Witnesses to Give Evidence

CPR Rule 33 outlines the circumstances and procedure by which a witness may be compelled to give evidence. This rule requires the issuance of a witness summons, which is a document issued by the court which requires the witness to attend court to give evidence or to produce documents to the court.

The witness summons must be in a prescribed form, and where there are multiple witnesses

being summoned, each witness must be independently summoned. Once the witness summons is prepared, it may require that the witness being summoned produces documents to the court on either the date of the trial of the proceedings or on any date on which an application in the proceedings is being heard. The court may also direct the production of the documents on a separate date.

The witness summons is issued on the date entered on the summons by the court, and the person in whose favour the witness summons is issued must obtain the permission of the court if the witness summons is requested to be issued less than 21 days before the date of the hearing at which the documents or evidence by the witness is to be produced.

Permission must also be sought where the witness is required to attend court to give evidence or produce documents on a date other than the date fixed for the trial or the date of any application in the proceedings.

A witness summons is binding only if it is served at least 14 days before the date on which the witness is required to attend to give his/her evidence before the court. Notwithstanding this minimum service requirement, the court may direct that the witness summons is binding even if it is served on a date that is less than 14 days before the date on which the witness is to attend to give his/her evidence.

Importantly, at the time that a witness is served with a witness summons, he/she must be offered or paid a sum reasonably sufficient to cover his/her subsistence and expenses for travelling to and from the court, and a sum which compensates for loss of time.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Whereas it is accepted as a matter of BVI law that the decisions and actions of directors would, as a matter of course, bind any company in respect of which they act as directors, by virtue of their ostensible authority, a director is not likely to be able to escape personal liability if his actions against the company are fraudulent in nature.

BVI courts have adopted the well-known legal maxim which has its origins in the UK decision in Lazarus Estates v Beasley [1956] 1 QB 702, where at 712 it is stated that "no court in this land will allow a person to keep an advantage which has been obtained by fraud... fraud unravels everything".

This position is supported by the words of Lord Hoffman in Standard Chartered Bank v Pakistan National Shipping Corp (No 2) [2002] UKHL 43,where at paragraph 22 he stated "no one can escape liability for his fraud by saying 'I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable.'"

The English court's attitude in relation to the fraudulent conduct of directors was further highlighted in the decision in Jetivia SA v Bilta (UK) Ltd [2015] UKSC 23 ("Jetivia"), where the position on the attribution of a fraudulent director's conduct to a company was settled. In that case, the court highlighted the inappropriateness in attributing the acts of a director to the company where the company is itself the victim of the director's acts. In summary, in Jetivia, the company itself was a victim of a fraud which had been perpetrated by a number of its directors.

Lord Neuberger at paragraph 7 of the judgment stated that "[w]here a company has been the victim of wrongdoing by its directors, or of which its directors had notice, then the wrongdoing, or knowledge, of the directors cannot be attributed to the company as a defence to a claim brought against the directors by the company's liquidator, in the name of the company and/or on behalf of its creditors, for the loss suffered by the company as a result of the wrongdoing, even where the directors were the only directors and shareholders of the company, and even though the wrongdoing or knowledge of the directors may be attributed to the company in many other types of proceedings."

This case is the latest judicial precedent on this subject matter in the BVI, and will therefore be followed by the courts in the BVI.

3.2 Claims against Ultimate Beneficial Owners

In the UK case of Prest v Petrodel Resources Ltd [2013] UKSC 34, the Supreme Court clarified that where a person controls a company, that person may be liable separately or together with the company for its acts as agent of the company. In that case, the court confirmed that there may be justification in a court piercing the corporate veil where the company's separate legal personality is being exploited so as to protect an ultimate wrongdoer.

The wrongdoing complained of must meet a certain threshold which the court has distilled down into two categories. The first, wrongdoing for the purpose of concealment; and the second, wrongdoing for the purpose of evasion – the "concealment principle" and the "evasion principle".

The court expressed that there is no piercing of the corporate veil when dealing with the concealment principle. In instances where this principle is engaged, the job of the court is to ascertain what is being concealed. In doing this, the court will look behind the corporate structure.

According to Prest v Petrodel, in the case of the evasion principle, "the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement" – (see paragraph 28 of the judgment).

The principles confirmed in Prest v Petrodel apply in the BVI.

3.3 Shareholders' Claims against Fraudulent Directors

There are a number of statutory duties which directors are required to adhere to in the conduct of their services to BVI companies. Where a director is in breach of any of these duties, a shareholder may institute a claim against the director based on breaches of those statutory duties.

As a shareholder, that individual will first need the permission of the court before it can bring a claim on behalf of the relevant BVI company. Section 184C of the BVI Business Companies Act, 2004 (as amended), which governs the bringing of derivative claims by members on behalf of BVI companies, also provides that the court, before granting permission to a member to bring a claim on behalf of a BVI company, will consider:

- whether the member is acting in good faith;
- whether the derivative action is in the interests of the company taking account of the views of the company's directors on commercial matters;

- whether the proceedings are likely to succeed;
- the costs of the proceedings in relation to the relief likely to be obtained; and
- whether an alternative remedy to the derivative claim is available.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

The only mechanism for the addition and substitution of parties to a claim is as provided in CPR 19.

Under this rule, a claimant has the power to add additional defendants to a claim without the permission of the court at any time before the first case management conference of the claim. If the addition is contemplated for a date after the first case management conference, then the permission of the court will be required.

As in all claims, any claim against a foreign defendant must be served out of the jurisdiction on that defendant. Permission to serve such a defendant must first be obtained by the court. The court's jurisdiction over that particular defendant will only be engaged when service on that defendant has occurred in accordance with the rules for service prescribed in the jurisdiction where the service is being effected. Proof of service will be required by the BVI court, and this must be by way of affidavit evidence.

If, after being served, a foreign defendant does not engage in the judicial process, then a request for default judgment can be made. If the default judgment is entered, the claimant will be able to pursue enforcement of the judgment in the BVI.

5. ENFORCEMENT

5.1 Methods of Enforcement

The principal legislation on the enforcement of judgments in the BVI is the Judgments Act 1907, and various other enforcement processes are governed by the provisions of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.

Where a judgment or order is granted for the payment of money, and that money is not money which is required to be paid into court, payment may be enforced in the following ways:

- by way of a charging order (CPR Rule 48);
- by way of a garnishee order (CPR Rule 50);
- by way of a judgment summons (CPR Rule 52);
- by way of an order for the sale or seizure of goods (CPR Rule 46);
- by way of the appointment of a receiver (CPR Rule 51).

Enforcement of judgments pursuant to CPR Rule 46 relates to writs of execution and, in addition to the aforementioned examples, includes:

- orders for the sequestration of assets;
- writs of delivery; and
- writs of possession.

There are certain instances where permission to enforce pursuant to CPR Rule 46 may be required. These instances include where the judgment sought to be enforced has been entered for a period greater than six years, or where the judgment debtor has died and the enforcement sought is against his/her estate.

Where charging orders are granted, these are commonly sought to be enforced against the BVI shares of the judgment debtor. Once those

shares stand charged, an order for sale is the next step.

Securing a final charging order is a two-stage process whereby the judgment creditor must first obtain a provisional charging order and then the final order. A provisional charging order is made on a "without-notice" basis and is considered "on the papers" without a hearing. The hearing of the final charging order application is made once notice of the provisional charging order is given to the judgment debtor and the order is granted, if the application is successful, within 14 days of the hearing.

The CPR Rule 50 attachment of debts procedure enables a judgment creditor to obtain the payment of the judgment debt from a person who owes the judgment creditor money. This garnishee remedy can however only be sought against someone resident in the BVI.

There is also scope for the enforcement of foreign judgments in the BVI pursuant to the Reciprocal Enforcement of Judgments Act. In order to enforce pursuant to this statute, however, the judgment must be a money judgment, and the country from which the judgment is sought to be enforced must be in the list of prescribed countries in the statute. If the country is not in the list of prescribed countries, then enforcement will only result if a new claim is filed in the BVI for the money judgment (the effect of which is to localise the judgment) and, once the claim is filed, a summary judgment application is made on the basis that there is no realistic prospect of the defendant successfully defending the claim.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

The rules of privilege are governed by Part XIX of the Evidence Act, 2006in three broad categories:

- legal professional privilege;
- loss of legal professional privilege; and
- privilege in respect of self-incrimination in other proceedings.

The underlying requirement for the protection of legal professional privilege pursuant to Section 114 of the Act is that the confidential communication must be made or prepared for the dominant purpose of providing or receiving legal services, whether it is for the purpose of legal advice generally or for the purpose of anticipated or pending legal proceedings. However, there are a number of specific factors which can result in the loss of legal professional privilege including the client's consent to disclosure of the confidential communication, instances were non-disclosure would prevent the court from enforcing an order of the court, special circumstances surrounding criminal proceedings, and a number of other instances.

Privilege in respect of self-incrimination in Section 116 of the Evidence Act codifies a witness' right to object to providing evidence on the ground that he or she could be incriminated for either committing a criminal offence, or be made subject to civil liability. Pursuant to Section 116, if the witness raises this objection, and if the court upholds the objection and determines that the witness has a reasonable basis for making the objection, the court will inform the witness that: (a) he need not give the evidence but that, if he does give evidence the court will give a certificate under this Section; and (b) the court will explain the effect of the certificate. If the objection is upheld by the court and the wit-

ness refuses to give evidence, the court shall not require the witness to give evidence.

However, pursuant to Section 116(5), if the court rejects and overrules the objection and the witness is compelled to give evidence, but the court finds that there were reasonable grounds for the objection, the court shall give the witness a certificate in respect of the evidence. Evidence which has been subject to a certificate under this section is not admissible against the person to whom the certificate was given in any legal or administrative proceedings, not being criminal proceedings in respect of the falsity of the evidence. Subsection 5 expressly excludes evidence in criminal proceedings in relation to whether an accused performed an act the doing of which is a fact in issue; or evidence in relation to a state of mind the existence of which is a fact in issue.

This is consistent with the BVI Police Evidence Act, 2019 which codifies the accused's right to remain silent in Section 186 – since all accused persons must be cautioned by an interviewing police officer that they have the right to remain silent and that if he or she exercises his or her right to remain silent, inferences may be drawn from their silence.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

As stated, professional privilege between a lawyer and client is governed by Section 114 of the Evidence Act 2006. However, under Section 114(6), where a client or party has voluntarily disclosed the substance of evidence, not being a disclosure made (a) in the course of making of the confidential communication or the preparation of the confidential document, or (b) as a result of duress or deception, Section 114 does not prevent the adducing of the evidence.

Additionally, subject to specific provisos Section 114 does not prevent the adducing of evidence of a communication made or a document prepared in furtherance of the commission of (i) an offence or (ii) an act that renders a person liable to a civil penalty; or a communication or a document that the client ought reasonably to have known was made or prepared in the furtherance of a deliberate abuse of a statutory power.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

In common law jurisdictions like the BVI, damages are compensatory in nature and designed to put the claimant in the position he would have been, had the alleged breach not occurred.

The relevant approach to punitive or exemplary damages in this jurisdiction is as follows.

- Punitive damages are generally not available, unless expressly provided for by statute as seen in Section 86 of the Labour Code 2010.
- At common law a claimant can pursue a claim for aggravated or exemplary damages, but to do so, it must be explicitly pleaded: Dominica Agricultural and Industrial Development Bank v Mavis Williams (supra); and Clayton James v The Public Service Board of Appeal, The Commissioner of Police, The Attorney General of St. Vincent & the Grenadies SVGHCV2004/0333 (unreported).

If aggravated or exemplary damages are pleaded, in order to succeed, the guiding principles that the court will apply are set out in Rookes v Bernard [1964] AC 1129.

7.2 Laws to Protect "Banking Secrecy"

Although there are no special laws which exist in the BVI relating to banking secrecy, a bank's duty of confidentiality may arise under the common law in specific circumstances or by contractual agreement. There is no criminal sanction for breach of a duty of confidence, although a bank may find itself liable to pay damages if an affected customer is able to prove that it suffered loss as a result of the bank's breach of confidentiality.

Where there is no statutory regime governing a bank's confidentiality to its customers, it will owe a customer a common law duty of confidentiality relating to any information that is held in respect of that customer's affairs. It is not uncommon for such common law duties to be strengthened by contractual duties of confidentiality.

All banks in the BVI are regulated by the BVI Financial Services Commission, which has wide powers to visit the premises of any bank to seek information and examine and take copies of documents. The relevant legislation also empowers the Commission to co-operate and share information with foreign regulatory authorities in order to detect and prevent financial crime, the financing of terrorism, misconduct or abuse of financial markets and offences involving fraud and dishonesty.

Even if a bank sought to argue that any duty to disclose confidential information was limited to providing such information to local regulatory bodies, the decision in Pharaon v BCCI SA [1998] 4 All ER 455 makes it clear that the duty of confidentiality could be overridden by the greater public interest in preventing and uncovering fraud, and that this could justify the provision of confidential documents to foreign regulatory authorities directly.

There is no statutory duty of confidence under BVI law, but a duty of confidentiality may arise under the common law in specific circumstances or by contractual agreement. There is no criminal sanction for breach of a duty of confidence, although it may sound in damages subject to proof of loss, and may be restrained by injunction if threatened.

However, banks could be compelled to disclose client information by order of the court in specific forms of civil proceedings including proceedings for Norwich Pharmacal or Bankers Trust orders. Additionally, there are various statutes in the jurisdiction which may permit or compel a bank to disclose information relating to a customer including but not limited to the Proceeds of Criminal Conduct Act, 1997; Drug Trafficking Offences Act 1992; Terrorism (United Nations Measures) (Overseas Territories) Order 2001; Criminal Justice (International Co-operation) Act 1993; Mutual Legal Assistance (United States of America) Act 1990; Banks and Trust Companies Act 1990; Financial Services Commission Act 2001; Financial Investigation Agency Act 2003; and the Proliferation Financing (Prohibition) Act 2009.

7.3 Crypto-assets

In the BVI, crypto-assets are recognised as property and it is possible to obtain freezing injunctive relief in relation to such assets. There is an ongoing action in the BVI in relation to injunctive relief that was granted by an applicant against unknown hackers. In this case, the question arose regarding the necessary ingredients to applications against persons unknown. The court provided useful guidance on this point and made clear that in making an application against unknown respondents, the applicant needs to be able to define the fraudsters by reference to specific characteristics, ie, email addresses, and that this definition must be such that the fraudsters are capable of being served.

Harneys has been at the forefront of the development of offshore jurisprudence for decades and involved in significant global disputes, winning keynote victories for its clients and often helping shape the law. It specialises in offshore litigation and insolvency, with a team that spans the British Virgin Islands, the Cayman Islands, Hong Kong, London, Shanghai, and Singapore, and provides clear, timely, and innovative solutions for clients in complex multi-jurisdictional disputes. Its client base is diverse, encompassing leading international and regional accountancy practices, onshore law firms, financial institutions, insolvency office holders, official and unofficial creditors' committees, private equity sponsors, hedge funds, debtor in possession loan providers, directors, trustees, shareholders and corporate debtors. It frequently advises lenders and investors at all levels of the capital structure, corporates, and insolvency office-holders on the use of schemes of arrangement in the context of parallel restructurings or reorganisation procedures in other jurisdictions, such as Chapter 11 of the US Bankruptcy Code or parallel schemes of arrangement.

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HARNEYS

Trends and Developments

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Cryptocurrency, Blockchain and Digital Assets

Overview

The global economy has been transformed by the emergence of the digital assets sector.

The British Virgin Islands (BVI) has long been a popular jurisdiction for individuals and entities looking to operate in the digital asset market.

The boom in digital asset ownership, and the popularity of this jurisdiction with entities and projects operating in this area, has led to an inevitable surge in cases where digital assets have been misappropriated from and/or dissipated through channels connected to the BVI. In turn, the BVI has adapted its traditional tools and embraced new ones to combat fraud and enhance asset tracing in this rapidly growing area.

The jurisdiction has attracted a large number of cryptocurrency exchanges, token issuers, crypto-funds and other entities providing blockchain services by virtue of its offering a friendly regulatory framework, coupled with a support network of experienced lawyers and accountants with extensive knowledge of blockchain technology and digital assets.

The frenzied activity in the industry is generating a rapidly increasing number of cases concerning fraud, the misappropriation of digital assets, and digital asset tracing.

Recent trends in digital fraud and asset tracing in the BVI

The BVI fraud and asset tracing market has seen an increase in activity related to digital assets. Examples include:

- individuals seeking to recover digital assets being withheld by exchanges registered in the jurisdiction;
- victims of wrongdoing seeking to freeze digital assets traced to BVI-registered centralised exchanges; and
- companies incorporated in the BVI pursuing claims for economic torts and seeking injunctions and disclosure orders from the BVI courts.

Where these cases have made their way to litigation, the BVI courts have demonstrated their ability to adapt traditional fraud and asset-tracing remedies to the new challenges posed by these technological advances. In doing so, the BVI courts have, on numerous occasions, been persuaded to follow the rapidly growing body of jurisprudence in England and Wales concerning digital asset fraud. For example, BVI courts have:

- held that digital assets can be considered property for the purposes of an interlocutory application for injunctive relief; and
- been willing to grant relief against "persons unknown" – an issue that is often prevalent in fraud cases concerning digital assets.

In addition to the proactive approach of the civil courts, law enforcement agencies in the BVI are also rapidly familiarising themselves with the

nature of digital asset fraud in this jurisdiction, and the tools available to them (including cross-border avenues), to tackle such wrongdoing.

A recent case study

A recent decision of the BVI courts demonstrates the jurisdiction's ability to deal with the challenges posed by digital asset fraud and asset tracing.

In this case, a BVI company provided cross-chain bridges to enable digital tokens to be transferred between blockchains. Hackers were able to exploit the software to (i) steal tokens from private user wallets that were authorised to interact with the bridge and (ii) mint new tokens from projects that operated on the bridge.

The BVI company consequently made various compensation payments to the affected users, thereby incurring loss.

The hackers exchanged large quantities of the stolen tokens for stablecoins (cryptocurrencies pegged at a fixed rate to a fiat currency) some of which were then transferred through a mixer fund, which intends to obfuscate the origin of any tokens that pass through it.

The applicant obtained expert digital asset tracing advice from a firm in the BVI, which concluded, on the balance of probabilities, that it had been able to trace the stolen tokens through the mixer fund. Subsequent tracing and enquiries with exchanges suggested that a portion of the stablecoins was then traced to a centralised exchange located in Croatia. That exchange was understood to hold know-your-customer information which would disclose the identity of the owner of a digital wallet believed to be under the control of the hackers.

The applicant filed a claim against the hackers for (i) damages arising from certain economic torts and/or (ii) a restitutionary remedy in unjust enrichment. The applicant also sought the following urgent ex parte relief:

- an interim worldwide freezing order against the hacker;
- permission to serve the hacker out of the jurisdiction by alternative methods, including via an email address identified during the asset tracing exercise and via the Croatian exchange believed to have contact details for the hacker (or his associate); and
- that the BVI court issue a letter of request to the Croatian authorities seeking assistance in obtaining evidence from the Croatian exchange that should confirm the identity of the hacker along with other information, such as any bank accounts to which fiat currency was paid pursuant to a sale of digital tokens.

All ex parte relief sought was granted and the freezing order was continued at a notice hearing on 15 March 2022, which the respondents did not attend.

Steps were also taken by the BVI Financial Investigation Agency (FIA) to obtain the identity of the hacker from the Croatian exchange, via the Croatian authorities.

Acknowledging that their identity was about to be revealed, the hacker approached the BVI company and settled the claim against it.

Developments into the future

The BVI courts have demonstrated their ability to move quickly to secure assets in cases of digital asset fraud and their willingness to assert jurisdiction over claims where there is a sufficient nexus to the jurisdiction. As such cases become more commonplace, the courts and law enforcement agencies in the BVI will continue to provide pragmatic and, where necessary, novel solutions. In particular, one of the challenges will

be in addressing how unknown persons can be served with documents if all that is known about them is their ownership of certain digital wallets.

When considering the fraud and asset recovery toolkit available in the BVI, one of the most commonly used forms of relief is the Norwich Pharmacal Order (NPO).

The prevalence of cryptocurrency exchanges registered in the BVI suggests that they may now also be a prime target for NPOs in circumstances where hackers have used exchanges to transfer their ill-gotten gains. In addition, or alternatively, the BVI may see an increase in the use of "double-barrelled" freezing and disclosure orders sought against unknown persons (eg, hackers) as well as against any centralised exchanges that they have used to hold or dissipate stolen tokens.

We expect to see a shift towards this type of application becoming more common, in light of the relatively comprehensive Customer Due Diligence (CDD) that reputable centralised exchanges will keep on their users (at least those that trade between fiat and cryptocurrencies).

Government agencies are becoming increasingly collaborative across borders, and access to vital information that they hold will be paramount in combatting fraud and tracking digital assets.

Harneys has been at the forefront of the development of offshore jurisprudence for decades and involved in significant global disputes, winning keynote victories for its clients and often helping shape the law. It specialises in offshore litigation and insolvency, with a team that spans the British Virgin Islands, the Cayman Islands, Hong Kong, London, Shanghai, and Singapore, and provides clear, timely, and innovative solutions for clients in complex multi-jurisdictional disputes. Its client base is diverse, encompassing leading international and regional accountancy practices, onshore law firms, financial institutions, insolvency office holders, official and unofficial creditors' committees, private equity sponsors, hedge funds, debtor in possession loan providers, directors, trustees, shareholders and corporate debtors. It frequently advises lenders and investors at all levels of the capital structure, corporates, and insolvency office-holders on the use of schemes of arrangement in the context of parallel restructurings or reorganisation procedures in other jurisdictions, such as Chapter 11 of the US Bankruptcy Code or parallel schemes of arrangement.

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

In Canada, various criminal and civil remedies are available for victims of fraud. The claims arise under statute, at common law and in equity and include personal and proprietary claims which may result in asset tracing. Canadian courts also assist in enforcing foreign judgments or awards where the judgment is from a court of competent jurisdiction, is final and is not for a penalty, taxes, a fine or enforcement of a foreign public law.

Fraud under the Criminal Code

In the criminal context, a criminal fraud offence must be proven beyond a reasonable doubt. Under the federal Criminal Code, the general fraud offence permits the police to investigate and the Crown counsel to prosecute allegations of fraud of any kind (Section 380) and in relation to private sector parties or public officials. Canadian courts have interpreted the criminal fraud offence broadly. This Section encompasses conduct that is objectively dishonest and results in deprivation or risk of deprivation to the victim. Criminal intent is a required element to establish liability. Besides the general offence of fraud, the Criminal Code, as well as other statutes, stipulate more specific fraud-related activities as offences, such as falsifying employment records (Section 398), disposal of property to defraud creditors (Section 392), fraudulent sale of real property (Section 387) and insider trading (Section 382.1(1)). Sanctions include incarceration, restitutionary payments to the victim or disgorgement of the proceeds of the offence.

Bribery and Anti-Corruption

The Criminal Code includes provisions related to fraud on the government, including the giving or receipt of any benefit and bribery of Canadian public officials (Sections 119-125) and secret commissions (Section 426). Canada has also extended its scope to cover such criminal actions when conducted outside its boundaries. Pursuant to its obligations under the Convention on the Organisation for Economic Co-operation and Development, Canada enacted the federal Corruption of Foreign Public Officials Act (CFPOA) to criminalise bribery of foreign public officials. In addition, Québec is the only province in Canada with its own anti-corruption legislation (the Anti-Corruption Act). The purpose of this legislation is to strengthen actions to prevent and fight corruption in the public sector, including in contractual matters. To achieve that, it established the office of the Anti-Corruption Commissioner as well as a procedure to facilitate the disclosure of wrongdoings.

Criminal Conspiracy and Misappropriation

The offence of conspiracy under the Criminal Code makes it an offence for everyone who conspires with anyone to commit an indictable offence (Section 465(1)(c)).

Misappropriation of property and money are crimes under the Criminal Code (Sections 330, 331 and 332). A person may be convicted of theft, notwithstanding that anything that is alleged to have been stolen was stolen by the representatives of an organisation from the organisation (Section 328(e)). Moreover, a person who is a trustee can be convicted of a criminal breach of trust if the person abuses their position as a trustee and commits an unauthorized act (Section 336), for example, distribution of trust assets to entities not entitled to receive them under the trust documents. Finally, a person who for a fraudulent purpose, takes, obtains, removes or conceals anything can be convicted of fraudulent concealment (Section 341).

Fraud under Civil Law

In the civil context, the fraud-based causes of action must be proven on the standard of the balance of probabilities. There are numerous

fraud-based causes of action, and corresponding remedies available to civil claimants. Claims of civil fraud are often based on a fraudulent misrepresentation, which is also referred to as the tort of deceit in common law provinces. Fraudulent misrepresentation occurs where a false statement is made, knowingly or recklessly, with the intent that it be relied upon and where the victim relies on that false statement.

A fraudulent act can also give rise to breaches of trust, fiduciary duty or a duty of care where the act is carried out by directors or officers of a company, or other persons in positions of trust. Victims can seek an accounting of and disgorgement of corresponding gains by the defendant, and also plead unjust enrichment where the wrongdoer has benefited and caused a corresponding deprivation to the plaintiff without a juristic reason.

A conversion claim and, possibly, a claim for an interest in certain assets or real property, may be available where a wrongdoer fraudulently interferes with a party's personal or real property rights. A claimant may also assert a fraudulent conveyance or preference when a defendant, with the intent to defeat creditors or other such parties, or facing contemplated claims, conveys assets or real property in order to insulate them from judgment.

Aside from the criminal offence for conspiracy referred to above, a claimant may also proceed with a civil action on the basis of conspiracy to defraud. The elements of this tort include an agreement between two or more parties to act, using either lawful or unlawful means, for the predominant purpose of causing injury to the claimant, with the result of the claimant suffering actual damage.

1.2 Causes of Action after Receipt of a Bribe

The Criminal Code makes it an offence to accept secret commissions (Section 426). The three actus reus elements of the offence include:

- the existence of an agency relationship;
- the accepting by an agent of a benefit as consideration for doing or forbearing to do any act in relation to the affairs of the agent's principal; and
- the source, amount and nature of the benefit.

The mens rea requirement for each of the actus reus must also be established, ie, the accused person:

- must be aware of the agency relationship;
- must knowingly accept the benefit as consideration for an act to be undertaken in relation to the affairs of the principal; and
- must be aware of the extent of the disclosure to the principal or lack thereof.

Under Section 426, "agent" includes an employee. The text of the offence refers to the person "corruptly" giving the commission to induce an agent. This is the "secret" element of the offence where a commission is received without the knowledge of the principal or the employer.

A claimant whose agent has received a bribe can sue the agent in a civil proceeding for damages caused by the agent's actions.

Where officers or directors breach their duty to act in the company's best interest by, for example, accepting payment for favouritism, the company could sue them for breach of fiduciary duty, breach of trust or breach of confidence. Depending on the context, this could also be construed as conversion of company property (or detinue), breach of contract, breach of duty of good faith, deceit or conspiracy and interference

with economic interests. In these circumstances, the company could sue the officers or directors for breaches of their obligations.

In addition to civil remedies, the claimant may, where the agent is an employee, terminate their employment.

Provinces and territories also have their own rules for a claimant to sue their agent, which vary depending on the relationships with the agent. For example, in Québec, where there is fraud against a company, an interested person, such as a shareholder, may, in the name of the company, institute a derivative action against the founders, directors, other senior officers or members of the company who have participated in the alleged act or derived personal profit. Moreover, when the agent is the mandatary of the claimant (ie, a person who has been mandated by the company to represent it to do certain acts), where the mandatary uses for their benefit any information they obtain or any property they are charged with receiving or administering, the claimant can sue the mandatary for the damage suffered. In the case of information, the mandatory can be sued for an amount equal to the enrichment they obtain or, in the case of property, appropriate rent or the interest on the sums used. A mandatary can also be held personally liable to a third party for acts that exceed his or her mandate. Finally, the claimant can, if they suffer damage, repudiate the acts of the person appointed by the mandatary as their substitute where the substitution was made without the claimant's authorisation or where the claimant's interest or the circumstances did not warrant the substitution.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Facilitation of Fraud under Criminal Law

Section 121(1)(d) of the Criminal Code prohibits selling of influence in connection with any matter of business relating to the government. The existence of an actual connection with government business must be established.

A party who aids or abets the commission of a fraudulent act can be charged as a party to the act committed by another person (Criminal Code, Section 21) or be charged with conspiracy to commit the fraudulent act (Criminal Code, Section 465(1)(c)). This requires that the assisting party knew, whether by act or omission, the intention to commit fraud by the other party.

Counselling another person to commit an offence, such as an intermediary or a party enlisting an intermediary, is an offence (Criminal Code, Sections 22 and 464). It is also an offence to be in possession of any property, thing or proceeds of any property or thing obtained directly or indirectly by crime (Criminal Code, Section 354) and to launder the proceeds of crime (Criminal Code, Section 462.31). This requires that the assisting party knew that the property was obtained by crime.

Facilitation of Fraud under Civil Law

Under civil law, the plaintiff can use allegations of knowing receipt and knowing assistance to trace and seek remedies down the chain of the fraud, to parties other than the fraudster. These remedies are based on constructive trusts, equitable remedies through which defalcated funds can be recovered.

Certain complaints may be made against a party receiving trust property. The tort of knowing receipt happens when strangers to the trust receive or apply trust property for their own use and benefit. This tort requires that the trust property is received in the recipient's personal capacity. Constructive knowledge about the breach of trust is a sufficient basis for imposing liability under "knowing receipt" cases.

For the tort of knowing assistance in breach of fiduciary duty, or "accessory liability", the constituent elements include the following:

- a fiduciary duty between the fraudster and the victim;
- the fiduciary duty must have breached that duty fraudulently and dishonestly;
- the stranger to the fiduciary relationship must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and
- the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct.

1.4 Limitation Periods

Under Canada's criminal law, the general offence of fraud under Section 380 of the Criminal Code is a hybrid offence (ie, a fraud over CAD5,000 is an indictable offence, but a fraud under CAD5,000 can be prosecuted either by way of summary conviction or by an indictable offence). In Canada, there is no statute of limitations for indictable offences. For summary offences, the proceedings must be instituted within six months of the offence (Criminal Code, Section 786(2)).

For civil claims, limitation periods vary from province to province. Provincial statutes govern the limitation periods and range from two to six years. For example, Alberta and Ontario both have a general two-year limitation period. Limitation periods start when the claimant discovers, or could have reasonably discovered, the claim. In Ontario, the claimant is presumed to have discovered the claim on the day the fraudulent activity takes place. In Québec, a civil claim must be brought within three years. Where the damages appear gradually, the period runs from the day the damages appear for the first time. Regardless of the claim's discovery, most provinces have enacted "ultimate" limitation periods that run from 10 to 20 years from the date the cause of action arises. In Ontario, the ultimate limitation period does not run during the time the wrongdoer wilfully conceals from the person with the claim the fact that damage has occurred, or wilfully misleads the person as to the appropriateness of a proceeding.

The equitable doctrine of fraudulent concealment tolls the applicable limitation period until the claimant is reasonably able to discover the claim. It exists to ensure that a limitation period does not operate as an instrument of injustice. The doctrine is applicable where the parties have a special relationship, the wrongdoer's conduct amounts to an unconscionable act and the wrongdoer conceals the claimant's right of action. Recent court commentary suggests that the requirement to establish the existence of a special relationship has been relaxed.

In practice, limitations periods with civil fraud cases are notable because, by their nature, many frauds are difficult to detect, making the date of discovery of particular significance. It is prudent for parties who have cause to believe a fraud has been committed to conduct all necessary investigations, to avoid a later argument that they did not act with the same vigilance as a reasonable person would have acted in identifying the subject conduct or loss in the circumstances.

1.5 Proprietary Claims against Property

The federal Criminal Code contains provisions for the Attorney General to seize or forfeit property that is bought with the proceeds of crime. The owner of property that has been seized, restrained or confiscated can apply to the Court for restitution (Criminal Code, Sections 462.333, 462.34(4), 462.42, 490 (7) and 490 (10).

In respect of civil remedies, victims of fraud may seek tracing orders from the court to identify recoverable assets which have been mixed with other funds. A court may entitle success-

ful claimants to a restitutionary claim upon lost assets. This allows victims to trace the assets to third parties and maintain a right to any increase in value that the property has sustained.

Victims of fraud also have available equitable remedies, such as a constructive trust over property which represents converted proceeds. The victim has an equitable right over the property which persists unless the goods are sold to a bona fide purchaser for value without notice. If the fraudster goes bankrupt, any property impressed with a constructive trust does not form part of the bankrupt's estate.

1.6 Rules of Pre-action Conduct

Some provinces in Canada allow parties to proceed with an injunction before the institution of proceedings. For example, in Ontario, Rule 40.01 of the Rules of Civil Procedure permits a party to bring a motion for injunctive relief (including a Mareva injunction to freeze a defendant's assets) pending an intended proceeding. These motions can, under the right circumstances, be brought without notice to the defendant. A claimant can, therefore, seek an injunction to protect its interests if it undertakes to issue a claim and commence an action shortly after the determination of the injunction. The court will, however, inquire as to whether the merits of the claim and in the injunction are sufficiently clear without the claim. The claimant cannot delay in commencing the action after the hearing of the injunction.

Similarly, in Québec law, a party may ask for an interlocutory injunction before the filing of the proceedings if the latter cannot be filed in a timely manner. In an urgent case, the court may grant a provisional injunction, even before service of the interlocutory injunction to the other party. A provisional injunction cannot be granted for a period exceeding ten days without the parties' consent (Civil Code of Procedure, Section 510).

1.7 Prevention of Defendants Dissipating or Secreting Assets

Victims of fraud have a number of options to stop a defendant from dissipating their assets pre-judgment. Many of these options are designed as urgent tools for the court to protect the status quo, pending a final decision on the merits. Urgent mandatory or prohibitory injunctive relief can be sought to compel or prevent certain interim steps from being taken that might serve the purpose of rendering a defendant judgment-proof or dispose of the subject matter of the litigation. A claimant can also move to appoint a monitor or receiver to manage the business operations, revenue and assets, to avoid ongoing harm to the business and prejudice to the claimant's alleged interest.

With respect to claimed interests in property, a certificate of pending litigation can be sought ex parte, to register a notice on title to real property and prevent its disposition involving unsuspecting third parties.

The most typical court tool to prevent the dissipation of assets pre-judgment is a Mareva injunction, or freezing order. A claimant can seek a Mareva injunction on an interim basis to stop the defendant from dissipating their assets before the disposition of the case. Victims could also request a writ of seizure from the court, an interim pre-judgment attachment order or seize and preserve assets of an absconding debtor under certain legislation or preservation orders. Typically, the Mareva orders are limited to assets within the jurisdictions of the court. However, "worldwide" Mareva injunctions are becoming increasingly common due to the freer movement of funds throughout the global economy, and the need to show greater flexibility and extend the court's reach. Such worldwide injunctions can cover assets outside the jurisdiction of the court. As such, when granted, this order will have the effect of restraining a defendant from dealing or

transferring assets, wherever those assets are located, notwithstanding enforcement and local legal issues that may arise in the foreign jurisdiction where the assets are situated.

Mareva Injunctions

A Mareva injunction is an in personam remedy as opposed to an in rem remedy, ie, this remedy compels the defendant to act in a particular way and does not give the applicant a proprietary interest over the defendant's assets. The courts have held that, in order to assert the in personam jurisdiction, the subject assets need not be in Ontario to demonstrate a risk of dissipation and have granted a "worldwide" Mareva.

The courts consider a Mareva injunction an extraordinary remedy. It prevents a defendant from disposing of their assets, dealing with them, or removing them from the jurisdiction. The purpose of a Mareva is to ensure that defendants do not make themselves judgment-proof. Mareva injunctions can be brought before, during, or after a trial (in aid of enforcement). A party may also bring a Mareva injunction motion before commencing its litigation, on an undertaking to commence the action shortly after the motion is decided.

A Mareva order is typically ex parte (without notice) and is for a fixed period of time, ordinarily lasting until the defendant has been provided notice and has had an opportunity to prepare responding material to challenge the ex parte order. When the application is made ex parte, the applicant must make full and frank disclosure of all material facts within their knowledge, particularly if it is harmful to the relief sought. After the initial determination, the court hears a with notice motion on whether the ex parte order should be extended or set aside.

In most common law provinces, to obtain a Mareva injunction, the applicant must:

- establish a strong prima facie case;
- show some grounds for believing the defendant has assets within the court's jurisdiction;
- zureshow some grounds for believing there is a risk of the assets being removed or dissipated before is satisfied;
- satisfy the court that it will suffer irreparable harm if the relief is not granted; and
- give an undertaking in damages, supported by a bond or security in certain cases.

In Ontario, courts have indicated that the requirement there be a risk of removal or dissipation can be established by inference and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances.

The British Columbia courts have adopted a more flexible two-step approach to Mareva injunctions, requiring a strong prima facie case and then a balancing of interests between the parties, having regard to all the relevant factors.

Mareva injunctions do not call for the assets to be physically seized by the court, although there are other court remedies available to do so. Consequently, there are no added fees associated with obtaining such an injunction. However, the requirement that the applicant give an undertaking in damages plays a critical role in establishing a basis for a Mareva injunction to be granted. This is not a mere formality but rather an important undertaking that must have substance and be reliable, to protect the defendant's interests if the freezing order is deemed to have been improperly ordered.

Mareva injunctions can also apply to third parties and, in practice, are frequently applied to banks. The fact that an innocent third party may be materially and adversely affected will not necessarily prevent a court from granting a Mareva order. It is however another consideration for the

courts, and the expected practice is for these third parties to be provided notice whenever possible, when not detrimental to the remedy being sought.

If a party fails to abide by a Mareva order, they may be held in contempt of court and possibly face imprisonment or fines, or have their assets seized.

Mareva injunctions are also available in Québec, however the test applied by Québec courts is slightly different from the common law provinces. In Québec, the Mareva injunction is treated like any other injunction. Thus, the criteria that must be met in order to obtain a Mareva injunction are the same as those for an interlocutory injunction, namely:

- the appearance of right;
- serious and irreparable harm; and
- the balance of convenience.

That being said, a prima facie case of a clear right relieves the claimant from having to demonstrate the balance of convenience test. In addition to these criteria, urgency is required in the case of an injunctive application of an interim nature. In practice, although the criteria to be applied are slightly different in Québec, as in the common law provinces, the Mareva injunction will be granted if there is a real risk that assets will disappear and if there is a reasonable fear that the defendant will seek to thwart the enforcement of a potential judgment by concealing assets, thereby causing irreparable harm to the claimant. In fact, the test for irreparable harm is similar to the "objective fear" test applicable in seizure before judgment cases, the criteria for which are set out in the next section.

Also, in Québec, where the application for a Mareva injunction is made ex parte, the claimant is subject to an obligation of full and frank disclosure, as is the case in the common law provinces.

Finally, in Québec, a Mareva injunction can be admitted to the publication of rights, thus making these rights opposable to third parties. In fact, a right registered on a property is presumed known to any person acquiring or publishing a right in the same property.

Seizure before Judgment

The more commonly used remedy in Québec is a seizure before judgment (Sections 517–518 of the Code of Civil Procedure). There are two types of seizure before judgment.

The first allows the creditor to seize movable property in which the creditor claims to have rights (whether as owner or otherwise) and does not require the prior authorisation of the court, unless the seizure concerns a technological medium or a document stored on such a medium. The creditor needs only to allege under oath the facts demonstrating the creditor's interest in the movable property.

The second type allows a creditor to seize assets when it is feared that the collection of a debt is in jeopardy because of questionable or unfair conduct on the part of the debtor. This type of seizure requires the authorisation of the court, which will only grant it if the claimant demonstrates the questionable or unfair conduct, if there is a valid and existing claim and if there is an objective fear of such jeopardy. A seizure before judgment is carried out under a notice of execution and supported by an affidavit in which the seizor affirms the existence of the claim as well as the facts justifying it and specifying, if applicable, the source of the information relied on. The bailiff serves the notice of execution on the defendant along with the seizor's affidavit at the moment of the seizure. Generally speaking, a third person is given custody of the seized prop-

erty, unless the seizor authorises the bailiff to leave the property in the hands of the defendant.

For all types of seizures before judgment, the creditor must institute a proceeding shortly after the seizure. The creditor will have to pay the costs for the seizure but will be able to claim them as legal costs if the proceeding is successful.

Other Remedies

In some common law provinces, other remedies include seeking an interim pre-judgment attachment order. An attachment order targets specific property that the defendant owns and can take various forms, including garnishment or seizure of assets. In Alberta, a court can exercise its jurisdiction to grant a claimant a pre-judgment attachment order under the Civil Enforcement Act, RSA 2000, c C-15 where: (1) there is a reasonable likelihood that the claim will be established; and (2) there are reasonable grounds for believing that the defendant is dealing with, or is likely to deal with, its exigible property outside of the ordinary course and in a way that would harm the claimant's enforcement (Section 17(2)).

In some jurisdictions, there are provincial statutes that provide remedies for the seizure and preservation of assets against a debtor absconding from the jurisdiction to avoid creditors. The Ontario Absconding Debtors Act, RSO, 1990, c. A.2, is one such example. The "absconding debtor" under this act is a person resident in Ontario who departs from Ontario with intent to defraud the their creditors. The absconding debtor's property may be seized and taken by an order of attachment for the satisfaction of the person's debts.

A victim of fraud may also seek interim preservation orders under Rules of Court to ensure that the defendant does not dispose of disputed property prior to judgment. In Ontario, Rule 45 of the Rules of Civil Procedure permits the court to make an interim order for preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorise entry on or into any property. Ordinarily, with motions brought under Rule 45, a party must demonstrate that:

- the assets sought to be preserved constitute the very subject matter of the dispute;
- there is a serious issue to be tried regarding the claim to the asset; and
- the balance of convenience favours granting the relief sought by the moving party.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

A claimant can make use of certain publicly available sources which can provide information about a party's assets. Some of these sources include the land property offices which hold records of real property ownership, personal property security registration systems and financial statements filed for public companies, which disclose information about the party's assets information.

Pending a judgment, a claimant may also seek certain court orders, such as a Mareva injunction or Anton Piller order, as a means to obtain financial disclosure from a defendant. A Mareva injunction, as described in more detail in **1.7 Prevention of Defendants Dissipating or Secreting Assets** prevents a party from disposing of or dealing with its assets pending the outcome of the claim or some interim step, as ordered by the court. In the process of seeking such an order, the claimant can seek information with respect to the defendant's assets as part of the examination process. In some jurisdictions, the claimant may seek ancillary orders requiring the

defendant or a third party to disclose information with respect to the subject assets. A party seeking such relief is typically required to provide an undertaking with respect to damages.

A claimant may also look to seek disclosure pre-action, including by way of seeking to compel examinations within an urgent injunction brought before issuing their claim. As described above, this can result in disclosure through the examination process in the motion. Discovery mechanisms against third parties are described in **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**.

2.2 Preserving Evidence

In Canada, victims of fraud may seek to preserve evidence through an Anton Piller order. An Anton Piller order permits a party to enter the premises of the defendants to seize and preserve evidence. Along with the Mareva, it is one of the most powerful anti-fraud tools available to claimants. There is considerable hesitancy in the Canadian courts in granting this remedy, given the extraordinary power it gives to the claimant and their lawyers, and the risk of its abuse, especially with respect to confidential and privileged records that may be seized.

This ex parte order is in essence a civil search order and is only granted in the clearest of cases. As part of implementing such an order, information about the defendant's assets may come to light.

The moving party has to meet the following test to obtain an Anton Piller order:

- a strong prima facie case;
- the damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious;
- there is convincing evidence to show that the defendant has in their possession incriminating documents or things; and
- there is a real possibility that the defendant may destroy or otherwise dispose of such material before the discovery process.

Interim preservation orders under the Rules of Court of most Canadian Provinces are also available where it is feared that important evidence may be destroyed, altered or suppressed. For example, as discussed in **1.7 Prevention of Defendants Dissipating or Secreting Assets**, Rule 45 of the Ontario Rules give jurisdiction to the court to make interim preservation orders.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

In cases where fraud is suspected, a party can seek disclosure of information about a defendant (usually with respect to its assets) from a third party by way of a Norwich Pharmacal order. This order is used to compel third parties to provide information where the claimant believes it has been wronged and needs the third party's information and/or documents to determine the circumstances of the wrongdoing or the location of funds. This type of order is frequently used to confirm the existence of debtor's bank accounts, trace account transfers or to track the defendant's online actions through internet service providers. Courts have the discretion to impose restrictions on how the information granted by a Norwich order is used.

The moving party must establish the following elements for a court to grant a Norwich order:

- a bona fide claim against the wrongdoer;
- the third party from who discovery is sought must have a connection to the wrong beyond being a witness to it;
- the third party must be the only practicable source of the information needed;

- the third party must be reasonably compensated for expenses arising out of compliance with the discovery order in addition to legal costs; and
- the public interest in favour of disclosure outweighs any legitimate privacy concerns.

In some Canadian jurisdictions, procedural court rules also permit a court to grant production orders from third parties within an existing court proceeding. A party may also seek an order of inspection of documents that are in the possession, control or power of a third party where the court is satisfied that the documents are relevant to a material issue in the action and it would be unfair to require the moving party to proceed to trial without having discovery of the document (see Rule 30.10 (1) of the Ontario Rules).

In Québec, a third party in possession of real evidence may be ordered to present it to the other parties, submit it to an expert or to preserve it until the end of the trial. Similar orders may also be invoked prior to the proceeding commencing. Effectively, in anticipation of litigation, a party apprehending that some necessary evidence might be lost or become difficult to produce, may examine witnesses, or have a thing or property inspected with the consent of the prospective party or the authorisation of the court. If the application is granted, the parties agree on where and when the witnesses will be heard or the property will be inspected. The discovery costs are borne by the applicant. However, if the evidence is subsequently used in a proceeding, the cost of the authorised depositions and expert reports forms part of the legal costs.

2.4 Procedural Orders

Under Canadian law, it is possible for a party to seize or freeze a debtor's assets without notifying the debtor. As described in in **1.7 Prevention of Defendants Dissipating or Secreting Assets**, a claimant can obtain a Mareva injunction that freezes the assets of a party and prevents the party from dealing with them. A Mareva injunction can be made ex parte without giving notice to the defendant. Due to the ex parte nature, the claimant has an additional burden to make full and frank disclosure of all material facts within their knowledge and must fairly raise the evidence against their case.

Anton Piller orders, which are aimed at seizing and preserving evidence that might otherwise be removed or destroyed, must by their nature be made ex parte. To be granted, there must be clear evidence that the defendant has the evidence sought and that there is a serious possibility of destruction of evidence by the defendant if the defendant were to be notified. As is the case with Mareva injunctions, the courts apply a heavy onus on the party applying for such an order to make full and frank disclosure because of the ex parte element.

Like Mareva and Anton Piller orders, Norwich orders can be made without notice to obtain information and documents from third parties before reaching the discovery stage of an action. This remedy is also considered extraordinary and exceptional with a heavy onus for the claimant.

In Québec, a creditor can seize the debtor's (or a third party's) assets and place them under judicial custody prior to judgment, without notifying the debtor. The debtor will only be informed when the bailiff proceeds with the seizure. A creditor can seize the debtor's assets when it is feared that the collection of a debt is in jeopardy because of questionable or unfair conduct on the part of the debtor. This seizure requires the authorisation of the court and the creditor must demonstrate the questionable or unfair conduct on the part of the debtor. The creditor can also seize the movable property in which the creditor claims to have rights (whether as owner or

otherwise). This seizure does not require the prior authorisation of the court unless the seizure concerns a technological medium or a document stored on such a medium. For this type of seizure, the creditor needs only to allege under oath the facts demonstrating the creditor's interest in the movable property. Since this request is made ex parte, the creditor has an obligation of full and frank disclosure. However, for all types of seizures before judgment, the creditor must institute a proceeding shortly after the seizure.

2.5 Criminal Redress

Victims of criminal offences can apply to the sentencing judge pursuant to Section 737.1 of the Criminal Code to obtain restitution for their loss and damages, the amount of which must be readily ascertainable. A restitution order is a discretionary order that forms part of the criminal sentence.

In Canada, criminal prosecution and civil claims are two separate processes. Since they have their own rules of evidence and burden of proof, the hearing of one proceeding does not automatically delay or impede the progression of the other. The two processes can proceed in parallel.

In fact, civil remedies are not suspended due to the fact that the act in question is a criminal offence (Criminal Code, Section 11). In order to obtain a stay of proceedings in a civil claim, until a decision is rendered in a criminal prosecution, the applicant must demonstrate that, without the stay, their fundamental rights to a full answer and defence will be seriously threatened or compromised. A party in a civil proceeding can also seek disclosure of criminal files and use, under certain circumstances, the criminal judgment as proof of facts in the civil claim. The disclosure of police or Crown documents are sought through what are commonly known as Wagg motions. Wagg motions are usually resolved on consent.

Practically speaking, due to limited resources, criminal prosecutors are less inclined to pursue commercial fraud between private parties if there is ongoing civil litigation and a prospective civil remedy.

2.6 Judgment without Trial

The Rules of Court in Canadian jurisdictions provide several mechanisms for rendering judgment without trial. One of those mechanisms is a default judgment. If a defendant fails to deliver the necessary pleadings in response to a claim within the prescribed time period, the plaintiff may seek a default judgment against the defendant. The default judgment can be obtained by filing appropriate documents with the court, including proof of service of the claim on the defendant.

Some Canadian jurisdictions also permit a party to obtain a summary judgment without the need for a trial. Any party can seek a summary judgment where there is no merit in the whole or part of the claim or defence. Typically, on summary judgment motions, the courts do not assess credibility or rule on disputed facts. However, in Ontario, the Rules allow a judge to weigh the evidence, assess creditability and draw reasonable inferences from the evidence in certain circumstances. Those circumstances include where there appears to be a genuine issue requiring a trial, but that need for trial can be avoided through the use of these powers.

Other procedural tools to dispose of actions without trial include a motion or application to strike the opposing party's pleadings for disclosing no reasonable cause of action or defence. Similarly, in Québec, a party may ask the court, via an application, to dismiss, to dismiss an application or a defence under certain circumstances, in particular when an application or a defence is unfounded in law even if the facts alleged are true.

2.7 Rules for Pleading Fraud

While there are no professional obligations in Canada specifically pertaining to claims for fraud, there are procedural considerations. First, fraud claims must be specifically pleaded and must contain full particulars about the allegation(s), failing which the other party can move to strike the claims and/or move for summary dismissal. Claimants will be allowed to prove such allegations at trial only if and to the extent that the allegations are raised in the pleadings.

Second, there are significant adverse cost consequences if a claim for fraud is alleged, but ultimately found to have no merit at trial. This is in recognition of the fact that a claim for fraud can cause significant harm to a defendant's reputation when alleged in a public court record.

2.8 Claims against "Unknown" Fraudsters

Where a claimant does not initially know the identity of the fraudster, it can issue a claim against the unknown defendant. The unknown defendant is typically referred to as "John Doe" in the pleadings, which acts as a placeholder until the identity of the fraudster comes to light. The same approach can be taken with unknown corporations which may, for example, be used in shell schemes to hide assets or to move them offshore. In Ontario, it is not necessary to name multiple "John Does" or to precisely guess how many defendants are involved, as long as the claim is drafted in a manner to identify which allegations are made against individuals filling specific roles.

These circumstances can cause practical challenges, however, where claimants have difficulty serving suspected defendants, or where they are attempting to obtain ex parte evidence from third parties on their bank accounts, such as Norwich orders.

2.9 Compelling Witnesses to Give Evidence

Most Canadian jurisdictions compel attendance of witnesses at trial by way of a subpoena. In Ontario and New Brunswick, the subpoena has been replaced with a summons, which is a change in form and not in substance.

Typically, obtaining a subpoena (or summons) is not an onerous process. Some jurisdictions require the subpoena to be court issued which occurs through the registrar or prothonotary's office, while in others, such as British Columbia, parties can serve subpoenas without court approval. A subpoena is generally personally served on the witness for it to be effective and is accompanied by witness fees for the witness' attendance and travel. A witness who fails to attend in accordance with a subpoena can be held in contempt of court and may also be fined or imprisoned. In addition, the court may order the person to pay all or part of the costs caused by their default.

Canadian provinces and territories have statutory mechanisms that address interprovincial subpoenas. The procedure for compelling a witness outside of the jurisdiction is generally more onerous than for a witness within the jurisdiction.

In civil proceedings, it is standard practice for each party to conduct examinations (oral or by way of written questions) to gather evidence and for document disclosure purposes before the conduct of trial.

In Québec, the law provides that certain persons, including the parties (and their representatives, agents, employees) and the victim, may be examined. Any other person not provided for in the law may be examined with their consent and that of the other party, or with the judge's authorisation. The absence of an answer for the written examination can be taken as an admis-

sion with respect to the facts or allegations to which the questions pertain. If the witness refuses to attend an oral examination, the person can be compelled to attend by way of a subpoena.

For a witness that is domiciled in or resident of a foreign state, the court may determine whether the examination is to take place in or outside the jurisdiction and any other matter respecting the holding of the examination. The test for determining the location of an examination is what is just and convenient for both parties. Where the examination is to take place in the foreign state, only the court of the witness's jurisdiction can compel the witness's attendance. The foreign court can assist with compelling the witness by giving effect to a letter of request (or, letters rogatory) issued by an Ontario court, for example.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Generally, fraud related causes of action include an element of knowledge for a wrongdoer to be found liable. In Canada, the law provides for the knowledge of a senior officer to be attributed to a company in order for the company to be held responsible for the fraud.

Under the federal Canadian Criminal Code, corporations can be held criminally liable for fraud (Section 22.2). A corporation can be found to be a party to an offence where its senior officer:

- is a party to the offense while acting in the scope of their authority;
- having the mental state required to be a party to the offense and acting within the scope of their authority, directs the work of other representatives of the organisation so that they commit the offence; or
- fails to take all reasonable measures to stop a representative of the organisation from being a party to the offence.

3.2 Claims against Ultimate Beneficial Owners

Where a senior officer of a company uses the entity as a vehicle for fraud, courts in Canada may 'pierce the corporate veil' and hold the senior officer personally liable. Canadian courts take a cautious approach to piercing the corporate veil. The corporate veil is lifted to do away with the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct by a natural person. The court typically looks for 'indicia of fraud' in deciding whether to pierce the corporate veil in such cases, including non-arm's-length parties being used as registered administrators of shell transferee companies and transfers of title, or rights to assets, for insufficient consideration. This is similar by analogy to a "sham trust" scenario.

Directors and officers of a company used to commit fraud may be found liable for tortious conduct. The directors and officers have fiduciary obligations and owe a duty of care to the company and its shareholders. Most Canadian jurisdictions have legislated the standard for the duty of care which is described as the duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. In the context of fraud, the directors and officers may be found to have breached their fiduciary obligations and the duty of care standard, which may give rise to lawsuits by shareholders, creditors or a limited group of other interested parties.

The provincial corporate statutes also provide for oppression claims against directors and officers where they have acted in an oppressive manner or have been unfairly prejudicial to or unfairly disregarded the interests of stakeholders (see **3.3 Shareholders' Claims against Fraudulent Directors**).

Generally, courts award damages as a remedy against directors and officers who are found liable and, if necessary, trace asset transfers. This will often involve a forensic accounting and, ultimately, a disgorgement of profits. The provincial oppression remedy statutory provisions also provide the court broad discretion to grant creative remedies, including setting aside fraudulent transactions and restraining conduct.

3.3 Shareholders' Claims against Fraudulent Directors

In Canada, shareholders commonly rely on the oppression remedy statutory provisions in corporate statutes to bring claims against fraudulent officers and directors. The Canada Business Corporations Act, RSC, c C-44 and all provincial business statutes, except for Québec and Prince Edward Island, provide for this remedy. The oppression remedy grants shareholders a right to challenge oppressive or unfairly prejudicial conduct. This is a broad remedy where the shareholders can even seek removal of the directors and officers. The shareholders can also seek interim injunctive relief where the shareholders must show that there is a serious question to be tried, the shareholders would suffer irreparable harm if the injunction is not granted and the balance of convenience favours granting the remedy.

Under most of the provincial corporate statutes, minority shareholders may also consider bringing a derivative action on behalf of the corporation against the management, directors or majority shareholders. In this manner, they would 'step into the shoes' of the corporation, bringing the lawsuit on its behalf.

The main difference between a derivative action and an oppression claim is that a derivative action is brought on behalf of the company while an oppression claim is brought as a personal claim. Therefore, a derivative claim is appropriate where the fraudulent conduct harms the company, whereas an oppression claim is more appropriate where the harm is unfairly directed at certain shareholders.

Shareholders may also bring a claim of personal damages against directors who fail to exercise duty of care or are in breach of their fiduciary duty as discussed in **3.2 Claims against Ultimate Beneficial Owners**.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

Rules of the court in Canadian common law jurisdictions provide for serving parties outside those jurisdictions (including outside Canada) with a proceeding against that party, so long as the underlying claim fits into a list of categories laid out in each provincial statute. These categories generally cover types of claims with a real and substantial connection to the Canadian jurisdiction, such as where:

- a relevant contract was formed in the Canadian jurisdiction;
- a tort was committed in the Canadian jurisdiction; or
- the subject property or assets are held in the Canadian jurisdiction.

Even where one of these categories does not clearly apply, a party may serve an originating

process outside the jurisdiction with leave of the court.

In Ontario, the procedures for service vary depending on whether the document is to be served in a "contracting state" or not. "Contracting state" means a state that is a signatory to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Convention").

Similarly, Québec rules provide for serving parties outside Canada either by following the Convention or, for states not party to the Convention, notification is made either: following general civil procedure service rules in Québec or in accordance with the law in force in the place where the notification is made. The court, on request, may also authorise a different method of notification if the circumstances require it.

Québec authorities will have jurisdiction regarding personal pecuniary right of action under certain specific circumstances, such as:

- a fault was committed in Québec, injury was suffered in Québec or one of the contractual obligations was to be performed in Québec;
- the parties have by agreement submitted the dispute to Québec authorities; or
- the defendant has submitted to the jurisdiction.

5. ENFORCEMENT

5.1 Methods of Enforcement

From a criminal perspective, a victim of a fraud can file a complaint to police agencies. The complaint needs to be filed in the proper jurisdiction. In some provinces the Royal Canadian Mounted Police (RCMP) are the ones investigating Criminal Code offences while in other provinces it might be the Ontario Provincial Police (OPP), the Sûreté du Québec (SQ) or the municipal police. The investigators could trace the proceeds of the crime for the benefit of the victim to get restitution.

In civil proceedings, in addition to the orders listed in **1.7 Prevention of Defendants Dissipating or Secreting Assets** and **2.4 Procedural Orders**, there are also the traditional motions for injunction and damages which can lead to seizure of the assets. A judgment creditor can also seek to examine (in aid of execution) the judgment debtor, and in some cases third parties, in relation to non-payment of the judgment. The creditor may also enforce the judgment by garnishment of debts payable to the debtor by third parties, including garnishing wages, bank accounts or other streams of income.

Provinces and territories have their own rules regarding the forced execution of judgments but, generally, a creditor who wishes to force execution of a judgment gives execution instructions to a bailiff to seize the debtor's property or income. A judgment creditor may seize any of the debtor's movable property that is in the debtor's possession or that is held by the creditor or a third person. However, some property cannot be seized, such as the work equipment necessary for the exercise of the debtor's professional activity (with some exceptions) and a debtor's movable property that furnishes the debtor's principal residence and is needed for the life of the family (up to a certain amount).

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

In Canada, a person is not incompetent to give evidence by reason of an interest or crime and no witness (except the accused in a criminal proceeding) shall be excused from answering any

question on the ground that the answer to the question may incriminate or establish the witness's liability in a civil proceeding. However, a witness who testifies in any proceeding is protected against incriminating statements being used to incriminate the witness in another proceeding, except in a prosecution for perjury or for the giving of contradictory evidence (Canadian Charter of Rights and Freedoms, Section 13; Canada Evidence Act, Sections 3 and 5). The statement can be used to attack the credibility of the accused.

In the criminal context, the judge cannot draw an adverse inference when a witness asks for Charter protection.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

In Canada, solicitor-client privilege does not protect the communications between counsel and their client that are shown to be prima facie in furtherance of fraud, irrespective of the lawyer's knowledge regarding the illegal activity. This is referred to as the future crimes and fraud exception and must contain three elements:

- the communication relates to proposed future conduct;
- the client must seek to advance conduct which it knows or should know is unlawful; and
- the wrongful conduct contemplated must be clearly wrong. However, when a lawyer counsels against an illegal activity, the courts have concluded that privilege is maintained. The courts have emphasised the necessity of strong evidence of fraud.

There are court cases setting out circumstances were fraudulent conduct allows access to a lawyer's file, despite claims of privilege. For example, courts have ordered production of a lawyer's file relating to their client, a defendant who allegedly acted in a fraudulent transaction.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

In Canada, punitive or exemplary damages are only awarded where an ordinary damages award would be insufficient to achieve the goals of punishment and deterrence. Even then, only the minimum amount necessary to achieve this purpose will be awarded, and awards are typically small, especially in comparison to those found in the United States, for example. To make a claim for punitive damages, the plaintiff must show that the defendant's conduct was so malicious, oppressive and high handed that it offends the court's sense of decency.

In the provinces of Alberta and Saskatchewan, a plaintiff must specifically plead punitive damages, but this is not a requirement in other Canadian common law jurisdictions. The party claiming punitive damages bears the burden of proof.

In Québec, only specific situations provided for in law give rise to the awarding of punitive damages. For example, where there is an unlawful and intentional interference with a right or freedom under the Charter of Human Rights and Freedoms, such as a bad faith infringement of property rights with malicious intent. Therefore, it is possible that in cases of fraud, punitive damages may be awarded in Québec.

7.2 Laws to Protect "Banking Secrecy"

Canada does not have specific laws to protect "banking secrecy", which prohibit banks from disclosing customer data. The general privacy laws (such as the Personal Information Protection and Electronic Documents Act) and com-

mon law duty of confidentiality provide for the legal framework surrounding disclosure of customer data, along with certain provisions of the federal Bank Act.

Pursuant to Section 487.018 federal Criminal Code, a justice or judge may order a banking institution to produce financial data upon an ex parte application of a peace or public officer. Upon receipt of the order, the financial institution may be asked to prepare and produce:

- either the account number of a person named in the order or the name of a person whose account number is specified in the order;
- the type of account;
- the status of the account; and
- the date on which it was opened or closed.

7.3 Crypto-assets

The wider use of cryptocurrency in everyday markets, and its susceptibility to fraud from anonymous actors, has forced Canadian courts to consider how to apply traditional judicial concepts and remedies to these less tangible digital assets. Although the Canadian courts have not conclusively deemed cryptocurrency to constitute property, they have in effect found that it can in some circumstances be treated as such in order to grant appropriate freezing and recovery remedies. For example, as discussed more fully in the Trends and Developments section, Canadian civil courts have started to apply freezing (Mareva), interim possession and civil search and seizure (Anton Piller) remedies to cryptocurrency. These important developments mark a seismic shift in the Canadian legal system, as it moves to fill a civil justice gap in the exploding digital marketplace.

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McMillan LLP is a leading business law firm serving public, private and not-for-profit clients across key industries in Canada, the United States and internationally through its offices in Vancouver, Calgary, Toronto, Ottawa, Montreal and Hong Kong. The firm represents corporations, other organisations and executives at all stages of criminal, quasi-criminal and regulatory investigations and prosecutions for all types of white-collar offences, including fraud, bribery and corruption, money laundering, cartels and price fixing, insider trading or other securities offences, economic sanctions, export and import controls and tax offences, as well as offences under health and safety, discrimination, immigration, financial services, energy, environmental and other regulatory regimes. The team also manages and defends against search warrants, inspection orders, interviews given under statutory compulsion, wiretapping orders, and other investigative actions, and advises on risk management, regulatory compliance, reputation management and defamation, among other matters.

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Trends and Developments

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Overview

Current trends and developments in international fraud largely relate to the growth in cybercrime, and on the challenges global businesses face in developing effective procedures and tools to address these evolving risks to their real and digital assets. While traditional fraudulent schemes still abound, the increased use of digital marketplaces and exchanges has led to new areas of risk.

The emergence of cryptocurrency, for example, and its increasing acceptance in commercial transactions, not to mention its ease of movement and exchange, has unsurprisingly attracted the attention of fraudsters. Canada's federal and national police service, the Royal Canadian Mounted Police (RCMP), recently stated that cryptocurrency fraud in Canada grew by 400% between 2017 and 2020. The ability to successfully trace and recover such assets presents even greater challenges given the medium of exchange and the cross-border nature of transactions.

To address the growing cryptocurrency fraud, the Canadian Anti-Fraud Centre has published guidelines to help the public avoid being defrauded and to protect virtual assets (Canadian Anti-Fraud Centre Bulletin: Using Cryptocurrency Safely, 29 January 2021). Until 2021, there was very limited Canadian case law on the recovery of digital assets and treatment of cryptocurrency. However, new precedent-setting cases in 2021 and 2022 succeeded in applying conventional judicial enforcement tools to digital assets, to trace, freeze and seize the proceeds of cryptocurrency fraud and overcome prior scepticism on whether the civil courts could and would intercede. It is still early days in this area of law, and businesses using such digital assets must keep a close eye on the quick-moving nature of these schemes, while Canadian judicial remedies close the tracing and enforcement gap.

Cybercrime Generally

The Canadian government and law enforcement view cybercrime as the most common cyber threat that Canadian organisations are likely to encounter. In the digital world of fraud we are seeing rising technical complexity and expansion into new forms of criminal activity.

Canadian law enforcement typically organises cybercrime into two categories:

- technology-as-target crimes, where the criminal activity targets computers and other information technologies directly, such as mischief relating to confidential data (eg, malware threats);
- and technology-as-instrument crimes, where the internet or other information technologies are used as the mechanism to carry out a crime, such as identity theft, money laundering, child exploitation and human or drug trafficking.

These types of cybercrimes look to exploit new and emerging technologies, and test existing cybersecurity defences, looking for any opening to generate illicit gains. Generally speaking, cybercriminals take advantage of gaps not only in company software and hardware, but in human tendencies in the course of their everyday business at work and online. The goal of

these cybercriminals is stealing an individual or company's confidential information through fraud, extortion and monetising it for profit or illicit use. These fraudsters target Canadians but operate and move data and funds offshore, often out of reach of Canadian law enforcement and, practically speaking, even when traceable, beyond effective recovery.

The government of Canada, through the National Cyber Security Strategy, supports the RCMP's National Cybercrime Coordination Unit, which co-ordinates cybercrime investigations in Canada and with international partners, providing both an information source and a national reporting system.

Cryptocurrency Fraud

Digital assets an are increasing target of cybercrime and by design allow for a more unencumbered and less regulated exchange. As a result, they are more susceptible to manipulation and tampering. In Canada, we are seeing cryptocurrencies as an area of increased risk, as regulation struggles to keep up with the demand and usage of these mediums of exchange.

Cryptocurrency is a digital asset that can act as a medium of exchange to buy goods and services, or for investments and trading. It is stored on third party exchanges or in hot (online) or cold (offline) storage wallets. In Canada, cryptocurrencies are not considered legal tender. As such, cryptocurrency is not issued by a government or a central bank and no financial institution is involved in the transactions, making their use on exchanges and other platforms more susceptible to fraud or mismanagement (see, for example, the widely reported Quadriga case).

Cryptocurrency has been used in Ponzi, extortion and fraud schemes and scams around the world. This is mainly because it is easier to move cryptocurrency between different jurisdictions globally, and to restrict its means of access, making it more difficult to determine which court has jurisdiction and how to locate and prosecute the wrongdoer. There is no central authority that maintains cryptocurrency user information, although it can sometimes be sought through cryptocurrency exchanges. There is also an element of anonymity in cryptocurrency transactions that fraudsters can exploit, as there are no names behind wallet addresses.

As a result, victims of fraud usually have to seek help from digital forensic investigators and use software tools to trace the movement of the subject cryptocurrency. This inevitably leads to additional logistics and costs for a victim who wants to sue the fraudster and trace the fund flow. Sometimes the amounts at issue do not validate incurring these additional pursuit costs, adding to the appeal of this form of fraud to criminals. This is in addition to the speed with which it can be transferred, sometimes multiple times using software to break on-chain links between addresses, making it difficult to trace and making the slow process of obtaining orders and enforcing them imperfect.

Transfers of cryptocurrencies are typically irreversible, which makes the recovery even more challenging. When dealing with monetary transactions, financial institutions can utilise mechanisms to reverse some of them (eg, credit card chargebacks). However, similar mechanisms are rarely available in respect of cryptocurrency transactions, at least without some assistance from an exchange.

Canadian Case Law – Early Treatment of Cryptocurrency

One of the first decisions dealing with asset tracing in the cryptocurrency space was a 2018 British Columbia Superior Court decision. In Copytrack Pte Ltd v Wall, the court ordered a tracing remedy for a type of cryptocurrency.

Copytrack Pte Ltd ("Copytrack"), a Singapore-based company, brought an application for summary judgment, and sought a tracing order to recover ethereum (Ether) tokens on the basis of wrongful retention or conversion.

Copytrack offered its tokens ("CPY") for sale to investors as part of an initial coin offering (ICO) campaign. The defendant participated in the ICO and subscribed for 530 CPY tokens (value about CAD780). Copytrack mistakenly transferred a different form of cryptocurrency to the defendant's wallet – about 530 Ether tokens (value CAD495,000). Despite Copytrack's request, the defendant failed to return the Ether tokens and later claimed that he no longer had possession of the tokens as they had been stolen by an unknown third party.

While granting the tracing and recovery remedy, the court did not make a determination in respect of whether cryptocurrency is a "good" for the purposes of the doctrines of conversion and detinue as the evidentiary record was inadequate. However, the court held that it was undisputed that the tokens in that case were Copytrack's property and it would be unjust to deny Copytrack a remedy.

The court did not provide any guidance on the form of tracing or rules to be applied when tracing cryptocurrencies. In this case, Copytrack submitted that the Ether tokens were traceable to five separate wallets. This type of information may not always be available and might pose a challenge in terms of enforcing asset-tracing orders. More recently, two new cases have built upon the Copytrack authority and more clearly demonstrate how cryptocurrency can be frozen (on exchanges) or seized and preserved by a third-party custodian (cold storage wallets), all carried out without notice to the defendant and pre-judgment to protect the interests of all parties in the litigation.

Freezing, Seizure and Preservation Orders for Cryptocurrency

Due to the digital nature of cryptocurrency, victims of fraud may not always have sufficient information to identify the location of the cryptocurrency, such as the wallet details or trading accounts through which it was improperly transferred. If either an exchange or a digital wallet or some other identifying information is available, and a private party wishes to commence a proceeding in civil court, interim without notice injunctive remedies now appear available to close the enforcement gap in cryptocurrency frauds.

First, with respect to cryptocurrency assets on exchanges or otherwise within the control of third parties, Canadian courts have demonstrated a willingness to order freezing (Mareva) orders, without notice to the defendant asset holders. Typically, Mareva injunctions are brought urgently on an ex parte basis to avoid further dissipation or conversion of assets pending the court order. To obtain a Mareva order, the plaintiff must prove, among other things, a strong prima facie case and that there is a serious risk of dissipation of assets. In many cases involving cryptocurrency, it will be harder to prove a strong prima facie case of fraud without an extensive investigation, which may take too long to be effective. A claimant may also have to broaden their investigation on the digital transactions, seeking a Norwich Pharmacal order against involved third parties, such as an exchange or internet service providers, in order to find ways to obtain user details, emails, internet postings and, ultimately, further account details.

Furthermore, the "risk of dissipation" may be harder to demonstrate through evidence or inference, given that the very nature of cryptocurrency – its ease of transfer – is a function of its medium, and not necessarily a sign of something improper in and of itself. The courts have

already been faced with arguments that the use of cryptocurrency is itself suspicious, but that superficial line of argument will only grow more ineffective as the medium of exchange shakes off its stigma.

In 2019, an English court confirmed that proprietary injunctions are available in respect of bitcoin, a form of cryptocurrency. In the 2019 case of AA v Persons Unknown and Others, a Canadian insurance company was the target of a ransomware attack. The English insurer of the Canadian company agreed to pay 109.25 bitcoins (value USD950,000) to the hacker in exchange for decrypting its customer's servers and desktop computers. Subsequent to the payment, the insurer conducted an investigation to trace the bitcoins and was able to obtain an address of a digital asset and cryptocurrency exchange known as Bitfinex, operated by companies in the British Virgin Islands. With that information, the insurer sought a freezing order in respect of the bitcoin held in accounts with the exchange. As a preliminary matter, the English court determined that the insurer had established that bitcoin constituted property. The court held that the injunction test was met: the evidence showed that there was a serious issue to be tried, the balance of convenience favoured the granting of the injunction and damages would not be an adequate remedy.

Fortunately, the Canadian civil courts have now expanded the availability of freezing, seizure and preservation injunctions against cryptocurrency.

In the February 2022 decision of Li v Barb and Others, a class action lawsuit by various businesses in the City of Ottawa successfully obtained a without notice Mareva injunction freezing cryptocurrency in more than 120 different addresses held by organisers of the "freedom convoy", who were in receipt of funds in support of their pandemic protests in Canada's capital (this civil Mareva order followed the Canadian governments freezing of 34 cryptocurrency addresses under the Emergencies Act). The court also directed several financial institutions, platforms and exchanges (including national banks and platforms such as "GoFundMe") to freeze all transactions related to the subject digital wallets. Examinations under oath quickly followed. These enforcement measures were however somewhat limited as unhosted wallets, and peer-to-peer cryptocurrency transfers that avoided third party intermediaries, could not be intercepted by this form of court intervention.

Fortunately, the Canadian civil courts have now also addressed this challenge posed by cryptocurrency frauds that transfer the unlawful proceeds to an unhosted digital wallet, without involving a third-party exchange. In the November 2021 landmark case of Cicada 137 v. Medjedovic, Benjamin Bathgate and Reuben Rothstein, McMillan LLP, successfully obtained the first reported Anton Piller order (civil search and seizure) on cryptocurrency in Canada. The plaintiff brought its without notice injunction to search for and seize evidence at the teenage defendant's residence, including the subject cold storage wallet devices and all passcodes, to preserve the evidence and assets and deliver them to a third party custodian until further disposition by the court. The court granted and extended this injunctive order, providing for extended searches for the digital wallet information, and issued a Warrant for Arrest against the defendant to force his compliance.

The Cicada 137 case is also one of the world's first cases that considers attacks against smart contracts (on a blockchain) and user interactions on decentralized finance (DeFi) trading platforms. The case may become the first cryptocurrency fraud and recovery case to address the controversial ethos of "Code is Law", where attackers assert the defence that if software

code does not prevent an attack, the action and subsequent windfall should be lawful.

Conclusion

In Canada, since our traditional judicial remedies used to trace and freeze funds were not created with cryptocurrency in mind, it is up to the courts to re-work the conventional approach and be flexible in ordering useful remedies that serve the purpose intended, while taking into account the peculiarities of digital tender.

The Canadian courts have proven increasingly willing to grant tracing, freezing, seizure and preservation orders for cryptocurrencies. However, their effectiveness in practice is still evolving and uncertain. It seems inevitable that, to avoid forcing claimants into extra-judicial processes, the courts will have no choice but to continue to adapt their orders and enforcement measures to the reality of cryptocurrencies in the coming years, to avoid greater proliferation of digital currency fraud schemes in Canada.

The Canadian authorities are taking some initial steps to help provide guidance on these commercial risks, including securities regulators. For example, the Canadian Securities Administrators (CSA) and the Investment Industry Regulatory Organization of Canada (IIROC) have issued guidelines (Joint Canadian Securities Administrators and Investment Industry Regulatory Organization of Canada, Notice 21 329: Guidance for Crypto Asset Trading Platforms: Compliance with Regulatory Requirements, 29 March 2021) outlining requirements applying to crypto-asset trading platforms and providing clarification on the ways in which the current securities legislation framework should apply to those platforms. The guidelines do not create new rules but rather explain how the current rules should be applied to the complex models of crypto-asset trading platforms in order to better regulate them and manage the recent explosion of unregistered platforms that have increased risks to the public. These guidelines highlight the obligation for such platforms to register either as an investment dealer or apply for interim registration until their activities are clarified with regulators.

If Canada's courts and regulators are to keep up with the wider use of this digital tender and ensure continued protection of commercial transactions, further guidance from the relevant authorities will need to come quickly and must demonstrate a readiness to change. Without support for meaningful information gathering and enforcement tools that can extend our investigation and recovery beyond Canada's borders, virtual tender will take effective asset tracing even further out of reach.

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McMillan LLP is a leading business law firm serving public, private and not-for-profit clients across key industries in Canada, the United States and internationally through its offices in Vancouver, Calgary, Toronto, Ottawa, Montreal and Hong Kong. The firm represents corporations, other organisations and executives at all stages of criminal, quasi-criminal and regulatory investigations and prosecutions for all types of white-collar offences, including fraud, bribery and corruption, money laundering, cartels and price fixing, insider trading or other securities offences, economic sanctions, export and import controls and tax offences, as well as offences under health and safety, discrimination, immigration, financial services, energy, environmental and other regulatory regimes. The team also manages and defends against search warrants, inspection orders, interviews given under statutory compulsion, wiretapping orders, and other investigative actions, and advises on risk management, regulatory compliance, reputation management and defamation, among other matters.

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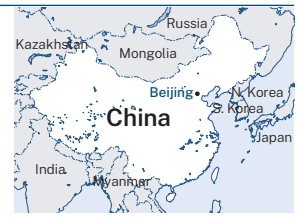

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

China, a civil law jurisdiction, does not have standalone laws or administrative regulations to counter fraudulent conduct. Rather, provisions on fraudulent conduct are found within different laws and administrative regulations, which provide legal bases for various fraud claims.

Claims to Rescind a Contract or Other Civil Act

Under the Civil Code of the PRC (the Civil Code), one of the elements for a legally effective civil act is the manifestation of true intent. Thus, a victim who is induced by fraud to sign a contract (a civil act) against their true intent can institute a civil action to rescind the contract. In addition to rescission, the victim can also claim against the perpetrator of the fraud for the return of the property fraudulently obtained and/or for compensation for losses so caused. In this instance, the victim may make the same claims against the contract counterparties even if they are not the perpetrator. If a third party fraudulently induces the victim to enter the contract, the victim may still make successful claims against the counterparties if they were or should have been aware of the third party's fraudulent acts.

Conspiracy Claims

Under the Civil Code, civil acts committed by a fraud perpetrator and one or more third parties are voidable where they constituted a malicious collusion and harmed the lawful rights and interests of others (Article 154). Thus, a fraud victim can institute a civil action against such parties and claim voidance of the civil acts. Such claims may be useful for the victim to trace and recover assets that are transferred to a third party in a conspiracy.

A third party knowingly assisting or facilitating the fraudulent acts may be held jointly and severally liable to the victim (see **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts**).

Tort Claims

Chinese law does not generally prescribe deceit as a tortious act. However, as deceit is often merely a means of infringing property or personal rights, the victims can instead find a cause of action to bring a tort claim against the perpetrator based on the infringement of property or personal rights. In addition, provisions of law in certain areas expressly prohibit specified fraudulent acts, for example in the Securities Law of the PRC (the Securities Law), the Law of the PRC Against Unfair Competition (the Anti-unfair Competition Law), and the Company Law of the PRC (the Company Law), where fraudulent acts can give rise to tort liability.

For instance, the Securities Law prescribes securities misrepresentation as a special type of fraud, which is defined as the disclosure of information in connection with the offering of securities that violates relevant provisions on information disclosure and causes false records, misleading statements, or material omissions in the information so disclosed. For more details, see **3.2 Claims against Ultimate Beneficial Owners**.

Generally, the victims have the burden to prove that the perpetrators have engaged in fraudulent acts, the losses suffered, causation and degree of fault. However, considering that it is often too hard for the victim to prove the fraudulent acts and fault, in some areas of law the burden of proof is reversed by requiring the defendant to show there was no fraudulent act or they were not at fault.

Duty of Loyalty Claims

Similar to the concept of fiduciary duty in common law jurisdictions, Chinese law imposes a duty of loyalty on the directors and officers of a company. In addition to other specific prohibited acts for the directors and officers, they have a general duty of loyalty and due diligence to the company they serve. Where a director or officer breaches their duty of loyalty (eg, by receiving corrupt payments or misappropriating assets), the company may institute a civil action against them and claim for damages suffered and/or the profits that the perpetrator has made. Also see **3.3 Shareholders' Claims against Fraudulent Directors**.

Criminal Law

Fraud is a serious criminal offence under the Criminal Law of the PRC (the Criminal Law), which provides for various criminal fraud offences including fraud, contract fraud, illegal taking of deposits from the public, fraudulent fundraising, and financial fraud. The conviction standards under the Criminal Law are quite low for each offence – eg, RMB 3,000 for criminal fraud and RMB 20,000 for criminal contract fraud committed by an individual. The remedies available to the victim are generally limited to a return of the property or compensation for the actual losses in criminal proceedings.

1.2 Causes of Action after Receipt of a Bribe

Civil Claims

Chinese law does not establish a general private right of action for bribery. However, bribery in business activities is expressly prohibited and can trigger civil claims on certain causes of action such as unfair competition or breach of the duty of loyalty.

Claims against the Briber

Under the Anti-unfair Competition Law, business operators and their employees are not allowed to bribe an agent/employee of a counterparty or someone who can use their authority or influence to influence the transaction with the counterparty to obtain trading opportunities or competitive advantage.

A victim whose legitimate rights and interests are harmed by such conduct may bring a claim against the briber to compensate for damages. The amount of such compensation can be determined on the basis of the actual losses suffered as a result of the infringement. Where the actual losses are difficult to calculate, compensation will be determined on the basis of the benefits obtained by the infringer as a result of the infringement.

Claims against Employees, Directors, and Officers

An employer whose employee receives a bribe may have civil claims against the employee for losses arising from the bribe. The employer may also rely on contributory infringement as a civil cause of action against the employee and the bribe-giver, who can be held jointly and severally liable with the employee.

Directors or officers of a company who accept bribes in connection with their duties violate their duty of loyalty to the company and, according to the Company Law, the income so obtained by the directors and officers belongs to the company. The company, as the victim, may be entitled to claim against directors and executives to compensate for damages and to return the illegally obtained income. For a related discussion on shareholder derivative actions, see **3.3 Shareholders' Claims against Fraudulent Directors**.

Administrative Sanctions

Where business operators violate the provisions of the Anti-unfair Competition Law by bribing others, the victim can also report to the compe-

tent supervision and inspection authority, which may confiscate the illegal gains and impose a fine of between RMB100,000 and RMB3 million. Where the circumstances are serious, the business licence of the bribing company can be revoked.

Criminal Offences

The Criminal Law provides for various criminal offences for those persons and companies involved in commercial bribery, including the bribe-giver and receiver.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Under the Civil Code, a third party who assists a perpetrator in carrying out a fraudulent act may bear joint and several liability with the perpetrator (Article 1169). To establish joint and several liability, the claimant must prove the third party was or should have been aware of the fraudulent act and the possible harmful consequences of providing such assistance. That is to say, the claimant must establish common intent between the third party and the perpetrator.

"Assistance" is defined as facilitating the perpetrator's commission of a fraudulent act, which does not necessarily cause the perpetrator to commit the act. An act of assistance can be committed after the fraudulent act, such as a third party's receipt of fraudulently obtained assets, if common intent is established. Conversely, without common intent, the third-party recipient will not be held jointly and severally liable with the perpetrator.

Without common intent, a third party may instead be held liable for losses caused to the claimant to the extent the claimant can establish that the third party's assistance violated their duties or mandatory provisions of law. In this instance, third-party liability is less certain because there is no direct causation between the assistance and the losses of the victim. In judicial practice, courts may decide liability at their discretion based on the circumstances – eg, the third party's degree of fault and their role during the fraud.

A party who assists or facilitates criminal fraud may become a joint defendant to the crime if there is common intent. Standalone criminal penalties 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.

1.4 Limitation Periods

Civil Statute of Limitations

Under the Civil Code, the right to seek protection of civil rights from the court is subject to a statute of limitations of three years from the date on which the victims knew or should have known that their rights had been infringed and the identity of the perpetrator. The statute of limitations can be suspended or renewed under certain statutory circumstances. However, courts no longer provide remedies when the absolute statute of limitation of 20 years has elapsed from the date the rights were infringed, except that there are special circumstances for which the court grants an extension upon the victims' application.

In addition to the statute of limitations, there are special types of limitation periods for certain specific remedies. For example, a claim for rescinding a contract or other civil act on the basis of civil fraud must be brought within one year from the date on which the victim is aware or should have been aware of the fraud. Such special limitation period is not allowed to be suspended, renewed, or extended, and expires five years after the civil act is committed, regardless of whether the fraudulent act or the identity of the fraudster was known to the victim.

Criminal Prosecution Limitation Periods

Under the Criminal Law, a 15-year or 20-year limitation period applies for serious offences in relation to fraud whose maximum punishment is fixed-term imprisonment of at least ten years to life, which begins from the date of the commission of the offence. However, no limitation exists where a suspect avoids a criminal investigation after the case has been filed.

1.5 Proprietary Claims against Property

Proprietary Claims and Bona Fide Acquisitions

Under Chinese law, generally a claimant can make a proprietary claim to seek the recovery of property misappropriated or induced by fraud to transfer. Specific to the claims in litigation, a claimant can plead to the court to affirm its ownership over the defrauded property and order the defendant or the party in possession to return the property. Where the defendant is an insolvent entity, the claimant may obtain the return of the property in the possession of the defendant through the bankruptcy administrator, according to Article 38 of the Enterprise Bankruptcy Law of the PRC (Enterprise Bankruptcy Law).

There is also an exception for proprietary claims, which is called a "bona fide acquisition". That is, if the perpetrator has transferred the property to a third party who has lawfully acquired the title of such property by showing that certain statutory conditions have been met. Under the Civil Code, a bona fide acquisition must meet the following conditions:

- the transfer of the property was in good faith;
- the transaction price was reasonable; and
- the property has been rightfully registered in accordance with the provisions of the law or is in physical possession of the third party.

Recovery of Mixed Funds

Cash funds are generally regarded as a special type of movable property; hence, the party who possesses the cash funds is presumed to be their owner. Proprietary claims cannot be made over cash funds unless they are separate so as to be specific or otherwise identifiable or distinguishable. Accordingly, if a claimant is defrauded of cash funds or obtains a monetary award, they are generally on par with other unsecured creditors, regardless of whether they have been mixed with the perpetrator's other funds.

Investment Gains from Defrauded Property

Gains from defrauded property can generally only be recovered together with proprietary claims. If the fraudster invests the proceeds and obtain gains as a result, the victim can only claim an amount equal to their original loss and is not allowed to claim the return of the full amount of profits created as a result of the defrauded property.

Proprietary Claims in Criminal Proceedings

In criminal proceedings, a criminal defendant who illegally possesses or disposes of the victims' property will be subject to forfeiture of the property (if available) or ordered to compensate the victims for their losses. In the latter case, the defendant's own lawful property can be subject to forfeiture by the criminal investigation organs and used to compensate the victims.

To the extent the victims are not fully compensated during the criminal investigation procedures, the court will order in the criminal judgment that the defendant's property be subject to forfeiture and used to further compensate the victims. In this case, the victims' right to compensation from the defendant will take priority over the defendant's unsecured creditors.

1.6 Rules of Pre-action Conduct

There are no particular rules of pre-action conduct that apply in relation to fraud claims under Chinese law.

As a practical matter, prospective claimants often apply for pre-action preservation measures, such as to effect property, conduct, or evidence preservation (see **1.7 Prevention of Defendants Dissipating or Secreting Assets** and **2.2 Preserving Evidence**).

1.7 Prevention of Defendants Dissipating or Secreting Assets

Fraud claimants, similar to other civil claimants, should observe and make use of preservation measures to increase their chances of a meaningful recovery.

According to the Civil Procedure Law of the PRC (the Civil Procedure Law), where the conduct of the defendant or other reasons may make it difficult to enforce a judgment or cause other harm to the claimant, the court may, upon the application of the claimant, rule to take preservation measures after the filing of the litigation case (ie, litigation preservation). Meanwhile, if there is an urgent situation where the claimant's lawful rights and interest may otherwise sustain irreparable harm, the court may, upon application of the claimant, rule to take preservation measures before the filing of the litigation case (ie, pre-litigation preservation).

Aside from the above, the application requirements are the same for litigation and pre-litigation preservation. For pre-litigation preservation, the victim must file the related civil lawsuit within 30 days; failure to do so will result in the court lifting the preservation measures. In judicial practice, courts have discretion over the review of "urgent situations", and it is usually difficult to obtain approval for pre-litigation preservation.

Under the Civil Procedure Law, the preservation measures include property preservation, conduct preservation and evidence preservation. For the purpose of preventing dissipating or secreting assets, the claimant generally only needs to apply for property preservation, which is in rem. In theory, the claimant is entitled to conduct preservation, which is in personam and similar to a preliminary injunction. However, since the fraudulent act is often instant rather than continuous, generally property preservation is enough to prevent a defendant from dissipating or secreting assets. Thus, courts often reject applications for conduct preservation in fraud cases.

Property Preservation

Applicants for property preservation should provide the court with relevant clues about the property owned by the intended defendant; the court usually does not take the initiative to inquire about asset information through the court's enforcement and control system or other means. When the applicant applies for property preservation, they are required to pay the property preservation application fee to the court. The application for property preservation is calculated according to the amount of the victim's request for preservation, up to a maximum of RMB5,000 per case.

In addition to the application fee, the court usually requires the applicant to provide a cross-undertaking for the preservation order to reduce the unjustified risk of loss to the intended defendant. The undertaking can take the form of cash deposit, real property mortgage, or a guaranty letter from an insurance company or a qualified guaranty company. For cash deposits, the cash amount should be no less than 30% of the value of the property to be preserved. For real property mortgage or guaranty letter, the appraised value of the real property or the guaranteed amount of

the guaranty letter should be no less than 100% of the value of the property to be preserved.

Property preservation measures remain in effect for a period of one to three years depending on the nature of the preserved property and can be renewed until the completion of the enforcement of final judgement. During this period, if the defendant seeks to evade an asset preservation order by dissipating or fraudulently transferring the assets, the claimant may request the court to impose a fine, detain the defendant, or even pursue criminal liability. If the property preservation proves wrongful or erroneous and causes losses to the defendant, the defendant may file a claim against the applicant and/or guarantor to obtain compensation.

Effect on Third Parties

When enforcing the ruling for property preservation, the court may seal, distrain, or freeze the property registered under the name or in possession of the defendant, as well as the property registered under the name or in possession of a third party, provided that the third party confirms in writing that the property belongs to the defendant or the claimant submits reasonably sufficient evidence to prove so.

Meanwhile, if a third party believes that they rightfully own the preserved property or otherwise involves their substantive rights, the third party may submit a written objection to the court, and the court will examine and decide within 15 days to cease the enforcement or reject the objection. If the objection is rejected and the third party is not satisfied with the decision, it may file a lawsuit against the claimant and request the court to overturn the property preservation ruling. If the third party ultimately obtains an effective judgment to overturn the preservation ruling, the court will lift the preservation measures accordingly.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

A property disclosure order can only be made by the court after the enforcement procedure of judgment is initiated. No procedure exists in civil actions which requires a defendant to give disclosure of their assets pending a judgment.

Before or after the litigation is accepted, the claimant can apply to the court for property preservation (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**), where the claimant needs to investigate on their own or entrust a lawyer to investigate certain public asset information (such as equity interests or shares in a company, intellectual property rights, etc). The claimant usually cannot inquire about real estate under the defendant's name nor access bank accounts in the defendant's name (see **7.2 Laws to Protect "Banking Secrecy"**).

2.2 Preserving Evidence

Under Chinese law, there is no such duty for the parties to preserve evidence. In this regard, claimants may apply to the court for pre-litigation or litigation evidence preservation in accordance with Article 84 of the Civil Procedure Law. In certain circumstances, courts may order evidence preservation at their own initiative.

Evidence preservation orders are imposed where it is believed that important evidence might be destroyed or lost or would be difficult to obtain later. On a pre-litigation basis the claimant must also show there is an "urgent situation" in need of evidence preservation (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**). Claimants may apply for evidence preservation to the court where the evidence is located, the respondent is domiciled, or the court with jurisdiction over the case intended to be filed.

In China, courts generally do not permit a party to conduct a physical search of documents at the defendant's residence or place of business.

In judicial practice, when examining a claimant's application, the court will usually make its decision based on factors such as the connection between the evidence to be preserved and the facts to be proved, the necessity and feasibility of evidence preservation, and so on. The court is responsible for enforcing evidence preservation, and the court may employ methods such as sealing, distraining, audio-video recording, reproducing, appraising, and inquests to carry out evidence preservation and make a record.

Before ruling to take evidence preservation measures, the court may at its discretion request the applicant to provide a cross-undertaking for losses that the intended defendant or third party may incur due to such preservation. Under normal circumstances, the court will not require the undertaking as evidence preservation is the preserving of specific evidentiary materials for later use, which will not harm property interests. If required, the court will determine the method or amount of undertaking on the basis of factors such as the impact of the preservation measures on the holder of the evidence, the value of the evidence to be preserved, and the amount of the subject matter in dispute.

In addition to evidence preservation carried out by the court, the claimant may on its own preserve evidence through various means – eg, engaging a notary public house to notarise the process of evidence gathering conducted by the claimant or its attorneys.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

Third-Party Disclosure in Civil Proceedings

In civil proceedings, a claimant may request any third party to disclose documents and evidence, but there are no mandatory procedures for the claimant to compel third parties to do so. If there is any important evidence that the parties cannot collect on their own, they may apply to the court to investigate and collect such evidence from third parties, who are required to co-operate with the investigation and provide the requested documents, evidence, or information.

The court has discretion to decide whether to act as requested and may, at its own discretion, question a third party who knows the facts of the case and create an investigation record. The record will then be subject to cross-examination by the claimant and the defendant.

Some provincial level higher courts have issued guidelines for attorney investigation orders. Attorneys to either party to the proceeding may apply for an investigation order, which, if granted, allows the attorney to collect requested evidence from a third party (usually file materials, rights certificates, bank account information, transaction documents, third parties' explanations of the facts related to the case, etc). The guidelines generally provide that the parties must keep confidential any confidential information or commercial secrets obtained through the investigation order and must not disclose the same to anyone else for any other purpose.

Generally, the court will not assist the claimant to obtain evidence from third parties before the commencement of civil proceedings. However, if the claimant is unable to accurately identify the defendant and has difficulty filing a case, the claimant may apply to the court for an investigation order for access to the defendant's identity information from a third party.

Third-Party Disclosure in Criminal Proceedings

In criminal proceedings, public security organs may, in the course of an investigation, obtain

such information from the holder of the information related to the criminal act, and may also question a third party who knows the facts of the criminal offence. The investigation procedures of the public security organs are confidential and the victim is usually not provided with the information obtained during the investigation.

However, the case file materials are handed over to the procuratorate after completion of the investigation procedures, and the victim can apply to the procuratorate to read the case file and obtain a copy of the case file materials.

2.4 Procedural Orders

Courts can grant preservation orders over the property, conduct, or evidence of the intended defendant or a third party. These orders may be issued without the need to notify the defendant or hold an ex parte hearing in advance. The intended party should be served with the order after it is issued. In practice, courts generally do not serve the intended party until the ruling has been enforced to ensure the intended party does not obstruct enforcement.

When the court decides to grant the orders, except for the undertaking that the claimant may be required to provide, there will be no additional burden on the claimant, nor does it need to compensate the defendant for not being present.

2.5 Criminal Redress

In China, the Supreme People's Procuratorate and its local counterparts are responsible for prosecuting criminal cases. Generally, the victims of fraud cannot themselves commence a criminal proceeding and can only report the suspected fraud to the local counterparts of the Ministry of Public Security, which is responsible for ordinary criminal investigations. In fraud cases, the criminal process is almost always the first choice for victims due to the reasons addressed in the following paragraphs, while the threshold for instituting a criminal proceeding is much higher than for a civil proceeding, unless there are large scale victims involved.

Advantages of Criminal Redress

Victims tend to seek redress through the criminal process based on the following three considerations.

- Public security organs have the authority to trace, seal, distrain, and freeze the defrauded assets regardless of whether they are in the name or possession of the fraudster or a third party, and can normally return the assets to the victims during the criminal investigation stage.
- The law stipulates that courts are likely to mitigate punishment if the defendant reaches a settlement with the victims and voluntarily returns the assets. In practice, in order to obtain a more lenient punishment, the defendant will take the initiative to find ways to raise funds to repay the victims.
- Compared to the criminal investigation and assets returning process, civil proceedings are time-consuming and cost-consuming and may even result in no recovery due to a lack of effective means to trace and enforce the defrauded assets that the fraudster usually dissipated and secreted after the fraud is revealed.

Interplay between Civil and Criminal Redress

Once a criminal proceeding commences, charges against the defendant will not be vacated even if the defendant fully compensates the victims. Accordingly, parallel proceedings may occur if the public security organ has instituted criminal proceedings. Under Chinese law, criminal proceedings take precedent over civil proceedings, provided that the parallel proceedings are based on substantially the same facts. Accordingly, courts will refuse to accept a civil case based on the same legal facts after a criminal proceed-

ing has been instituted against the defendant. Courts are also expected to dismiss civil cases that have been accepted and transfer the case materials to the relevant criminal investigation organ.

Moreover, after the defendant is criminally charged, it will generally become insolvent, and the assets recovered by the judicial organs must also be distributed proportionally among all victims. This may lead to the victims not being compensated in full. For this reason, victims may prefer to pursue a civil cause of action if they are able to discover and preserve the assets of the defendant or if the defendant is willing to raise funds to compensate the victim for their losses.

2.6 Judgment without Trial

In civil proceedings, the court must serve each party a notice for the coming trial and must hold at least one full trial for each case before rendering a judgment. However, where a defendant, after duly served with a notice, fails to appear in court or quits during the trial, the court may at its discretion enter a default judgment. There is no procedure for the claimant to move for a summary or default judgment in any event, even if the defendant fails to appear in court or answer the complaint or makes a wholly unmeritorious defence.

Where the defendant fails to appear in court, the trial shall proceed as normal, and the court has the authority to clarify all the key facts alleged by the claimant to mitigate the risk that a third-party's interest will be harmed by the judgment.

2.7 Rules for Pleading Fraud

Civil Fraud Claims

Chinese courts implement a case registration system for civil litigation, and the court will generally file and accept the pleading as long as the following statutory requirements are met: identity information of the defendant; specific claims; specific factual basis and reasons; and the court has jurisdiction over the case. Although there are no special rules or professional conduct considerations or heightened standards for pleading fraud in China, the "specific factual basis and reasons" requirement itself grants discretion to the court in examining pleading materials and deciding whether to accept and file the case. Given this, it is possible that the court may require the claimant to provide more cogent evidence than other types of claims with a view to precluding unwarranted allegations of fraud being made.

Criminal Fraud Claims

If the victim makes a criminal report to the public security organs, it is usually necessary to provide prima facie evidentiary materials on the crime of fraud. There are no particular provisions requiring a victim to provide evidence in the case of fraud. Where, in the course of filing and reviewing a case, public security organs discover that the facts of the case or the criminal clues provided by the victim are unclear, they may employ measures such as questioning, inquiry, inquest, appraisal, and collection of evidentiary materials that do not restrict the personal or property rights of the suspects.

Where, after review, the public security organs find that there are criminal facts and it is necessary to pursue criminal liability, the case may be officially accepted. However, due to lack of detailed guidelines on the criteria for filing a criminal case, the public security organs have broad discretion on whether to accept the case, and the threshold to commence a criminal investigation is usually high.

Notably, the public security organs will explain to the victim the legal consequences of making false accusations. However, as long as the facts are not fabricated or falsified, even if the facts reported by the victim are discrepancies or

even erroneous accusations, the victim will usually not be held legally liable for making accusations against an alleged perpetrator.

2.8 Claims against "Unknown" Fraudsters

According to the Civil Procedure Law, one of the requisites for the court to accept a civil case is that the defendant must be specifically identifiable. Therefore, civil fraud claimants must provide the court with the defendant's identity; otherwise, the court will not accept the case. To remedy this, victims may:

- apply to the court for a pre-litigation investigation order through an attorney and ask the attorney to investigate the identity of the perpetrator from a third party; or
- request to examine the related case file materials prepared by the public security organ and procuratorate to learn the identity of the perpetrator (see **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**).

By contrast, in the criminal context, public security organs do not require victims of fraud to provide accurate identity information about "unknown" fraudsters when they accept a report of fraud. After accepting the case, the public security organ may independently investigate and ascertain the identity of the perpetrator at the case filing and review stage and prepare a criminal investigation report. A case will be filed if criminality is discovered and it is deemed necessary to pursue criminal charges against the perpetrator.

2.9 Compelling Witnesses to Give Evidence

Civil Proceedings

In civil proceedings, all persons with knowledge of the circumstances of the case are legally obligated to appear in court to testify. However, in practice, the claimant must usually contact the witness on their own and apply to the court for the witness to testify in court. Only in a few special circumstances will the court subpoena a witness to appear in court and testify, such as if the parties are suspected to have maliciously colluded to harm the legitimate rights and interests of others.

Chinese law does not impose penalties on witnesses who refuse to testify in civil proceedings. However, if a witness falsifies or destroys important evidence, or otherwise obstructs investigation and evidence collection activities, the court may impose a fine, detain the witness, or pursue criminal liability, depending upon the seriousness of the circumstances.

Where a parallel criminal proceeding exists, the victim may apply to the procuratorate during the review and prosecution stage to consult and copy the investigation case file materials and obtain a transcript of the public security organ's questioning of the witness for submission to the court as evidence to prove the facts claimed by the victim.

Criminal Proceedings

In the criminal context, all persons with knowledge of the circumstances of the case are legally obligated to co-operate with the investigation. In practice, public security organs may question persons who know the circumstances of the case, require them to truthfully provide evidence and make records of witness testimony. A transcript of a witness's testimony may serve as evidence in a criminal case.

In a criminal proceeding, the court is entitled to compel witness testimony under special circumstances. For example, if the court deems the witness's testimony necessary because the procurator, the parties, or the defender objects to the witness's testimony and the testimony has

a major impact on the conviction and sentencing of the case. If a witness does not appear in court to testify without a legitimate reason, the court may compel them to appear in court, except where the witness is the defendant's spouse, parent, or child.

Furthermore, if a witness refuses to appear in court without justifiable reasons or refuses to testify after appearing in court, the court may sanction or detain them depending on the seriousness of the offence. Where a witness is dissatisfied with the detention decision, they may apply for reconsideration to the superior-level court for reconsideration, but enforcement is not suspended during the period of reconsideration.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Civil Liability

Under Chinese law, a legal person or non-legal person organisation, including limited liability company or other corporate entity ("employer"), is liable for the actions taken by its employees, including its directors or officers, provided that the actions occur within their responsibility and authority and are carried out in the name of the employer. That is, if an employee commits fraud while performing duties for its employer, the employer may be vicariously liable to the victims of the fraud.

The following factors are generally considered to determine whether an employer can be found vicariously liable:

- whether the time and place where the fraud occurred belonged to the working hours and the place of work;
- whether the subjective intention of the fraudulent act was all or at least partially related to the performance of the employee's duties; and
- whether the employee's acts were for the benefit of the employer.

Criminal Liability

The Criminal Law provides for the concept of unit crimes. "Units" under the Criminal Law include not only companies, enterprises, and other types of legal persons with independent legal personality, but also some other organisations such as branches or internal departments of units. To determine whether an employee's acts constitute criminal fraud committed by the unit, the following conditions generally need to be met:

- the employee's fraudulent act can represent the intent of the unit;
- the employee commits the fraudulent act in the name of the unit; and
- the profit from the fraudulent act belongs to the unit.

For crimes committed by units, the unit is generally fined and the directly responsible supervisors and other directly responsible personnel may be subject to criminal punishment.

3.2 Claims against Ultimate Beneficial Owners

In some cases, a perpetrator may seek to evade liability for fraud by abusing the independent legal personality of a corporation. Specifically, a perpetrator may be a shareholder of a corporation who uses the corporate form to commit fraud and then takes advantage of the limited liability afforded to them.

To combat such abuse, the Company Law recognises the principle of "piercing the corporate veil", which allows a court to hold a shareholder jointly liable for the obligations of the corporation.

To invoke this principle, the claimant must show that the shareholder had abused the company's independent legal person status and the limited liability of the shareholders to evade debts and seriously harm the interests of the company's creditors. The key fact to be proven is that the shareholder did not treat the corporation as an independent entity. For example, the staff, assets, and business of the company have been commingled with those of the shareholder.

It is difficult in practice to successfully argue a pierce-the-corporate-veil claim, except in the context of a one-person corporation where the sole shareholder, rather than the victim, has the burden to prove that the corporation's assets are independent of their personal assets.

In addition to "piercing the corporate veil", as discussed above, there are some other areas where fraud victims can bring claims against those who stand behind companies when the company has been used as the vehicle for fraud. For instance, where a securities issuer violates provisions on information disclosure by making false records, misleading statements, or material omissions in the disclosed information, causing investors to suffer losses in securities transactions, the Securities Law provides that the controlling shareholder and/or actual controller of the issuer will be jointly and severally liable with the issuer for the losses caused to the investors, unless they can prove that they are not at fault.

3.3 Shareholders' Claims against Fraudulent Directors

Under the Company Law, shareholders have the right to bring derivative actions on behalf of their company against fraudulent directors. Causes of action against fraudulent directors include where the directors cause harm to the company while undertaking their duties in violation of any law, regulation, or the company's by-laws. Certain rules exist as to shareholder eligibility, commencing the action, and recovery and costs.

Shareholder Eligibility

To initiate a derivative action, the shareholders of a company limited by shares (joint stock company) to the action must have held, individually or collectively, at least 1% of the company's shares for at least 180 consecutive days prior to the action. Shareholders of a limited liability company are not subject to any eligibility requirements for derivative actions.

Commencing the Action

The shareholders to the action should make a request in writing to the company's supervisor or board of supervisors. Shareholders themselves can initiate the action on behalf of the company under certain circumstances. This includes exigent circumstances and where the company's supervisor or board of supervisors refuses to initiate the action or fails to do so within 30 days of receiving the shareholders' request.

Recovery and Costs

Recovery obtained in a derivative action belongs to the company. Thus, for example, recovery in the action might involve the fraudulent director disgorging illegal gains and transferring those gains to the company.

The company is required to reimburse the shareholders for litigation costs to the extent they are reasonable. For more information on shareholder derivative actions in China and related matters, see our contribution to *Shareholders' Rights & Shareholder Activism 2021.*

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

In civil cases, the court must analyse whether it is competent to join as a defendant an overseas party who is not domiciled in China. This analysis considers the nature of the claims and the circumstances over which the court has jurisdiction, including:

- for contract fraud claims against an overseas party, the place where the contract was concluded or performed within China;
- for a tort fraud claims against an overseas party, the tort occurred within China;
- the property in dispute is located in China; and
- the overseas party has assets within China.

To exercise jurisdiction over overseas parties, the court must make sure that they are properly served. Chinese courts may use electronic service (by fax, email, etc) to serve overseas parties not domiciled in China, if the laws of the country or region where they are domiciled allow for electronic service. In addition, Chinese courts may also serve judicial documents through other channels, such as mutual legal assistance agreements, Hague conventions of service, diplomatic channels, and postal service (such as those permitted by the state where the person to be served).

Chinese courts have jurisdiction over overseas parties who commit criminal fraud within China in accordance with the principle of territoriality, according to the Criminal Law. Where an overseas party commits a crime against China or its citizens outside the territory of China, and the minimum sentence under the Criminal Law is fixed-term imprisonment of not less than three years, the Criminal Law applies extraterritorially to such party except where the party's act does not violate local law in the place where the act was committed.

5. ENFORCEMENT

5.1 Methods of Enforcement

Under Chinese law, after the judgment takes effect, the successful fraud claimant becomes a judgment creditor, and the defendant becomes a judgment debtor. Where the defendant fails to pay off the debt under the judgment within the time limit designated by the judgment, the claimant can apply to the court to initiate enforcement proceedings against the defendant.

Initiating the Enforcement Procedure

A successful fraud claimant who receives a judgment or arbitral award against a defendant may apply to the Chinese court with jurisdiction to initiate the enforcement procedure directly, provided that the judgment or arbitral award is made by a Chinese court or arbitration institution.

Where a judgment or arbitration award is made by a foreign court or arbitration institution, the creditor will first apply to the Chinese court with jurisdiction for recognition of such judgment or award, and the recognition will be handled in accordance with an international treaty concluded or acceded to by China and the country or region where the court or arbitral institution is located (eg, the New York Convention) or in accordance with the principle of reciprocity. After the judgment or award is recognised by the Chinese court, the enforcement procedure can be initiated.

Property Disclosure for Enforcement

In the course of enforcement, the applicant should provide clues as to the assets of the judgment debtor. The court will conduct an investigation through the online enforcement

inspection and control system and, where the case requires an investigation, it will conduct an investigation through other means and at the same time employ other investigation methods. Where the judgment debtor does not perform the obligations set forth in effective legal documents, the applicant may also request the court to publish a reward announcement to find assets available for enforcement.

During the enforcement procedures, the court will serve the judgment debtor with an order to disclose their assets and the debtor must truthfully disclose details of their assets to the court. Where the judgment debtor refuses to disclose, falsely discloses, or delays in disclosing without legitimate reasons, the court may sanction the judgment debtor or their legal representative, depending on the seriousness of the offence. Sanctions include adding the judgment debtor's name to a list of "dishonest judgment debtors" and, in serious circumstances, subjecting the judgment debtor to criminal liability.

Asset Control and Disposal

During enforcement, the court has the right to seal, distrain, or freeze the assets of the judgment debtor, including movable property in the possession or real property/specific movable property registered in the name of the judgment debtor, as well as any property in the possession or registered in the name of a third party provided that the third party confirms in writing that the assets belong to the judgment debtor.

Once the judgment debtor's assets have been sealed, distrained, or frozen, the court may dispose of them by auction, public sale, or ruling to pay off a debt in kind, and transfer the money obtained from enforcement to the applicant in satisfaction of the judgment or award.

Sanctions for Failure to Satisfy a Judgment

In general

Where a judgment debtor does not satisfy their obligations as set forth in a judgment or award, the court may:

- make a record in the credit reporting system, and publicise the debtor's non-performance of their obligations through the media;
- take other statutory punitive measures; and
- name the debtor in the "list of dishonest judgment debtors", which is used to inform others, including credit-reporting agencies, that the judgment debtor has not fully performed their obligations.

Consumption restrictions

The applicant may request the court to impose consumption restrictions on the judgment debtor once they are named in the "list of dishonest judgment debtors".

Consumption restrictions for natural persons include prohibitions on air and high-speed rail travel, luxury hotel accommodation, leasing of high-end office space, vacation travel, arranging for children to attend expensive private schools, and other luxuries that are not considered necessary for life and work.

Consumption restrictions imposed on legal persons may also be imposed on their legal representative, principal responsible person, persons directly responsible for enabling satisfaction of the debt, and actual controller.

Restrictions on exiting mainland China

Judgment debtors who fail to satisfy a judgment or award may be prohibited from exiting mainland China. Upon the applicant's request, the court may determine it necessary to impose an exit ban and notify relevant administrative authorities to assist in enforcing the ban.

Detention, fines and criminal liability
Judgment debtors who refuse to satisfy a judgment, ruling, or obstruct the court's enforcement may be subject to a fine, detention, or even criminal liability, depending on the specific conduct and the corresponding circumstances provided for by law.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

In China, no one can be compelled to give testimony that would incriminate themselves in criminal proceedings. In contrast to other jurisdictions, the right to remain silent is not expressly provided for in Chinese law, neither are the judicial authorities obligated to remind suspects of their right to remain silent before taking legal actions against such suspects. However, it is clear that the accused may not be found guilty and sentenced only based on their oral testimony without supporting evidence.

By contrast, in civil proceedings, if one party expressly admits unfavourable facts during court hearings or in written materials such as complaints, the other party does not need to adduce evidence to prove these facts, and the court can usually use this as the factual basis for the judgment.

In accordance with the rules of evidence in the Civil Procedure Law, where a court requests a party to submit relevant evidence and it refuses to do so, submits false evidence, destroys evidence, or commits other acts that make the evidence unusable without a legitimate reason, the court may presume that the other party's relevant factual assertions have been established.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

Chinese law does not provide a general privilege over communications that can be exempted from disclosure. Judicial and administrative authorities, particularly public security organs in criminal procedures, are granted broad authority to inquire and collect evidence. Despite this, in criminal proceedings, counsel is required to keep their client's information confidential, except for information related to certain specific criminal offences, including endangering national security, public security and personal safety.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

Under Chinese law, the remedies for fraud claims are generally limited to the claimant's losses, which may include reasonably expected profits. In general, courts will not award punitive or exemplary damages in cases of fraud, except where the claim may relate to intellectual property infringement.

7.2 Laws to Protect "Banking Secrecy"

There are no special laws in China to protect communications between banks and their clients from disclosure. The general rule under the Law of the PRC on Commercial Banks is that commercial banks must keep strictly confidential their customers' bank account information and have the right to refuse inquiries from third parties regarding bank account details and requests to freeze or withhold funds, unless otherwise provided for by laws and regulations. However, under Chinese law, judicial authorities are granted broad authority to make such inquiries with commercial banks as well as other financial institutions and to collect evidence. Com-

mercial banks will generally comply with a court order on such matters.

Courts may use the online enforcement inspection and control system to search the banking information of the defendant, as mentioned in **5.1 Methods of Enforcement**. However, during fraud-related civil proceedings, it is generally hard for the claimant to obtain the courts' approval to inquire into the bank accounts of the defendant.

7.3 Crypto-assets

China has implemented regulations that strictly regulate crypto-assets. As a consequence, Chinese courts often invalidate crypto-asset related trading and investment arrangements.

Chinese law remains silent as to the nature of crypto-assets. To date, no legal provisions have been issued regarding the protection of crypto-assets. This means crypto-assets are not considered statutory property, as Chinese law adopts the numerus clausus principle (ie, the categories and content of the real rights are provided by law). Thus, in Chinese judicial practice, "stealing" cryptocurrency has been held as constituting the crime of illegally obtaining data from computer information systems, but not theft.

If an enforcement applicant can provide clear clues as to the location of crypto-assets, it is theoretically possible for a court in China to grant an asset preservation order against such crypto-assets and to enforce the order. Due to China's heavy restrictions on crypto-assets-related activities, however, there is currently no crypto-asset trading platform domiciled within the jurisdiction of Chinese courts. Because of this, it is very difficult for courts to effectively control crypto-assets. Unsurprisingly, no public records exist in which a party has successfully preserved crypto-assets in a civil proceeding.

Regarding fraud involving crypto-assets, since Chinese laws do not recognise crypto-assets as statutory property, fraud related to crypto-assets will not be treated as civil fraud unless it also involves fiat currency or other property. In related criminal proceedings, public security organs also do not invest as much administrative resources in recovering crypto-assets as in recovering other assets.

For a more detailed discussion of crypto-asset regulations and judicial practice in China, see our adjacent article: *International Fraud & Asset Tracing 2022,* Trends & Developments, China.

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Han Kun Law Offices is a leading full-service law firm in China with more than 700 professionals located in five offices in Beijing, Shanghai, Shenzhen, Haikou and Hong Kong. The firm's main practice areas include dispute resolution, private equity, mergers and acquisitions, international and domestic capital markets, investment funds, asset management, antitrust/competition, banking and finance, aviation finance, foreign direct investment, compliance, private client/wealth management and intellectual property. Han Kun's litigation team has served many top companies in a broad range of fields and industries, both domestically and overseas, providing personalised and effective solutions for their commercial disputes. The litigation team has extensive experience in material, difficult and complex commercial disputes, including in fraud, securities misrepresentation, breach of fiduciary duty, and asset tracing/recovery.

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Trends and Developments

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Introduction

China has implemented regulations that strictly regulate virtual currencies, which include cryptocurrencies. These regulations are observable in the nation's courts, which tend to take a negative view of cryptocurrencies and related business activities. This has contributed to making cryptocurrency asset tracing in judicial proceedings an exceedingly difficult task.

Summary of China's Evolving Regulatory Restrictions on Cryptocurrencies

On 3 December 2013, multiple central governmental authorities issued the Notice on Prevention of Bitcoin Risks (the 2013 Notice), which stated that Bitcoin should be considered a virtual commodity rather than legitimate currency and should not be circulated in the market as legal tender.

On 4 September 2017, multiple central governmental authorities issued the Announcement on Prevention of Token Fundraising Risks (the 2017 Announcement), which reiterated that virtual currencies are not legitimate currency and further stated that:

- all fundraising activities through token issuances must stop immediately;
- no token trading platforms may engage in exchanges between any fiat currency and tokens or virtual currencies, trade or trade as central counterparties tokens or virtual currencies, or provide pricing, information agency, or other services for tokens or virtual currencies; and
- financial institutions and non-banking payment institutions must not provide products or services such as account opening, registration, trading, clearing, and settlement for token fundraising or virtual currencies, and must not underwrite insurance associated with tokens or virtual currencies.

On 18 May 2021, multiple central governmental authorities issued the Announcement on Prevention of Risks of Virtual Currency Trading and Speculation (the 2021 Announcement), which reiterated most of the positions of the 2017 Announcement, and (i) further stated that members of an internet platform enterprise must not provide online business premises, commercial display, marketing publicity, paid flow diversion and other services for business activities relating to virtual currencies, and (ii) warned that, in Chinese judicial practice, virtual currency trading contracts are not protected by law and the consequences of and losses arising from such investment transactions will be borne by the parties concerned themselves.

On 15 September 2021, multiple central governmental authorities issued the Notice on Further Preventing and Resolving the Risks of Virtual Currency Trading and Speculation (the 2021 Notice), which reiterated previous positions on cryptocurrencies and further stated that:

- business activities relating to virtual currencies are illegal financial activities;
- the provision of services by offshore virtual currency exchanges to domestic residents via the internet is also considered to be an illegal financial activity; and
- civil acts taken to invest in virtual currencies and related derivatives are null and void when

found to be in breach of public order and good morals, and the losses arising therefrom are borne by the parties concerned themselves.

On 3 September 2021, multiple central governmental authorities issued the Notice on Addressing Virtual Currency "Mining" Activities (the Mining Notice), which explicitly forbids new virtual currency mining projects and subjects existing virtual currency mining projects to severe restrictions, including requiring existing projects to close before a designated time limit. On 27 December 2021, China revised the Catalogue for Guiding Industry Restructuring (2019 Version) and listed virtual currency mining as an industry to be eliminated.

Chinese Judicial Views on Cryptocurrencies and Related Business Activities

Chinese law does not recognise cryptocurrencies as statutory property

Chinese law remains silent as to the nature of cryptocurrencies. Article 127 of the Civil Code of the PRC provides that "[w]here there are laws particularly providing for the protection of data and online virtual assets, such provisions shall be followed", However, so far, there are no legal provisions issued regarding the protection of online virtual assets. This omission means denial of property rights to cryptocurrencies for the moment, given that Chinese law adopts the numerus clausus principle. That is to say, cryptocurrencies and other virtual assets are not recognised as "property" under Chinese law. Thus, in Chinese judicial practice, "stealing" cryptocurrency constitutes the crime of illegally obtaining data from computer information systems, but not theft.

Evolution of the regulatory departments' stringent position on cryptocurrencies has led Chinese courts to render negative judgments on cryptocurrencies and related business activities

In general, under Chinese law, violating national-level departmental rules (such as the notices and announcements summarised above) does not result in the invalidation of civil acts. However, a legal basis exists for Chinese courts to invalidate civil acts that are determined to be in violation of departmental rules that pertain to financial security, market order, national macro-policies, public order and good morals.

Chinese courts generally agree that departmental rules concerning cryptocurrencies involve the socioeconomic order and national macro-policies, and violation of such rules is contrary to public order and good morals. Thus, as Chinese regulators have taken a more adverse position on cryptocurrencies, so too have Chinese courts become increasingly inclined to rule as void cryptocurrency-related business activities which are found in violation of relevant departmental rules.

Uncertainty exists for claims for the return of cryptocurrency

Chinese courts generally hold that merely possessing cryptocurrency does not violate Chinese law. In many cases, Chinese courts have supported claims for the return of cryptocurrency based on unlawful infringement of such possession.

Many Chinese courts have supported plaintiffs' claims for the return of disputed cryptocurrency in cases of robbery, stealing, misappropriation, or wrongful payment of cryptocurrency, and even in instances of cryptocurrency lending or escrow; however, this position is by no means certain. While still uncommon, Chinese courts have become more inclined to deny plaintiffs'

claims for the return of cryptocurrency, particularly as regulatory positions toward cryptocurrency tighten.

For example, last year in a Bitcoin lending dispute case, the Jiangsu Changzhou Intermediate People's Court, citing the 2013 Notice and the 2017 Announcement, held that claims for the return of the disputed Bitcoin were not justiciable; in another Bitcoin lending dispute case, a local court dismissed the plaintiff's claim for return of the disputed Bitcoin based on violation of the 2013 Notice.

While the courts in these cases did not explicitly cite the latest departmental rules, for various reasons, it is likely that the courts' positions in these cases were influenced by the latest changes in the position of Chinese regulatory departments.

Contracts for cryptocurrency trading or investment are often found unenforceable

In cases of trading or investing in cryptocurrencies, Chinese courts diverge on the enforceability of the underlying contracts. For example, the Beijing Higher People's Court held in a recent case that the underlying trading contract for the cryptocurrency Tripio was valid and enforceable because, unlike fundraising activities through token issuances, trading virtual currency as a commodity does not violate mandatory provisions of Chinese law.

However, it is more common for Chinese courts to invalidate cryptocurrency trading or investment contracts which do not directly involve fundraising activities through token issuances. The typical reasoning for these holdings is that the disputed transaction disturbs the socioeconomic order and is therefore contrary to public order and good morals, which is one of the statutory bases for invalidating civil acts.

Notably, after the Mining Notice was promulgated in September 2021, there have been consistent court judgments which found existing mining contracts void (even if reached before September 2021). It is likely that Chinese courts in future cases will continue to invalidate such mining contracts.

In general, Chinese courts do not support claims involving conversions between cryptocurrencies and fiat currencies

In Chinese legal proceedings, a claim for fiat currency is generally more favourable than a claim for cryptocurrency, as the former is easier to enforce. However, Chinese policy expressly prohibits exchange services between fiat currency and cryptocurrency, as mentioned above. Thus, Chinese courts generally do not support the conversion of claims for cryptocurrency into claims for fiat currency.

In a widely discussed arbitration case, the Shenzhen Court of International Arbitration ordered the respondent to pay the applicant a certain amount of money, which was the estimated value of undelivered cryptocurrency as determined by the tribunal based on prices quoted on okcoin.com, an offshore cryptocurrency trading platform. This award, however, was later annulled by the court for the following reasons.

- Chinese policy forbids exchanges between cryptocurrency and fiat currency and forbids cryptocurrency pricing and information agency services.
- The award discretionally ordered payment of the US dollar (USD) equivalent of the disputed cryptocurrency and further ordered conversion of the USD amount into RMB. This was considered a disguised exchange between cryptocurrency and fiat currency that violates Chinese policy and is therefore contrary to social public interests.

Notably, while the ruling to annul the award was entered by a local court, it reflects the position of the Supreme People's Court. This is because, according to Chinese law, local courts must obtain approval from the Supreme People's Court before they may issue such annulment rulings.

A small exception exists as to the above rule: private agreements for conversions between fiat and virtual currencies. If the parties have agreed on a conversion price for exchange between the disputed cryptocurrency and fiat currency, then, if the plaintiff properly so claims, a Chinese court may directly order payment of the relevant amount of fiat currency for undelivered cryptocurrency.

In another widely discussed case, the Shanghai First Intermediate People's Court, based on the agreed conversion price reached by the plaintiffs and the defendants during the trial, ordered the defendants to pay the plaintiffs a specified amount for each unreturned Bitcoin.

Uncertain legal consequences following the invalidation of cryptocurrency contracts

Normally, after a contract is ruled void, the original owner of the property underlying the contract is entitled to its return or to be compensated based on the property's appraisal value. However, courts in many cryptocurrency trading and investment cases have refused claimant requests for the return of the underlying cryptocurrency or its appraisal value as compensation, holding that the claimants cannot hold protectable rights to cryptocurrency. In other cases, courts have chosen to allocate losses from the dispute between the parties based on each party's degree of fault.

Tracing of Cryptocurrency in Preservation and Enforcement Proceedings

Tracing of cryptocurrency in property preservation proceedings

China has shut down all third-party cryptocurrency trading platforms. Currently, no such cryptocurrency trading platforms are domiciled within the jurisdiction of Chinese courts. Because of this, it is very difficult for Chinese courts to trace and control cryptocurrency assets. Tracing methods available to courts in property preservation proceedings are also limited. It is thus unsurprising that no public records can be found in which a party has successfully preserved cryptocurrency assets in a civil proceeding.

Tracing cryptocurrencies in enforcement proceedings

As discussed above, Chinese courts have almost never preserved cryptocurrency assets in advance of entering a judgment. Relatedly, Chinese courts, even at the enforcement stage, have limited means to trace cryptocurrency assets possessed by judgment debtors. Normally, courts may try to push a judgment debtor to voluntarily surrender their cryptocurrency assets by warning of potential judicial sanctions and/or criminal liabilities, such as the crime of refusing to perform an effective judgment or ruling. However, oftentimes, this approach does not yield favourable results.

Because of the above, most court judgments involving the return of cryptocurrency are ultimately unenforced. In many cases, the court cannot trace the cryptocurrency owned by the judgment debtor and is forced to terminate the enforcement process after it issues a consumption restriction order against the judgment debtor and adds their name to the list of dishonest judgment debtors.

Despite this, upon application and with preliminary leads, a court may decide at its discretion

to take the following actions to trace cryptocurrency assets.

- Tracing carriers of private cryptocurrency asset keys through a search of domiciles, offices, or other premises related to the judgment debtor.
- If private cryptocurrency asset keys are kept by a third-party trading platform, the court may issue a notice of assistance to the third-party platform, requesting the platform to freeze the wallet (and thus the cryptocurrency assets in the wallet) held in the name of the judgment debtor. As discussed, however, all such third-party platforms are operated by offshore entities. There is no guarantee that the offshore platform would follow the Chinese court's request.

Cryptocurrency Tracing in Criminal Proceedings

In criminal proceedings, obstacles exist as to the attachment of cryptocurrency assets, as listed below.

- According to Article 64 of the Criminal Law of the PRC, "money and property" illegally obtained by a criminal is to be recovered. Some Chinese criminal judicial departments hesitate when deciding to attach cryptocurrency assets because Chinese law does not expressly consider cryptocurrency to be "money and property".
- According to the Criminal Procedure Law of the PRC, the primary means for recovery of "money and property" include sealing, distraining, and freezing. However, cryptocurrency may not be effectively attached by any of these means.
- Cryptocurrency may not be effectively controlled before being transferred to the account (wallet) in the name of the judicial department. However, Chinese policies do not currently allow judicial departments to hold custody of attached cryptocurrencies in wallets opened with offshore third-party platforms.

Because of the above, criminal judicial departments need to expend more effort than usual in order to trace and effectively control cryptocurrency assets. However, compared to civil proceedings, judicial departments in criminal proceedings generally have more powerful and comprehensive means to trace cryptocurrency assets.

Difficulties in Disposing of Cryptocurrency Assets

For judgments for the return or delivery of cryptocurrency, courts in enforcement proceedings can directly deliver the controlled cryptocurrency to the applicant (claimant). In other cases, a judgment may order payment in fiat currency but the controlled assets include cryptocurrency. In this case, the court would need to dispose of the cryptocurrency and realise its value in fiat currency and then pay the realised fiat currency to the applicant (claimant).

However, court sales/disposals of cryptocurrency assets face substantial difficulties. Firstly, there is no legitimate trading/pricing market within China for cryptocurrencies. The court's enforcement department would be unable to produce a qualified appraisal value for cryptocurrencies, which is usually a prerequisite for the court to dispose of any assets.

Secondly, there are no explicit rules for disposing of cryptocurrencies, which creates confusion for court enforcement departments. For example, as offshore trading platform services to domestic residents have been deemed as illegal financial activities (2021 Notice), it is uncertain whether an enforcement department can dispose of cryptocurrency assets on these offshore platforms. If not, and given that there is no legitimate trading/pricing market within China, it may

be impossible for the enforcement department to dispose of cryptocurrency assets.

For the above reasons, in many enforcement cases, cryptocurrency assets cannot be disposed of in a proper, timely manner and their market value cannot be fully realised. In some cases, the enforcement department even closes the enforcement proceeding with the attached cryptocurrency assets undisposed.

Conclusion and Suggestions

In general, China's regulatory position on cryptocurrencies and related business activities has become more restrictive in the past few years. As a result, it is now highly risky to conduct cryptocurrency-related business activities in China. Due to a lack of protective legal rules, and in the absence of an integrated Chinese trading platform, tracing and recovering cryptocurrency assets in Chinese legal proceedings have proven to be difficult.

Nevertheless, if one intends to conduct cryptocurrency-related business activities in China at this time, we have the following suggestions.

- Carefully monitor changes in Chinese regulatory policies. In cryptocurrency-related areas, policy changes can be instructive for business activities.
- When possible, consummate the transaction as soon as possible, as regulatory policies may change quickly. Use caution when entering into long-term investment projects involving cryptocurrencies in China at this time.
- Adopt more complete transaction terms. In particular, include terms on exchange between the cryptocurrency and fiat currency and, to the extent possible, stipulate contractual liabilities in fiat currency.
- If applicable, it is also reasonable to consider choosing a governing law other than Chinese law for the transaction.

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Han Kun Law Offices is a leading full-service law firm in China with more than 700 professionals located in five offices in Beijing, Shanghai, Shenzhen, Haikou and Hong Kong. The firm's main practice areas include dispute resolution, private equity, mergers and acquisitions, international and domestic capital markets, investment funds, asset management, antitrust/competition, banking and finance, aviation finance, foreign direct investment, compliance, private client/wealth management and intellectual property. Han Kun's litigation team has served many top companies in a broad range of fields and industries, both domestically and overseas, providing personalised and effective solutions for their commercial disputes. The litigation team has extensive experience in material, difficult and complex commercial disputes, including in fraud, securities misrepresentation, breach of fiduciary duty, and asset tracing/recovery.

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CYPRUS

Trends and Developments

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Introduction

In the past year there have been several developments regarding fraud and asset tracing, the most prominent of which are briefly presented below. Cyprus remains one of the most cost-effective common law forums for litigating international fraud claims.

The Reform of the Cypriot Justice System

Following the review of the Civil Procedure Rules, several bills on holistic justice and judicial reform are expected to reach the plenary session of the House of Representatives in May 2022.

According to the Ministry of Justice, the reform aims at building a modern and efficient system for administering justice, and the primary objectives are the timely delivery of justice, the simplification of procedures, the effective management of the current backlog, the integration of technology and the introduction of modern IT systems.

Another aspect of the pending reform that will certainly facilitate international asset tracing is the establishment of a specialised Commercial Court. The new Commercial Court will handle high-value commercial disputes with fast track and more simplified procedures. The litigants will also have the option to choose the English language as the language of the proceedings.

Legality of Litigation Funding Agreements in Cyprus

Litigation funding is not common in domestic disputes in Cyprus given that the cost of litigation in Cyprus is much lower than in the UK and other common law jurisdictions. However, in recent years, several cross-border litigation proceedings have been initiated in Cyprus by parties who have entered into litigation funding agreements with funds situated in another jurisdiction.

Although there were no court judgments providing guidance on this matter, litigation funding was considered to potentially fall within the ambit of the common law torts of maintenance and champerty. As a result, any agreement between a party and a third person for the funding of litigation in return for a share in the proceeds could be deemed illegal and, thus, void.

Furthermore, it has been argued that parties who have entered into such “illegal” arrangements should not be entitled to the protection of Cypriot courts, or that judgments issued in favour of claimants who have received litigation funding could not be recognised and enforced in Cyprus on public policy grounds.

However, in a recent first-instance judgment, Cypriot courts seem to have taken a different view of litigation funding arrangements.

In this particular case, the claimants were successful in issuing a judgment against the defendants in litigation proceedings in the United Kingdom. After the issue of the judgment, the claimants sought to have the judgment executed against legal entities in Cyprus. The declaration of enforceability was obtained on the basis of

Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, since the judgment was issued in proceedings initiated before 10 January 2015.

The defendants applied before the courts for the setting aside of the order for recognition and enforcement of the judgment on the grounds that the claimants had received funding from a third party to promote their litigation efforts and that, as a result, the execution of the issued judgment should be refused as "manifestly contrary" to the public policy of Cyprus. It must be noted that currently there is no legal framework in Cyprus regulating litigation third-party funding.

The first-instance court rejected the position of the defendants and the application for setting aside the recognition order and stated that, in the absence of Supreme Court case law regarding the torts of maintenance and champerty and the legality of litigation funding, the modern principles of common law should be applied on the basis of Section 29 of the Courts of Justice Law 14/1960.

The court went beyond examining whether litigation funding is manifestly contrary to public policy and made a finding that third-party funding is legal under Cypriot law, as well as citing the findings of the recent High Court decision in Akhmedova v Akhmedov & Ors (Litigation Funding) (Rev 1) [2020] EWHC 1526 (Fam). In order to reach its conclusions, the court drew guidance from judgments in other common law jurisdictions including Canada, New Zealand, Jersey, the Cayman Islands and Bermuda.

What is particularly interesting is the fact that the application for setting aside, pending before the court, would only be successful if the recognition of the judgment could be considered "manifestly contrary" to public policy, which is a difficult standard to meet. In other cases, actions which would be considered illegal in Cyprus (including a criminal offence), such as charging interest above the maximum allowed rate provided by law, were found to not be "manifestly contrary" to Cypriot public policy.

It must be noted, however, that the aforementioned judgment regarding litigation funding is merely a first-instance judgment, and as a result is not binding on other courts. However, it may be an indication of the evolution of the approach of Cypriot courts to this matter.

Norwich Pharmacal/Disclosure Orders against Cypriot Service Providers and Professional Trustees in Aid of Execution of a Foreign Judgment

In recent years it has become more and more common for service providers in Cyprus, acting either as nominee directors, nominee shareholders or trustees of clients, to be the recipients of applications for the issue of disclosure orders against them in aid of foreign proceedings that are pending or will be initiated in the future against their clients.

Although the applicable principles under Cypriot law in cases where litigation is imminent or pending are rather clear, the same cannot be said about the requirements for the issue of disclosure injunctions against professional trustees in aid of execution of an already issued judgment in a foreign jurisdiction.

Recently, a district court has provided valuable clarity to the murky area of disclosure requests sought against local service providers acting as trustees of Cyprus International Trusts (CITs) in aid of the enforcement of a foreign judgment against a third party, and while cross-border litigation proceedings involving the trust structures are pending.

In a very high-profile Norwich Pharmacal/disclosure order (NPO) case earlier this year, related to a multi-million cross-border dispute, the district court had to decide whether, under the circumstances, a disclosure order should be issued in order to facilitate the execution of a judgment issued in the UK against a third party.

The disclosure order was sought against Cypriot professional service providers who had acted in the past as trustees and/or advisors of several Cypriot International Trusts. The claimants alleged that the defendant in the UK proceedings had funnelled assets through the trusts and that information held by the former trustees of the CIT would potentially enable the execution of the issued judgment.

The court rejected the claimants' application for disclosure orders, and its analysis in this case is very instructive with regards to cases where an NPO is sought in Cyprus, but the substantive dispute is pending overseas. The court referred to the UK Court of Appeals judgment in Ramilos Trading v Buyanovsky [2016] ("Ramilos") and considered that, since the Cypriot statutory framework is very similar to the Evidence (Proceedings in other Jurisdictions) Act 1975 that was considered in Ramilos, Norwich Pharmacal relief was not available to the applicants.

The court held the following.

- The Norwich Pharmacal relief is not available simply because a foreign judgment has been entered. Instead, the court clarified that a Norwich Pharmacal order against the trustees will be issued if the claimant is able to establish that the respondent professional service providers were mixed up in dishonest attempts to defeat execution of the judgment.
- In cases involving trust structures, the claimant must show that the professional trustees were parties to a dishonest arrangement. The "shamming intent" must be shared by both the third party/settlor and the trustees, who must be parties to the dishonest arrangement at the time that the trusts were created.
- The court held that the purpose of a Norwich Pharmacal order is not to be used for wide-ranging discovery, or for the gathering of evidence, but to be strictly limited to necessary information. The provision of oral or documentary evidence in assistance of foreign judicial proceedings has always been exclusively statutory. Even though the boundaries between information and evidence are not always clear since information can be converted to evidence, courts must refuse to issue a Norwich Pharmacal order for obtaining evidence that will be used in foreign proceedings, and the applicants must proceed in accordance with the provisions of the available statutory framework.
- Where the requested information can be obtained by other means either abroad or in Cyprus, applications for Norwich Pharmacal/disclosure orders may be considered abusive.

It is evident that the issue of Norwich Pharmacal/disclosure orders against service providers and/or professional trustees in aid of execution of a foreign judgment is not straightforward and significantly more cumbersome than disclosure proceedings initiated before or at the outset of litigation, and the level of involvement required is significantly higher.

It must be noted, however, that the aforementioned judgment is merely a first-instance judgment, and as a result is not binding on other courts.

Order for the Arrest of a Ship in Aid of Proceedings Pending before the Courts of Another EU Member State

In a recent case the Supreme Court, in its jurisdiction as Admiralty Court, provides valuable

guidance on whether an order for the arrest of a ship could be issued in aid of proceedings pending in another member state on the basis of Regulation 1215/2012.

The claimants had submitted a lawsuit in Greece claiming the ownership of the ship, and were also able to have an interim order for the arrest of the ship issued by a Greek court. However, at a later date the Greek court cancelled the issued order for the arrest of the ship.

After the order was cancelled, the ship sailed from the port of Elefsina and arrived in Cyprus. While it was situated in the port of Larnaca, the claimants applied without notice to the other parties before the Supreme Court and were successful in issuing a new order for the arrest of the ship.

Subsequently, the owners of the ship applied for the cancellation of the issued order claiming that the Cypriot court did not have jurisdiction to issue the arrest order and, furthermore, that the arrest order should not have been issued since the Greek court, before which the main proceedings were pending, had already considered a similar application for the issue of an arrest order and had, eventually, rejected it.

At first instance, the Cypriot court dismissed the application for cancellation of the order and found that the Cypriot court had jurisdiction to issue ship arrest orders in aid of proceedings pending in other member states. It must be noted that this was the second time the Supreme Court, in its admiralty jurisdiction, considered that the arrest of a vessel in aid of proceedings pending abroad was possible on the basis of Article 35 of Regulation 1215/2012.

Furthermore, the court found that the issue of the arrest order was appropriate given the circumstances of the case.

An appeal was filed, and the ship remained under arrest pending the appeal.

The Supreme Court decided in a very recent judgment that the first-instance judgment was wrong and the application for cancellation of the order should have been successful.

The Supreme Court considered that such relief cannot be considered to be "in aid" of the foreign proceedings in cases where the primary court could have granted an order for arrest of the ship but declined to do so.

Despite the outcome in this specific case, it seems that the Supreme Court has left open the possibility that vessel arrest orders can be issued by the Cypriot admiralty courts, in the appropriate circumstances.

Cryptocurrency Fraud: Asset Tracing and Enforcement before Cypriot Courts

All over the world, cases involving cryptocurrency fraud have increased significantly. However, litigation involving cryptocurrency or crypto-assets fraud has proven to be complex and requires special considerations compared to litigation involving more traditional assets.

Courts in the UK have issued several judgments that have recognised crypto-assets as property that can be the subject of proprietary injunctions (see AA v Persons Unknown, Re Bitcoin [2019] EWHC 3556 (Comm)).

Furthermore, in Fetch.ai Ltd v Persons Unknown [2021] EWHC 2254, the UK court issued a worldwide freezing injunction against the unknown perpetrators, as well as Bankers Trust and Norwich Pharmacal orders for information held by the cryptocurrency exchange in order to be able to promote their claim against the fraudsters. Similar relief was provided in Mr Dollar Bill

Limited v Persons Unknown and Others [2021] EWHC 2718 (Ch).

Very recently, the first ever third-party debt order (formerly known as a garnishee order) in relation to crypto-assets was granted by the UK High Court (see Ion Science Ltd v Persons Unknown (unreported, 28 January 2022)).

However, it must be noted that certain special considerations must be taken into account regarding litigation involving cryptocurrency. One of the most prominent issues that affects the approach of the courts is their volatility. The value of crypto-assets fluctuates significantly over time, and as a result, a freezing injunction against such assets may cause disproportionately more harm to a defendant who will be prohibited from liquidating his/her investment (see Toma v Murray [2020] EWHC 2295).

Cypriot courts are expected to follow the case law of the UK courts and, as a result, crypto-assets are considered property under Cypriot law – and similar protection and interim relief can be provided in Cyprus to victims of crypto-fraud. Consequently, crypto-assets will be capable of being traced and enforced against under Cypriot law.

Cyprus arises as a very attractive forum for crypto-asset fraud litigation since the cost of litigation is significantly lower than in other common law jurisdictions.

Furthermore, Cyprus is one of the very few common law jurisdictions in the European Union that allows for the issue of worldwide freezing injunctions, which are an essential weapon in the arsenal of any crypto-asset fraud victim.

Litigation regarding crypto-assets is expected to grow exponentially over the next few years, and it is essential for litigators and courts alike to adapt their approach in order to effectively protect the victims of crypto-fraud.

Service of Legal Documents to Entities under Receivership and the Locus Standi of the Receivers and Managers

The Supreme Court of Cyprus clarified that in cases where a receiver and manager (R&M) is appointed over the assets of a legal entity pursuant to the terms of a floating charge, and certain legal proceedings affect or may affect the assets under the scope of the receivership, then (a) the R&M must be served with the legal documents and be notified about any legal proceedings against the legal entity, and (b) the R&M (not the board of directors) has the exclusive right and locus standi to represent the legal entity in the pending legal proceedings.

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Karamanolis & Karamanolis LLC is a modern, innovative and client-centric boutique law firm founded by experienced and passionate professionals. The litigation and arbitration practice of the firm combines deep industry knowledge with years of experience in commercial and corporate disputes, including commercial fraud and cross-border asset recovery, management and corporate control disputes, derivative claims, breach of fiduciary duties, M&A litigation, trust disputes, winding-up applications, enforcement of foreign judgments and arbitral awards, breach of contract, product liability, construction disputes, and employment law claims. It also covers unlawful termination of distribution, franchise and licensing agreements and contentious aspects of intellectual property law. The firm regularly represents clients in multi-jurisdictional cases which require the issuance of interim freezing injunctions, disclosure and search orders, and orders for the appointment of liquidators and receivers.

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

There are various provisions in Danish law protecting against fraud, including fraud in business relationships. The primary regulation is provided in the Danish Criminal Code, criminalising, inter alia, embezzlement, fraudulent deceit, breach of trust, fraudulent preference, bribery, and forgery. Generally, fraud claims are investigated by the police and the prosecution, which will also bring proceedings under criminal procedural law. In practice, however, offences are also frequently prosecuted in civil proceedings, usually with a claim for payment of damages to compensate for losses incurred as a result of the offence. It is possible, in principle, to be awarded damages in criminal proceedings. In many cases, though, the civil claim will be deferred to a separate trial. Fraud claims may also lead to claims under property law, and such claims may be pursued as part of the criminal proceedings or through civil proceedings.

Embezzlement

Cases of embezzlement include situations in which a person, to obtain an unlawful gain for themselves or others, appropriates tangible property in their possession or wrongfully spends money entrusted to them (see Sections 278(1)(i) and (iii) of the Criminal Code). Examples include cases where an accountant or finance assistant wrongfully transfers funds belonging to their employer or to customers to their own or another person's account. The crucial element in embezzlement is that the person committing it is taking advantage of an opportunity to deal with property or funds. Fraud in the form of embezzlement therefore goes beyond employment relationships and includes transactions undertaken by others, such as advisers, agents, brokers, etc. Embezzlement is punishable by fine or imprisonment for a term of up to eight years.

Fraudulent Deceit

Fraudulent deceit encompasses situations in which a person, by creating, confirming or exploiting a mistake, induces another person to perform or fail to perform an act and thereby inflicts a loss on that or another person (see Section 279 of the Criminal Code). In practice, fraudulent deceit is categorised into different types, such as investment fraud, trade fraud, insurance fraud, credit fraud, and work-related fraud. Claims of fraudulent deceit are among the most common fraud claims. As well as the creation of a mistake, fraudulent deceit also covers cases where the perpetrator confirms or exploits an existing mistake. Fraudulent deceit requires an actual or threatened financial loss and is punishable by fine or imprisonment for a term of up to eight years.

Breach of Trust

Breach of trust encompasses situations in which a person, to obtain an unlawful gain for themselves or others, acts contrary to the best interests of another person whose property has been entrusted to them for a specific purpose, and thereby inflicts, or causes a risk of inflicting, a financial loss on that other person (see Section 280(ii) of the Criminal Code). Actions over breach of trust are often brought against persons in managerial positions. Breach of trust is punishable by fine or imprisonment for a term of up to eight years.

Fraudulent Preference

Often closely connected to bankruptcy offences, fraudulent preference encompasses, inter alia, situations in which a debtor:

- wrongfully disposes of property belonging to them in which a third party has acquired an interest;
- sells assets after the commencement of bankruptcy proceedings against them; or

- by false pretences, concealment, pro forma transactions, large gifts, disproportionate consumption, sales at reduced prices, settlement of or the provision of security for liabilities not yet due, or in any other similar manner, withholds their possessions or claims from being used to satisfy any or all of their creditors (see Section 283 of the Criminal Code).

Fraudulent preference is punishable by fine or imprisonment for a term of up to eight years.

Bribery in Business Relationships

Danish law distinguishes between bribery in public and private sectors. Bribery of public officials is punishable by a fine or imprisonment for up to six years, whereas private-sector bribery carries a sentence of a fine or imprisonment for up to four years (see Section 299(2) of the Criminal Code). Bribery cases in the private sector are subject to conditional public prosecution, which means that a case will only be pursued by the police and the prosecution if it has been reported to them. Both the receipt (passive) and giving (active) of a bribe are covered by Danish regulation. In order for a bribe to be considered illegal, it must be in breach of the recipient's duty. Whether a bribe is in breach of the recipient's duty depends on the specific circumstances and the nature of the bribe. Receipt of a kickback in the form of money is undoubtedly a breach of duty, whereas receipt of other non-monetary benefits will require additional proof of a breach of duty. In practice, bribery rules cover both the receipt and giving of monetary and non-monetary benefits. By way of example, depending on the circumstances, return services and job promises may be deemed to be covered by the regulation.

Forgery

Under Danish law, a document is considered forged if the document or the content of the document does not originate from the purported issuer (see Section 171(3) cf (1) of the Criminal Code). This applies to both written and electronic documents. If a person uses a forged document to deceive in a legal matter, such forgery is punishable by a fine or imprisonment for up to six years. The concept of deceit implies that the document must have been significant in inducing an action or inaction of legal importance, or must have been suitable for that purpose. If the recipient of the document knew of the forgery in advance, the condition that the document must have been used to deceive in a legal matter would not have been met. However, even if the forgery has been poorly executed, this will have no impact on the question of whether the document is forged or has been used to deceive in a legal matter if the other conditions for punishment by reason of forgery are fulfilled. The use of forged documents is often one of the elements in the aforementioned cases regarding embezzlement, fraudulent deceit, breach of trust and fraudulent preference.

In addition to the regulation of fraudulent deceit in the Criminal Code, Danish law also contains other safeguards against fraud, including rules on contractual invalidity and damages.

1.2 Causes of Action after Receipt of a Bribe

As mentioned above, Danish law prohibits both passive and active bribery. This implies that, in addition to taking legal action against an employee or other persons who have acted on behalf of the claimant (such as agents or others) and who have received a bribe, a claimant will also be able to take such action against the person who has granted the bribe. Typical legal action may include a claim for payment of damages and/or reporting of the bribery to the competent authorities, accompanied by a claim for criminal prosecution. If the briber is a company, the claim may be raised against the company

as a legal person, and possibly also against the liable person(s), provided that the conditions for liability are satisfied.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Under Danish law, legal action may be taken not only against the offender directly responsible for the offence but also against any person(s), including legal persons, who, without being directly involved, are complicit in the offence by inciting, aiding or abetting it. In assessing the potential liability of multiple persons, the general Danish rules on criminal complicity and on joint and several liability will apply. Typical legal action, for instance in cases involving bribery, may include a claim for payment of damages and/or reporting of the fraudulent act to the competent authorities, accompanied by a claim for criminal prosecution, if the conditions for criminal liability are fulfilled.

Subsequent Complicity

Generally, the rules on criminal complicity and joint and several liability apply only to prior acts or omissions. Subsequent complicity, ie, acts or omissions undertaken by others after the fraudulent act has been committed, will not be regarded as complicity, unless the assistance was agreed in advance or falls within the Danish rules on liability for possession of stolen goods or money laundering.

Possession of Fraudulently Obtained Assets and Money Laundering

Under Danish law, any person who fraudulently receives or procures for himself or others a share of the proceeds from a fraudulent act, or who fraudulently, by hiding, storing, transporting, assisting in the disposal of or in any similar manner, subsequently assists another person in securing the proceeds from a fraudulent act, will be deemed to be in possession of fraudulently obtained assets (see Section 290 of the Criminal Code). For this purpose, "proceeds" means the direct benefit obtained from the fraudulent act, for instance assistance in the disposal of stolen assets. If the subsequent assistance is provided in relation to money proceeds, the offence must be assessed under Section 290a of the Criminal Code dealing with money laundering. Money laundering includes conversion or transfer of any direct or indirect proceeds from a criminal activity for the purpose of hiding or disguising the unlawful origin of such proceeds.

Under Danish law, the complicity of a bank in transactions related to criminal activities will, as a general rule, be assessed under the special money laundering rules applying to banks – not the Criminal Code. The penalty for possession of fraudulently obtained assets and for money laundering is a fine or imprisonment of up to six and eight years, respectively.

1.4 Limitation Periods

Under Danish law, the limitation period varies, depending, inter alia, on whether the fraudulent act gives rise to civil or criminal liability.

Limitation Period under Criminal Law

Under criminal law, the limitation period will reflect the penalty for the offence. The limitation period for fraud claims is typically ten years. However, the limitation period may be shorter in less serious cases, because the penalty in such cases is lower than those described in **1.1 General Characteristics of Fraud Claims**. As a general rule, the limitation period will start running from the date of the offence and will be suspended by the bringing of charges against the offender.

Limitation Period under Civil Law

Under Section 3 of the Danish Limitation Act, any claim for damages against an offender will typically become time-barred after three years. The limitation period starts to run from the time when

the damage occurs or the time when the claimant knew, or should have known, of the damage. If a claim for fraud is also pursued by the police or the prosecution, any claim for damages may be dealt with as part of the criminal proceedings. In this respect, Section 13 of the Danish Limitation Act provides that, in such cases, expiry of the limitation period will not bar any claim for damages against the offender as a result of the offence. Furthermore, such a claim may also be made by bringing a separate action within one year after the final decision in the criminal action, or within one year after the imposition of an out-of-court fine or other criminal law sanction on the offender.

1.5 Proprietary Claims against Property

The fact that the offender is no longer in possession of the proceeds from a fraudulent act is without prejudice to the possibility of confiscating an amount equal to those proceeds or seeking compensation for the loss incurred. If it is not possible to determine the amount of the proceeds, an estimate can be made. If the case concerns a proprietary claim, it will depend on the type of asset involved. The following applies in relation to real and movable property, claims, and investment securities.

Movable Property

In a ruling of 21 January 2020, the Danish Supreme Court found that A, who had lost his car through misappropriation, could claim that the car be returned by B, the bona fide buyer. Referring to the Danish Law of King Christian V 6-17-5, which entitles anyone whose asset has been stolen to recover that asset from a subsequent bona fide buyer, and to its previous decisions in the Swane cases, which also involved theft, the Court noted, inter alia, that it has been established that the initial owner enjoys an extensive right of recovery which can only be derogated from in exceptional cases. Derogation is subject to the initial owner acting with great carelessness or unreasonable acquiescence, for instance by not taking legal action to prevent a transfer after learning that there is an imminent risk of such a transfer.

Real Property

Rights over real property are regulated in the Danish Registration of Property Act. According to Section 27 of the Act, registered rights prevail over prior rights, provided that the new rights holder is in good faith. However, Section 27 also provides that any objection that the instrument is false or falsified, or that it has been drawn up by personal violence or threat of personal violence against the law, will be valid, also in relation to the bona fide buyer. Accordingly, if B has fraudulently convinced A to transfer his house to B, and if B has then, after registering the deed of conveyance in the Land Register, resold the property to C, who has registered the deed in good faith, then A will not be able to recover the house. If, however, the contract of sale between A and B had been entered into using personal violence, then A may recover the property.

Claims

Transfers of claims are regulated in the Danish Debt Instruments Act, which distinguishes between negotiable debt instruments and ordinary debt instruments. The transferee of an ordinary debt instrument will not enjoy better rights than the transferor. The opposite applies to the transfer of negotiable debt instruments. Thus, it follows from Section 14 of the Danish Debt Instruments Act that any absence of the right to transfer the debt instrument is without prejudice to the transferee's right, unless the transferee knew this or failed to act with the diligence required by the circumstances.

Investment Securities

The transfer of investment securities is regulated by the Danish Capital Markets Act. Section 185

contains rules that are similar to the rules governing transfer of rights over real property.

1.6 Rules of Pre-action Conduct

Under Danish law, no special pre-action rules apply in cases involving fraud. However, Section 336a of the Danish Administration of Justice Act imposes an obligation on the parties to a civil action to seek to avoid unnecessary litigation and to explore the possibility of settling the dispute before taking legal action. If the parties fail to meet this obligation, they may be ordered to pay the costs caused by such a failure. The rule applies to civil actions – not actions where the claimant reports the defendant to the relevant authorities. Once a civil action has been brought, the court will convene a pre-trial hearing to allow the parties to present their views on the factual and legal circumstances of the case.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Under Danish law, a claimant who is the victim of fraud has various options to protect against the risk of concealment. In criminal actions, the relevant rules are the provisions on seizure in the Danish Administration of Justice Act, while the provisions on freezing orders and summary enforcement proceedings apply in civil actions. Concealment is categorised as fraudulent preference (see **1.1 General Characteristics of Fraud Claims**).

Criminal Actions

A claimant who is the victim of fraud may, when filing a police report, ask the police to seize an asset to secure a claim for damages or a claim for restitution of an asset that has been appropriated from the claimant. If the police agree, they can apply to the court for a seizure order. Typically, a seizure order is issued against the defendant, but in certain circumstances it may also be issued against a third party. It is a condition that the defendant is reasonably suspected of having committed an offence which is being pursued by the police and the prosecution, and that a claim for restitution of an asset or payment of damages has been made. Where the purpose of the seizure is to secure a claim for damages against the defendant, it is also a condition that seizure is deemed necessary. If the ownership of an asset is uncertain, it may be seized, until a possible dispute over the ownership has been resolved.

A seizure order to secure a claim for damages will lapse if the defendant is subsequently adjudged bankrupt. Where seizure is undertaken with a view to restitution of an asset, it is not possible to deal with the asset contrary to the purpose of the seizure, neither by subsequent agreement nor by debt enforcement proceedings.

Freezing Orders

The rules on freezing orders allow a claimant to seek, on a civil law basis, the availability of funds to cover monetary claims, including damages. A request for a freezing order must be submitted by the claimant to the enforcement court in writing. The object of a freezing order can be both money and assets. The enforcement court may request provision of security for the harm and inconvenience caused by the freezing order, and it is a condition for maintaining the freezing order that the claimant, within one week of the freezing order, initiates court proceedings concerning the claim covered by the order, unless the defendant, during or after the freezing order, waives proceedings. A freezing order will lapse in the same way as seizure in the event of the defendant's subsequent bankruptcy.

Summary Enforcement Proceedings

If a claimant can prove or establish their ownership of an asset, the claimant may request assistance from the enforcement court in enforcing possession of the asset. The enforcement court may refuse enforcement proceedings if it finds

such proceedings suspicious. The enforcement court may request provision of security for the harm and inconvenience that the proceedings will cause to the defendant. The security must be released after three months, unless the defendant has brought an action beforehand claiming abolition and compensation, in so far as such claims have not been raised in connection with an appeal against the decision issued by the enforcement court.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

Under Danish law, a defendant is not generally required to disclose their assets in order to assist in identifying assets prior to a trial.

In the case of bankruptcy proceedings, the debtor is obliged to fully disclose their assets. If the debtor fraudulently withholds information about their assets in order to hide the assets from the creditors, the debtor may be held liable for fraudulent preference.

As described in **1.7 Prevention of Defendants Dissipating or Secreting Assets**, it is possible to secure assets prior to a trial by means of seizure in criminal cases, and freezing and summary enforcement proceedings in civil cases.

Apart from under the rules in the Danish Bankruptcy Act and the Danish Administration of Justice Act, the defendant is not obliged to assist in securing assets prior to a trial.

Various publicly accessible documents contain information about real estate and other assets owned by the defendant. The police may also obtain information from the tax authorities on the defendant's income and assets.

2.2 Preserving Evidence

Danish law allows for the issue of an order for disclosure and search to secure evidence, which is laid down in the Danish Administration of Justice Act.

Criminal Cases

During criminal proceedings, the police may secure evidence by means of a search at a suspect's address, and disclosure and search at non-suspects' addresses.

A disclosure order is only issued against non-suspects (persons, enterprises or authorities) and is considered to be the least intrusive intervention under Danish law. Since 1 February 2021, the police have had the authority to order some of the enterprises and persons covered by the Danish AML Act to disclose information about transactions, accounts, custody accounts, deposit boxes, etc. Other orders for disclosure are issued by the courts, ordering the person, enterprise etc in possession of a document or an asset to disclose it to the police if it can serve as evidence, should be confiscated or, in connection with the offence, has been appropriated from someone who can claim it back. The only additional requirement of disclosure is that the relevant investigation is part of the public prosecution. The police may also decide to issue a disclosure order if the purpose of the intervention would otherwise be lost.

A disclosure order cannot be issued against a person who is exempted or excluded from appearing as a witness.

A distinction is made between searches of premises or objects in the possession of a suspect and searches of premises or objects in the possession of a non-suspect. The distinction is not determined by ownership, as the concept of possession also covers rented or borrowed

premises or objects. Searches can be carried out in both private homes and businesses.

The conditions for a search at a suspect's premises are that the suspect is reasonably suspected of having committed an offence that is subject to public prosecution, and that the search is of essential importance to the investigation. In the case of searches of homes, residential premises, documents, papers, etc, as well as the contents of locked objects, it is a further requirement that the offence is punishable by a custodial sentence or that there are specific grounds for believing that it is possible to find evidence or objects that can be seized. The indication or suspicion requirements are increased in this respect; however, the requirements are still relatively low. A suspect may consent to a police search, but the indication, crime and suspicion requirements still need to be satisfied. If, during a search at a suspect's premises, the police find written or similar communications with persons who are excluded from appearing as witnesses, eg, lawyers, doctors and ministers of religion, such communications may not be searched; however, they are allowed to search a suspect's notes about a meeting with a person who is excluded from appearing as a witness.

In the case of a search at a non-suspect's premises, it is a requirement that the investigation concerns an offence punishable by a custodial sentence. The indication requirement means that there are certain circumstances indicating that a search may reveal objects that can be used as evidence or seized; thus, the indication requirement is higher than for searches at a suspect's premises. A non-suspect may also consent to a search, in which case the indication and crime requirements are waived, and the search may be carried out even if, for example, the offence does not carry a custodial sentence. Contrary to disclosure, it is possible to conduct a search of a non-suspect excluded from appearing as a witness; however, written and similar communications with the suspect may not be searched.

Civil Cases

In civil cases, a distinction is made between the opposing party's disclosure duty and a third-party's disclosure duty.

At the request of a party, the court can demand the opposing party disclose specific documents in the latter's possession, which are deemed relevant to the case. If the opposing party fails to comply with the court's order for disclosure of documents, this may be prejudicial to the case, and the court may, in its assessment of the evidence, attribute prejudice to the opposing party. The duty to disclose documents at the request of the opposing party is subject to the same restrictions as the duty for a party to give evidence.

The court may, at the request of a party, order a third party to produce or disclose a document in their possession. A third party's duty of disclosure is equivalent to the duty of giving evidence. The party seeking a third-party disclosure order must describe the facts which the documents are intended to prove, and which are relevant to the case and the theme of the evidence. A disclosure order cannot be issued against a person who is exempted or excluded from appearing as a witness.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

As stated in **2.2 Preserving Evidence**, in both criminal and civil cases it is possible to order a third party to disclose documents for use as evidence.

The application for a disclosure order cannot be dealt with by the court until after commencement of the action (in civil cases) or commencement of the investigations (in criminal cases). Anticipated evidence is possible if, prior to the court

action, there is a risk that important evidence will be lost, cannot be brought before the court without significant inconvenience or delay, or it is believed to be of importance for the investigation or for reasons of public interest. An example of the use of anticipated evidence is the questioning of a witness who is terminally ill, for which reason the opportunity to secure the evidence may be lost.

In cases involving infringement of IP rights, the enforcement court may, at the request of the rights holder or any other party entitled to take legal action against the infringement, order a search and seizure investigation at the other party's premises for the purpose of securing evidence of the infringement. If prior notice of the search is likely to result in removal, destruction or alteration of evidence of the infringement, the enforcement court may decide not to give such notice.

2.4 Procedural Orders

In criminal law, the defendant's counsel must, as a general rule, be notified of all court hearings, including hearings held to obtain search warrants and orders. If the investigation is at such an early stage that no defence counsel has yet been appointed, only the police and the prosecution will participate at the hearings on seizure, disclosure and search orders. The orders may later be appealed.

If there is a risk of evidence being destroyed, the court may decide, at the request of the police, not to inform the defendant and/or defence counsel of a court hearing. Similarly, a plaintiff in a civil action may request that the defendant not be informed of court hearings.

2.5 Criminal Redress

In cases involving fraud or other types of financial crime, the victim may ask the police and the prosecution to present their claim for damages during the criminal proceedings. The claim can also be presented by the victim during the criminal proceedings, if applicable following the victim's testimony. The court may decide to hear the claim and award damages, if the court finds that the claim is justified and sufficiently clear. The court may also decide to refer the claim to the civil courts, in which case the victim will have to bring a civil action. In practice, the claims for damages will often be referred to a separate civil hearing. The action for damages may also be brought as a civil action running parallel to, and independently of, the criminal action. The civil action will, in some circumstances, be stayed pending a decision on the question of guilt in the criminal action.

2.6 Judgment without Trial

In civil actions, the burden of proof is on the plaintiff; in criminal actions it is on the police and the prosecution. However, the defendant cannot prevent a case by failing to participate.

In criminal proceedings, it is possible to proceed with the trial hearing if the defendant does not appear. If a duly summoned defendant fails to appear without giving notice of lawful absence, the court may order that the witnesses summoned should be heard. If the defendant's presence is deemed unnecessary by the court, the case may in some cases be set down for judgment despite the defendant's absence. The case can be set down for judgment when the defendant has evaded after the indictment has been served to the person concerned. It is also possible to proceed with the hearing despite the defendant's absence, if the defendant has left the court without permission after first appearing. If the defendant has agreed to a hearing of the case in his absence, the case may be set down for judgment only if the claim is for unconditional imprisonment for up to one year, confiscation, expulsion, disqualification, or compensation.

Additionally, the case may be set down for judgment despite the defendant's absence if the maximum penalty is unconditional imprisonment for six months, or other legal consequences on the condition that a measure under Section 68 of the Danish Criminal Code shall remain the same as any previously imposed measure, confiscation, expulsion, compensation or disqualification under the Danish Road Traffic Act or the Danish Act on Safety at Sea. For such default judgment to be given, the defendant must have been duly summoned and informed that failure to appear may result in the defendant being convicted as charged. Finally, the court may proceed with the case despite the defendant's absence if the court is satisfied that the defendant will be acquitted.

2.7 Rules for Pleading Fraud

Danish criminal law is based on the principle of substantive truth, which implies that the authorities involved, including the courts, are required to reach the right decision. Accordingly, agreements between the defendant and the police and prosecution on the basis for the decision can only be made to a limited extent.

2.8 Claims against "Unknown" Fraudsters

There are no special rules in Danish law governing claims against "unknown" fraudsters. It is possible to file a police report even if the fraudster is unknown. The police may initiate various types of investigations that could directly or indirectly identify the fraudster, including by obtaining legal assistance from foreign authorities and bank details from other countries. If the police are still unable to identify the fraudster, the case will be filed in the police systems. If new evidence emerges that can identify the fraudster, the case may be reopened.

2.9 Compelling Witnesses to Give Evidence

In both criminal and civil proceedings, witnesses are called to give evidence in court. The sanctions for failure to appear in court will be stated in the witness summons.

If a witness fails to appear without lawful excuse or otherwise refuses to give evidence, the court may impose various sanctions on the witness to induce him or her to give evidence. If a duly summoned witness fails to appear in court, the court may have the witness picked up by the police. If the hearing has started without the witness appearing, the court may issue an arrest warrant against the witness, who will then be arrested and taken to the next hearing by the police. The court may also impose a fine on the witness, both for non-appearance and for refusal to give evidence despite appearance in court. The court may also impose a continuous fine for a maximum period of six months, if the witness continues to refuse giving evidence. Furthermore, the witness may be ordered to pay the expenses caused by his/her behaviour. Finally, the court may order the witness to be taken into custody by the police or subject the witness to measures. As an example, the witness may be ordered to submit to supervision, to appear before the police at specified times until the witness can give evidence in court, or until the witness agrees to answer or to take off any clothing concealing his or her face. However, the witness may not be held in custody for more than six months in the same case, continuously or cumulatively.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Under Danish law, legal action may be taken against any person liable for assisting in the commission of fraud, including any legal person. The liability of legal persons is detailed in Section 27 of the Criminal Code. According to that provision, it is a condition of the criminal liability of a legal person that the offence has been committed in the course of their activities, and that the offence was caused by one or more natural persons connected to the legal person, or by the legal person themselves. The provision regulates only the question of criminal liability. Whether a legal person is liable in damages depends on an assessment of whether as an employee they have acted atypically and unforeseeably.

3.2 Claims against Ultimate Beneficial Owners

Claims may be brought against the beneficial owners of legal persons if they have assisted in the commission of the offence by instigation, advice or action. However, the fact that they are shareholders or beneficial owners does not in itself make them liable for fraud which the company is deemed to have committed.

3.3 Shareholders' Claims against Fraudulent Directors

Sections 361–362 of the Danish Companies Act regulate in more detail the possibility for shareholders to decide that the company should bring claims against the management and others who have committed an offence.

It follows from Section 364 of the Companies Act that the decision to hold somebody responsible must be taken by a general meeting.

If the general meeting has granted discharge to the management, a new decision may be taken if it turns out that the management has not submitted substantially correct and complete information to the general meeting before the decision was taken.

Shareholders representing at least one tenth of the company capital who have opposed a decision to grant discharge may bring an action claiming that the person or persons responsible must pay damages to the company for the loss suffered. Shareholders that subsequently bring an action will be liable for the legal costs, but will be entitled to recover them from the company in so far as the costs are covered by the amount recovered by the company in connection with the action.

However, if a company is declared bankrupt and the reference date occurs within 24 months after the date of the general meeting that granted the discharge or waived the right to bring an action, the bankruptcy estate may bring an action for damages regardless of that decision.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

The jurisdiction of the Danish authorities covers offences that have been committed in Denmark or otherwise have a connection to Denmark, whether the offence has effect in Denmark or acts of attempt or complicity have been committed on Danish territory. If jurisdiction exists, Danish authorities will be able to deal with a case of fraud regardless of whether the perpetrator is resident or domiciled outside Denmark. A foreign company can be sued in Denmark if the fraud has been committed in Denmark, for example in connection with a business meeting that took

place in Denmark. Danish law recognises extra-territorial jurisdiction to a limited extent only.

5. ENFORCEMENT

5.1 Methods of Enforcement

As mentioned in **1.1 General Characteristics of Fraud Claims**, cases of fraud are investigated and prosecuted by the police and the prosecution. Typically, such cases are initiated by filing a report. In addition, cases of fraud are dealt with by the civil courts, most often resulting in a claim for damages and/or return of the assets appropriated from the claimant. Large financial crime cases, including international fraud cases, are dealt with by the National Crime Unit. Other cases of fraud are dealt with by the police in the district where the fraud has been committed.

The investigative steps typically taken in these cases include search, seizure and asset tracing.

With regards to asset tracing, Danish law provides that even after the conclusion of a case, the police may initiate investigations for the purpose of seizing and confiscating the proceeds of fraud.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

Danish law recognises the privilege against self-incrimination. When suspected of having committed a criminal offence, a defendant must be instructed that he or she has a right to silence. In police interrogations, it must appear from the interrogation report that the requirement for such instruction has been complied with. The burden of proof in criminal proceedings lies with the police and the prosecution, so there will be no adverse inference if the defendant refuses to provide information.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

Danish law recognises legal privilege in both criminal and civil proceedings. The protection extends to the content of the advice given by the lawyer to the client, including written communications and memos prepared by the lawyer.

In practice, therefore, the police and the claimants will generally not be allowed to interrogate the suspect's lawyer.

When the police search the premises of a suspect, such a search must not include communications originating from the suspect's lawyer. However, the suspect's own memos are not protected from the search. If privileged material is not kept confidential, there is a risk that the material could be subject to a search or a request for disclosure. Thus, a report that has been written by a lawyer on a particular subject and forwarded to an independent third party is not necessarily protected against a subsequent disclosure request.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

Danish law does not provide an opportunity to raise punitive or exemplary damages claims against a perpetrator.

7.2 Laws to Protect "Banking Secrecy"

Under Danish law, police and prosecution have broad powers to request information from banks and other financial operators in connection with criminal investigations. The relevant operators

are then required to comply with the request, notwithstanding any duties of confidentiality.

The information that may be requested includes information on transactions, accounts, custody accounts, deposit boxes, etc. The police may also request the operators to disclose information available to them concerning transactions in accounts to which funds have been transferred, or in a transaction originating from a transaction covered by the request. It is a requirement that the police request is in writing and accompanied by reasons for the request.

7.3 Crypto-assets

Crypto-assets, including cryptocurrencies, are not separately regulated under Danish law.

In 2018, the Fifth Money Laundering Directive (5AMLD) was adopted, and has been implemented in the Danish Money Laundering Act. The Directive introduced regulation of money laundering through the use of "virtual currencies", including cryptocurrencies. The regulatory approach of the Directive only addresses cryptocurrencies, not crypto-assets as a whole.

Despite the implementation and regulation of "virtual currencies" in the Money Laundering Act, crypto-assets are currently not generally recognised as electronic money under the Danish Payments Act (implementation of Article 2(2) of EMD2). Crypto-assets can, on the other hand, be regarded as assets.

The protection in Danish law against fraud is not negatively delimited and therefore also includes fraud relating to crypto-assets.

However, Danish law does not provide any aggregate protection of trade in crypto-assets, and Danish authorities warn, on equal terms with EU authorities, about the risks associated with such trade.

Section 169a of the Criminal Code prohibits any person from wrongfully making, obtaining or distributing false electronic money with the intention of spending it as genuine money. The provision does not currently cover crypto-assets, as crypto-assets are not recognised as electronic money under the Payments Act.

The very use of false electronic money or false virtual currencies will be treated as fraudulent deceit or data fraud.

Kromann Reumert is a full-service Danish law firm with offices in Copenhagen, Aarhus and London, and employs approximately 300 attorneys. It has substantial experience in handling corporate criminal law and white-collar matters, in particular bribery, financial crime, AML cases and fraud. It assists clients with aspects of criminal law, including representation in court, and assists companies with internal investigations, handling of dismissals, and filing reports with the police. It also advises on claims for damages and recovery of assets. As a full-service firm, it also undertakes forensic work in fraud cases. It regularly works with partners in international matters and has substantial insight into the routines of law enforcement agencies in Denmark and abroad.

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ECUADOR

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

Fraud Claims in Ecuador

Several forms of fraud are recognised under the Ecuadorian Criminal Code (*Código Orgánico Integral Penal*, or COIP), mainly intentional and illegal acts against the property of a third party, by means of deceptive, false, and misleading facts, which induce an error.

Fraud in Ecuador is mainly based on the provisions of Article 186 of the COIP, which establishes that in order for a fraud to exist there must be four characteristics:

- deception or misleading acts;
- simulation of false facts;
- concealment of true facts; and
- an effect on the victim's patrimony, assets or money.

All four conditions must be met for a fraud to take place.

Procedural matters

Ecuadorian legislation contemplates an adversarial accusatory system; therefore, fraud claims in Ecuador are filed before the General Prosecutor's Office (*Fiscalía General del Estado*, or FGE), which is responsible for public criminal actions.

Fraud claims must be brought through public criminal actions; this means that a public prosecutor has to investigate an alleged crime and request the Judge of Criminal Guarantees to initiate criminal proceedings for the alleged crime.

The COIP establishes a series of principles, requirements and procedural rules that must be in accordance with the Constitution of the Republic of Ecuador. Therefore, once the Judge of Criminal Guarantees initiates a criminal proceeding, the process itself must necessarily comply with the rules of due process and respect all constitutional guarantees.

Once the criminal process has begun, judges must order precautionary measures (such as a prohibition on leaving the country, periodic appearances before the authorities or even preventive imprisonment). The Judge of Criminal Guarantees will have to determine if it is evident from the facts presented that fraud has been committed. If a judge determines that fraud has been committed, the defendant will be called to trial. However, if no fraud or other crime is identified, the judge will dismiss the defendant and declare their innocence. In this last case, the precautionary measures will have to be lifted and the proceedings will be definitively closed.

However, if the Judge of Criminal Guarantees calls the defendant(s) to trial, they must necessarily hand over the case to a court made up of three competent judges to hear the case, carry out the trial hearing and finally decide whether to ratify the innocence of the defendant(s) or, if not, to find them guilty and sentence them to imprisonment.

Nevertheless, any of the procedural parties has the right to file an appeal before a higher court and, once the appeal has been heard and if this is not favourable, before a National Judge.

False Statements, Corrupt Payments, Conspiracy and Misappropriation

The making of false statements is a crime known as "perjury and false testimony" and is provided in Article 270 of the COIP. The article states that "[t]he person who, by declaring, confessing, informing or translating before a competent authority, fails to tell the truth under oath, commits perjury. Perjury shall be punished with imprisonment from three to five years; when doing so not under oath, the person commits false testimony.

False testimony shall be punished with imprisonment from one to three years." It is very important to note that perjury can only be committed under oath, therefore, it must be committed or done when testifying or declaring in court or, in the absence thereof, before a notary public. And, as previously explained, the process must be developed by means of a public prosecutor who initiates an investigation and subsequently requests a Judge of Criminal Guarantees to initiate the criminal process and dictate the respective precautionary measures.

Corrupt payments are contemplated in the COIP through different crimes such as bribery or concussion (extortion), provided in Articles 280 and 281, respectively. Bribery and concussion requires that one of the participants who committed the crime must be a public official of the Ecuadorian state and that, at the time the crime was committed, they were working as an Ecuadorian public official. However, a recent reform of the COIP (passed on 17 February 2021 and which came into effect in late 2021) creates a new form of crime: corrupt acts in the private sector. It defines a variety of inappropriate conduct as a crime (eg, it is a crime for general managers or shareholders, among others, to receive a gift, illegal salaries or promises, among other things). The definition of this crime, in the opinion of the authors of this article, is poorly drafted and overly broad; businesses will therefore need to take a careful look at their practices.

Conspiracy, known as illicit association, is a crime provided for in Article 370 of the COIP and it is committed when two or more people associate with the purpose of committing crimes (that are punishable with imprisonment of less than five years). Illicit association is punished, for the sole fact of the association, with imprisonment of three to five years.

Finally, misappropriation in Ecuador is a crime known as trust abuse and is provided for in Article 187 of the COIP. This crime is committed when a person – who is entrusted to manage money, goods, or assets, or where these are under their control with the condition of returning them or using them in a specific way – uses/steals them for their own or a third party's benefit. Trust abuse is punished with imprisonment of one to three years. This crime is commonly committed by employees in senior positions. This is a crime that applies to the private sector.

1.2 Causes of Action after Receipt of a Bribe

The causes of action available in the Ecuadorian jurisdiction for a claimant whose agent has received a bribe are mainly the following.

The receipt by the agent of any gift or any type of compensation, which the agent has knowingly accepted, in return for performing or omitting certain acts that otherwise would have not been committed, and that have damaged in any way the assets of the company to the benefit of the agent or a third party, will be considered a crime.

Being a crime contemplated in the law and in the COIP, a complaint shall be filed with the Public Prosecutor's Office for the crime of concussion and/or bribery as applicable, so that a prosecutor investigates the crime committed, respecting all the rules of due process for this purpose.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Ecuadorian legislation punishes the crimes that are typified in the COIP; however, it is the judge of the case who must determine the status under which each defendant is punished and sanctioned. This means that the judgment issued will determine the degree of responsibility that each defendant has and will determine whether they are the author of the crime, an accomplice

or helped to cover it up. Therefore, all persons who assist or facilitate the fraudulent acts of another, must assume the legal consequences as accomplices for the crime that was committed.

The claims available in Ecuador against parties who assist or facilitate the fraudulent acts of another are the same as if the claim were to be brought against the perpetrator who committed the crime.

It is important to point out that an accomplice is a person who fraudulently facilitates or cooperates with secondary acts, prior or simultaneous to the performance of a criminal offence. There are situations in which the party's assistance consists of the receipt of fraudulently obtained assets, after the crime was committed. This person will no longer be punished as an accomplice, however, since their assistance did not occur before or during the committing of the criminal offence, as mentioned above.

However, Article 289 of the COIP provides that a party's assistance consisting of the receipt of fraudulently obtained assets is a crime, known as "front-manning" (*testaferrismo*). This crime punishes the person who consents to pretend that the fraudulently obtained assets (including real estate, titles, shares, participations, money and securities) are their own. This crime is punished with imprisonment for three to five years. If it is proven that the crime was committed by a legal entity, it will be sanctioned with the extinction of the legal entity and a monetary fine.

Likewise, Article 370 of the COIP, states the following regarding "unlawful association": "When two or more persons associate for the purpose of committing crimes, punishable with imprisonment of less than five years, each of them shall be punished, for the sole fact of the association, with imprisonment of three to five years."

1.4 Limitation Periods

In Ecuador, the limitation period for crimes is the same period of time as the maximum term of imprisonment for that specific crime. This means, for example, that the limitation period for fraud, punishable with five years of imprisonment, will be five years counting from the day the fraud was committed.

Notwithstanding all of the above, it is important to emphasise that when the prosecutor requests the judge to press charges and the judge orders the charges and initiates the criminal proceeding, the statute of limitations is interrupted.

1.5 Proprietary Claims against Property

Criminal law in Ecuador has two purposes: (i) to punish the offender with an imprisonment sentence, and (ii) to repair the rights of the victim by means of comprehensive reparation.

In this sense, when a claimant seeks the recovery of property, assets, money or funds that have been misappropriated or induced by fraud to transfer, and where those funds have been mixed or invested before being recovered by the victim, the claimant must necessarily overcome the following barriers.

- Obtaining an enforceable judgment that orders the payment of integral reparation to the victim, or obtaining an order for the full reparation of the victim's rights; this decision must be enforceable so no appeals can be filed against the judgment.
- Following this, a second phase or procedural stage for executing the decision must be initiated through a civil process before a civil judge to apply seizures or withholdings on assets owned by the debtor or on the debtor's income.

In practice it is very unlikely that a seizure or withholdings will be possible. The probability of

success in recovering funds which represent the proceeds of fraud, but which have been mixed with other funds, is very low.

1.6 Rules of Pre-action Conduct

Under Ecuadorian legislation, no particular rules of pre-action conduct apply in relation to fraud claims.

1.7 Prevention of Defendants Dissipating or Secreting Assets

In Ecuador, what a victim of fraud can do to prevent a defendant from dissipating assets or secreting them with a view to avoiding the concrescences of a judgment is to request in rem precautionary measures.

Precautionary Measures on Property

Precautionary measures must necessarily be ordered at the beginning of the process, meaning, at the moment in which the Judge of Criminal Guarantees presses charges upon the request of the prosecutor in the case. Thus, it is the prosecutor of the case who, seeking to secure the rights of the victim of an alleged crime, requests and/or recommends that the judge order certain precautionary measures of a real or personal nature. In this sense, it is important to clarify that the COIP recognises, in its Article 549, the in rem precautionary measures that can be dictated by a judge.

The judge may order the following precautionary measures on the assets of the natural or legal person being prosecuted:

- abduction;
- seizure;
- detention; and
- prohibition of alienation.

Once the measures have been ordered, they must be entered in the respective registries free of charge.

Likewise, Article 444.11 of the COIP establishes that the prosecutor has the power to request that the judge dictate the precautionary and protection measures that they consider appropriate for the defence of the victims and the re-establishment of their rights. The revocation or termination of such measures can also be requested when the judge considers that the investigation carried out has made it possible to dispel the evidence that led to them.

On the other hand, Article 519 of the COIP establishes that the judge may order one or more precautionary and protective measures provided for in the Code in order to:

- protect the rights of the victims and other participants in the criminal proceedings;
- guarantee the presence of the accused person in the criminal proceeding, their compliance with the judgment and the integral reparation;
- prevent the destruction or obstruction of evidence that may lead to the disappearance of elements of the conviction; and
- guarantee full reparation to the victims.

In this sense, it is important to clarify that the lawyers representing the victim are the ones who must co-ordinate with the public prosecutor of the case to request that the judge enacts the in rem precautionary measures in order to secure the assets which are the object of the infraction. It is, however, the judge who has the last word and who must decide.

Court Fees

There are no court fees to pay since the Constitution of the Republic of Ecuador recognises the right of the victims to full reparation of the damages caused, to effective and free judicial protection and to have their procedural rights respected as a responsibility of the national judicial system. In the case of non-compliance

by the defendant with any of the precautionary measures, at the request of the prosecutor and in a reasoned manner at a hearing, preventive imprisonment must be ordered by the judge. Finally, the claimant is not required to provide a cross guarantee for damages.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

In Ecuador there are no procedures available to require a defendant to give disclosure of their assets to assist in preserving assets pending a judgment. Additionally, defendants have the constitutional right to remain silent and not self-incriminate.

It is the responsibility of the person filing the complaint, together with the prosecutor, to demonstrate to the Judge of Criminal Proceedings which are the properties, assets and money of the defendant on which precautionary measures, such as measures of a real nature, will be imposed. If any of these properties, goods or money are not in the name of the defendant, the precautionary measure cannot be imposed.

The claimant does not need to give a cross-undertaking in damages.

2.2 Preserving Evidence

Under Ecuadorian law, the procedure available for preserving and conserving evidence in circumstances where it is feared that important evidence might be destroyed or suppressed is that the evidence enters a chain of custody at the request of the prosecutor or by order of a judge. Evidence will enter the chain of custody at the crime scene and is then secured until it is presented before the judge and the judge makes a ruling. Once it has entered the chain of custody it cannot be removed except by order of the competent authority.

Courts in Ecuador allow a party to conduct a physical search of documents at the defendant's residence or place of business only when there is a search warrant issued by a Judge of Criminal Guarantees, and in turn this Judge has issued an official notice to the Judicial Police and the National Police giving the respective search warrant.

A judicial order will be required to conduct a physical search of documents.

The claimant does not need to give a cross-undertaking in damages. Responsibility for damages due to a search warrant is assumed by the FGE and the National Police.

There is a second way to preserve evidence that is in danger of being manipulated or erased, which is to request an "urgent act" from the prosecutor's office to order a prosecutor to collect the evidence and keep it in a prosecutor's file. However, in practice, it may take some time until the prosecutor's office collects the evidence and therefore this is not always the best method to follow.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

In Ecuador there is only one procedure to obtain a disclosure of documents and evidence from third parties, and this occurs when the prosecutor, either of its own accord or at the request of the parties, orders documents from third parties.

This procedure cannot be invoked before the commencement of the proceedings. There must necessarily be an open criminal investigation to obtain disclosure of documents from third parties. Nevertheless, documents disclosed form third parties will have to remain confidential due

to the fact that criminal investigations are necessarily confidential. Disclosed documents will only be made public if there are charges pressed against the defendant and a process has been initiated.

2.4 Procedural Orders

In Ecuador, procedural orders can be brought by judges or prosecutors without notifying the intended defendant. Defendants only need to be notified once, when the process is initiated, then, in white-collar crime and fraud cases, the process con continue, even in the absence of the defendant.

The prosecutor, during the investigation period, has broad capacity to gather or request all type of evidence. However, the defendant always has access to the full file and evidence gathered by the prosecutor.

There is no additional burden placed on the claimant to offer compensation when the defendant is not present in the case proceedings.

2.5 Criminal Redress

The COIP and the law contemplate and establish two purposes for criminal law: (i) punishment and (ii) repairing the rights of the victim.

In this sense, all criminal proceedings in Ecuador seek to punish and/or sanction the perpetrators of the crimes and secondly to repair the rights of the victim. This second aim is known as "integral reparation". However, in practice sometimes the ruling only establishes what the reparation should be, and the victim then initiates a civil proceeding to enforce that reparation.

Therefore, victims of fraud in Ecuador rarely seek redress against the perpetrator via the criminal process because it is not common to get any economic compensation through a criminal process. Criminal actions are used more as a threat to negotiate economic compensation. In practice, if a civil case has been started for the same matter the judge will usually consider that it is only a damages case and not a criminal offence, meaning that the civil claims impede the progression of a criminal prosecution.

2.6 Judgment without Trial

In Ecuador, as a general rule, it is not possible to obtain a judgment without a full trial. The ordinary criminal process has three stages:

- the prosecutorial investigation stage;
- the evaluation and preparatory trial stage; and
- the trial stage.

In the evaluation and preparatory trial stage, the first hearing is held. In this hearing the elements of conviction are presented and the evidence is announced. In the third trial stage the second hearing, called the trial hearing, is held. Only in this trial hearing may the evidence be presented and explained. In this same hearing, the judge is obliged to announce the decision taken (the written judgment is subsequently drafted and notified to the parties). The judgment cannot be obtained if this full process is not held.

However, there is a special abbreviated procedure, which the defendant must voluntarily state that they wish to be subject to in order for it to proceed. To do so, the defendant must plead guilty to the crime and the penalty imposed, and the defence attorney must confirm the defendant's willingness to plead guilty. In this procedure, it is no longer necessary to carry out the three stages with two hearings. The procedure is reduced to a single hearing where the judge condemns the defendant.

It should also be noted that the following are crimes that can be tried in absentia, when the defendant does not appear at the hearings:

- peculation;
- bribery;
- concussion; and
- illicit enrichment.

2.7 Rules for Pleading Fraud

In Ecuador there are no special rules or professional conduct considerations to plead fraud. Fraud claims are the same as any other criminal case. However, to preclude unwarranted allegations of fraud or any other crime, if a claim is considered as malicious, damages may be initiated against the complainant.

2.8 Claims against "Unknown" Fraudsters

In Ecuador it is possible to bring claims against "unknown" fraudsters. These claims are dealt with by the Unit to Uncover Perpetrators, Accomplices and Cover-Ups. However, if this Unit is not able to uncover who the fraudster is, then the case will not continue.

2.9 Compelling Witnesses to Give Evidence

In practice, neither the prosecutor nor the defendants have powers to compel witnesses to give evidence. However, at the judge's sole discretion, and if the judge considers it necessary, a witness may be ordered to appear with the support of the National Police.

In practice, it is very difficult to compel a witness to testify at trial, and thus become part of the trial evidence, since it will become testimonial evidence.

Witnesses must declare under oath that they are going to tell the truth and that no one has exerted pressure on them to testify something in particular, or to bring more evidence to the trial.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

In Ecuador, imposing liability for fraud onto a Corporate Entity is provided for in Article 49 of the COIP, which establishes that the acts of company officers generate responsibility for the company, if the acts are done for the benefit of the company. Therefore, it may be said that the knowledge of a director or officer that generates a crime is attributed to the company, if the company benefits from said knowledge.

It should also be pointed out that the COIP contemplates criminal liability for legal entities; therefore, a prosecutor may request that the legal entity be linked to the criminal process through its representative(s) in order to be criminally prosecuted. In this sense, it is fully feasible to impose criminal liability on a legal entity or company when a representative commits acts of corruption, as long as the prosecutor deems it necessary.

3.2 Claims against Ultimate Beneficial Owners

Under Ecuadorian jurisdiction, it is possible to bring claims against those who stand behind companies, such as ultimate beneficial owners, when the company has been used as a vehicle for fraud. Complaints can be filed against any person, regardless of whether or not this person held any position in a company or whether or not they were the ultimate beneficiary. However, it is the responsibility of the person filing the complaint to prove to the prosecutor how and in what manner the infraction was committed, since the burden of proof is on them, and to what extent the ultimate beneficial owner was involved in the crime.

3.3 Shareholders' Claims against Fraudulent Directors

The rules for criminal action against directors of companies that misuse the capital of that company are the same as for other white-collar crimes. As mentioned in **1.1 General Characteristics of Fraud Claims**, Ecuadorian legislation includes the trust abuse crime as the one where a person fraudulently takes advantage of money, assets, and goods that were entrusted. This is common with company directors who abuse their position of power to benefit fraudulently from the company's funds.

Article 187 of the COIP, which deals with trust abuse (*abuso de confianza*), establishes that the person who disposes, for themselves or a third party, of money, goods or patrimonial assets delivered under the condition of being returned or being used in a predetermined way, shall be punished with deprivation of liberty for a term of one to three years.

The same penalty is imposed on the person who, abusing the signature of another, on a blank document, extends with it any other document to the detriment of the signer or a third party.

The process for bringing claims against fraudulent directors will begin by means of a complaint before the District Attorney General's Office so that a prosecutor investigates the cause and subsequently requests the Judge of Criminal Guarantees to press charges and to begin the ordinary criminal process as in the majority of white-collar crimes.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

In Ecuador, international agreements and treaties prevail and take precedence over domestic law. In this sense, the FGE carries out international co-operation in certain crimes and investigations. Thus, the COIP establishes that the Attorney General's Office will request, with the governing authority of foreign policy, the execution of bilateral agreements for co-operation and international criminal assistance. Additionally, it may execute co-operation agreements with its peers in the jurisdictions involved, in order to make effective the return of assets, which agreements may be signed on an ad hoc basis as appropriate.

However, in the practice of criminal procedural law in Ecuador, international co-operation occurs with little regularity, and necessarily requires the intervention, direction and control of the highest authority of the FGE, in this case whoever holds the position of Prosecutor General of the Nation.

This type of international co-operation usually only occurs in criminal proceedings that have been important in the media because they deal with political corruption. It is difficult to have international co-operation for crimes such as fraud or breach of trust.

5. ENFORCEMENT

5.1 Methods of Enforcement

The execution of criminal judgments must comply with certain requirements defined and indicated in the law.

In the first place, the judgment must be duly executed, so that it cannot be appealed or chal-

lenged by any resource indicated in the law. Secondly, if there is an imprisonment judgment, it is the Judge of Criminal Guarantees who must issue a warrant and/or an arrest warrant, and therefore order the Judicial Police of Ecuador to register in its databases the referred arrest warrant. It will then be the responsibility of the Judicial Police, in conjunction with the National Police, to arrest the convicted person and deliver them to the social rehabilitation centre of their domicile to serve the sentence of imprisonment.

With respect to the integral reparation of the victim's rights, it will be understood that the judgment is not executed until the offender has not paid the fine or repaid the economic rights caused by the infraction.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

The right to remain silent and the privilege against self-incrimination is fully recognised in Ecuadorian law. This means that no defendant at any stage of the process is obliged to testify against themselves. They may always remain silent.

Under no circumstances can the court force the defendant to incriminate themselves, since this right is recognised in the Constitution of the Republic of Ecuador. It is important to emphasise that it is the prosecution that has the legal responsibility to prove and demonstrate in court the commission of a crime or criminal offence.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

Although it is fully recognised by the Constitution of Ecuador and the COIP that there is confidentiality between the defendant and their attorney, this can be interfered with by means of a court order at the request of the relevant prosecutor.

In this sense, once there is authorisation from the judge, an official notice will be issued to the Chief of Subsystems of Interception of Communications or Computer Data by the FGE to carry out the interception of communications or computer data, prior co-ordination with the requesting prosecutor is required in order to give priority to the investigation of crimes.

The District Attorney General's Office, as the entity that directs and organises the specialised integral system of investigation, forensic medicine and forensic sciences (specialised system), will manage and control the operations of the subsystem. The interception of the communication or computer data will be carried out by the assigned prosecutors within an ongoing investigation, complying with due process.

Under no circumstances may a telecommunications service provider hinder the interception work required for the administration of justice, in accordance with the provisions of Article 77 of the Organic Law of Telecommunications.

The prosecutor will co-ordinate – with the specialised system – the execution of the security protocols issued for this purpose. The information generated at the request of the prosecutor of the case will be recorded in a digital form identified with a security code, for custody and transfer purposes, following the provisions for chain of custody.

The prosecutor assigned to the Subsystems of Interception of Communications or Computer Data will be the executor of the court order and the only person competent to order the extraction, recording and delivery of the intercepted communications or computer data; therefore, no other official, nor police or civil servant belonging

to the specialised system, may record or extract any evidence or information without the authorisation of the prosecutor.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

Regardless of the penalty of imprisonment for those who commit a crime in Ecuador, the judge in a ruling will establish what represents "full reparation" of the damages caused. The victim may suggest to the judge of the case what the full reparation of the damages caused should be in the hearing and trial, specifically in the closing argument, after having demonstrated the damage caused with the evidence adduced in the oral trial.

Additionally, in Ecuador the Civil Code recognises that any unjustified prosecution, as long as it is proven to be such, grants the right to sue before a civil judge for damages caused by the unjustified prosecution. This civil suit is known as a "moral damages" suit.

The procedure to be followed is the same as any other civil lawsuit under the General Organic Code of Proceedings and mainly consists of the following stages:

- filing of the lawsuit before a civil judge;
- qualification of the claim;
- summons to the defendant by means of three ballots;
- trial hearing;
- judgment;
- appeal to the Provincial Court; and
- cassation before the National Court.

7.2 Laws to Protect "Banking Secrecy"

In Ecuador, banking secrecy is recognised through the different laws that deal with everything related to the national financial system, laws such as the Organic Monetary and Financial Code or even the Constitution of the Republic of Ecuador. Banking secrecy means that one cannot access other people's banking transactions or review their account statements, given the privacy of such information.

However, this can be circumvented by law as long as there is a court order by a judge ordering a financial institution or bank to disclose the account statements and bank transactions.

Thus, the attorney representing the victim of the crime must be the one to request the prosecutor of the case to add the bank transactions of the person under investigation as evidence in their client's favour or as an element of conviction for the prosecution. In addition, the prosecutor must request that the judge authorise proceeding with the respective court order.

However, there is a possibility that the defence will oppose this measure and that, ultimately, the judge in the case may not grant the request.

7.3 Crypto-assets

The COIP does not yet specifically regulate cryptocurrencies. This means that in cases of fraud related to cryptocurrency, it will be a common prosecutor who handles cases of fraud who will have to demonstrate and prove how the fraud occurred and justify that it was perpetrated within the Ecuadorian jurisdiction.

Cryptocurrency is treated as property, much like any other form, in Ecuador. Unfortunately, as not much legislation on cryptocurrency, or crypto-assets more broadly, has been developed, the COIP does not regulate it and therefor a freezing

injunction or equivalent relief cannot be obtained in relation to these types of assets.

The main challenge in cryptocurrency-related frauds will be to prove to a common prosecutor that the fraud was committed within the Ecuadorian jurisdiction, since being purely virtual property; the defence will probably argue that the crime has not been committed within the Ecuadorian jurisdiction.

Flor Bustamante Pizarro & Hurtado (FBPH) was launched in 2021 with offices in Quito, Ecuador, and has made an immediate impact on the Ecuadorian legal market as a new firm formed by well-reputed professionals with significant experience in local and cross-border transactions. In the short term, FBPH expects to be a major player in the Ecuadorian legal market. The firm is currently formed by 27 lawyers – ten partners and 17 associates – with vast experience in their professional fields. FBPH is focused on the main business areas of Ecuador´s economy, such as energy and natural resources, public and administrative law, M&A, development of public infrastructure projects (ie, transportation, ports and airports, energy, oil and gas, etc), banking and finance (with an emphasis on project finance), tax, corporate and commercial matters, antitrust, local and international arbitration and labour. Highly rated professionals lead each of the mentioned areas at the firm. FBPH is committed to assisting clients in their compliance with Ecuadorian law throughout their operations in the country.

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ENGLAND AND WALES

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

The law of England and Wales does not provide a specific, single cause of action of civil or commercial fraud, it has developed a flexible and creative approach to assisting victims of fraudulent behaviour. The typical claims utilised by a victim of fraud are fraudulent misrepresentation (under the tort of deceit) and breach of trust or fiduciary duty (which are claims in equity).

Fraudulent Misrepresentation (Deceit)

Fraudulent misrepresentation (or deceit) is a cause of action available where Party A makes a false representation to Party B either by words or conduct, knowing it to be untrue (or being reckless as to whether or not it is true) and intending Party B to rely on that representation. If Party B does so, and suffers a loss as a consequence, then Party A will be liable to Party B in tort.

Importantly, there is also a statutory action for misrepresentation under the Misrepresentation Act 1967. A claim under the Act is often preferable to bringing an action in fraud because:

- it reverses the burden of proof by requiring Party A to show they had an honest belief in the truth of the representation at the time it was made;
- it does not require Party B to prove fraudulent conduct (which is a high hurdle in English law); and
- it still allows for a measure of damages commensurate with a claim in fraud (ie, Party B is allowed to recover all losses flowing from the affected transaction, as opposed to, eg, a claim in negligent misstatement, where Party B is only allowed to recover losses that are the direct consequence of the misstatement).

Breach of Trust/Breach of Fiduciary Duty

A "trustee" or "fiduciary" relationship often plays an important part in fraud claims. It exists where one person (the "fiduciary") has undertaken to act for or on behalf of another person (the "principal") in circumstances that give rise to a special relationship of trust and confidence. Common examples may be the relationship between a trustee and beneficiary in an express trust, a solicitor and their client, a company director (including shadow director) and the company, a financial adviser and the investors they are advising, an agent and their principal, or a business partner and their co-partner(s).

Where such a relationship exists, the fiduciary must act with outright loyalty towards their principal. In broad terms, this means that they must act in good faith, must not make a profit out of the relationship of trust, and must not put themselves in a position where their duty may conflict with their own interests.

Unsurprisingly, fraudulent behaviour (such as misappropriation of assets) in the context of one of these relationships will amount to a breach of trust/breach of fiduciary duty.

There are a number of remedies available for a claim of breach of trust or breach of fiduciary duty. Most commonly, the fiduciary will be required to compensate the principal for losses suffered, or to "account" for any losses and (potentially) profits made as a result of the breach. The principal may also be able to "follow" or "trace" specific trust property or proceeds and assert an equitable interest over them (see **1.5 Proprietary Claims against Property**).

Other Causes of Action

Third-party involvement

English law also provides separate causes of action against third parties who assist or facilitate fraudulent acts (eg, unlawful means con-

spiracy and dishonest assistance). These are discussed in detail in **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts**.

Specific insolvency claims – "wrongful trading" and "transaction at undervalue"

Additionally, there are specific claims that arise in an insolvency setting. In particular, English insolvency law provides a specific claim available to liquidators of "wrongful trading", which will occur where a company's director(s) continues to trade in circumstances where they know (or ought to have known) that there is no reasonable prospect of the company avoiding insolvency proceedings. A director who knowingly fails to exercise due care may become personally liable to the company/its creditors for the losses they cause.

Steps may also be taken where a company enters into a "transaction at undervalue" whereby assets are gifted or sold to third parties at a price that is significantly below their actual value. If the company subsequently becomes insolvent, a court may order the reversal of any such transactions that took place in the two years prior to the insolvency.

1.2 Causes of Action after Receipt of a Bribe

Civil Claim

A civil law claim may be brought by a person who discovers that their agent or employee has been bribed or has received a secret commission. In bringing such a claim, the claimant must show:

- a payment was made to the agent/employee of the briber's counterparty;
- the briber knew that the recipient was the agent/employee of the counterparty; and
- the payment was not properly disclosed to the counterparty.

Where that occurs, English law makes an irrebuttable presumption that the party making the payment did so to cause the agent/employee to prioritise their interests over those of the counterparty, and that the agent/employee was actually influenced by the bribe. It should be noted that the agent/employee cannot avoid liability by arguing that the payment is governed by (and has no adverse consequences under) foreign law. This is because the English courts will not apply a foreign law where doing so conflicts with the principles of domestic public policy.

In bribery cases, the English court has historically been readily willing to find that a fiduciary relationship existed by giving the usual rules a wide and loose interpretation – or indeed by disregarding the usual rules that would otherwise suggest that no such relationship existed.

Damages and/or Equitable Remedies

If a claim of bribery is successful, the claimant can seek damages and/or equitable remedies (such as requiring the defendant(s) to account for, or return, any profits made). The amount recovered will generally be at least the value of the bribe (even if there is no other identifiable loss), which can be, for example, on the basis that English law deems that the agent/employee holds the bribe on a "constructive trust" for the benefit of their principal/employer. This is significant as it provides the principal/employer with a proprietary interest (see **1.5 Proprietary Claims against Property**) over those funds (and therefore the asset is not available to creditors of the agent) and carries no requirement to prove that the actions of the agent/employee caused damage to the principal/employer.

Dishonest Assistance

The wronged party may also claim for dishonest assistance (see **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts**) against the person who paid the bribe (assum-

ing the party receiving the bribe is a fiduciary) or for procuring a breach of contract (on the basis that an agent/employee will typically breach the terms of any contract if they receive a bribe). In doing so, the wronged party may be able to rescind all transactions between them and the party paying the bribe (or the company they are associated with).

Injury by Unlawful Means

In some circumstances, it may be possible for a wronged party to bring a claim for conspiracy to injure by unlawful means (see **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts**) against a third-party competitor that it suspects of bribery (ie, in circumstances where Party A suspects that its competitor, Party B, has paid bribes to a potential customer, Party C, such that Party C agrees to do business with Party B and not with Party A). Such claims are difficult to substantiate, as it is insufficient to show that the bribe was merely likely to injure Party A – rather it must be shown that Party B had an intention to injure Party A.

Separate Criminal Offences

Note there are also separate criminal offences for bribery, which arise under the Bribery Act 2010.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

In some circumstances, English law allows a wronged party to claim against third parties who do not owe any pre-existing duties. These claims will be particularly important where the primary wrongdoer (ie, the one who owes specific, pre-existing duties to the victim) is out of the jurisdiction or does not have assets with which to satisfy a claim. Three causes of action are most relevant in such circumstances.

The Three Most Relevant Causes of Action

Dishonest assistance

A claim in dishonest assistance will exist where:

- a breach of trust and/or fiduciary duty has occurred, causing loss (see **1.1 General Characteristics of Fraud Claims**);
- the third-party defendant assisted in that breach of trust or breach of fiduciary duty; and
- the third-party defendant acted dishonestly in doing so.

In these circumstances, the third party will be deemed to have acted dishonestly where they have not acted in the way an honest person would have done in the circumstances. This is largely an objective question, which asks whether the third party's actions fell below the standard expected of ordinary honest people, regardless of whether or not they knew it fell below that standard. Importantly, it is not necessary for the wronged party to show that the trustee/fiduciary was also dishonest in breaching their duty.

Where a claim of dishonest assistance is successful, the third party is liable to the wronged party as though they were a trustee or a fiduciary. This means they can be ordered to account for any profits, as well as be required to pay damages.

Knowing receipt

Unlike dishonest assistance, a claim for knowing receipt focuses on a third party who actually receives misappropriated property or proceeds, knowing that they were provided in breach of trust or breach of a fiduciary duty. The third party's state of mind must make it unconscionable for them to retain the benefit of the property or proceeds (even if they have not acted dishonestly).

As with dishonest assistance, the third party is liable to the wronged party as though they were a trustee or a fiduciary, which in a case of knowing receipt may also include accounting for the value of misappropriated property.

Conspiracy

A wronged party may also have a claim in the tort of conspiracy where a number of parties conspired to injure them. This is a helpful tool to a potential claimant as it allows potential defendants to be grouped together (where it can be proved that they took concerted action), even where they may not have a direct cause of action against all of them.

There are two forms of conspiracy. First, "lawful means conspiracy", whereby the claimant must show that notwithstanding the fact that lawful means were used, the defendants' predominant intention was to injure them. This form of conspiracy is rarely seen in practice. The second, more common, form is "unlawful means conspiracy". The fact that the defendants may have utilised unlawful means lowers the evidential burden for the claimant. In particular, they need only show that the defendants intended to injure them, even if that was not the predominant intention. For this second form of conspiracy, "unlawful means" exist where the wronged party has an actionable claim against one or more of the defendants, or where criminal conduct is involved. To claim damages, the claimant is required to show that it has suffered loss as a result of the unlawful act.

Misappropriation

In addition, as noted below, in certain circumstances it may be possible to argue that an asset in the hands of a third party is held on constructive trust for the victim of fraud (eg, where an asset has been misappropriated in breach of fiduciary duty).

Breach of Duty of Care by a Bank

Where fraudulent transactions have been administered by a bank, it may be possible to recover resultant losses from the bank for a breach of the "Quincecare" duty (so called because of the case from which it derives). It is an implied term of the contract between bank and customer that the bank will exercise reasonable care and skill when executing the customer's instructions. The bank may breach its duty where it executes the customer's instructions knowing (or shutting its eyes to the fact) that they were made dishonestly, acts recklessly in failing to make reasonable enquiries, or where there were reasonable grounds to believe the instructions were an attempt to misappropriate funds. It is possible for banks to expressly exclude the duty in their contractual terms, but recent cases suggest victims of fraud may increasingly rely on the cause of action where there are low hopes of recovery from the principal actors (for example, because they are insolvent, or have disappeared).

1.4 Limitation Periods

The limitation period for the wronged party in a fraud claim is typically six years, starting from when they either discovered the fraud or when they could have done so using reasonable diligence.

Importantly, in the context of fraud (whether in relation to trust property or otherwise), where the defendant has deliberately concealed any fact that is relevant to the victim's ability to bring a claim, the limitation period will not begin to run until that concealment has been discovered, or could reasonably have been discovered.

An exception to the general six-year rule also exists in relation to trust property. Specifically, there is no set limitation period in respect of (i) any fraudulent breach of trust, or (ii) any action to recover trust property that the trustee has taken for themselves. This allowance relates only to

trustees who have assumed responsibility for trust property (and therefore does not apply to trusts that arise solely at the discretion of the courts). Furthermore, dependent on the remedy that is being sought, the court may still have discretion to say that there has been unreasonable delay and that it would be unfair to the trustee to allow the claim to proceed.

1.5 Proprietary Claims against Property

Where property has been fraudulently obtained and transferred to a third party, the victim may have a proprietary claim in respect of that property (or its proceeds), unless it has been obtained by a third party in good faith, for value, and without notice of the relevant fraudulent activity.

A proprietary claim will be particularly significant where the third party or the wrongdoer is insolvent as it enables the wronged party to rank ahead of general creditors.

A proprietary interest also becomes particularly relevant (and particularly helpful to a victim of fraud) where a fiduciary or trustee has made a financial gain through a wrongful act, as this will enable the victim to obtain that gain for themselves. By way of example, where a financial adviser invests in an opportunity alongside their client, but fails (in breach of their fiduciary duty) to disclose a conflict of interest, the client may be able to claim the financial adviser's share of the profits from the investment (in addition to retaining their own profit). In this regard, a proprietary interest can dramatically increase the value of any claim.

"Following" and "Tracing" Transferred Property

The proprietary remedies available are assisted by the evidential rules of "following" and "tracing" transferred property. These are processes by which a claimant can identify the relevant property or proceeds that will form the focus of the claim. In broad terms, the claimant generally has a choice to either "follow" the relevant property and recover it from the third party (assuming they are not a good faith purchaser, for value, without prior notice), or they can instead "trace" and recover any proceeds or new assets the fraudster obtained from the third party.

In the event that the proceeds of fraudulent activity become mixed with other funds, there are rules for identifying what the wronged party is entitled to (either in terms of a share of the fund or any asset purchased with it).

1.6 Rules of Pre-action Conduct

Claims in England and Wales are governed by certain "pre-action protocols" that set out the steps that the courts will expect parties to take prior to commencing proceedings. These steps include setting out the claim in full, providing the other side with an opportunity to respond, considering whether the dispute is suitable for alternative forms of dispute resolution such as mediation, and so on. While there is no specific protocol for instances of fraud, an allegation of fraud is serious and has far-reaching consequences even if it is not proved. Given this, any allegation of fraud must be clearly and accurately pleaded (as discussed in **2.7 Rules for Pleading Fraud**).

Note that the pre-action protocols do not apply in respect of "without notice" applications, although there are other steps that must be taken in such circumstances (see **2.4 Procedural Orders**).

1.7 Prevention of Defendants Dissipating or Secreting Assets

A wronged party may seek an interim "freezing injunction" that prevents a defendant from disposing of, or otherwise dealing with, their assets. This is intended to prevent the defendant from hiding, moving or dissipating their assets in a

way that makes them "judgment-proof". Such orders typically also require the defendant to promptly disclose a list of their assets (which they are subsequently required to verify by way of affidavit). Failure to comply with the order may result in the defendant being in contempt of court, which can result in the defendant being fined or (in serious cases) imprisoned. Failure to comply is also likely to affect the defendant's credibility and may have other consequences for their substantive defence of the claim.

Freezing orders are "in personam" orders, meaning they operate over individuals, rather than over specific assets. This is significant as it means they do not only limit dealings with assets that are located within England and Wales (a "domestic freezing order"), but also dealings with assets that are located overseas (a "worldwide freezing order" – discussed in greater detail below). Furthermore, a freezing order can extend over various types of assets (normally bank accounts, shares, physical property, but also things like goodwill) provided that the defendant has a legal or beneficial interest in them. Exceptions to the freezing order (eg, reasonable living costs, legal fees, ordinary business transactions, etc) are typically defined.

In certain cases, it may be possible to obtain a proprietary injunction where a party claims a proprietary interest in a specific asset. There will generally be very limited exceptions to such an order.

An application for a freezing order is made as a standard application to the court but is a complex application, usually done without notice to the respondent, which requires an applicant to discharge its duty of full and frank disclosure (see **2.4 Procedural Orders**). The court fees associated with this are reasonably modest (at the time of writing (May 2022), the fee for a without-notice application was GBP108). However, in making such an application the claimant will typically need to provide (i) an undertaking to commence a claim shortly after the injunction hearing is determined, and (ii) a "cross-undertaking in damages", meaning they must compensate the defendant for any loss suffered if it is later shown that the injunction should not have been granted. It is sometimes necessary to secure that undertaking through a bank guarantee or payment into court.

Remedies Assisting with International Claims

In relation to preventing the dissipation of overseas assets, the English courts have developed two remedies that assist with international claims.

Worldwide freezing injunctions

The English courts have shown a willingness to be dynamic in respect of freezing injunctions with an international aspect. Examples of this include orders being granted in circumstances where the defendant has no significant presence in England and Wales, and orders preventing a defendant from dealing with their overseas assets unless they transferred a specified value of assets to England and left them there for the duration of the order.

The requirements associated with a worldwide freezing order are similar to those associated with a general, domestic freezing order. The notable exceptions, however, are that the claimant must show that (i) any assets the defendant has in England and Wales are insufficient to satisfy the claim, and (ii) there are suitable assets in other jurisdictions. The relevant court will also give consideration to issues such as the interests of other parties or creditors, either in England or overseas.

When making an order, the defendant is entitled to additional protections, given the risk that they may face proceedings in each jurisdiction where

their assets are located. Accordingly, orders typically contain a provision that they will not be enforced outside England and Wales without the permission of the English court. Even if permission is granted by the English court, the process of actually enforcing a worldwide order abroad can be problematic depending on the location of the parties, the relevant international agreements and so on.

Interim relief in support of foreign proceedings

The English court may grant interim relief (including freezing injunctions) to support proceedings that have been brought in a different jurisdiction.

In the case of a freezing injunction, the claimant must show that it is expedient for the order to be granted. This will depend on matters such as the domicile of the defendant, whether granting the order will interfere with the case-management powers of the foreign court, and/or whether the order will create the possibility of conflicting/overlapping restrictions in different jurisdictions.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

A freezing injunction (discussed in detail in **1.7 Prevention of Defendants Dissipating or Secreting Assets**) will typically require the defendant to swear an affidavit giving details of assets they have a legal or beneficial interest in. This includes details as to the value and location of any such assets (including overseas locations in the case of a worldwide order). Such disclosure may also be ordered by the court prior to any application for a freezing order (although this is uncommon given that one of the main purposes for seeking disclosure is to guard against the dissipation of assets, and that purpose would be undermined if a freezing order has not been put in place).

The defendant may be required to submit to cross-examination if there are any concerns regarding the disclosure they have given. Failure to comply with the requirement to give disclosure, or providing inadequate/false information, may lead to a finding of contempt of court (and therefore a fine or, in serious cases, imprisonment).

In an effort to ensure compliance with the disclosure requirements (as well as a freezing and/or search and seizure order), in appropriate cases it is possible to obtain an order requiring the defendant to hand over their passport to the claimant's solicitor. Such an order ensures that the defendant cannot leave the jurisdiction until the court orders otherwise.

2.2 Preserving Evidence

Search and Seizure Order

A claimant may obtain a search and seizure order giving the claimant (or their solicitors/agents) access to relevant premises and allowing them to take possession of specified evidence such as documents, computers, electronic data, etc. The purpose of such an order is to preserve (rather than obtain) evidence in circumstances where there is a real risk that it might otherwise be destroyed. These orders are only available in very limited circumstances. Where they are granted, an independent supervising solicitor will oversee the process to ensure it is conducted in a manner that is consistent with the terms of the order.

Terms and conditions

In applying for a search and seizure order, it is necessary to specify which premises will be searched. Those premises must normally be in the United Kingdom and under the defendant's control. No material may be removed from the

premises unless it is specifically identified in the order (and accordingly, orders cannot include any "catch-all" wording), nor can legally privileged material be obtained. The claimant will typically need to provide a "cross-undertaking in damages", which means they must compensate the defendant for any loss unduly suffered as a consequence of the search and seizure order. They must also undertake to commence a claim shortly after any such order is made.

Note that a search and seizure order does not allow a claimant to force their way into the defendant's premises. Rather, if the defendant refuses entry, the claimant's remedy is through contempt of court proceedings.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

There are three main ways in which a wronged party may seek to obtain information from third parties.

Third-Party Disclosure Pursuant to the Civil Procedure Rules (the "CPRs")

Rule 31.17 of the CPRs allows for disclosure from a non-party when the disclosure sought is (i) likely to support the claimant's case, or adversely affect the case of the other party(ies), and (ii) necessary to deal with the claim fairly and/or save costs. In considering whether to grant such an order, the court will consider the burden imposed on the third party by having to provide disclosure.

Importantly, Rule 31.17 only applies where proceedings have been commenced. It is possible to obtain disclosure before proceedings have begun under Rule 31.16, but such an order can only be sought against someone who is likely to become a party to any subsequent proceedings (which will be difficult where the third party has not committed any wrong).

Norwich Pharmacal Orders

Where the CPR disclosure route does not assist, a Norwich Pharmacal order (so-called because of the case from which it derives) enables a wronged party to obtain disclosure from a third party who is involved in wrongdoing (innocently or not), but who is unlikely to be a party to any subsequent proceedings.

Norwich Pharmacal orders are flexible and have been developed to respond to a range of circumstances. In fraud cases, they are commonly sought against banks, and are used to identify the proper defendant to a claim, to trace assets, to assist in pleading a case, and/or to enforce a judgment. They are often sought "without notice" and are accompanied by a "gagging order" preventing the third party from informing anyone, including its customer(s), that the order has been obtained.

Bankers Trust Orders

Bankers Trust orders (again, so-called because of the case from which they derive) are typically made against banks or other institutions that hold misappropriated funds or through which misappropriated funds have passed. They require the bank or institution to disclose information relating to customer accounts and can accordingly be very useful in tracing funds. They operate in a similar manner to Norwich Pharmacal orders, but are generally easier to obtain.

Restricted Use

Where an order allows for material to be obtained from a third party, that material can normally only be used in respect of the specific proceedings in which the order was made – it cannot be used for other collateral purposes without the permission of the court.

2.4 Procedural Orders

Procedural orders in fraud cases are often sought "without notice" to the defendant in

order to avoid "tipping them off". If the order is granted, the defendant is then subsequently given an opportunity (through the "return date") to vary or discharge the order.

In an effort to ensure the defendant is not unduly disadvantaged by not being present when the order is first sought, the claimant must give "full and frank" disclosure of all relevant facts, including any points that are disputed or which might have otherwise been advanced by the defendant. The English courts are becoming increasingly vigilant in ensuring that the duty of full and frank disclosure is properly complied with by claimants. This issue is taken seriously and is often a point on which the defendant may subsequently challenge what has taken place. Such challenges may have serious repercussions in that they may not only damage the claimant's credibility, but may also result in the order being discharged at the return date (or earlier) and an adverse costs order being made against the claimant. Furthermore, in seeking an order without notice, the claimant will typically need to provide a "cross-undertaking in damages" which means they must compensate the defendant for any loss suffered if it is later shown that the injunction should not have been granted.

2.5 Criminal Redress

Criminal proceedings for complex and high-value instances of fraud in the United Kingdom are typically investigated and prosecuted by the Government's Serious Fraud Office. While uncommon, it is possible for a private party or individual to bring their own criminal prosecution against the wrongdoer.

In some instances a criminal conviction for fraud will result in an order requiring the wrongdoer to repay the victim, although this is not always the case.

Fraud victims seeking redress will usually pursue a civil claim against the wrongdoer on the basis that:

- civil proceedings are controlled by the victim (rather than a prosecutor);
- civil proceedings have a lower standard of proof (in that the claim must be proven on the balance of probabilities rather than beyond a reasonable doubt); and
- civil proceedings (generally) take less time than a criminal investigation and any subsequent trial.

There is nothing to prevent a civil claim following criminal proceedings, or vice versa. Similarly, civil and criminal proceedings may take place simultaneously, provided there is no risk of serious prejudice to the defendant(s). Having noted this, it is uncommon for proceedings to take place simultaneously.

2.6 Judgment without Trial

As with other civil proceedings, it may be possible for a claimant in a fraud claim to obtain "default judgment" where the defendant does not take steps in the proceedings. Similarly (although only in extreme cases), a defendant who fails to comply with orders and instructions issued by the court may be "de-barred" from taking steps to defend the claim.

It should be noted that the enforcement of any judgment is a separate process (see **5.1 Methods of Enforcement**) and will be particularly difficult where a dispute has an international element and/or where the defendant is refusing to engage. It is difficult (although not impossible) to obtain "summary judgment" (whereby a judgment is obtained without a full trial) in fraud claims because it will generally be necessary for the defendant to be cross-examined and to have the opportunity to respond to the allegations that are being made.

2.7 Rules for Pleading Fraud

There are special rules (set out in Rule 16 of the CPRs and the associated Practice Directions) that apply to pleadings of fraud and/or dishonesty. In particular, allegations must be clear and should set out the specific facts that the claimant intends to rely on in showing that the other party acted fraudulently or dishonestly.

Furthermore, barristers and solicitors in England are subject to specific professional rules in relation to fraud allegations. In general terms, these rules provide that a barrister or solicitor must not make an allegation of fraud unless they have clear instructions and reasonably credible supporting material. In this respect, care should be taken not to overstate the position against a defendant. Pleadings may be amended following disclosure should fraudulent or dishonest activity come to light through that process.

2.8 Claims against "Unknown" Fraudsters

The English courts have the ability to make judgments and orders against "persons unknown" where a claimant cannot identify a specific individual who has caused them harm. Where a freezing order (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**) is made against persons unknown, it is likely to apply to any person who assisted or participated in the fraud, as well as any person who received misappropriated funds. A freezing order will often be paired with orders against third parties like banks (see **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**) in an effort to identify people involved in the fraud.

The ability to take steps against persons unknown has become particularly significant in recent years given the rise of cyberfraud. Such orders show the English courts' willingness to take a flexible and innovative approach when assisting victims of fraud.

2.9 Compelling Witnesses to Give Evidence

The CPRs allow a court to issue a summons requiring a witness located within the jurisdiction to attend court to give evidence or to produce documents. This power is in addition to the orders requiring third parties to provide specific information and material (see **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**), which are more likely to be utilised in a fraud claim.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

As a general rule, English law holds that a company acts through its board of directors and senior officers, and that the actions and states of mind of those individuals will be attributed to the company. Similarly, companies will normally be vicariously liable for the actions (including fraudulent actions) of employees and agents where they are acting within the scope of their employment or authority.

3.2 Claims against Ultimate Beneficial Owners

Under English law it is difficult to "pierce the corporate veil" so that a beneficial owner of a company will become liable for the actions of the company. Such claims will normally only exist where the beneficial owner is effectively a "shadow director" of the company in that they exercise control and influence over its business decisions, and the actual directors act in accordance with their instructions. Where this occurs, the beneficial owner will have the same duties as an actual director (see **3.3 Shareholders' Claims against Fraudulent Directors**).

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Seladore Legal Limited

The more common approach to bringing a claim against the beneficial owner of a fraudulent company is to bring a claim of conspiracy (as discussed in **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts**).

3.3 Shareholders' Claims against Fraudulent Directors

Individual directors must act, with good faith, within the powers set out in the company's constitution. They must also exercise reasonable care, skill, diligence and independence, and seek to promote the success of the company. Undertaking fraudulent or dishonest activity in a way that harms the company will clearly breach these duties.

The Company as Plaintiff

Importantly, these duties are owed to the company itself, rather than to individual shareholders. This means that, under English law, where a wrong is committed against a company, the proper plaintiff in any subsequent claim is the company itself (rather than the shareholders of the company). Accordingly, under normal circumstances, any enforcement action against an individual director will generally be taken by the board or (in an insolvency situation) a liquidator. Importantly, the principle of "no reflective loss" means that a shareholder cannot bring a claim in respect of a loss suffered by the company where the company itself has a cause of action in respect of the same wrongdoing.

Derivative Actions

In some circumstances, it is possible for an individual shareholder (or a group of shareholders) to bring a "derivative action" on behalf of the company. The central question for any court considering whether or not to allow a derivative action is whether a wrong committed against the company would not be adequately redressed if the action were not allowed to proceed.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

For many years, England has been a prominent and leading venue for international disputes, and English law has developed to reflect this. It continues to be a popular environment in which to resolve international fraud claims. As a corollary to this, the English courts have developed a number of rules to join overseas parties to English proceedings, and/or to initiate proceedings in England against such parties.

Where a party is located outside the jurisdiction, it will be necessary for the claimant to obtain the court's permission to serve out of the jurisdiction. To do so, they will need to show (broadly) that:

- there is a serious issue to be tried;
- one or more of the "jurisdictional gateways" is satisfied; and
- England is the proper and appropriate forum for the claim.

These gateways provide the English courts with jurisdiction over foreign defendants where the subject matter of the dispute is sufficiently connected to England or Wales. The most common gateways for fraud claims are that the claim relates partly or wholly to property within the jurisdiction, the claim involves a contract governed by English law or a jurisdiction clause in favour of England, the harmful act or the harm suffered occurred in England or Wales, and/or that an international co-defendant is a "necessary and proper party" to proceedings in England against other defendants over whom there is jurisdiction (eg, due to a jurisdiction clause or due to their domicile).

It is open to a foreign party who has been joined to challenge jurisdiction, including on the grounds of forum non conveniens (ie, that England is not the appropriate venue for a particular claim, and a more convenient forum exists elsewhere).

5. ENFORCEMENT

5.1 Methods of Enforcement

In England and Wales, the court will not automatically enforce any judgment or order that is obtained against a defendant. In circumstances where the defendant fails to make payment by the timeframe set by the court, the claimant will be required to take steps to enforce the judgment (including by seeking a further order from the court).

Common Forms of Enforcement in Fraud Proceedings

A freezing order

It is possible to obtain a post-judgment freezing order. This is more straightforward than obtaining a freezing order before a claim is commenced and it can be a useful tool in securing assets pending other enforcement mechanisms being used.

A charging order

A charging order imposes a charge over the defendant's interests (including beneficial interests) in specific land, securities or other assets. In doing so, it prevents the defendant from selling the land or assets without paying what is owed to the claimant (assuming there are no other prior creditors). A charging order is sometimes combined with an "order for sale", which requires the defendant to sell the property or asset in order to satisfy the judgment.

A third-party debt order

A third-party debt order freezes assets that are owned by the defendant, but which are in the hands of a third party, such as a bank. In doing so, it restricts the defendant's ability to access those assets and may lead to the third party being required to make payment to the claimant.

Insolvency proceedings

If the result of the judgment is that the defendant no longer has sufficient assets to pay their debts, it may be possible to apply for them to be wound-up (in the case of a company) or made bankrupt (in the case of an individual). In such circumstances, the defendant's assets will vest in a trustee in bankruptcy or a liquidator, who will then seek to realise the value of those assets and pay the defendant's creditors accordingly.

Care should be taken before initiating insolvency proceedings, as the amount received by the claimant will depend on (i) the value of any assets owned by the defendant, and (ii) the interests of any other creditors (particularly preferred creditors such as employees, or those who hold a security interest in particular assets).

Examination of the debtor

Where the judgment debtor is within the jurisdiction of the English courts it is possible to obtain an order for their examination. This requires the judgment debtor to attend court and be cross-examined about their assets and affairs. If the judgment debtor does not attend, or does not answer truthfully, then they may be subject to proceedings for contempt of court.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

English law provides that a party may refuse to produce material or information that would oth-

erwise be disclosable, if doing so will incriminate them in criminal proceedings or expose them to a penalty in England and Wales. This right will also be relevant in cases involving a search and seizure order (as discussed in **2.2 Preserving Evidence**) in that the defendant must be informed of their privilege against self-incrimination before the premises are entered.

In the context of fraud, there are noteworthy limits on the right to privilege against self-incrimination. First, Section 13 of the Fraud Act 2006 disapplies the privilege in relation to criminal fraud and the related offences (including bribery) under that Act. Secondly, the English courts have taken a limited reading of the privilege in respect of pre-existing evidence obtained through a search order that does not require the defendant to testify to its existence. In such cases, it has been held that the evidence obtained may be regarded as being able to "speak for itself" and so does not create the risk that the defendant will be coaxed into making a false statement.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

A party to English legal proceedings can withhold "privileged" documents. In broad terms (and specific advice should be sought in respect of each of these), the two main forms of privilege arise in relation to communications between a lawyer and their client for the purpose of giving or receiving legal advice ("legal advice privilege"), and communications between a lawyer, their client and/or a third party for the dominant purpose of conducting legal proceedings, including criminal proceedings ("litigation privilege").

Importantly, privilege will not exist where communications are made for the purpose of allowing or assisting a party to commit a crime or fraud. This has been described as the "crime-fraud" or "iniquity" exception and requires a strong prima facie case of fraud (rather than actual proof of fraud). The exception applies to both legal advice privilege and litigation privilege. It exists whether or not the lawyer involved in the communications knows of the wrongful purpose.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

Remedies in English law are typically focused on either compensating the wronged party or disgorging any gains that have been obtained by another party in unjust circumstances. As a consequence, the courts are slow to award damages that are purely punitive/exemplary.

However, it is now well established in English law that punitive damages are available where a wrong has been committed wilfully and/or dishonestly (such as in instances of fraud). This allows a victim of such wrongdoing to claim more than they have lost.

It is important to note that the approach to punitive damages continues to be "proportionate and principled". Accordingly, they will only be awarded in cases where the wrongdoing is particularly egregious, and even then, they are likely to be reasonably modest in value.

7.2 Laws to Protect "Banking Secrecy"

There is no specific banking secrecy regime in the United Kingdom. While English law provides that banks owe a general duty of confidentiality to their customers, there are a growing number of exceptions to this duty based on efforts to prevent money laundering, the funding of terrorism, tax evasion and so on.

In any event, in instances of fraud, English law provides avenues by which a wronged party may seek to obtain information from third-party banks (see the discussion of third-party disclosure and Norwich Pharmacal orders set out in **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**). Where sufficient evidence of fraudulent activity exists, these avenues are unlikely to be impeded by general considerations such as a bank's duty of confidence to its customers.

7.3 Crypto-assets

To date, the courts of England and Wales have consistently held that crypto-assets can be treated as property. The location of the asset (relevant to determining whether a court has jurisdiction over the dispute) is where the person or company who owned the coin or token is domiciled.

Case law on the status of crypto-assets has so far been confined to preliminary findings for the purposes of determining applications for interim relief. In such applications, a judge need only determine whether there is a realistically arguable claim that the crypto-assets in question are a form of property for the purposes of English law. While the approach courts have adopted is likely to be endorsed, the issue is widely expected to be revisited in detail in the near future.

Aside from court intervention in instances of fraud, dealings in crypto-assets remain largely unregulated in the UK. As of January 2020, UK crypto-asset businesses were required to register with the UK Financial Conduct Authority (FCA) and comply with the Money Laundering Regulations but investors are otherwise not protected by financial services regulation.

Accordingly, English courts have demonstrated willingness to be responsive in cases of crypto-asset fraud, which is steadily on the rise (albeit not in line with the massive increase in crypto-asset usage), recognising that "time is of the essence" when facing potentially rapid dissipation of the proceeds of fraud. The particular issue in cases of crypto-asset fraud is that it is difficult to establish the identity and location of the wrongdoers. In such cases, the English courts are able to grant:

- a Bankers Trust order against a cryptocurrency exchange (including one located outside of England and Wales) to obtain information about the relevant transactions with a view to identifying the hackers (see **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**); or
- a proprietary injunction against "persons unknown", provided the relief was limited to assets which the individuals knew or ought reasonably to have known did not belong to them (see **2.8 Claims against "Unknown" Fraudsters**).

If the individuals can be identified, it is also possible to obtain freezing relief as against those individuals' dealings with the proceeds (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**).

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Trends and Developments

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Introduction

As this article is being written, the world, which seemed to be emerging from the COVID-19 pandemic, is once again in turmoil as a result of the Russian invasion of Ukraine. It goes without saying that that is a human tragedy. It is, however, also likely that that these events will cause very significant disruption to the landscape across which fraud and asset tracing practitioners operate. It has already led to new legislation, and it will also, undoubtedly, lead to a repositioning of assets and changes in the structures used to hold them.

In the England & Wales Trends & Developments chapter of the 2021 edition of this publication, it was suggested that the unusual trend of a drop in fraud cases during a time of economic downturn in 2020 was most likely a result of the impact of COVID-19 on businesses generally, and that a sharp up-tick in the volume of fraud cases heard in UK courts would soon be seen as businesses returned to normal activity. While "normality" was not in fact restored and another major lockdown was imposed at the beginning of 2021, businesses and – according to KPMG's Fraud Barometer report – the UK courts have shown the ability to adapt to remote operations, and 2021 saw a 66% increase in fraud cases valued at GBP100,000 and above compared with 2020.

Interestingly, however, the opposite trend was noted in terms of the value of fraud claims, the total falling 39% to GBP444.7 million in 2021, with no new high value (over GBP50 million) cases. Despite the absence of very large claims, all the signs point to a steady rise in fraud activity that is likely to continue into 2022 as the motivation and opportunity presented by unstable economic conditions persists. In London's courts, for example, there was a 71% increase in allegations of fraud committed by employees and individuals in management roles compared with 2020, with commercial businesses, government institutions and financial institutions increasingly falling victim.

Economic Crime

The Economic Crime (Transparency and Enforcement) Act was introduced to Parliament as a bill on 1 March and received Royal Assent on 15 March 2022. It marked an expedited effort – as a result of Russia's invasion of Ukraine – to pass a law that has seen slow development since the UK government announced its intention to create a register of overseas entities and beneficial owners owning property in the UK in 2016. The Act, the aim of which the government says is "to crack down on dirty money in the UK and corrupt elites" covers three broad areas:

- the creation of a public register of beneficial owners of non-UK entities that buy or own land in the UK;
- widening the potential use of the Unexplained Wealth Orders (UWO) regime (for example to officers of legal entities holding assets, and to UK property held in trusts) and making them easier to use for law enforcement authorities; and
- the broadening of sanctions enforcement, allowing for the imposition of fines on a strict liability basis by the Treasury's Office of Financial Sanctions Implementation (OFSI)

and for public "naming and shaming" of firms or individuals in breach.

The most significant element relevant to fraud and asset tracing practitioners will be the public register which will hold records of any individual who:

- directly or indirectly holds more than 25% of the shares or voting rights of a relevant non-UK entity (similar to the "persons with significant control" (PSCs) register that UK companies have been required to submit since 2016);
- directly or indirectly holds less than 25% but who exercises (or has the right to exercise) significant control over the entity; and
- directly or indirectly have the right to appoint or remove a majority of the board of directors of the overseas entity.

For England and Wales, the registration requirements will apply retrospectively to all qualifying land bought by overseas entities and registered at HM Land Registry on or after 1 January 1999. Non-compliance will be a criminal offence for the entity, all of its officers and (if served with the requisite information notice by the entity) the beneficial owner.

However, the Act leaves loopholes for certain beneficial owners to remain anonymous. Where a person purchases UK property via a company registered, for example, in the BVI and there is no single shareholder with "significant control", then no shareholder will need to be disclosed on the register; only the managing officer. Furthermore, if the overseas entity is owned via a professional corporate trust provider as nominee, it can be named in the beneficial owner's place on the register. Other concerns in respect of land owned by individuals subject to sanctions is that beneficial owners may sell their property within the six-month grace period provided for registration, or could simply decide to provide false information given there are no measures in play to verify registration details.

Nevertheless, the new the transparency requirements under the Act are ultimately likely to assist those pursuing claims against fraudsters, and those seeking to trace assets.

The UK government is planning a second Economic Crime Bill, announced in a White Paper published at the same time as the first Bill was introduced, proposing further reforms to address illicit finance and improve corporate transparency. The proposals include a requirement for directors and PSCs to have to verify their identity with Companies House, thus addressing one practical issue with the Act, and ensuring that there is at least one verified natural person linked to every company. The White Paper also suggests allowing companies to have only one class of corporate director, which must be UK-based. Overseas agents will be prevented from forming UK companies, unless they are subject to a UK-equivalent supervisory regime. Companies House will also be given powers to reject filings, query information that may be false or inaccurate, and share information with law enforcement authorities. Other measures likely to be included in the second Bill include new powers to seize crypto-assets, enhanced anti-money laundering powers to encourage businesses to share information on suspected economic crime, and measures to restrict the misuse of limited partnerships.

Crypto-assets

A report by Chainanalysis shows that cryptocurrency-based crime remains on an upward trend, increasing in value from USD7.8 billion globally in 2020 to USD14 billion in 2021. It should perhaps not be surprising when legitimate cryptocurrency usage has increased 567% in the same period, meaning that the increase in reported

crime has in fact been relatively modest. In the UK, it is thought that around 2.3 million people own a crypto-asset. Action Fraud reported that, by October 2021, the amount of money lost to fraud in the UK (GBP146 million) was already 30% higher than the figure for the whole of 2020.

There have been a number of crypto-asset fraud cases in England and Wales in the past few years and the courts have so far consistently held that crypto-assets can be treated as property, with the location of the asset (relevant to determining whether the court has jurisdiction over the dispute) being where the person or company who owned the coin or token is domiciled. It is worth bearing in mind that the courts of first instance have reached this consensus only in the context of preliminary findings for the purposes of determining applications for interim relief. In such applications, a judge need only determine whether there is a realistically arguable claim that the crypto-assets in question are a form of property for the purposes of English law. While it is an approach likely to be endorsed, the issue will surely be revisited in detail at some stage in the near future.

Dealings in crypto-assets remain largely unregulated in the UK. As of January 2020, UK crypto-asset businesses were required to register with the UK Financial Conduct Authority (FCA) and comply with the Money Laundering Regulations but investors are otherwise not protected by financial services regulation. The UK government regulatory focus over the next year is likely to be on misleading advertising of crypto-assets, and little has been said in relation to fraud. The civil courts therefore have a significant role to play in counter-fraud enforcement.

The endorsement of the approach taken by a High Court judge in the 2019–20 decision, Fetch.ai Ltd and another v Persons Unknown Category A and others [2021] EWHC 2254 (Comm), also demonstrated the courts' continued willingness to grant:

- a "Bankers Trust order" against a crypto-currency exchange (including one located outside of England and Wales) in the context of fraud committed by unknown hackers to obtain critical information about the relevant transactions; and
- a proprietary injunction against "persons unknown" (provided the relief was limited to assets which the individuals knew or ought reasonably to have known did not belong to them).

A similar range of interim relief was granted in early 2022 in Sally Jayne Danisz v (1) Persons Unknown (2) Huobi Global Limited (trading as Huobi) [2022] EWHC 280 (QB), against a likely fraudulent cryptocurrency investment platform based in London and Switzerland after an investor's funds were misappropriated, as well as disclosure orders against another platform that likely administered transactions in relation to the dissipated assets. The judge recognised that crypto transactions allow assets to be dissipated "at the click of a mouse" and that in such cases time is "manifestly of the essence", highlighting the courts' willingness act quickly to grant powerful pre-emptive remedies to secure the proceeds of fraud.

As indicated in a recent speech by Sir Geoffrey Vos, the Master of the Rolls (the head of the English civil division), the UK is keen to be at the vanguard of digital currencies, blockchain and smart contracts, and the way to achieve this is by making English law the choice of law for blockchain technology. One feature of this effort he highlighted was the establishment of a sub-committee of the Civil Procedure Rules Committee, which is looking at amending or expanding the grounds on which proceedings (in particular third-party disclosure applications)

can be served out of the jurisdiction, in order to address the current difficulty of tracing assets in cases of crypto fraud. Also of potential benefit in the context of the urgency and volume of crypto fraud cases is the UK government's proposal to create an Online Procedure Rule Committee that will provide a new set of rules for the online justice system, with a view to supplying swifter and simpler access to justice for parties and their lawyers.

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

The German Criminal Code captures the concept of fraud in a variety of criminal offences. Fraud is a concept that is also regulated by civil law – where fraudulent behaviour may affect the validity of a contract or form the basis of a damage claim. The following information aims to present an overview.

Criminal Law

Fraud

According to the German Criminal Code, fraud is committed by causing or maintaining an error under false pretences or by distorting or suppressing true facts with the intention of obtaining unlawful pecuniary benefits, and so damaging somebody else's assets. The completion of the offence namely requires these elements:

- an act of deception;
- the deceived party's misconception;
- a disposition of assets by the victim or third party; and
- resulting damage.

This fact pattern must be connected in a chain of causality. Deception can be committed explicitly, in implied behaviour or – in the case of guarantor status – omission. The deceived person's misconception must provoke the disposition of assets. The element of disposal reflects this dogmatic characteristic: fraud is considered as an act of self-harm, but it is also possible that the deceived person causes a disposition of assets at the expense of a third party. In both cases the induced disposition of assets must mirror the benefit that the perpetrator intends to obtain. Depending on the severity of the offence and the circumstances, the law provides for a range of possible sanctions which range from a monetary fine to imprisonment for a term of up to five years, in the case of a conviction. Severe cases, such as commercial fraud, may lead to even graver punishments.

Further fraud offences

As mentioned above, the concept of fraud has a range of varieties expressed in different offences. *Computer fraud* was introduced into the Code as a separate offence to reflect technological particularities. Fraudulent conduct in the context of *subventions, capital investment fraud, insurance fraud, obtainment of benefits by deception, credit fraud, sports betting fraud* as well as the *manipulation of professional sports competitions* is covered by specific individual criminal offences that meet the dogmatic requirements of the respective behaviour. Hence, the significance of the phenomenon "fraud" in its naturally associated comprehension is reflected in a spectrum of subject-specific regulations.

Breach of trust

Besides the above, fraudulent behaviour can also be found in the offence of *breach of trust (embezzlement)*. Whoever abuses the power to dispose of the assets of another or to make binding agreements for another, or whoever breaches their duty to safeguard the pecuniary interests of another which are incumbent upon them and thereby adversely affects the person whose pecuniary interests they were responsible for, incurs a penalty of imprisonment of up to five years or a monetary fine. The offence aims to protect the assets of the trustor and to prevent the misuse of a position of duty granted to the perpetrator by the trustor – ie, the damaging of assets can be classified as an act from within. It requires the existence of an upscale (qualified) fiduciary duty. Due to the – theoretically – unlimited scope of this concept, German judicature urges the investigation authorities and courts to apply rigourous requirements and a restrictive usage of it in practice.

Corruption

Accepting benefits/taking bribes

The German Criminal Code attempts to regulate the occurrence of bribery and corruption in their different forms and differentiates between the interaction with public officials on the one hand and commercial bribery on the other. The offences created in this context are divided into two categories (active and passive corruption) which form their respective counterparts. On the receiving end, public officials, European officials or persons entrusted with special public service functions, incur a penalty by accepting, or allowing themselves to be promised, a benefit for themselves or for a third party in return for the discharge of a duty. Similarly, judges, members of a court of the European Union, or arbitrators make themselves liable by demanding, allowing themselves to be promised, or accepting a benefit for themselves or a third party in return for the fact that they performed or will in the future perform a judicial act. In this context, it is sufficient that the benefit is granted in the context of the public service. If the benefit constitutes a specific, unlawful action of service, a qualification and more severe sanctions are triggered. On the active side, the law aims at and penalises citizens who promise, offer, or grant such benefits in return for the discharge of a service. The link between benefit and compensation requires the existence of an "unjustness agreement" (*Unrechtsvereinbarung*) – the specifics of which are the subject of controversial discussion.

Commercial bribery

In the field of commercial practice, bribery is committed by an employee or agent of business who demands, allows themselves to be promised or accepts a benefit in return for giving an unfair preference to another. Bribery can also be seen as breaching an incumbent duty by accepting or allowing to be promised a benefit in return for performing or refraining from performing an act in the competitive purchase of goods or services without the permission of the entrepreneur. The person that offers, promises, or grants such a benefit, or rather breaches the duty incumbent on the entrepreneur by offering, promising, or granting performance of or refrainment from competitive purchase, incurs a penalty just as the bribe-taker does.

False Statements

The Commercial Code also establishes offences involving false statements, such as inaccurate representation or the violation of reporting obligations. These offences are intended to protect public trust in the accuracy and completeness of the information regarding a company. The offences are designed as abstract strict liability torts and therefore do not require further results.

Civil Law

Despite the lack of specific regulations in the Civil Law Code on fraud, claims in the context of fraudulent conduct do exist. In the context of contracts, fraudulent behaviour towards the contracting party can lead to voidability on the grounds of deceit. Consequently, a person who has been induced by deceit to make a declaration of intent may challenge his declaration. If a third party commits the deception, the declaration is only voidable under the restriction that the intended recipient knew of the deceit or ought to have known of it. Furthermore, the deceived party may claim for damages caused by the conclusion of the void contract or demand asset recovery in the way of an unjust enrichment claim.

1.2 Causes of Action after Receipt of a Bribe

The claimant whose agent has received a bribe has the following causes of action available.

Actions within Criminal Law

As with any damaged party in a criminal scheme, the claimant is entitled to file a criminal complaint and support an investigation by submit-

ting relevant information to the authorities. He can request access to the investigation file if he can bring forward a legitimate interest – for which an interest in exploring civil claims is sufficient. In case the perpetrator (or participant) of any offence (such as fraud, breach of trust, or bribery) has obtained benefits by committing the offence, the court orders the confiscation of whatever was obtained, including the proceeds.

Actions within Civil Law

An agent that takes a bribe does not act in the interest of his contractual partner. Fraudulent conduct triggers the desire for the contracting party to refrain from the contractual relation, for which the Civil Code offers different options.

The claimant can invoke the nullity of the legal transaction. Collusive agreements based on bribery violate statutory prohibitions and are contrary to public policy. Consequently, the entire legal transaction would be considered null and void.

Fraudulent behaviour may also lead to voidability of the transaction on the grounds of deceit. Whoever was induced to make a declaration by deceit can challenge on these grounds. If this right is asserted, the legal transaction will be regarded as having been void from its conclusion.

Furthermore, the deceived party may also claim for damages caused by the conclusion of the invalid contract or demand asset recovery in the way of an unjust enrichment claim. Considering the relevant contractual or statutory provisions relevant in each individual case, the damage caused by the agent's breach of duty may be recoverable.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Criminal Law

Parties who assist or facilitate the fraudulent acts of the perpetrator may be punishable under the German Criminal Code. Criminal liability differs depending on the nature and extent of a party's particular action.

Aiding and Abetting

A person who intentionally assists another in the commission of an unlawful act such as bribery or fraud is sanctioned as an aider and abetter. The penalty is determined in accordance with the penalty threatened upon the perpetrator, but the penalty may be mitigated. An aider is regarded as not having any authority of action but rather supporting the offence in a factual or psychological manner. Alternatively, a person who intentionally induces another to commit a fraudulent act is punished as an abettor and receives the same penalty as the offender. The impact of the abettor's behaviour must evoke the decision of the offender to commit the crime.

"Supporting Offences"

Sometimes the actions which support the original offence fulfil an offence of their own. The "supporting" party therefore becomes an offender himself.

The offence of *handling stolen goods* regulates the culpability of whoever, for the purpose of personal enrichment or the enrichment of a third party, buys or procures by other means property which another offender has obtained for themselves or a third party by committing an offence against the property of another person, or disposes of or assists in disposing of such property.

Money laundering makes the concealment of unlawfully acquired assets punishable. The offence intends to penalise anyone who conceals an object resulting from an illegal act or

who – with the intention of thwarting the discovery, confiscation or determination of its origin – exchanges, transfers or spends the object, procures it for himself or a third party or alternatively keeps or uses such an object with the knowledge of its origin.

Civil Law

Whoever assists or facilitates a fraudulent act can be made liable for the damage caused by the fraudulent conduct. If more than one person is responsible for the damage, they are jointly liable. In that case, the participants of the fraudulent conduct are seen as joint and several debtors and obliged in equal proportions in relation to one another, unless otherwise determined.

In cases in which a party's assistance consists of the receipt of fraudulently obtained assets without further involvement in the fraudulent conduct, the victim of fraud may claim the recovery of the property (unless the recipient was able to acquire property in good faith) or compensation via the law of unjust enrichment.

1.4 Limitation Periods

Limitation periods and forfeiture do exist in both civil and criminal law.

Limitation Period for Criminal Prosecution

While there are a number of particularities regarding the start (and hence the end) of a limitation period, the legislation focuses on a general rule. The prosecution of a criminal offence is limited, and the limitation period for fraud – and, similarly, for most of the other offences mentioned above – is determined in accordance with the seriousness of the offence and the range of the penalty. In general, the limitation period runs out after three years. In severe cases, the limitation period is extended to five years (cf German Criminal Code, Section 78 paragraph 3 No 4, 5). The limitation period starts with the termination of the offence, which in respect of fraud is seen as the completion of the act as a whole, including that the benefit has actually been achieved.

Civil Law

As with any other civil claim, the claim for damages or unjust enrichment is subject to limitation. The standard limitation period runs out after three years. It starts at the end of the year in which the claim arose and in which the claimant obtains knowledge (or would have if he had not shown gross negligence) of the circumstances and of the identity of the obligor.

According to the Civil Code, the avoidance of a declaration of intent on the grounds of deceit may be asserted within one year. The period commences once the person entitled to avoid discovers the deceit. Nevertheless, this challenge is barred once ten years have passed since the declaration of intent was made.

1.5 Proprietary Claims against Property

The following rules apply in circumstances where a claimant seeks recovery of property misappropriated or fraudulently induced to be transferred.

The transfer of property ownership induced by the fraudulent conduct can be challenged. If successful, the transfer will be considered null and void from the beginning (ex tunc). The claimant remains the proprietor and may therefore claim the surrender of the property.

Despite the preservation of proprietorship status due to the void transfer, the claimant is in danger of losing the property to a third party. The German Civil Code offers the possibility to acquire property from the non-entitled party in good faith. In this case, the right to recover possession is terminated with the loss of property.

The former proprietor then retains a claim for damages or unjust enrichment against the fraudulent party. The latter claim offers the pos-

sibility to demand the surrender of the benefits (ie, assets) of the perpetrator by obtaining the property. The claim therefore covers not just the achieved profit – any increase in value will be added. Since the claim for unjust enrichment aims for compensation in the form of value – not the recovery of the original funds – it is irrelevant if the proceeds of fraud have been mixed with other funds.

1.6 Rules of Pre-action Conduct

The Civil Code of Procedure does not cover any particular rules of pre-action conduct in relation to fraud claims. It is generally not necessary to carry out a dispute resolution before the court process. The statement of claim must include information as to whether, prior to the complaint being brought, attempts were made at mediation or if any other proceedings serving an alternative resolution of the conflict were pursued.

Criminal law distinguishes between offences that require a request by the victim to be prosecuted and offences that are automatically prosecuted ex officio due to their importance for the public interest – which applies for fraud, bribery, and breach of trust. An exception only applies where the victim is related to or lives in the same household with the perpetrator, or in the case of minor damage. Nevertheless, charges can be brought once the prosecutor considers the case to be of public interest.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Criminal Law

The victim of a crime may file a criminal complaint in order to prevent a defendant from dissipating assets or secreting them, and profit from the actions taken by the authorities in the context of the investigation. Should the prosecution decide to drop the investigation, the aggrieved person is entitled to lodge a complaint against the terminating notification.

If the perpetrator of fraud has obtained benefits from the offence, the court may order their confiscation, including benefits from the proceeds. The confiscation rules were changed recently and their practical importance is enormous. Confiscation not only supports the recovery of unlawfully obtained advantages from criminal offences – it also aims to deprive the perpetrator of the incentive to commit an offence against property by making it unprofitable to do so.

Third-party confiscation is disregarded at times, but plays an important role in practice. Assets may (and will) be seized and arrested as early as the investigation authorities deem it necessary. The receipt of benefits in good faith does not protect from confiscation. Third-party involvement may be extended to a public court hearing. The court before which the defendant has been indicted shall order that a person who is not an accused shall become a party to the confiscation aspect of the proceedings as an ancillary party, if the court anticipates that a confiscation order will be made against such a third person. Principally, the third person will have the same rights as the defendant, with the notable restriction that the hearing may even be conducted in the absence of the third party if it had been properly notified.

Code of Civil Procedure

In urgent cases, the Code of Civil Procedure provides for the possibility of interim relief of seizure and arrest. The remedy of seizure supports the securement of compulsory enforcement against movable or immovable property for a monetary claim. It can be issued if the enforcement of the judgment could be frustrated or is likely to become significantly more difficult. Regarding the grounds for arrest, there is a distinction between the arrest in rem, which “freezes” the debtors’ assets, and the subsidiary arrest in personam.

The court may issue the seizure dependent on the provision of a security. If the grounds for seizure have not been demonstrated to the court's satisfaction, the court may only issue a seizure against a security due to the disadvantages that the debtor risks suffering.

Moreover, interim injunctions serve the purpose of securing the claim, but they are not as important as the measures of seizure and arrest in the context of fraud patterns.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

It can be crucial for a claimant to have knowledge of the defendants' available assets as this may influence the outcome of a civil lawsuit or the enforcement of the judgment – the disclosure of the defendants' assets may assist their preservation. Hence, the claimant has a legitimate interest in obtaining such information.

A defendant can only be forced to disclose his assets after the judgment has been made. In the context of the enforcement of a monetary claim, the debtor is obliged to provide information to the court-appointed enforcement office of his financial circumstances and the assets he owns. In this regard, the debtor is required to cite all assets belonging to him, including dispositions made to an affiliated person over the last two years. In the case of non-compliance, the defendant may be sanctioned with coercive detention. If, in this case, the creditor files a corresponding application, the court issues a warrant of arrest against the debtor.

2.2 Preserving Evidence

The German Code of Criminal Procedure offers tools for the preservation of evidence if there are concerns that evidence could be destroyed or suppressed.

If the evidence remains in the custody of the perpetrator or a third person, objects considered to be important evidence for an investigation shall be taken into custody. If the objects are in the custody of a person unwilling to surrender, they shall be seized, which means that they are taken away from the person in custody against their will or secured by other measures such as sealing.

To discover such evidence, the authorities can aim for, and the courts can issue, searches against a person who is suspected to be an offender or participant of an offence, suspected of handling stolen data, aiding after the fact, obstructing prosecution or handling stolen goods.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

It may become necessary to obtain information or documents that are in the possession of a third party. However, they enjoy more protection and rights than a suspect.

Evidence may be obtained by the search of other persons' premises. The search against third parties is only admissible for the purpose of apprehending the suspect, following up the traces of an offence or the seizure of certain objects. It is necessary that certain facts support the conclusion that the person, trace or object sought is located on the premises of the other person. The third person concerned by the search has a legitimate interest in witnessing the proceeding, and is therefore allowed to be present or to be represented during the search.

The documents may then be seized for evidentiary purposes. Special requirements apply for third parties, and certain restrictions and privi-

leges need to be taken into account, eg, for defence counsel. However, the restrictions do not apply if the privileged party is alleged to have participated in the offence itself, or committed a certain offence connected to the original offence, or if the objects concerned were derived from an offence, have been used or are intended for use in committing an offence or emanate from an offence.

2.4 Procedural Orders

There is no information on this issue available for this jurisdiction.

2.5 Criminal Redress

Interaction between Criminal and Civil Proceedings

Both criminal and civil proceedings have their own provisions and jurisdiction and therefore remain separate. The interaction between them can play an important role in seeking redress against the perpetrator.

There are advantages in filing a criminal complaint in the context of a civil procedure. While the parties must gather and present the evidence supporting their claim in a civil matter, the ex officio principle applies in a criminal investigation, and authorities and courts need to gather the evidence which may prove helpful in a civil lawsuit. An aggrieved person may inspect the investigation file if it can establish a legitimate interest – as said above, seeking a civil claim should be sufficient.

Evidential Value of a Criminal Judgment

While the two pillars of the justice system are formally separate, a criminal judgment or even investigative evidence may be used as documentary evidence in civil proceedings. This evidential use applies under the restriction that the civil judge must subject the criminal judgment to his own critical evaluation and, if necessary, hear witnesses again.

Delaying Proceedings

A civil court may suspend the main hearing during a legal dispute if the matter is being subjected to criminal investigation, and if this has the potential to influence the court's decision. The suspension of the main hearing can lead to an unspecified delay in the civil proceedings. It is a strategic question whether or not to file a criminal complaint in the context of a civil claim.

2.6 Judgment without Trial

Courts occasionally need to deal with uncooperative parties. The court may take certain actions to facilitate and accelerate the proceedings and issue a judgment despite such situations.

The Civil Procedural Code offers the court the possibility of issuing a default judgment. If a party does not appear at the hearing, or does not argue the merits, or does not speak out in the written pre-trial, a default judgment may be issued. The effects are far-reaching, but the party in default is granted a second chance, and the recipient of a default judgment has the possibility to appeal. If successful, the status of the proceedings prior to the failure to comply will be reinstated.

The defendant in a criminal hearing is obliged to be present before the court – the hearing does not take place in the absence of the accused so the rights of the accused to defend himself and to be heard are protected. The court is entitled to issue an arrest warrant if the defendant fails to attend. Certain exceptions to his mandatory presence apply, and criminal cases may be heard or continued without the defendant present under certain circumstances. While this scenario hardly ever happens in practice, a defendant is entitled to be represented in the hearing by a lawyer if the hearing can also be held in the absence of the defendant. Furthermore, the defendant may apply to be released

from the obligation to appear at the main hearing.

2.7 Rules for Pleading Fraud

There is no information on this issue available for this jurisdiction.

2.8 Claims against "Unknown" Fraudsters

Sometimes an aggrieved party faces the problematic situation that the identity of the fraudulent person is unknown. This lack of knowledge may adversely affect the success of criminal procedure or a civil lawsuit in different ways.

In respect of a criminal prosecution, the victim may file a criminal complaint against an unknown offender. The identity of the perpetrator may be revealed during the investigation based on the ex officio principle that applies in criminal proceedings, and the victim may be informed if and when access to the file is granted. Obviously, the investigation authorities have better and more effective means of identifying individuals.

The Code of Civil Procedure, on the contrary, demands that the statement of claim includes the identity of and personal information on the defendant. Unless the fraud victim can provide such information, filing a civil lawsuit is not possible. Therefore, it may well make sense for the victim to file a criminal complaint in order to have the chance to obtain the identity through the official investigation, based on which a civil lawsuit can be filed afterwards.

2.9 Compelling Witnesses to Give Evidence

Occasionally, witnesses do not co-operate and may thus hinder legal action. Certain provisions in both criminal and civil procedure secure the effectiveness of the summoning of witnesses.

In a criminal investigation as well as in a criminal court hearing, the properly summoned witness is obliged to appear and testify. If he fails to appear, the costs attributable to the default shall be charged. Beyond that, the refusal to appear and testify will be sanctioned with an administrative fine. If the fine cannot be collected, he may even be sanctioned with an arrest order for disobedience.

In respect of civil procedure, the court may exceptionally issue that the question concerning the witness be answered in writing if it considers the written testimony to be sufficient to proceed in this manner.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

An important feature of any fraud claim is the extent to which an individual corporate director's or officer's knowledge is attributed to the company they represent, and if the corporation itself can be charged for fraud in the case of such attribution.

While there are legislative efforts attempting to change the current regime, German criminal law does not recognise criminal corporate liability. A criminal punishment can only be imposed on individuals, including a person who is acting on behalf of a company or corporate entity. However, criminal offences within a company, and in fact even breaches of administrative law, can have enormous implications for corporate entities. Companies can be made financially liable via the Statute on Administrative Offences (*Ordnungswidrigkeitengesetz*, or OWiG) which provides for both sanctions and confiscation

measures against a legal person. Criminal or administrative offences within a company regularly qualify as failures of supervision by the management level, which in itself not only constitutes an administrative offence and leads to an individualised (administrative) penalty, but also triggers a company sanction and extensive confiscations or disgorgement measures.

Meanwhile, civil action depends on the legal structure of the entity if the claimant wants to go after the individual director, and while many structures clearly distinguish between corporate and personal liability and provide for a layer of protection limiting liability to the corporate assets, claims may well be extended to the directors personally if they are based on fraud and a director's or officer's knowledge thereof. Conversely, however, this knowledge can be attributed to the company if the director or officer acted on its behalf, and liability can be established against the legal entity.

3.2 Claims against Ultimate Beneficial Owners

There is no information on this issue available for this jurisdiction.

3.3 Shareholders' Claims against Fraudulent Directors

In order to secure the interests of the company, it is desirable that shareholders are able to take action on behalf of their company against the fraudulent directors who exercise control over the company.

There are certain rules enabling shareholders to bring a claim on behalf of their company against fraudulent directors who exercise control over the company. The shareholders of both general and limited commercial partnerships – including the executing director – are subject to a duty of loyalty to the corporation. This duty of loyalty obliges the executive director to advance the interests of the corporation. As a negative component of this duty, the director must refrain from damaging the corporate interests. With regards to a stock corporation (*Aktiengesellschaft*, or AG) or a limited liability company (*Gesellschaft mit beschränkter Haftung*, or GmbH), the law establishes the duty for the directors and officers to conduct the company's affairs with the due care of a prudent businessman. Fraudulent conduct breaches such duties as it damages the purpose of the respective corporation. Therefore, the damages resulting from such conduct may be asserted by the shareholders on the behalf of the company.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

It may sometimes be expedient to involve a third party in the assertion of a fraud claim. In special cases, the third party may be subject to extraterritorial jurisdiction. The following presents an overview of the possibility of joining a proceeding and the effects of international circumstances on proceedings.

Civil Proceedings

In Germany, there is the possibility to exchange or extend the parties participating in a lawsuit. The latter becomes relevant in the case of a desired joinder to a fraud claim that has already been initiated. There are no special rules in respect of the joinder of overseas parties; therefore, the general requirements apply. A distinction can be made between cases of joinders regulated by law and cases where the extension of the parties is based on the parties' desire.

The German Code of Civil Procedure regulates the joinder of parties at the beginning of a lawsuit, and it is possible for a plurality of persons

to jointly sue or be sued if they form a community of interest regarding the disputed right, or wherever the cause is identical, or the claims are based on an essentially similar factual and legal cause. In these cases, the effect of the joinder is limited; therefore, joined parties shall deal with their opponent as individuals in such a form that the actions of one of the joined parties will neither benefit the other joined party nor place it at a disadvantage.

Sometimes, the joinder of parties becomes necessary. This is the case whenever the legal relationship at issue can only be established vis-à-vis all joined parties uniformly, or whenever the joinder of parties is a necessity for other (procedural) reasons. Consequently, a joined party in default may be represented by the other joined parties.

In cases where the lawsuit has already begun, a joinder of parties regulated by law is only intended for the attachment of claims and other assets. Nevertheless, there may be cases in which the parties of an ongoing lawsuit desire a joinder. This situation is not regulated by law but acknowledged under certain circumstances, which, according to different opinions in literature and jurisprudence, are determined by law or depend on the possibility of an extension of the lawsuit. It is, however, uncontroversial that – in the second instance – the joinder of another defendant requires his consent, otherwise it would mean a loss for the joining defendant.

Moreover, there is the possibility to include another party in support of a party in the form of a third-party intervention. The intervention aims to give a third party who has a legitimate interest in the outcome of the legal dispute the possibility to intervene in the proceedings in support of one party. In contrast to the joinder of parties, the third person does not become a party of the lawsuit.

International jurisdiction in the field of civil law is mostly determined by the provisions of the Brussels Regulation (EU) 1215/2012. Based on different criteria such as residence, place of fulfilment of the contract, etc, the jurisdiction for German courts is still being established. The factual and local jurisdiction within Germany, then, lies in accordance with the Code of Civil Procedure.

Criminal Proceedings

Anyone, regardless of nationality or whether they are an individual or legal entity, can initiate an investigation by filing a complaint, and support it by providing evidence. There are special rules for aggrieved parties.

The party damaged by an offence may have a legitimate interest in getting access to the investigation file, in participating in the criminal proceedings, and have an influence on their outcome. With regards to certain offences (which are conclusively listed in the German Criminal Procedural Code), the aggrieved party has the right to join the hearing as a private accessory. While it would usually be alien to the systematics of the legal system (and hence is often only applied reluctantly in practice), the Procedural Code provides for the option to claim civil damages via the criminal route in what is called the *adhesion procedure*.

The German Criminal Code establishes that, in general, German law (only) applies to offences committed in German territory. Nevertheless, there are a few exceptions to this territorial principle. Regardless of which law is applicable at the place where the offence was committed, German criminal law applies to certain offences committed abroad with a specific domestic connection or to offences committed abroad against internationally protected legal interests. Furthermore, German criminal law may apply to offences committed abroad against a German national if the act is a criminal offence at the place of its

commission or if that place is not subject to any criminal law jurisdiction.

5. ENFORCEMENT

5.1 Methods of Enforcement

Enforcement requires the creditor to hold an enforcement title against the debtor, as this constitutes the foundation for the enforcement. A final court judgment is the most relevant method of enforcement, but the Civil Procedural Code lists a number of others, as follows:

- attachment of goods;
- attachment of claims and other assets held by the debtor, such as earnings;
- statement of assets by the debtor;
- coercive measures to ensure that actions are taken or refrained from;
- forced sale; and
- receivership.

All enforcement methods have the same basic requirements in common. According to the Procedural Code, the claimant must file a request and determine the type and extent of the enforcement. The application must be addressed to the enforcement body competent to deal with the matter locally, factually, and functionally; the functional responsibility depends on the enforcement method. An enforcement measure may only begin after the enforcement order has been served to the debtor.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

The right to silence, from which the right to invoke the privilege against self-incrimination derives, is a constitutional right. A person suspected of having committed an offence has the right to remain silent during a criminal investigation against himself, or indeed against other people should his statement bear the risk of triggering an element of suspicion and hence an investigation. The right to remain silent extends to any civil matter during which the person concerned is requested to give a statement as a witness. The right to silence encompasses the refusal to testify and to refrain from giving any information. The right to refuse testimony is an expression of the Roman nemo tenetur principle, which states that no one can be forced to incriminate himself. The right to remain silent has a constitutional status that is equivalent to a fundamental right and represents a basic principle in criminal proceedings.

The Criminal Procedural Code establishes the right to remain silent in many forms and hence mirrors the Constitution. While criminal procedural law guarantees a right to defend yourself actively, ie, by giving statements in your defence (the right to be heard), the Code also states that a suspect must be instructed of his right to silence by the investigation authorities, ie, that he may refrain from responding to any questions or making any statements on the charges brought upon him. The right to remain silent exists during the entire criminal procedure and must not lead to a disadvantageous interpretation by the prosecution or a court. Therefore, no inferences must be drawn when a defendant invokes his privilege.

While suspects – who are not in custody – can refuse to even appear to an interview, witnesses' attendance is in general compulsory once they are summoned by a prosecutor during an investigation or by a court to a hearing. Every witness must testify, but there are exceptions to the general rule.

A witness has the right to refuse testimony under certain circumstances. The Procedural Code establishes this in cases where the witness has a

right to refuse testimony due to a close personal or family connection with the suspect (fiancé, spouse, etc) or on professional grounds (lawyers, doctors, clergy, etc).

Because of the nemo tenetur principle, witnesses also have the right to refuse to respond to any questions which would subject them, or their relatives, to the risk of being prosecuted for a criminal or regulatory/administrative offence. The assertion of the right to refuse to answer must not lead to any inferences.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

Communication between lawyer and client is protected by a strict privilege in criminal matters. It can only be overcome where the lawyer is suspected of having committed or engaged in a criminal offence himself. There are a few controversies in this area, eg, on whether the communication before the formal initiation of an investigation is covered by the privilege, and how and to what extent the privilege extends to corporate entities. As mentioned above, legal persons cannot be prosecuted in, but may be affected by, a criminal investigation.

While the right to privilege is clearly defined in criminal matters, the civil procedure has different standards. As one of the main differences to common law jurisdictions, German civil action does not imply the "discovery" or "disclosure" of documents. On the contrary, the *principle of provision* applies, stating that the parties must present the facts of the case and that the court does not conduct its own investigation into the facts.

Nevertheless, there are certain exceptions comparable to the concept of "discovery" or "disclosure", though these legal institutions are usually one instrument of judicial process management and do not create a direct claim between the parties. The German Code of Civil Procedure, for example, establishes the obligation to submit certain documents that are in the possession of a party or third person when ordered by the court. Nevertheless, the obligation does not apply for third parties entitled to refuse to testify – which includes a lawyer. Hence, lawyers do not have to surrender the documents that are in their possession. Lawyer-client communication enjoys the concept of privilege to a large extent and is ultimately at the discretion of the party concerned.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

There is no information on this issue available for this jurisdiction.

7.2 Laws to Protect "Banking Secrecy"

The concept of "banking secrecy" ensures a bank's secrecy towards third parties when it comes to customer-related data.

There are no statutes on the concept of "banking secrecy" in Germany. However, banking secrecy provisions often form part of the general terms and conditions of a banking contract, and the protection provided is of a civil nature.

Banking secrecy has limitations and can therefore be circumvented. The provisions that allow a breach of banking secrecy primarily serve the purpose of criminal prosecution. If a bank employee, for instance, is questioned by a criminal court as a witness for the purpose of seeking evidence in a fraud case, the refusal of an answer is not allowed. Furthermore, some special areas force private banks to surrender certain information to the authorities, with

anti-money laundering provisions as the most prominent example. Transaction data needs to be submitted to the relevant anti-money laundering departments once certain criteria are met, and the banks' systems are triggered to do so without the approval or even the knowledge of the parties to the transaction.

7.3 Crypto-assets

Both the occurrence and the importance of so-called "crypt-assets" has increased. The following paragraphs aim to give an overview of the classification of crypto-assets, legal requirements, and the treatment of crypto-assets within criminal proceedings.

Due to their qualification as a digital representation of a value which is not recognised by any central bank or public authority, crypto-assets are categorised as financial instruments rather than a monetary currency. Due to their marketability, crypto-assets such as Bitcoin inherit a determinable value depending on the supply and demand in the market. Crypto-assets can, therefore, be classified as electronic assets that are used as a private medium of exchange or for the purpose of investment.

The mere use of crypto-assets as a substitute for cash or book money in the exchange business does not require a permit. A service provider or supplier is allowed to have his services paid for via the virtual "currency" without thereby providing banking transactions or financial services. The reverse also applies – any customer is free to pay with crypto-assets where possible.

Commercial services trading with cryptocurrencies, on the other hand, are considered to be banking transactions or financial services and therefore require a licence.

For many reasons, if only due to their acknowledged market value, crypto-assets may be the object of fraudulent conduct.

In this context, it is questionable whether crypto-assets can be confiscated during criminal proceedings. As said above, and in general, if the perpetrator of or participant to criminal behaviour has obtained anything through the offence, the investigation authorities or the court order the confiscation of what was obtained, including the benefits from the proceeds.

Due to their market value, crypto-assets are considered and qualified as "what was obtained" by the perpetrator or the participant. Accordingly, the confiscation of crypto-assets is possible. When it comes to determining the value of the confiscated crypto-assets, an increase in value that occurs after the confiscation is irrelevant. However, the confiscation itself may prove problematic, as each transaction requires a private key. Whoever is in possession of the key thus has control over the assets. In cases where this person refuses to provide the pertinent information, confiscation is not possible.

BEUKELMANN MÜLLER PARTNER is a specialist criminal law firm focusing on business and tax crime, representing individual and corporate clients in criminal, administrative and regulatory matters as well as in internal investigations. Based in Munich, Germany, BMP represents clients in both domestic and international cases, providing advice in German, English, Spanish and French. Founded in 1981 and merged with another prestigious white-collar boutique firm in 2021, the firm has established a reputation for providing strategic and solution-orientated advice through a team of committed, highly qualified specialists with a depth of experience in criminal law. It prides itself in handling each and every case in a professional and dedicated manner to the highest standard. BMP's specialists are constantly developing their professional knowledge and skills by participating in, and contributing to, advanced and continuous legal training programmes.

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

A distinction should be drawn between criminal and civil fraud claims, under the provisions of the Greek Criminal Code (hereinafter GCC) and the Greek Civil Code (hereinafter GCivC) respectively.

Criminal Law

Fraud

Article 386 GCC describes the basic type of fraud, which is committed by knowingly representing untrue facts as true or by unlawfully concealing or suppressing true facts, and, in this way, persuading another person to act or omit to act, thus causing pecuniary damage. Intent of the perpetrator to gain illicit financial benefit for oneself or a third party is required.

The GCC also provides for fraud variants, including computer fraud (Article 386A), which is committed by abusing electronic data, as well as subsidies fraud (Article 386B), whereby the perpetrator illegally obtains or misuses public funds.

Fraud exceeding EUR120,000 is considered a felony under Greek criminal law and entails imprisonment of maximum ten years and a monetary penalty.

It is noted that special criminal provisions might apply to certain types of fraud (eg, tax fraud, customs fraud, securities fraud).

Corruption

Offences involving corrupt payments include:

- bribery, active and passive, in the public sector (Articles 235 and 236 GCC), namely the act of giving (or receiving) or promising (or accepting), directly or through third parties or intermediaries, undue benefits or gain to/from a public official for committing or omitting an act in the exercise of one's duties or against one's duties;
- bribery, active and passive, in the private sector (Article 396 GCC) is an act of giving (or receiving) unlawful benefits or gain, directly or indirectly, in exchange for an action or omission contrary to one's duties (as defined by law, contract, agreement, etc).

Special rules apply regarding the bribery of judges (Article 237 GCC) and the bribery of political officials (Articles 159 and 159A GCC).

Breach of fiduciary duties

The perpetrator of this offence (Article 390 GCC) is someone entrusted with the administration of another (natural or legal) person's property and who intentionally causes financial losses to it, by not respecting the applicable diligent management rules.

Penalties to be imposed vary, depending on the total of damages caused, while the breach of fiduciary duties in respect of state-owned property constitutes an aggravating factor, involving even stricter penalties (imprisonment of up to 15 years).

False statements and declarations

According to Article 176 of Law 4548/2018, the founder, member of the board of directors or the director of a company, who knowingly makes false or misleading positive statements to the public, either concerning the coverage or payment of capital or for the purposes of subscription to securities issued by the company, is punished with imprisonment and a fine ranging from EUR10,000 to EUR100,000.

Conspiracy

Preparatory acts related to the subsequent commission of a crime (including fraud) are, as a rule, not punishable under Greek criminal law.

Exceptionally, such acts are punishable only when related to certain serious offences (eg, the circulation of counterfeit currency).

Civil Law

Contractual liability

Anyone who has been deceived into making a declaration of intent has the right to request the annulment of said legal act and may also seek restitution of further damages incurred (Article 147 et seq GCivC).

Tort claims

The injured party is entitled to compensation, including material and moral damage caused by the wrongful act, provided that deceit (as a criminal act) has taken place, against its interests protected by law (Articles 914 et seq GCivC).

Alternatively, provisions for unjust enrichment (Articles 904 et seq GCivC) may also apply.

1.2 Causes of Action after Receipt of a Bribe

In the event that an agent has received a bribe, the following causes of action apply.

Criminal Law

The agent would face accusations of passive bribery, following the submission of a pertinent criminal complaint (by the principal) or an ex officio prosecution. Criminal liability for breach of fiduciary duties is also not excluded, depending on the specifics of the case.

Civil Law

The injured party (ie, principal/company) may file an action in tort against the perpetrator (Article 914 in combination with Article 932 GCivC) for pecuniary and non-pecuniary damages.

Civil liability of the perpetrator may be also sought on the basis of his/her pre-existing contractual obligations towards the principal/company.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Criminal Liability

Instigation and complicity

Anyone who instigates another person to commit a certain crime is punished, as if he/she had directly perpetrated that offence (Article 46 GCC). Moreover, whoever assists the perpetrator, before or during the commission of a crime, is punishable with a reduced penalty, except if the accomplice directly assists the perpetrator, by placing the object of the offence at his/her disposal. In the latter case, the court may impose on the accomplice the same penalty as that of the perpetrator (Article 47 GCC).

Commission of separate offences

The further receipt of fraudulently obtained assets (ie, following the completion of the fraud by the perpetrator) is likely to raise criminal liability of the involved party (recipient), as follows:

- acceptance and disposal of proceeds of crime (Article 394 GCC), which consists in the possession of objects (or the earned gains from such objects) that were acquired through criminal acts;
- (anti)money – laundering legislation (Article 2 of Law 4557/2018), which prohibits the possession of property on condition that the recipient is aware that it was acquired through criminal acts. The notion of "criminal acts" includes certain offences, such as computer fraud and bribery, as well as any other crime, from which illicit financial proceeds originate.

Civil Liability

An action in tort may be directed against more than one defendant at the same time, provided that the damage to the claimant was caused by the joint acts of more persons (Article 926

GCivC). The same provision applies even in case that simultaneous or consecutive actions of more persons have taken place at the disadvantage of the claimant, but it has not been determined which of these has actually caused the damage.

1.4 Limitation Periods

Criminal Law

According to Article 111 GCC, prosecution of criminal offences is time-barred, beginning from the day these occurred, as follows:

- felonies punishable with life imprisonment have a statute of limitations of 20 years, with a possible extension of another five years during pending proceedings before a trial court;
- felonies punishable with up to 15 years of imprisonment have a statute of limitations of 15 years, with a possible extension of another five years during pending proceedings before a trial court;
- misdemeanours have a statute of limitations of five years, with a possible extension of another three years as above.

When it comes to certain financial crimes (eg, fraud, breach of fiduciary duties), the otherwise applicable statute of limitations (15 years) is extended to 20 years, on condition that the acts are directed against the property of the Greek state. Exceptional provisions as to the statute of limitations for certain criminal offences are also included in special criminal legislation.

Civil Law

As a rule, the right to file a civil action lapses after 20 years from the date that the pertinent claims were born and could be judicially pursued (Articles 249 and 252 GCivC).

However, if the wrongful civil act that gave rise to the respective claims constitutes, in parallel, a criminal offence, which is subject to a longer limitation period, preclusion of civil claims follows the latter statute of limitations (Article 937 GCivC).

For certain categories of civil claims, the applicable limitation period for their judicial pursuit is significantly shorter, namely five years, beginning from the date these were born (Article 250 GCivC).

1.5 Proprietary Claims against Property

Proprietary Claims

A fraud victim may file an action in tort against the defendant with the competent civil court of first instance, seeking restitution for the loss or damage sustained (Article 914 et seq GCivC). Damages shall be awarded as compensation for the pecuniary harm caused by the defendant, possibly including loss of profits. It should be noted that moral damages could also be awarded in the form of compensation due to non-pecuniary harm as a result of the unlawful behaviour (please see also **1.2 Causes of Action after Receipt of a Bribe**).

Under Greek insolvency proceedings, there are no established preferential rights of creditors who are victims of fraud.

Proceeds of Fraud

All assets deriving from the commission of fraud (predicate offence to money laundering) acquired directly or indirectly from the proceeds of such offence, or which constitute the means that were used or were going to be used in committing such offences, are subject to confiscation and forfeiture. Any legal act concerning confiscated property is prohibited and shall be considered as null and void (Articles 174-176 GCivC).

Proceeds of crime may be returned to the victims of fraud by a court decision, otherwise they are considered property of the Greek state.

1.6 Rules of Pre-action Conduct

Civil Proceedings

There are no general preconditions for the claimant before taking judicial action in a fraud case. Yet, it is rather common in practice for an extrajudicial declaration to be sent to the opposing litigant, with a request for restitution of caused damages, prior to filing a lawsuit.

Criminal Proceedings

From a criminal law perspective, Article 405 GCC provides that, if the perpetrator, of his own will, fully compensates the injured party, before being examined as a suspect or defendant, and without causing unlawful harm to a third party, no criminal sanctions are imposed.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Effect of Interim Measures

The Greek Code of Civil Procedure (hereinafter GCCivP) contains various provisions, allowing the plaintiff to apply – even before the commencement of ordinary proceedings – for an interim injunction or provisional order against the opposing party, in order to freeze movable or real estate assets or rights in rem over such assets, as well as claims with respect to them (Articles 682 et seq, 707 et seq GCCivP).

The range of such injunctions is wide, so the competent court has the discretion to shape them in the most appropriate manner. The plaintiff needs to prove the urgent character of the requested measures, while injunctions that have been granted prior to the commencement of ordinary proceedings automatically seize to exist, unless an action is filed by the plaintiff within 30 days or within the timeframe instructed by the court.

Greek courts order the unsuccessful litigant to pay costs of the proceedings, which, as a rule, are of nominal value and cover a small part of the actual costs incurred by the winning party.

Non-Compliance by the Defendant

Consequences of a defendant's non-compliance with aforementioned court orders could include the imposition of a fine up to EUR100,000, as well as his/her personal detention (Article 947 GCCivP).

Moreover, a person who tries to conceal, transfer, destroy, etc, his/her property in order to prevent the enforcement of a judgment could be held criminally liable by virtue of Article 397 GCC. According to said article, a debtor who intentionally frustrates, in whole or in part, the satisfaction of his debt by damaging, destroying, transferring without value, concealing or appropriating without equivalent and marketable collateral any of his/her property, or who creates false debits of false contracts, shall be punished by imprisonment of up to two years or by pecuniary penalty.

Asset-Freezing in Criminal Proceedings

Depending on the specifics of the case (eg, banking fraud), a fraud victim could accompany his/her criminal complaint before the competent prosecutor with a request for asset-freezing against the defendant, on the basis of money-laundering legislation (Article 42 of Law 4557/2018).

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

Besides publicly accessible information (Land Registry, General Commercial Registry, etc), criminal law mechanisms are generally deemed effective in tracing a defendant's assets.

Civil Proceedings

Disclosure is not a recognised or established procedure for the exchange of information between litigants in Greek civil proceedings. The general principle established in the GCCivP is that the court acts only upon request of the litigants and reaches its ruling based on the factual allegations and evidence submitted by each party. Consequently, litigants bear the burden of proof of their own allegations and cannot be forced to disclose evidence in relation to the opposing party's claims or face sanctions for not acting in such a manner.

Criminal Proceedings

Unlike civil procedure, prosecuting and investigative authorities are not solely bound by evidence adduced by the litigants. Once the competent prosecutor has pressed charges and made referral of the case to main investigation, the investigating judge has extensive powers to gather evidence (including requests for production of evidence/information) in accordance with the provisions of the Greek Code of Criminal Procedure (hereinafter GCCP), the constitution and relevant legislation.

It is noted, however, that even during this stage of investigation, the fundamental rights of the defendant, such as the right to be presumed innocent and the right to avoid self-incrimination, remain intact.

2.2 Preserving Evidence

Preservation of Evidence

In urgent and serious cases (eg, corruption, large-scale fraud and money laundering), it is not unusual for enforcement agencies and the prosecutor to take immediate action to secure evidence, by issuing a warrant for search and seizure or freezing orders, even before any charges are filed or involved persons are called for questioning. Preservation of evidence may be also achieved through confiscation (Articles 260 et seq GCCP).

Moreover, Article 245 paragraph 2 GCCP provides that, upon suspected commission of a crime, and given that there is an imminent threat of loss of evidence, the competent investigative officers are entitled to perform all necessary acts in order to determine the offence and its perpetrator, even without prior notice to the prosecutor.

Private Investigations

Investigative acts and orders lie with the competence of state authorities (eg, prosecutor, investigating judge and so on). Private investigations are allowed if conducted in accordance with applicable laws. Lawfully acquired evidence by parties is admissible in pending procedures.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

Civil Proceedings

A litigant may file an application with the court for the presentation of a specific document by the opposing or a third party (Article 450 et seq GCCivP). The party filing the application for the presentation of the document should expressly specify in its application the document, disclosure of which is sought. An order granting or dismissing the application is issued by the competent court.

Criminal Proceedings

Please see **2.1 Disclosure of Defendants' Assets**.

Rules of Evidence

Lawfully obtained evidence may constitute means of proof and be used as such before Greek courts in civil and criminal proceedings. The evaluation of evidence is made freely by the court, but the final ruling needs to be sufficiently reasoned.

2.4 Procedural Orders

Provisional orders may be issued ex parte, even without the service of a notice to the opposing litigant (Article 691A paragraph 2 GCCivP). Please see also **1.7 Prevention of Defendants Dissipating or Secreting Assets**.

2.5 Criminal Redress

Fraud Victims as a Party to Criminal Proceedings

The victim of a criminal offence (including fraud victims) is entitled to acquire plaintiff status in criminal proceedings, by making a declaration in support of the charges against the accused. Such a declaration can be submitted as a written statement during the pre-trial stages or before the criminal court, until the beginning of the examination of evidence (ie, usually before the calling of the first witness). Articles 63-68 in conjunction with Articles 82-88 of GCCP compose the relevant legal framework. Moreover, the criminal court has the power after issuing its judgment on the charges brought to order the return of seized assets to the victim of fraud or other related offences.

The participation of the (fraud) victim in criminal proceedings aims at the conviction of the accused, with no possibility of filing of private claims for compensation that arise from the same wrongful act. Nonetheless, the victim may pursue civil claims before civil courts.

Parallel Criminal and Civil Proceedings

When a civil lawsuit is intertwined with criminal claims, which are to be adjudicated by the competent criminal court, it is usual practice (though not mandatory) that the ruling of the civil court is postponed until a final criminal judgment has been issued.

2.6 Judgment without Trial

On some occasions, it is possible that the judgment of a civil or criminal court is issued without the conduct of a full trial. More specifically, the following applies.

Dispute Resolution

Article 293 GCCivP, under the title "Procedure and Results of Conciliation", stipulates those litigants may, at any stage of the trial, reach a settlement provided under the applicable laws. The settlement is done by means of a declaration before the court or the surrogated judge or before a notary public and terminates the proceedings. The minutes of the conciliation constitute an enforceable title (Article 904 paragraph 2 GCCivP).

Plea Bargaining

The newly enacted Articles 303 et seq GCCP (by virtue of Law 4620/2019) introduced the possibility of plea bargaining in criminal proceedings. According to the relevant provisions, the defendant may, during the pre-trial stages or until the beginning of the evidence hearing before the competent first instance court, submit a request for plea bargaining in relation to the charges filed. The prosecutor has no right to initiate sua sponte such plea bargaining.

In exchange for the defendant's confession and acceptance of criminal charges, the prosecutor may propose a reduced penalty, as prescribed by law, after considering the nature and specifics of the case. If a final agreement is reached between the defendant and the prosecutor, the competent criminal court ratifies said agreement in a summary hearing.

Default Judgments

In civil proceedings, the absence of any of the litigants (who is not represented by a lawyer) has the following consequences:

- in absence of the plaintiff, the filed action is automatically rejected (Article 272 GCCivP);

- in absence of the defendant, who has been properly summoned, the court considers that the claims of the plaintiff are true (Article 271 GCCivP). If the defendant appears and accepts the content of the plaintiff's action, the court issues a judgment according to said acceptance (Article 298 GCicC).

In criminal proceedings, the court may proceed with the adjudication of the case even in the absence of the defendant (who is not represented by a lawyer), provided that the latter has been legally summoned and there are no other circumstances that could justify the postponement of the trial (Article 340 GCCP).

2.7 Rules for Pleading Fraud

Whether in civil or criminal proceedings, pleading fraud requires a solid factual basis, accompanied by adequate evidence. More specifically, the following applies.

Pleading Fraud in Civil Proceedings

Article 216 GCCivP stipulates that a lawsuit must contain, inter alia, a clear statement of the facts which, in accordance with the law, justify such action and its submission by the plaintiff against the defendant. In practice, civil courts place considerable emphasis on this provision and often reject civil actions that are not detailed and precise.

Concerning proprietary claims (such as fraud claims), the monetary value of the object in question must be also specified.

Pleading Fraud in Criminal Proceedings

The existence of adequate evidence is a crucial prerequisite for the initiation and progress of standard criminal procedure. In this context, the prosecutor may dismiss vague criminal complaints or allegations that do not have a concrete legal basis (Article 43 GCCP).

Similarly, the judicial council, handling a criminal case following the conduct of a main investigation, may choose not to make a referral of said case to trial, if criminal charges are not corroborated by adequate evidence (Article 308 GCCP).

2.8 Claims against "Unknown" Fraudsters

It is not possible to file a civil action against unknown litigants. According to Articles 118 and 216 GCCivP, a civil action should at least contain:

- the names and addresses of the litigants;
- the court to which it is addressed;
- the particulars of the claim.

On the contrary, a criminal complaint can be submitted even against unknown perpetrators. Further progress of the proceedings shall be suspended until the alleged perpetrators are identified.

2.9 Compelling Witnesses to Give Evidence

Please see **2.1 Disclosure of Defendants' Assets** and **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Civil Liability

A civil lawsuit against both the individual perpetrator as well as the legal entity, on behalf of which the defendant had acted, is in line with the relevant provisions on the jurisdiction of Greek courts (Articles 74 and 76 GCCivP in conjunction with Articles 334 and 922 GCivC). The sole

adequate prerequisite for such an action is that the wrongful behaviour of the company's director or officer occurred during the performance of his/her duties.

Criminal Liability

As a rule, only individuals can be held criminally liable under Greek law. In certain cases, corporate conduct may be sanctioned, especially in the context of anti-corruption, anti-money laundering and anti-cartel legislation, when it is linked with positive gains or advantages for the entity. The company is liable as an entity – notwithstanding the individual (criminal or administrative) liability of employees – when there is some type of profit, gain or advantage to the company. The severity of sanctions in such cases (in the form of administrative penalties and fines) usually depends on the type of profit or gain and the annual turnover of the company.

3.2 Claims against Ultimate Beneficial Owners

Civil Law

According to established case law of Greek civil courts (including no. 2/2013 Judgment of the Supreme Court of Greece, Areios Pagos, sitting in plenary session), the corporate veil of legal entities shall be lifted, provided that the separate legal personality of a company (Article 70 GCivC) is essentially being abused, contrary to the pervading principle of good faith (Articles 281, 200 and 288 GCivC).

The above interpretation of the law applies, for example, in cases, whereby a legal entity is being used as a vehicle for the facilitation of criminal or other wrongful acts and consequently, the ultimate beneficial owners of the entity could face tort-based liability for wrongful actions.

Criminal Law

Regardless of whether the corporate veil of an entity would be lifted or not in civil proceedings, ultimate beneficial owners of a company could face criminal accusations, especially as instigators to an offence, in the event that the legal entity is involved in criminal activity.

3.3 Shareholders' Claims against Fraudulent Directors

Civil Claims

As a rule, claims on behalf of a société anonyme shall be judicially pursued by the board of directors and not shareholders themselves (Article 77 of Law 4548/2018). On occasion that the board of directors does not proceed accordingly, a decision to bring claims against company directors may be made by the general assembly of shareholders.

In addition, Article 102 of Law 4548/2018 provides that members of the board of directors are liable towards the company for damages that have been caused due to an act or omission, which constitutes a breach of their duties.

As a result, if fraudulent directors are, in parallel, members of the board of directors, the pertinent lawsuit may be filed:

- following a request from majority shareholders to the board of directors, the filing of the above lawsuit (by the board of directors on behalf of the company) is mandatory (Article 104 paragraph 4 of Law 4548/2018);
- following a request from minority shareholders to the board of directors, if said request is rejected, minority shareholders may submit the same request before the competent court of first instance (Article 105 of Law 4548/2018);
- following a decision of the general assembly of the company's shareholders.

Criminal Claims

Fraudulent directors, who harm the company's and shareholders' interests, commit the crime

of breach of fiduciary duties (please see also **1.1 General Characteristics of Fraud Claims**). If caused damage exceed EUR120,000, such offence shall be prosecuted ex officio.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

Jurisdiction and Judicial Assistance

Articles 1 et seq GCCivP and Articles 109 et seq GCCP determine the domestic jurisdiction of civil and criminal Courts respectively.

Regarding cases with cross-border elements, there are two sets of applicable rules:

- in relation to member states of the European Union and EU-based litigants, relevant EU Regulations apply (eg, EU Regulation 1393/2007 regarding the service of documents);
- in relation to third countries and non-EU based litigants, judicial assistance is regulated by bilateral or multilateral international treaties (eg, the Hague Convention of 1965).

For practical reasons, European or international claimants who wish to acquire party-status to Greek civil or criminal proceedings are advised to appoint (also) a lawyer based within the jurisdiction of the competent domestic court.

Extraterritorial Effect of Greek Criminal Laws

Apart from offences committed within national territory, Greek criminal law has an extraterritorial effect in the following cases:

- felonies or misdemeanours committed by nationals abroad, under the condition of dual criminality (Article 6 GCC – principle of active personality);
- felonies or misdemeanours committed abroad against nationals, state or other entities with their seat in Greece abroad, under the condition of dual criminality (Article 7 GCC – principle of passive personality);
- certain offences prescribed in Article 8 GCC, regardless of the prerequisite of dual criminality according to the principle of universal jurisdiction (eg, terrorism, human trafficking, piracy, drug trafficking, etc).

5. ENFORCEMENT

5.1 Methods of Enforcement

Enforcement of Civil Judgments

Final judgments or first instance courts that have been issued as provisionally enforceable may be immediately enforced. A certified copy of the enforcement order, which is provided by the presiding judge of the court that issued the relevant judgment, is required in order to initiate the enforcement procedure (Articles 904 and 918 GCCivP). Once the order is served, enforcement actions may take place after three working days have passed (Article 926 GCCivP).

Enforcement actions include garnishment (confiscation) of the defendant's assets and real estate property and/or auction of said assets and property.

Enforcement of Criminal Judgments

The enforcement of criminal judgments lies with the competent prosecuting authorities of the court that issued said judgment. As a rule, only final criminal judgments are enforceable (Article 545 GCCP). However, if a defendant has been convicted for a felony or even a serious misdemeanour, the first instance court may rule that its judgment shall be directly enforced, notwithstanding the submission of an appeal against it (Article 497 GCCP).

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

Criminal Proceedings

The right to silence and not to incriminate oneself is enshrined in Article 104 GCCP. In accordance with said provision, the exercise of said right by the suspect or accused of a criminal offence shall not be interpreted as evidence of guilt; the exercise of said right does not preclude further collection of evidence by the investigative authorities.

The right to silence and not to incriminate oneself is reflected in a number of other provisions of the GCCP as well (eg, Article 273, which refers to the interrogation of the defendant).

Civil Proceedings

Although the defendant cannot be obliged to adduce evidence or disclose information (please see also **2.1 Disclosure of Defendants' Assets**), the right to silence does not apply to civil proceedings. If the defendant does not attend the trial to rebut the plaintiff's claims, the allegations of the latter will be accepted as true (Article 271 GCCivP).

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

The process of "discovery" or "disclosure" is not established under Greek civil law, yet there are certain categories of privileged information, communications and documents especially recognised throughout criminal proceedings.

Attorney-Client Privilege

Attorney-client privilege is well established within the Greek legal system and covers a broad range of data (eg, electronic correspondence, written memos, oral communications, etc) that shall be treated as confidential. Attorney-client privilege can be invoked in all types of procedures, whether criminal, administrative or civil, without making a distinction between natural and legal persons as to the identification of the client.

Sources of this privilege are to be found in the Lawyers' Code (Law 4194/2013), the Criminal Code (GCC), Code of Criminal Procedure (GCCP), as well as the Code of Civil Procedure (GCCivP).

Professional Privilege

Except for lawyers, disclosure of privileged information may be denied by certain professionals, such as doctors, clerics, pharmacists, etc (Article 212 GCCP).

Pursuant to Articles 263 and 264 GCCP moreover, seizure of privileged documents in the possession of the above-mentioned professionals is prohibited.

Undermining Privileges

In exceptional cases, prosecuting authorities may have broad powers for the collection of evidence and information, thus not being bound by professional privilege (eg, financial crime prosecutor). Nonetheless, attorney-client privilege remains intact, as explicitly prescribed by law (Article 36 GCCP).

The attorney-client privilege can be undermined, either upon the voluntary decision of the client or where an attorney is individually involved in the commission of criminal acts.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

There are no such provisions under Greek law.

7.2 Laws to Protect "Banking Secrecy"

Article 3 of no. 1059/1971 Legislative Decree on Bank Secrecy, as amended by Act 1858/1989, stipulates that release of information on bank accounts is allowed, if it is necessary, for the purposes of the investigation or punishment of a serious crime.

In order to release such information, an order by the competent judicial council at the request of the investigating judge, who carries out the main investigation, or of the prosecutor, who carries out the preliminary investigation or the summary investigation, is necessary. The same power is conferred to the court at the trial stage.

7.3 Crypto-assets

In accordance with European Directives 2019/2177 and 2018/843, the notion of "property", as defined by Article 3 of anti-money laundering Law 4557/2018, has been amended (by virtue of recent Law 4734/2020), so as to include "virtual currencies".

More specifically, the above term refers to the digital representation of a value that is not issued by a central bank or public authority, nor has their guarantee, nor is necessarily linked to legally circulating currency or has the legal status of currency or money, yet it is accepted by natural or legal entities as a means of transaction and may be transferred, stored or circulated electronically.

Consequently, freezing orders or equivalent actions are, in principle, applicable to said type of assets, yet the pertinent field remains to be further regulated.

ANAGNOSTOPOULOS is a leading Athens-based practice established in 1986 that assists corporates and select individuals in managing criminal and regulatory risks. The firm is noted for combining sophisticated advice with forceful litigation in a wide variety of practice areas. Over the years, it has built a reputation as a high-end team of specialists who take a holistic and creative approach to complex cases and are fully committed to their clients' needs, while upholding high standards of ethics and professional integrity. The firm responds to the emerging needs of corporate clients in respect to specific aspects of corporate governance and liability, drawing upon a solid knowledge base in corporate criminal liability, internal company investigations and compliance procedures, corruption practices and cartel offences. The firm's litigation group is led by Ilias G. Anagnostopoulos, who is considered one of the foremost white-collar crime experts, while the firm is distinguished by its track record in high-profile cases.

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

It has been said that the many forms of fraud are as diverse as man's infinite capacity to invent them (Grossman, 1993). Perhaps that is why in Hong Kong there is no overarching definition of "fraud".

The High Court of Hong Kong recently described fraud as "a concept rather than a specific cause of action", adding, "that is why one finds the word used in many and diverse cases, albeit as a shorthand expression, to refer to the different types of behaviour which are under scrutiny in each case" (Polyline v Ching Lin Chuen [2021] HKCFI 483).

The law has responded to the many types of behaviour with myriad causes of action and a diverse range of remedies.

Fraudulent activity may include deception, though it is not essential. There is usually financial loss to the victim, but not always. The elements of fraud are set out (though not specifically defined) in the Theft Ordinance (Cap 210), which makes it a criminal offence to induce another person by deception and "with intent to defraud" to do anything that results in either a benefit or a prejudice to another person.

In the criminal jurisdiction, the legal concept of dishonesty is itself highly complex, as it is both a subjective and objective standard: R v Ghosh [1982] QB 1053. It is subjective in terms of whether or not the defendant realised they were being dishonest, and objective in terms of whether the behaviour was dishonest according to the ordinary standards of reasonable behaviour. In the civil jurisdiction, the test is largely objective – see Royal Brunei Airlines v Tan [1995] 2 AC 378, Barlow Clowes International Ltd (in Liquidation) & Ors v Eurotrust International Ltd [2005] UKPC 37 and Ivey v Genting Casinos (UK) Ltd [2018] AC 391.

Fraud in Hong Kong

In Hong Kong, fraud commonly involves the fabrication or falsification of financial statements, which are either misrepresented or edited to omit key information. The goal is often to make a business appear more profitable than it is.

To be convincing, the fraudster usually implements a fake paper trail of underlying contracts, invoices and payment receipts. This may involve setting up a series of supposedly unrelated companies who act as the "suppliers" and "customers" of the company, giving the impression that funds are flowing through the business. Funds can even be recycled in a "round-robin" scheme, enabling fraudsters to funnel the same cash through the business over and again, falsely driving up revenue figures and enhancing the apparent value of the company.

Misappropriation of funds

Fraudsters look for ways to extract funds from businesses that pass casual scrutiny. A company might purchase fixed assets, or acquire a business at an inflated price from a connected company, or acquire a property in an obscure location making it difficult to verify independently.

Fraud through Hong Kong

Hong Kong banks are often unwitting participants in the money-laundering process, partly due to the ease and relative anonymity with which an individual can set up a company and open a bank account.

Victims fall foul of all sorts of deceptions, including email and phone scams, investment and wire frauds, even impostor scams. Common ploys include persuading the victim to think they are

transferring funds to the "police" for safekeeping, or tricking a bank into thinking it is following instructions from its customer, when in fact it is complying with instructions from an impostor. There is a constant stream of "CEO" frauds, in which unknown hackers clone company email addresses, study the written language of senior management officers and then instruct accounts executives to remit funds to bank accounts controlled by fraudsters. Cryptocurrency fraudsters trick victims into purchasing cryptocurrencies on fake crypto-trading platforms. While the victims may "see" growth of their portfolios on the fake platforms, the fraudsters have actually stolen the victims' property.

General Characteristics of Fraud Claims

The individual heads of claim that apply depend on the underlying facts. Usual causes of action that victims rely on include:

(a) fraudulent misrepresentation;
(b) deceit and fraudulent inducement;
(c) dishonest assistance (accessory liability);
(d) knowing receipt;
(e) constructive trust – arises when the recipient holds funds that they know have been paid to them by mistake;
(f) restitution on the grounds of unjust enrichment – where the unjust enrichment consists of a pecuniary benefit, the claim is known as an action for money had and received.

Claims (a) to (e) all involve some manner of knowledge or dishonesty on the part of the defendant. Claim (f) does not necessarily require the plaintiff to prove dishonesty or knowledge of the fraud on the part of the recipient. If plaintiffs can prove they have a proprietary claim (that is, applying common law and equitable rules of tracing, they can locate their funds in defendants' accounts) then, subject to any equitable defences the defendants might have, their claim may succeed without having to prove that the defendant had knowledge of the original fraud. Defendants regularly argue by way of defence that they have changed their positions in reliance upon the receipt of the plaintiff's funds or they are bona fide purchasers of the funds for value without notice of the fraud.

Other claims include breach of fiduciary duty and breach of the duties of good faith and fidelity, which may apply if the wrongdoer owes a duty to the victim, but fails to act in the victim's best interests. Conspiracy claims can be brought against those who make agreements with fraudsters with intent to injure the plaintiff. Conspiracy claims encompasses all the overt acts carried out pursuant to the conspiracy, together with the damage done to the victim (see Tempra Virginia Pido v Compass Technology Company Limited & Anor [2010] 2 HKLRD 537).

The most common relief sought for fraud is damages or restitution, although other remedies may also be sought, including injunctive or declaratory relief or an account of profits, which enables a plaintiff to recover any profits made by the defendant with the proceeds of the fraud.

1.2 Causes of Action after Receipt of a Bribe

A claimant whose agent has received a bribe may be able to avail themselves of the causes of action set out below.

In this context, an "agent" includes any person employed by or acting for another. The "principal" is the person who has granted an agent power to act on their behalf. There is not necessarily a requirement for a pre-existing legal, contractual or fiduciary obligation.

Against the Corrupt Agent – Breach of Fiduciary Duty

In Attorney General of Hong Kong v Reid [1994] 1 AC 324, the defendant abused his public office by receiving bribes in exchange for preventing criminal prosecutions. The Privy Council (on appeal from Hong Kong) held that where fiduciaries receive bribes in breach of their fiduciary duties, the law regards the fiduciaries as holding the money they received on trust for the benefit of their principals as constructive trustees. Therefore, the principal can recover the bribe as well as any property acquired with it, or any profits made through its use.

The Hong Kong courts followed Reid in Secretary for Justice v Hon Kam Wing & Others [2003] 1 HKLRD 524. In Hon Kam Wing, the courts framed the same principle a different way, holding that equity regards the bribe as a legitimate payment intended for the principal. The payment must be paid over to the principal immediately upon receipt, and equity imposes a constructive trust over the funds or property for the benefit of the principal. The UK Supreme Court confirmed the principle in Reid in FHR European Ventures LLP & Ors v Cedar Capital Partners LLC [2014] UKSC 45, and has subsequently been endorsed by the Hong Kong courts.

In addition to suing for breach of fiduciary duty, a principal or employer can also sue corrupt agents or employees for breach of their employment or service contracts.

Criminal Sanctions

The Prevention of Bribery Ordinance (Cap 201) (POBO), enforced by the Independent Commission Against Corruption (ICAC), is the primary anti-corruption legislation in Hong Kong. The POBO prohibits the offer and acceptance of bribes in both the public and private sectors and establishes a series of offences for corrupt conduct.

In the private sector, it is an offence under the POBO to offer an agent, or for an agent to solicit or accept any reward to perform any action without permission from their principal when conducting the principal's business. There is a defence available for agents acting with "lawful authority or reasonable excuse". On summary conviction, the maximum sentence for the private sector offence under the POBO is three years' imprisonment and a fine of HKD100,000. The sentences for the public sector offences under the POBO are significantly higher, the maximum being ten years' imprisonment and a fine of HKD1 million.

In addition, a person found guilty of accepting a bribe will be ordered to repay the bribe (Section 12(1), POBO).

Similarly, the court has the power to order the return of property from the convicted person to the victim direct by ordering the return of property (Section 84, Criminal Procedure Ordinance (Cap 221)).

It is technically possible to find a company liable for soliciting or accepting a bribe, though in practice most prosecutions target individuals.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Criminal and civil claims can be brought against parties who assist or facilitate fraudulent acts. In some cases, claims (in particular claims for restitution) are available even where the assisting party has no knowledge of the fraud. Some of the key parties who assist or facilitate fraudulent acts include:

- banks (inadvertently);
- account holders who receive the proceeds of fraud directly from the fraudster (often with knowledge of the fraud);

- second-level recipients (sometimes inadvertently); and
- professional service providers such as auditors and accountants.

Banks

Nowadays, banks are acutely aware of the problem of money laundering and of their commercial and social responsibility to prevent illegal transactions taking place through their customers' accounts.

When a bank is put on notice of a fraud and that its customer holds funds on constructive trust, the bank can be liable in damages for breach of that constructive trust if it subsequently moves the funds. It is therefore important to put the bank on notice of the victim's equitable proprietary interest in the funds as soon as a fraud is discovered.

The Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap 615) (AMLO) empowers the police to launch criminal proceedings against banks for ignoring or assisting in money laundering.

Account Holders

The architect of the fraud rarely holds the bank account into which the victim remits their funds. Rather, criminal rings will recruit "money mules" to set up and manage Hong Kong bank accounts to launder the proceeds of fraud. These account holders frequently live in Mainland China, beyond the jurisdiction of the Hong Kong courts and police.

Such bank accounts are usually corporate accounts held by shell companies, with nominal share capital and a single director and shareholder. The signatories are usually individuals residing on the Mainland and the account opening documents will usually state low monthly salaries. The purpose of the business is usually random and innocuous, the sale of frozen meat or trading air purifiers. These people are the pawns in the money-laundering process, not the kings and queens. Tracking them down for arrest is not just difficult, because they are outside the jurisdiction, but of limited utility when found.

Civil claims against the account holder company are limited to proprietary claims against the company (or individual bank account holder, if the account is not a corporate account) such as money had and received and unjust enrichment, in order to recover what funds are left. Where the account holder is a Hong Kong individual, the police will investigate and, if possible, press charges.

Those who knowingly assist in money-laundering operations risk being charged with a number of criminal offences, such as conspiracy under Section 159A Crimes Ordinance (Cap 200) or the common law offence of conspiracy to defraud. Civil causes of action commonly pleaded against accessories to wrongdoing include knowing receipt and dishonest assistance.

The Organised and Serious Crimes Ordinance (Cap 455) (OSCO) empowers the police to charge individuals who deal with property they know, or have reasonable grounds to believe, are the proceeds of an indictable offence. The offender is liable on conviction on indictment to a fine of HKD5 million and imprisonment for 14 years, or on summary conviction to a fine of HKD500,000 and imprisonment for three years.

The prosecution may also apply for a restraint order in order to prohibit a person from dealing with their property (Section 15, OSCO). Restraint orders can effectively freeze bank accounts holding the proceeds of fraud.

Second, Third and Higher-Level Recipients

There are usually several rounds of dissipation. First-level recipients (who are often acutely aware that the funds they have received are the proceeds of fraud), usually quickly transfer the funds on to second-level recipients, who often then transfer the funds onwards. These higher-level recipients tend to have less knowledge of the underlying fraud than those from whom they received the funds.

Victims must therefore decide whether to apply for an injunction or seek other interim relief against the second and third-level recipients to secure and recover their fund, or whether to apply for a disclosure order to find out where the funds went next. Cost considerations are paramount.

Victims may be entitled to bring a proprietary claim in equity over the funds found in the hands of the second or third-level recipients. Whether or not such claims succeed will depend on whether the recipients have a legitimate reason for receiving the funds. Recipients often argue that they received the funds pursuant to a legitimate business transaction or, as is often the case in Hong Kong, in the course of an underground currency exchange – exchanging RMB for HKD or USD. Recipients often seek to rely on the equitable defences mentioned above of bona fide purchaser for value or change of position to defeat a proprietary claim.

However, the Hong Kong courts have ruled that defendant recipients may not invoke these defences where they use underground banking to circumvent the foreign exchange laws of Mainland China (see the authors' case DBS Bank (Hong Kong) Ltd v Pan Jing [2020] HKCFI 268 and TTI Global Resources Hong Kong Ltd v Hongkong Myphone Technology Co Ltd [2021] HKCFI 306).

Professional Service Providers

Professionals engaged to carry out services such as maintaining accounts, conducting audits or calculating tax liabilities may unwittingly facilitate a fraud. They may find themselves exposed to tortious claims such as negligence and for breach of professional standards.

1.4 Limitation Periods

In general, the limitation period in Hong Kong for causes of action in both tort and contract (except contracts under seal) is six years from the date on which the cause of action accrued (Section 4 Limitation Ordinance (Cap 347) (LO)).

Where fraud, mistake or concealment has occurred, the limitation period does not begin until the fraud, mistake or concealment is discovered, or could have been discovered with reasonable diligence (Section 26(1) LO).

However, such postponement of a limitation period will not enable a claimant to recover any property, enforce a charge, or set aside a transaction affecting that property against an innocent third party who purchased the property with valuable consideration (Section 26(4) LO).

At the opposite end of the spectrum, there is no limitation period for a beneficiary to bring an action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy, or to recover trust property or proceeds from the trustee (Section 20 LO). Although there is no statutory limitation period for such action, the equitable doctrine of laches may still apply and bar such claims.

1.5 Proprietary Claims against Property

In order to recover property that has passed from hand to hand, victims must first identify and locate the property and prove that it belongs to them.

Victims may be able to trace their funds into the property and thus claim a proprietary interest.

The tracing rules developed by the English courts and applied in Hong Kong will determine if the victims can claim a proprietary interest in the property they have located. Proprietary claims are powerful because they take priority over the claims of other creditors.

Following and Tracing

Following is the process of identifying the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as a substitute for the old. Tracing is not a remedy. It is a process which, if properly followed, enables victims to identify, locate and ultimately recover their property.

Property can be traced both at common law and in equity. At common law, the right to trace ceases once the property of the victim is mixed with the property of the wrongdoer – for example, when the proceeds of fraud are deposited into a bank account with an existing credit balance. However, equity allows tracing into mixed funds.

Tracing in Equity: the Subordination Principle

Where the proceeds of fraud are mixed with other funds, victims must use the tracing rules and the principles of subordination to identify their property. Broadly speaking, the subordination principle holds that, as between the victim and the wrongdoer, the equities are unequal and favour the victim. This means that where an asset is exchanged for another, the victim can choose whether to follow the original asset into the hands of the new owner, or to trace its value in the hands of the previous owner (Foskett v McKeown). The courts have established the following general rules to assist identifying and tracing in equity.

- If the funds of two innocent parties are mixed, the "first-in, first-out" rule applies (the rule in Clayton's Case, Devaynes v Nobel (1816) 35 ER 781). This rule presumes that the funds first paid into the account are the funds first paid out.
- If the wrongdoer mixes HKD10 of their own money with HKD10 received from a victim, and then dissipates HKD10 from the mixed funds, the victim is entitled to presume that the wrongdoer has spent their own money first, and kept the victim's money intact (Re Hallett's Estate (1880) 13 Ch D 696).
- When the wrongdoer mixes HKD10 of their own money with HKD10 of a victim's money, then uses HKD10 to buy a painting and dissipates the remaining HKD10, equity deems the wrongdoer to have used the victim's money to buy the painting, so that the painting becomes the traceable proceeds of the victim's money (Re Oatway [1903] 2 Ch 356, 360).
- More recently, equity allows backward tracing (see: The Federal Republic of Brazil v Durant International Corpn [2015] UKPC 35). Backward tracing allows plaintiffs to claim funds that have left the bank account of the wrongdoer before their funds were deposited, so long as they can prove that the payment out was in anticipation of their funds being paid in.

Using these principles, victims of fraud can preserve their proprietary claim over the proceeds of the fraud even when mixed with other assets. The subordination principle can work against both the wrongdoer and recipients of transfers from the wrongdoer's account.

Trust Claims

Where a victim can establish that they are the beneficiary under a trust, they can trace the trust property into substitute assets, to expand their claim in terms of both people and property. Trust

claims and tracing claims are therefore important both procedurally and substantively.

Gains Made on the Proceeds of Fraud

Where the wrongdoer invests the proceeds of fraud successfully, the victim may be entitled to recover profits in addition to the original sum. This is particularly the case where the fraudster owes the victim a fiduciary duty.

The victim can recover the funds by applying to court for a disgorgement order, an order that forces the defendant to repay the profit gained from the fraud. The Securities and Futures Commission (SFC) has obtained numerous disgorgement orders to recover profits in cases of insider trading or securities fraud. Alternatively, the court can order an account of profits, which can then be claimed by the victim.

Vesting Orders

In recent years, a practice has developed in Hong Kong which enables victims of frauds to obtain vesting orders under Section 52(1)(e) of the Trustee Ordinance (Cap 29) (TO).

Vesting orders work as follows:

- a defendant who receives property obtained by fraud holds the property as constructive trustee for the victim;
- a credit balance in the defendant's bank account represents a debt owed by the bank to the defendant;
- the victim applies under Section 52(1)(e) TO for an order that the defendant's right to sue for and recover the sums against the bank be vested in the victim, and that the bank should transfer the sums directly to the victim;
- before making the application, the bank must be joined to the proceedings so that any vesting order binds the bank.

Although there are conflicting decisions on whether the recipients of funds obtained by fraud are "true" trustees for the purpose of Section 52 TO, the authors consider it is sensible and practical law. However, in view of the differing approaches taken by Hong Kong judges, many victims of fraud opt for the conventional approach, which is to apply for garnishee orders against the defendant's bank under Order 49 of the Rules of High Court (Cap 4A) (RHC) (discussed further below).

1.6 Rules of Pre-action Conduct

Although there is no standard pre-action protocol for fraud cases in Hong Kong, a number of pre-action steps are available to victims, which enable them to obtain and preserve evidence and prevent wrongdoers from dissipating their assets.

Damage Control: Preservation of Assets

As soon as fraud is discovered, victims should act fast to stop the funds from being dissipated. There is little point in taking recovery action if some or all of the lost funds have not been located and frozen. Victims should follow these general guidelines:

- tell the bank – immediately inform the bank and request the bank to reverse the transfer;
- tell the police – file a Suspicious Transaction Report with the Joint Financial Intelligence Unit (JFIU), the anti-money laundering, anti-terrorist financing arm of the Hong Kong Police;
- consider obtaining interim injunctive relief (see below); and/or
- consider obtaining disclosure orders, in particular Norwich Pharmacal orders.

As discussed in **1.7 Prevention of Defendants Dissipating or Secreting Assets**, victims can apply to court for injunctive relief to freeze property over which the victim has a proprietary

claim, and restrict alleged wrongdoers from dealing with their assets. These are important steps in any fraud action. Injunctions can be granted in respect of assets within the jurisdiction or worldwide, and can restrain wrongdoers from removing or disposing of assets.

Where victims of fraud successfully freeze assets, civil proceedings should be commenced to recover the funds.

Pre-action Disclosure

As discussed in **2. Procedures and Trials**, pre-action disclosure against third parties (such as Norwich Pharmacal orders) can be sought to obtain information about potential defendants, which the third party has in its possession.

Pre-action disclosure is also available against potential defendants under RHC Order 24 rule 7ARHC and Section 42 of the High Court Ordinance (Cap 4). Such orders can assist an applicant who is aware of the identity of potential suspects but does not have sufficient details to advance a claim.

Private investigators can also be engaged to identify potential defendants and available assets.

1.7 Prevention of Defendants Dissipating or Secreting Assets

There are several weapons in the legal arsenal to prevent wrongdoers from dissipating or secreting assets before a judgment is obtained against them.

Mareva Injunction

Mareva injunctions restrain defendants from disposing of their assets with the intention of frustrating a judgment later made against them. Mareva injunctions operate in personam.

Mareva injunction applications are usually made ex parte – that is, without notice to the defendant. When an application for a Mareva injunction is made ex parte, the plaintiff is obliged to make full and frank disclosure to the court (ie, tell the court everything, even the weak points of the application). Shortly after the court grants a Mareva injunction, the defendant will have an opportunity to challenge and set aside the order.

An applicant can apply for a Mareva injunction at any time before or during the litigation process, so long as the court is satisfied that:

- there is a good arguable case on a substantive claim against the defendant;
- the defendant has assets within Hong Kong;
- the balance of convenience is in favour of granting the injunction; and
- there is a real risk of dissipation or secretion of assets.

If defendants fails to comply with the terms of a Mareva injunction, they may be liable for contempt of court and ordered to pay a fine, or sent to prison.

Proprietary Injunction

If the victim wants to preserve specific assets or money over which they claim ownership, then they should seek a proprietary injunction. The threshold for obtaining a proprietary injunction is lower than obtaining a Mareva injunction as the plaintiff only has to show that there is a serious issue to be tried in relation to the assets that are in dispute. There is no need to prove that there is a real risk of dissipation of assets (Pacific Rainbow International Inc v Shenzhen Wolverine Tech Ltd [2017] HKEC 869, paragraphs 37-39).

Court Fees

Court fees are inexpensive in Hong Kong. The cost of issuing a writ is HKD1,045 and a further

fee of HKD1,045 is payable for each injunction or Norwich Pharmacal application that is made.

Cross-Undertakings in Damages

A plaintiff who seeks injunctive relief must give an undertaking to pay the defendant any damages the defendant might suffer if it later transpires that the injunction should not have been granted. This is known as a cross-undertaking in damages. Cross-undertakings are provided to mitigate the risk of the loss that may be caused by the injunction on the defendant. As a condition of granting an injunction, the cross-undertaking often must be "fortified", either by a bank guarantee or a payment into court. In cases where there is a strong arguable case of fraud, the court may not order fortification until the defendant appears before the court. Plaintiffs must fully understand the requirements of the cross-undertakings in damages before embarking on an application for injunctive relief.

The Effect on Third Parties

It is a contempt of court for any person notified of an injunction knowingly to assist in or permit a breach of the order. Any person doing so may be imprisoned, fined or have their assets seized.

Generally, the terms of an injunction will not affect or concern anyone outside Hong Kong until it is enforced or declared enforceable outside Hong Kong.

Prohibition against Debtors Leaving Hong Kong

RHC Order 44A enables a plaintiff or a judgment creditor (a party with a judgment in its favour), to apply to court ex parte for an order prohibiting a debtor from leaving Hong Kong. This ensures that the debtor cannot escape to a more judgment-proof jurisdiction.

If the judgment amount has not yet been crystallised, the court will only make the order if there is reason to believe that the debtor is about to leave Hong Kong, which would impede enforcement.

Even where the judgment amount is clear, the court will only grant the application if the prohibition is conducive to the enforcement of a judgment involving money or property.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

Mareva Injunctions

Ancillary to the order restricting the defendant from dealing with their assets, a Mareva injunction may also require the defendant to disclose what has become of the plaintiff's property, and also disclose details of all assets owned or controlled by them, whether in their own name or not.

The Hong Kong courts have the power to grant Mareva injunctions on a worldwide basis and require the defendant to disclose the nature and value of their worldwide assets.

Ancillary Disclosure Orders

The court has inherent jurisdiction to order the defendant to:

- provide a statement of their assets; and
- give discovery of documents or answer interrogatories for the purpose of ascertaining the existence, nature and location of those assets.

The standard form Mareva injunction contained in Practice Direction 11.2 refers to assets "whether in his [the defendant's] own name or not, and whether solely or jointly owned". As such, the disclosure order would include assets held in the name of the defendant, assets held

jointly with other person(s), as well as those held by nominees on the defendant's behalf.

Disclosure of assets under a Mareva injunction will normally be by affidavit. If the disclosure is unsatisfactory, the court may order a further and better affidavit and, ultimately, cross-examination on affidavit before a judge or examiner.

If a defendant fails to comply with a disclosure order, they may be liable for contempt of court and ordered to pay a fine or sentenced to imprisonment.

As discussed above, a plaintiff seeking a Mareva injunction is required to give a cross-undertaking in damages.

2.2 Preserving Evidence

Anton Piller Orders

Where it is feared that important evidence may be destroyed or suppressed, a plaintiff may obtain a search and seizure order (known as an Anton Piller order) requiring the defendant to permit the plaintiff to enter the defendant's premises and inspect, seize and remove documents relating to the underlying matter into safe custody.

Although an Anton Piller order permits a physical search of the documents at the defendant's premises, it does not amount to a search warrant and therefore no forcible entry to the premises can be made.

The application for an Anton Piller order is made ex parte (hence there is a duty to give full and frank disclosure) and is executed without notice to the defendant.

The pre-conditions for making an Anton Piller order are:

- there must be an extremely strong prima facie case;
- the potential or actual damage must be very serious;
- there must be clear evidence that the defendant has in their possession relevant materials or documents, and that there is a real possibility that they may destroy such material before any inter partes application can be made;
- the harm to be caused by the execution of the order to the defendant must not be excessive or out of proportion to the legitimate object of the order.

Even if the above conditions are satisfied, the court has residual discretion to consider whether to grant an Anton Piller order. Due to their draconian effect, Anton Piller orders are only granted in "rare and extreme cases" where it is necessary in the interests of justice and in terms no wider than is necessary to achieve the legitimate objective of the order.

A plaintiff will be required to give a cross-undertaking as to damages as part of the Anton Piller order.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

For victims who fall prey to fraudsters, the disclosure of details of the wrongdoer is crucial to identify the wrongdoer, trace and secure the lost property and make a recovery. Such disclosure orders are called Norwich Pharmacal orders and are an important tool in combatting fraud.

Norwich Pharmacal Orders (NPO)

NPOs are usually sought against banks, who inadvertently handle the stolen funds, have visibility over when and where they went next, as well as the identity of the account holder. An NPO can also be made against cryptocurrency exchanges.

The information sought by the plaintiff can range from remittance advices and bank statements to bank account opening documents disclosing the identity of the bank account holder and signatories.

NPOs do not traditionally operate extraterritorially. The Hong Kong courts will not usually require the Hong Kong branch of a foreign bank to disclose information held by the foreign branch. Questions of comity arise because the rights and duties of the foreign branch of the bank will be subject to the laws of the foreign jurisdiction, not the laws of Hong Kong. However, the recent decision in A1 and A2 v R1, R2 and R3 [2021] HKCFI 650, has expanded the scope of the operation of Norwich Pharmacal orders over bank accounts held in foreign branches of Hong Kong banks.

The case involved a cross-border fraud running into the hundreds of millions of US dollars. The applicants successfully persuaded the Hong Kong court to grant disclosure orders over the Macau branches of two Hong Kong banks. The logic was that both Hong Kong banks were regulated by the Hong Kong Monetary Authority, which requires them to ensure that their overseas branches in Macau comply with extensive record keeping requirements, including keeping various records for at least five years for the purposes of (amongst other things) tracing criminal property. On that basis, it was reasonable to assume that the banks would have in their possession documents and information relating to the relevant accounts.

The two-step process

In Asiya Asset Management (Cayman) Ltd v Dipper Trading Co Ltd [2019] HKCFI 1090, the High Court of Hong Kong directed that in non-urgent cases a plaintiff who seeks an NPO against a bank should put the bank on notice of the impending NPO application rather than proceeding ex parte.

In order to prevent the bank from tipping off the wrongdoer in relation to the legal proceedings, the plaintiff should separately apply ex parte for a gagging order against the bank, pending the hearing of the application for the NPO.

In A1 and A2 v R1, R2 and R3, the court confirmed that the two-step approach should be followed in "all save the most exceptional of cases". The process of putting the bank on notice and simultaneously obtaining a gagging order to protect the applicant and avoid the bank being put in an otherwise difficult situation of breaching its duty of confidentiality otherwise owed to its customer, provides, "the proper balancing of interest between (a) the party seeking the information […] and (b) the bank's customer". The learned judge added that "those safeguards cannot be avoided in the name of convenience or to save costs, and are not overridden by the understandable wish to obtain information as quickly and cheaply as possible".

When to apply

An NPO can be obtained before or after the commencement of proceedings.

Where there are proceedings on foot and an NPO is required to identify further wrongdoers, the order should not be sought in the existing proceedings and a separate originating summons should be issued.

Form of NPO application

The application is made pursuant to the inherent jurisdiction of the court by way of an originating summons. The originating summons should be in Form 8 or Form 10 of Appendix A to RHC (depending on the urgency of the application) and should set out the full terms of the orders sought.

The application must also be supported by affidavit evidence setting out:

- the factual background;
- if an application is made without notice, the reason for the without notice application and the urgency or secrecy of the application;
- evidence to show that the mere witness rule will not be breached (ie, that without the information an action cannot be brought);
- evidence that the respondent has been involved with or mixed up in the wrongdoing;
- specify the documents or information sought;
- the reason the respondent is believed to be in possession of the documents or information sought;
- the purpose for which the documents and information is required;
- that disclosure is necessary in the interests of justice;
- any other factors relevant to the exercise of the court's discretion; and
- set out the cross-undertaking in damages, and attach any evidence in support of the undertaking.

A draft NPO should also be prepared.

Pre-action Discovery

A party may apply for pre-action discovery against any party under RHC Order 24 rule 7A(1).

The documents sought must be shown to be "directly relevant" to an issue arising in the proceedings and necessary for disposing fairly of the cause or matter or for saving costs. A document is "directly relevant" if it is likely to be relied on in evidence by any party in the proceedings or the document supports or adversely affects any party's case. This would exclude background and "chain of enquiry" documents.

The application is made by an originating summons in expedited form (Form 10 of Appendix A to RHC) with supporting affidavit. The person against whom the order is sought must be made the defendant and served in the usual way.

Discovery against a Non-Party in an Existing Action

A party to an existing action may apply for an order for the disclosure of documents by a person who is not a party to the proceedings. The application is made pursuant to RHC Order 24 rule 7A(2). The application is made by way of summons in the action, together with a supporting affidavit.

The summons and supporting affidavit must be served on the third party personally (against whom discovery is sought) as if it were an originating process and served on all the parties to the action.

The supporting affidavit must (i) specify or describe the documents sought, and (ii) show that the person against whom the order is sought is likely to have or have had such documents in their possession, custody or power.

The test for relevance in non-party disclosure applications is the same as for other types of discovery which includes background documents and "chain of enquiry" documents in the Peruvian Guano sense.

2.4 Procedural Orders

Ex parte applications are appropriate in cases of urgency or where there are grounds for believing that defendants will take steps to frustrate the proceedings if they become aware of the application.

A number of procedural orders can be obtained on an ex parte basis including:

- Mareva injunctions and (where appropriate) ancillary disclosure orders (see **1.7 Preven-**

tion of Defendants Dissipating or Secreting Assets and **2.1 Disclosure of Defendants' Assets**);
- Anton Piller orders (see **2.2 Preserving Evidence**).

The court has jurisdiction to make ex parte orders against, for example, banks for Norwich Pharmacal discovery, but the courts have said that "it would however be hard to think of any appropriate case where it should exercise its discretion to do so on that basis" (Asiya Asset Management (Cayman) Ltd v Dipper Trading Co Ltd [2019] HKCFI 1090). The plaintiff must therefore put the bank on notice. This delay, however necessary in the interests of justice to the bank, is frustrating in the context of fraud where time is of the essence.

It should be noted that orders given ex parte will generally operate for a limited time and the substantive hearing of the matter will be adjourned to a later date. This gives the defendant an opportunity to oppose the injunction or order sought (ie, an inter partes hearing).

In all ex parte applications, there is a duty to give full and frank disclosure of all material matters. If there is any material non-disclosure on the part of the applicant, the order is at risk of being set aside.

2.5 Criminal Redress

Quite often the law enforcement and civil lawyers work in tandem to recover funds. In cases of bank wire fraud where a victim has been tricked into transferring funds into another bank account as a result of fraud, the victim usually files a report with the police. The report will contain details of the incident such as the time and date of the transfer, brief facts of the incident, name of suspect(s) and financial loss; it can be done at any police station or via the e-Report Centre.

The police will usually contact the recipient bank to see if the funds are still in that account. If the matter has been reported promptly, the fraudster may not have had the opportunity to move the funds elsewhere and they may still be in the account. If the funds have been transferred out of the bank account, or there is only a nominal amount left, the police usually obtain a warrant ordering the recipient bank to disclose the relevant bank records to identify the second-level recipients.

There has been a practice for the police to request the recipient banks to make a suspicious transaction report to the JFIU and then issue a letter of no consent (LNC) to "freeze" the funds in that account.

The LNC regime was recently challenged by judicial review in Tam Sze Leung & Ors v Commissioner of Police [2021] HKCFI 3118, in which the court decided that such "informal freezing" is unconstitutional, especially in light of Section 15 of the OSCO, which provides a procedure for applying for a restraint order.

This latest development has created uncertainty, and law has no love of uncertainty. The efficient use of the Mareva injunction jurisdiction is now even more important than before. Until the decision in Tam Sze Leung is considered by another court, victims of fraud would be wise to obtain urgent Mareva relief rather than rely on the sensible and practical "informal freezing" regime developed by the Hong Kong police.

If Tam Sze Leung is not followed, or if a legislative basis for the LNC is enacted, the LNC regime will resume its status as a powerful and practical tool in fraud cases where time is always of the essence.

Where a criminal prosecution is on foot, the defendant would usually seek to stay the civil

proceedings pending the outcome of the criminal process. Furthermore, a certificate of conviction is admissible in evidence in the civil action, so if the plaintiff has managed to locate and secure the proceeds of the fraud or other assets of the defendant, the criminal trial may aid the process of making a recovery before the civil courts.

2.6 Judgment without Trial

Default Judgment

A plaintiff may obtain judgment without a trial ("default judgment") where a defendant has failed to give notice of intention to defend and the claim falls within one of the classes of claim under RHC Order 13 rules 1-4 (ie, a claim for a liquidated sum, unliquidated damages, detention of goods, or possession of land).

Where the writ is endorsed with multiple heads of claim (eg, a proprietary claim and a claim for monies had and received), it is possible for the plaintiff to abandon the proprietary claim in order to come within the scope of RHC Order 13 rules 1-4.

The requirements for entering judgment by default are:

- that the writ has been duly served;
- that the defendant has not filed an acknowledgment of service within the time required, or an acknowledgement has been returned but contains a statement that the defendant does not intend to defend;
- proof of service of the writ by way of an affidavit of service; and
- that in a claim for the recovery of land, no relief is claimed of the nature specified in RHC Order 88 relating to mortgage transactions.

The above requirements must be complied with strictly, otherwise the judgment is irregular and may be set aside.

Where the plaintiff is seeking declaratory relief or other relief, which does not fall within RHC Order 13 rules 1-4, and the defendant fails to serve its defence, the plaintiff can apply for default judgment under RHC Order 19 rule 7.

Where the default judgment sought involves a declaration, the court retains discretion to decide whether to grant such relief, and will only grant declaratory relief where there is a genuine need and justice might not be done if such relief was denied.

Where an acknowledgement of service is filed, the plaintiff must serve a notice in writing of their intention to enter judgment in default of the filing of a defence not less than two clear days before entering judgment (RHC Order 19 rule 8A).

Summary Judgment

Summary judgment refers to a judgment obtained without a full trial on the ground that the defendant has no defence to the claim. The procedures for applying for summary judgment are provided in RHC Order 14. Summary judgment is available to most actions begun by writ and, since 1 December 2021, it is now available for claims based on allegation of fraud.

The application for summary judgment should be made as soon as possible after notice of intention to defend has been given and after a statement of claim has been served. The application is made by affidavit, which must (i) verify the facts upon which the claim is made, and (ii) state that in the deponent's belief there is no defence to the claim.

Where a defence has been served, the affidavit should address the allegations made in the defence and show why, notwithstanding the defence, the plaintiff still believes that there is no defence to the claim.

The application must be made promptly, as delay may be a reason for refusing summary judgment.

2.7 Rules for Pleading Fraud

It is well established that fraud or dishonesty must be distinctly alleged and sufficiently particularised in pleadings. This does not mean that the words "fraud" or "dishonesty" must necessarily be used. However, the pleadings must set out the primary facts that are relied upon to justify any alleged inference of fraud or dishonesty. It is not open to the court to infer dishonesty from facts that have not been pleaded.

The court has inherent jurisdiction to strike out allegations of fraud made without proper evidence. Lawyers also have a professional duty to ensure that there is clear and sufficient evidence to support a pleading of fraud or dishonesty.

2.8 Claims against "Unknown" Fraudsters

Rapidly developing technology is leading to increasingly sophisticated cyber-attacks and fraud, often conducted in foreign jurisdictions and behind a veil of anonymity. The English courts are innovating in line with these developments, and in 2018 granted the first worldwide freezing order against "persons unknown". In addition, the courts have permitted service of freezing orders by way of Facebook and WhatsApp messenger.

The Hong Kong courts have granted injunctive relief against persons unknown, albeit not yet in the context of fraud. In 2016, the Hong Kong courts made an order restraining the disclosure of two audio recordings made by "persons unknown" of a meeting of the Council of the University of Hong Kong. In 2018, an interim injunction was awarded to restrain "persons unknown" from busking and carrying out other outdoor performance activities in a shopping arcade in Hong Kong.

A case has not yet come before the Hong Kong courts in relation to unknown fraudsters, but the courts have already shown that they are committed to adapting in order to protect the rights of the victim plaintiff. If and when an application is made against "fraudsters unknown", the decision of the English courts will be highly persuasive.

2.9 Compelling Witnesses to Give Evidence

A witness in Hong Kong can be compelled to attend court to give evidence by a writ of subpoena. A subpoena can be issued either to obtain oral evidence at trial (subpoena ad testificandum) or to obtain documents (subpoena duces tecum).

The writ of subpoena must be in prescribed form (No 28 or 29 in Appendix A of RHC). Before a subpoena can be issued, a praecipe must be filed in the High Court Registry together with a note from a judge or master authorising the issue of the subpoena.

Since a subpoena is an order of the court, deliberate failure to obey the order by non-attendance or non-production of documents may amount to contempt, and the intended witness may be liable to a fine or imprisonment.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

An important feature of any fraud claim is the extent to which the knowledge of directors and

officers of a company can be attributed to the company.

The starting points are the "primary rule" and the general rules of agency. The "primary rule" looks at the company's articles of association or company law statutes and identifies whose decisions bind the company. For example, the articles of the company may state that the decision of the board of directors or the majority of shareholders is treated as the decision of the company for a specified purpose. In such a case, the knowledge of the board or the majority of shareholders will be attributed to the company.

These starting points are subject to any special rules of attribution that the court may fashion based on the particular context (eg, where a particular statutory provision requires such rules so that it is not frustrated) and, importantly in fraud cases, to the "fraud exception".

The special rules of attribution will depend on the facts of the particular case and the language and legislative purpose of the relevant statutory provisions (Moulin Global Eyecare Trading Limited (in liquidation) v The Commissioner of Inland Revenue (2014) 17 HKCFAR 218).

In deciding whether the "fraud exception" applies, the Hong Kong Court of Final Appeal in Moulin Global distinguished the following situations.

- Where a company commences legal action against its directors and officers for wrongdoing, which caused loss to the company, the knowledge of the director or officer is not attributable to the company because it would be "absurd and unjust to permit a fraudulent director or employee to be able to use his own serious breach of duty to his corporate employer as a defence".
- Where a third party takes legal action against the company for the fraudulent conduct of a director or employee, the knowledge of the director or officer is attributable to the company, because the company must take responsibility for such fraudulent conduct, even if the company may be a victim in a way.

3.2 Claims against Ultimate Beneficial Owners

Common Law

It is well established that a company is a separate entity from its beneficial owners. Beneficial owners are often said to exist behind a "corporate veil" and are protected from liability for the actions of the company.

However, in certain circumstances, the corporate veil can be pierced so that the actions of a company are treated as the actions of its shareholders. When the company has been used as a vehicle for fraud, it is possible to pierce the corporate veil and bring claims against the beneficial owners and directors of the company. The plaintiff has to establish the following in order to pierce the corporate veil (see VTB Capital plc v Nutritek International Corp [2012] EWCA Civ 808):

- the company is involved in some impropriety linked to use of the company structure to avoid or conceal liability; and
- the wrongdoer controls the company at the time of the relevant transaction.

Normally, the court will pierce the corporate veil only when there is clear evidence of fraud. It is legitimate to use a limited liability company as a vehicle of business in order to minimise the risk of business (Bakri Bunker Trading Co Ltd v Owners and Persons Interested in Ship Neptune [1986] HKLR 345; China Ocean Shipping Co v Mitrans Shipping Co Ltd [1995] 3 HKC 123).

Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (CWUMPO)

If, in the course of the winding up of a company:

- any person carries on the business of the company with an intent to defraud creditors, or for any fraudulent purpose, the court may find such a person personally responsible for all or any of the debts or other liabilities of the company (Section 275, CWUMPO);
- any person misapplies or retains any money or property of the company, they may be compelled to repay or restore the money or property (Section 276, CWUMPO).

For example, if the directors transferred the assets of the company to themselves in the course of the company's winding up, the directors may be liable under Section 276 of CWUMPO.

3.3 Shareholders' Claims against Fraudulent Directors

Shareholders can bring claims against fraudulent directors under both common law and statute.

General Principles

Where directors have breached their duties owed to the company, or where any person has infringed any rights of the company, the general rule is that the proper plaintiff is the company itself (Foss v Harbottle (1843) 67 ER 189).

Where both the company and a member have a cause of action arising from the same conduct, but the member's loss is not a separate and distinct loss, but is reflective of the company's loss, the member is not entitled to bring a personal action to recover that reflective loss (Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204). However, the UK Supreme Court has since held that this rule is limited to claims by shareholders which, as a result of actionable loss suffered by their company, the value of their shares or of the distributions they receive as shareholders, has been diminished (Marex Financial Ltd v Sevilleja [2020] 3 WLR 255 (UKSC)). Marex has been mentioned in recent Hong Kong judgments but has so far not been directly applied. The authors consider Marex is good law and should be applied in Hong Kong.

Common Law Derivative Action

Under common law, a shareholder can commence a derivative action in relation to a fraud on the company (Edwards v Halliwell [1950] 2 All ER 1064, 1067). The shareholder has to establish that:

- the wrongdoers have committed fraud on the company; and
- the wrongdoers are in control of the company – the element of control is often stated to be control of voting power in the general meeting (Burland v Earle [1902] AC 83, 93-94).

Statutory Derivative Action (Pt 14, Division 4, Companies Ordinance)

With the permission of the court, a shareholder can commence a statutory derivative action on behalf of the company in respect of misconduct committed against the company (Section 732, Companies Ordinance). "Misconduct" means "fraud, negligence, breach of duty, or default in compliance with any Ordinance or rule of law" (Section 731, Companies Ordinance).

The court may permit the shareholder to commence a derivative action if it is satisfied that:

- on the face of the application, it appears to be in the company's interests that leave be granted;
- there is a serious question to be tried;
- the company has not itself brought the proceedings; and
- the shareholder has served a written notice on the company in accordance with Sections

733(3)-733(4) of the Companies Ordinance (unless the requirement has been dispensed with by the court pursuant to Section 733(5)).

Statutory injunction (Pt 14, Division 3, Companies Ordinance)

Sections 728-730 of the Companies Ordinance allow certain individuals, including shareholders, the right to seek an injunction to restrain breaches of the Companies Ordinance or breaches of fiduciary duties by directors.

Shareholders and creditors of the company whose interests have been, are or would be, affected by the conduct can seek an injunction under Section 729 of the Companies Ordinance.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

Joinder of Parties

Under RHC Order 15 rule 6, the court can add any of the following persons as a party to an action:

- any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute can be completely determined; or
- any person with whom there may exist a question connected to any relief or remedy claimed by a party to the action, which the court considers it just and convenient to determine as between the person and that party as well as between the parties to the cause or matter.

Extraterritorial Jurisdiction

There are generally three distinct ways for a civil plaintiff to establish the jurisdiction of the Hong Kong courts:

- submission to jurisdiction – jurisdiction of the Hong Kong court may be established by demonstrating that the defendant has, or is deemed to have, voluntarily submitted to it;
- service of process on the defendant within Hong Kong;
- service of process on the defendant outside Hong Kong – in most cases, leave from the court must be obtained by applying ex parte upon affidavit evidence.

The power of the Hong Kong courts to exercise extraterritorial jurisdiction is subject to RHC Order 11, which sets out the requirements for service of process out of the jurisdiction.

Service of Writ Out of the Jurisdiction

If a foreign party is added as a defendant to a claim, the plaintiff has to seek leave from the court under RHC Order 11 to serve the writ out of the jurisdiction. An application for leave is typically made ex parte with an affidavit in support. The plaintiff must satisfy the court that the claim falls within one or more of the "gateways" under RHC Order 11 rule 1(1) (or at least a good arguable case that it does), and that there is a serious issue to be tried on the merits of the underlying claim. The court will also consider whether Hong Kong is the appropriate forum for the trial of the action.

One possible gateway is RHC Order 11 rule 1(1)(c). It applies to the situation where, in an action begun by writ, the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto.

The following conditions have to be met on affidavit for a successful application under RHC Order 11 rule 1(1)(c):

- genuine proceedings are properly commenced and pending within the jurisdiction

against another "anchor" defendant (either in or outside Hong Kong) that involve a real issue, which the plaintiff may reasonably ask the court to try;
- the proposed defendant is a "necessary" or "proper" party thereto;
- that the Hong Kong court is the appropriate forum in which the case should be tried, but bearing in mind the action already pending here.

Another important gateway in this area of the law is RHC Order 11 rule 1(1)(p), which provides that service of a writ out of the jurisdiction is permissible where: "the claim is brought for money had and received or for an account or for other relief against the defendant as a constructive trustee, and the defendant's alleged liability arises out of acts committed whether by him or otherwise, within the jurisdiction."

Separately, RHC Order 69 sets out the requirements for service of process within Hong Kong from a country or place outside Hong Kong.

5. ENFORCEMENT

5.1 Methods of Enforcement

Enforcement of Criminal Offences

The principal authorities that investigate criminal offending in Hong Kong are:

- the Hong Kong Police Force;
- the Commercial Crime Bureau;
- the Cyber Security and Technology Crime Bureau and Organised Crime and Triad Bureau;
- the JFIU is a joint operation of the Police and the Hong Kong Customs & Excise Department (anti-money laundering and terrorist financing); and
- the Securities and Futures Commission (SFC) (insider dealing offences and market abuse).

These authorities, in conjunction with the Department of Justice, prosecute individuals and corporates suspected of committing an offence, and the Hong Kong courts decide the question of guilt. The burden of proving the commission of the offence by the defendant is on the prosecuting authority and the standard of proof is "beyond reasonable doubt".

Enforcement of a Judgment or Order

Garnishee order

Where a plaintiff has obtained a judgment in their favour for a specified sum (usually the amount received by the defendant in the course of the fraud), the defendant becomes a judgment debtor and the plaintiff can apply to court for a garnishee order. A garnishee order requires a person who owes the judgment debtor a debt to repay that debt directly to the judgment creditor. A typical garnishee order requires the judgment debtor's bank to pay the judgment debtor's debt directly to the judgment creditor.

The garnishee order is obtained in two stages. The first is an ex parte paper application. The judgment creditor files a draft garnishee order to show cause, supported by an affidavit explaining why the order should be granted. Once granted, a sealed copy must be served on first the garnishee bank and then the judgment debtor. The funds in the judgment debtor's account will be frozen as soon as the bank is aware of the garnishee order to show cause. Following a specified period of time (which gives the judgment debtor a final chance to object and apply to have the order set aside), there will be a short hearing at which, all going well, the court will make the garnishee order absolute. Once the garnishee order absolute is served on the bank (or other paying party), the bank should release the funds to the judgment creditor.

Charging order
A charging order is a charge on an interest in land or over securities. In deciding whether to make a charging order, the court considers the circumstances of the case as well as the personal circumstances of the debtor, and whether the creditor or the debtor would be unduly prejudiced by the making of the order.

A court would not make a charging order on an asset of considerable value in respect of a relatively small debt.

The courts have also held that a charging order should not be made when the court is aware of the fact that the debtor is, or is likely to turn out to be, insolvent, and an exercise of the court's discretion in making a charging order would give one creditor an advantage over others.

If the judgment debtor does not satisfy the judgment after the charging order has been made, the judgment creditor can enforce the charging order by selling the charged land or securities.

Writ of execution
A writ of execution directs a bailiff to seize goods, chattels and other property of the judgment debtor to satisfy the judgment debt. The judgment creditor has to issue a writ of execution of the type it requires (eg, a writ of fieri facias) to obtain the judgment debt, or a writ of possession, to obtain repossession of land, or a writ of delivery, for the delivery of goods. The bailiff executes writs of execution.

Examination order
An examination order is an order for cross-examination of the judgment debtor on oath in open court. Usually the Registrar (or their appointee) will carry out the cross-examination.

The judgment creditor can apply ex parte for an examination order, which, if obtained, should be served personally on the judgment debtor.

Winding-up petition/bankruptcy
The most common ground to present a winding up petition (in the case of a debt unpaid by a company) or instigate bankruptcy proceedings against an individual is to show that the judgment debtor is insolvent. The best way to do that is to issue a statutory demand requiring payment of the undisputed debt within 21 days. If the judgment debtor fails to pay the debt within 21 days, the petition can be presented.

If the court grants the order, a liquidator or trustee in bankruptcy will be appointed and empowered to look into the assets and predicament of the judgment debtor.

Winding up and bankruptcy are class remedies, which benefit the whole body of creditors. Following the adjudication of its proof of debt by the liquidators, the petitioning creditor will rank pari passu with all other creditors of the same class and be paid a dividend from the assets of the company upon the winding up.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

Protection against self-incrimination is a fundamental tenet of the common law. In Hong Kong, the right is enshrined in the Hong Kong Bill of Rights Ordinance. When invoked, no adverse inference can be drawn from remaining silent. This is because it is unfair for a person to have the right to remain silent, only for their silence to be put against them at trial.

However, the right not to self-incriminate is abrogated in some specific circumstances.

In 2012, the Hong Kong Court of Final Appeal held that a person who was not a suspect was not allowed to invoke their right to silence in the course of an investigation conducted under the POBO. Subject to a limited use order, the witness was required to provide the information and documentation requested.

In 2019, the courts clarified the position on self-incrimination in relation to Section 181 notices from the SFC (a Section 181 notice is a preliminary notice for obtaining trading information). The judgment of the court made it clear that claiming privilege against self-incrimination can amount to a reasonable excuse for non-compliance under Section 181. This is significant because, on average, the SFC issues around 8,000 of these letters of enquiry per year.

That said, the privilege will not usually apply where the documents requested by the SFC are "pre-existing materials [that] have existence independent of the will" of the person claiming the privilege. The privilege may only extend to "materials created in response to the investigation".

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

Privilege will not protect anything said or done to further a crime.

If communications that would otherwise be protected by legal professional privilege are made to further fraud and if the party seeking the disclosure can establish a strong prima facie case of fraud, then the disclosing party cannot assert legal professional privilege. To trigger the exception, there has to be a definite charge of fraud or illegality. Fraud here is used in a relatively wide sense, encompassing general iniquity.

Therefore, legal professional privilege does not extend where, for example, a solicitor is consulted on how to carry out an illegal act. In an action against ex-employees for conspiracy to injure, breach of the duty of fidelity and breach of confidence, discovery was ordered over documents between the solicitors and the defendant clients relating to setting up companies. It was irrelevant whether or not the solicitor was aware of the conspiracy (Gamlen Chemical Co (UK) Ltd v Rochem Ltd (No 2) 1983 RPC 1).

The courts are entitled to look at the document in question, to determine whether privilege should be upheld.

However, the courts are very reluctant to deprive a party of legal professional privilege on an interlocutory application. Each case is judged on its facts. The courts will strike a balance between legal professional privilege considerations and the gravity of the fraud charge.

It is worth also noting that privilege is not lost if the purpose of the document was to ask, or warn against, the results of contemplated acts (Butler v Board of Trade [1971] Ch 680).

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

The general objective of punitive or exemplary damages is to punish, deter and denunciate (Allan v Ng & Co (a firm) [2012] 2 HKLRD 160). It is not therefore possible to claim punitive or exemplary damages as a form of compensation.

There are three situations where punitive or exemplary damages may be awarded (Rookes v Barnard [1964] UKHL 1):

(a) oppressive, arbitrary or unconstitutional actions by the servants of government;
(b) where the defendant's conduct was "calculated" to make a profit for himself or herself;
(c) where expressly authorised by statute.

A case of fraud may fall within category (b) above, and therefore punitive or exemplary damages may be awarded.

It is important to note that exemplary damages are a remedy of last resort. Exemplary damages will be awarded if, but only if, the remedies available to the court are inadequate to punish and deter the defendant (Allan v Ng & Co (a firm)).

Awards of exemplary damages should in general be moderate (Allan v Ng & Co (a firm)).

As a matter of procedure, the plaintiff must specifically plead their claim for exemplary damages, together with the facts on which they rely (RHC Order 18 rule 8(3)).

7.2 Laws to Protect "Banking Secrecy"

Banking Secrecy

In Hong Kong, a bank owes a qualified duty of secrecy to its customer.

Common law duty

The leading case on banks' duty of secrecy is Tournier v National Provincial and Union Bank of England (1924) 1 KB 461, where Atkin LJ defined the extent of the duty as going beyond the balance in the account, extending at least to all transactions that go through the account, and any securities. He added that the duty extends to information obtained from other sources than the customer's account, if the information was obtained as a result of the relationship between banker and customer. The duty extends beyond the closure of the account.

The duty of confidence that a bank owes to its customer is not absolute but qualified. The qualifications can be classified as follows:

- where disclosure is under compulsion by law;
- where there is a duty to the public to disclose;
- where the interests of the bank require disclosure; and
- where the disclosure is made by the express or implied consent of the customer.

Official secrecy – Banking Ordinance (Cap 155)

Section 120 of the Banking Ordinance provides for the boundaries of a bank sharing customer information to regulators.

Section 120(5) provides that the duty of secrecy does not apply to certain circumstances, such as disclosure of information of criminal proceedings, disclosure to the ICAC and SFC, and disclosure for anti-money laundering and counter-terrorist financing purposes.

Code of Banking Practice

The Code of Banking Practice (the Code) is issued jointly by the Hong Kong Association of Banks (HKAB) and the Deposit Taking Companies Association (DTCA), and is endorsed by the Hong Kong Monetary Authority (HKMA). Authorised institutions must observe the Code in dealing with their customers. Failure to observe the Code could lead to disciplinary action by the HKMA.

The Code sets out certain requirements to increase the security of customer information. For example, the Code provides guidance on keeping customers' affairs private and confidential and electronic banking services.

Personal Data (Privacy) Ordinance (Cap 486)
Additionally, a bank is required to keep certain customer information private under the Personal Data (Privacy) Ordinance (Cap 486).

Seeking Evidence in Fraud Claims

Banker's record – Evidence Ordinance (Cap 8)
A court order is required to compel the production of a banker's record as evidence in court if the bank is not a party to the proceedings (Section 20(2), Evidence Ordinance).

On the application of any party to any proceedings, the court may order that the party has the right to inspect and take copies of any entries in a banker's record for any of the purposes of such proceedings (Section 21, Evidence Ordinance).

"Banker's record" includes: (i) any document or record used in the ordinary business of a bank; and (ii) any record so used that is capable of being reproduced in a legible form (Section 2, Evidence Ordinance).

Bankers Trust orders
A Bankers Trust order directs a bank to disclose certain information. The information disclosed are wide-ranging and the court may order disclosure of correspondence, cheques and banking records. A Bankers Trust order is usually made against banks or professional advisers who either hold the misappropriated funds or through whom those funds have passed. Following the two-step process set out in Asiya Asset Management (see **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**), applications for Bankers Trust orders should be made on an inter partes basis whenever possible.

Recently, the courts have made Bankers Trust orders against cryptocurrency exchanges as well (see, for example, Fetch.ai Ltd & Anor v Persons Unknown Category A & Ors [2021] EWHC 2254 (Comm)).

Applications for Bankers Trust orders can be made in aid of an interlocutory application for a Mareva or Anton Piller order. Similarly, Bankers Trust orders are sometimes granted where a plaintiff claims a proprietary interest in assets held by the defendant.

Applicants may be required to give an undertaking in damages, to pay the bank's expenses, and to use the documents only for the purpose of tracing.

Indictable offences
A bank can be compelled to disclose customer information by virtue of a disclosure notice under the Police Force Ordinance (Cap 232) (PFO). Section 67(1) of the PFO gives the Commissioner of the Police the power to order the disclosure, provided that the Commissioner has good reason to suspect that an indictable offence has been committed, and it is useful for the purpose of investigating such offence or apprehending the offender.

Organised and Serious Crimes Ordinance, anti-money laundering and anti-terrorism
A bank can also be compelled to disclose customer information under the Organised and Serious Crimes Ordinance (Cap 455) (OSCO).

Under Section 25A(1) of the OSCO, if a person (including therefore a banker) knows or suspects that property represents the proceeds of an indictable offence, they must disclose the evidence of that knowledge or suspicion, to an authorised officer.

In addition, the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap 615) imposes statutory customer due diligence and record-keeping obli-

gations for financial institutions, including banks. This impacts upon the banker's duty of confidentiality. For example, banks are required to identify transactions that are complex, unusually large in amount or of an unusual pattern and/or have no apparent economic or lawful purpose, by examining the background and purposes of those transactions and setting out its findings in writing (Section 5(1)(c) of Schedule 2).

7.3 Crypto-assets

Hong Kong law treats crypto-assets as property; see Yan Yu Ying v Leung Wing Hei [2021] HKCFI 3160. The position is the same under English law (AA v Persons Unknown [2019] EWHC 3556 (Comm)).

It is possible to obtain both proprietary and Mareva injunction relief in Hong Kong in relation to crypto-assets. In Yan Yu Ying v Leung Wing Hei, the plaintiff obtained a proprietary injunction to restrain the defendant from dealing with Bitcoin and assets up to the value of HKD328,363,760. The court granted the proprietary injunction, but refused to grant the Mareva injunction on the balance of fairness. However the court did not rule out the possibility of granting a Mareva injunction in relation to crypto-assets in a suitable case in the future.

The task of tracing cryptocurrencies can be straightforward because blockchain identifies cryptocurrency transactions with a transaction hash, which is a unique string of characters given to every transaction verified by and added to the blockchain. In addition, the senders and recipients of cryptocurrencies are identified by their wallet addresses.

However, problems with tracing cryptocurrencies can arise when fraudsters mix multiple sources of funds for large and random periods, and then redirect the currencies to their destination addresses. Defences of change of position and bona fide purchaser for value without notice of the fraud regularly arise.

It is possible to obtain NPOs against cryptocurrency exchanges based in Hong Kong. A cryptocurrency exchange served with an NPO can be compelled to provide information, including the source and destination of the subject cryptocurrencies, and customer information and IP addresses of the wallet operators. This information will assist a plaintiff to bring both personal and proprietary claims. Applying Fetch.ai Ltd & Anor v Persons Unknown Category A & Ors [2021] EWHC 2254 (Comm), the authors have obtained Bankers Trust orders and NPOs against cryptocurrency exchanges registered abroad, but operating in Hong Kong.

Holman Fenwick Willan (HFW) is recognised internationally as an industry leader advising on all aspects of aviation, commodities, construction, energy and resources, insurance and reinsurance, and shipping. The Hong Kong office has a stellar record in representing clients in all forms of disputes, both regionally and internationally. The fraud and insolvency practice provides a full-service onshore capability in Hong Kong. It has a long tradition of success acting for the victims of fraud, banks, local and international businesses and directors. The practice has particular expertise in dealing with trust matters and shareholder disputes in offshore financial jurisdictions. The type of fraud work undertaken includes multi-jurisdictional fraud claims; locating, securing and recovering the proceeds of fraud; obtaining Norwich Pharmacal orders and injunction orders of all kinds, including Mareva, proprietary, mandatory and anti-suit injunctions, stop orders and committal orders; and negotiating settlements with fraudsters – which is an art!

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

Fraud has been expressly defined in various statutes such as the Companies Act, 2013 ("the Companies Act") and the Indian Contract Act, 1872 ("the Contract Act"). However, in all cases, a basic characteristic of fraud claims is that there must be an intention to deceive another person, take undue advantage of them, or to injure their interests. Generally, a dishonest concealment of facts amounts to fraud as much as overt actions or the making of false statements. In fact, the occurrence of a loss is also not needed to set up a case of fraud. Specifically, under the Companies Act, an abuse of position with intent to deceive is also covered under fraud.

There is a more nuanced definition of fraud under the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003, made under the Securities and Exchange Board of India Act, 1992 ("the SEBI Act"), which deals with fraud committed while dealing in securities. This definition includes any act, expression, omission or concealment committed, whether in a deceitful manner or not, by a person while dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any wrongful gain or avoidance of any loss.

Under Indian law, the general penal statute, ie, the Indian Penal Code, 1860 ("the IPC") does not define fraud as a distinct offence. However, it provides for fraudulent intention as an ingredient of various specific offences. The IPC defines "fraudulently" to mean with an intent to defraud.

Dishonest misappropriation of property, or dishonest conversion of a property for one's own use, is also a penal offence. This offence takes the form of "cheating" where, by deceitful or fraudulent means, someone induces a person to deliver a property to himself. On the other hand, where a person has been entrusted with this property and dishonestly or illegally misappropriates or converts it for his own use or benefit, this comprises the offence of "criminal breach of trust".

It is to be noted that not only the commission of a fraudulent act per se, but any agreement or conspiracy to enter into a fraudulent act, entered into by two or more persons, is also penalised under the IPC, regardless of whether the actual fraud is committed.

Paying illegal gratification (corrupt payments) to a public or a government official, is punishable under a special statute, the Prevention of Corruption Act, 1988 (the "PC Act"). The PC Act penalises a government servant as well as any person or organisation (including its officers) who makes the corrupt payment to the public official to obtain a benefit. The term "payments" is defined very broadly under the Act, and includes getting any undue advantage, whether pecuniary or otherwise. Likewise, "public servant" has been defined broadly to include officials working in corporations controlled or aided by the government, and anyone performing a public duty (such as bank officials, irrespective of whether they are employed by the government). There is no de minimus standard for the quantum that would qualify as a bribe.

1.2 Causes of Action after Receipt of a Bribe

The PC Act

As mentioned in **1.1 General Characteristics of Fraud Claims**, where the person receiving any illegal gratification, monetary or otherwise, in return for an undue advantage to a person or organisation providing the bribe is a public servant, the offence is covered under the PC Act.

Claims relating to bribery in India can only be brought against public servants, and persons or organisations who bribe or attempt to bribe such public servants. Receipt of a bribe by an agent of a claimant in general is also punishable under the PC Act where such a bribe has been received to induce a public servant to perform his public duty improperly or dishonestly.

The claimant in that case may proceed to file a complaint with specialised investigative agencies such as the Central Bureau of Investigation ("CBI"), or the state Anti-Corruption Bureau. However, the claimant may not be able to get the CBI to act on a complaint, and the CBI may treat the complaint as information upon which it initiates its own investigation.

The Companies Act

Under the Companies Act, it is the directors' responsibility to create adequate internal financial controls that enable the prevention and detection of fraud and other irregularities within a company. Such internal controls include the setting up of channels for reporting of the receipt of a bribe by an agent. In the event of a failure to do so, various recourses are available under the Companies Act, such as prosecution for fraud, an action for disgorgement pursuant to a class action (in the case of egregious default), or an action for unfair prejudice or oppression and mismanagement.

A statutory auditor of the company is obliged to report fraud if he detects that a bribe has been received by a company official. The auditor is obliged not only to detect any fraud in the company but also to ensure that the company takes satisfactory action to remedy it, failing which the auditor is obliged to report it to the Central Government. In the event that the auditor fails to do so, he is exposed to various legal liabilities, as explained in **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts**.

The company may also pass a Special Resolution that its affairs are required to be investigated and inform the Serious Fraud Investigation Office ("SFIO") constituted under the Companies Act.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

The IPC

In India, abetment of an act is defined as providing any instigation or aid to facilitate the commission of an offence, and is a punishable act in itself, regardless of whether the intended offence is committed. It is important to note that the definition of abetment in India also includes engaging with one or more person(s) in any conspiracy for committing a fraudulent act, if any act or omission takes place in pursuance of that conspiracy. Parties who conspire towards, assist in or facilitate such fraudulent acts are punished with the same punishment as though they had committed the intended offence. The claims for abetment would extend to situations wherein a party's assistance towards the commission of a crime consists of receiving or harbouring fraudulently obtained assets, but only if the party had knowledge that the assets were fraudulently obtained.

The Companies Act

In the event that the statutory auditor of the company fails to perform his duties, or does not detect fraud despite it being brought to his notice, the auditor may face various actions such as a class action for disgorgement, regulatory action including disbarment and criminal prosecution for fraud. In addition to other actions, he may also be removed from his position through a government action for removal, and may be debarred for a period of five years if he is found to be guilty of directly or indirectly having acted in a fraudulent manner or having colluded in a fraud by the company, its officers, or its directors.

The Prevention of Money Laundering Act, 2002 ("the PMLA")

Under the PMLA, knowingly receiving, possessing or concealing such fraudulently obtained property may constitute the crime of money laundering. Such property is liable to be classified as a "proceed of crime" under the Act, and can also be attached during the investigation stage itself.

1.4 Limitation Periods

In India, the Limitation Act, 1963 ("the Limitation Act") provides that the period of limitation in the case of fraud commences from the time the fraud is actually discovered, or could have been discovered using reasonable measures, by the victim.

Criminal Proceedings

In general, the limitation period of an offence is dependent on the period of imprisonment prescribed for a particular offence. For example, if an offence is punishable with imprisonment for up to three years, it must be taken cognisance of by a judge within three years from the commission of the offence. In the case of offences relating to fraudulent acts, the limitation period would depend upon the specific offence made. Moreover, for offences punishable with imprisonment of more than three years, no limitation period has been prescribed. Thus, a court can take cognisance of the offence of cheating and dishonestly inducing delivery of property (punishable with up to seven years' imprisonment), or the forgery of a valuable security or will (punishable with up to ten years' imprisonment) at any point in time. However, criminal courts have inherent powers to condone delay where the delay has been properly explained or it is in the interests of justice to do so.

Civil Proceedings

As regards civil claims, the period of limitation is specified under the schedule to the Limitation Act. The periods differ depending upon the causes of action; however, the cause of action would commence from the time that the fraud is discovered or was discoverable.

1.5 Proprietary Claims against Property

The Contract Act

Under the Contract Act, where an agreement is deemed to be void or voidable on account of fraud, the person who has received an undue advantage under such an agreement is bound to restore it, or make suitable compensation to the aggrieved party. However, where restoration of such property is not possible on account of conversion of the proceeds of fraud, a claimant will still be entitled to compensation on account of the loss that he may have suffered.

The Insolvency and Bankruptcy Code, 2016 ("the IBC")

The IBC provides for various processes in order to claw back or disgorge any undue benefit received by any creditor or related party of a corporate debtor. Section 66 provides that during the liquidation process or the corporate insolvency resolution process, where any resolution professional or liquidator finds that the corporate debtor has conducted his business with intent to defraud creditors or for any fraudulent purpose, the adjudicating authority may direct any persons (including directors or partners) who were knowingly parties to it to make such contributions to the assets of the corporate debtor as it may deem fit.

The obligation is also cast on the resolution professional to claw back such preferential transactions (if they qualify for the conditions in Section 43) or undervalued transactions (if they qualify for the conditions in Section 46) by making an application under Section 44 or 45 of the IBC, respectively. However, such processes only allow these transactions to be restored to a corporate debtor and not a claimant. Any person

applying for such transactions to be reversed will be entitled to proceeds from such transactions in accordance with the resolution plan or the scheme provided for the distribution of assets in liquidation under Section 53 of the IBC.

The Insolvency and Bankruptcy Board of India ("the IBBI") has also been given powers to direct "any person" who has made an unlawful gain or averted loss by contravening the IBC to disgorge an amount equivalent to such unlawful gain. The IBBI has also been given the power to take appropriate steps in order to restitute the loss suffered by such a person on account of this contravention, if such a person is identifiable and the loss suffered is directly attributable to the contravener.

The CrPC

Under the CrPC, the police are also empowered to seize any property or evidence that they suspect may have been involved in any fraudulent act. Where the claimant seeks to establish his proprietary rights in a criminal proceeding to recover property, he may make a claim before the court. The court can in that case order the restoration of property after the end of the trial. Such release and restoration of property may be without conditions or with conditions that the claimant shall execute a bond, with or without securities, to the satisfaction of the court.

The PMLA

As stated in **1.3 Claims against Parties who Assist or Facilitate Fraudulent Acts**, under the PMLA, "proceeds of crime" are defined widely and constitute not only the property obtained through fraudulent activities, but also its equivalent value. Therefore, even if the proceeds of fraud have been mixed with other funds, the value of these proceeds may be identified under the enactment. This is important because it recognises that the tainted property may no longer be available.

The Directorate of Enforcement ("the ED"), which is the investigating agency under the PMLA, is entitled to attach/freeze such properties derived or obtained, directly or indirectly, from the proceeds of crime. If upon completion of trial the offence of money laundering is proved, such property stands confiscated by the Central Government and vested free from all encumbrances. If, however, the trial results in an acquittal, the property is released to the persons entitled to receive it. Regardless, the special court trying the offence of money laundering is entitled to direct the Government to restore the confiscated property to a bona fide claimant, who may have suffered a loss due to the offence of money laundering, at any point after or during the trial.

1.6 Rules of Pre-action Conduct

Criminal Proceedings

In the case of a criminal complaint in relation to fraudulent acts, there are no rules of pre-action conduct. The complainant should approach the magistrate, or, where the offence is cognisable, the police authorities in order to initiate investigation into the offence.

Civil Law Proceedings

In the case where a claimant is filing a civil claim in relation to a fraud alleged to have been perpetrated under a contract, such a party should furnish a legal notice (usually a demand notice) or such pre-action steps as required under the dispute resolution clause in the contract.

Moreover, specific legislations or provisions may have their own particular rules of pre-conduct action: for example, a claim under the Commercial Courts Act, 2015 ("the CC Act") requires the parties to have undergone pre-institution mediation of the dispute where no urgent interim relief/s are sought by the claimant; a civil action against the government or a public official may only be instituted after a written notice has been served two months in advance, unless waived

by the court. It is pertinent to mention that failure to adhere to pre-conduct action may be fatal to the claim in certain instances, specifically where the statute provides for this.

1.7 Prevention of Defendants Dissipating or Secreting Assets

A victim of fraud can, while pursuing civil claims, file an application for a temporary injunction to prevent a party from alienating assets while adjudication upon the claim is ongoing. The application must show that the common law criteria for an injunction is satisfied: that there is a prima facie case in favour of the claimant, the balance of convenience lies in favour of the claimant, and irreparable injury would be caused to the claimant if such an injunction is not granted. This injunction is in personam. However, the injunction may also apply to third parties, where such third parties interfere with or obstruct the course of justice.

Where a suit is instituted for seeking damages/permanent injunction, the court fees payable will be computed as per the Court Fees Act, 1870, as well as the rules governing that specific court, which may be ad valorem (with or without caps, depending on where the action takes place). However, the fees payable for seeking an ad interim injunction under the suit may be a nominal fee. Such fees may differ for different courts and would need to be computed accordingly.

A similar right would be available to a party if it prefers an application under Section 9 of the Arbitration and Conciliation Act, 1996, wherein such a party can seek an ad interim injunction for preservation of assets or the substratum of an arbitration, before, during, and after the constitution of an arbitral tribunal but before execution of an arbitral award.

The CrPC allows police officers to seize any property that may be involved in the commission of any fraudulent offence. As mentioned in **1.5 Proprietary Claims against Property**, the property may be released to the claimant upon conclusion of the trial.

Civil Law Remedies in the Case of Violation of Injunction

The violation of the aforementioned orders granting an interim injunction would amount to contempt of court by the opposite party, and is punishable with civil imprisonment and/or a fine. The court would also be entitled to declare any transaction in violation of such orders null and void.

Criminal Law Remedies in the Case of Violation of Injunction

Under the IPC, any fraudulent removal or dissipation of assets to prevent a property from being forfeited for the satisfaction of an order or a decree that has been passed, or is likely to be passed, is punishable by imprisonment of up to two years, or with a fine, or both.

Cross-Undertakings

While there is no statutory requirement for the claimant to give a cross-undertaking in damages, the courts (while keeping in mind equitable principles), or the arbitral tribunal (by way of the principles governing commercial arbitrations), may require a cross-undertaking to be given by a claimant to indemnify the losses suffered by a party on grant of injunction against it, if such a party ultimately succeeds in its defence. Further, while granting an injunction or an interim relief, a court can put parties to terms.

Under Section 144 of the Code of Civil Procedure, 1908 ("the CPC"), where any order is varied, reversed or modified subsequently, a party can apply to the court for restitution of its position to before the making of such an order, which could include refund of costs and payment of interest, damages and compensation.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

Criminal Proceedings

With respect to criminal actions, under Section 91 of the CrPC, any person may be compelled by a court or a police officer vide a written notice to produce any specified documents that aid in the investigation of any fraudulent act. The person may be compelled to disclose documents in relation to assets held by himself or herself as well as nominees on his or her behalf. Omission to produce documents in this regard may be punishable with simple imprisonment up to six months and a fine of up to INR1,000.

Civil Proceedings

In civil proceedings, a claimant may make an application to a court to seek discovery, inspection and admission of certain documents in control of the opposite party. Furthermore, where the court is satisfied that in the usual course of business, assets of the opposite party are held by a third party, then the court, following the submission of an application, may direct the third party to disclose such assets. The opposite party may also be required to answer specific questions (termed as "interrogatories") served by the claimant. A wrongful disclosure or failure to disclose may be punishable as civil contempt under the Contempt of Courts Act, 1971. Further, the court may impose costs upon any party, if it believes that such a party has issued interrogatories which are unreasonable, vexatious, or exceedingly lengthy in any manner.

Cross-undertakings

As explained in **1.7 Prevention of Defendants Dissipating or Secreting Assets**, a party can be put to terms. Under Section 144 of CPC, a court has the power to restore a party to its original position in case an order against it is subsequently vacated or modified. This power includes the power of the court to order that a party be paid such costs that are properly consequential on such variation, reversal, or modification.

2.2 Preserving Evidence

Criminal Proceedings

Law enforcement agencies often have their own manuals or rules that provide for the preservation and storage of evidence. For example, the CBI manual provides that all documents and material objects seized during an investigation must be promptly sealed in a scientific manner and deposited in the designated property room. Furthermore, the details of such documents and material objects must be entered in the sub-module of crimes, or register where the sub-module is not operational. These documents/items can be issued to the investigating officer as and when required for the purpose of investigation, by proper receipt. Further, such documents/items shall be returned as soon as they are not required by the investigating officer. The manual also states that every investigating officer shall be personally responsible for the safe custody of such documents/items at all stages of the investigation.

As mentioned in **1.3 Claims against Parties who Assist or Facilitate Fraudulent Acts**, **1.5 Proprietary Claims against Property** and **1.7 Prevention of Defendants Dissipating or Secreting Assets**, under the PMLA, the ED is entitled to attach any property that it reasonably suspects is a "proceed of crime". This enables preservation of such proceeds of crime that may be used as evidence in the trial. Under the PMLA, specific rules have also been enacted under the Prevention of Money Laundering (Receipt and Management of Confiscated Properties) Rules, 2005 which provide for proper identification, maintenance, and custody of confiscated properties.

Moreover, the police and the courts are given the power to seize and attach any property that is suspected of being involved in the commission of any fraudulent offence. Under these criminal statutes, "property" is defined extremely widely to include movable or immovable property, corporeal or incorporeal property, as well as the instruments relating to such assets, and includes bank accounts.

It may be noted that the IPC provides that any person who secretes or destroys any document to prevent its production in legal proceedings shall be punished with imprisonment of two years or a fine, or both. This acts as a deterrent to a party to not tamper with or destroy evidence.

Civil Proceedings

The CPC provides that a court may regulate and control the evidence placed before it. The High Courts in India have their own specific rules in relation to maintenance of evidence. For example, the rules formulated by the High Court of Delhi provide that old and delicate documents should be safeguarded from any damage, such as by using a protective covering, or by using a photocopy while keeping the original document sealed. The CPC also provides for the appointment of a receiver, under Order XL, to protect and preserve a property which is the subject matter of a suit for realisation, management or improvement of a property, or to collect rent and profits while the suit is pending.

Physical Search of Documents

The Indian Evidence Act, 1872 gives broad powers to the court to seek production of any document at any time, as the court may deem fit (unless this falls under a recognised privileged communication). However, under the criminal law, the rights of the victim are limited and do not extend to conducting a physical search of documents at the defendant's residence or place of business.

Under civil law, such a claimant would be able to seek discovery and inspection of the evidence upon making an application for this to the court. Such an inspection would usually take place at the office of the defendant's pleader, or at the usual place of custody of such evidence. No undertaking is required to be given by the claimant in such cases, but the application is required to be made on oath to ensure that such documents are relevant for the purposes of the proceedings in question. However, the inspection is limited to documents referred to and/or relied upon by the defendant in its pleadings, or specific documents that the claimant affirms that the defendant has, and does not take on the nature of a general search of the defendant's premises. The CPC also provides for the appointment of commissions under Order XXVI, where the court finds the need for local investigation/inspection or of ascertaining the amount of any mesne profits or damages, or annual net profits. After such an investigation/inspection, the commissioner has to reduce his evidence into writing and, together with his report, submit this to the court. Such commissioners have the power to take evidence from a witness by examination on interrogatories or otherwise, as well.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

Criminal Proceedings

As stated in **2.1 Disclosure of Defendants' Assets**, Section 91 of the CrPC can be utilised by a court or the police to summon any person to produce any document or thing necessary for investigation or trial. The Section is not limited to obtaining disclosure from an accused person alone, but can be used to seek documents from any person in whose possession or power such document or thing is believed to be.

Civil Proceedings

Further, under the CPC and the Indian Evidence Act, 1872, a court has broad powers to seek

production of any document or evidence from any party, either on its own or pursuant to an application filed by a claimant in this regard.

2.4 Procedural Orders

Under the CPC, a claimant seeking a temporary injunction (such as to preserve any property or prevent any further injury) may be granted an ex parte injunction if the court believes that the delay in notifying the other party may defeat the purpose of the injunction sought for. However, the claimant will be required to inform the opposite party of this and send all documents forthwith. Such an injunction is also liable to be vacated upon an application filed by the opposite party if the claimant has knowingly made a false or misleading statement in its application for the purpose of obtaining such an injunction. The CPC also states that once such an ex parte interim injunction is granted, the court is required to hear and dispose of the application of the claimant for injunction within 30 days of passing the interim order.

2.5 Criminal Redress

Victims of fraudulent acts or fraud have two avenues through which they can seek redress against perpetrators: initiation of criminal proceedings or the filing of a civil suit. In practice, the route chosen by victims depends upon what form of redress they are seeking. In India, there are limited provisions for providing compensation to victims in criminal proceedings; and the grant of such compensation is recoverable from the fine imposed by the court, and is subject to the discretion of the court. Hence, if the overarching goal of initiation of proceedings is recovery, a victim will be well advised to pursue civil proceedings; but, if the goal is to seek punishment for the perpetrator, criminal proceedings may be a better option.

The victim can also pursue both civil and criminal remedies simultaneously for the same cause of action. Such proceedings take place before different courts and hence do not impact the speed at which they are disposed. It should be noted, however, that the standard of proof required to hold against the perpetrator in both cases is different. In civil proceedings, it is sufficient for the victim to show on "preponderance of probabilities" that the perpetrator is at fault, whereas in criminal proceedings, it is the duty of the prosecution (for example, the State) to show that the perpetrator is liable "beyond reasonable doubt". While in theory, both proceedings are independent and don't have a bearing on each other, in practice an adverse ruling in one may be prejudicial for the party in the second proceeding, depending on the facts dealt with and if the conviction precedes the civil determination.

2.6 Judgment without Trial

Criminal Proceedings

Under the CrPC, there are no provisions that allow for the obtaining of a judgment without a full trial being conducted. However, if an accused is absconding and there is no immediate prospect of arresting him, the CrPC provides for the recording of evidence against the accused in his absence. Such evidence may then be used against the accused when his trial can take place. The court may also dispense with the presence of the accused if it is satisfied that his presence is not necessary, or that the accused has persistently disturbed the court proceedings. In fact, the Supreme Court of India has noted that absconding persons cause undue delay in adjudication of trials and the CrPC needs to be amended to allow for "trial in absentia".

Civil Proceedings

The Courts can also issue an ex parte decree in the absence of a defendant provided that sufficient opportunity has been provided to the defendant, and despite which the defendant failed to appear before such a court.

With respect to civil cases, the CPC also provides for the claimant filing an application before the court seeking a summary judgment in certain commercial disputes, without the recording of any oral evidence. Extensive procedure has been laid down in Order XIII-A pursuant to the CC Act for summary judgements. The CPC, read along with the CC Act, also empowers the court to pronounce judgment at the first hearing of the suit itself when it appears that the parties are not at issue on any question of law or fact. Moreover, there is also a separate provision for institution of summary suits that involve the plaintiff seeking recovery from the defendant for an ascertainable amount based on an instrument executed between the parties. Such summary suits only allow the hearing of defence if the leave to participate is granted, and if such leave is refused by the court, the suit is decreed in favour of the plaintiff.

2.7 Rules for Pleading Fraud

Courts in India have given an expansive and inclusive definition to fraud. The primary component that must be alleged and proved in claims pertaining to fraud is that the claimant was fraudulently or dishonestly induced to act in a certain manner by the perpetrator. While proving that a wrongful gain was caused to the perpetrator and a wrongful loss was caused to the claimant may not be necessary in every instance, the Supreme Court of India has repeatedly held that the party alleging fraud must set forth full particulars of fraud and the case can only be decided on the basis of the particulars laid out. Mere bald allegations or pleadings of fraud by the claimant are not sufficient to proceed with a claim for fraud. Order VI Rule 4 of the CPC also states that in all cases where a party's pleadings rely on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, particulars (with dates and times if necessary) shall be stated in the pleadings.

2.8 Claims against "Unknown" Fraudsters

A claim against unknown fraudsters can be made in India, especially when seeking an ex parte interim injunction against an unknown party, in order to protect the claimant's interests where there is an imminent threat to the same, and the identify of the fraudster is unknown. The courts in India have granted such "John Doe" orders (referred to as "Ashok Kumar" orders in India) frequently in cases involving fraudulent misrepresentations or frauds in relation to intellectual property claims.

2.9 Compelling Witnesses to Give Evidence

Criminal Proceedings

As stated in **2.1 Disclosure of Defendants' Assets** and **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**, Section 91 of the CrPC can be invoked by the police or a court to direct a person to produce certain specified documents in their possession as evidence. Further, as stated in **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**, courts in India generally have broad powers to summon a witness, either on their own motion, or upon an application by a claimant, and compel production of any evidence or document.

Civil Proceedings

Even arbitral tribunals can seek court assistance in taking evidence under Section 27 of the A&C Act by exercising the stipulated powers. These powers have also been elucidated in the Indian Evidence Act. Powers have also been granted to courts under Order XXVI of the CPC to appoint a commission to depose a witness or pursue interrogatories in cases where the witness is within local limits and cannot be compelled to appear before a court, or where there is apprehension of evading jurisdiction before such a person can be compelled to appear before a court, or when

such a witness is incapable of attending evidentiary proceedings.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Indian courts have laid down that where an offence requiring mens rea or a guilty mind, such as fraud, is committed by persons exercising control over the affairs of a corporate entity, then the offence would also be imputed to the entity. Such imputation will be dependent upon the degree to which the corporation can be said to be acting through such persons, so as to make such persons the "alter ego" of the entity. Therefore, the corporate entity will be held to be liable for the actions of its director or officer if such persons are acting in the course of their regular duties.

3.2 Claims against Ultimate Beneficial Owners

When a corporate entity has been used as a vehicle for fraud, and its separate identity has been misused to commit such frauds, the courts in India use the well-established common law doctrine of piercing of the corporate veil to uncover the individuals who are the ultimate beneficial owners of the entity. In such circumstances, the courts will disregard the separate legal identity generally accorded to corporations in order to punish the actual perpetrators of the fraudulent conduct. The courts have frequently lifted the corporate veil when they suspect that the company itself is a sham entity created for an unlawful purpose or through unlawful means.

It is important to note that in order to aid the identification and regulation of such individuals, in 2018 the Ministry of Corporate Affairs in India introduced the Significant Beneficial Ownership Rules, which define the criteria for constituting a Significant Beneficial Owner (SBO) in a company. The Rules require the reporting company to submit specified information pertaining to SBOs to the Registrar of Companies, thereby providing investigative and regulatory agencies with ready access to ultimate beneficiaries in complex ownership structures. Similar rules also exist under the PMLA, wherein banks and financial institutions are charged with the responsibility of maintaining records of their clients and their respective beneficial owners. The Securities and Exchange Board of India (SEBI) has also issued multiple guidelines and circulars to identify ultimate beneficial ownership amongst companies listed on a stock exchange.

3.3 Shareholders' Claims against Fraudulent Directors

Under the Companies Act, shareholders may institute oppression and mismanagement proceedings against the company and its director(s) where, inter alia, the affairs of the company have been or are being conducted in a manner that is prejudicial to public interest or prejudicial to such shareholders' interests. The requisite requirement for initiating such proceedings has been provided for under the Companies Act as not less than 100 members or one-tenth of the total members (whichever is less) or any member(s) holding one-tenth of the paid-up share capital of the company, in the case of a company that has a share capital. In the case of a company that does not have a share capital, not less than one-fifth of the total members of such a company can initiate such proceedings.

It should be noted that the High Court of Delhi has read that provisions under the Companies Act, including Sections 241 and 242, allowing for initiation of proceedings and the relief of freezing assets and disgorgement of property as dis-

gorgement, is a civil action in the nature of an equitable relief.

The Companies Act also permits institution of a class action, where members can approach the National Company Law Tribunal to, inter alia, seek certain orders, such as to claim damages or to demand any other suitable action from or against the company or its directors for any fraudulent, unlawful or wrongful act or omission on their part. In the case of a company having a share capital, a "class" is defined as not less than 100 members, or not less than 5% of the total members, whichever is less, or member(s) holding not less than 5% of the share capital of a company in the case of an unlisted company, and not less than 2% of the issued share capital in the case of a listed company. In the case of a company not having a share capital, a "class" has been defined as not less than one-fifth of the total members of such a company.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

Fraud under the Contract Act

Any suit for declaration of contract rendered void in terms of Section 17 of the Contract Act, or for claiming damages on account of fraud committed by a private party in a contract, may require joinder of an overseas party to such a suit. Such a joinder would be governed by the provisions of the CPC. While the CPC does not create a distinction between joinders of an overseas party and a domestic party, a joinder is allowed on account of liability under the same contract (Order I Rule 6) or on account of a cause of action (Order II Rule 3). In such cases, the courts allow issuing a notice/summons to an overseas party. However, if the overseas party fails to appear and defend its case, the courts may proceed ex parte to decide the suit.

A decree passed by an Indian court against an overseas party, specifically for damages on account of fraud, may need to be enforced specifically. In cases where the jurisdiction in which the decree is to be executed is a reciprocating country notified under the CPC, the decree would become enforceable in the reciprocating country. However, for non-reciprocating countries, a decree may only hold evidentiary value and may have to be adjudicated on merits.

Arbitrability of Fraud

The law in India now allows fraud of a civil nature to be arbitrated between parties. Any allegation of fraud that affects the private dispute between parties is arbitrable, unless the allegation is that the arbitration agreement itself is vitiated by fraud. However, fraud amounting to criminal consequences falls within the realm of public law, and can only be adjudicated by a court.

Indian law has made a lot of strides in terms of joining non-signatories to an arbitration, and a composite reference to domestic and overseas parties in the same arbitration agreement has been accepted by Indian courts.

Fraud under the Companies Act

While the Companies Act provides punishment for fraud under Section 447, the applicability of the Companies Act on an overseas entity is limited. A foreign company, for the purposes of the Companies Act, is defined under Section 2 (42) to mean any company or body corporate incorporated outside India which:

- has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- conducts any business activity in India in any other manner.

In this context, Section 379 of the Companies Act provides that where not less than 50% of the paid-up share capital of a foreign company is held by:

- one or more citizens of India; or
- one or more companies or bodies corporate incorporated in India; or
- one or more citizens of India, and
- one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate,

such a company shall comply with certain provisions as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

Section 380 provides for service of any process, notice, or other document required to be served on a foreign company. Section 228 provides for inspection, inquiry or investigation in relation to foreign companies.

Criminal Proceedings

An Indian court would have jurisdiction over criminal acts committed with a fraudulent intent under the IPC when the act has been committed by:

- any citizen of India residing beyond India; and
- any person on a ship or aircraft registered in India wherever it may be.

In case an Indian Court can exercise jurisdiction over an overseas entity, the CrPC provides for an elaborate process for service of summons or warrants etc in any contracting "state", through an authority for transmission. In this regard, India has entered into Mutual Legal Assistance Treaty/ Arrangements (MLATs) with various countries which provide for reciprocal arrangements for the serving of such judicial documents. Such requests are processed by the Ministry of Home Affairs, which transfers such documents to the relevant Indian missions/embassies.

The difference between the two categories of countries is that the country involving an MLAT has an obligation to consider serving the documents, whereas non-MLAT countries do not have any obligation to consider such a request. Similarly, India has entered into various bilateral treaties that allow knowledge-sharing, mutual assistance and extradition to enable investigation, arrest and production of accused persons in India.

Some expropriatory statutes such as the PMLA also allow attachment of property of equal value in India for any tainted property held in a foreign country.

5. ENFORCEMENT

5.1 Methods of Enforcement

Civil Proceedings

Where a decree has been obtained by a petitioner based on a claim of fraud in contractual disputes, such a decree may be executed either by the court which passed it, or by the court to which it is sent for execution. Order XXI of the CPC provides a detailed procedure for executing a decree in an Indian court.

A decree obtained from a foreign jurisdiction may also be enforced in an Indian court provided it passes the test of finality as laid down in Section 13 of the CPC. Section 44A of the CPC provides that a decree of any superior court of a reciprocating territory is executable in India as a decree passed by an Indian district court.

Similarly, a domestic arbitral award passed under the Arbitration and Conciliation Act, 1996 ("the A&C Act") can be enforced in accordance with the provisions of the CPC, in the same man-

ner as if it were a decree of the court. Such an enforcement under Section 36 of the A&C Act is subject to any appeal that may lie under Section 34 of the A&C Act. An international arbitral award may be enforced in India where the court is satisfied that it fulfils the conditions provided for in Sections 44 and 57 of the A&C Act. Such an executable foreign award is deemed to be a decree of the court.

Criminal Proceedings

While cognisance of criminal fraud can only be taken by an Indian court exercising criminal jurisdiction, there are various agencies that can investigate criminal acts of a fraudulent nature. Powers of investigation, as provided under the CrPC, can be exercised by state police, and officers of special divisions such as the Economic Offence Wing and CBI. Special multidisciplinary agencies have also been given powers to investigate fraud under specific statutes, ie, the SFIO to investigate fraud under the Companies Act and the ED to investigate the predicate offence of fraud under the PMLA.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

Criminal Proceedings

A right against self-incrimination is innate in Indian jurisprudence and has been guaranteed as a fundamental right by Article 20(3) of the Constitution of India. This fundamental right is echoed in various other statutes including the CrPC and the Evidence Act. The protection not only extends to oral testimony but also to the production of documents. It is important to note here that this constitutional protection is not only available at the pre-trial stage but also during the trial, and a witness may refrain from giving evidence that may result in self-incrimination. In such cases, since the burden of proof is on the investigation agencies and the prosecution, negative inference cannot be drawn from exercising this fundamental right.

However, in special statutes where the burden of proof is on an accused to prove that punitive actions should not be exercised against him, for example in cases of attachment of property under the PMLA, exercising such a right may result in a negative inference being drawn by courts and no protection can be sought under Article 20(3) of the Constitution of India in this regard.

Civil Proceedings

On the same principle, since civil disputes do not lead to "self-incrimination", no right to silence is available in civil proceedings for adjudication of fraud and a court may draw adverse inferences on issues wherein the defendant does not adduce evidence or refuses to give testimony to defend his case. This is in line with the principle enshrined in Section 114 of the Evidence Act.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

In India, privilege from disclosing communications between a lawyer and his client is statutorily recognised under Section 126, 128 and 129 of the Evidence Act and Section 227 of the Companies Act. This privilege from disclosing communication between a client and lawyer exists even after such a relationship has ended. There are few exceptions to this rule, ie:

- where any such communication was made in furtherance of any illegal purpose; and
- where any fact observed by any lawyer, in the course of his employment as such, shows that any crime or fraud has been committed since the commencement of his employment.

This privilege is also waived in cases where a client expressly waives his privilege or adduces evidence and offers himself as a witness, in which case he may be compelled to disclose any communication, which, in the opinion of the court, is necessary in order to explain any evidence he has led, and no other. The same has to be read in the context of Section 128 of the Evidence Act wherein by merely volunteering to give evidence, such a privilege is not waived. The section also contemplates that if a party calls in his lawyer as a witness, he may be deemed to have consented to such disclosure only if he questions his lawyer on fact, which otherwise would have been protected from disclosure under Section 126.

While Section 126 provides for privilege in communication with a "barrister, attorney, pleader or vakil", the same distinction is not visible in the Advocates Act, 1961 ("the Advocates Act"), wherein only an "advocate" is permitted to practise the "profession of law" in India. It is pertinent to note that the term "advocate" is not used in either Section 126 or Section 129 of the Evidence Act. The terms used for a legal professional are very wide under Section 126 and are not restricted to "advocate" as defined in the Advocates Act. While the Advocates Act, 1961 does not make a distinction between different types of legal professionals, the intent of the legislature is clear and intended to use an inclusive definition. Further, the language used in Section 129 uses an even wider connotation of "legal professional adviser", which has not been defined in the Advocates Act.

However, it is to be considered that under the Bar Council of India Rules ("the BCI Rules"), when lawyers join a company under full-time employment, they are under an obligation under such rules to surrender their registration as an advocate. This conundrum creates a complexity in recognising privilege on communication with "in-house" legal counsels in India.

There have been instances where the High Courts have considered the nature of advice or the scope of work of an in-house legal counsel to extend legal privilege to communications with in-house counsels or departmental lawyers engaged in government employment. However, there has been a view taken by some High Courts that that an in-house counsel cannot claim to be an "advocate" under the Advocates Act, and hence the legal privilege enshrined under the Evidence Act would not be available to such lawyers.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

In Indian jurisdiction, exemplary damages are only granted in cases relating to libel, claims in tort along with economic aspects, such as slander of goods, or IPR matters. The principles for granting damages are enshrined under Sections 73 and 74 of the Contract Act.

Section 73 of the Contract Act deals with compensation for breach of a contract which results in actual damage. Such damages are in the nature of unliquidated damages. Section 73 of the Contract Act itself provides that a party can claim compensation for any loss or damage caused to him which "naturally arose in the usual course of things". Furthermore, Section 73 also provides that compensation therein is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Even the explanation provided in Section 73 states that in estimating the loss or damage arising from a breach of contract, the means which existed for remedying the inconvenience caused by the

non-performance of the contract must be taken into account.

A conjoint reading of this principle makes it clear that the principles under Section 73 only allow for a party to be placed, as far as money can allow, in as good a situation as if the contract had been performed and a duty has been cast on the plaintiff to take all reasonable steps to mitigate the loss suffered by him. These principles do not allow the courts to grant exemplary or punitive damages in fraud claims.

Section 74 of the Contract Act provides that if a sum is named in the contract as the amount to be paid in case of such a breach, or "if the contract contains any other stipulation by way of penalty", the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

While the principle enshrined under Section 74 of the Contract Act allows any amount stipulated in the contract, even by way of penalty, to be granted as damages to a plaintiff, the Indian courts have diluted the principle under Section 74 to reasonable compensation only if it is a "genuine pre-estimate of damages" fixed by both parties and found to be such by the court. The courts have therefore held that the expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded without proving the actual loss. However, amounts stipulated in contracts in terrorem cannot be granted under Indian law. This principle therefore limits the scope of exemplary or punitive damages under the Contract Act.

It should be noted that the aforementioned principles may not be applicable, stricto sensu, in cases involving fraud as fraud unravels all and any contract obtained by fraud would make it voidable. In such cases, the principles under Section 65 of the Contract Act apply, which provide that any person who has received any advantage under such an agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it. The term "received any advantage" provides for restitution of an innocent party to a position as if he had not entered into such a contract. This allows any undue gain received under such a contract to be restituted to an innocent party. This principle has been further diluted by Indian courts to the effect that the primary aim of awarding compensation is not to penalise the defaulting party, but to put an innocent party in the same position as if it had not entered into such a contract. Therefore, where compensation can be determined based on principles of computing damages under the Contract Act, there may not be any need to award compensation by restitution.

It may be noted that provisions relating to disgorgement of unlawful gains typically obtained through wrongful means (which is inclusive of fraud) have been introduced in the Securities and Exchange Board of India Act, 1992 ("the SEBI Act") and have been subsequently introduced vide Section 212(14A) of the Companies Act, which came into effect from August 15 2019. As stated in **3.3 Shareholders' Claims against Fraudulent Directors**, the Companies Act already allows for initiation of proceedings and the relief of freezing assets and disgorgement of property as disgorgement is a civil action in the nature of an equitable relief, and not a penal

action. Therefore, the SFIO would also be bound by the same principle for disgorgement.

Similar principles have also been accepted by the Securities Appellate Tribunal to direct disgorgement under the SEBI Act. It was noted that a repayment of ill-gotten gains that is imposed on wrongdoers is a monetary equitable remedy that is designed to prevent a wrongdoer from unjustly enriching himself as a result of his illegal conduct, and is not a punishment. Therefore, the principle applied under the statutes is caveated by the fact that the disgorgement has to be limited to the unlawful gains obtained and should never exceed them.

It is now a settled principle that disgorgement of ill-gotten proceeds can be directed under various expropriatory statutes, however, this is limited to attachment/confiscation of property to the extent of monies that have been appropriated illegally. These provisions therefore do not allow for exemplary damages for illicit acts committed by a party.

7.2 Laws to Protect "Banking Secrecy"

Indian law statutorily imposes the duty of fidelity, confidentiality and secrecy upon various intermediaries such as banks, public financial institutions, and credit information companies. However, these obligations are subject to certain exceptions. The obligation to maintain secrecy, fidelity and confidentiality is cast upon banks under the Banking Regulation Act, 1949 (Section 34A), public financial institutions through the Public Financial Institutions (Obligation as to Fidelity and Secrecy) Act, 1983, credit information companies through the Credit Information Companies (Regulation) Act, 2005 and on intermediaries processing payments under the Payment and Settlement Systems Act, 2007. These obligations are punishable through various regulatory, monetary and criminal sanctions. The Bankers' Book Evidence Act, 1891 also protects any banker from being compelled to produce any bankers' book, and appear as a witness to prove the matters, transactions and accounts recorded in such books unless specifically mandated by the court for a special cause.

Furthermore, the Indian Information Technology Act, 2000 also recognises financial information to be sensitive personal data or information, ie, "financial information such as a bank account or credit card or debit card or other payment instrument detail" and prohibits any disclosure of the same unless it is personally consented to by the entity/person to whom it belongs, or without consent when sought by investigating agencies in accordance with the law. Last, the Companies Act also provides for a safeguard against disclosure of third-party sensitive financial information, in case such information is sought from bankers of any company under investigation (other than the information of the company itself).

While the right to banking secrecy has been recognised, as indicated, this is not absolute. It is possible under law to compel a bank through summons and processes issued in accordance with the law to disclose such information as it has in its possession. This right is clearly recognised in favour of investigating agencies, either through periodic reporting requirements such as those under the PMLA, or through a specific power to issue summons for disclosure of information vested with various authorities, such as the police, income tax authorities, ED, customs authorities, etc, who have been given power to compel a person to provide his books of accounts, or face penalty for non-compliance as specified under various statutes such as the Income Tax Act, 1961, the Foreign Exchange Management Act, 1999, the Customs Act, 1962, and the CrPC. In addition to this, the police, income tax authorities, ED, custom authorities, etc, have the power to search for and seize documents from banks in the course of their investi-

gation. Lastly, banks and intermediaries are also subject to a limited disclosure under the Right to Information Act, 2005 in the case where information held by them qualifies as public information.

7.3 Crypto-assets

There is no legislation in India that specifically prohibits dealing with crypto-assets. In fact, the Government of India (GOI) has contemplated a specific bill dealing with crypto-assets, though this has not materialised into substantive legislation. The Finance Act, 2022 ("the Finance Act") has for the first time recognised taxation of certain virtual digital assets as a basis to recognise the income generated from such virtual digital assets. However, this has not legitimised virtual digital assets expressly. The Finance Act has specifically referred to crypto-assets as "virtual digital assets" for the purposes of taxing any income from such assets at 30% and every transaction involving such "virtual digital assets" at 1% tax deducted at source.

The Finance Act has introduced a new clause (47A) in Section 2 of the Income Tax Act to define a virtual digital asset as "any information or code or number or token (not being Indian currency or any foreign currency), generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value which is exchanged with or without consideration, with the promise or representation of having inherent value, or functions as a store of value or a unit of account and includes its use in any financial transaction or investment, but not limited to, investment schemes and can be transferred, stored or traded electronically. Non-fungible tokens and any other token of a similar nature are included in this definition." The connotation used by the GOI, ie, "virtual digital assets", seems to be in consonance with the terminology adopted by the Financial Action Task Force (FATF).

In fact, the Finance Act recognises that the introduction of any cryptocurrency can only happen as a result of the Central Bank, namely the Reserve Bank of India (RBI) which alone has the power to issue a Central Bank Digital Currency as defined under the Finance Act. In light of this, cryptocurrencies are not recognised as legal tender under Indian law and the Finance Act clearly identifies that the power to issue currency coins and notes rests only with the RBI.

The RBI has repeatedly cautioned parties from dealing with cryptocurrencies and had, vide a circular dated April 6 2018 (April 6 Circular), asked banks and entities regulated by the RBI not to allow use of the banking system for trade in crypto-assets. However, the Supreme Court of India, in Internet and Mobile Association of India v RBI, struck down the April 6 Circular. Therefore, banks are presently dealing with accounts which relate to entities/persons dealing with crypto-assets. However, the RBI, vide its circular dated May 31 2021, has also advised its regulated entities to continue to carry out customer due-diligence processes for transactions in "virtual digital assets", in line with regulations governing standards for Know Your Customer, Anti-Money Laundering, Combating of Financing of Terrorism obligations under the PMLA.

In a recent response to a parliamentary question on the use of cryptocurrencies in money laundering, the Minister of State (Ministry of Finance) stated that the Directorate of Enforcement was investigating seven cases under the PMLA in which it was alleged that crypto-assets were used to launder money. It was also revealed that monies worth INR135 Crores (INR1.35 billion) have been attached by the Directorate of Enforcement under the PMLA in such investigations.

In response to another parliamentary question in March 2022 on regulation of cryptocurren-

cies in India, the Minister of State (Ministry of Finance) stated that the RBI had issued various public notices on December 24 2013, February 1 2017, and December 5 2017 that dealing in "virtual digital assets" is associated with potential economic, financial, operational, legal, customer protection and security-related risks. Further, it was clarified that cryptocurrencies are unregulated in India and that the legal framework for the sector may be finalised only after all aspects are carefully examined in consultation with the stakeholders concerned.

It was also disclosed in response to another parliamentary question by the Minister of State (Ministry of Finance) that few cases of evasion of the Goods and Services Tax (GST) by cryptocurrency exchanges have been detected by the GOI. This demonstrates the following:

- the GOI is tracking the crypto-exchanges for evasion of tax and is increasingly regulating this space;
- the GOI considers transactions relating to crypto-assets as taxable, either as transactions of "goods", or such exchanges to be providing "services", and it is not clear as to how the tax regime is classifying this; and
- the GOI is taking steps to initiate recovery from crypto-exchanges and is increasingly monitoring and investigating intermediaries in this space as well.

Since these are ongoing investigations, not much information is available on this, and it is unclear as to the modus operandi of such attachment and whether the same attaches the crypto-asset in any digital form, whether digital wallets are being attached, or whether property/monies equivalent to the value of such crypto-assets have been attached. In a recent order by the Supreme Court, an accused was directed to provide details of his digital wallet to the Directorate of Enforcement.

This nuanced area is becoming a topic of debate, as by their very nature "asset tracing" of crypto-assets provides a challenge. "Blockchain" technology does not allow complete asset tracing and, as recognised by the Supreme Court of India, every crypto-asset differs in nature, whether it is anonymous or pseudo-anonymous, and regarding what will be the impact of attachment or confiscation of such property considering that a public ledger does not allow change of ownership in a traditional way.

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AZB & Partners was founded in 2004 with a clear purpose to provide reliable, practical and full-service advice to clients, across all sectors. It brought together the practices of CZB & Partners in Mumbai and Bangalore, and Ajay Bahl & Company in Delhi. Having grown steadily since its inception, AZB & Partners now has offices across Mumbai, Delhi, Bangalore, and Pune. AB & Partners has an accomplished and driven team of over 450 lawyers committed to delivering best-in-class legal solutions to help clients achieve their objectives. Its greatest strength is an in-depth understanding of legal, regulatory and commercial environments, in India and elsewhere. This strength enables it to provide bespoke counsel to help its diverse clients negotiate any dynamic or volatile business environment. At AZB & Partners, collaboration is an everyday reality – the firm combines individual and mutual strengths to achieve collective growth.

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Trends and Developments

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The Serious Fraud Investigation Office – a Growing Force

The Serious Fraud Investigation Office (SFIO) has been set up as a specialised multidisciplinary organisation to investigate serious cases of corporate fraud by the Ministry of Corporate Affairs (MCA). The Companies Act 2013 ("the Act") gives the SFIO primacy as an investigating agency. This is evident from the fact that once the SFIO initiates an investigation, other agencies cannot proceed further with their investigations into the same matter till the SFIO finishes its investigation. Further, other agencies are obliged to transfer pertinent documents and material to the SFIO to enable it to investigate the matter being investigated. Upon culmination of the SFIO's investigation, the SFIO is authorised to share any information/documents available to it with any investigation agency, government or police authority, as well as any tax authority, with respect to any action being undertaken by them for any matter being investigated.

The SFIO was originally formed in 2003 and did not have any special status as an agency under the Companies Act 1956. The absence of any special powers or primacy was largely responsible for the SFIO not being the favoured agency for investigating cases by the MCA, which largely relied upon the Registrar of Companies (ROC) for undertaking such actions. However, this position changed once the Act came into force from April 1 2014. Once the SFIO's power and status were codified under Sections 211 and 212 of the Act, the MCA started entrusting it with investigating matters of corporate fraud.

The MCA now appoints the SFIO to investigate corporate frauds involving complex transactions that have interdepartmental and multidisciplinary ramifications or substantial impact on public interest. This is supported from data available on the SFIO's website itself – the SFIO completed investigations in 104 cases in its first ten years, ie, from FY 2003–04 to FY 2012–13, and has completed 186 investigations in the first three years of its powers being codified, ie, from FY 2014–15 to FY 2016–2017. While these numbers have increased in recent years, the SFIO's website does not have information on completed investigations beyond FY 2016–17. In response to a question on 19 September 2020, the Minister of State for Corporate Affairs informed Parliament that the SFIO was at that time investigating 92 cases. This indicates a substantial increase in reliance on the SFIO for investigations by the MCA.

Under Section 212 of the Act, the SFIO is tasked with preparing a detailed investigation report, which it then presents to the MCA for its examination and sanction. The MCA may direct the SFIO to initiate prosecution after analysing the SFIO's investigation report. However, the impact of the SFIO's reports is not limited to criminal prosecution alone. An SFIO's report may also be used to initiate various other actions, such as an action for removal of the statutory auditor, and an action for oppression, mismanagement and unfair prejudice, either at the behest of the government, the shareholders of a company or in a class action.

Multiple regulators and enforcement agencies have started relying on the SFIO's findings and

initiating action pursuant to those findings. The MCA itself has, in certain cases, taken multiple steps before the investigation report of the SFIO even results in a prosecution by the special courts formed under the Act to examine the same subject of investigation. Our firm analyses the developments in the increasing use of the SFIO's investigative powers, and reliance on its reports.

Aftermath of an SFIO Report

The SFIO may submit two types of reports to the MCA – (i) an interim report while the investigation is ongoing, or (ii) an investigation report on completion of the investigation. The SFIO's investigation report is treated at par with a police officer's report under Indian law, and can be used to initiate prosecution against the accused entity(ies)/individual(s). However, the court has recently held that the SFIO is not required to complete its investigation before initiation of prosecution.

A criminal case can be filed pursuant to the SFIO's interim report as long as detailed charges are made out against the accused. In the Infrastructure Leasing and Financial Services (IL&FS) scam, where losses were initially quantified at 92,000 crores (USD13 billion), the SFIO was brought in as the sole investigating agency, to the exclusion of all others, to look into the matter. In this case, the SFIO not only investigated the matter but also initiated prosecutions based on their findings in the interim report.

Imprisonment and fines – prosecution by the SFIO

The SFIO's reports are not merely a tool for preliminary investigation, but also form the basis for penal action and prosecution under the Act and under other laws in India. While the Act provides for investigative powers to the SFIO, prosecutions led by the SFIO to determine the guilt of the accused have steadily increased. Over time, the SFIO has also seen a consistent rise in the number of convictions as a result of this. As per the SFIO's website, the SFIO had closed 93 convictions with penalty and imprisonment till FY 2018–2019, and the SFIO's conviction rate had increased from 48% in FY 2013–2014 to 70% in FY 2019–2020.

Liability for fraudulent conduct of business

Section 339 of the Act provides that where, in the course of winding up, it appears that any business of a company has been carried on with an intent to defraud creditors of the company or any other persons or for any fraudulent purpose, the National Company Law Tribunal ("the Tribunal") may declare the persons who were knowingly parties to the carrying on of the business of the company as personally liable. Such liability is without limitation towards all or any of the debts/liabilities of the company. Every person party to the carrying on of the business, who had the knowledge of such fraud, may be punishable. The liability of a party to the fraud may also include creation and enforcement of a charge on any debt or obligation due from the company to such person, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in such person, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf.

The principle of attribution and responsibility, without any limitation of liability, is not just limited to actions pertaining to Section 339 of the Act alone and transfers undertaken to defeat creditors. The said principle has also been extended to oppression, mismanagement and unfair prejudice cases filed before the Tribunal on account of Section 246 of the Act. In the event such application is made before the Tribunal, it can take necessary actions for recovery of undue gains, including disgorgement of assets.

In recent times, the MCA has exercised its rights under Section 241(2) of the Act to initiate an action of oppression and mismanagement in cases where the SFIO has issued an interim report or an investigation report. In such cases, the SFIO's report has been considered as evidence to admit such an action by the MCA. The Tribunal has passed directions for safeguarding the stakeholders' interests based on the findings in the SFIO's report. The MCA has leaned heavily on such findings to obtain various pre-emptory orders, including orders of attachment before a judgment, and dissolution and takeover of recalcitrant boards of directors.

Claw-back based on the SFIO's reports – disgorgement of assets

Another recent impactful addition to the effect of an SFIO report is the ability to use it as a basis to seek appropriate orders with regards to disgorgement of assets from such directors, key managerial personnel, other officers or any other person liable personally for the fraud committed upon the company. In terms of Section 212(14A), the central government now has the authority to initiate proceedings before the Tribunal seeking disgorgement of assets based on the SFIO's findings of fraud. The action for disgorgement of assets can be initiated pursuant to the SFIO's interim report or final report. Such action can be pursued against any person to claw back unjust enrichment obtained through fraud without any limitation on liability.

This may provide the Tribunal with an opportunity to directly consider findings set out in the SFIO's reports as the foundation to trace the assets acquired through fraud, and consequently direct disgorgement of such assets. Jurisprudence on the reliance placed by the Tribunal on the SFIO's findings to direct disgorgement of assets under Section 212(14A), and the extent to which the SFIO's findings can be relied upon for directing disgorgement, is a matter that is yet to be tested before courts. However, a recent ruling observed that disgorgement of assets based on the SFIO's reports must be for public interest since such claw-backs are in the nature of equitable relief designed to prevent a wrongdoer from unjustly enriching themselves.

This recent addition of permitting use of the SFIO's reports is far-reaching. This considerably increases the weight of a report, as well as the reliance upon it. This is because an SFIO's report can now effectively be a basis for deprivation of property even before trial by the Special Court where the report can be tested.

Re-casting of accounts

The accounts of a company may be reopened and re-cast if it is established that the accounts were (i) prepared in a fraudulent manner, or (ii) the reliability of financial statements is in doubt due to mismanagement of the affairs of the company. The MCA has in the recent past relied upon the SFIO's findings to show that accounts were prepared in a fraudulent manner, and consequently to reopen past accounts and re-cast them. Since the SFIO's investigations cover financial fraud and mismanagement, such investigation extensively evaluates the financials of the company under investigation. Enforcement actions based on an SFIO's investigation and findings is longer limited to prosecution, asset tracing and recovery, but now also includes correction of financial statements.

The interplay between the SFIO's findings and re-casting of financial statements has been tested before the Supreme Court. For instance, the MCA had obtained permission to reopen and re-cast the accounts of three entities linked to the IL&FS group of companies for five years from FY 2012–2013 to FY 2017–2018. The order permitting re-casting of accounts was challenged all the way to the Supreme Court in appeal. The Supreme Court affirmed the reliance

placed on findings of mismanagement/fraud in the SFIO's reports. Consequently, independent chartered accountants were directed to re-cast the accounts and revise the balance sheets of the three entities.

Use of an SFIO's report by other regulators

There is always an interaction between different regulators in cases of corporate fraud due to the innovative and widespread nature of wrongdoings. This activates the jurisdictions of multiple regulators and law enforcement agencies due to potential violations of different laws. While other law enforcement agencies cannot proceed with their investigations on fraud once a case is assigned to the SFIO, several other sectoral regulators are free to rely upon the SFIO's reports to determine the wrongdoing under their respective domains.

The SFIO has the obligation to share its findings with other regulators, investigating agencies, and tax authorities to enable them to take appropriate actions in accordance with their statutory powers for any contraventions made on the basis of such findings. These regulators rely on the findings in the SFIO's reports to build their case, since the fraud investigated by the SFIO is at times the bedrock to other violations. Regulators such as the National Financial Reporting Authority (NFRA), the Reserve Bank of India (RBI), the ROC, and the Securities and Exchange Board of India (SEBI) are known to rely on findings in the SFIO's reports to initiate proceedings for violations under their respective regulatory domain.

The NFRA is tasked with investigating the quality of audits and taking disciplinary action against auditors and audit firms. The NFRA has the power to impose sanctions such as monetary penalty or prohibition from practising if an auditor or audit firm's audit fails to meet the prescribed standards. The NFRA is a relatively new creation aimed at improving regulatory oversight on audit and other accountancy-based financial services. In the IL&FS scam, the SFIO's investigation cast aspersion on the role of the statutory auditors of IL&FS Financial Services Limited (IFIN). Consequently, the NFRA reviewed the statutory audit and financial statements of IFIN for the past ten years and released Audit Quality Review Reports alleging IFIN's statutory auditors failed to discharge their duty. The NFRA, in the case of certain individual auditors, has even imposed a fine and barred them from being appointed as an auditor or internal auditor of any company for five to seven years. The NFRA's authority to review IFIN's audit has been challenged, and it will be interesting to see how Indian courts define the NFRA's powers and authority.

The RBI also relied on the SFIO's report in the IL&FS scam. IFIN, a key subsidiary of IL&FS, was a licensed non-banking finance company regulated by the RBI. The SFIO's report flagged ever-greening of loans, violation of norms related to adequate provisioning, credit concentration, and net owned funds. Taking notice of these violations, the RBI instituted its own proceedings to penalise and cancel IFIN's licence.

In the case of National Spot Exchange Limited (NSEL), the SEBI relied on the SFIO's report in its proceedings to cancel NSEL's registration as a commodity derivates broker. The SEBI has also initiated an investigation into the IL&FS group companies pursuant to the SFIO's interim report, and relied on the SFIO's findings to initiate proceedings against intermediaries associated with such companies.

Courts on the SFIO's Authority and Conduct of Investigation

Time limits for investigation

The MCA has the power to set time limits on the SFIO's investigations. However, the Supreme Court held that the timelines set by the MCA

are not mandatory in nature since the Act does not set any time limit on the SFIO to prepare its investigation report. The SFIO's authority to investigate a matter does not end in the case that the SFIO is unable to adhere to the time limit set by the MCA.

Interim reports and investigation reports carry equal evidentiary value

The Bombay High Court examined whether prosecution could be initiated on the basis of an SFIO's interim report where the SFIO had initiated prosecution while its investigation was still ongoing. The Bombay High Court held that prosecution can be initiated on the basis of an interim report even if investigation into the affairs of connected companies or cross-linkages is still ongoing. The status and evidentiary value of an interim report is to be determined on the strength of the SFIO's findings and not the nomenclature of the report.

The SFIO can engage independent technical experts to speed up its investigation

The Supreme Court has permitted the SFIO to engage external independent technical experts, such as chartered accountants and valuers, in its investigations – for instance, in the SFIO's investigation into the affairs of the Heera Gold Exim group. The relative speed of the SFIO's investigations is likely to increase in addition to more nuanced findings if this is repeated in future investigations.

Strict criteria for bail in economic offences

Recently, the government and courts have started viewing economic offences causing huge loss to public funds very seriously. Courts have considered economic offences as a separate class requiring greater scrutiny and restraint while considering cases arising from them, such as whether to grant bail to the accused while the investigation or prosecution is ongoing. The Supreme Court has repeatedly refused bail in SFIO matters, observing that such offences are grave offences that pose serious threat to the financial health of the country.

The SFIO – The Dominant Fraud Investigating Agency in the Future

The SFIO has in recent years brought investigation of corporate fraud to the forefront. It is given a priority amongst investigating authorities for investigations into corporate fraud, and no other investigating authority can proceed with its investigation once the SFIO is given the mandate to investigate a matter. The SFIO has increasingly conducted more investigations and achieved more convictions, becoming the preferred authority for the central government to investigate cases of fraud.

The SFIO's role has changed from a mere investigating authority to a one-stop authority for the resolution of fraud. An example of the increasing mandate of the SFIO is the Heera Gold Exim case, where the SFIO was directed to assist investors in realising their claims against the accused by collating all claims and distributing the appropriate amounts. This increasing reliance on, and authority of, the SFIO will define investigations into corporate fraud and asset tracing in the coming years.

Contributed by: *Vijayendra Pratap Singh, Aditya Jalan, Raghav Seth and Sadhvi Chhabra,* ***AZB & Partners***

AZB & Partners was founded in 2004 with a clear purpose to provide reliable, practical and full-service advice to clients, across all sectors. It brought together the practices of CZB & Partners in Mumbai and Bangalore, and Ajay Bahl & Company in Delhi. Having grown steadily since its inception, AZB & Partners now has offices across Mumbai, Delhi, Bangalore, and Pune. AB & Partners has an accomplished and driven team of over 450 lawyers committed to delivering best-in-class legal solutions to help clients achieve their objectives. Its greatest strength is an in-depth understanding of legal, regulatory and commercial environments, in India and elsewhere. This strength enables it to provide bespoke counsel to help its diverse clients negotiate any dynamic or volatile business environment. At AZB & Partners, collaboration is an everyday reality – the firm combines individual and mutual strengths to achieve collective growth.

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Law and Practice

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

Fraud claims in Italy can give rise to implications from both a criminal and civil law perspective.

Criminal Law

Fraud

Fraud is regulated by Article 640 of the Italian Criminal Code (hereinafter I.CR.C) as an offence whereby the offender, using trickery or deception, misleads the damaged party, with the aim to procure an unfair advantage to himself/herself or others, together with a detriment to the damaged party.

Fraud requires the offender to misrepresent reality giving the appearance of non-existing circumstances. Typically, the fraudster re-enforces its actions, with astute schemes, manoeuvres and (often) with accompanying documents which have been either counterfeited or created to simulate or conceal this reality, at first, gaining the trust of the victim to then mislead him/her and make him/her fall into a mistake. For the fraud to be criminally relevant it has to cause a reduction in the assets of the victims, or other damage to them.

Victims of fraud claims can also include the government (or governmental entities) and fraud may also target the obtainment of public funds, in which case the conduct of the fraudsters is sanctioned more severely, and claims may be brought directly by public prosecutors.

Among fraud claims in business transactions, particular significance in Italian case law has been given to the concept of "contractual fraud", where the fraudster, using deceit, misrepresentations and/or otherwise altering real circumstances, induces the victim to enter into a contract that he/she would have never signed otherwise, thereby obtaining an unfair profit. In such cases, the offence is committed through the initial intention to defraud the victims, regardless of any concrete damages visited on them.

Misappropriation

Different from fraud, misappropriation (Article 646, I.CR.C.) is regarded as when the offender is not using deception or schemes to defraud the victim, but already has lawful availability of money or assets of the victim (due, for instance, to a valid contract actually in place or due to any commercial relation between the two parties).

In misappropriation claims, the offender takes ownership of money or other mobile assets, even if only for a short period of time and even in cases where the money or assets are later returned to their legitimate owner.

As in fraud claims, when misappropriation involves public servants and officials, the offence is sanctioned more severely, as the statutory provisions are intended to protect both the assets of the victim and the interests of public administration.

Making of corrupt payments

In transactions involving public servants and officials, corruption practices (eg, bribery) may have an impact on how these transactions are entered into and/or performed. These offences most often fall into one of the following categories:

- corruption where money or another benefit is sought to perform statutory duties or to omit/delay their execution (Articles 318 and 319 of the I.CR.C.), where the public function is systematically leaning towards private interests;
- corruption where the main purpose targeted by the corruptor is to illegitimately facilitate or penalise a party in a civil, criminal or

administrative proceeding (Article 319-quater, I.CR.C.);
- abuse of power by public servants and officials forcing (Article 317, I.CR.C.) or inducing (Article 319-quater, I.CR.C.) someone to unlawfully give or promise money or any other advantage.

Corruption within companies' organisations

While the above provisions govern corruption of public servants and officials, other statutory provisions (Article 2635 of the Italian Civil Code, hereinafter I.C.C.) punish corruption practices within companies' organisations, mainly targeting directors, general managers, statutory auditors and other management functions.

These functions are sanctioned for soliciting or receiving, for the benefit of themselves or others, money or other advantages (or accepting the promise thereof) to perform or omit an act in breach of their company's duties.

Sanctions also apply in the event corruption is not successful and where it remains at the stage of a mere attempt.

Conspiracy and criminal association

When criminal actions are brought by two (or more) persons, all of them are sanctioned for the same offence (please see **1.3 Claims against Parties who Assist or Facilitate Fraudulent Acts**). More severe sanctions are imposed against promoters and organisers, as well as when conspiracy involves more than five individuals (Article 112, I.CR.C.).

In addition, Article 416 of the I.CR.C. punishes actions within the scope of promoting, constituting, organising, directing or participating in an association composed of three or more persons, planned for the purpose of committing a certain number of offences, in such a way as to concretely endanger public order.

The punishment of those responsible for the offence of criminal conspiracy is separate and entirely independent from the actual commission of individual offences. In brief, a criminal association is a crime in itself, even if it does not commit any offence to third parties. Sanctions upon promoters, constitutors, organisers or leaders are more severe than those provided for mere participants.

Civil and Commercial Law

Misrepresentations, false statements, trickery and deceit may also have serious consequences from a civil law perspective and, in particular, may negatively affect the contractual undertakings between parties at many stages, from negotiation to performance of an agreement.

Articles 1137, 1175 and 1176 of the I.C.C. impose on any negotiating party the obligation to act fairly and in good faith throughout the negotiation and performance of a contract. As a result, many types of conduct are considered unlawful, triggering civil liability, such as providing incorrect information to the other party.

In addition, if an agreement has been entered into using trickery and deception intended to mislead the other party, under Articles 1439 and 1440 of the I.C.C., the agreement may be cancelled (in case the deceit has been so material that, without it, the other party would not have entered the relevant contract), with the right for the other party to seek compensation for the damages suffered, as well as restitution of any amount paid. If the deceptions were not so material, but still able to impact the terms and conditions of the contract, the agreement remains valid, but the other party may seek damages to restore the contractual balance.

Other provisions protect from misrepresentation in other areas or corporate laws, such as, for instance, misrepresentation in financial

statements, corporate communications and/or accounting documents, where offences are sanctioned under criminal law.

Additional consequences derive from misappropriation, misrepresentation, disguises and other concealment of assets, as well as dissipation occurring within bankruptcy proceedings, where there is greater need to protect the interests of creditors who may be deprived of resources and guarantees to satisfy their claims.

1.2 Causes of Action after Receipt of a Bribe

Under Italian law, bribery constitutes a criminal offence in cases where it involves public servants and officials, as well as in cases where it involves agents of a company (see **1.1 General Characteristics of Fraud Claims**).

Thus, both the offender who has received a bribe as well as the party paying, giving or promising the bribe are subject to the same criminal sanctions, including imprisonment.

In any of these cases, the offender can be prosecuted directly by the State. However, the victim of a bribing scheme may still have an interest in reporting offences to competent authorities, thus facilitating the discovery of the crime as well as allowing the performance of investigation activities aimed at uncovering the offence (and the offenders), and the collection of all relevant evidence. The prompt involvement of public prosecution offices may also facilitate the recovery of sums and/or assets which have been involved in the bribery.

A claimant may also have the right to initiate a civil claim towards the offender (as well as anyone who received the bribe) to recover any damage caused by the latter, under the principles of tort liability of people committing unlawful actions provoking undue damages to others (Article 2043, I.C.C.). Indemnification may be obtained either by starting civil proceedings, or by asking for indemnification in a criminal trial related to the suffered offence (see **2.5 Criminal Redress**).

In case the offender is an agent of a company, the latter may also bring actions for mismanagement and breach of fiduciary duties, forcing the removal of the offender from the company's organisation as well as entitling the company to recover damages suffered (including reputational damages).

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

According to Article 110 of the I.CR.C., when several persons take part in the same offence, all of them may be sanctioned for the relevant offence, without distinguishing between author, co-author, instigator, facilitator, etc.

Thus, each co-operator is not only liable for the actions performed by him, but also for those committed by the other parties, if aimed to achieve the agreed purpose.

In the event the commission of an offence is unintentionally facilitated by someone, the latter may be liable for negligent misconduct (occurring in the relevant circumstances) and/or for breach of professional duties.

A typical statutory provision concerning assistance and facilitation of the fraudulent acts of another is established under Article 648 of the I.CR.C., which punishes (with imprisonment of up to eight years) anyone who, in order to secure a profit for himself or others, acquires, receives or conceals money or assets resulting from any offence. This provision punishes conduct which is not criminal in itself, but that may have criminal relevance if the offender is aware (or has reason to be aware) that money or goods he/she has

acquired, received or concealed derive from a crime.

Similarly, money laundering provisions (Article 648-bis, I.CR.C.) are intended to prevent co-operation which may help the author of the crime to hide and disguise the unlawful origin of said money, goods and profits.

In the event a civil action is initiated against two or more persons involved in the same offence (see **1.2 Causes of Action after Receipt of a Bribe**), they are deemed as jointly and severally liable to indemnify the claimant (Article 2055, I.C.C.).

1.4 Limitation Periods

For criminal actions, in accordance with Article 157 of the I.CR.C., each crime has its own limitation period depending on the importance of the offence and is determined proportionally to the maximum sanction prescribed by law, with a minimum of six years for the most serious crimes and four years for others. For instance, for generic frauds under Article 640 of the I.CR.C., whose offenders are subject to imprisonment for up to five years, the limitation period is six years.

For civil actions, Article 2946 of the I.C.C. establishes a general period of limitation of ten years, which starts from the moment in which the relevant right may be exercised. Special limitation periods are established, for instance, for:

- indemnification claims deriving from a tort (five years);
- claims over corporate matters (five years);
- revocatory actions for frauds incurred by creditors (five years).

Statutory limitation periods may be subject to suspension and interruption.

1.5 Proprietary Claims against Property

In cases where a claimant seeks the recovery of property misappropriated or induced by fraud to transfer, some remedies are available to retrieve property and/or equivalent sums.

Criminal Proceedings

In cases where a person is the victim of a fraudulent act, all those properties and assets which have been used to commit a crime, as well as all those proceeds representing the profit from or the result of the crime, are subject to confiscation (Article 240, I.CR.C.), so that they can be used to restore the rights of the claimant.

Courts have discretion over confiscation measures, except for some cases where they are mandatory, such as, for instance, when targeting property that represents the converted proceeds of the fraud and/or the telematic and electronic devices used to commit a fraud. In relation to some particular offences (eg, frauds against the State, to obtain public funds, abuse of a weak position of the defrauded, computer fraud, corruption, or within companies' organisations), when it is not possible to directly confiscate assets used for the offence or the relevant proceeds, courts may still order confiscation "per equivalent", targeting other properties of the offender for a corresponding value.

Confiscation is allowed for assets belonging to the offender, to those who have assisted or facilitated the criminal conduct or to those who, despite not being directly involved, have indirectly taken advantage of it.

Civil Proceedings

If transfer of ownership is induced through fraud to transfer, the contract is cancellable (Article 1439, I.C.C.) as described in **section 1.1**, and consequently, the offended person may request the restitution of assets unlawfully acquired by

the fraudster, as well as all the relevant interests, gains and proceeds (Article 2033, I.C.C.).

Similarly, whenever assets are subject to misappropriation, the claimant has the chance to claw back his/her property from the defendant through an action for recovery (Article 948, I.C.C.), aimed to ascertain the ownership of the property and request its restitution.

Where assets have been transferred to a third party, the defendant has to obtain return of the assets directly from that third party, failing which the claimant is entitled to obtain indemnification for an equivalent value, in addition to any other damage suffered.

Bona Fide Third Party

Confiscation and the aforementioned civil actions face certain limitations when clashing with the interests of a bona fide third party.

If the third party is not aware of the origins of the assets, nor of the unlawful conduct of the offender (provided that this unawareness is irreproachable and is not the result of wilful misconduct or gross negligence) and he has not received any indirect advantage from it, the damaged party may not recover the assets from the bona fide third party, nor is it possible to bring claw-back actions or order confiscation against them. This is without prejudice to any other indemnification remedy that the damaged party may have against the offender and to the right to request expropriation or confiscation "per equivalent" of other assets of the offender.

1.6 Rules of Pre-action Conduct

Criminal Proceedings

For fraud claims not directly prosecuted by public officials, the offended party is required to make a complaint against the offender to be filed with a competent public prosecutor office, or any other criminal police authority. A complaint must be made within three months from the date the offended party received notice of the relevant criminal act.

Certain fraud claims of higher relevance can be initiated by the public prosecutor's office, at its own motion (for instance, frauds against the government, frauds implying considerable damage to the claimant's property, frauds committed through threats and other offences with a higher degree of danger).

Civil Proceedings

For certain civil claims, as a pre-action rule of conduct, it is necessary to file a preliminary request to access alternative dispute resolution methods to facilitate out-of-court agreements. The two main alternative dispute resolution methods available are (i) mediation before a third-party mediator, and (ii) assisted negotiation with the necessary support of the parties' attorneys.

1.7 Prevention of Defendants Dissipating or Secreting Assets

To prevent dissipation or secreting of assets, the fraud victim may have recourse to several provisional measures, under both civil and criminal law, which can be granted if two requirements are met:

- fumus boni iuris – arising when the substantial likelihood of success of an alleged claim is ascertained, prima facie, by the court;
- periculum in mora – arising in the presence of a well-founded fear that delays in the issuance of a certain order on the merits will probably jeopardise the claimant's interests.

Criminal Proceedings

Criminal procedural law provides instruments for an early freezing of assets involved in fraud schemes, where each instrument fulfils a different and specific purpose, as follows.

- Conservative seizure (sequestro conservativo) (Article 316, Italian Criminal Code of Proceedings, hereinafter I.CR.C.P.) – This aims to prevent the offender disposing of the relevant assets, and avoiding paying sanctions, court fees and any other amounts due as a result of a conviction. It may be ordered by the competent court, following investigations and indictment, on money and assets belonging to the defendant and to other parties which fraudulently received ownership of said assets, as the transfer may be subject to claw-back actions.
- Preventative seizure (sequestro preventivo) (Article 321, I.CR.C.P.) – This aims to prevent the offender (or other third party) maintaining availability of assets related to the offence, aggravating or prolonging the relevant consequences or facilitating the commission of additional ones. It may be requested even during the preliminary investigation phase, with court approval, and may concern any other asset subject to confiscation (see **1.5 Proprietary Claims against Property**).
- Probationary seizure (sequestro probatorio) (Article 253, I.CR.C.P.) – This is ordered in relation to the assets related to the offence (including its proceeds) to avoid their concealment or destruction and ensure their availability as evidence in court.

Civil Proceedings

Similar to the above, civil proceedings provide different types of remedies to freeze assets involved in fraud claims, as detailed as follows.

- Conservative seizure (sequestro conservativo) (Article 2905 of the I.C.C. and Article 671 of the Italian Code of Civil Proceedings (hereinafter I.C.C.P.) – This is requested on movable or immovable assets owned by the debtor, where there is a risk that the latter will be dissipating said assets, affecting the creditors' rights. It may also target assets owned by third parties acquired by them fraudulently or in bad faith, or assets held by third parties subject to claw-back remedies.
- Judicial seizure (sequestro giudiziario) (Article 760 No 2, I.C.C.P.) – This is requested on books, records, documents and other means from which evidence is purported to be derived, to preserve existing evidence to be used in court.

Enforcement and Sanctions

To ensure the effectiveness of the freezing order, provisions governing the enforcement of seizures may require that third parties are made aware of the existence of the freezing order (see **5. Enforcement**), for instance:

- for immovable assets, vehicles and other registered assets, through publicity in the relevant public registries;
- for other assets through foreclosure and delivery of notices to third parties having possession of those assets (eg, notice to the bank holding accounts in the name of the offender).

Following these fulfilments, third parties are prevented from purchasing and/or disposing of any of the assets targeted by the conservative measure.

Serious consequences are imposed on the defendant and/or other parties who do not comply with the court's seizure orders, this constituting a crime sanctioned with imprisonment up to one year and a monetary fine (Article 388, I.CR.C.).

Cross-Undertaking in Damages

Pursuant to Article 669-undecies, I.C.C.P., with the order granting or confirming a provisional measure, a court may attribute, to the party that made the request, the posting of a bond (cauzione) to the claimant to secure compensation for

any loss the defendant might suffer as a result of improper provisional measures being requested, based on the outcome of the merits. If the bond is not provided, the provisional measure becomes ineffective.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

Civil Proceedings

In a civil proceeding, the court may order inspections of places, belongings and persons. Disclosure orders cannot force the recipient to violate professional or state secrets (Article 118, I.C.C.P.). Furthermore, a defendant may be required by the judicial officer to disclose his assets during enforcement proceedings and forced expropriation (see **5. Enforcement**).

In case the debtor does not fulfil the order of further disclosure of assets imposed by the judicial authority, or makes a false statement, he may be sanctioned with imprisonment of two months to two years and a monetary fine.

The claimant may also obtain a disclosure of the debtor's assets through research in public databases, tax registries, archives of financial relationships, records of social security institutions, for the acquisition of all information pertaining to the discovery of assets and claims to be enforced (Article 492-bis, I.C.C.P.), subject to authorisation by the court.

Criminal Proceedings

Criminal law provides the possibility to acquire documentary evidence to disclose relevant information regarding the defendant (Article 234, I.CR.C.P.), including digital documents and data stored abroad (Article 234-bis, I.CR.C.P.). Documents representing the terms and the means of the offence may be acquired regardless of the person/entity who owns them (Article 235, I.CR.C.P.).

Evidence may be obtained by several means (ie, inspection, search, seizure, order to disclose secret documents, wiretapping) and can be researched by authorities on third parties' property, as well as by checking databases, documents, mail, information and software.

All these activities and measures are ordered by the judicial authority.

If, as a result of searching, evidence linked to the offence is found, it may be seized. Seizure may be carried out at third parties' premises, such as banks, IT providers, telecommunications companies, etc (Articles 254-bis and 255, I.CR.C.P.). For instance, the judicial authority may proceed with the seizure from banks of documents, values, sums deposited in current accounts and anything else, even if contained in safety deposit boxes, when it has justified reasons to believe that they are pertinent to the offence, even if not registered in the name of the offender.

2.2 Preserving Evidence

Procedures for preserving evidence in circumstances where it is feared that important evidence might be destroyed or suppressed are established both under criminal and civil procedural law.

Criminal Proceedings

The court may issue provisional measures and in particular probationary seizure (see **1.7 Prevention of Defendants Disspating or Secreting Assets**) when it is necessary to preserve evidence in circumstances and where there is a serious and actual fear that it may be destroyed or suppressed (Article 274a, I.CR.C.P.).

Generally, investigations are conducted by public prosecutor offices and police officials (see **2.4**

Procedural Orders). However, the defendant may also, through an attorney, carry out parallel and additional investigations in order to adequately protect the defendant's right to defence (Article 327-bis, I.CR.C.P.), such as researching and requesting access to documents, interviewing persons in possession of relevant information, accessing public and private properties, and with the support of private investigators. In certain instances (eg, when it is necessary to access private properties), the court's authorisation is required.

Civil Proceedings

When there is a risk that evidence may be lost or dissipated (periculum in mora), prior investigation proceedings can be activated, which allow a claimant to obtain the disclosure of evidence that is relevant and likely to be admissible (fumus boni iuris) before the start of a trial, on merits.

In such cases, the claimant may resort to one or more of the following remedies:

- Prior examination of witnesses (Article 692, I.C.C.P.), which may be required if there is a well-founded reason that one or more witnesses may not be examined when called in an ordinary trial.
- Prior technical assessment and judicial inspection (Article 696, I.C.C.P.), which may be required if there is an urgency to verify, before the start of a trial, the quality and conditions of assets and places, which would not be the same if evidence assessment was postponed until an ordinary trial starts.

Prior evidentiary proceedings may also be requested after the start of a trial, and these are in addition to the judicial seizure (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**).

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

Together with the measures previously described (see **2.1 Disclosure of Defendants' Assets**), in Italy it is possible to obtain documents and evidence from third parties through disclosure orders, which may be released by courts.

Criminal Proceedings

In addition to general measures to disclose evidence (please see **2.2 Preserving Evidence**), additional remedies are granted to secure obtainment of evidence held by professionally qualified parties (such as attorneys, notaries, investigators, etc). These disclosures may include, upon request, acts and documents, data, information and computer programs, and anything else held by such parties by reason of their profession. However, the parties can refuse to fulfil the order if they declare that documents contain confidential information inherent to their profession. Such measures may also be invoked before the commencement of proceedings.

Civil Proceedings

Under Italian civil proceedings, the parties have an obligation to support their own cases by producing all the relevant evidence (Article 115, I.C.P.C.). However, a party may face some obstacles in this process in cases where important proof is held by a counterparty or a third party.

To overcome such hurdles, the court may, under Article 210, I.C.P.C. and at the request of a party, order the other party or a third person to disclose a document or any other item or asset deemed essential for the trial. Disclosure orders have the same limitations as established for civil inspection, as discussed in **2.1 Disclosure of Defendants' Assets** (namely, orders must be essential for the discovery of relevant facts, must be carried out without causing a serious prejudice to the involved party or third person, and

the involved parties cannot be forced to violate professional or state secrets).

When disclosure orders involve a third party, the court may require its direct participation in the trial, where it may file an opposition against the disclosure order.

The court may also require a public authority to provide written information regarding acts and documents held by the public authority itself, which the court considers as necessary to be acquired within the proceeding (Article 213, I.C.P.C.).

2.4 Procedural Orders

Despite the due process principle embedded in the Italian Constitution, certain provisions allow for the issuance of special and provisional ex parte measures restricting, in some cases, this principle (albeit temporarily).

Civil Proceedings

To obtain the measures referred to in **1.7 Prevention of Defendants Dissipating or Secreting Assets** and **2.2 Preserving Evidence** (ie, conservative and judicial seizure), the ordinary procedure requires the filing of an application to the competent courts. This is followed by a summary proceeding, with the participation of both claimant and defendant, at the end of which an order is issued on the provisional measure (Articles 669-sexies, paragraph 1, I.C.C.P.).

However, when there is the need to obtain an immediate order or the participation of the defendant may prejudice the application of these measures, the claimant may request an ex parte order for the issuance of the provisional measure. The court, having ascertained these needs, may immediately issue the order and postpone the debate to a hearing with the defendant, to be held as soon as possible (Articles 669-sexies, paragraph 2, I.C.C.P.). At the hearing, the court may confirm, reform or revoke the urgent order.

Criminal Proceedings

All the stages of criminal proceedings are separate, and distinguishing between a pre-trial phase and a trial phase is important – in the former, guarantees to the accused person are attenuated, while in the latter the due process principle must be fully observed.

Investigation is carried out at a pre-trial stage by the public prosecutor and the judicial police, at the end of which the public prosecutor assesses the evidence in his possession and proposes to the judge for preliminary investigation either the indictment of the suspect or the dismissal of the investigation.

Preliminary investigations need to be carried out without any risk of interference by the suspect or third parties who may be detrimental to investigation efforts. For this reason, investigations start without prior notice to the defendant and all the relevant acts are subject to secrecy, until notice of indictment is delivered to the defendant.

In situations requiring the presence of the defendant's attorney (eg, examination of the suspect, inspections, technical assessments, research, seizures), the public prosecutor's office shall notify to the defendant a notice of investigation indicating the alleged charges together with an invitation to exercise the right to appoint a lawyer (Article 369, I.CR.C.P.).

Furthermore, if a provisional measure is ordered (please see **1.7 Prevention of Defendants Dissipating or Secreting Assets**), its issuance is carried out ex parte, though the suspect targeted with the provisional measure may challenge it by filing a request for review. The request for seizure is presented by the public prosecutor

to the court, which will decide on the existence of the requirements and whether to ultimately approve the measure.

2.5 Criminal Redress

A civil action can be exercised by the damaged party directly in a criminal trial, through the establishment of a civil party (Articles 74 et seq, I.CR.C.P.), or in a civil case and then transferred to the criminal trial.

When a civil action regarding a crime is taken before a civil court, it may be transferred into a criminal proceeding until a judgment on the merits has been pronounced in the civil proceeding, even if it is not final. Conversely, the civil action continues in the civil proceedings if it is not transferred to the criminal proceedings, or if it has started when the incorporation in judgment of a civil party was no longer permitted.

If the victim decides to bring the action in a civil court, this proceeding will be independent of a criminal trial; however the court may still suspend the civil proceeding where another trial is pending, which may affect the outcome of the decision at hand.

The damaged party still has the option to directly act in the criminal proceeding or to initiate an autonomous civil action for obtaining compensation for damages suffered, taking into consideration that the civil proceeding, even if independent and although being subject to a less rigid burden of proof, could in some particular cases be suspended pending the rulings of the criminal court.

In the civil action the damaged party must prove the facts regarding the claims for compensation, whereas in a criminal trial the burden of proof on the elements constituting the offence lies with the public prosecutor, who has extremely effective means of seeking evidence.

It is also worth mentioning that an acquittal sentence in a criminal trial in favour of the defendant also affects the rights of the claimant, as he may be prevented from pursuing his civil claims.

2.6 Judgment without Trial

The parties shall have the right – but not the obligation – to take part in a trial. This considered, a judgment without trial may still occur in a trial where the defendant wilfully and knowingly fails to participate, despite being aware of its existence.

In criminal proceedings, if a defendant decides not to appear, the court first has to verify whether he has had actual knowledge of the proceedings against him. Once actual knowledge has been ascertained, the relevant trial continues even without the presence of the defendant, but he/she will continue to be represented by an attorney appointed by the court.

In civil proceedings, if the defendant decides not to take part in a proceeding (after the court has ascertained that he/she has been properly notified of the existence of the proceeding), the latter can continue without his/her participation. The defendant is kept informed about the main events of the proceeding (such as acts containing new claims, counterclaims, court orders and others), and he will have the right to join it at any moment until the hearing for closing arguments is held. If the defendant proves that the claimant's request or its servicing is void and that, consequently, he was not aware of the existence of the trial (Article 294, I.C.C.P.), the court may restore all the defendant's reliefs and deadlines which would otherwise have been forfeited.

2.7 Rules for Pleading Fraud

As a general rule, in civil proceedings the claimant (as the party damaged by the fraud) must fulfil the burden of proof and provide the necessary evidence to convince the court to uphold

his pleadings against the defendant. In case the relevant claim, for which an order was executed, turns out to be manifestly ungrounded, or a party acted or resisted in court with bad faith or gross negligence, the same party may be sentenced to pay damages, in addition to court and legal fees (Article 96, paragraphs 1–2, I.C.C.P.).

With regards to criminal proceedings related to fraud, the damaged party must make a complaint providing the public prosecutor and pertinent authorities any relevant detail, evidence and information in his/her possession, in order for them to promptly run investigations and support the indictment. Anyone who makes a claim intentionally accusing someone he knows to be innocent, or who fabricates evidence against them, may be prosecuted for slander (Article 368, I.CR.C.).

To a certain extent, false and/or ungrounded allegations may also trigger defamation and reputational damages claims.

2.8 Claims against "Unknown" Fraudsters

Under criminal law it is possible to make a complaint against unknown suspects (ie, fraudsters who have not been identified yet), indicating to competent authorities any useful circumstances which may help their identification. Following the report, however, if investigations have not led to a solution within six months, the public prosecutor may ask the court to dismiss the case or to authorise the investigations to continue. Where the fraudsters are still not identified, the charges cannot be pushed forward, and, consequently, no claim can be initiated.

2.9 Compelling Witnesses to Give Evidence

Under both civil and criminal procedural laws, witnessing is a statutory duty. Once properly summoned in writing, witnesses are obliged to appear, to comply with the instructions given by the judge in relation to the trial and to truthfully answer questions.

If an inconvenience occurs impeding the witnesses' ability to appear, they must promptly inform the judicial authority or the party who called them, stating the justified reasons for their inability to attend. Where witnesses do not appear at the hearing without any justified reason, the court may order their forced appearance, and may also convict them or force them to pay monetary fines.

Moreover, if witnesses use fraudulent schemes to avoid attendance, they may also be sanctioned with imprisonment, in addition to monetary fines. Any breach of the duty to truthfully answer questions generates consequences of perjury and may be criminally prosecuted.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Civil Liability

Corporate entities may be civilly liable for autonomous and unauthorised unlawful acts carried out by their directors and officers in the performance of their duties, especially when the company, directly or indirectly, benefited from those acts.

In fact, according to the principle of "organic identification", directors and officers acting on behalf of their company carry out their activities as if they were the company itself. Thus, their civil liability towards a damaged claimant extends also to the company they represent.

In these cases, the liability of the company is additional to the liability of the director and officer, giving rise to a source of joint and several liability.

The extension of civil liability from an individual director or officer to the company may be avoided in those cases where it clearly appears that the actions carried out by directors and officers do not fall within the corporate purpose of the entity and are outside the scope of the company's interest.

Corporate Criminal Liability (Legislative Decree No 231/2001)

Criminal liability constitutes an exception to the aforementioned principle, since it has a personal nature and, therefore, directly affects directors and officers, rather than the company itself.

Following the introduction of Legislative Decree No 231/2001, companies and other legal entities are subject to a particular kind of liability (which formally has an administrative nature but acts mostly like criminal liability) for offences carried out by persons having roles of representation and management within the company, as well as officers subject to the supervision or direction of directors and other such individuals.

This liability of the company is autonomous and additional to the personal criminal liability of directors and officers.

To validly claim the existence of corporate criminal liability, it is necessary that the offence is committed "in the interest or to the advantage of the organisation", while if the offender acts solely and exclusively in the interests or for the advantage of himself or third parties, the organisation is not deemed liable.

The offences triggering liability of a company may include, for instance: offences against public administration (ie, corruption, bribery), misrepresentation of financial information, tax fraud, money laundering, computer crimes, environmental crimes, etc. To a certain extent, the company can also be held liable if offences are perpetrated outside Italian territory.

If one of these offences is committed by a director or officer, the company itself is sanctioned with monetary fines, disqualification from carrying out certain activities and confiscation of assets.

To avoid liability, the company is required to adopt and actively implement the following:

- a so-called "Organisation, Management and Control Model" (or 231 Model), which is a manual containing principles and procedures to evaluate, monitor, prevent and manage the risk of offences being committed within the corporate organisation;
- a supervisory body, with the duty to evaluate and monitor the observation and implementation of the 231 Model.

3.2 Claims against Ultimate Beneficial Owners

When a company is used as a vehicle for fraud, remedies are still available to the claimant to directly address the individuals culpable of the offence (eg, shadow directors and ultimate beneficial owners), especially for limited liability companies; whereas for partnership-like entities, members remain subject to joint and unlimited liability.

Claims targeting individuals behind the "corporate veil" usually follow a two-tier approach:

- first, actions are brought against the individuals who formally hold roles and functions within the company, such as the actual directors and managing body;

- secondly, remedies may be sought against shadow directors and ultimate beneficial owners, to the extent evidence is found connecting these individuals to the offence being perpetrated and/or where it is discovered that they gained advantage from the offence carried out by the apparent fraudsters.

Italian case laws impose upon shadow or de facto directors the same liabilities and obligations as upon actual directors, with relevant indemnification obligations towards a company's creditors and other damaged parties, for breach of fiduciary duties.

Similarly, ultimate beneficial owners may be held liable if they actively took part in the offence (or benefited from it) and/or if they were systematically involved in the management of the company, so as to fall within the category of shadow directors.

Article 2086 of the I.C.C., as recently amended, also imposes upon owners and founders the duty to implement an organisational and management system adequate to the nature and size of the business, to detect the onset of an insolvency situation and avoid harm to creditors and other third parties.

3.3 Shareholders' Claims against Fraudulent Directors

Directors are jointly and severally liable towards the company, its shareholders, creditors and other third parties for breach of their fiduciary duties and/or mismanagement.

Rules to bring a claim may vary depending on whether the party actioning the remedy is the company itself or a single shareholder, a creditor or a third party.

For companies limited by shares (Articles 2393 and 2393-bis, I.C.C.), actions brought by the company against directors shall first be resolved by the shareholders' meeting or, alternatively, may be initiated with a resolution of the supervisory board in charge of ongoing management and accounting control. If the resolution is approved with a majority of one fifth of the share capital, the targeted directors are immediately revoked from their office. The action may be brought by minority shareholders representing at least one fifth of the share capital (or one fortieth in listed companies), or the lower percentage set forth in the by-laws.

Similar remedies are provided for limited liability companies (Article 2476, I.C.C.), where actions may be promoted by each quotaholder in the interest of the company (therefore, there is no need for a majority vote in the quotaholders' meeting), with the possibility to request removal of the involved directors as a provisional measure.

In addition to this, claims against directors may be brought by creditors if the company's assets have been depleted and are not sufficient to satisfy their claims. Single shareholders and/or any third party also have the right to initiate an action to recover any direct damage that they suffered (it being different from the harm suffered by the company itself) as a result of directors' mismanagement and fraudulent conduct.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

Criminal Law

Italian jurisdiction relies on the principle of territoriality, whereby a crime committed on Italian soil is punishable under Italian laws.

A crime is deemed to be committed on Italian soil even if just a part of the criminal conduct has taken place in Italy, or if the relevant events or effects have happened, in whole or in part, in Italy (so, for instance, Italian courts have jurisdiction over international informatic frauds if the offence, committed abroad by a foreigner, has produced its effects in Italy).

In addition, to a certain extent special provisions regulate jurisdiction of Italian courts for offences committed abroad (eg, offences against Italian states, offences committed by public officials, offences committed abroad by an Italian citizen if the offender is located in Italy, offences committed abroad by a foreigner causing harm to the Italian State or Italian entities).

In addition, Italy has implemented European Union legal provisions on criminal judicial cooperation and introduced new instruments, principles and regulations concerning: mutual assistance in criminal matters between member states; conventions on extradition between member states; the institution of a European judicial network on criminal matters; the implementation of a European arrest warrant and of the European investigation order; the mutual recognition of pre-trial supervision measures; the mutual recognition of freezing orders and confiscation orders.

Civil Law

As a general rule, Italian courts have jurisdiction over civil claims whenever the defendant is domiciled in Italy, or if they have a representative in Italy (Article 3, L 218/1995).

The parties may also conventionally decide to attribute jurisdiction to Italian courts, for example, in the case of actions based on contractual liability (Article 4, L 218/1995).

From a European perspective, Regulation 1215/2012 (Brussels I-bis), fully applicable in Italy, establishes jurisdiction between member states, as well as provides for mutual recognition and enforcement of judgments on civil and commercial matters.

Regulation 1215/2012, while confirming the jurisdiction of the country where the defendant is domiciled, is capable of attracting to Italian jurisdiction some particular matters related to international fraud claims, such as:

- for matters relating to a contract, if the relative obligation had to be performed in Italy (and particularly, if the services under the contract were provided or should have been provided in Italy);
- for matters relating to tort, when the harmful event has occurred or may occur in Italy;
- with reference to civil claims for damages or restitutions representing the result of criminal proceedings, if these proceedings have taken place in Italy;
- the enforcement in Italy of decisions taken by courts of another member state or the seeking of relevant provisional and protective measures in Italy.

5. ENFORCEMENT

5.1 Methods of Enforcement

Enforcement of Criminal Sanctions (Articles 656 et seq, I.CR.C.P.)

Criminal enforcement may occur only after a judgment becomes final (Article 650, I.CR.C.P.). Prior to the final decision on the merits, preventative measures may still be requested and authorised to partially anticipate the effects of the enforcement.

Enforcement depends on the type of sanction that has been imposed by a judgment, in particular those listed here.

- Custodial measures: custodial sentences are enforced with the detention order issued by the public prosecutor. For custodial sentences requiring detention for a period of less than three years, the detention order is issued together with a suspension decree, allowing the offender to benefit from milder sanctions (ie, house arrest, surveillance, etc). A person convicted by detention may also request the conditional suspension of the sanction, if its duration does not exceed two years and if the convicted person has not already been sentenced by a custodial measure. For fraud claims, the conditional suspension lasts for five years, during which the offender is subject to probation. At the end of the suspension the crime is extinguished.
- Monetary measures: in addition to or alternatively to custodial measures, enforcement may also imply the payment of monetary fines proportionate to the committed offence. Any failure to pay will determine an automatic conversion into detention.
- Ancillary sanctions: courts may also impose ancillary sanctions, which may have a serious impact on the convicted from a personal, professional and reputational point of view, ie, a travel ban, and disqualification from holding public offices or executive offices of legal entities. Sanctions will also remain on the criminal records of the offender.

Enforcement of Civil Decisions and Expropriation of Assets

Before starting enforcement, the claimant must obtain an enforceable order (ie, judgments, injunctions and other orders issued by the court) to be served to the debtor, together with a writ of execution, requiring obligations to be performed. Following receipt of notice, the debtor has ten days to fulfil their obligation under the order, failing which, enforcement procedures can follow.

During enforcement, the claimant is supported by a judicial officer who carries out all the relevant enforcement activities by using a wide range of powers, including resorting to law enforcement officials.

The enforcement procedure mostly sought-after in fraud claims, and more generally, in monetary claims, is the expropriation of assets.

Expropriation is initiated with a foreclosure (please see **2.1 Disclosure of Defendants' Assets**), which takes different forms (which can also be accumulated) depending on the targeted assets:

- movable assets or money in possession of the debtor;
- movable assets or money of the debtor in possession of third parties;
- immovable assets.

For movable assets, foreclosures consist of an injunction addressed to the debtor whereby they are warned not to dispose of any of the foreclosed assets, together with their proceeds. A custodian may also be appointed to protect the assets throughout the expropriation process.

When movable assets or money of the debtor are held by third parties (eg, money in bank accounts, investment accounts, salaries and wages due from an employer), a notice is addressed to the third parties whereby they are warned not to transfer, dispose and/or return any of those assets, and are also required to declare the exact amount of any assets/money owed and in their possession.

For immovable assets, foreclosure is enforced through filing and registration in the relevant land

registry, so that the existence of the lien can be opposed to any third party.

Once assets have been frozen through foreclosure, the final steps of the enforcement process are aimed to ensure that the assets are sold or assigned. The sale of assets may take place by auction or without auction, and in the presence of intervening creditors; the distribution of the proceeds or the assignment of the assets is carried out following the implementation of a distribution plan.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

In criminal proceedings the defendant may invoke a "right to silence", by means of which he can refuse to provide information to investigators, to public prosecutors and to courts; and he is not obliged to tell the truth either. Opting for silence may often prove inconvenient, as it can be interpreted and evaluated as evidence of guilt. In pre-trial examinations, the suspect only has the obligation to identify himself, whereas in the event of a trial the defendant is examined and cross-examined only if he so requests or expresses his consent.

Differently from criminal proceedings, in civil proceedings parties cannot take advantage of the right to silence or take the role of witness, being directly involved in the proceeding. However, parties may be subject to formal interrogation based on specific and separate questions predetermined by the counterparty in the relative requests for evidence. Questions are addressed directly by the judge, either freely or based on those requests formulated by the parties in a detailed manner – and admitted by the judge beforehand. This interrogation can also be aimed at obtaining the judicial confession of facts unfavourable to the party to whom he is referred. If a party does not appear or refuses to answer questions without any justified reason, the court may deem the allegations confirmed.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

Lawyers must maintain the utmost confidentiality about professional activity carried out in favour of their client, as well as about information they become aware of in connection with their office.

Only limited exemptions are provided to this principle, such as in those circumstances where it is necessary to prevent the commission of particularly serious offences. Nevertheless, any authorised disclosure needs to be proportionate to the envisaged purpose.

In criminal proceedings, wiretapping of attorney-client conversations is prohibited. The seizure of any correspondence between the client and the attorney is also forbidden, unless the court has a well-founded reason to believe that it constitutes the product or the result of the crime (Article 103, I.CR.C.P.).

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

Punitive damages are not expressly regulated in the Italian legal system.

Nevertheless, in recent years, the Italian Supreme Court has eventually acknowledged the applicability, in some cases, of punitive damages, as they are deemed "not incompatible with Italian public policy" (Supreme Court, Plenary Session, No 16601/2017).

As a result, foreign judgments ordering punitive damages may be acknowledged and enforced in Italy. However, there are certain conditions to be met: the punitive damages imposed by the foreign judgment must be explicitly foreseen by the law of the "country of origin", and must also be foreseeable in their amount.

A prelude to this conclusion can be seen in other specific matters not strictly related to fraud matters, where Italian laws provide monetary fines in a measure not corresponding to the harm suffered by the damaged party, such as with infringement of patents and trademarks, environmental damages, or compensation for damages, even ex officio, for procedural liability where it appears that a party has acted or resisted in court recklessly with bad faith or gross negligence (Article 96, paragraph 3, I.C.C.P.).

7.2 Laws to Protect "Banking Secrecy"

The Italian legal system lacks an explicit legislative provision on banking secrecy. However, there are rules which, although not directly aimed at guaranteeing this secrecy, expand the protection of customers towards financial operators by imposing a general obligation of correctness in the performance of legal relationships and an obligation of guaranteeing the confidentiality of data known by banks in relations with actual or potential customers.

Case law is now consolidated in the belief that the choices of courts and legislators, if oriented in favour of the protection of confidentiality of certain data held by banks and financial institutions, cannot constitute an obstacle to ascertaining the correct payment of taxes and to the enforcement of other primary requirements, such as those connected to the administration of justice and the persecution of crimes.

Thus, banking details may be disclosed for several reasons, ie, in order to verify income and the consequent correct payment of taxes, or to investigate the possible commission of offences. Even in civil enforcement procedures (please see **2.1 Disclosure of Defendants' Assets**) the claimant may obtain disclosure of information regarding any financial relationship between the debtor and banks.

7.3 Crypto-assets

Crypto-assets are not an official legal tender, nevertheless they may be used as a method of payment for purchasing goods and services if the seller accepts them.

Both Italian and European legislators are trying to fill the regulatory gap by defining crypto-assets and imposing relevant limits. For example, in 2017 the Italian Ministry of Economics and Finance (MEF) included service providers related to virtual currency among the recipients of anti-money laundering obligations; while in 2022 the Cryptocurrency Registry was established, by which transaction data must be transmitted quarterly to the MEF. Additionally, in 2018 the European Parliament formally recognised crypto-assets and imposed mandatory checks on customers by digital wallet service providers, in order to end anonymity (Directive 2018/843).

Prevailing jurisprudence admits: (i) probationary seizure, performed by digitally extracting evidence of relevant transactions; (ii) preventative seizure, performed either by seizing the agent's hardware, files or the informatic data held by service providers in which assets are located. In addition, criminal provisions punishing the transfer and usage of money or assets deriving from a crime (ie, money laundering) are systematically applied to crypto-assets, even when they are used to hide, thanks to their anonymity, the illegal origin of funds.

LAWP – Studio legale e tributario is a law and tax firm with over 20 years of providing assistance in corporate and commercial transactions (including M&A, financing, joint ventures) as well as in tax matters, to both private and corporate clients. It successfully operates in civil, commercial and tax law by pooling the expertise of lawyers and chartered accountants. LAWP professionals are particularly appreciated in the handling of complex issues requiring diverse skills and innovative solutions and assist national and international clients in connection with cross-border matters impacting several jurisdictions. LAWP also advises on a wide range of complex commercial litigation and arbitration matters, in commercial, corporate, sport and financial sectors, with a focus on contractual claims, directors' liabilities, and tax litigation, as well as in international fraud and asset tracing. It also assists in all activities to obtain provisional measures, enforce foreign judicial decisions or measures, and obtain civil compensation, and in out-of-court undertakings.

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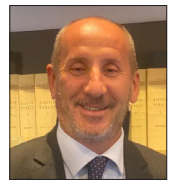

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JAPAN

Law and Practice

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

Fraud

When a fraudster deceives a victim and causes them to be under a false impression and to deliver property or other assets to obtain an advantage or cause another person to obtain such advantage, the fraudster is punishable under Article 246 of the Penal Code. A prison sentence of up to ten years may be imposed.

In addition, under the Civil Code, fraudulent acts can be revoked and a person who embezzles another person's property in their possession in the course of business may be punished by imprisonment for up to ten years for embezzlement (Penal Code Article 253). This is an act of unlawfully obtaining property in one's possession in violation of one's entrusted duties, and is an act committed in violation of the trust of the person in question.

In addition to the typical acts of fraud and embezzlement described above, a crime in which a director or executive officer of a company acts in breach of their duties for the purpose of benefiting themselves or a third party, or for the purpose of causing damage to the company, thereby causing damage to the company, may be punishable as a special breach of duty and may have a penalty of up to ten years imprisonment and/or a fine of up to JPY10 million imposed on them under Article 960 of the Companies Act.

Bribery

If a public official, in connection with their duties, accepts, demands or promises to accept a bribe, they shall be punished with imprisonment for a term not exceeding five years. In this case, if they accept a bribe to perform illegal activities, they may be punished with imprisonment for a term not exceeding seven years (Penal Code Article 197).

The crime of bribery is based on the status of a public official; generally, it is not a crime for an employee of a company to accept a commercial bribe. However, if a director, auditor, manager, or employee (such as a department or section manager) of a company, who has been delegated with authority over any type or specific matter related to the company's business, receives, demands, or promises to receive a financial benefit in connection with their authority, they may be imprisoned for up to five years or fined up to JPY5 million (Article 967 of the Companies Act).

Recovery of Damagers

In Japan, in order to recover damages caused by fraud from a fraudster, it is common for the victim to file a lawsuit for damages, claiming that said fraudster committed an illegal act. This claim may be based on an improper act, such as deceptively obtaining assets. Alternatively, in the context of an investment contract, the claim could be based on a false statement of intent to invest in the investment described in the investment contract, or on the use of funds for an investment other than the original stated investment purpose. Furthermore, cases where there is no investment at all due to fraudulent descriptions or terms in the investment contract (such as Ponzi schemes) can be regarded as a breach of contract.

Conspiracy/Aiding and Abetting

In addition, any conspiracy to operate, or aid and abet, a fraudulent scheme also creates potential liability for damages as an unlawful act.

1.2 Causes of Action after Receipt of a Bribe

In Japan, both offering and accepting bribes are illegal acts that violate the Penal Code. Article 708 of the Civil Code provides that "[a] person

who has tendered performance of an obligation for an unlawful cause may not demand the return of the thing tendered." This is why a person who has offered a bribe cannot demand the return of the bribe from the recipient. The above principle is based on the "clean hands" principle, which holds that courts will not provide legal remedies to those whose hands are "dirty" (ie, those who have acted unethically).

Furthermore, a person who learns that their agent has taken an illegal bribe cannot demand that the agent turn over the bribe. Even if the claimant files a lawsuit against their agent for transfer of the bribe, the court will not recognise the applicant's right to make a claim for the bribe. This is because the court will not enforce an illegal claim: if the court allows the applicant to demand the transfer of a bribe, the court would essentially be assisting in a demand for illegal profits. However, a principal may claim compensation for the damages suffered by them against their own agent.

Overall, in a civil trial, an agent who has received a bribe is not required to comply with a claim for repayment of the bribe from the person who paid the bribe, nor for a transfer of the bribe from the agent's principal. However, since the act of accepting a bribe is a crime, if this act is brought to light, it is normal for the recipient to voluntarily return the bribe. This is because retaining the bribe would increase their potential criminal penalty. In addition, if there is a criminal proceeding against the agent, a judge will order that such a bribe be confiscated.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Article 719, paragraph (1) of the Civil Code provides that "[i]f more than one person has inflicted damages on others by joint tort, each person shall be jointly and severally liable to compensate for such damages." Furthermore, Article 719, paragraph (2) provides that "[t]he provision of the preceding paragraph shall apply to a person who induces or aids a person who commits an act, by deeming them to be a concerted person." Therefore, those who support or assist tortfeasors are jointly and severally liable for damages as joint tortfeasors.

If a tortfeasor illegally acquires property and subsequently transfers that property to another person who knows that the property was acquired via tortious conduct, it becomes difficult for the victim to recover the property via a claim in tort. Therefore, such a transfer may (i) fall under the definition of aiding and abetting the tort, and (ii) be subject to compensation for damages.

1.4 Limitation Periods

Article 724 of the Civil Code stipulates that "the right to claim damages in tort shall be extinguished by prescription if not exercised by the victim or their legal representative within three years from the time when he/she comes to know of the damages and the tortfeasor. The same shall apply when 20 years have elapsed from the time of the tort."

Normally, in cases of tortious damages claims, such as those arising out of fraudulent schemes, the victim or their legal representative is more likely to know the damage and less likely to know the identity of the tortfeasor. Therefore, the right to claim may lapse after three years due to the statute of limitations. However, a 20-year statute of limitations applies to cases where fraud has been committed but the identity of the tortfeasor is not known to the victim. In other words, as long as the tortfeasor is identified within 20 years, the claimant has three years from the date of identification to file a claim. However, the claimant's rights to claim are extinguished 20 years after the date of the incident, regardless of whether the damage or the identity of the tortfeasor was known to the claimant.

1.5 Proprietary Claims against Property

If the owner of any property transfers it due to fraud, and the recipient further disposes of that property to a third party, that third party may be requested to return the property to its rightful owner if they received said property in bad faith (eg, knowing that it was fraudulently obtained). However, if the person who acquired the property did so in good faith, the property itself cannot be forcibly transferred to its rightful owner. Despite this, the original property owner can claim the proceeds from the sale of the property as damages from the original tortfeasor. If the fraudulently obtained property has been disposed of for funds, the claimant can demand payment of those funds as damages even if the proceeds have been mixed with other money.

If the tortfeasor invests the proceeds and obtains more money as a result, the original victim may only claim an amount equal to their original loss, not the increased amount. This is because claims for damages due to tort can be made only to the extent that there is a reasonable causal relationship. Where the claimed money has been used to make a large amount of profit, which the claimant could not reasonably foresee, it is not possible to claim the return of the full amount of profits created as a result of the original funds.

1.6 Rules of Pre-action Conduct

Provisional attachment and provisional injunction procedures exist in order to prevent the property of tortfeasors from being dispersed or hidden. These procedures exist for civil claims in general and there are no special preservation systems which apply only for claims for damages arising from fraud.

Freezing Fraudulent Accounts for Victim Redress

There exists one exceptional system of special relief for victims of fraud in Japan. This system allows victims of wire fraud and similar offences to recover some of their losses by empowering banks to make payments to victims out of the funds seized from the proceeds of said fraud (pursuant to the Act on Damage Recovery Benefits Distributed from Funds in Bank Accounts Used for Crimes). This system was established in order to provide relief to victims of wire fraud by paying them compensation from money which has been transferred to the account of a financial institution as a result of such fraud and which is still identifiable.

Specifically, when a financial institution finds that there are reasonable grounds to suspect that a deposit account has been used for crime, that institution must promptly suspend transactions with said account and freeze it. The financial institution must then make a request to the Deposit Insurance Corporation, a government agency, to give public notice of the commencement of a procedure for seizing the monies deposited in said account. The Deposit Insurance Corporation shall, upon receiving such a request, give public notice without delay. This public notice must be made available for public inspection via the internet, and any person who has suffered damage as a result of the crime may request payment of damage recovery benefits.

Difficulties with This Process

There are two notable problems with this system.

The first is the speed with which financial institutions freeze the deposits. When a bank decides whether an account is used for a crime, it takes into consideration information provided by investigative authorities, as well as the results of its own investigation into the status of transactions related to the account, and the whereabouts of the account holder. Therefore, the speed of the bank's own investigation is important because there is a high possibility that the tortfeasor may withdraw the funds from the bank account

between the time the bank receives information about a criminal wrongdoing from the victim or the Consumer Affairs Centre, but before a formal police investigation is conducted. The bank must conduct its own investigation to prevent the attitude of "[i]f there is no information from the police indicating that the account has been used in crime, that account shall not be frozen" from taking hold. Moreover, if a financial institution takes measures to suspend transactions in a deposit account upon notification from the victim or their attorney, and measures to freeze the deposit account are taken before the tortfeasor withdraws the funds, such measures will be an effective means of allowing the victim to recover damages.

The second problem is the low level of public awareness of the public notices issued by the Deposit Insurance Corporation. There may be victims who cannot (or do not) see the internet announcements, or do not know that these notices exist. A common example is elderly people, who are common targets of fraudulent schemes, who may also have difficulty using the internet. In this case, it is important for the victim to contact the police or lawyers, file a damage report promptly, and request payment of damage recovery benefits from the Deposit Insurance Corporation when a public notice is issued.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Provisional seizure and provisional injunction procedures can be used in order to prevent the concealment or dissipation of illegally obtained property by tortfeasors.

Provisional Seizure (Provisional Attachment)

For a monetary claim, a provisional seizure can be used as a means to maintain the status quo and preserve the efficacy of future compulsory execution orders. This procedure operates by selecting appropriate funds corresponding to the amount of the claim from among the monies that were allegedly tortiously obtained. When a person is deprived of cash or physical valuables by a deceptive fraudulent act, it is difficult to find out where that dishonestly acquired cash or property is being held. However, in the case of a fraudulent request to transfer money to a specific bank account, it is possible to obtain a provisional seizure order and request the freezing of the account concerned. As a general rule, banks do not freeze deposits without an order of provisional seizure issued by a court, so victims must go through the procedure of obtaining an order for provisional seizure. This attachment procedure falls under the jurisdiction of the debtor's residence, or the jurisdiction where the funds are located.

Provisional Injunction

A provisional injunction is a measure intended to maintain the status quo of a physical object when the victim of a tort has a right to demand return of that specific object from the tortfeasor and the current physical or legal status of the object may change, potentially frustrating the enforcement of that right in the future. In cases where compulsory execution is hindered or is likely to be hindered (such as when the property is converted into cash or when real estate is disposed of, when it becomes difficult to recover the property, or when it becomes difficult to locate the property due to the escape or relocation of the debtor) preservation will usually be judged to be necessary. This provisional injunction procedure is subject to the jurisdiction of the debtor's address or the place where their property is located.

Effectiveness of Seizures and Injunctions

Even if further transfer of property is made in violation of a provisional seizure or provisional injunction, as described above, that transfer does not have legal validity and will be revoked. An order for provisional injunction against real

property is recorded in the real property registry, so it is deemed to be known by any person who receives the assignment of the real property and is effective against them. In other words, provisional orders in respect to land are also effective against third parties after the provisional injunction order is acquired and registered in the registry.

Security Deposit

In addition, in order to obtain an order of provisional seizure or provisional injunction, the applicant is required to provide a security deposit of approximately one third of the value of the property to be held as security in order to preserve the defendant's right to claim damages.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

A property disclosure order can only be made after the acquisition of a judgment, and an application for such an order cannot be made before the acquisition of the judgment.

A claimant in a monetary claim who has an enforceable authenticated copy of a title of obligation may file a petition for an order to disclose property against the holder of the claimed property when there is prima facie evidence showing failure to obtain full performance of a monetary claim, or prima facie evidence of failure to obtain full performance of a monetary claim even if compulsory execution against known property is implemented (Article 197 of the Civil Execution Act).

Since Japan does not have an unexplained wealth order (UWO) system, such as that of the United Kingdom, there is no way to confirm the existence of the debtor's property unless the victim files a petition for a provisional seizure order with the court, obtains the court's decision, and goes through seizure procedures against bank accounts or other property.

Therefore, there are no legal preservation procedures for property before the acquisition of a judgment, except for the provisional seizure order and provisional injunction order as described in **1.7 Prevention of Defendants Dissipating or Secreting Assets**. However, these procedures cannot be executed when the property of the defendant is not known to the claimant. In addition, a petition for provisional seizure or provisional injunction may only be filed against the defendant themselves, and not a nominee.

Furthermore, in order to obtain an order of provisional seizure or provisional injunction, the applicant is required to provide a security deposit of approximately one third of the property's value, to be held as security in order to preserve the defendant's right to claim damages.

2.2 Preserving Evidence

In Japan, there is a procedure for preserving evidence under the Code of Civil Procedure. This procedure can be used by the parties in cases where there is a risk that evidence expected to be used in civil litigation is likely to be destroyed or tampered with (Article 234 of the Code of Civil Procedure). The requirement for this procedure to be invoked is: "where the court finds that there are circumstances under which it would be difficult to use the evidence unless it has conducted an examination of that evidence in advance." This is understood to refer to cases where evidence is likely to be lost, or where the usefulness of that evidence is likely to deteriorate with the passage of time.

It should be noted that this procedure is for the court to preserve evidence by conducting an examination of evidence, such as via the examination of a witness, examination of a party,

observation of physical evidence, or examination of documentary evidence, at the request of a party. Therefore, the examination of evidence is carried out by the court and not by the parties. In Japan, there is no procedure by which the parties themselves are allowed, with the permission of the court, to search for and preserve evidence at the residence or place of business of the other party.

A petitioner for the preservation of evidence is not required to make a pledge or provide any collateral to cover any potential loss that might be incurred by the other party.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

In Japanese civil suits, there are several evidence-collecting procedures that allow for the disclosure of documentary evidence and other evidence from third parties.

Procedures Available Prior to the Filing of an Action

Attorney inquiry system

The attorney inquiry system is governed by the Attorney Act. Using this procedure, a bar association to which an attorney belongs makes an inquiry, at the request of that attorney – to a specific public office, or a public or private organisation – for information necessary for that attorney's case (Article 23, paragraph (2) of the Attorney Act). If the bar association finds that an attorney's inquiry request is reasonable, it may, in accordance with that request, make an inquiry to public offices or public or private organisations and request that they submit the necessary evidence.

However, if the matters relating to the inquiry are outside the jurisdiction of the specified public office, or the public or private organisation, or if the inquiry violates the reputation or dignity of any person, the bar association will reject the inquiry request as inappropriate. The public office, or public or private organisation subject to the inquiry has a legal obligation to report back to the bar association. Despite this obligation, there have been cases in which the target office or organisation refused to answer on the grounds of protecting the privacy of its customers, or the confidentiality obligations of public officials. There is no enforceability mechanism or penalty for non-compliance with this legal obligation. Therefore, in practice, inquiries in relation to tax, postal and telegraphic matters, and bank deposits are often rejected.

Procedures Available After the Filing of an Action

Request for document production

Upon the petition of a party, the court may request that a person in possession of specific documents (such as the Legal Affairs Bureau) send those documents to the court for use as evidence (Article 226 of the Code of Civil Procedure). Public agencies and offices have a general obligation to accept the request of the court, but they may refuse a request in certain cases, such as where the disclosure of the documents may infringe upon the privacy of an individual. On the other hand, private persons have no obligation to accept a request from the court.

Request for examination

One of the procedures that can be used after the filing of an action is a request for examination (Article 186 of the Code of Civil Procedure). This is an evidentiary examination procedure in which the court makes requests to public offices, schools, chambers of commerce and industry, stock exchanges, and other public and private organisations to conduct necessary examinations of disputed matter in the litigation. It is understood that the entities subject to the request have a public obligation to comply with the court, but there is no penalty for refusing to do so.

Document submission order

Upon the petition of a party, the court may issue an order to the other party, which holds a relevant document, to submit that document to the court (Article 223, paragraph (1) of the Code of Civil Procedure). It is also possible for the court to issue the same order to a third party, and if the third party does not comply with the order, the court can impose a non-criminal fine of up to JPY200,000 on that third party (Article 225, paragraph (1) of the Code of Civil Procedure). The current Code of Civil Procedure contains a general obligation to submit documents, and any document may be subject to a document submission order. However, the Code of Civil Procedure also provides grounds for excluding certain documents from that obligation.

When filing a petition for a document submission order, it is necessary to clearly identify and specify each document that the applicant wishes to be subject to the order. However, there are cases where, at the time of filing, the applicant has insufficient information to specify the target document. In these cases, if at least the "matters by which the holder of the document can identify the document pertaining to the petition" have been specified, the court can request that the holder of the document identify and submit the document (Article 222, paragraph (1) of the Code of Civil Procedure). It is generally understood that this requires the applicant to provide criteria or information which enables the holder of the document to identify the requested document from other documents without an unreasonable amount of time or labour.

In general, a document submission order in a Japanese civil suit is merely a procedure to have necessary documents submitted as evidence; this is quite different from the discovery process found in common law, which requires extensive disclosure of evidence relevant to the case when the necessity of that evidence is not yet completely clear.

2.4 Procedural Orders

Preservation procedures such as attachment and provisional injunctions, described in **1.7 Prevention of Defendants Dissipating or Secreting Assets**, need to be implemented in such a way so that the other party is not aware of them in advance, in order to ensure their effectiveness. The degree of necessary secrecy depends on the type of preservation procedure. For attachment and provisional injunctions in relation to a disputed subject matter (which are normally used in suits for the recovery of damages for wrongful harm) the court may issue a preservation order as a provisional remedy following a written hearing consisting only of a written petition and prima facie evidence (without a full hearing to give parties an opportunity to present their opinions). Even if a hearing is held, it is sufficient for the court to hear only the party filing the petition.

The procedure for the preservation of evidence, explained in **2.2 Preserving Evidence**, can be carried out even if the intended defendant is unknown and cannot be identified. In this case, the court may appoint a special agent for the prospective defendant (Article 236 of the Code of Civil Procedure). When the proceedings for the preservation of evidence are undertaken against an identified defendant, however, the court is required to summon both parties on the date for the examination of evidence in order to give them both the opportunity to attend the proceedings. However, it is not necessary to summon either or both parties in "case[s] requiring urgency" (Article 240 of the Code of Civil Procedure). For example, it is generally understood that a "case requiring urgency" is one where examination of evidence becomes impossible if both parties are summoned, such as when a wit-

ness is in critical condition, or when an incident site cannot be left unattended.

2.5 Criminal Redress

Plaintiffs in civil suits in Japan lack access to strong evidence collection procedures such as discovery in common law systems. Therefore, plaintiffs need to gather sufficient evidence by themselves to prove the alleged wrongdoing. In general, however, it is quite difficult for a party to independently collect sufficient evidence to obtain a successful judgment in a lawsuit.

There are many cases in which victims cannot identify fraudsters in the first place. Therefore, victims often file criminal complaints expecting that the investigating authorities (such as the police) will reveal the identity of fraudsters and the relevant facts of the fraud. In practice, it is common for victims to reach settlements with fraudsters in order to recover damages in the course of criminal procedures. In such cases, there is an incentive for fraudsters to compensate victims because a public prosecutor may decide to drop the case against them, or seek a less severe penalty at trial. As a result, in many cases, an out-of-court settlement is reached without civil proceedings and the victim's damages are made good to a considerable extent.

In fact, it is difficult for a fraudster to deal with civil suits in cases where they are detained during the investigation and trial of the associated criminal case. Accordingly, civil suits are often initiated after the criminal cases have been resolved. Because of this, the records of criminal cases are often used as evidence in civil proceedings by plaintiffs using means such as the attorney inquiry system or the document submission order described in **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**.

On the other hand, there is also a system which allows a sort of parallel criminal-and-civil proceeding, in the form of the restitution order system (Act on Measures Incidental to Criminal Procedures for Purpose of Protection of Rights and Interests of Crime Victims, Chapter 7). This system provides a simple and speedy solution to the issue of damages by allowing the court in a criminal trial to hear a civil claim after the defendant's culpability has been established, and order the defendant to pay damages to victims. However, this system is available only in cases where a person is killed or injured by intentional criminal acts, such as murder or assault, and cannot be used to recover damages caused by white-collar crime.

2.6 Judgment without Trial

When a plaintiff files a civil action, the court designates a first hearing date. However, if the defendant does not appear on the first hearing date and does not submit a written plea, all the facts alleged by the plaintiff in the complaint will be deemed to be true by the court (Article 159, paragraph (3) of the Code of Civil Procedure). Since the court does not need to conduct any further examination of evidence, it immediately concludes oral arguments and makes a judgment in favour of the plaintiff. Such a ruling is called a judgment by default.

If the defendant is absent on the first hearing date but submits a written plea demanding dismissal of the plaintiff's claim instead, the defendant shall be deemed to have made a statement (Article 158 of the Code of Civil Procedure). However, if the court finds it to be appropriate, in consideration of the circumstances of the trial and the status of the defendant, it may, at the request of the plaintiff, conclude oral arguments and render a judgment in favour of the plaintiff unless the defendant attends on a subsequent date.

There are also cases where the defendant attends court hearings but makes incomprehensible arguments. It is up to the defendant to decide what kind of argument to make in a civil court and to submit evidence. Therefore, if the defendant does not properly defend the case, it is possible for the plaintiff to obtain a judgment in its favour at an early stage. However, courts have the authority to ask questions and request proof in order to clarify facts or legal relationships. In some cases, the court is expected to actively exercise that authority if they do not believe that the truth has been found and, therefore, that an early judgment is likely to be inappropriate. Accordingly, in cases where the court determines that the plaintiff's victory would not deliver justice, the plaintiff may not necessarily receive a judgment in their favour at an early stage.

2.7 Rules for Pleading Fraud

There are no special rules or professional codes of conduct for making allegations of fraud. As explained in **2.5 Criminal Redress**, victims of fraud often seek to recover their damages from fraud in the course of criminal proceedings rather than civil proceedings. However, in practice, the hurdle for victims of fraud to have the investigative authorities accept criminal complaints, and then to commence an investigation is generally high.

In particular, when a company files a criminal complaint as a victim of corporate crime, it is necessary to conduct an internal investigation and collect as much evidence as possible regarding relevant facts, as well as seek legal advice from outside legal counsel on any legal issues relating to criminal enforcement. In fact, if the company does not respond promptly and appropriately to requests for submission of documents, authorities will not be able to take the necessary actions to investigate the alleged fraud.

2.8 Claims against "Unknown" Fraudsters

A plaintiff is required to file a complaint with a court in order to initiate a civil action. The complaint must contain a statement as to the "party" it is brought against (Article 133, paragraphs (1) and (2) of the Code of Civil Procedure). In cases where the other party is a natural person, it is common to identify that party by their name and address. If that identification is insufficient, the court usually dismisses the complaint. One reason for this rule is a case precedent which holds that the parties to a civil suit are the persons subject to the effect of the judgment as the addressees of the judgment. Therefore, it is necessary to specify the identity of the parties to the extent that they can be distinguished from other people. However, for the same reason, it is sufficient that the parties are identified by the time the judgment is received, and it is not strictly necessary that the parties be identified at the time the lawsuit is filed.

In addition, the number of cases in which it is not easy to identify fraudsters, such as fraud perpetrated using the internet, is increasing. In some of these case precedents, the court held that in exceptional cases where it is difficult to identify the defendant, and the plaintiff is making the utmost effort to do so, it is impermissible to dismiss the complaint immediately without trying a request for examination, or using similar post-filing evidence-collecting procedures. Therefore, in cases where it is possible that the defendant can be identified by evidence-collecting procedures (eg, request for examination and document submission orders, as explained in **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**) available after the filing of a lawsuit, a lawsuit may be filed against an unidentified perpetrator.

2.9 Compelling Witnesses to Give Evidence

In civil proceedings, when a party requests the examination of a witness and the court agrees, the court will summon the witness to examine them on the trial date. In principle, witnesses are obliged to appear, swear an oath, and testify (Article 190 of the Civil Procedure). If a witness does not appear without justification, a court may punish them through a non-criminal fine of up to JPY100,000 (Article 192, paragraph (1) of the Code of Civil Procedure). In addition, they may be fined up to JPY100,000 or punished by misdemeanour imprisonment without punitive labour (Article 193, paragraph (1) of the Code of Civil Procedure).

In addition, the court may subpoena a witness who fails to appear without justification. "Subpoena" in this context means detention of the witness and forced appearance in court. In addition, as explained in **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**, upon the motion of a party, a witness may be ordered by the court to produce documents in their possession via a document submission order. If a witness does not comply with an order to submit a document, the court can issue an order to punish them via a non-penal fine of not more than JPY200,000 (Article 225, paragraph (1) of the Code of Civil Procedure). This type of non-penal fine is sometimes called a "civil penalty". The amount of the fine is generally not large.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Under Japanese law, a corporation is "liable to compensate for any damage caused to a third party by its representative in the course of the performance of their duties" (Articles 78 and 197 of the Act on General Incorporated Associations and General Incorporated Foundations, Article 350 of the Companies Act). Therefore, if the acts (or omissions) of a corporation's representatives meet all elements of liability in tort, including wilfulness or negligence, and if such acts (or omissions) were made within the scope of employment of that representative, the corporation will be jointly and severally liable with the representative.

It is understood that this tort liability does not specifically arise out of any particular type of legal personality, but rather is the general responsibility of an organisation acting through its representatives. For this reason, the law applies by analogy to associations without legal capacity, and to unions with a designated representative (ie, an executing person).

In practice, there are many cases where it is discovered during the course of a suit against a corporation for damages arising from fraud that the representative director and other directors had performed their duties while knowing that they were acting fraudulently. For example, in the cases of World Ocean Farm and Japan Life, which were large-scale fraud cases, criminal convictions were given to directors, including the representative director, who knowingly acted fraudulently (see **1.1 General Characteristics of Fraud Claims** for further details).

3.2 Claims against Ultimate Beneficial Owners

Under Japanese jurisprudence and precedents, if a legal entity is merely a puppet of a natural person or another legal entity (a parent corporation) who or which effectively controls that legal entity, the courts are willing to look through the separate legal personality of a legal entity when

it is not appropriate to treat that legal entity as a separate legal person.

Specifically, this principle applies when (i) legal personality is abused to avoid the application of the law, and (ii) the legal personality is a mere façade.

For example, if a representative of a company is found to have committed an illegal act in the name of that company, but the company does not have an office or any employees, it is possible that the court will look past the corporate status of the company as a mere façade and hold the representative directly responsible.

3.3 Shareholders' Claims against Fraudulent Directors

In principle, a company itself should pursue damages against one of its directors if that director commits fraud. However, if the decision on whether or not to pursue damages is left to the company, that company may neglect to hold the director responsible out of a sense of camaraderie or sentimentality.

Therefore, the Companies Act of Japan allows a shareholder to file a suit on behalf of a company to hold officers and certain other company-related persons liable (a so-called shareholder derivative action; Article 847 of the Companies Act and thereafter).

In principle, a shareholder derivative action can be filed by any shareholder who has held at least one share for at least six months (Article 847, paragraph (1)). In such a suit, it is possible to pursue the liability of incorporators, directors at incorporation, company auditors at incorporation, and liquidators in addition to the liability of officers, etc.

It should be noted that, as a matter of procedure, it is not possible to file a shareholder derivative action immediately after the fraud by a company officer becomes apparent. In principle, a shareholder derivative action may only be filed when the shareholder requests that the company file a suit to hold the relevant director liable (Claims to sue, Article 817, paragraph (1), Article 217 of the Companies Ordinance) and the company does not file a suit within 60 days from the date of the filing of that request.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

Supporting Party and Independent Party Participation

Under the Code of Civil Procedure, there are two systems that can be used when a party wishes to participate in a claim for a fraud initiated in Japan from overseas: (i) supporting participation, and (ii) independent party participation.

Supporting participation is a form of intervention in which a third party (the "supporting intervener") with an interest in the outcome of an action between other parties indirectly intervenes in the action to protect its own interests by assisting one of the parties (Article 42 of the Code of Civil Procedure).

Independent party participation is a form of intervention in which, where there is a dispute between three or more parties over the same rights or legal relationships and an action is already pending between two of the parties, a person other than an existing party brings a further action against an existing party to an action as an independent party who asserts that their rights are prejudiced as a result of the existing action between the other parties and that all, or part, of the subject matter of the action relates to their rights (Article 47 of the Code of Civil

Procedure). There are two types of independent party participation: (i) bringing a claim and action against both the plaintiff and defendant (two-sided participation), and (ii) bringing a claim and action against only one other party in the dispute (one-sided participation).

Extraterritorial Application of Japanese Law

The Japanese court system allows overseas victims to participate as creditors in a suit as long as they have an interest in the rights and legal relationships subject to litigation and, and have the standing to do so.

Regarding the extraterritorial application of Japanese law in civil suits, Japanese law stipulates that "the formation and effect of a claim arising from a tort shall be governed by the law of the place where the result of the wrongful act occurred." (Article 17 of the Act on General Rules for Application). Therefore, in cases where any wrongful act (such as deceit) occurs overseas and any damage is incurred in Japan as a result thereof, the laws of Japan shall apply.

On the other hand, with regard to the application of Japanese law to criminal proceedings, the basic principle of Japanese criminal law is the territorial principle. This principle holds that Japanese criminal law is applicable to any person as long as the crime is committed in Japan (Article 1, paragraph (1) of the Penal Code). With regard to some serious crimes, the principle of protectionism, in which any person who commits a crime outside Japan is subject to the Penal Code (Article 2), and the principle of nationality, in which the Penal Code applies if a Japanese national commits a crime outside Japan (Article 3), apply. However, fraud, embezzlement or special breach of trust, conducted in the course of business, which are typical examples of fraudulent misconduct, are not subject to the principle of protectionism or the principle of nationality. With regard to the bribing of foreign public officials (Article 18 of the Unfair Competition Prevention Act), the principle of nationality is adopted for offences conducted outside of Japan.

Overall, Japanese courts are more reluctant to assert jurisdiction over foreign cases of fraud than their Western counterparts.

5. ENFORCEMENT

5.1 Methods of Enforcement

Administrative Enforcement

In cases of misconduct, administrative measures are taken against corporations as a starting point. Specific administrative actions include (i) reporting orders, (ii) business improvement orders and business suspension orders, and (iii) revocation of permits and licences.

An order to report under (i) is an administrative disposition requiring the corporation to submit reports and materials concerning its business, and generally imposes a criminal penalty if a false report is made. A business improvement order under (ii) is an administrative disposition that requests changes in business methods or improvements in the operation of businesses or facilities, etc, when the appropriateness of said business operations is called into question. A business suspension order under (iii) is an administrative disposition to suspend business operations for a specified period of time. This is the most severe administrative disposition for the business operation of a legal person. Criminal penalties can be prescribed as an enforcement action in cases where a legal person does not comply with the above administrative dispositions. In addition, administrative authorities are empowered to conduct administrative investigations as a precondition for administrative actions to be taken, and can provide administrative guidance as necessary.

Criminal Enforcement

Criminal sanctions can be imposed against individuals and corporations that commit unlawful acts. Crimes such as fraud, or embezzlement in the course of business, and special breach of trust are typical crimes punishable under the Penal Code. In addition, criminal penalties are also prescribed under the Financial Instrument and Exchange Act, the Food Sanitation Act, and the Construction Business Act. When a member of a company commits an illegal act, it is possible to punish not only that individual, but also the company itself under a dual penalty clause.

Civil Recovery

As to measures to enforce recovery of damages, there are claims for damages against individuals and corporations through civil litigation, as well as preservative and execution procedures.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

In Japan, a person's right against self-incrimination is recognised in the right to remain silent in criminal proceedings. However, there is no provision which directly recognises these rights in civil proceedings.

The accused in criminal proceedings may remain silent at all times in open court, or may refuse to answer particular questions (Article 311, paragraph (1) of the Code of Criminal Procedure). This provision corresponds to the provision relating to the privilege against self-incrimination set forth in the Constitution of Japan (Article 38, paragraph (1)), which means that the accused is not required to make statements, even in open court. Where the accused has exercised their right to remain silent, that exercise of that right cannot be taken into consideration in findings of fact to the detriment of the accused. In addition, it is generally believed that the person exercising the right to remain silent cannot be disadvantaged in sentencing. If the accused denies the charges, they may be disadvantaged if the accused exercises the right to remain silent without providing other reasonable grounds for the denial.

While there is no provision which directly protects the right against self-incrimination and the right to remain silent in civil suits, there are circumstances in which these rights are indirectly protected. For example, when a court orders the holder of a document to produce it as evidence, the holder of that document may refuse the production of any document that contains information that could lead to criminal prosecution against, or the conviction of, the holder or their spouse, family members, etc (Article 220, paragraph (4) (a) of the Code of Civil Procedure).

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

There are no general provisions for attorney-client privilege in Japan. The amended Anti-monopoly Act (and the regulations under Article 76, paragraph (1) of said Act), which came into effect on 25 December 2020, introduced limited attorney-client privilege in administrative investigation procedures regarding violations of the Act that involve unreasonable restraint of trade.

Accordingly, except in the limited circumstances described above, attorney-client communications can be disclosed during the litigation of fraud claims under the Code of Civil Procedure like any other form of evidence. Such communications are not in any way protected by attorney-client privilege.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

Under Japanese tort law, compensation is granted only for the monetary value of any property damage and/or psychological damage caused by fraud. In other words, the court is not allowed to add punitive damages at its discretion in accordance with any aggravating factors for the misconduct, or to dissuade the recurrence of similar misconduct in the future.

Although punitive damages cannot be awarded, it should be noted that the court has discretion in assessing the monetary value of damages. This is due to a provision which states "where it is found that any damage has occurred, if it is extremely difficult, due to the nature of the damage, to prove the amount thereof, the court may determine a reasonable amount of damage based on the entire import of oral argument and the result of the examination of evidence." (Article 248 of the Code of Civil Procedure).

7.2 Laws to Protect "Banking Secrecy"

In Japan, there is no specific law governing bank secrecy which prohibits banks from providing customer information to government agencies, except under certain conditions such as when criminal charges have been brought.

However, under standard business practice or contract provisions, Japanese financial institutions are considered legally bound by a duty of confidentiality not to disclose customer information obtained from customers to third parties. Customer information includes information on the details of customers' transactions and information about customers' reputations obtained in relation to transactions with customers. On the other hand, public information is not subject to confidentiality obligations.

It should be noted that the binding effect of the confidentiality obligation is much weaker than, for example, the legal provisions on bank secrecy which exist in Switzerland and other countries.

The basic practical response of Japanese financial institutions is to co-operate with inquiries and requests for co-operation from public investigators (such as tax offices and the police) concerning deposit transactions. This is true not only in cases of compulsory investigations (for instance, inspections), but also in cases of voluntary investigations.

In addition, when an inquiry about, for example, deposit transactions, is received from a bar association or a court, it is normal practice to respond to the inquiry after obtaining the consent of the customer, even for a voluntary inquiry.

If the court issues an order to submit a document in litigation, the financial institution in possession of that document may refuse to submit those documents if they (i) contain technical or professional secrets, or other information; or (ii) were made exclusively for use by the holder of the document (Article 220 of the Code of Civil Procedure). Therefore, it is legally possible for financial institutions to refuse to disclose documents on the grounds that said documents fall under the category of documents concerning professional secrets or documents created for their own use.

7.3 Crypto-assets

Japan was, in April 2017, the first country in the world to introduce a legal framework to deal with virtual currency, by amending the Payment Services Act, which requires virtual currency exchange operators to register with the authorities. Subsequently, the Payment Services Act was amended again in light of international trends and other factors, and the legal name of "virtual currency" was changed to "crypto-

assets". In addition, the government introduced stricter management methods for crypto-assets and advertising regulations for crypto-asset exchange operators. Moreover, the Financial Instruments and Exchange ACT (the "FIEA") was amended to make security tokens subject to the FIEA regulations.

However, since crypto-assets are not tangible objects under Japanese law, they do not qualify as "things" under the Civil Code and are therefore not considered objects of legal ownership. The question of whether any property rights can be established for crypto-assets is still being debated, and both the legal status and legal nature of crypto-assets under Japanese civil law are not clear.

Most users of crypto-assets use the services of crypto-asset exchange operators to manage and control crypto-assets. Therefore, since 2018, in the case where a user has fraudulently exchanged stolen assets for crypto-assets (the "fraudster") and the fraudster has no other assets, it has become a common practice for the victim to recover damages by seeking an order for the compulsory execution of the right of the fraudster to request a transfer of the said crypto-assets against the relevant crypto-asset exchange operator with which the fraudster has an account.

In the area of criminal enforcement, the Tokyo District Court issued a protective order for confiscation of cryptocurrency prior to prosecution under the Organised Crime Punishment Act in 2020 at the request of the investigation authorities. This is the first time that a protective order to confiscate crypto-assets has been issued in Japan. Property obtained through criminal acts and property obtained as a reward are subject to confiscation, and property subject to a protective order for confiscation is subject to confiscation if the criminal is found guilty at trial.

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

General Definition of Fraud under Liechtenstein Law

Liechtenstein is a civil law jurisdiction. Although case law exists and serves as a practically relevant source of legal knowledge, playing an important role in daily legal practice, it is not capable of creating binding precedent as it does in common law jurisdictions. Subsequently, fraud claims – according to Liechtenstein legal doctrine – arise from legislation.

Liechtenstein law includes no explicit provisions with regard to civil fraud claims. Fraud as a specific legal term is only referenced in the Liechtenstein Criminal Code (*Strafgesetzbuch*; StGB).

Fraud, as defined in Section 146 of the Liechtenstein Criminal Code, is any conduct that induces a third party – through intentional deception about facts – to perform, acquiesce in, or omit to perform an act that damages the property of that person or another person, if the deception is committed with the intention to unlawfully enrich oneself or a third party through the conduct of the deceived person.

Fraud Claims under Civil Law

Although, there are no specific provisions in Liechtenstein civil law dealing explicitly with fraud, fraud claims play an important role in a civil law context.

Civil fraud claims may arise from the general provisions on tort law included in Section 1295 et seqq of the Liechtenstein General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*; ABGB). This may include, on an abstract level, all unlawful conduct causing harm to another person or another person's property and thus also fraudulent actions.

Fraud claims are primarily aimed at restoration of the previous state. Monetary compensation, on the other hand, must only be provided if it is impossible or impractical to restore the original condition.

As a consequence of the above, individuals who have suffered damages from fraudulent actions are entitled to claim damages and individuals who have entered into contracts on the basis of fraudulent actions may contest such contracts. This includes damages caused by, or contracts concluded as a consequence of, false statements made by a counterparty.

All examples of criminal fraud referenced below; ie, the making of corrupt payments, criminal conspiracy and misappropriation, may give rise to civil fraud claims if they include the unlawful dealing of damage to others and meet the further legal requirements.

Claims for Restitution of Unjustified Enrichment

Further to claims for damages, claims for restitution of unjustified enrichment pursuant to Section 877 (condictio sine causa) and Section 1431 (condictio indebiti) of the General Civil Code may serve as legal basis to reclaim fraudulently obtained funds or assets, albeit being less practically relevant and in general subsidiary to damages claims. Enrichment claims may be brought where a transfer of assets has been performed without legal justification; eg, by mistake of the transferor or on the basis of a void contract.

Claims for Unauthorised Use

If an unauthorised person obtains monetary or other advantage by using assets to which the person is not entitled in terms of property, the rightful owner may bring a claim based on unauthorised use according to Section 1041 of the General Civil Code. Such claims are subject to a special statute of limitations of thirty years.

Challenging Contracts Concluded by Means of Cunning Deception

Fraud is also recognised in other legal contexts. If a person has entered into a contract because of deliberate deception by another, the first is not bound to that contract according to Section 870 et seqq of the General Civil Code. From these provisions on contracts also arises the possibility of having a contract altered by the court, or even of contesting a contract that has been concluded through fraudulent actions.

After a contract entered into by means of fraud has been successfully challenged, funds transferred on the basis of such contract may be reclaimed by bringing enrichment claims according to Section 877 of the General Civil Code.

Special Claims against Directors

Section 218 of the Persons and Companies Act (*Personen- und Gesellschaftsrecht*; PGR) provides legal entities with a special claim of liability (for intentional as well as negligent conduct) against their directors or corporate bodies.

Civil Fraud Claims: Procedural Aspects

There are no special procedural provisions for the enforcement of fraud claims. The general rules of civil proceedings as stipulated in the Liechtenstein Code of Civil Procedure (Zivilprozessordnung; ZPO) apply.

Characteristics of Fraud in Criminal Law

According to its dogmatic classification, fraud is a crime leading to the victim inflicting harm on themselves and/or their property as a result of the deliberate deception of another. By their own deliberate conduct, the perpetrator deceives the victim about certain facts and thus causes a disposition of assets by which the victim harms themselves or a third party.

Fraud requires a particularly guided intention to unlawfully enrich oneself or a third party by deceiving somebody and tricking them into making self-harming dispositions of assets as a result of this deception.

Such deceiving conduct may either be performed by the making of an intentionally untrue statement or by a wilful omission to make true or complete statements, where legally required.

Examples of Fraud and Related Offences

By applying the above criteria, the making of false statements to cause someone else to harm their own financial interests or those of a third party will be qualified as a typical example of fraud. Where false or falsified documents are used to commit fraud, it will even be considered a case of severe fraud (Section 147 Criminal Code) with correspondingly more severe penalties.

Bribery and Corruptibility

Corruption payments to public officials, expert witnesses or arbitrators with regard to the performance of acts in breach of duty are punishable according to Section 307 of the Criminal Code with a prison term of up to three years.

Even payments for the performance of acts in accordance with official duties (eg, for acceleration or preferential treatment of an application) are punishable according to Section 307a of the Criminal Code.

Additionally, offering benefits to influence the performance of official duties without reference to a certain official act may be punished pursuant to Section 307b of the Criminal Code.

Besides corruption payments to officials, bribery and corruptibility are also punishable when committed in a private business context with regard to legally relevant actions in breach of duty (Section 309 of the Criminal Code).

The mirror image offences; ie, passive conduct relating to corruptibility and similar offences, are mentioned in the same Chapter in Sections 304 and 306 for the public, and Section 309 for the private sector, respectively.

Conspiracy

Section 277 of the Criminal Code targets criminal conspiracies, defined as actions by two or more people aimed at the commission of particular, severe offences such as murder or blackmail kidnapping. Although a certain plan of action and a firm decision to commit the offence are necessary, no steps to realise or execute the plan are required to become liable for this offence.

Misappropriation

Furthermore, the Liechtenstein Criminal Code includes provisions to prevent misappropriation of funds and assets in Section 153 of the Criminal Code.

The provision is intended to ensure proper conduct of authorised disposers with regard to their handling of assets of the respective beneficial owners. As a special offence, misappropriation can only be committed by a person with the legal authority and permission to dispose of and administer the assets of another. Misappropriation occurs wherever rules on the protection of financial interests of the beneficial owner are unreasonably violated.

Relevance of Misappropriation in Liechtenstein

As a consequence of its liberal private and contractual law and its favourable tax regime, Liechtenstein is home to numerous legal structures for wealth preservation and asset management, especially private and charitable benefit foundations and trusts, but also financial asset managers like fund management companies, banks and insurance companies.

This leads to a vast number of legal entities being managed by professional trustees, board members and others with the authority to make legally valid dispositions relating to other people's assets. Committing misappropriation in the capacity of trustee is considered an aggravating circumstance by Liechtenstein courts. Misappropriation claims often are of special relevance in the context of wealth and asset tracing proceedings in Liechtenstein.

1.2 Causes of Action after Receipt of a Bribe

In the case of damages that have already been dealt, a claimant may resort to the standard tort law provisions and claim damages if the following conditions are met:

- (material or immaterial) damage must already have been inflicted on the victim;
- actions of the perpetrator must have been causal for the infliction of the damage on the victim;
- actions of the perpetrator must have been committed unlawfully, in violation of legal provisions or a contract; and
- the perpetrator must be personally and subjectively culpable for their actions.

Apart from this, the receipt of a bribe may be reported to the public prosecutor's office to be prosecuted under Section 307 et seqq of the Criminal Code.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Taking Action against Third Parties Assisting in Fraud

As a general rule, the same criteria which apply to claims against fraudsters themselves are also relevant with regard to third parties who assist in or facilitate fraudulent acts of another according to Section 1301 of the General Civil Code. The provision refers explicitly to direct or indirect

assistance and hence comprises a broad range of different conduct.

By way of example, the receipt of fraudulently obtained assets of other persons will be considered a case of the above Section 1301 in conjunction with Section 1295 of the General Civil Code in a civil context. Depending on the share and degree of culpability of each affected individual, liability will either be proportionate (pro rata) or joint and several.

From a criminal law point of view, such actions will be considered as either the receipt of stolen goods according to Section 164 of the Criminal Code or participation in the offence (eg, fraud, bribery, corruptibility and misappropriation) of another in conjunction with Section 12 of the Criminal Code.

1.4 Limitation Periods

General tort claims and thus also civil law fraud claims under Liechtenstein law are subject to a statute of limitations of three years after notice of the damage inflicted, the identity of the perpetrator and the causal connection between those two become known to the injured party according to Section 1489 of the General Civil Code. In every case, however, the absolute statute of limitation for such claims is thirty years.

The statute of limitations for the prosecution of fraud in criminal law is one year, starting upon completion of the offence according to Section 146 in conjunction with Section 57, paragraph 3 of the Criminal Code.

1.5 Proprietary Claims against Property

Property Rights and Property Claims

When assessing the perspectives of proprietary claims, an examination of the actual validity of the respective fraudulent property transfer is necessary in advance. Property claims under Liechtenstein law must always relate to certain determinable assets.

The transfer of property rights, and of rights in rem in general, is composed of a valid agreement to transfer (titulus) and the effective transfer (modus) of an asset. This must be considered when analysing proprietary claims against misappropriated or otherwise fraudulently transferred assets.

Where a transfer of property has already been perfected according to Liechtenstein law, even if somehow induced by fraud, directly resorting to proprietary claims is not a promising means of acquiring redress.

Important Proprietary Claims

The exercise of property rights by a proprietor is generally unrestricted. A proprietor may use assets as they wish and is entitled to prohibit anyone else from any disposition. As a consequence, a proprietor may also demand the return of their assets from anyone's custody or factual possession, by means of the general proprietary claim (rei vindication) according to Section 20, paragraph 1 of the Law on Property (*Sachenrecht*; SR).

Whenever a valid transfer of property has already taken place, however, the converted proceeds of assets obtained by fraud are not subject to recovery by proprietary claims against the fraudster. Taking action against a fraudster under these conditions is only possible based on claims arising from obligations law.

If a third party has acquired originally misappropriated or otherwise fraudulently obtained assets in good faith, such party will be considered the rightful proprietor. Consequently, a third party who has acquired assets in good faith is legally protected against proprietary claims of a former owner (Section 512 of the Law on Property).

On the other hand, a third party, who knew or ought to know that it was acquiring from a person who was not entitled to legally dispose of the assets (acquisition in bad faith), does not enjoy protection of the laws. Hence, proprietary claims can be successfully asserted against such third parties.

Proprietary Claims and Insolvency Proceedings

Rights of segregation (Aussonderungsrecht)

According to Section 5, paragraph 1 of the Insolvency Act (*Insolvenzordnung*; IO), the insolvency estate is constituted by the debtor's assets exclusively. As a consequence, the property of others is not part of the insolvency estate and not subject to insolvency proceedings, even if the debtor has an asset in their factual possession.

Consequently, Liechtenstein law provides for a right to segregation (*Aussonderungsrecht*), which enables a proprietor to claim segregation of an asset from the insolvency estate.

Right to a separate settlement (Absonderungsrecht)

Furthermore, pledge, property transfer for security purposes, security assignment and the right to retention are considered insolvency-proof claims as well. Such legal positions provide for a right to a separate settlement (*Absonderungsrecht*) of the authorised person who is entitled to claim preferential settlement of their claims from the realisation proceeds of the particular assets to which their legal position is related.

Recovery of mixed funds

The person who mixes funds stemming from fraud with other funds, acquires property through commingling. As a result, proprietary claims will not be effective to reclaim property. Instead, the claimant must draw on obligatory claims like tort claims and claims for the restitution of unjustified enrichment.

Investment gains from fraudulently obtained funds

Profits generated through the successful investment of funds, which were initially obtained by fraud, are generally considered property of the investor and hence the fraudster or proprietor.

Notably, if the respective conditions under tort law are met, the victim may not only claim positive damages but also redress for lost profits which would otherwise have probably been realised. Furthermore, a claim based on unauthorised use may be brought in such cases.

1.6 Rules of Pre-action Conduct

No specific pre-action conduct regulations apply in relation to fraud claims. Please note, however, that Liechtenstein procedural law requires diligent examination of the specific burdens of proof if claimants intend to assert their claims successfully.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Acting Swiftly: Interim Injunctions

Success or failure in asset tracing and recovery proceedings depend heavily on the claimant's acting swiftly. As a consequence, interim measures intended to prevent fraudsters from secreting assets are regularly of utmost importance.

Interim measures, according to the Liechtenstein Enforcement Act (*Exekutionsordnung*; EO), may be granted prior to as well as after the commencement of regular proceedings and are available either in rem or in personam.

Interim measures may be issued as security restraining orders (for pecuniary claims; *Sicherungsbote*) or official orders (for non-pecuniary claims; *Amtsbefehle*). Such injunctions are

intended to maintain a current factual state and prevent a defendant from damaging, destroying, concealing or setting aside assets by custody and administration of the assets by the court, judicial prohibition to dispose of the assets or judicial prohibition to third parties to fulfil claims of the party affected through court order.

Local court practice favours the granting of interim relief wherever the concerned counterparty is a domiciliary entity; ie, a Liechtenstein-based entity whose activity is limited to the management of funds or the holding of assets.

As personal interim measures, arrest and detention of the fraudster are possible. Since these are considered to be serious sanctions, they are only permissible if the fraudster is on the run, their possible escape would thwart the enforcement of the applicant's claim, and if other measures are not sufficient to ensure legal protection of an applicant/endangered party. Such personal interim measures are only eligible as ultima ratio, in cases where no other measures can succeed in safeguarding the interests of the endangered party.

Applications for interim injunction may, but do not necessarily have to, be attached to other pending proceedings. The burden of proof for the potential secretion or dissipation of assets lies with the applicant, whereby it is sufficient to make the alleged conduct of the counterparty plausible. Past behaviour or attempts to secrete assets will also be considered adequate evidence. As interim relief measures have to be determined regarding their timeframe, it may be necessary to apply for an extension of the measure from time to time.

Interim measures are always issued and executed at the expense of the claimant. Court fees vary and may amount up to CHF8,500 depending on the monetary valuation of the claim.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

Procedural Ways to Achieve Disclosure

Civil law aspects

The Code of Civil Procedure generally leaves the collection and submission of evidence to the parties. Liechtenstein law does not provide rules for the compulsory discovery of pretrial evidence. Even during civil proceedings, the possibilities to force a counterparty to produce evidence; eg, documents related to assets, are restricted to situations in which:

- the respective evidence has already been referred to by the affected counterparty in the course of the proceedings;
- the party required to proof is legally entitled to disclosure of the document; or
- the concerned documents are common documents to the parties – ie, refer to a legal relationship between the two parties.

Neither the appearance of a party in court nor the testimony during a party hearing can be compelled by the court. The above remarks refer only to the parties of the lawsuit and, as a general rule, are not extended to their nominees or other associates. A cross-undertaking in damages is not required.

Criminal proceedings

Contrary to civil proceedings, the tasks to collect and prepare evidence in criminal proceedings are largely assigned to the competent judge or the public prosecutor, depending on the stage of proceedings. This comprises a range of coercive measures such as the seizure of documents and coercive penalties to compel witnesses to give testimony.

2.2 Preserving Evidence

If the collection of certain types of evidence is likely to be aggravated or impossible in the future, a party may apply for a court order for the preservation of evidence. This applies to the following categories of evidence:

- local inspection by the court;
- expert witness statements and testimony; and
- witness testimony.

Physical searches for documents at the defendant's residence or place of business cannot be granted by the courts in civil proceedings. Such searches and seizures of objects and documents may only be conducted in criminal proceedings.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

According to Liechtenstein legal doctrine, civil proceedings follow a two-party system (with rules on permissive and compulsory joinder of further parties). However, third parties may be summoned to testify as witnesses. In the course of such testimony, witnesses are obliged to answer the questions posed to them comprehensively and truthfully, provided they do not have a right to refuse to testify.

Third parties can be forced to produce evidence in the form of documents by issuance of a court order requiring them to do so.

Under certain conditions, witness testimony may already be obtained prior to the commencement of the proceedings. This applies whenever it must be assumed that the taking of evidence will later be made more difficult or impossible (see **2.2 Preserving Evidence**).

Procedural law does not place particular restrictions on the use of such evidence. Notably, however, the rules on preserving evidence refer only to the aforementioned categories.

2.4 Procedural Orders

Ex Parte Measures

In civil proceedings, the taking of evidence without notification of the defendant/respondent is generally not intended. Two-sidedness is a guiding principle of the proceedings and the defendant must be given the opportunity to address all evidence presented to ensure procedural equality. Measures ex parte or without notice are generally not foreseen. This also applies to the preserving taking of evidence.

Even the procedures granting interim injunctions are basically two-sided and only specific circumstances justify the omission of an inter partes procedure. The reason for this strict approach towards unilateral taking of evidence is rooted in Liechtenstein law's reception of Article 6 (fair trial) of the European Convention on Human Rights (ECHR).

There are, however, specific situations when the issuance of ex parte interim injunctions is possible. This applies whenever the conducting of an inter partes procedure would thwart the purpose of a measure, which must be determined on an individual case-by-case basis.

2.5 Criminal Redress

Joining Criminal Proceedings as Private Participants

It is not uncommon for fraud victims to seek redress via joining criminal proceedings as private participants, pursuant to Section 32 of the Code of Criminal Proceedings.

This instrument not only provides victims of fraud with the opportunity to pursue their civil claims through the criminal proceedings, but also further equips them with significant proce-

dural rights, including the right to ask questions, submit evidence and inspect files.

In the past, the Liechtenstein Supreme Court has even held that private participants joining criminal proceedings are entitled to be heard and receive a decision on their claims within a reasonable period of time.

The Interplay of Civil and Criminal Proceedings

Civil and criminal proceedings may and actually often do run in parallel. Civil courts, for example, are not bound to the facts found in a criminal proceeding and vice versa. The progression of criminal proceedings does not necessarily impede related civil proceedings.

According to the Code of Civil Procedure, however, civil proceedings may be suspended until the conclusion of related criminal proceedings if the outcome of the latter is prejudicial for the former.

2.6 Judgment without Trial

Exceptions from the Principle of Full Trial

As a general rule, Liechtenstein law requires a full trial and the possibility for the defendant to invalidate all allegations brought against them, to dispute the claimant's arguments.

However, if the defendant does not appear at the first oral hearing although properly summoned, leaving unused the opportunity to defend themselves, civil procedural law provides for the possibility to issue a judgment by default (*Versäumungsurteil*) upon application of the claimant.

Additionally, the Code of Civil Procedure provides for a simplified summary proceeding to sue for pecuniary claims. If filed accordingly, the competent judge will issue a payment order on the grounds of the application which will then be delivered to the debtor for response within 14 days. If the debtor objects within 14 days, the payment order becomes invalid. If there is no reaction, however, the payment order becomes legally valid and may serve as basis for enforcement proceedings.

2.7 Rules for Pleading Fraud

Pleading Civil Fraud under General Tort Rules

Specific fraud-related claims do not exist in Liechtenstein civil law. From this follows that pleading fraud rather means pleading a specifically fraud-related behaviour responsible for damages under, for example, tort law.

This in turn requires proving:

- the damage inflicted, referring to positive damage dealt to already existing legal interests as well as the loss of future profits;
- the causal connection between the perpetrator's behaviour and the caused damage;
- the unlawfulness of the conduct (this can either be a breach of contract or any infringement of a norm intended to protect legally acknowledged interests); and
- the personal fault of the defendant, whereas this includes both intentional conduct and (gross as well as minor) negligence.

Notably, the calculation of damages is dependent on the type of fault (intentional conduct, negligence). Intentional or grossly negligent conduct gives rise to the obligation to compensate the other party for positive damages and loss of profits. The first includes primarily restitution, compensation for the damage actually incurred, and compensation for the expenses necessary to redress the damage. Minor negligence requires only the compensation for positive damages incurred.

As fraud always requires a deliberate deception of the victim, this implies intentional conduct and hence leads to a calculation of profits adding

compensation for the loss of profits to positive damages.

Furthermore, it is of utmost importance to consider the procedural rules on the burden of proof before deciding to plead fraud in civil courts. Essentially, each party is obliged to prove the facts favourable to its own respective legal position. In obvious and typical cases, the courts may also accept prima facie evidence. The existence of a damage and the causality of the defendant's behaviour for its emergence are always up to the claimant to prove.

2.8 Claims against "Unknown" Fraudsters

According to the Code of Civil Procedure, the filing of a civil lawsuit requires precise designation of the defendant. Consequently, the defendant (in this case the fraudster) must be known to the claimant as a precondition to take civil legal action.

This is a matter in which the interplay of criminal and civil law instruments may be useful. A victim of fraud may bring an offence to the attention of the public prosecutor's office. If the office considers the information, possibly finds an initial suspicion of an offence and opens an investigation, this may result in the discovery of the fraudster's identity. The victim is subsequently able to either join the criminal proceedings as a private participant and/or take civil legal action as soon as the identity of the fraudster has been revealed.

2.9 Compelling Witnesses to Give Evidence

Contrary to parties of a legal dispute, witnesses can be compelled to appear and testify before the court. Refusal to do so will be fined or sanctioned by arrest (for imprisonment of six weeks at most) to make the witness testify.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Attribution of Knowledge to Legal Entities

Comprehensive liability of companies and foundations

Liechtenstein's function as an important location for holding entities and domiciliary structures makes the attribution of the knowledge of individual directors to the legal entities they represent particularly and practically relevant.

In general, directors and other persons with respective power of representation are entitled to perform all legal acts on behalf of the respective entities in relation to third parties, which act in good faith (Section 187 et seqq of the Persons and Companies Act).

With regard to the external liability regime, legal entities are liable to third parties for the conduct of their representatives without limitations. This applies not only to companies but also to foundations, which is of utmost practical relevance for legal practitioners.

Although directors and other representatives are obliged to follow internal limitations stipulated by organisational documents or resolutions of corporate bodies of the entity, such internal limitations do not generally render contradictory external conduct invalid.

Limitations of the representation of legal entities

However, there are certain limitations to the power of representation of legal entities, which are mainly set out in Section 187a of the Persons and Companies Act. If corporate bodies or directors take actions exceeding their statutory

powers, the represented legal entity is not bound by their decisions.

Furthermore, directors' actions exceeding the business purpose are not binding on an entity if the entity proves that the contracting partner knew or would have been obliged to know that the respective conduct was not covered by the business purpose. The Liechtenstein Supreme Court (*Oberster Gerichtshof*; OGH) has held that this is to be applied per analogiam also to foundations with the foundation purpose taking the place of the business purpose.

In addition to that, representatives' actions contradicting or exceeding limitations placed by internal regulations (eg, statutes or articles of association) are not binding on a legal entity if it succeeds in proving that the contracting partner knew or would have been obliged to know about such internal limitations of the powers of representation.

Consequences of actions invalidated according to the above provisions are to be determined by application of the claim for restitution as a consequence of unjustified enrichment pursuant to Section 877 of the General Civil Code (condictio sine causa).

Inverse piercing of the veil

For situations in which a defendant is trying to set aside assets by providing them for the establishment of a legal entity; eg, a foundation, Liechtenstein case law has developed the concept of inverse piercing of the corporate veil by looking through the natural person at the legal entity and enabling a claim against this entity if the transfer of funds/assets constitutes an abuse of rights according to Section 2, paragraph 2 of the Persons and Companies Act and Section 2, paragraph 2 of the Law on Property, respectively.

Attribution of private knowledge

Private knowledge; ie, knowledge which directors or corporate bodies have acquired outside of the performance of their duties on behalf of the legal entity, will also be attributed to that entity according to settled case law.

Responsibility for criminal conduct

Legal entities bear full responsibility for the criminal conduct of their directors according to Liechtenstein case law. This line of jurisprudence is also extended to the foundation board as governing body of a foundation.

3.2 Claims against Ultimate Beneficial Owners

Piercing of the Corporate Veil

If legal entities have been used as vehicles to commit fraud, Liechtenstein case law recognises the concept of a piercing of the corporate veil; ie, attributing rights and obligations of a legal person to the natural person behind it, provided the use of legal entities as instruments amounts to an abuse of rights.

3.3 Shareholders' Claims against Fraudulent Directors

Primary Claims of the Legal Entity and Subsidiary Claims of Shareholders against Directors

Section 218, paragraph 2 of the Liechtenstein Persons and Companies Act (*Personen und Gesellschaftsrecht*; PGR) specifically deals with the issue of shareholders' claims against the directors of a legal entity. The large number of externally managed companies and legal structures helps illustrate the practical significance of such claims.

Shareholders' claims of responsibility against directors are subsidiary to claims of an entity itself against its directors because the provisions on directors' obligations are intended to protect the property of the legal entity in the first place

and are meant to provide legal relief to creditors and shareholders only indirectly.

The general rule in this context is that directors are liable to the legal entity represented by them for both intentional conduct and negligence. In insolvency proceedings, the insolvency estate (*Insolvenzmasse*) as legal person is entitled to this claim against the directors of its legal predecessor.

Shareholders may claim compensation from directors only if two conditions are fulfilled cumulatively. Firstly, shareholders have to be injured directly by the fraudulent behaviour of directors of the legal entity without interposition of the entity itself and, secondly, the legal entity must have no claim against its own directors at all.

The provisions on the responsibility of directors vis-à-vis the legal entities represented by them do not follow the mere rules of a liability ex delicto. Rather does Section 218 et seqq of the Persons and Companies Act create a so-called internal liability regime covering both intentional conduct and negligence, based on the statutory ex contractu liability provisions.

The statute of limitations is three years after knowledge of the damage inflicted, the identity of the perpetrator and the causal connection between those two become known to the injured party. However, in cases of intentional infliction of damage or the fraudulent making of untrue statements, the statute of limitations will be extended to ten years.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

No Specific Framework to Join Overseas Parties in Liechtenstein Proceedings

There is no specific legal framework to joining overseas parties in fraud claims in Liechtenstein. The location and thus the question of whether parties are domiciled overseas or in Liechtenstein is not relevant, but rather the potential joining party's relationship to the subject of the proceedings.

Joining criminal proceedings, induced by whomever, as a private participant requires the assertion of a private law claim by a person alleging a violation of its rights by the perpetrator.

Civil proceedings are generally designed to be bipartite. Parties who have an interest in one of the parties prevailing in the lawsuit may, however, join the proceedings as an intervening party (*Nebenintervention*) according to Section 17 et seqq of the Code of Civil Procedure. Intervening parties may submit evidence and use all procedural means of attack and defence to support their cause.

Liechtenstein Courts do not generally purport to exert extraterritorial jurisdiction.

5. ENFORCEMENT

5.1 Methods of Enforcement

The Liechtenstein Enforcement Act recognises the enforcement of legally valid and effective decisions (*Exekutionstitel*) by, inter alia, the following methods for different classes of assets.

• Enforcement against immovable assets:

(a) compulsory creation of a lien over debtor's assets;
(b) forced administration of assets through an official receiver; and
(c) compulsory auction.

- Enforcement against monetary claims: garnishment and transfer.
- Enforcement against tangible movable assets: garnishment, estimation and sale.

Furthermore, enforcement may also be granted with respect to the performance or omission of actions of a person.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

In principle, there are no specific rules applicable to defendants in criminal fraud proceedings. Defendants are subject to the general provisions of the Code of Criminal Procedure.

Liechtenstein law recognises the privilege against self-incrimination (nemo tenetur se ipsum accusare) in criminal proceedings as an implicit fundamental right. By invoking the right not to incriminate themselves, defendants must not suffer any disadvantages that would undermine this privilege.

Inferences from the invoking of this privilege by the defendant should be drawn very cautiously. Pursuant to Liechtenstein legal doctrine, the silence of a defendant must not be interpreted to their disadvantage. At the same time, silence may be interpreted not as of little advantage to the defendant but rather of neutral advantage.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

Communication between lawyers and their clients enjoys a privileged status of confidentiality under Liechtenstein law. There is no basis for obtaining such correspondence in civil proceedings and criminal procedural law also provides for comprehensive protection of the confidentiality of such communication.

Lawyers are exempt from the obligation to testify before courts according to Section 108, paragraph 1, No 2 of the Code of Criminal Procedure. As a consequence, every attempt to try to obtain correspondence between a lawyer and their client will be considered an attempt to circumvent this privilege, which amounts to an extensive interpretation of the privilege by Liechtenstein courts.

Documents related to correspondence between a lawyer and their client may only be disclosed upon agreement of the respective client.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

Liechtenstein tort law, similar to other civil law jurisdictions, does not recognise the concept of punitive or exemplary damages. Damages are only granted to compensate the loss caused and are not intended to have a punitive character.

7.2 Laws to Protect "Banking Secrecy"

Liechtenstein Banking Secrecy According to the Banking Act

Liechtenstein law includes a provision explicitly protecting banking secrecy in Section 14 of the Banking Act (*Bankengesetz*, BankenG) and the Banking Ordinance (*Bankenverordnung*, BankV).

The law also refers explicitly to investment firms, also introducing investment firm secrecy.

Banking secrecy extends to all members of corporate bodies, employees and other representatives of banks and includes all information of the client disclosed on the basis of the legal relationship with the bank. The Liechtenstein Constitutional Court even qualified it as a "material fundamental right".

Exceptions from Banking Secrecy: Ways to Obtain Information

Although banking secrecy may be the principle, there are many different exceptions. Today, banking secrecy mainly applies to civil proceedings in a traditional sense. It does not, however, apply to criminal proceedings and agents of banks must therefore not decline the disclosure of information received from their clients before criminal courts.

Consequently, the parallel launching or incentivising of criminal proceedings – eg, in the case of fraud allegations – may introduce the possibility of obtaining information, which would be covered by banking secrecy in civil proceedings.

7.3 Crypto-assets

Trailblazing Crypto Legislation in Liechtenstein: The Token and Trusted Services Providers Act

Liechtenstein has assumed a role as pioneer jurisdiction in the field of crypto legislation by introducing the Token and Trusted Services Providers Act (*Token- und VT-Dienstleister-Gesetz*) as early as 2019. The legislation governs regulatory and civil law aspects of crypto-assets and will be applicable to tokens and crypto-assets either by nature (with respect to crypto-assets issued by a Liechtenstein issuer) or by declaration/agreement (with respect to legal relationships and crypto-assets issued by a foreign issuer which are explicitly subject to the legislation).

Civil Law Aspects of Crypto-assets

Although the law refrains from the explicit use of the conventional concepts of the system of property law, the Token and Trusted Services Providers Act introduces a comprehensive regime for the transfer of the power of disposition relating to crypto-assets, which emulates traditional concepts of the transfer of rights in rem and ensures legal certainty with regard to dispositions of crypto-assets.

Freezing Orders and Interim Relief in Respect of Crypto-assets and Fraud-Related Issues

Owing to the relative novelty of the field of crypto-assets law to the Liechtenstein legal system, there is no available case law and only limited legal writing on the matter of freezing orders pertaining to crypto-assets or tokens.

However, legislative materials provide for the clear intention of the legislature to have the provisions on property law applied in a functionally adequate manner to crypto-assets. On the basis of this consideration, freezing orders as well as other interim relief measures will be available pertaining to crypto-assets with due regard to their specific legal nature (especially their intangibility).

The authors of this article are currently not aware of any particular legal issues which would arise in the context of fraud involving crypto-assets.

Gasser Partner Attorneys at Law is an independent international law firm, primarily focused on the legal representation of its clients before courts and public authorities, as well as providing advice in all areas of the law. The firm advises and represents private clients as well as institutional clients – including banks, asset managers, fiduciary service providers, insurance companies, fund administrators and industrial companies – from Liechtenstein and abroad. It has specialists in every area of the law, enabling it to solve complex international cases efficiently. The private clients, asset and succession planning department of the practice deals with advising families and private clients (high net worth individuals, in particular) in asset and succession planning matters, and also in company reorganisation, including the management of issues arising in the succession of private companies. The firm's other key areas of practice relating to private wealth are arbitration and litigation; corporate, foundation and trust; commercial; real estate; and employment.

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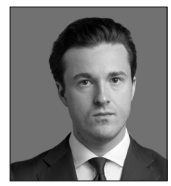

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

Monaco's civil law system provides the possibility of filing civil and criminal claims for:

- fraud;
- making false statements;
- corrupt payments;
- the equivalent of conspiracy; and
- misappropriation.

Victims may be parties to the criminal prosecutions, represented by counsel and with access to the file, and demand damages. Alternatively, they may sue before the civil courts.

The status of victim in a criminal prosecution is defined in Article 2 of the Code of Criminal Procedure: "The action to repair the damage directly caused by a fact that constitutes a penal infraction belongs to all those who have personally suffered... The action will be receivable, indistinctly, for all the damages, material, physical or moral."

Fraud

The basic fraud infraction (*escroquerie*) is defined in Article 330 of the Penal Code as follows: "Whoever, either by using a false name or false quality, or by employing fraudulent manoeuvres to persuade another of the existence of false enterprises, of an imaginary power or credit, or to create the hope of a success, an accident, or of any other chimerical event, persuades another to give him or deliver funds, moveable assets, effects, cash, merchandise, bills, promises, receipts or any other writing containing or operation an obligation or a waiver and who will have by these means defrauded or attempted to defraud all or a part of another's fortune, is punished by imprisonment of from one to five years and a fine." If the crime involves the issuance of a public offering of whatever nature, the prison sentence is extended to a maximum of ten years.

Abuse of Confidence

Abuse of confidence, as defined in Article 337 of the Penal Code, is a variant on fraud and consists of misappropriating or dissipating assets entrusted for a specific purpose. The maximum jail sentence is three years. The sanctions are increased to five years if there is a public offering, or where a broker or professional has misappropriated funds; for example, escrowed funds. If a public official (notary or bailiff) or an employee to whom funds are regularly entrusted violates that trust, the maximum sentence is ten years.

Corruption

Corruption is sanctioned in Article 113 et seq of the Penal Code. This covers public officials or agents, and private actors, regardless of nationality, and specifically includes arbitrators. The acts that are sanctioned in Article 113-1 of the Penal Code include a public agent (defined as a person endowed with public authority) retaining a personal interest in an operation or enterprise over which they have authority, as well as passive or active influence peddling (Article 113-3 of the Penal Code).

Passive corruption is the crime committed by the corrupted person (public or private). Active corruption is committed by the corrupter. Both are sanctioned at Article 113-2.

False Documents and Testimony

Specific procedures are provided for allegations of the production of false documents in civil procedures (in Articles 290 to 299 of the Code of Civil Procedure, or CPC). Where there is an allegation during a procedure that a document has been falsified, a declaration must be made to the clerk of the court. The court may then compel the person(s) to appear. Since there is no live

personal testimony in civil actions, this is a rare occurrence. Alternatively, the court can name an expert to verify the document. The person claiming that the documents are false can, during the trial, file a criminal complaint – as can the public prosecutor. Unless the presiding judge decides that the determination of the validity of the document does not impede the case from going forward, the trial will be suspended pending the determination.

The elements of *faux en écriture* (Article 90 et seq of the Penal Code) are the alteration of the truth committed with the knowledge of creating harm in a piece of writing destined to or apt to be used to prove a right or having the effect of a right. It is an aggravating circumstance if the act that is falsified is among those considered to be authentic (notarial) or public (a document), and when the falsification is committed by a public official.

False testimony in a civil case is punished under Article 302 of the Penal Code, while perjury in criminal cases (a distinction is made between correctional or lesser offences and criminal cases) is sanctioned in Articles 300 and 301.

Conspiracy

Conspiracy is covered in Articles 209–211 of the Penal Code. These sanction any association or agreement to prepare or commit crimes punished by at least five years' imprisonment as an "association of malefactors", or *malfaiteurs*, which is the equivalent of a conspiracy charge.

Role of a Civil Party

In all these cases, the civil party can be a party to the criminal prosecution by seeking to participate in the investigation or trial (which is a possibility up until the first day of the hearing) or by initiating the investigation by filing the complaint (*plainte avec constitution partie civile*). The civil party can be awarded damages in the criminal proceedings.

The civil party victim may also and concurrently sue the defendants in a civil proceeding, either on the basis of breach of contract or the general one of civil responsibility (Article 1229 of the Civil Code), which is the basis for an action in tort. Article 1229 states that any act that causes harm to another obligates the person whose fault caused the damage to repair it. This includes fault by negligence and imprudence.

Where there are concurrent civil and criminal lawsuits involving the same parties and facts, the civil court may suspend the civil action awaiting the outcome of the criminal action.

1.2 Causes of Action after Receipt of a Bribe

A claimant whose agent has received a bribe may file a criminal complaint of passive corruption, against the agent and the person having paid the bribe, requesting damages. The claimant may also file a civil action in breach of the agency contract. There may be elements of abuse of confidence or fraud, as well as filing false documents. There may also be money laundering (Articles 218 and 219 of the Penal Code) or receipt of stolen property claims (Articles 339 and 340 of the Penal Code). All the claims can be concurrent.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Parties who assist or facilitate the fraudulent acts of another can be charged as accomplices to the underlying crime. The receipt of fraudulently obtained assets is qualified as "*recel*" (receipt of stolen property, including property obtained through a crime), which is punishable under Article 339 of the Penal Code. Money laundering prosecutions would also be envisioned under Articles 218 and 219 of the Penal Code.

A relatively new provision criminalising the organisation of insolvency to avoid enforcement of a judgment and that applies even before a judgment is final is set forth in Article 368-1 of the Penal Code. The criminal infraction extends to those who assist in creating the insolvency, and thus to the accomplices. The Code specifically provides that accomplices will be jointly liable.

The Civil Code provides for the Paulian Action, in Article 1022, which allows creditors to attack all acts performed by a debtor to defraud the creditors of their rights. The effect of the Paulian Action is to consider the transfer to a third party as null and thus unopposable to the creditor.

1.4 Limitation Periods

The general civil statute of limitations period is five years from the date the party bringing an action knew, or should have known, the facts allowing the lawsuit to be brought.

Criminal acts defined as *délits* are mostly punishable by up to three years in prison and tried before a correctional tribunal. The statute of limitations is three years, although corruption carries a special limitation of five years. For acts defined as crimes rather than *délits*, the imprisonment is from five years to life (but generally 20 years). The statute of limitations is 20 years.

1.5 Proprietary Claims against Property

Article 1800 of the Civil Code, paragraph 2, provides that a judge may order real or personal assets to be escrowed or sequestered where there is a dispute over ownership between two or more persons. The fruits of the escrowed asset will go to the party establishing the right of ownership.

As regards criminal proceedings, the investigating magistrate may order a freeze on assets if this is considered necessary for the manifestation of the truth. However, in Articles 12 and 32 of the Penal Code, confiscation of the proceeds of a crime is also provided for.

In the event of insolvency, a party claiming ownership can request the return of property held by the bankrupt party. Security in the form of seizure orders or judicial mortgage will have precedence (unless the judicial administrator claims a preferential transfer).

1.6 Rules of Pre-action Conduct

There are no particular or specific rules requiring, for example, a letter before action to return assets prior to filing an ex parte motion to seek an order to freeze them. In a standard civil action, it is necessary to demand reimbursement of any amount alleged to be due prior to starting an action. This is known as a *mise en demeure*, which also starts the running of legal interest on the claim.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Freezing Orders

The victim of fraud can request a freezing order on assets belonging to a defendant and held by third parties, as a pre-judgment attachment, by filing an ex parte request with the president of the Court of First Instance (Articles 490 and 491, CPC). The claimant must show the existence of a "certain principle of a claim with a sufficiency of evidence". This is a standard established by case law. It is not required to show the existence of a foreign judgment. A *saisie* is the equivalent of a freezing injunction, and does not require a cross-undertaking or court fees (as a bond). If the request is refused, the creditor can appeal in an ex parte proceeding. The *saisie*, or freezing order, will be specific to "accounts in a bank" held by a debtor, for example. The Monaco courts will not issue a general "worldwide" freezing order of the type that can be obtained in common law jurisdictions.

The pre-judgment attachment grants precedence over other creditors. It is not necessary to explain why it is thought a third party or bank holds assets, nor is it necessary to specify the bank account numbers, for example, to be seized. It is not necessary to evoke a risk of asset dissipation to justify the necessity of the seizure order.

It is possible (Article 487, CPC) to unilaterally and without a court order make assets, including bank funds, temporarily unavailable to the defendant by filing a request with the court, which will be served to the third parties or the defendant. The presiding judge will then reply within a very short time with a decision on whether to allow the temporary unavailability to continue. While the initial request is ex parte, the third party and the debtor will be informed. If the request fails, then the debtor will have been notified and will often take immediate measures to remove funds from the jurisdiction.

Debtors and Third Parties Holding Assets

If the assets are held by the debtor rather than a third party, the creditor can request permission from the presiding judge to seize the assets. A bailiff will then intervene at the office or residence to do so, making an inventory of the assets seized. For this procedure (Article 759, CPC), it is necessary to explain that there is a risk of dissipation.

Third parties holding assets, particularly banks, will be served with a seizure order and must reply immediately as to whether it can be satisfied (whether funds exist and, if so, the amount to be frozen under the order). They must make a complementary declaration at the date of the first hearing of the amount seized, after transactions pending at the time of the seizure are cleared. Failure to do so exposes the bank or third party to being held liable for the amount authorised to be seized. Dissipation of assets seized by a bailiff is a criminal offence.

Escrowing of Assets

It is possible to request the escrowing of assets under Article 1800 of the Civil Code if there is a dispute over ownership, on an ex parte basis. This method has recently been favoured by the courts even where there is no "principle of the certainty of a claim". The matters are on appeal.

Court Fees

While no court fees or bonds are payable, Monaco *avocat-défenseurs* – that is, members of the Monaco Bar (which consists of 32 lawyers, not all of whom are *avocat-défenseurs*) – are entitled to 0.4% of the amount in controversy, if a claim or procedure is successful, as statutory fees, on top of their honoraria, and even if their participation is limited to mere representation of foreign counsel. They are entitled to 0.2% of the amount of a settlement that may ensue, even when they have not been involved, and 0.3% if they have been involved in negotiations.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

There are no procedures available for deposition or discovery. Attempts to enforce deposition and discovery orders from foreign courts on Monaco residents in civil cases have not been successful.

It is possible to request and obtain through an ex parte proceeding a civil order compelling a third party to turn over information. There are no sanctions for refusing to comply, and the party requesting may then sue in an accelerated proceeding known as a *référé* to seek an order to comply, with an *astreinte*, or civil fine.

2.2 Preserving Evidence

The CPC has been revised by Law No 1.511 of 2 December 2021, at Article 300-1, to provide the possibility that a court order be requested to preserve evidence. The request can be made ex parte. The order will suspend the running of the civil statute of limitations for a period of not less than six months form the time the order to produce evidence is executed.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

It is possible to request an order ex parte to obtain documentation from a third party, prior to a proceeding, and there are no restrictions placed on the use of such material.

It is also possible under the new provisions of the CPC to request that evidence be produced from a party or a third party (Articles 274, 277, 277-1, 277-2 and 278) during a trial, and a fine (an *astreinte*) can be imposed for failure to do so.

In criminal proceedings, the investigating magistrate may obtain all information and documentation necessary for the "manifestation of the truth" and the civil party victim will have access to the file and thus the documentation. However, no use can be made of it because it is covered by the "secrecy of the instruction" until such time as the investigation is terminated and the matter is tried.

2.4 Procedural Orders

As indicated above, the seizure orders are filed ex parte and it is always appropriate to attempt this prior to trial. Because they are ex parte, the current presiding judge is particularly attentive to the loyalty of the party requesting it. The presiding judge will refuse any such ex parte request once the litigation has begun, because it is felt that an ex parte request in that event is disloyal if the other party is not informed.

2.5 Criminal Redress

Victims of fraud often seek redress through the criminal process, becoming parties in the investigation, with access to the file. If they file a complaint with the investigating magistrate with *constitution de partie civile*, they will be required to deposit a bond, which will be established by the investigating magistrate and which is not often more than EUR15,000.

Participation in the criminal investigation does not prevent the same victim from initiating a civil lawsuit, which may then be suspended pending the outcome of the criminal investigation.

The civil statute of limitations is suspended during the criminal investigation, but if the investigation does not result in holding the defendant over for a criminal trial, then it may be considered not to have tolled and there is a risk that any subsequent civil procedure is time barred.

2.6 Judgment without Trial

A civil trial will only consist of oral argument by respective counsel (and often, particularly during the pandemic, this will be reduced to filing the written pleadings and supporting documentation without oral argument). There is no live testimony by the parties or witnesses in a civil trial. There is no possibility for a directed verdict where the defence is unmeritorious (or for a motion to dismiss a case where the complaint is unmeritorious). The court may restrict the time available for oral argument if it considers the pleadings have sufficiently addressed the issues.

A judgment can be obtained if a defendant does not appear (by default), provided satisfactory efforts have been made to serve through the designated authorities under the Hague Convention on service abroad, or where the defendant does not continue in their defence once they have designated counsel. In this case, the judg-

ment will be considered contradictory or adversarial.

2.7 Rules for Pleading Fraud

Members of the Monaco Bar, which is restricted to Monaco nationals, are expected to respect the truth and to exercise the profession with dignity, good conscience and loyalty (Law 1.0476 of 28 July 1982, Article 14). Foreign lawyers pleading before the Monaco courts are expected to maintain the same standards in addition to the standards set out by their own Bars. French lawyers, for example, swear an oath to exercise the profession with "dignity, conscience, independence, probity and humanity". There are no known or published cases of Monaco lawyers being sanctioned or disciplined for failing to respect these standards or any other violations, although malpractice suits are not entirely unknown.

It is accepted practice that a defendant in a criminal case will seek to settle with a civil complainant, who will then withdraw the complaint. This will not end the criminal investigation, nor the possibility of the defendant being condemned, but will prevent the civil party from receiving damages or participating in the trial. Certain members of the Monaco Bar will file criminal complaints as a means of pressuring defendants or civil party victims in criminal cases. While this strategy is disliked by prosecutors and investigating magistrates alike, it does not always fail and has never been known to be sanctioned or result in disciplinary measures or prosecution.

2.8 Claims against "Unknown" Fraudsters

It is possible to file a criminal complaint against X, as unknown parties, and this is often the case. One reason that this tactic is used is that it prevents the defendant from filing charges in calumnious denunciation if the criminal complaint fails. It is not possible to file a civil summons and complaint against an unknown party.

2.9 Compelling Witnesses to Give Evidence

The investigating magistrate in a criminal case may compel witnesses to give evidence for their own investigations.

In civil matters, the CPC, at Article 326 et seq, provides for the possibility of demanding an investigation and testimony, but this has not been known to have been put into practice. Spouses, ex-spouses and children may in any event not be compelled to testify, nor may anyone who is professionally bound by confidentiality.

The new Article 277 of the CPC provides that third parties may be compelled to produce documentation.

Monaco has adhered to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

A company or legal entity can be held liable for a crime or delict under the provisions of Article 4-4 of the Penal Code. The company's responsibility does not preclude the responsibility of the directors or officers. The entity may therefore be held liable for the fraud to the victims in a criminal trial.

In a civil case, the directors may be held responsible for their actions on behalf of the company.

3.2 Claims against Ultimate Beneficial Owners

In criminal matters, the ultimate beneficial owners – having benefitted from the infractions – can be included along with the companies and the directors and officers.

In civil cases, the legal personality of the company has been respected in case law where, for example, a claim is against an ultimate beneficial owner or shareholder, and an asset is held by the corporate vehicle. However, there has been a recent tendency towards allowing seizure of the corporate asset on the basis that the corporate vehicle is a sham.

3.3 Shareholders' Claims against Fraudulent Directors

The shareholders of a company cannot act on behalf of a company to sue fraudulent directors unless they are mandated to do so. They have standing as shareholders to sue the fraudulent directors both civilly as injured parties and by filing criminal complaints as victims. They could sue to have a judicial administrator named for the company, who could then sue the directors on behalf of the company.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

While Monaco does not, in general, purport to exercise extraterritorial jurisdiction, overseas parties can be joined under the provisions of Article 5 of the Code of Private International Law (CDIP), which provides that Monaco has jurisdiction provided that one party is a Monaco resident, even where the other defendants are not. There is a caveat, which is that there will be no jurisdiction if the request is made "only to bring a party who has his habitual residence or domicile outside Monaco" into the Monaco courts. Since the CDIP is relatively recent (2017), there is no case law published applying this exception.

Where there is a seizure action, it must be validated before the Monaco courts by a simple action to request payment of the sum in question. In that case, the overseas party will be a party to the action and the Monaco court will have jurisdiction (Article 6, No 7, CDIP).

To execute on the seized assets, it will often be necessary to demand recognition of a foreign judgment. In that event, "any interested party" may bring the action in recognition (Article 15, CDIP) and the defendant may be the overseas or foreign party.

5. ENFORCEMENT

5.1 Methods of Enforcement

Enforcement can be obtained in civil matters by obtaining a final judgment (or a judgment with provisional execution, regardless of appeal) from the Monaco court. Only a bailiff may execute judgments. These may be executed against previously seized assets or any other assets of the debtor.

The foreign judgment that has received recognition from the Monaco court may also be enforced. The CDIP stipulates that foreign judgments are to be enforced unless it is shown that:

- the foreign court did not have jurisdiction under Monaco legislation;
- the defendant did not have notice and an opportunity to defend;
- recognition of the foreign judgment would be manifestly contrary to Monaco public order;
- the foreign judgment is contrary to a decision rendered between the same parties in the

Principality or by a foreign court and recognised in the Principality; and
- litigation is pending in Monaco between the same parties and on the same matter in the Principality that was filed first.

The Monaco court may not modify the foreign judgment.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

A defendant in a criminal investigation is entitled not to reply, but a negative inference will be drawn from the non-cooperation, both during the investigation and during trial.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

The new CPC provisions allowing for discovery orders have not yet produced case law. Because they may be accompanied with a fine, or an *astreinte*, these can be expected to give rise to litigation. Banks served with orders to disclose "any accounts" held by a debtor have been known to refuse, citing banking secrecy. If a Monaco lawyer or a foreign practitioner were served with an order to disclose (*compulsoire*), the lawyer would refuse to comply.

In criminal cases, the privilege is strongly debated in France and has been raised in Monaco in a recent case in which information was obtained from the telephone of a foreign lawyer practising in Monaco. The principle would be similar to the common fraud exemption known in the common law.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

There are no punitive or exemplary damages.

7.2 Laws to Protect "Banking Secrecy"

Banking secrecy rules apply in civil cases. Article 308 of the Penal Code makes it a criminal violation for anyone who has received information in confidence to divulge it. Banking secrecy cannot be opposed in a criminal investigation, but has been known to have been raised by a third-party bank served with a civil court order to produce information.

7.3 Crypto-assets

Crypto-assets would be treated as any other assets but it would be particularly difficult to obtain a seizure order. No published case law exists.

DMLO Conseil regularly advises on local and cross-border mandates, both contentious and non-contentious, in the areas of banking and financial regulation, corporate (commercial and M&A), real estate, intellectual property, private client wealth management and taxation, and family law. The firm has a multi-jurisdictional litigation and dispute resolution practice and is renowned for its expertise in representing civil party victims in asset recovery in international bankruptcy, corruption and fraud cases.

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POLAND

Trends and Developments

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Freezing Funds in an Account in a Bank or Other Financial Institution by the Prosecutor, due to a Suspicion that They May Be Associated with Money Laundering

Quite recently the Supreme Court in Poland issued two important judgments concerning the freezing of funds in accounts due to a suspicion that they may be associated with money laundering.

The phenomenon of money laundering covering all actions aimed at introducing money or intangible assets deriving from illegal sources, or used in the financing of illegal business, to legal trading is perceived as particularly harmful. It is directly associated with the operations of developed, often cross-border, criminal structures. Organised crime, in particular when operating internationally, generates enormous profits (for instance from the drug trade or human trafficking). Criminal groups attempt to introduce this "dirty money" to legal trade, in order to freely and safely use it in the future and to cover the tracks of its illegal origins. The existence of channels that make this possible constitutes a condition for the existence of criminal structures. These channels are used to facilitate the legalisation of the sources of material benefits used by criminal organisations.

Various legal and organisational solutions have been adopted in countries in order to, on the one hand, prevent the phenomenon of money laundering (in particular to counteract the use of the financial system to this end), and on the other hand, where money has been subject to laundering – to allow the relevant state authorities to reveal such instances and hold the perpetrators liable. Various forms of money laundering are criminalised in Poland under Article 299 of the Polish Criminal Code (PCC).

One of the measures used to fight money laundering procedures constitutes the freezing of funds deposited in an account maintained by a bank or other financial institution for a specific period of time. In Poland, the basis for applying this measure is found in Articles 86–87 of the Act on Counteracting Money Laundering and Financing of Terrorism of 1 March 2018 (Journal of Laws of 2022, item 593 as amended; "the AML Act"), and, with respect to bank accounts and accounts maintained by credit unions, the provisions of Article 106a of the Banking Law of 29 August 1997 (Journal of Laws of 2021, item 2439; "Banking Law") and Article 16 of the Act on Credit Unions of 5 November 2009 (Journal of Laws of 2021, item 1844, as amended; "Credit Unions Act").

Freezing funds deposited in an account by a prosecutor constitutes a means of procedural coercion. It is used to block assets in the form of funds deposited in the account by its holder for a specific period of time in order to allow an investigation into the status of the assets while the funds are frozen. In the longer term, if it is confirmed that the asset is connected with a crime, freezing the funds makes it possible to use an asset-based collateral with respect to these assets, and to prevent the funds from being used to commit further criminal acts.

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Freezing an account constitutes an independent, relatively new, out-of-code means of the temporary seizure of assets. It is a measure similar to an asset-based collateral, as governed in Chapter 32 of the Polish Code of Criminal Procedure (PCCP), in particular a temporary seizure of movable property under Article 295 of the PCCP. These measures should, however, be distinguished. The prerequisites for freezing the account and applying this measure, despite certain common elements, differ from those that apply to an asset-based collateral. An account may be frozen irrespective of whether or not criminal proceedings are pending against its holder. On the other hand, an asset-based collateral can only be established on the assets of a person against whom criminal proceedings are pending (see Article 291 Section 1 of the PCCP in conjunction with Article 71 Section 3 of the PCCP), and in extraordinary circumstances – also on assets of a person alleged to have committed a crime (Article 295 of the PCCP) or other entities (Article 291 Section 2 of the PCCP).

Pursuant to the provisions of Articles 86–87 of the AML Act, if there is a suspicion that the crime of money laundering (Article 299 of the PCC) or financing of terrorism (Article 165a of the PCC) has been perpetrated, a prosecutor, either acting under a notice filed by the General Inspector of Financial Information or of their own accord, may freeze the account maintained by a bank or other financial institution in which funds that may be associated with that crime have been deposited. The prosecutor freezes the account for a specific period of time, not longer than six months. The decision must stipulate the scope, form and period of time for which the account is to be frozen. After the introduction of amendments that entered into force on 12 January 2022, the prosecutor is authorised to prolong the freeze for a further specified period of time up to six months. The account holder can complain against the prosecutor's decision to freeze the account, or prolong the freezing of the account, to the relevant court. Similarly, the rules governing the freezing of funds in an account by the prosecutor in relation to a suspicion of the offence of money laundering (Article 299 of the PCC) or the financing of terrorism (Article 165a of the PCC) are laid down in the provisions of Article 106a of the Banking Law and Article 16 of the Credit Unions Act.

Freezing Funds for Additional Reasons

It is worth adding that, according to the applicable provisions, the funds in an account may be frozen not just in relation to a suspicion of money laundering (Article 299 of the PCC) or financing of terrorism (Article 165a of the PCC). The prosecutor may also freeze the account:

- under the provisions of Article 89 of the AML Act, if there is a reasonable suspicion that funds deposited in the account come from any crime or fiscal crime, or are associated with such a crime or fiscal crime;
- under the provisions of Article 106a of the Banking Law, if there is a reasonable suspicion that the operations of a bank are being used to hide criminal activity or are used for purposes associated with a crime or fiscal crime;
- under the provisions of Article 16 of the Credit Unions Act, if there is a reasonable suspicion that the operations of a credit union are being used to hide criminal activity or are being used for purposes associated with a crime or fiscal crime;
- under the provisions of Article 40 of the Act on Supervision over the Capital Markets of 29 July 2005 (Journal of Laws of 2020, item 1400, as amended) if there is a reasonable suspicion that a crime specified in Articles 181–183 of the Act on Trade in Financial Instruments has been committed, or a crime that may have material implications on trade on a regulated market has been committed,

if the account has been used to commit the crime.

It has been the case that the prosecutor's office was unable, whether for reasons within its control or independent of them, to determine whether the funds in an account have been associated with a crime of money laundering or not, and if so, whether the account holder was participating in this procedure when the account was frozen, even for the maximum period of time provided for in the act. In these circumstances, certain prosecutors have opted to avoid the consequences of cancelling the freeze (ie, the account holder being free to use the funds deposited in this account), by prolonging the situation in which these funds are frozen. To do this, they have used the institution of the seizure of movable items treated as evidence (as exhibits) governed by Article 217 et seq of the PCCP, which – it must be emphasised – in principle constitutes a more painful (greater) interference in the property rights of the account holder than the interference arising from the use of the means of coercion in the form of freezing an account, since it is not limited by any statutory time limit. The appearance of legality is ascribed to this practice by the provisions of Article 86 Section 13 of the AML Act, as well as Article 106a Section 8 of the Banking Law and Article 16 Section 9 of the Credit Unions Act, and more specifically the reservation contained therein whereby the funds are released if, before the expiry of the period of time to apply the freezing of the account, no "decision on asset-based collateral" or "decision on exhibits" is issued.

Certain representatives of the jurisprudence and legal environment are right to point out that this practice of the prosecutor's office is inadmissible and constitutes a circumvention of guarantees granted to account holders in the provisions on freezing an account. However, the common courts of law, which check the decisions of prosecutors on the "retention" of funds deposited in accounts as exhibits as a result of complaints filed by the account holders, have tended not to question it. Luckily, there have been courts that have started to express doubts about whether this really complies with the law, and which applied to the Supreme Court to have the issue settled. The Supreme Court treated these doubts as justified.

Implications of Freezing Funds on Ownership Rights

Motivated by the need to counteract discrepancies in the judicature, as well as taking into consideration critical views of the representatives of the jurisprudence and legal environment regarding the dominant interpretation of these provisions, the Supreme Court adopted two resolutions: a resolution of 13 October 2021 (I KZP 1/21) and a resolution of 9 November 2021 (I KZP 3/21), in which the Supreme Court pointed out that the funds collected in a bank account do not bear the characteristics of exhibits within the meaning of Article 86 Section 13 of the AML Act and Article 106a Section 8 of the Banking Law, respectively, since they do not exist as movable items, and are nothing more than entries in the IT system. As a result, the Supreme Court agreed that prolonging the freezing of funds collected in an account for a period of time longer than the maximum period of time specified in Article 86 of the AML Act and Article 106a of the Banking Law through a decision to treat these funds as exhibits is groundless.

In extensive justifications of these resolutions, the Supreme Court emphasised that the regulations included in Article 86 of the AML Act and in Article 106a of the Banking Law interfere heavily in private ownership, which, according to Article 20 of the Constitution of the Republic of Poland, constitutes one of the systemic principles of Poland. Hence, the interpretation of these provisions must not be contrary to either Article 20 or

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Article 31 Section 3 of the Constitution of Poland. The latter provision states that limitations in the scope of exercising constitutional liberties and rights may only be introduced through an act, only when it is necessary for issues of safety or order, for example, and only when they do not violate the essence of these liberties or rights. Also important is Article 64 of the Constitution of Poland, according to which, ownership may only be limited through an act, and only to the extent in which it does not violate the essence of the ownership right.

In light of the statutory regulations of a bank account agreement, the bank account holder's funds, once paid, become the ownership of the bank, while the bank account holder is authorised to exercise a due and payable claim to have them released in the amount arising from the account balance. The claim is a property obligatory right of the account holder. The bank may temporarily invest the free funds in the bank account, but it is obliged to return them in full, or partially, at each demand. The claim is performed by returning the account holder's funds, who at that moment recovers the possession and ownership of the funds, or any other right in rem or obligatory right associated with the funds before they were deposited in the bank.

Freezing funds – as was aptly noted by the Supreme Court – deeply interferes both in the rights of the account holder and of the bank, which is the owner of the funds deposited in the account. What is more, under Article 86 of the AML Act and Article 106a of the Banking Law, the account of a natural (or legal) person who is not a suspect within the procedural meaning, since no charges were pressed against this person and who still enjoys the presumption of innocence, may still be frozen. Applying these measures may have severe negative consequences for the person concerned, including the inability to conduct business activity. For these reasons, the nature of the measures should be treated as extraordinary, while their application should be limited in time to a necessary minimum. The provision that limits the freezing of the account for a specific period of time has the nature of a guarantee and must be interpreted strictly, while the deadline stipulated in it constitutes a maximum and definite period of time.

As has already been mentioned, both Article 86 of the AML Act and Article 106a of the Banking Law adopt a solution whereby the freezing of funds is cancelled if, before the expiry of the period of time to apply it, no decision on asset-based collateral or decision on exhibits is issued.

The Supreme Court aptly indicated that the problem with issuing a decision on asset-based collateral in such a situation raises no doubts. Pursuant to Article 291 Section 1 of the PCCP, this is possible after the criminal proceedings enter the in personam stage, ie, after charges are pressed against a person whose funds have been frozen in their account. In the past, the Polish Constitutional Tribunal has checked the constitutionality of the provision on the asset-based collateral and agreed that it was consistent with the rules of a democratic state of law, proportionality in the limitation of the constitutional rights and liberties, the presumption of innocence and the protection of the ownership right and other property rights. At the same time, the tribunal pointed out that the asset-based collateral certainly interferes with property rights since it deprives a person presented with charges of the possibility of disposing of a specific property. Yet, the nuisance aims at performing one of the fundamental assumptions of a democratic state of law, namely the guarantee of the enforceability of court judgments (see the judgment of the Constitutional Tribunal of 6 September 2004, SK 10/04).

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The Importance of What Constitutes an "Exhibit" when Freezing Funds

The problem of the admissibility of the prosecutor issuing a decision on exhibits that treats the funds frozen earlier as exhibits is not so clear-cut. According to the doctrine of criminal procedure regarding the definition of an "exhibit", the Supreme Court pointed out that it is a thing, which in every case constitutes a physically existing object that may undergo inspection. An exhibit in criminal proceedings always bears individual features, since it carries specific information that is important for the course of the proceedings, as it is a source of evidence. An essence of conducting evidence in court constitutes the process of making assumptions based on this specific piece of evidence, which leads to making arrangements as to the facts. Furthermore, the Supreme Court noted that the funds deposited in a bank account do not have these features, since they do not exist as items, (as objects), but rather constitute entries in the IT system, with no specific items in the form of banknotes or coins that could undergo an inspection. Therefore, the funds in question do not bear the characteristics of evidence in a procedural meaning. What raises no doubt, however, is that account statements, confirmations of payments and withdrawals, and other similar documents, irrespective of whether they are on paper or in an electronic form, can be treated as exhibits. Their content is subject to inspection (irrespective of the nature of the carrier), as it is with respect to any document. A banknote, on the other hand, is an exhibit when it carries such information as, for instance, a specific serial number, fingerprints, biological traces, etc.

The Supreme Court also pointed out that, since definite deadlines are stipulated for the freezing of funds in an account, the provisions on a decision on exhibits concerning these funds must not be interpreted in a way allowing a person (the account holder) with no charges pressed against them to be indefinitely prevented from using the funds. Otherwise, it would be possible to indefinitely deprive a person of one of the most important attributes of ownership without the need to move from an in rem to an in personam stage in the criminal procedure.

The Supreme Court very aptly pointed out that "fighting with crime without respecting the procedural guarantees may lead to repressing an innocent man, and thereby constitutes the denial of an effective instrument of counteracting crime, while accepting the de facto indefinite freezing of funds in a bank account thanks to `treating' them as an exhibit, means that there is no incentive for law enforcement authorities to undertake effective and efficient actions."

The Ministry of Justice, dissatisfied with the position of the Supreme Court (as the Prosecutor General, the Minister of Justice is also the head of the Prosecutor's Office), attempted to defend the practice questioned by the Supreme Court through legislation. Parliament adopted an amendment to the PCCP adding new provisions (a new Article 236b of the PCCP), which, expressis verbis, provide that funds in an account are deemed to be a movable item within the meaning of the provisions on exhibits, and that a decision on exhibits may apply to funds in the account if they have been retained as evidence in a case. This change, introduced by the Act of 17 December 2021 (Journal of Laws of 2021, item 2447), entered into force on 12 January 2022. The opportunity was also used to extend the maximum period of applying this measure in all provisions determining grounds to freeze the account to 12 months.

We will see if the Ministry of Justice's plans will come to fruition. However, it seems that the introduction of Article 236b of the PCCP does not remove the two principal objections formulated against the practice of "retaining" funds in an

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account by subsequently treating them as exhibits–namely that, due to the nature of these funds, this practice cannot serve any evidence-related purposes, and that it breaches the provisions of the Constitution of Poland protecting ownership and other property rights, since it constitutes an excessive, disproportionate interference in the account holder's property rights.

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DeBenedetti Majewski Szcześniak Kancelaria Prawnicza Sp.K. is a transactional-litigation boutique with 21 lawyers in Warsaw, Poland. It specialises in corporate law, private equity, M&A, bankruptcy/restructuring, litigation and mediation, as well as in criminal law. Its experience in drafting complicated transactions, tailored to the needs of very demanding clients, means that it is the go-to firm for any difficult commercial situations, both in Poland and abroad. It also acts as subcontractor for many international law firms without a Warsaw office, assisting with cross-border M&A transactions, advising on local aspects of FCPA/Bribery Act claims, and amending contracts in order to reflect Polish law and business aspects.

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

As a trading and financial hub, there is often an international element to fraud claims in Singapore. The general characteristics of fraud claims in Singapore include:

- the making of false statements;
- misappropriation or diversion of assets (particularly through multiple and offshore entities);
- falsification of documents and banking records;
- conspiracy to defraud (including between individuals and the corporate entities used to perpetrate the fraud);
- breach of fiduciary duties by an agent or officer of a company;
- dishonest assistance; and
- corrupt payments.

1.2 Causes of Action after Receipt of a Bribe

The principal's cause of action may be founded on restitution (money had and received) or breach of fiduciary duty (prohibition against secret profits). The latter is relevant if the principal also intends to seek a constructive trust over the bribe and trace the proceeds thereof.

A principal's right at law to recover the bribe or the monetary value of the bribe received by its agent is statutorily recognised. Section 14 of the Prevention of Corruption Act provides that a principal may recover as a civil debt the amount or monetary value of the bribe received by the agent, or from the person who gave the bribe, and no conviction or acquittal of the defendant shall operate as a bar to recovery. The fact that the agent had paid fines equivalent to or in excess of the value of the bribe received is not a bar to recovery by the principal. The possibility of double disgorgement acts as a further deterrent against corruption.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

The party who assisted or facilitated the fraudulent acts of another may be liable in a claim for:

- unlawful means conspiracy, together with the primary wrongdoer, if the fraudulent acts were carried out by one or more of them pursuant to conspiracy between them to injure the victim;
- dishonest assistance, if that party assisted or facilitated the breach of fiduciary duties; or
- knowing receipt, where the assistance/facilitation involved the receipt of trust/proprietary funds.

1.4 Limitation Periods

Generally, causes of action grounded in contract and tort are subject to a six-year limitation period (see Section 6 of the Limitation Act).

There are, however, specific provisions that deal with claims based on fraud. For instance:

- under Section 22 of the Limitation Act, no period of limitation shall apply to an action by a beneficiary under a trust, being an action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy, or to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use; and
- under Section 29 of the Limitation Act, the six-year limitation period shall not begin to run in certain cases of fraud or mistake until the plaintiff has discovered the fraud or mistake, as the case may be, or could with reasonable diligence have discovered it.

1.5 Proprietary Claims against Property

Generally, a victim of a fraud may make a proprietary claim for the misappropriated funds or property, and seek a constructive trust to be imposed over the funds or property. The constructive trust will give priority to the claimant against other unsecured creditors in an insolvency situation. It also enables the claimant to trace and follow the fraud proceeds. Hence, if the proceeds of fraud are invested successfully before they are recovered by the victim, the victim is entitled to trace the fraud proceeds into the investment and claim the full value thereof.

Where the proceeds of the fraud have been commingled, there are specific rules and methods of distribution that the Singapore courts may apply in considering the distribution of such commingled funds, depending on whether the assets were commingled with the assets of the fraudster, or that of other innocent third parties, and whether and how the commingled funds have been spent or dissipated. In the case of the former, the courts will apply the rule that is most favourable to the victim. The courts may apply the presumption (which is rebuttable) that the fraudster had spent their own money first and the remaining money is the beneficiary's (if the victim seeks to claim the remaining funds), or the presumption that the beneficiary's money was spent first (if the victim seeks to trace the proceeds of the funds). In the case of the latter, the courts may order a pro rata distribution from the commingled assets.

1.6 Rules of Pre-action Conduct

There are no rules of pre-action conduct required of a claimant in relation to fraud claims. There is generally no obligation to provide any advance notice or to undertake any alternative dispute resolution prior to the commencement of any legal proceedings (unless otherwise agreed between the parties).

1.7 Prevention of Defendants Dissipating or Secreting Assets

A claimant may seek either a freezing injunction (in personam) over the defendant to prevent them from dealing with or disposing of assets beyond a certain value, or a proprietary injunction (in rem) over a specific asset in which the plaintiff asserts a proprietary interest. Such injunctions are typically sought on an urgent and without notice (ex parte) basis. Freezing injunctions can be sought either in aid of domestic or foreign proceedings, although the legal requirements for each differ.

A claimant may also seek a freezing injunction against a third party (non-cause of action defendant) who is holding onto the defendant's assets as nominee.

Exceptionally, a claimant may also seek an interim receivership order requiring the defendant's assets to be handed over and managed by a court-appointed receiver, pending trial of the action. A receivership order may be granted if the court concludes that the defendant cannot be trusted to obey the freezing order, for example, where the defendant's assets are held via a complex, opaque and multi-layered corporate structure.

If the defendant does not comply with the court order, they may be liable for contempt of court under the Administration of Justice (Protection) Act for a fine up to SGD100,000, or imprisonment for a term not exceeding three years, or both. Additionally, the court may refuse to hear the defendant until the contempt is purged, or the defendant submits to the order or direction of the court, or an apology is made to the satisfaction of the court. Third parties (such as banks) within Singapore are also bound by the freezing order when they receive notice of the injunction, failing which the third party may also be liable for contempt of court.

A claimant seeking a freezing or proprietary injunction will need to pay filing fees for the application, which may range between SGD2,000 to SGD10,000, depending on the volume and number of documents filed. The fees are not pegged to the value of the claim. The claimant will also be required to provide a cross-undertaking in damages to the court, which may be substantial depending on the nature of the claim and the potential loss and damage that may be incurred by the defendant. In certain cases, the claimant may also be required to provide fortification of such undertaking, which would usually be in the form of payment into court, a solicitor's undertaking, or bank guarantee.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

Generally, a claimant can seek disclosure orders as an ancillary order to support the freezing injunction. The defendant will be required to file an affidavit to identify their assets, whether held in their own name or not, and whether solely or jointly owned.

If there is reasonable ground to believe that the defendant has not complied with their disclosure obligations, the claimant may apply for the defendant to be cross-examined on their asset disclosure. Where the defendant is found to have acted in breach of the disclosure orders, they may be liable for contempt of court.

A claimant may also rely on the defendant's failure to comply with the disclosure order as a basis to apply for an interim receivership order requiring the defendant's assets to be handed over and managed by a court-appointed receiver, pending trial of the action.

In any event, the claimant will be required to provide a cross-undertaking in damages to the court. In certain cases, the claimant may also be required to provide fortification of such undertaking.

2.2 Preserving Evidence

The court may grant a search order (formerly known as an "Anton Piller order") to prevent a defendant from destroying incriminating evidence. Such an order permits certain persons to enter the defendant's premises to search for, seize and retain documents or other items.

Such an application is usually made on an ex parte basis. The requirements that must be satisfied in order to obtain a search order are:

- the applicant has an extremely strong prima facie case;
- the potential damage suffered by the applicant would have been very serious;
- there was a real possibility that the defendant would destroy relevant documents before an inter partes application (ie, with notice to the other party) can be made; and
- the effect of the search order would not be out of proportion to the legitimate object of the order.

Similar to an application for a freezing order, the applicant will have to undertake to pay damages that may be sustained by the defendant as a result of the search order if it is granted by the court.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

A court application is permitted to seek disclosure of documents and evidence from third parties, either before the commencement (pre-action) or during the course of proceedings.

In either case, the applicant will be required to specify or describe the documents sought and show how such documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made, and that the documents are likely to be in the possession, custody, or power of the third party against whom disclosure is sought.

In the cases of fraud and asset tracing, the courts would usually be prepared to grant pre-action disclosure orders in line with the principles for the grant of a Norwich Pharmacal order or Banker's Trust order, ie, to enable the identification of the wrongdoer or the tracing of misappropriated funds or property.

A party who is given discovery of documents pursuant to an order of court gives an implied undertaking to the court only to use those documents for the conduct of the case in which the discovery is given, and not for any collateral or ulterior purpose (also known as the "Riddick Undertaking").

As discovery on compulsion of court order is an intrusion of privacy, the Riddick principle ensures that this compulsion is not pressed further than the course of justice requires. This implied undertaking is sometimes fortified by an express undertaking to the same effect.

A breach of the undertaking amounts to a contempt of court. The Riddick principle is, however, not an absolute one, and a court has discretion to release or modify the undertaking.

2.4 Procedural Orders

Generally, an application for a freezing injunction or a search order will be made on an ex parte basis. The courts' practice directions, however, require that except in cases of extreme urgency or with leave of court, the applicant shall still be required to provide a minimum of two hours' notice to the other party before the ex parte hearing.

The applicant of an ex parte application must make full and frank disclosure to the court of all facts which are material to the exercise of the court's discretion whether to grant the relief. In other words, the applicant must disclose all matters within their knowledge which might be material, even if they are prejudicial to the applicant's claim.

2.5 Criminal Redress

Generally, the victims of fraud would seek redress concurrently through criminal and civil proceedings. The criminal prosecution and civil proceedings may progress in parallel. In less serious fraud cases, however, criminal prosecution may take place only after the conclusion of the civil claim.

As mentioned at **1.2 Causes of Action after Receipt of a Bribe**, Singapore has various statutory provisions that would capture different fraudulent acts.

For example, the Penal Code it provides for:

- dishonest misappropriation of property (Section 403);
- criminal breach of trust (Section 405);
- dishonest receipt of stolen property (Section 411);
- cheating (Section 415);
- dishonest or fraudulent disposition of property (Section 421);
- forgery (Section 463); and
- falsification of accounts (Section 477A).

The Companies Act also sets out the following conduct which, if a person is found guilty of, may amount to an offence:

- false and misleading statement (Section 401);

- false statements or reports (Section 402);
- fraud by officers (Section 406); and
- breach of directors' duty (Section 157).

2.6 Judgment without Trial

A default judgment may be obtained where a defendant fails to enter a notice of intention to contest or not contest the claim, or file a defence within the stipulated timelines.

In cases where it is clear that the defence is wholly unmeritorious, the plaintiff may seek summary judgment without trial. Generally, summary judgment would be argued on affidavit evidence, and would be granted where there are no triable issues.

2.7 Rules for Pleading Fraud

The Legal Profession (Professional Conduct) Rules provide that a legal practitioner must not draft any originating process, pleadings, affidavit, witness statement or notice or grounds of appeal containing any allegations of fraud unless the legal practitioner has clear instructions to make such an allegation and has before the legal practitioner reasonably credible material which establishes a prima facie case of fraud.

In terms of the standard of proof for a fraud claim, the burden remains the same as in other civil cases – that is the civil standard, ie, on the balance of probabilities. However, the Singapore courts have observed that the more serious the allegation (which is the case in a fraud claim), the stronger or more cogent the evidence is required for the claimant to discharge their burden.

2.8 Claims against "Unknown" Fraudsters

The authors successfully represented the plaintiff in a recent Singapore High Court decision in CLM v CLN [2022] SGHC 46, which held for the first time in Singapore that the Singapore court has the jurisdiction to grant interim orders against unknown persons, where the description of the unknown persons is sufficiently certain as to identify those who are included and those who are not.

2.9 Compelling Witnesses to Give Evidence

A party can apply to the court to issue an order for a witness to attend court to testify or an order to produce documents.

In determining whether to grant the order, the court considers whether the witnesses are in a position to give oral and/or documentary evidence relevant to the issues raised in the case.

An order to attend court or order to produce documents should not be used to fish for evidence, or to embarrass or inconvenience the witness.

Such an application is governed by the Rules of Court 2021. An order to attend court or an order to produce documents must be served personally and within the specific timeframe stipulated in the Rules of Court 2021.

If a witness disobeys an order to attend court or an order to produce documents, the court has jurisdiction to enforce the order by committal.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

A company can be made liable for the acts of its directors and officers through the doctrine of attribution. Under this doctrine, the company and its officers are still treated as distinct legal

entities, but the acts and the states of mind of the officers are treated as those of the company.

There are three types of rules of attribution.

First, there are primary rules of attribution that are found in the company's constitution or implied by company law, which deem certain acts by certain natural persons to be the acts of the company. For instance, if the board of directors of a company is aware of acts being performed by employees or agents of the company, knowledge of such acts could be attributed to the company.

Secondly, there are general rules of attribution by which a natural person may have the acts of another attributed to them, ie, the principles of agency, and by which a natural person may be held liable for the acts of another, such as the principles of estoppel, ostensible authority and vicarious liability.

Thirdly, there are special rules of attribution where, although the primary and general rules of attribution are not applicable, the courts find that a substantive rule of law is applicable to the company. This would depend on the interpretation or construction of the relevant rule which the person's act or state of mind was, for the purpose of the rule, to be attributed to the company.

In particular, the special rules of attribution operate differently depending on the factual matrix. In the case of fraud, the courts have held that while a company could be bound by the improper acts of the directors at the suit of an innocent third party, that rule of attribution should not apply where the company itself is bringing a claim against the directors for their breach of duties.

3.2 Claims against Ultimate Beneficial Owners

In certain exceptional circumstances, courts can ignore the separate legal personality of a company and look to those who stand behind the companies eg, shareholders. This is typically referred to as "lifting the corporate veil".

One scenario where corporate veil can be lifted is where the company is used as by the person as an instrument of fraud. A fraudster will not be allowed to commit a wrong through a company that they control and then assert that it is the company and not themselves who should bear the responsibility for the wrong.

The corporate veil can also be lifted where the company is simply an alter ego of the fraudster, ie, where there is no distinction between the company and the fraudster, and the company is simply carrying on the business of its controller.

3.3 Shareholders' Claims against Fraudulent Directors

The general rule is that the proper plaintiff to bring a claim against fraudulent directors is the company itself. Shareholders are typically not allowed to sue on the company's behalf but can request the company's board of directors to take action. The shareholders of the company may also attempt to oust the fraudulent directors by way of a shareholder resolution, and then have the company bring claims against its fraudulent ex-directors.

However, in the situation where the wrongdoers are themselves in control of the company and do not allow for an action to be brought in the company's name, the minority shareholders may consider seeking leave from the court to pursue a derivative action, either under common law or statute.

Specifically, under Section 216A of the Companies Act, the shareholder may apply to court for leave to bring an action in the company's name. The court would need to be satisfied that:

- the complainant is acting in good faith; and
- it is prima facie in the interests of the company that the action should be brought.

Under the common law derivative action, the action against the fraudulent director is brought in the shareholder's name. There are two requirements that need to be satisfied before the court may grant leave to start a derivative action, namely:

- it is prima facie in the interest of the company that the action should be brought; and
- the complainant must have standing to bring the action, by showing that there has been "fraud committed against the minority" and the alleged wrongdoers are in control of the company.

The idea of "fraud on the minority" is a term of art here and is different from actual fraud under common law. It includes, for example, situations where the director misappropriates the company's money or opportunities, or receives bribes or benefits at the expense of the company.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

In order to bring a claim against overseas parties, it must be established that the Singapore court has jurisdiction over the overseas parties or is the appropriate court to hear the action.

Whether or not the Singapore courts assume extraterritorial jurisdiction will depend on the nature of the specific issue at hand. The Singapore Court of Appeal has held that the Singapore courts do not have jurisdiction to adjudicate on matters concerning immovable property located outside of Singapore. In a separate case, it was held that the Singapore courts can order a foreign individual to be subject to examination of judgment debtor proceedings if the foreign individual is so closely connected to the substantive claim that the Singapore court is justified in taking jurisdiction over him or her.

5. ENFORCEMENT

5.1 Methods of Enforcement

After a judgment is issued, the recovery of lost assets may still be frustrated as the fraudster may undertake efforts to make enforcement of the judgment difficult. For instance, the fraudster may seek to conceal or dissipate its assets, or may simply refuse to comply with the judgment order. There are various court remedies available to locate, preserve, and procure the assets of the fraudster.

Examination of Enforcement Respondent

Armed with a court judgment, the company may apply under Order 22 Rule 11 of the Rules of Court 2021 for an order for the Examination of Enforcement Respondent against the fraudster. The fraudster would then be compelled to attend court to answer questions relating to their existing property, or property which may become available to them. The fraudster may also be compelled to produce any books or documents in their possession which are relevant to their assets.

Preservation of Assets

Freezing orders, as explained at **1.7 Prevention of Defendants Dissipating or Secreting Assets**, are also available as remedies to preserve the assets of the fraudster post-judgment,

pending execution. Given that a judgment has already been obtained, an application for a post-judgment freezing order requires only that there are grounds for believing that the debtor intends to dispose of their assets to avoid execution.

Enforcement Orders

Where it is known that properties belonging to the fraudster exist within the jurisdiction, an Enforcement Order may be issued under Order 22 Rule 2 of the Rules of Court 2021 for the properties to be seized by a public official and sold. The proceeds of sale will then be paid to the company in satisfaction of the judgment debt.

Where it is known that the fraudster is owed debts by other persons, an Enforcement Order may also be issued to the other person to pay the debt amount to the plaintiff, up to the value of the judgment amount. The most common targets of such orders are banks in which fraudsters have deposited money.

Contempt Orders

As a measure of last resort, an application for a committal order may be taken out against the fraudster under Order 23 Rule 2 of the Rules of Court 2021. This entails the threat of criminal sanctions against the fraudster to compel compliance with the judgment issued.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

The right to silence can be invoked when a person is asked to provide information that has a tendency to incriminate them. However, the fact that the answer or the document to be provided will expose the person to civil liability is generally insufficient to attract the privilege.

The right is therefore more commonly applied in criminal proceedings. In Singapore, the right to self-incrimination is not a constitutional right under the principles of natural justice. When summoned for an investigation, a person must state what they know about the facts and circumstances of the case, except that they are not required to disclose anything which they think might expose them to a criminal charge, such as admitting or suggesting that they did it.

At the same time, the court has the power under Section 116(g) of the Evidence Act to presume that evidence which could be and is not produced, would if produced, be unfavourable to the person who withholds it. As a result, courts have drawn adverse inference against a party who fails to produce documents or call crucial witnesses to testify at trial, both in civil and criminal proceedings.

In order for the court to draw adverse inference, there are two main requirements that need to be satisfied.

- First, there needs to be a substratum of evidence which establishes a prima facie case against the person against whom the inference is to be drawn. In other words, there must already be a case to answer on that issue before the court is entitled to draw the desired inference.
- Secondly, that person must have access to the information they are said to be concealing or withholding.

Note that in criminal proceedings, Section 261 of the Criminal Procedure Code expressly provides the Singapore courts with the power to draw adverse inference from the silence of the accused for failing to mention any fact which they subsequently rely on in their defence.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

While communications between a lawyer and client attract legal advice privilege or litigation privilege, such communications can be stripped of their privileged status on the basis of "fraud exception".

In particular, Section 128(2) of the Evidence Act expressly provides that legal advice privilege will not apply to "any communication made in furtherance of any illegal purpose" or "any fact observed by any advocate or solicitor in the course of his [or her] employment as such showing that any crime or fraud has been committed since the commencement of his [or her] employment." The Singapore courts have held that litigation privilege is also subject to the same fraud exception.

The party seeking to lift privilege must at least show some prima facie evidence that the privileged communications were made as part of an ongoing fraud. When determining whether the "fraud exception" applies, the court will conduct a balancing exercise between the protection of privilege and the importance of preventing the commission of such fraudulent and/or criminal acts.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

Generally, the Singapore courts have not been willing to award punitive damages in contract law, as the purpose of damages in contract law is to compensate the plaintiff for their loss, instead of punishing the wrongdoer. Even if fraud is established, the courts are reluctant to award punitive damages and depart from the general rule that punitive damages cannot be awarded for breach of contract.

Punitive damages may, however, be awarded for claims in tort, where the totality of the defendant's conduct is so outrageous that it warrants punishment, deterrence and condemnation. The courts will also consider whether the defendant has already been punished by criminal law or through the imposition of a disciplinary sanction when deciding whether to award punitive damages. The overarching principle is that the courts will not make a punitive award when there is no need to do so.

7.2 Laws to Protect "Banking Secrecy"

Under Section 47(1) of the Banking Act, the bank is not allowed to disclose customer information to any other persons. However, the Banking Act also provides exceptions where disclosure is allowed, for instance, where the disclosure is necessary to comply with a court order, or to comply with a request made pursuant to written law to furnish information for the purposes of an investigation or prosecution of a suspected offence.

As such, there are recognised exceptions to the banking secrecy laws such as a Bankers' Trust Order (see **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**). The customer's information can also be provided to a police officer or public officer who is duly authorised to carry out the investigation or prosecution.

7.3 Crypto-assets

The Singapore High Court has held that cryptocurrencies are property and, when stolen, can be subject to proprietary injunction. The Court also granted a worldwide freezing injunction against the defendants who allegedly stole cryptocurrencies even though their identities were unknown, and disclosure orders against

the crypto exchanges to help in the tracing of the stolen assets.

This decision would have implications on cryptocurrency exchanges operating in Singapore as they may now be served with disclosure orders to disclose information relating to user accounts and freezing injunctions to freeze cryptocurrency held in user accounts, notwithstanding any contractual terms between an exchange and its users.

Rajah & Tann Singapore LLP has a dedicated fraud, asset recovery, investigations and crisis management (FICM) team that includes former prosecution lawyers and legal advisers to the Commercial Affairs Department of the Singapore police force. The FICM team builds upon the wealth of experience gathered by its partners in dealing with complex cross-border commercial fraud, cross-border asset recovery, white-collar crime, regulatory and compliance advice, and insolvency as well as through its close collaborations with anti-fraud, anti-bribery and forensic-accounting professionals. The firm has acted in some of the most high-profile cross-border investigations in the region, notably, Lehman Brothers, MF Global, Wirecard's investigations into fraud allegations, the collapse of OW Bunker, and the Malaysian 1MDB scandal. Rajah & Tann Singapore is a member firm of Rajah & Tann Asia, a network of over 800 fee earners across ten jurisdictions, delivering excellent service to clients, including in the Singapore-based regional desks.

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Trends and Developments

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Introduction

Fraud cases worldwide have increased in scope, complexity and sheer frequency, due to developments in technology and commerce. In 2022, with the continued rise in the number of digital accounts and online activity, it is expected that fraudulent transactions will occur with greater severity across digital touchpoints. Of specific concern is the cryptocurrency market, with a global market value of about USD2 trillion, yet its regulation and legal status continue to be subject to much debate and uncertainty – for instance, in ascertaining the exact entities operating exchanges, or which countries even have jurisdiction over them.

In Singapore, the cryptocurrency industry has also seen a meteoric rise in the number of cases in the past year, outpacing all other forms of fraud locally. Being a leading trading and financial hub, the country has sought to legislatively regulate the cryptocurrency industry. At the same time, civil remedies through tracing efforts have broken new grounds in terms of orders sought, and obtained, before the Singapore courts. In this article, we highlight how such fraud schemes are commonly perpetrated, the difficulties faced with recovery and tracing of the assets, as well as the developments in law.

Fraud in the Cryptocurrency Trading Industry

In 2021 alone, Singaporean victims are estimated to have lost up to SGD190.9 million from "cryptocurrency investment scams". Such scams, sinisterly known as "pig butchering scams", involve fraudsters persuading victims to purchase cryptocurrency and transferring it to them under the guise of investment plans. Some achieve this by cultivating a relationship with the victims, and thereafter encouraging them to pay administrative or security fees, or taxes, to reap profits in investment schemes linked to cryptocurrency. Others offer a chance for individuals to be directly involved in the mining of the cryptocurrency. One such company, A&A Blockchain Technology Innovation, that is currently under investigation by the authorities, promised a fixed daily return of 0.5% in a cryptocurrency mining investment scheme.

The ubiquity of such fraudulent schemes has been such that the Monetary Authority of Singapore (MAS) and the Singapore Police Force have issued public notices, warning of such scams. This concern has also been raised in the Singapore parliament where, in response, the Minister for Law observed that there is a limit to how much law enforcement agencies can do once the scam has taken place, given that the vast majority of such cryptocurrency scammers are based outside Singapore.

Asset Tracing in Cases of Cryptocurrency Trading Fraud

It is in this context that efforts to trace and freeze stolen cryptocurrency assume greater importance. The first difficulty arises because, as the Minister for Law noted, perpetrators tend to be based overseas. Even in a civil claim, one will have to convince a court that it has jurisdiction over these perpetrators – this is a difficult task, but all the more so where the perpetrators have no links to Singapore.

A practical problem also arises as regards the identification of both the perpetrators and the stolen assets. Cryptocurrency fraudsters may, in many situations, be unknown to the victim. This

would severely impede the investigations and tracing process, and any court orders would be difficult to obtain since no defendant can properly be identified. Cryptocurrency fraudsters may also attempt to conceal the stolen assets by using services to mix potentially identifiable or "tainted" cryptocurrency with vast sums of other funds. These "cryptocurrency tumblers" or "coin mixers" utilise various methods to anonymise funds transfers or to conceal a user's transaction graph. As these services often do not require KYC verifications, it would be ideal for fraudsters, making it extremely difficult to trace and identify the stolen cryptocurrency.

A further layer of complexity is also introduced where cryptocurrency exchanges are involved. While these exchanges are likely to be the entities that possess information relevant to the tracing process, they tend to be unregulated. They further tend to not be headquartered in any specific jurisdiction, raising the question of which jurisdiction disclosure orders should be sought from. The difficulty is only compounded where the stolen cryptocurrency is routed through various exchanges as part of the attempt by fraudsters to obfuscate tracing efforts.

A situation involving all of the above difficulties recently arose in Singapore, in CLM v CLN [2022] SGHC 46, when an American entrepreneur had more than USD7 million worth of cryptocurrency stolen by unidentified perpetrators. Investigations and tracing efforts ultimately determined that the unidentified perpetrators had dissipated the cryptocurrency through a series of transactions, through two separate cryptocurrency exchanges, and even further on to entities based in the United States, one of whom maintained a cryptocurrency exchange. Rajah & Tann Singapore, acting on behalf of the fraud victim, obtained a worldwide freezing order against the assets of the unknown persons, a first order of its kind granted in Singapore. Equally important were disclosure orders that were obtained against the two cryptocurrency exchanges, requiring them to disclose information and documents relating to the accounts credit with part of the stolen cryptocurrency.

Another matter involved the Torque Group, a company that served as a platform for cryptocurrency trading, that was rendered insolvent because of unauthorised trades and/or misappropriation of the company's assets by one of the company's officers. The company was placed into liquidation in its place of incorporation. Rajah & Tann Singapore, acting on behalf of the company's liquidators, obtained an order from the Singapore courts that recognised the foreign liquidation proceedings. More notably, along with the recognition order, the liquidators were also granted the powers to compel entities or persons in Singapore to provide information and/or produce documents that pertained to the dealings with and/or affairs of the company. Such ancillary relief significantly assisted the liquidators in their investigations, in particular, with obtaining information that could reveal the location of the misappropriated assets of the company and the identities of any wrongdoers that the company might have claims against.

It can therefore be seen that, in such cases, it is critical to act with utmost urgency to prevent fraudsters from taking actions to conceal their ill-gotten assets. Experienced legal counsel and forensic teams trained to effectively trace the assets and seek the appropriate legal remedies would, in most instances, be imperative in ensuring a successful recovery.

Singapore's Legislative Efforts

The worrying rise in the number of cryptocurrency frauds is such that the Singapore government has also moved quickly to enact applicable legislation. One such example is the Singapore's Payment Services Act 2019 (the "PS Act") that

was recently amended by the Payment Services (Amendment) Bill (the "PS Bill"), in a bid to strengthen the laws that govern digital payment tokens.

The PS Bill has expanded the scope of applicability of the PS Act to include Virtual Assets Service Providers ("VASPs") that: (i) facilitate the transmission of digital payment tokens ("DPTs") from one account to another; (ii) provide custodial services for DPTs; and (iii) facilitate the exchange of DPTs even where the provider does not possess the moneys or DPTs involved. Such VASPs will now be required to be licensed and subject to the rules and regulations set by MAS. The PS Bill will also enable the MAS to impose protection measures on VASPs where it deems necessary. This would include requiring the VASP to segregate customer assets from its own, safeguarding the customer's money in the event of insolvency.

On 5 April 2022, the Singapore government also passed the Financial Services and Markets Bill (the "FSM Bill"). One aspect of the FSM Bill, insofar as cryptocurrencies are concerned, is to build upon and enhance the existing regulation of VASPs. In particular, to mitigate the risk of regulatory arbitrage – that is, where no single jurisdiction has sufficient regulatory hold due to the internet and digital nature of the business – such VASPs are now regulated as a new class of Financial Institutions, subject to oversight from the MAS. Such VASPs would also be required to have a permanent place of business in order to obtain the requisite licence to operate.

Crucially, it should be noted that the scope of digital token services under the FSM Bill is a wide one, and includes the facilitation of the exchange of DPTs, inducing or attempting to induce a person to enter into any agreement for digital tokens in exchange for money or other DPTs, and even financial advice relating to the offer or sale of DPTs. Such regulations are undoubtedly useful in shaping the understanding in relation to DPTs and the permissible standards in relation to the services offered. At the same time, the wide applicability of the FSM Bill, coupled with the powers of court made available, would offer greater protection in the cryptocurrency space.

These legislative changes recognise that various services could be exploited by criminals to move or layer the proceeds of illicit assets, either through the transfer of value from one person to another (in the form of DPTs), or using these services to safekeep the illicit assets, thus forming an additional layer against investigation efforts. While this is certainly a step in the right direction, given that the both the PS Act and the FSM Bill are recent legislative efforts, their efficacy remains to be seen as industry players adapt accordingly.

Conclusion

It is a foregone conclusion that fraud will continue to exist and that fraudsters will continually update and innovate with developments in commerce and technology. In the cryptocurrency industry, the evolving nature of fraud is unfortunately turbocharged, while most countries unfortunately lag behind in their regulations. While the Singapore government has taken steps to enact legislation and to promote efforts to combat such fraud, for now, civil remedies will be the main frontier to mitigate the consequences of such fraud. Legal practitioners should thus be continually updated of the evolving landscape and be aware of the best available strategies to recover stolen proceeds for their clients. Through this article, it is hoped that legal practitioners, forensic teams and their clients will better understand the trends and developments of fraud and asset tracing that are most relevant in Singapore today.

Rajah & Tann Singapore LLP has a dedicated fraud, asset recovery, investigations and crisis management (FICM) team that includes former prosecution lawyers and legal advisers to the Commercial Affairs Department of the Singapore police force. The FICM team builds upon the wealth of experience gathered by its partners in dealing with complex cross-border commercial fraud, cross-border asset recovery, white-collar crime, regulatory and compliance advice, and insolvency as well as through its close collaborations with anti-fraud, anti-bribery and forensic-accounting professionals. The firm has acted in some of the most high-profile cross-border investigations in the region, notably, Lehman Brothers, MF Global, Wirecard's investigations into fraud allegations, the collapse of OW Bunker, and the Malaysian 1MDB scandal. Rajah & Tann Singapore is a member firm of Rajah & Tann Asia, a network of over 800 fee earners across ten jurisdictions, delivering excellent service to clients, including in the Singapore-based regional desks.

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

The general characteristics of fraud claims in Korea can be broadly categorised into both criminal claims and civil claims. The main reason for this broad categorisation is that the concept of fraud is not specific to criminal law, but can also entangle civil claims.

From the Perspective of Criminal Claims

Fraud is defined as a crime in which a person deceives the other party and uses the wrongful intention of the other party to obtain property gains. According to Article 347 of the Criminal Act, the crime of fraud is stipulated as that a person who deceives another party to receive property or property gains shall be punished by imprisonment for not more than ten years, or by a fine not exceeding KRW20 million. The main factors that can constitute fraud under criminal law include:

- specific intent to commit fraud;
- deception;
- an act of disposition; and
- causation.

The act of deception can involve omission or non-action that is required by law or other regulations in certain situations, in addition to an aggressive act of making false statements. Fraud claims can include various kinds of situations and business transactions; for example, excessive exaggeration and false advertisement can be categorised as enabling a fraud claim based on Korean law. It is said that some exaggeration in product promotion and advertisement lacks deception as long as it can be acknowledged in light of good faith and the practice of general commerce. However, in the event of a false notification in a way that is reprehensible in light of good faith, it goes beyond the limits of exaggeration and false advertising, and can constitute a deceptive act of fraud (Supreme Court 97do1561 Decision). This Supreme Court case was the first case in Korea that accepted a fraud claim regarding excessive exaggeration of product advertisement.

The making of corrupt payments to public officers or the personnel of financial institutions can also constitute another violation of a special act, like the FTCA regulation in the US.

From the Perspective of Civil Claims

In terms of civil claims, fraud can generally be the triggering point of a tort claim. The declaration of expression caused by a fraudulent act or omission by the other party who had intent to commit fraud can be cancelled, or be the triggering point of revocation of a former declaration. Also, the party who has been deceived by the other party's fraudulent acts can file a civil claim arguing compensation in damages rather than arguing for cancellation or revocation of former transactions. When a fraud claim is involved, the claimant typically uses both a criminal claim and civil claim.

1.2 Causes of Action after Receipt of a Bribe

The So-called Kim Young-Ran Act

From the perspective of criminal law in Korea, receipt of a bribe can constitute a serious violation of the Criminal Act in addition to the so-called Kim Young-Ran Act, which prohibits a person from providing a gift or benefit beyond a certain amount of money to a public officer, or someone with a similar position. The Kim Young-Ran Act is named after the former Supreme Court Justice of Korea, who had proposed such a regulation in order to prevent widely prevalent acts of giving and taking gifts in the so-called Gap-Eul relationship in Korea. The coverage can extend to gifts or benefits that are not related to a benefit in return, that is, the typical character

of a bribe, therefore the aforementioned act can cover broad areas beyond the typical coverage of bribery.

Special Regulations on Employees of Financial Institutions

If an employee of a financial institution accepts, demands, or promises to receive money, valuables or other benefits in connection with his/her duties, or if he/she provides it to a third party, he/she can be punished pursuant to the Act on the Aggravated Punishment of Specific Economic Crimes, etc. An example where this provision applies is when a bank employee receives money in exchange for a convenience during the bank loan process. The law requires financial institutions to have integrity on an equivalent standard with public officials.

However, there has been some controversy over whether it is correct to regard the duties of public officials as the same as those of employees of financial institutions, and whether it is reasonable to treat employees of private companies differently from employees of financial institutions.

Other Causes of Action

From the perspective of civil law, bribery can be one of the factors that constitutes a tort claim against the person who has provided or received a bribe, either directly or through their agent. From the perspective of administrative law, the act of giving and taking a bribe can constitute a relevant violation of government procurement acts, which can extend to sanctions such as prevention of future participation in governmental bid procedures. In accordance with government procurement acts, a person who has committed a fraudulent act shall not be entitled to participate in a bid for not more than within two years, or can be imposed a penalty surcharge in lieu of it.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

The Illegality of Assistance or Facilitation of Fraudulent Acts

From a criminal law perspective, the acts of assisting or facilitating the fraudulent acts of another can constitute criminal violations such as conspiracy or aiding/abetting of another's criminal acts, depending on the magnitude of assistance or facilitation. There is not yet a clear bright line that can divide conspiracy and aiding/abetting depending on specific situations; however, any kind of assistance or facilitation of another's fraudulent acts can be punished under the criminal law.

Additionally, fraudulently obtained assets can be seized by criminal investigative authorities and confiscated, depending upon the court's decision. Acquisition in the crime of acquiring stolen property means acquiring the right to dispose of the stolen property, in effect by taking possession of the stolen property.

Bank Account Transfer and Withdrawal Cases

In the case of account transferring to a main criminal that can be evaluated as assistance of fraudulent acts, the Korean Supreme Court held that "as the fraudulent act of the main criminal is terminated when the defendant receives money from the victim without transferring it to the principal offender, even if the accused later withdraws the money from the savings account, it is the only the result of requesting the bank to return the deposit as the holder of account, and therefore the accused act of withdrawal cannot be punished as a separate crime of acquiring stolen property." (Supreme Court 2010do6256 Decision). It can be evaluated that in order to be a separate crime that is differentiated from the main crime, there should be another violation in terms of acquiring stolen property.

Degree of the Recognition of Stolen Goods

Recognition of stolen goods does not require definitive recognition, but it is sufficient to have a conscious negligence to the extent of doubting that it may be a stolen object. In a general transaction, if there are any suspicions as to whether the item is stolen, for example, if it is an expensive luxury item without a certificate or if it is excessively cheap compared to the market price, then it may be punished as acquiring stolen property.

In terms of civil law, the acts of assistance or facilitation of another's fraudulent acts can constitute a tort claim, and the person who assisted or facilitated another's fraudulent acts can be jointly and severally liable to compensate in damages.

1.4 Limitation Periods

Limitation Periods and Preparation of a Civil Claim

The limitation periods of a tort claim in Korea are three years from the date of recognition of the illegal acts and damage amounts, or ten years from the date of the occurrence of the illegal acts. From a criminal perspective, the limitation period depends on the maximum possible sentence period for each specific violation. The criminal limitation period for fraud is ten years, and if the perpetrator fled abroad for the purpose of avoiding punishment, the statute of limitations regarding prosecution is suspended during the avoidance period, and begins again the moment they return to Korea.

Typically the victim of fraud files a criminal complaint first, and waits for the result of the investigation before preparing a civil complaint against the perpetrators. However, sometimes investigating criminal matters can take a long time, especially in high-profile cases, therefore it is important not to miss the minimum three-years limitation period in preparation for tort claim filing.

1.5 Proprietary Claims against Property

Cancellation of a Contract due to Fraud Generally

In the case of a false notice of specific facts about important matters in a transaction, in a way that is reprehensible in light of the principle of good faith, this is evaluated as illegal defrauding. Additionally, it is deemed that the causal relationship between the illegal deception and the conclusion of the contract exists, and if there was no deception, the contract could not be concluded or not be concluded under the same conditions. In that case, the contract can be cancelled by fraudulent expression of intention.

Pursuant to Article 110(2) of the Civil Act, the declaration of expression transferring interests caused by a fraudulent act or omission by the other party can be cancelled or revoked; however, it can be restricted when there is a bona fide third-party beneficiary who has a legitimate interest in the transferred property. If a contract can be cancelled due to fraud, it becomes void retroactively, therefore the profits obtained by the parties must be returned as unjust gains based on the law.

Creditor's Right of Revocation

Pursuant to Article 406 of the Civil Act, a claimant can seek the recovery of property when the debtor intentionally transferred their interest knowing this transfer may harm their creditors. However, they can also be restricted when there is a bona fide third-party beneficiary or the person who had purchased the property from the vendor who has no knowledge of the fraudulent acts. In that case, the claimant cannot recover the misappropriated property directly from the current title owner; however, the claimant can request the return of the sales price from the

perpetrator, which is a sort of unjust enrichment concept recognised in the Common Law system.

Even if the proceeds of fraud are invested successfully, the claimant can only request the return of the sales price; however, they cannot request the return of the total proceeds invested. Also, there is a limitation period of one year from the date of recognition of the fraud, or five years from the date of the occurrence of the fraudulent acts.

Fraudulent Transactions of Real Estate with a Mortgage

If a transaction related to real estate falls under a fraudulent act, in principle, the fraudulent act must be cancelled and an order to restore the real estate itself, such as cancellation of the registration of transfer of ownership, can be ordered. However, in the case of fraudulent transactions of the real estate on which a mortgage has been set, the Korean Supreme Court has held that fraudulent acts are established only within the range of the remaining amount after deducting the amount of the secured claims of the mortgage from the value of the real estate (Supreme Court 97da6711 Decision). According to this decision, the creditor cannot request the whole cancellation of title registration, but can only request the return of the remaining amount.

1.6 Rules of Pre-action Conduct

There is no pre-action conduct rule in relation to fraud claims in Korea. Typically the victim of fraud initially files a criminal complaint, and when the case is charged by the prosecutor's officer through various kinds of investigation, then the claimant can choose whether it should go to a civil court, or seek an alternative dispute resolution procedure such as mediation, etc.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Application for Preliminary Measures

Typically the victim of fraud can prevent a debtor defendant from transferring or dissipating assets by filing an application for preliminary measures. Basically, there are two types of preliminary measures. If the creditor has a monetary claim against the defendant, the creditor can file an application for a preliminary attachment order on a specific asset owned by the defendant debtor. The target should be specific assets, so this may be a bank account, receivables, leasehold deposit, or real estate in the name of the debtor defendant.

It the creditor does not have a monetary claim but has a specific right provoked by a fraudulent act (which, for example, may be the right to transfer the title on the real estate), the creditor can file an application for a preliminary injunction order preventing the debtor from transferring the assets.

The Relevant Court Fees

The relevant court fees include a stamp fee and service fee, which are a relatively small amount compared to the fees required for filing a main lawsuit, and are not geared towards the claim amount. However, the creditor is required to pay the deposit amount according to the court's order, which is proportional to the claim amount. The deposit amount depends both on the claim amount and assets to be attached or injuncted.

Typically the deposit amount ranges from a tenth to two-fifths of the claim amount, and the court can ask the creditor to deposit cash or to submit an insurance policy that guarantees repayment of the deposit amount. When the creditor needs to attach to the bank account in the name of a debtor, the court generally stipulates a deposit of 40% of the claim amount, half of which as cash and the other half as a payment

guarantee. There is no special rule or standard on how much amount of money or bond should be deposited. It depends on the judge and is determined case by case.

Sanctions for Non-Compliance by the Defendant

If the defendant does not follow the court's freezing order, the creditor can disregard the former disposition by the defendant. For example, if the creditor has received a preliminary injunction order from the court prohibiting the sale of specific property in the name of the defendant, and the defendant has tried to sell the property to a third party, the creditor can argue that there is no title transfer between the defendant and the third party; and if the creditor finally wins the main lawsuit against the defendant, he/she can enforce on that asset even though the title has already been transferred to the third party.

If the debtor disposes of the property to a third party after the registration of the provisional prohibition of disposition is made, the act of disposition in violation of the provisional measure is effective between the debtor and the third party; however, they cannot oppose provisional measures in favour of the creditor (Supreme Court 2000da32417 Decision). In Korea, this is called the relative effect of preliminary injunction, because the debtor cannot argue against the effectiveness of transfer to the creditor.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

Application for Asset Disclosure

Pursuant to Article 61 of the Civil Enforcement Act, a creditor who has received a final enforceable court's decision requesting the defendant to pay a certain amount of money can file an application with the court requiring the defendant to disclose their assets (held in the name of the defendant). Without the final court's decision, the creditor cannot ask the court to require the debtor to disclose asset information in advance.

After reviewing the application for asset disclosure, the court can issue an order requiring the defendant to disclose asset lists including all positive and negative assets within a specified date. Unless the debtor does file an objection to the court's order within one week after the service date, the court's order will be finalised, and the court appoints a hearing date that requires the defendant to attend the hearing and submit the asset lists.

In the asset lists, the defendant must submit information on (i) paid transfer of real estate within one year, (ii) paid transfer of property other than real estate to his/her relatives within one year, and (iii) any gift excluding ceremonial gifts within two years before service of the court's order.

Sanctions for Non-compliance of Asset Disclosure

If the defendant does not follow the court's order in this regard, there are sanctions such as being detained for not longer than 20 days. Additionally, the creditor can ask the court to search for or screen assets in the name of the defendant through financial institutions, governmental organisations, etc. The creditor does not have to provide a deposit, only some court fees.

2.2 Preserving Evidence

"Preservation of evidence" is a method of investigating evidence to be used to admit the facts in advance before or during litigation. Some commentators argue that it is desirable to operate it flexibly so that it can be used as a pre-trial evidence collection system under Korean law, which does not recognise a pre-trial discovery system.

A party that wants to preserve important evidence before filing a civil claim can ask the court to preserve this evidence by filing an application for evidence preservation. In this application, the applicant is required to explain why evidence preservation is urgent and necessary before filing a claim. If evidence is not investigated in advance, there must be circumstances in which it will be difficult to use the evidence later.

The evidence requested for preservation can include witness examination or other documents or digital files that can be easily contaminated. In the case of CCTV or communications data, the retention period is set at several months, so if it is not secured in advance in the investigation procedure, it may be difficult to secure it in subsequent procedures. However, a party cannot conduct a physical search of documents at the defendant's residence or place of business directly, even if the court has issued a preservation decision.

It is up to the court whether to accept this kind of application, and the court's fee forms part of future litigation costs.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

Application for Document Production

Korean courts still do not recognise the discovery system widely used in the US legal system, and the Korean Bar Association is currently researching the adoption of such a discovery system. Typically though, application for document production is used in the Korean legal system. A party who wants to obtain documents from a third party files an application for document production with the court and, pursuant to Article 345 of the Civil Procedure Act, the party should clarify the reason for document production. Then, the court decides whether to issue an order based on the application requesting document production.

However, unlike with the adversely affected party, a third party is not required to submit requested documents and there is no sanction for not disclosing requested documents. This procedure is only available during the main lawsuit, and is generally not permitted before the commencement of proceedings unless there is necessity for preserving important evidence.

Request for Information

In order to prove specific facts during litigation, the method of request for information to a third party is also widely used in Korea. A party who wants to use it should file a request for information form with the court, specifying the reason for filing the request. Similar to a document production request, a request for information to a third party issued by the court does not have a mandatory effect on the third party; therefore, even if the third party does not reply to the request, there is no specified sanction.

2.4 Procedural Orders

Cases where an Ex Parte Hearing is Permitted

An ex parte hearing is only possible in some provisional measures in Korea. For example, a preliminary attachment order can be issued without a hearing based on the application and supporting evidence submitted by the creditor, and then the order will be served on the debtor and any related third party. Additionally, some preliminary injunction orders to preserve present conditions can be issued without a hearing procedure. Typically the court requests that the claimant deposit cash or a payment guarantee policy in order to compensate for the plausible damages of the intended defendant.

The debtor may file an objection with the court against the preliminary attachment order or preliminary injunction order made without a hearing, and can apply for re-examination by opening another hearing.

2.5 Criminal Redress

Based on the Criminal Victim Protection Act, victims of fraud can seek redress against the perpetrator through a criminal mediation procedure. However, most victims of fraud file a separate tort claim against the perpetrator during or concurrently with the criminal procedure. Also, criminal prosecution investigation does not delay the progression of a parallel civil claim.

It is up to the judge whether or not to wait and see regarding the result through criminal prosecution or a criminal hearing, and generally civil court judges have a tendency to wait for any criminal result before deciding the civil claim case.

2.6 Judgment without Trial

Default Judgment

There is a sort of default judgment procedure in Korea where a defendant does not submit an answer within 30 days after the service date of complaint; however, it is up to the judge whether the court renders a default judgment or not. Generally the judge waits for the filing of the answer, and even if the default judgment date is appointed, if the defendant files an answer before the designated judgment date, then the civil procedure will resume without the default judgment.

Application for a Payment Order

If the claimant does not want a full trial, then there is the option of application for a payment order, which is a simple litigation procedure through the court's payment order. When the claimant files an application for a payment order with some supporting evidence with the court, the court reviews the application and issues a payment order requesting the debtor to pay the claim amount without further requesting additional evidence. The debtor has the option to accept the payment order served, or file an objection within two weeks after the service date of the payment order.

If the debtor accepts the payment order and does not file an objection within two weeks, then the payment order will be final and enforceable; therefore, the creditor can enforce on the debtor's assets. However, if the debtor files an objection, then there will be a full trial hearing. This is a simple and expedited procedure to get the court's final and enforceable order with a small amount of court fees payable, and is recommended for a lot of foreign entities that want to collect unpaid receivables from a Korean debtor through expedited procedures.

2.7 Rules for Pleading Fraud

There is no special rule or procedure for pleading fraud in Korea, and there is no difference between handling a fraud claim and other causes of action.

2.8 Claims against "Unknown" Fraudsters

In general it is not possible to bring a civil claim with unknown fraudsters, mainly because the court needs to serve the civil complaint to the designated address in the complaint. It is permissible to add another defendant or to change the name of the defendant during the pending procedure, provided that it is certain that the plaintiff designated the wrong name of the defendant or made a mistake in filing preparation.

However, it is not impossible to bring a criminal claim with unknown fraudsters. Contrary to a civil claim, here it is up to the relevant investigation authorities to investigate criminal matters.

2.9 Compelling Witnesses to Give Evidence

It is up to the judge whether to compel witnesses to attend an examination hearing. If a witness

does not attend the hearing, and unless he/she has the right to refuse to testify even if he/she has been served the summons, the court can impose a fine of up to KRW5,000,000. Additionally, if the witness repeatedly does not attend, then the court can order to detain the witness for up to seven days. The court can force the witness to attend the examination hearing with the help of a police officer by issuing a detention warrant.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

An individual corporate director's or officer's knowledge regarding fraudulent matters can be attributed to the company, provided that they acted in their capacity as a corporate director and the other party had knowledge that a corporate director acted on its behalf. Conversely, if an individual director purportedly acted on a company's behalf and the other party had knowledge that they did not actually represent the company, then the director's act may not be attributed to the company. It can serve in the company's defence that it does not want to be attributed to the director's personal act.

In addition to punishing perpetrators for illegal acts, there are special rules in Korea regarding punishing the relevant corporation, for instance the joint punishment provision.

3.2 Claims against Ultimate Beneficial Owners

Piercing the Corporate Veil Generally

Piercing the corporate veil is a concept that is recognised in Korea, though in extremely rare cases. In Korea, this theory is sometimes called the doctrine of the disregard of the corporate entity, which has the same meaning. The main factors in this theory include:

- that there must be unity of interest and ownership between the two entities; and
- fraudulent acts by the shareholders wholly governing the corporate entity; and
- this therefore creates unequitable damages to the corporate entity's creditors.

Although a company may appear to be a corporation, in reality, if it is merely an individual entity of the company behind the corporation that is involved, or the company is used as a means to avoid the application of law such as tax evasion in the running of the company, then the corporate form cannot be abused.

Relevant Korean Supreme Court Cases

The Korean Supreme Court has held that "as a stock company is a separate entity independent of its shareholders, its independent legal personality is not denied in principle. However, if an individual establishes a company with the same business purpose, physical equipment, and human members while conducting business without establishing a company, the company has the form of a corporation in appearance, but is merely borrowing the form of a corporation. In exceptional cases where the company is merely a private enterprise of an individual who is completely behind the legal personality, or the company is used rudely as a means to avoid legal liability to the individual, we can deny the legal personality of the company and hold the individual responsible." (Supreme Court 2019da293449 Decision).

In another case, the Korean Supreme Court has held that even if a corporate entity has its form as a company, but is actually a personal entity or is used to evade liability for background owners, then this is against the rule of equity and any

background owner shall be liable for corporate liability (Supreme Court 2008da82490 decision).

The Reverse Application of Piercing the Corporate Veil

The reverse application of corporate denial is the theory that, when a debtor invests property in order to avoid debt and establishes a new company and steals property, the newly established company should also be liable to the creditor. The Korean Supreme Court accepted this theory and held that it harms creditors by comprehensibly considering the management status of the existing company at the time of dissolution, and whether a fair price has been paid when assets are transferred to a new company (Supreme Court 2002da66892 Decision).

3.3 Shareholders' Claims against Fraudulent Directors

Derivative Lawsuits

Pursuant to Article 403 of the Commercial Act, a shareholder who owns 1% of shares of a company can file a derivative lawsuit on behalf of the company against the liable directors of the company. The ownership rate of 1% is lowered for a listed company, where 0.01% of shares is sufficient to file a derivative lawsuit pursuant to Article 542-6(6) of the Commercial Act.

Recent Adoption of Multiple Derivative Lawsuits

Additionally, according to Article 406-2 of the Commercial Act, newly enacted on December 29 2020, a shareholder who owns 1% of shares of a parent company can file a derivative lawsuit on behalf of a subsidiary company against the liable director of the subsidiary company, which is called a multiple derivative lawsuit. The ownership rate of 1% is lowered for a listed company; therefore a shareholder who owns 0.5% of shares of a parent company can file a derivative lawsuit on behalf of the subsidiary company.

This adoption of the multiple derivative lawsuit was initially controversial in Korea, as there were a lot of objections from business areas.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

The Two Types of Joinder of Overseas Parties

Joinder of overseas parties can be broadly categorised into two types based on the Civil Procedure Act, one of which is a voluntary joinder by overseas parties who want to join a pending fraud claim in Korea, and the other of which is notice of a pending fraud claim to plausibly affected parties and providing the option to the noticed parties of whether or not to join the pending litigation. In both cases, the parties who want to join the pending claims or are given notice of the claims should have a legal interest in the result of the claims that can justify the joinder of parties, and must get the court's permission in this regard.

Additionally, the service process for the overseas parties is based on the Hague Convention or a bilateral treaty, and therefore takes around six to twelve months in processing.

5. ENFORCEMENT

5.1 Methods of Enforcement

In monetary claims, the most usual methods of enforcement available in Korea are applications for an attachment order on the bank accounts or real estate held in the name of debtors, provided that the creditor has a final and enforceable judgment. Typically it takes around three to six months to handle enforcement procedures, depending on the characteristic of the attached assets. If a creditor does not have a final and

enforceable judgment, however, and wants to preserve the debtor's assets in advance, then the creditor can file an application for a preliminary attachment order.

In non-monetary claims where the creditor has a right to deliver a property against the debtor who possesses it, the creditor can file an application for a delivery request with the enforcing court.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

A witness can invoke the right to refuse to provide information when it is related to self-incrimination, or where there is a risk that his/her relative could be charged. In addition, the fact that a party has actually invoked privilege does not affect the essence of the case, and no inferences are drawn from raising such a privilege.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

Pursuant to Article 26 of the Lawyers Act, a lawyer must not disclose confidential information and has a right to refuse to provide such confidential information. However, the Korean legal system does not yet have the sort of privilege widely recognised in Common Law countries. Such confidentiality or privilege can be restricted when there is an important public need or the client's consent, or if it is needed to defend the lawyer's own interests.

However, there is increasing controversy regarding the restriction of confidentiality when there is an important public need, which can be broadly or arbitrarily interpreted by the investigating authorities. The Korean Bar Association is trying to amend the Lawyers Act in order to adopt the attorney-client privilege, which is an indispensable concept in terms of preserving legal professionalism.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

No General Rule Recognising Punitive Damages

In principle, the Korean legal system does not recognise so-called punitive damages in fraud claims and there is no general rule accepting punitive damages. Among the various kinds of damage compensation, the Korean legal system typically accepts compensatory damage in a tort or breach-of-contract claim.

Adoption of Punitive Damages in Special Acts since 2011

In 2011, in a case of compensation for damages caused by abuse of power by contractors, punitive damage compensation (more precisely, triple-damage compensation) was first introduced in Article 35(2) of the Act of Fair Subcontract Transactions. This is the first legal provision to recognise punitive damages in Korea.

Since the adoption of punitive damages in the Act of Fair Subcontract Transactions, special acts on various kinds of areas, such as the Act on Protection of Fixed-Term and Part-time Workers, the Act on the Protection, etc. of Dispatched Workers, the Act on Fairness of Agency Transactions, the Act on Fairness of Franchise Transactions, the Product Liability Act and the Antitrust and Fair Trade Act, etc. have adopted punitive damages clauses.

Although there is no general provision on punitive damages in fraud claims, special acts where fairness of transactions is thought to be need-

ed, and special clauses adopting triple-damage compensation, have been introduced.

The Supreme Court's Ruling Recognising that the US Court's Punitive Damages Award Can Be Enforced in Korea

Recently the Korean Supreme Court held that a Hawaii court's judgment, which approved punitive damages for a US company due to a Korean company's unfair trade practices, can be enforced in Korea (Supreme Court 2018da231550 Decision). In this case, the Korean Supreme Court specifically held that "the domestic Fair Trade Act does not allow compensation for damages that exceed the scope of compensation for unfair trade practices, but is introducing a system that allows compensation within three times the actual amount of damages for unfair joint actions of business operators. It is difficult to see that it is unacceptable in light of the principles, ideology, and system of our country's damage compensation system to approve a judgment of a foreign court that ordered damages equal to three times the actual amount of damage."

In the past, it has been acknowledged that punitive damages cannot be recognised and enforced in Korea, mainly because it is against public policy. However, since the recent aforementioned Supreme Court case, there will be recurring considerations on whether to recognise punitive damages in a specific case.

No General Rules on Exemplary Damages

There is no special rule in relation to exemplary damages in addition to compensatory damages in the Korean legal system; however, when there is difficulty in proving damage amounts, such as mental distress or something similar, courts have a tendency to set a nominal amount of money as compensatory damages.

7.2 Laws to Protect "Banking Secrecy"

The Act on Real Name Financial Transactions and Confidentiality regulates and protects so-called banking secrecy in general. Article 4(1) of the Act states that "a person who engages in financial institutions shall not share information or data on the details of financial transactions to another without the written request or consent of the title holder" unless there is a court's order to submit or a warrant issued by a judge, etc.

Typically a party can file an application for an order to submit financial transaction information with the court during the course of civil or criminal claims in relation to fraud allegations, and provided that the judge issues an order in this regard, a party can legitimately obtain confidential financial information.

7.3 Crypto-assets

Definition of Virtual Assets in Relevant Rules

The Criminal Proceeds Concealment Control Act stipulates that "property resulting from a criminal act that falls under a serious crime or property obtained as a reward for the criminal act can be confiscated" (Article 2(2)(a), Article 8(1)). Additionally, the Enforcement Decree of this act stipulates that "hidden property refers to cash, deposits, stocks, and other tangible and intangible property value that is hidden by a person whose judgment on confiscation or collection has been finalised" (Article 2(2)). Intangible assets that have been acquired through criminal acts that fall under the serious crimes stipulated in the Criminal Proceeds Concealment Control Act may be confiscated.

Article 2(3) of the Act on Reporting and Use of Specific Financial Transaction Information newly amended in 2021 stipulates that "a virtual asset means an electronic certificate (including any rights related thereto) that has economic value and can be traded or transferred electronically." It is intended to provide a basis for securing the

grounds for supervision and inspection by the head of the Korea Financial Information Analysis Institute for the implementation of anti-money laundering obligations, such as reporting suspicious transactions and high-value cash transactions by virtual-asset business operators.

Whether a Virtual Asset Is an Intangible Property with a Property Value

With the recent proliferation of cryptocurrencies such as Bitcoin, and the increasing number of cases of their misuse as a means of hiding assets, municipal governments across Korea are putting pressure on delinquents with a new method called virtual currency seizure. With the revision of the Act on the Reporting and Use of Specific Financial Transaction Information, virtual-asset business operators have to fulfil their respective obligations, such as customer identification and suspicious transaction reporting, to existing financial institutions, thus making asset tracking possible.

Related Supreme Court Cases

In 2018 the Korean Supreme Court ruled that virtual currency could be confiscated as it was regarded as an intangible asset with property value (Supreme Court 2018do3619 Decision). The question is whether or not Bitcoin is an intangible property with a property value. In this case, the Korean Supreme Court held that:

- Bitcoin is a kind of so-called virtual currency that digitally represents economic value and enables electronic transfer, storage, and transaction; and
- Bitcoin is an intangible asset of property value based on the fact that it was treated as having value by being paid for by advertisers who wanted it.

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Daeryook & Aju LLC offers bespoke legal solutions tailored to meet the fast-changing demands of business environments, including international fraud, asset tracing and recovery. Established through the merger between Daeryook and Aju in 2009, DR & AJU LLC stands among Korea's top ten law firms. It is a full-service law firm with more than 200 lawyers and over 130 experts, which continues to grow with a distinct focus on developing agile and responsive strategies to best cope with the dynamic changes of the legal landscape. DR & AJU has recently launched a Serious Accidents Advisory Group and a Risk Management Group as part of this commitment, and has also become the first-ever Korean law firm to institute proxy advisory services and implement an AI legal search solution. DR & AJU is well recognised for its distinguished practice in the areas of M&A, litigation, arbitration, restructuring/insolvency, shipping, projects and energy, and more.

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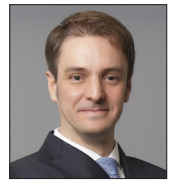

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SWEDEN

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

Fraud Claims under Swedish Law

Under Swedish law, different types of fraud claims may arise in different contexts and under different circumstances. General statutes on fraud and other cases of dishonesty, including conspiracy to commit such offences, are found in the Swedish Criminal Code.

Generally, under Swedish law, fraud can be characterised as an act of intentional deception whereby the offender induces someone into an action or omission that involves an unlawful financial gain for the offender and a financial loss for the person being deceived. The fraudulent act can be carried out in any kind of manner, such as by making false statements, orally or in writing, or by omitting information or by adopting a certain false demeanour, such as creating an outward false appearance of being someone else (including identity theft or identity fraud) or of having a certain position or authority.

Common Types of Fraud

Common types of fraud include investment frauds (such as Ponzi schemes), securities frauds, credit card frauds and government subsidies frauds (such as COVID-19 wage subsidies frauds). Depending on the circumstances, an act that would amount to accounting fraud, tax fraud, bankruptcy fraud, insider trading or market manipulation (including "pump and dump" schemes), for instance, may serve as a means to perpetrate another offence – for instance, an investment fraud, such as when a company's financial data is manipulated, its revenues inflated or its expenses deflated – but may also be prosecuted as a free-standing offence.

Corrupt Payments

The making of corrupt payments can be characterised as giving or offering, improperly, an item of value to influence an official or other person in charge of a public or private legal duty in the carrying out of their duties. The mirror crime of bribe taking is characterised by the corresponding requisites of someone receiving or requesting, improperly, an item of value for the performance of their duties.

Even though making or receiving corrupt payments is punishable under the Criminal Code, bribe giving and bribe taking do not fall within the same general category as fraud or misappropriation (or embezzlement). However, it would not be uncommon for corrupt payments to occur in connection with various kinds of frauds. For instance, a bribe can be offered as an inducement for someone to participate in some fraudulent scheme, in breach of their fiduciary duties; see **1.2 Causes of Action after Receipt of a Bribe** (Breach of Fiduciary Duty, Damages and Termination).

Recently, there have been several cases in Sweden where pension fund managers have been alleged of bribe taking and where it has been alleged that the bribe served the purpose of inducing the pension fund managers to buy, on behalf of the pension funds, securities from the bribe giver at highly inflated prices and to the detriment of those whose retirement income is secured by the fund. Other crimes – such as accounting fraud, tax fraud and money laundering – often occur in connection with bribe giving and bribe taking, either to facilitate or conceal, or as a result of the corrupt payment.

Embezzlement and Misappropriation

Depending on the circumstances, the wrongful or fraudulent use of another person's funds or property that is in the care of the offender can be characterised as embezzlement or misap-

propriation, both of which are punishable under the Criminal Code. Embezzlement has a certain resemblance to fraud in that it requires an unlawful financial gain and a financial loss, while the punishable aspect of misappropriation is the owner being dispossessed of their assets or otherwise deprived of their rights.

Differing from fraud, in the case of embezzlement and misappropriation, the offender has come into the lawful (or at least not unlawful) possession of – or control over – someone else's funds or property, which assets are then misused by the offender for their own purposes. In the case of embezzlement, the offender has come into the possession of those assets because they have been entrusted with the management or control over them, as a result of a contract, an employment or a similar position. In the case of misappropriation, the offender may have come into the possession of those assets by mistake, such as a mistaken payment, or through some sort of financial arrangement with the owner of those assets, such as a hire-purchase or a finance lease that was eventually intended to see the offender become the owner of those assets, but only after having fulfilled their financial obligations to the owner.

Both offences are characterised by the first person (the offender) disregarding their obligation to the second person (the owner) to surrender, give account or pay for the assets, and instead using them inappropriately and to their own benefit.

Objective and Subjective Legal Requirements under Criminal Law

In Swedish criminal law, a distinction is made between the objective and subjective legal requirements in order for an act or an omission to be punishable.

Objective requirements

Generally, the statutes in the Criminal Code shall explain the criminal deed as a certain activity, omission or conduct and, usually, a certain resulting effect, such as a financial loss or some other detriment to the victim of the offence. Normally, the criminal offence shall relate to a certain deed, but the offence of misappropriation may (not infrequently) consist of a lack of action, such as an omission to return property to its owner.

Subjective requirements

In order to be punishable, most but not all offences must have been carried out with what may be referred to as "a guilty mind" or intent (to commit a crime); ie, a subjective state of mind must accompany the act or lack of action in order for it to constitute a punishable violation (mens rea). For there to be intent, the defendant's state of mind must embrace all the objective requirements of the offence. However, being ignorant of the fact that a certain deed or omission is punishable under the statutes shall not serve as an excuse that excludes criminal liability ("ignorance of the law excuses not"). The requirement for intent is never expressly set out in the applicable statutes, but, unless otherwise stated, intent is always required. Only when the statute indicates differently shall carelessness suffice for there to be a punishable offence. In cases where the bar for punishment is lower than to require intent, this is indicated in the statutes by phrases such as "ought to have known", "with disregard for", "through carelessness" or similar expressions.

1.2 Causes of Action after Receipt of a Bribe

Breach of Fiduciary Duty, Damages and Termination

An agent who has received a bribe and, as a result, has acted or promised to act in the interest of the person paying the bribe, rather than in the interest of the agent's principal, whether

public or private, would be in breach of their fiduciary duty, in addition to being guilty of the offence of bribe taking. Breach of fiduciary duty is punishable under the Criminal Code, and would also make the agent liable to damages, termination or dismissal.

Contract Avoidance

A contract entered into by the agent on behalf of their principal – whether with the person paying the bribe or a third party – as a result of the bribe may be voided or set aside, depending on the circumstances. In a contract with a third party, avoiding or setting aside the contract would normally require the third party to have had actual or constructive knowledge of the corrupt practices and of the contract being the result of such corrupt practices.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Aiding and Abetting/Accessory to a Crime

In addition to the principal offender, a person may equally be guilty of an offence if they encourage, assist, aid and abet, counsel or procure the commission of an offence by a principal offender.

Receiving

Depending on the circumstances, a person receiving fraudulently obtained monies or other assets may be punished for the offence of receiving. The same would apply if a person obtains an improper gain from another person's criminal acquisition, such as a person living on the criminal earnings of their spouse while knowing that those earnings are the spoils of crime. Asserting a claim with knowledge of the fact that it arises from an offence would also be treated as receiving. A person receiving fraudulently obtained monies could also be punished for money laundering.

Damages and Proprietary Claims

A person assisting in or facilitating a fraudulent activity could be liable to damages. A person guilty of receiving could also be subject to a proprietary claim.

1.4 Limitation Periods

Time Bars for Prosecution

There are limitation periods for the prosecution of all criminal offences, with a few rare exceptions (such as murder, genocide and certain terrorist crimes). The criminal prosecution of fraud would always be subject to limitation periods, which vary according to the seriousness of the offence. If the fraud is deemed a misdemeanour, the limitation period would be two years from the commission of the crime; in the case of gross fraud, the limitation period would be ten years. If the fraud is not gross but is also not a misdemeanour, the limitation period would be five years. These limitation periods are set out in the Criminal Code.

Time Bars for Civil Law Remedies

There is also a limitation period of ten years for the associated civil law remedies, which is set out in the Statute of Limitations Act. However, there would be no limitation period for a proprietary claim against property. As an exception to this rule, under limited circumstances, an ownership claim may be time barred as a result of usucaption; ie, ownership gained through possession beyond a certain period. In the case of movables, ownership is gained by a good faith possession for ten years.

Interrupting the Limitation Period

The limitation period for criminal prosecution is tolled when the suspect is charged with the offence or arraigned by a court of law because of the offence. The limitation period for damages is tolled when the offender receives a claim or admits liability.

1.5 Proprietary Claims against Property

Proprietary Claims and Good Faith Acquisitions

A proprietary claim for the restitution or return of misappropriated specific and identifiable property, and such specific and identifiable property that the owner has been induced by fraud to transfer to another person, can always be asserted against the offender. Such a claim can also be asserted against a third party that has acquired the property from the offender, unless said third party has made a good faith acquisition. Notably, a good faith acquisition is never possible in the case of stolen property or robbery.

Converted Proceeds

If the original property has been converted into some other property, the general rule is that a proprietary claim can be asserted against such converted proceeds, provided that there is a strong causality between the original property and the converted proceeds, and provided that the latter property is specific and identifiable. Put differently, the converted proceeds must be specifically and identifiably traceable back to the original property.

A proprietary claim can never be asserted against some property only because it is of the same kind as the misappropriated or diverted property or fully equivalent to the original property. The converted proceeds can, however, have changed hands several times and still be treated as traceable and still be subject to a proprietary claim. Assets that are the proceeds of fraud or some other crime and that have been mixed with other assets in such a way that they have become indistinguishable cannot generally be subject to a proprietary claim. However, in limited circumstances, the Swedish Supreme Court has formulated an exception, under which a proprietary claim relating to monies, including bank deposits, that are the proceeds of a crime may be allowed when they have been mixed with other monies. A further exception in the Supreme Court's case law applies to other non-specific assets that are found in the defendant's possession immediately or very shortly after the crime.

A special case of property being mixed is what is referred to under property law as accession, which is a special mode of acquiring property that involves the addition of value to property through the addition of new materials. In the case of accession, a proprietary claim can be affected, particularly when the added new materials cannot easily be separated from the other property.

Gains

If gains are specifically and identifiably traceable back to the original property, they would be treated in the same way as other converted proceeds, at least up to parity with the value of the original property, but probably also above par value. To the extent a proprietary claim would not be allowed, such gains could probably be subject to a compensatory claim under unjust enrichment theories.

1.6 Rules of Pre-action Conduct

Procedural Sanctions

There are no express or specific procedural rules setting out what conduct or steps parties or litigants are expected or required to take before commencing proceedings for civil law claims (unlike criminal proceedings, which always follow strict rules and protocols). However, if the claimant fails to write to the defendant with enough details of its claim and offer the defendant a reasonable opportunity to respond to the claim and the possibility of settling or satisfying it, before initiating legal proceedings, this may affect the court's assessment of compensation for costs.

Rules of Professional Conduct

As a general rule, subject to a limited exception for compelling reasons only, such as urgency, under the Swedish Bar Association's Rules of Professional Conduct, a member of the Swedish Bar is required to give the defendant advance notice prior to initiating legal proceedings. Failing this, the lawyer may be sanctioned by the Bar.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Freezing Injunctions

To prevent a defendant from dissipating or secreting assets, the victim of a fraud may motion for an interim or interlocutory freezing injunction. Such an injunction may be ordered against a defendant, either for the general purpose of securing the defendant's assets in an amount sufficient to offer financial compensation to the victim of the fraud or to secure a proprietary claim against some specific assets. The freezing injunction is directed towards specific assets only in cases involving proprietary claims. The normal approach would therefore be to direct the freezing injunction towards the defendant's general – worldwide – assets, without any limitation other than in terms of the amount of the claim to be secured by the court order. Which specific assets to attach would then be a matter of how best to enforce the freezing injunction. A freezing injunction would always be against a specific person, but it could be limited to that person's actions in respect of some specific property only.

Pre-trial Freezing Injunctions

The victim could also motion for a freezing injunction ahead of initiating legal proceedings on the merits, but they would then be required to initiate such proceedings on the merits within one month from the freezing injunction being granted.

Court Fees

The only court fees that would be payable would be the regular, flat-rate court fees, and such rates would not be geared towards the amount of the claim or the value of the property.

Injunction Bonds

A plaintiff enforcing a freezing injunction would be liable under law for any loss or damage suffered by the defendant as a result of the freezing injunction having been enforced should the freezing injunction later be found to have been improper. Therefore, as a condition for the granting of a freezing injunction, as a rule, a court requires the plaintiff to provide a cross-undertaking in damages. Since the defendant is already liable under law, such a cross-undertaking must be issued by a third party. Such third party must be solvent for the full amount of the cross-undertaking and, in practice, the cross-undertaking would normally be in the form of a bank guaranty, often referred to as an injunction bond.

Under very limited circumstances, the court may waive the posting of an injunction bond. The injunction bond must be in an amount sufficient to cover the defendant's potential loss or damage. It must also be sufficient to cover the defendant's costs for exercising their rights under the injunction bond.

Enforcement of Freezing Injunctions

Freezing injunctions are enforced, on the plaintiff's application, by the Enforcement Authority, which decides whether to take possession of the attached property or to entrust the property with the defendant. If the attached property is entrusted with the defendant, the defendant may not assign or otherwise dispose of the property in a manner that would be to the detriment of the plaintiff. Non-compliance with the freezing injunction by the defendant would be punishable under the Criminal Code.

A Freezing Injunction's Effects on Parties Other than the Defendant

A freezing injunction shall not provide the plaintiff with a proprietary claim or any preferential right or lien over the attached property. Therefore, despite the freezing injunction, a third party may seek enforcement against the attached property, for instance. In principle, any disposition by the defendant of attached property after execution shall be null and void. However, depending on the type of assets, a good faith acquisition may be possible.

Other Protective Orders

In addition to freezing injunctions, a plaintiff may seek other procedural orders with the aim of preventing the defendant from interfering with the exercise or realisation of the plaintiff's rights or substantially undermining the value of those rights.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

Disclosure of Assets

Other than under family laws, a defendant would be under no obligation, in their capacity as a litigant, to disclose their assets for asset preserving purposes. Under bankruptcy laws and enforcement laws, however, a debtor is required to provide full disclosure of their assets and a debtor who knowingly and fraudulently conceals their assets may be liable to a fine or imprisonment. However, there is no "disclose it or lose it" rule.

Other than petitioning to have the defendant declared bankrupt or to enforce a judgment, there are no procedures whereby a defendant could be compelled to disclose their assets for asset preserving purposes. There is no requirement for the claimant to provide a cross-undertaking in damages in order to initiate such proceedings. However, an unfounded petition for bankruptcy may make the petitioner liable to damages, and enforcing a judgment that is under appeal shall make the plaintiff liable to damages if the judgment is not upheld.

Assisting in Preserving Assets

Except for the possibility of obtaining a freezing injunction – see **1.7 Prevention of Defendants Dissipating or Secreting Assets** (Freezing Injunctions) – there are no procedures whereby a defendant can be required to assist in preserving their assets. An insolvent or distressed debtor, however, is under a general obligation not to dispose of their assets (for instance, by removing or hiding them) to the detriment of creditors; failing this, the debtor may be liable to a fine or imprisonment.

2.2 Preserving Evidence

General Rules on the Taking of Evidence

Under procedural rules, the parties are generally responsible for the taking of evidence but may seek the court's assistance on the taking of evidence in somewhat limited circumstances (for instance, by means of a request for document production). However, no non-specific searches for information or documentary evidence – or, in pejorative terms, "fishing expeditions" – shall be allowed, and the court shall not render assistance when the sole purpose of a request for court assistance is to attempt to ascertain the identity of a potential defendant (see **2.8 Claims against "Unknown" Fraudsters**) or to obtain the disclosure of documents or other evidence the sole purpose of which would be to help the plaintiff assess whether they have a legal basis for their claim or to formulate their legal grounds.

The only exception to this is in intellectual property infringement cases, in which so-called Anton Piller orders (ie, orders that provide the right, through the Enforcement Authority, to search premises and seize evidence) shall be

available to the plaintiff, subject to certain conditions being fulfilled, and in which a plaintiff can exercise their right of information, pursuant to the so-called Enforcement Directive.

Evidence to Be Used in Future Legal Proceedings

When there is a risk that evidence concerning circumstances deemed to be of importance to a person's legal rights may be lost or difficult to obtain and where, as of yet, no proceedings concerning such rights are pending, a court may take and preserve evidence for future proceedings under special rules, upon the request of a party whose rights are so concerned. Such evidence may be taken in the form of witness examinations, expert opinions or documentary evidence. Typically, such assistance may be sought if a potential witness in future legal proceedings is terminally ill and has a limited life expectancy.

Even though there is no published case law on such situations, there is no reason to assume that the same rules would not apply in less typical situations, such as when there is a risk that someone would deliberately try to destroy or suppress evidence. However, the rules for the taking of evidence to be used in future legal proceedings shall probably prove rather ineffective in such cases, since they cannot be applied ex parte. The rules for the taking of evidence to be used in future proceedings are relatively rarely relied upon. If proceedings are already pending, different rules shall apply and general discovery rules may be relied upon and witness examinations may take place in the course of a special early session, separate from the main hearing.

Discovery

As noted above, general discovery rules may be relied upon for the purpose of obtaining documentary evidence only once legal proceedings have been initiated. Also, the purpose of discovery is not the preservation of documents per se, but rather to obtain evidence from the other party. Therefore, a document production order shall only be granted when the party seeking such an order can convince the court of a document's specific evidentiary value in the pending proceedings. There are several exemptions from the disclosure obligation; see **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties** (Exemptions from the Disclosure Obligation).

Party-Conducted Search at the Defendant's Residence or Place of Business

Other than in criminal cases, there are no rules that would allow a party to conduct a search at the defendant's premises or that would allow a party to seize evidence itself. Also, as noted above, the search and seizure opportunity available in intellectual property cases has to be exercised through the Enforcement Authority.

Criminal Proceedings

The rules for the taking of evidence to be used in future legal proceedings may not be used for the purpose of investigating a crime. Different rules apply in criminal proceedings, which give law enforcement authorities wide powers to secure evidence. A new feature in this regard is that transcripts from early interrogations with suspects and witnesses that the Police makes during its crime investigation may be used during the main hearing (see Section 15 of Chapter 35 of the Swedish Code of Judicial Procedure). For example, a variety of search and seizure means are available to the law enforcement authorities, such as searches of premises and body searches.

Unlawful Suppression of Evidence

Under the Swedish Criminal Code, the deliberate destruction or suppression of documentary evidence is punishable.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

A Third Party Shall Be Subject to the Same Disclosure Obligations as a Private Litigant

A private litigant shall be able to obtain disclosure or discovery of documentary evidence from its opposing party and third parties alike. Procedures to obtain disclosure can only be invoked once legal proceedings have been commenced. If no such proceedings are pending, private litigants have to rely on such rules as explained in **2.2 Preserving Evidence** (Evidence to Be Used in Future Legal Proceedings). Different rules apply in criminal proceedings; see **2.2 Preserving Evidence** (Criminal Proceedings).

Exemptions from the Disclosure Obligation

There are several exemptions from the disclosure obligation, some of which are absolute and some of which do not apply in extraordinary circumstances. The most important exceptions are described immediately below.

Correspondence between close family members

A party and a party's close family members cannot be compelled to disclose communications among themselves.

Legal professional privilege

Legal professional privilege shall exempt a client from the disclosure obligation (see **6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure**).

Self-incriminating documents

There shall be no obligation to disclose documents that would reveal the holder of the document or such person's close family member to have committed a crime or a dishonourable act.

Personal notes

Personal notes prepared for the document holder's private use shall be exempt from the disclosure obligation, except in extraordinary circumstances.

Trade secret information

Trade secret information shall be exempt from the disclosure obligation, except in extraordinary circumstances. In cases where disclosure has been ordered, notwithstanding the fact that those documents may contain trade secret information, the party obtaining access to such documents shall be liable to damages if they make unauthorised use of, or disclose, such trade secret information for purposes (eg, for a business purpose) other than those for which the documents were obtained, pursuant to Swedish law on the protection of trade secret information. Also, under general rules, a court may issue a non-disclosure order to preserve secret information that has been obtained as a result of a court order.

Obligation to Make Property Available for Inspection

Anybody (a party to litigation and a third party alike) who holds an object other than documentary evidence that can be conveniently brought to the court and that can be assumed to be of importance as evidence can be ordered to make the object available for inspection. However, no such obligation may be imposed on a defendant in criminal proceedings or on such a defendant's close family members. Furthermore, the exceptions regarding self-incriminating documents and trade secret information, as explained above, shall apply.

2.4 Procedural Orders

Ex Parte Procedural Orders

In urgent cases, such procedural orders as discussed in **1.7 Prevention of Defendants Dissipating or Secreting Assets** (Freezing Injunctions) and (Other Protective Orders) may be granted ex parte. An ex parte procedural order would only serve as a temporary order awaiting

the defendant's response and further hearings in the matter.

Requisites for the Granting of an Ex Parte Order

A procedural order may be granted ex parte when the delay caused by the defendant having the opportunity to respond to the plaintiff's request for such an order would "place the plaintiff's claim at risk". The reality behind this requisite is that it is not so much the delay in itself that would place the plaintiff's claim at risk as it is the risk that the defendant, being forewarned, would use the respite to attempt to dissipate or secrete assets, or to try to avoid the consequences of the procedural order and, by extension, a judgment. The Supreme Court has emphasised that there must be an imminent risk of the defendant obstructing or sabotaging the plaintiff's prospects of being able to have their claim satisfied in order for the plaintiff's claim to be "at risk".

Injunction Bonds

General rules on the posting of injunction bonds – see **1.7 Prevention of Defendants Dissipating or Secreting Assets** (Injunction Bonds) – would also apply to ex parte orders, but no additional such burden would be placed on the plaintiff.

2.5 Criminal Redress

Seeking Redress against a Perpetrator of Fraud via the Criminal Process

A victim of fraud may request the public prosecutor to prepare and present their claim via the criminal process, provided that the claim is not manifestly meritless and that no major inconvenience to the criminal proceedings would result therefrom. However, when the public prosecutor agrees to bring such a claim, it is ultimately the court that decides whether to allow the joining together of the victim's claim for damages, for instance, with the criminal prosecution. Normally, the courts will allow such consolidation unless the joint adjudication would cause a major inconvenience.

If the joining together is disallowed, the court shall order the victim's claim to be handled in civil proceedings and the victim shall then have to prepare and present their case without the assistance of the public prosecutor. Unless the offender consents to the victim's claim, in many fraud cases the public prosecutor declines to assist the victim or the court disallows consolidation because the victim's claim is considered too complex to be adjudicated in conjunction with criminal proceedings. Criminal proceedings should not be allowed to be slowed down or complicated because of a damages claim. Unless there is consolidation, the criminal and civil proceedings shall run their separate courses. However, depending on the circumstances, civil proceedings may be stayed pending resolution of the criminal case.

2.6 Judgment without Trial

Judgment without a Full Trial in Criminal Proceedings

A judgment that finds the defendant guilty is not possible without a full trial, with one exception. The sole exception relates to misdemeanours, but only if there is no reason to consider any sentence other than a fine, a suspended sentence or such sentences in combination, and if neither party requests a full trial and the court does not consider a full hearing to be necessary in order to aid the inquiry. The exception also applies when a court has decided that a previously imposed sentence shall apply also to additional offences.

Judgment without a Full Trial in Civil Law Proceedings

A so-called default judgment – ie, a judgment in favour of either party based on the other party's failure to take action as required by the court – may be entered in certain instances. Also, if

the court deems the plaintiff's case to be without any legal basis or if it is otherwise clear that the plaintiff's case is unfounded, the court may immediately render a judgment in favour of the defendant, without first issuing a summons calling upon the defendant to answer the case.

The test for determining that a plaintiff's case is without any legal basis is when the relief sought by the plaintiff cannot be granted if the plaintiff is able to prove the existence of those facts upon which they are relying. Furthermore, if the court determines that a full trial is not necessary for inquiry reasons, it may rule the case without a full trial, but only if neither party requests a full trial. Additionally, a court may enter a judgment based upon the defendant's consent or the plaintiff's concession.

The court cannot rule on a case without a full trial only because it considers the defendant's case to be meritless. However, under very limited circumstances and when the court is of the opinion that it is evident how a certain dispute should be resolved, the court may decide to rule on the case following a simplified form of trial, but only provided that it takes place in immediate conjunction with a pre-trial, preparatory, meeting. In practice, a simplified form of trial shall require that there shall be no oral evidence. The court may also decide to hold a simplified trial in conjunction with a pre-trial meeting if both parties consent to such.

2.7 Rules for Pleading Fraud

Defamation

In order to plead fraud, the plaintiff would need to be able to demonstrate that the allegation is true or that there are reasonable grounds to assume that it is true. In practice, this would require cogent evidence. Pleading fraud without such evidence would not make the pleadings inadmissible, but it may make the plaintiff guilty of defamation. If the allegation is of such a nature that it is liable to result in "serious damage" to the defendant, the plaintiff may be held guilty of gross defamation, which is a crime that carries the risk of a jail sentence. In other cases, the plaintiff could be fined.

In addition to the requirement for cogent evidence, a litigant would need to have a justifiable cause for alleging fraud. However, when fraud is pleaded as grounds for damages or some other relief and when there is convincing factual evidence in support of such pleadings, such allegations would be deemed justifiable in most cases. Normally, litigants would be allowed some latitude when determining whether a certain allegation was justifiable in the circumstances.

Rules of Professional Conduct

Under the Swedish Bar's Rules of Professional Conduct, a lawyer may not "in the course of a legal proceeding submit evidence of circumstances which are disparaging to the opposing party or make offensive or disparaging statements about the opposing party unless, in the circumstances, this appears justifiable in order to act in the best interest of the client".

In a published commentary, the Bar has emphasised the balancing of competing interests between a lawyer's responsibility to act in the best interest of their client but also show consideration for the opposing party. The published commentary goes on to explain that the lawyer's actions should be assessed as perceived at the time of the lawyer's doings and without the possible benefit of hindsight wisdom being held against the lawyer. However, in practice, the rule against disparaging evidence and statements has been very strictly upheld by the Bar. The lawyer must ascertain the truthfulness of what is alleged and, in so doing, cannot solely rely on their client. However, merely ascertaining truthfulness is not enough: the allegation must also

be deemed objectively justifiable in furtherance of the client's interest.

2.8 Claims against "Unknown" Fraudsters

The practice of issuing proceedings against persons unknown, or fictitious persons, as defendants is not possible in Sweden.

2.9 Compelling Witnesses to Give Evidence

Subpoena to Appear in Court

In civil and criminal proceedings, a witness will be subpoenaed to appear in court. The subpoena will be under the threat of legally enforceable penalties for failure to appear. Also, a court may have the police bring an absenting witness to court. A witness refusing to appear before court can also be detained.

Refusal to Answer Questions

A witness who is not exempt from the duty to testify (see below) may be excused from answering particular questions; see, mutatis mutandis, **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties** (Legal Professional Privilege), (Self-incriminating Documents) and (Trade Secret Information). Unless so excused, a witness who refuses to answer questions can be compelled to do so under the penalty of a fine and, if still refusing to answer, may be remanded in custody for a period of no more than three months. However, an express refusal to answer questions shall not be treated as perjury.

Exemption from the Duty to Testify

There are a few exemptions from the duty to testify. A criminal defendant can never be forced to testify (see also **6.1 Invoking the Privilege against Self-incrimination**). Close family members cannot be compelled to testify in criminal proceedings. Legal professional privilege shall also provide a certain testimonial privilege (see **6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure**).

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

A company is a legal person and as such can acquire rights and incur obligations. Also, a company is capable of suing and of being sued. However, unlike a natural person, a company does not have a will or a mind separate from the will and mind of those natural persons who manage and control it. When considering a company's lack of will and a mind in the context of liability for fraud (or any other criminal liability), there are some important principles or doctrines to consider, which, at least at the outset, may appear somewhat difficult to distinguish from one another. Still, they manifest themselves in different ways.

Only Natural Persons Can Incur Criminal Liability

In order to have criminal liability, the offender must have had a certain state of mind; see **1.1 General Characteristics of Fraud Claims** (Subjective Requirements). A company itself cannot have a state of mind and, therefore, is not capable of committing a crime in the legal sense. It is also an established principle under Swedish law that only natural persons can incur criminal liability, not legal entities.

Corporate Fines

This principle notwithstanding, in specific circumstances a corporate fine can be imposed on a company if an offence is committed in the exercise of the company's business activities or of some other activity when the offence was

liable to result in a financial gain for the company. However, a fine can only be imposed if the company failed to take reasonable steps to prevent the offence, and also if the offence was committed by someone in a leading position or by someone who had a special responsibility for the supervision or control of the activity in question.

To confuse matters, the statute on corporate fines is to be found in the Criminal Code and cases concerning the imposition of corporate fines largely follow the same procedural rules as those in criminal proceedings. However, at least technically, corporate fines – like the confiscation of property – manifest themselves not as a criminal sanction, but rather as a means of criminal prevention or deterrence. In the Criminal Code, corporate fines are described as "special legal consequences of offences".

The Respondeat Superior Doctrine

Under the respondeat superior doctrine, an employer is vicariously responsible for the acts and omissions of its directors and other employees, and can incur civil law liability as a consequence of such acts and omissions, but only if the director or employee was acting in the course of and within the scope of their employment. Importantly, however, a company cannot incur criminal liability for the wrongdoings of its directors or employees. Because the respondeat superior doctrine only applies to actions in the course of, and within the scope of, employment, it would be unusual for a company to incur any liability as a result of a fraud committed by a director or other employee.

The respondeat superior doctrine manifests itself not in criminal law (other than possibly in terms of the imposition of corporate fines) and not in contract, but in tort. The fact that a company may be responsible to third parties under the respondeat superior doctrine, however, should not be confused with what may appear to be a similar matter, that of whether the knowledge of a director or another employee should be attributed to the company (corporate attribution).

Corporate Attribution

Because a company is merely an artificial person, without any mind and will of its own, the knowledge of those who manage and control the company may be attributed to the company and treated as the knowledge of the company, depending on the circumstances. However, this is not the case when the company itself has been the victim of some wrongdoings by those same persons. Corporate attribution manifests itself not in criminal law (other than possibly in terms of the imposition of corporate fines) and not in tort, but in contract and could result in contract avoidance or setting aside. For instance, a third party that has been deceived by a company director through misrepresentations or otherwise to enter into a contract with the company can then seek contract avoidance against the company because of the director's state of mind.

3.2 Claims against Ultimate Beneficial Owners

Piercing of the Corporate Veil

Even though there are no statutory rules enabling a plaintiff to disregard the limited liability characteristics of a corporation in order to make its shareholders answer for the corporation's liabilities, the principle of piercing the corporate veil has been recognised in Swedish case law, in limited circumstances. When the corporate veil, or protective shield, is pierced, contrary to the general concept of a limited liability corporation, the shareholders have to assume liability for the corporation's liabilities. Piercing of the corporate veil actions are not common in Sweden and, due to the scarcity of such cases, there is no definitive guideline regarding the circumstances in which such an action will be successful,

although the following common traits may be identified:

- the number of corporate shareholders is limited;
- the corporation's operations are not independent of its owners and the corporation strives to ensure the interests of its owners rather than its own interests;
- the owners misuse the limited liability format in a disingenuous manner so as to avoid personal liability; and
- the corporation is undercapitalised relative to its operations.

3.3 Shareholders' Claims against Fraudulent Directors

Actio Pro Socio

Under the Swedish Companies Act, shareholders together holding at least one tenth of all shares in a limited liability company have standing to bring an actio pro socio in court; ie, an action whereby the plaintiff shareholder, in its own name and at its own cost risk, requires the defendant company director to pay damages or fulfil some other obligation towards the company. If successful, the plaintiff shareholder would be entitled to have its legal costs reimbursed by the company, but only from the proceeds of the court action. Shareholders holding one tenth of all shares would also be able to prevent the discharge of liability for a fraudulent company director. Similar rules also apply to partnerships and co-operatives.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

General Rules on Joinders

Under procedural rules, there is a mechanism whereby a third party – either domestic or overseas – can initiate legal proceedings and, in appropriate circumstances, have such proceedings joined into ongoing court proceedings. Such a joinder will be granted when the pleadings in both proceedings concern the same matter, or if the joinder would aid the inquiry in those proceedings.

Intervention Parties

A third party, whether domestic or overseas, may seek to participate in ongoing proceedings as an intervenor to support one of the parties in the ongoing litigation, also without instituting an action of its own, by making an application to the court. However, an intervenor shall not be treated as a party to the proceedings and shall not have standing in its own name to have an award issued against the defendant. An intervenor shall be able to take the same procedural steps as would be available to the party on whose side the intervenor has intervened.

With very few exceptions, however, the intervenor shall not be able to act in opposition to the party on whose side the intervenor has intervened, and shall have no right of appeal except by supporting the appeal of the party on whose side the intervenor has intervened. If the party on whose side the intervenor has intervened loses, the intervenor shall be liable to the opposing party for its reasonable litigation costs caused by the intervention.

Cost Bonds

With some exceptions, upon a timely request by the defendant, non-resident plaintiffs are required to post a plaintiff surety bond to guarantee that they will be able to pay the defendant's reasonable costs for the litigation if they lose. An important exemption from this obligation to post a cost bond shall apply to plaintiffs from other EU member states; as the UK has left the European Union, UK plaintiffs are no longer exempt from this obligation.

The obligation to post a cost bond applies to a non-resident litigant submitting a writ whereby a legal action is started. On a strict semantic interpretation of the statute, this would not include an act of intervention. The reason for the law requiring the posting of a bond would, however, seem to speak in favour of applying the same rule also to an intervenor, although there is no settled case law on this matter.

Extraterritorial Jurisdiction

In several cases, the Criminal Code establishes extraterritorial jurisdiction for crimes committed outside Sweden. Most importantly, such extraterritorial jurisdiction exists over Swedish citizens and non-Swedish citizens who are domiciled in Sweden. However, to establish extraterritorial jurisdiction, the dual criminality requirement must be satisfied, with some exceptions (see Section 5 Chapter 2 of the Criminal Code), meaning that the offence must also be subject to criminal punishment under the laws of the place where it was committed. With some exceptions, establishing extraterritorial jurisdiction requires authorisation by the government, which is rarely denied.

5. ENFORCEMENT

5.1 Methods of Enforcement

Enforcing a Money Award

A request for the enforcement of a money award shall always be filed with the Enforcement Authority. Hence, enforcement is not automatic and will not be done through the courts. The Enforcement Authority has some simple rules to comply with, but requesting enforcement is quite uncomplicated. Methods of enforcement include attachment of the debtor's assets, which can eventually be sold to pay the debt, or, when the debtor is a natural person, attachment of the debtor's earnings. Enforcement can also be sought if the award is under appeal, but no attached goods will be sold and the debt will not be paid until all appeals have been exhausted. As noted in **2.2 Preserving Evidence** (General Rules on the Taking of Evidence), enforcing a judgment that is under appeal may make the plaintiff liable to damages.

A member of the Swedish Bar is required to give the debtor advance notice before seeking enforcement. Failure to do so may lead to the lawyer being sanctioned by the Bar.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

Rights under the European Convention on Human Rights

The European Convention on Human Rights (the "Convention") has status as Swedish law and is therefore directly applicable, for instance, in Swedish criminal proceedings. Under the Convention, anyone charged with a crime has the right to a fair trial (Article 6.1), shall be assumed innocent until proven guilty according to law (Article 6.2), and is provided certain minimum rights, such as the right to a proper defence (Article 6.3). The right to silence and the privilege against self-incrimination would flow from Article 6 of the Convention.

Exceptions to the Testimonial Duty and Disclosure Obligation

A defendant in criminal proceedings would have no obligation to give evidence that would incriminate themselves, nor to produce documents that would equally incriminate themselves. During criminal investigations, a suspect may not be coerced or lured into providing information. A defendant in criminal proceedings shall also not testify under penalty of perjury.

Drawing Inferences from a Defendant's Refusal to Co-operate in Criminal Proceedings

According to the case law of the European Court of Human Rights, depending on the circumstances, a court shall be allowed to draw inferences from a defendant in criminal proceedings invoking the privilege against self-incrimination and to assess the evidentiary value of the defendant's silence or refusal to produce documents, but only together with the other evidence in the case, and the defendant's refusal to co-operate may not be used as the sole or primary evidence to convict the defendant of a crime. According to Swedish case law, a court may draw inferences from a defendant's refusal to answer a specific question that they could have been expected to be able to answer; this would not be the case if the defendant is consistent in their refusal to answer questions and thus remains silent throughout the entire proceedings.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

Testimonial Privilege

The Swedish legal professional privilege rule is not a general rule on the protection of all communications between a lawyer and their client. Instead, the privilege is aimed at protecting what has been entrusted in confidence to a lawyer by their client. The rule protecting client confidences takes the form of a statutory obligation for the lawyer not to give evidence about what the client has confided in the lawyer or what the lawyer has come to know in connection therewith.

The phrase "what the lawyer has come to know in connection therewith", and exactly how to understand this phrase, has caused considerable debate in the Swedish legal doctrine, and this discussion cannot be properly accounted for within the confines of this guide. Therefore, focus will be on what is at the core of professional legal privilege: client confidences. This statutory rule may be referred to as a "testimonial privilege", meaning that a lawyer can refuse to give certain evidence. However, the reality behind the rule is that it confers an obligation on the lawyer not to testify about client confidences and it may be upheld by judges on their own volition, in the absence of an objection to the lawyer testifying.

Testimony in Cases Involving Serious Crimes Are Exempt from the Testimonial Privilege

When a lawyer is required to give testimony in a case involving a crime that carries a minimum sentence of two years' imprisonment, such testimony is not covered by legal privilege. However, this rule does not apply for a lawyer representing the defendant in the criminal prosecution of such a crime. Notably, fraud is not such a serious crime that it would exempt the lawyer from testimonial privilege.

Legal Professional Privilege Is Limited to Client Confidences

The way in which the rule on legal professional privilege is drafted does not – at least not directly – prevent testimony about what the lawyer has communicated to their client other than when such communication would reveal client confidences. However, in practice, what a lawyer has communicated with their client (for instance, legal advice) may arguably be exempt from an obligation to give evidence because of its inherent lack of evidentiary value, depending on the circumstances.

Reliance on Legal Professional Privilege

Strictly following the wording of the statutory rule on legal professional privilege, the implication would be that the testimonial privilege does not extend to exempt the lawyer's client from having to testify about their communications with the lawyer. This is because, as already noted, the rule is drafted in the way of an obligation specifi-

cally for the lawyer not to give evidence. It has, however, been argued that the aim of protecting confidences between a lawyer and their client would be defeated if the rule does not extend to also cover the lawyer's client, although there is no settled case law on this matter. Even if a client would be able to rely on the testimonial privilege not to testify about their communications with the lawyer, the underlying facts that the lawyer-client communication is concerned with would not be protected – only the communication and the client's confidences, as such.

The Disclosure Privilege

The testimonial privilege is mirrored by a rule protecting correspondence between a lawyer and their client from discovery, but only to the extent that the correspondence would reveal client confidences. Differing from the testimonial privilege, such correspondence is expressly exempt from discovery both from the lawyer and from their client. Unlike in some jurisdictions, however, there is no specific "attorney work-product" doctrine, and protection for a lawyer's work-product does not extend beyond the general legal professional privilege rule, meaning that the work-product of a lawyer will be exempt from discovery only to the extent that it would reveal client confidences. As with the duty to give evidence, however, a lawyer's work-product may be protected from discovery because of its inherent lack of evidentiary value.

Waiving Legal Professional Privilege

The client can always waive legal professional privilege, with such waivers normally being narrowly construed.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

Only Compensatory Damages

Punitive or exemplary damages do not exist under Swedish law; only compensatory damages are available and only actual damages designed to replace precisely what was lost – nothing more and nothing less. This is a general rule of Swedish law and is not unique to fraud claims. Traditionally, Swedish courts have also tended to be somewhat conservative when assessing the quantum of damages.

7.2 Laws to Protect "Banking Secrecy"

Financial Privacy

The concept of financial privacy is generally recognised under Swedish law and is regulated through banking laws. Thus, as a general rule, a bank or another regulated financial institute owes its clients a legal duty not to disclose any foregoing activities (bank-client confidentiality) to a third party. In pursuit of a criminal investigation, however, law enforcement officials may require access to such information that would otherwise be protected by bank-client confidentiality.

Financial Privacy Rules Do Not Exempt from the Testimonial Duty or from the Disclosure Obligation

As noted above, as a general rule, information that qualifies as a trade secret shall be exempt from the testimonial duty and the disclosure obligation (see **2.9 Compelling Witnesses to Give Evidence** (Refusal to Answer Questions) and **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties** (Trade Secret Information)). However, there is no similar protection for bank-client confidentiality. Therefore, whereas the credit policies of a bank or its risk management policies may generally be exempt

from the testimonial duty and discovery on the grounds of being trade secrets, the same would not normally apply to information regarding its actual dealings with a particular client.

7.3 Crypto-assets

The Swedish Prosecution Authority has issued a legal guidance under what circumstances crypto-assets can be subject to freezing and equivalent reliefs under Swedish law. Crypto-currencies such as Bitcoin are not classified as physical property under Swedish law, but rather intellectual property. Therefore, reliefs related to physical property are excluded for crypto-assets. Physical storage objects acting as crypto wallets can be subject to seizure of property under Swedish law. However, such seizure neither entitles the transfer of crypto-assets nor means that the crypto-assets themselves are subject to the seizure.

The Swedish Prosecution Authority is of the opinion that crypto-assets can be subject to seizure of money under Swedish law; eg, by pointing out that crypto-assets may be subject to the Swedish anti-money laundering and terrorist financing regulation, as well as the Swedish law on currency exchange. Crypto-assets can also be taken in custody and can be handled by the Swedish Enforcement Authority. The volatility of certain crypto-assets may be a challenge for the issuance of sequestration, as such orders are normally issued in Swedish krona, whereas the value of the crypto-assets may vary significantly over time, establishing differences in value between the sequestration order and the possible seizure of crypto-assets.

Delphi is a Swedish independent commercial law firm with specialists in most areas within business law. Delphi's dispute resolution practice group comprises more than 30 lawyers and the team acts as counsel in all areas of dispute resolution, arbitration and litigation – domestic and international – in a variety of industries and areas of law.

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SWITZERLAND

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

In Switzerland, the concept of fraud carries a predominantly criminal connotation, as an offence punishable under the Swiss Criminal Code (SCC). Beyond this strict definition of fraud, however, a number of other causes of action available under Swiss law also include components of fraudulent and/or injurious conduct. Briefly outlined below are the various key avenues available to a victim of such fraudulent behaviour under Swiss law.

Causes of Action Arising out of Criminal Conduct

Criminal fraud and related offences

Fraud is a criminal offence that requires four key elements:

- deceit;
- astute or malicious conduct;
- intent with the objective of unlawful self-enrichment; and
- a mistake on the victim's part, causing it to make a self-harming disposition of assets.

These conditions require all of the following elements.

First, the perpetrator must deceive the victim; eg, by making false statements, concealing true facts or reinforcing the victim's mistaken belief.

Second, the perpetrator must act astutely or maliciously. This is the case where the perpetrator relies on a web of lies, fraudulent manoeuvres or the staging/enacting of falsehoods in order to deceive the victim. Astute or malicious conduct is also involved where the perpetrator prevents the victim from verifying false information or where the victim cannot reasonably be expected to verify the information it is provided with, given, for example, the relationship of trust or express reassurances from the perpetrator. On the other hand, malicious or astute conduct may be denied where the victim could have reasonably undertaken verifications but failed to do so.

Third, the perpetrator must act wilfully and with the intent of unlawfully securing financial gain for itself or a third party.

Lastly, the fraud must induce a mistake on the victim's part and cause the victim to act to the detriment of its own financial interests or those of a third party, thereby suffering damage.

The offence of fraud can be committed in the context of international commercial or business transactions; eg, where a party knowingly commits to an agreement with no intention of honouring it or induces its contracting party to contract on false pretences. As a criminal offence, fraud must, however, be distinguished from the mere failure to perform a contract, in which case liability is generally contractual, not tortious.

In addition to the strict notion of fraud, other criminal offences applicable in the business or commercial context may also include a certain degree of fraudulent and/or injurious conduct, such as (among others):

- forgery of documents;
- criminal mismanagement and misappropriation; and
- maliciously causing financial loss to another.

Under Swiss law, there is no separate charge of conspiracy to defraud, but several co-perpetrators to a fraud offence as well as aiders and abettors ("accomplices" and "instigators" in Swiss legal terms) are, as a rule, prosecuted together and may be held severally and jointly liable for civil compensation (see **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts**).

Liability in tort

The above criminal offences can give rise to civil compensation under tortious liability. Liability in tort depends on four cumulative requirements, for which the claimant bears the burden of proof:

- unlawful conduct by the perpetrator;
- damage suffered by the victim;
- a causal link between the conduct and the damage caused; and
- the fault of the perpetrator (eg, breach of a duty of care).

The victim of a criminal offence may seek the recovery of assets and/or compensation for damages suffered as a result of the criminal offences listed above, either in the framework of a criminal investigation or by way of an action filed in the civil courts (for the advantages of both options, see **2.5 Criminal Redress**).

Causes of Action Arising out of Contractual Fraud

In the contractual context, Swiss law provides the concepts of wilful (or fraudulent) misrepresentation and of pre-contractual liability, which both arise specifically in connection with the conclusion of contracts. Moreover, where fraudulent conduct arises in relation to an existing contract between the parties, it can give rise to contractual liability.

Wilful misrepresentation

Wilful (or fraudulent) misrepresentation takes place where a person intentionally creates or exploits a mistake and induces its contracting partner to enter into the contract on the basis of this mistake. Wilful misrepresentation depends on three key requirements, for which the claimant bears the burden of proof.

- An act of intentional or wilful misrepresentation, which includes making false statements, reinforcing the victim's mistaken belief or concealing true facts that the person in question had a duty to reveal.
- A mistake on the part of the victim, which induces the victim to enter into a contract.
- A causal link between the act of misrepresentation and the conclusion of the contract (ie, the victim would not otherwise have concluded the contract or would not have contracted on the same terms).

A victim of wilful misrepresentation may choose from several remedies.

First, the victim can invalidate the contract as null and void. On this basis, they can claim restitution of any sums paid, based on a claim for unjust enrichment, and claim restitution of any assets/property unduly transferred (see **1.5 Proprietary Claims against Property**). The victim can also seek compensation in tort for damages suffered.

Alternatively, the victim can choose to maintain and honour the contract, but still seek compensation in tort for damages suffered as a result of the misrepresentation.

Similar avenues are available to parties who were induced to enter into a contract on the basis of a material mistake or duress.

Culpa in contrahendo

In addition to wilful misrepresentation, liability can also arise out of precontractual obligations (culpa in contrahendo, based on the principle of good faith). Under Swiss law, parties must negotiate in good faith and in accordance with their true intentions. A party who intentionally gives inaccurate advice or information, fails to disclose facts of reasonably foreseeable importance to the contracting party or otherwise creates certain expectations leading the other party to make subsequent arrangements can, under

certain circumstances, be held liable for the resulting damage.

Contractual liability

In some cases, fraudulent and/or injurious conduct can also give rise to a contractual claim under an existing contract. The victim can opt to lodge a claim against its contractual partner based on the general provisions on contractual liability and/or provisions specifically governing the contract in question.

Four conditions must be met under the general rule on contractual liability:

- a breach of contract;
- damage suffered by the claimant;
- a causal link between the breach and the damage caused; and
- a fault on the defendant's part (however, under contractual liability – unlike liability in tort – the fault of the defendant is presumed; ie, it is up to the defendant to demonstrate that they were not at fault).

Moreover, the provisions of the SCO that govern specific contracts contain additional rules dealing with wilful misrepresentation or fraudulent conduct by a party to such contract. This is, for example, the case with provisions governing the contract of sale, which limit a seller's defences if the seller wilfully misled the buyer or fraudulently concealed a default.

Generally, insofar as contract claims are concerned, Swiss law holds as null and void any contractual provisions limiting or excluding a party's liability for wilful misconduct or gross negligence, unless the exclusion of liability applies to the acts of so-called auxiliaries; eg, employees. This rule aims at restricting exclusions of liability, namely, in cases of wilful fraudulent conduct.

Agency without Authority

The SCO also contains provisions on the concept of agency without authority (negotiorum gestio), which allows a principal to sue an agent who acted unlawfully and in bad faith, and thus infringed the rights of the principal.

This provision applies, for example, where an asset entrusted to a party was used or sold without authority.

The principal can seek to recover the profits obtained by the agent as a result of its unlawful conduct, but may have to reimburse certain expenses incurred by the agent.

Furthermore, specific provisions of Swiss law apply where the infringement concerns intellectual property and personality rights, among others.

Causes of Action in an Insolvency/ Bankruptcy Context

Finally, Swiss law also provides for remedies for fraudulent or injurious conduct committed in a bankruptcy (or pre-bankruptcy) context. Thus, a victim can seek civil compensation if it suffers damage as a result of criminal offences preceding or committed in the context of bankruptcy, such as fraudulent bankruptcy or mismanagement.

In addition or alternatively to this, creditors may file, within three years of the declaration of bankruptcy, civil claw-back actions in cases where the debtor carried out acts in the five years preceding the declaration of bankruptcy, with a clear intent of disadvantaging its creditors or of favouring certain creditors to the disadvantage of others.

1.2 Causes of Action after Receipt of a Bribe

Bribery in the private sector is punishable under Swiss law. Thus, a person who demands, secures a promise of or accepts an undue advantage in their capacity as agent of a company (eg, representative, employee or board member) commits an act of bribery, provided this results in conduct contrary to the agent's professional duties or in the exercise of its discretion.

Depending on the conduct of the agent, they can also be held liable for criminal mismanagement, an act of fraud and other offences as relevant. This will, in particular, be true if the agent has breached their duty of care towards their employer; eg, by failing to turn the commission received over to the company or by abusing their powers within the company to conclude deals on its behalf.

The bribe that the agent fails to turn over to their employer can amount to damage suffered by the company but, as such, it is unlikely to be recoverable by the employer; instead, the bribe amounts to proceeds of corruption that will likely be confiscated by the state.

On the other hand, under certain circumstances, the company may be able to seek compensation from the agent for the damage caused by the agent's conduct, pursuant to the provisions (statutory and/or contractual) governing their relationship (see also **3.1 Imposing Liability for Fraud on to a Corporate Entity** and **3.3 Shareholders' Claims against Fraudulent Directors**).

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Distinction between Perfect and Imperfect Solidarity

Under the rules on tortious liability, where two or more persons have together caused damage by a common fault and by conduct that is unlawful, they are jointly and severally liable to the victim, whether as co-perpetrators, instigators or accomplices (so-called perfect solidarity).

The degree to which the co-perpetrators, instigators or accomplices assist or facilitate a fraudulent act has no impact on their civil liability vis-à-vis the victim, to the extent that the parties will be held jointly and severally liable. The victim may thus choose to claim compensation in full equally from the perpetrator(s), the instigator or the accomplice to the same act. The court will then determine at its discretion whether and to what extent the liable parties have a recourse claim against one another.

On the other hand, where two or more persons are liable for the same damage but on different grounds (ie, absence of one common fault), the victim will still be entitled to choose to claim the damage in full or in part against any of the liable parties. However, the rules of recourse between the various persons liable will differ slightly. As a rule, the court will decide on their degree of liability, starting first with those who are liable in tort, then by contract and lastly, by statutory liability (so-called imperfect solidarity).

Receipt of Fraudulently Obtained Assets

The situation is different if a person's assistance consists only in the receipt of fraudulently obtained assets: such party is in principle excluded from joint and several liability. Under the law, they are civilly liable for the damage caused only if and to the extent that they effectively obtained a share in the gains generated by the unlawful conduct or otherwise caused damage due to their involvement or assistance.

Third parties who knowingly receive assets that were fraudulently obtained may also be criminally liable for the offence of handling stolen goods or money laundering. In such cases, the criminal

authorities can order various remedial measures against the third party in question (see **1.5 Proprietary Claims against Property**).

1.4 Limitation Periods

Civil claims arising out of unlawful and/or fraudulent conduct are subject to statutory limitation periods. As of January 2020, following a partial revision of the SCO, the following statutory limitation periods apply.

Contractual Claims

For contractual claims, the general limitation period is ten years, unless a shorter period of five years applies by virtue of the type of claim in question; eg, periodic payments such as rent or interest; particular services of agents, employees, doctors, lawyers, craftsmen, etc; and others.

Wilful Misrepresentation

The limitation period for a victim of wilful misrepresentation to declare the contract null and void is one year from the date on which the victim discovered the wilful misrepresentation.

After this time period, the contract is deemed ratified by the victim, who may still seek compensation for damages in tort. Even where a victim has failed to bring a tort claim within the above limitation periods, however, they may still be entitled to refuse to perform the obligation incumbent on them under a contract tainted by fraudulent conduct.

Claims Based on Precontractual Liability (Culpa in Contrahendo)

Claims based on culpa in contrahendo are structurally almost identical to contractual damages claims. However, the Swiss Federal Supreme Court consistently applies the limitation period applicable to tort claims (see directly below).

Tort Claims

Tort claims must generally be raised within a period of three years as of the date on which the victim became aware of the damage suffered and the identity of the liable person, but in any event, within ten years following the date on which the unlawful conduct took place or ceased to occur (or 20 years in cases of death or bodily injury).

For tort claims arising from a criminal offence for which the SCC provides a longer limitation period, this longer period applies. For example, the criminal offences of fraud and forgery are felonies and both are subject to a limitation period of 15 years.

Here too, where a victim has failed to bring a tort claim within the above limitation periods, they may nonetheless be entitled to refuse to perform the obligation incumbent on them under a contract tainted by fraudulent conduct.

Claims based on agency without authority are also subject to the same statute of limitations.

Unjust Enrichment

Claims of unjust enrichment (ie, recovery of sums paid without cause) are also subject to a limitation period of three years after the date on which the victim became aware of their claim, but must in any event be raised within ten years from the moment the claim first arose.

Proprietary Claims

See **1.5 Proprietary Claims against Property**.

Criminal Redress

The limitations applicable to tort claims also apply to civil compensation claims lodged in the framework of criminal proceedings. In addition, the victim must heed certain deadlines and procedural rules as applicable.

1.5 Proprietary Claims against Property

In cases where a claimant seeks to recover material assets misappropriated or transferred as a result of fraud, the claimant has a choice of two avenues: civil action(s) or criminal redress.

Civil Recovery

Where property over an asset was transferred without due cause (eg, based on a contract invalidated due to wilful misrepresentation), the claimant can at any time file an action to reclaim title against any person who holds the asset in question.

In addition, where the claimant was dispossessed of a movable asset against their will, the claimant can also file an action to reclaim possession against any person who holds the asset, within a period of five years or 30 years for cultural property. The five-year limitation does not apply where the current holder did not acquire the asset in good faith (ie, bad faith holder of assets).

The victim may also seek to recover the profits and/or interest generated with the use of the misappropriated or fraudulently obtained assets. The defendant will, however, be entitled to seek compensation for certain expenses in relation to the assets.

A defendant can resist the actions above by claiming to have acquired title in good faith or through the passage of time (uninterrupted and good faith possession for five or 30 years).

Movable assets can also include cash or bearer shares to the extent they are not mixed with assets belonging to a third party. As for the recovery of mixed assets or of funds, actions for the recovery of title or possession are not available: instead, the claimant may initiate an action for unjust enrichment or another action as relevant (see **1.1 General Characteristics of Fraud Claims**).

Where the asset transferred as a result of fraud is immovable property, the victim can act against the person who was unduly listed as the new owner of the property to reclaim it.

Criminal Redress

Where property was criminally misappropriated or a transfer was induced by criminal fraud, the criminal authorities can:

- directly restore the fraudulently obtained assets to the victim; or
- confiscate (ie, forfeit) the assets, if available or, failing such, order a compensatory claim for an equivalent amount and allocate the assets (or proceeds of the sale thereof) to the victim.

If assets were transferred to a third party in between, the third party in question could object to confiscation, namely, if they had acquired the assets in good faith (ie, if unaware of the grounds for confiscation) and if due consideration was provided in return.

The remedial measures will also cover the profits and/or interest generated with the use of the criminal proceeds. In cases where the proceeds of fraud were mixed with other funds, their confiscation/compensation remains possible, provided their movement can be retraced and connected to the offences in question.

1.6 Rules of Pre-action Conduct

Advance on Costs and Security for Costs

Claims brought before a civil court will be subject to an advance on (court) costs due before the claim is administered and served upon the opposing party. In addition, upon the request of a defendant, the claimant will be ordered to provide security for (legal) costs, in the form of

a cash payment to the court or a bond, where the claimant:

- resides or is seated abroad;
- appears insolvent;
- owes costs to the defendant from prior proceedings; or
- for other reasons, is unlikely to provide compensation for legal costs.

Prior Conciliation Proceedings

Moreover, most claims brought before a civil court, whether contractual or in tort, are subject to prior mandatory conciliation, the aim of which is to secure, where possible, a mutually acceptable solution for the parties before the matter goes to court. Conciliation can be waived unilaterally in certain circumstances and types of cases.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Interim relief can be sought before a claim on the merits is filed with a civil court or else throughout the civil trial. This aims at preventing a defendant, by way of a preliminary injunction, from disposing of certain assets located in Switzerland pending the resolution of the underlying substantive proceedings.

Swiss law makes a distinction between monetary and non-monetary claims.

Civil Attachment for Monetary Claims

A creditor can secure a monetary claim by filing an application for the attachment (freezing) of assets under the Swiss Debt Enforcement and Bankruptcy Act (SDEBA). The attached assets include bank accounts, movable and immovable property, claims and securities, among others.

The applicant must demonstrate the likelihood of the following three points:

- the existence of the claim that needs securing;
- a statutory ground for attachment; and
- the existence of assets and their location.

A statutory ground for attachment is given in six alternative scenarios, such as where (among others):

- the debtor has no permanent residence;
- the debtor is attempting to conceal assets or is planning to flee Switzerland to avoid fulfilling its obligations; or
- the creditor holds a definitive enforceable title against the debtor (such as a judgment or arbitral award).

The attachment must, in principle, only target assets belonging directly to the debtor, unless a valid case of piercing the veil can be argued (see also **3.2 Claims against Ultimate Beneficial Owners**). Third parties affected by an attachment can lodge a claim for restitution by asserting a preferable right over the asset in question.

The attachment is ordered ex parte, usually within 24 to 48 hours. The proceedings become adversarial only if the opposing party objects to the attachment within ten days from service of the attachment order.

Failure to comply with the attachment order is a criminal offence and will expose the non-complying party to criminal penalties.

Interim Measures Securing Non-monetary Claims

Measures can also be sought to secure non-monetary claims under the Swiss Civil Procedure Code. These include injunctions (eg, a ban on moving or transferring property), orders to cease and desist or to remedy an unlawful situation, performance in kind, and others.

The applicant must demonstrate the likelihood of the following three points:

- the likely existence of a valid cause of action on the merits;
- an impending harm (or urgent risk thereof) to the rights on which the applicant relies; and
- a risk of damage that will be difficult to repair.

The measures can be granted inter partes (which can take several months, depending on the complexity of the matter and the domicile of the parties) or ex parte (such measures are usually ordered within 24 to 48 hours). In addition to the conditions outlined above, a party requesting ex parte measures must prove an imminent risk of danger and/or a certain degree of urgency, or else a risk associated with tipping off the opposing party.

Interim measures can be imposed under the threat of criminal sanctions, in which case, the non-complying party is liable to a fine of up to CHF10,000 (see also **5. Enforcement**).

Characteristics Common to Both Types of Measures

Moreover, in relation to both types of interim measures discussed above:

- if the interim measures precede a civil trial, the applicant will have a fixed number of days from the service of the interim order or the attachment to "validate" these measures by commencing a civil action against the opposing party;
- the applicant must pay an advance on costs (eg, up to CHF2,000 for an attachment application, plus extra costs due for the execution of the attachment order); and
- the applicant is liable for damages caused by an unjustified interim measure or attachment and the court may, on this basis, order the applicant to provide security (eg, security in an attachment application can amount to up to 10% of the claim value).

No Worldwide Freezing Order Available under Swiss Law

There is no equivalent under Swiss law to a worldwide freezing order (WFO) or Mareva injunction that would cover assets belonging to a defendant globally. In fact, freezing orders do not target a defendant and its estate as such, but rather a specific asset.

That being said, a WFO secured abroad can be enforced in Switzerland under certain conditions and serve as a ground for the attachment of certain (specifically designated) assets located on Swiss soil.

Criminal Freezing Orders

In addition to the above civil avenues, the criminal authorities have extensive coercive measures at their disposal and can order the freezing of assets located in Switzerland or request the freezing of assets located abroad via judicial legal assistance. Assets may be frozen if it is likely that they will have to be returned to the victim, confiscated or used for a compensatory claim. Under certain conditions, the freezing order can target third-party assets (see **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts** and **1.5 Proprietary Claims against Property**).

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

As mentioned above (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**), a defendant may be the subject of an interim measure (such as a civil attachment or injunction) prohibiting it from dissipating assets located in Switzerland.

Civil Claims

In applying for such measures in Switzerland, the applicant must, as a rule, indicate specifically what assets they wish to target and the location of these assets. While a number of publicly available sources in Switzerland can prove helpful (such as the commercial register, the land register, the aircraft register, etc), it will be up to the applicant to piece the evidence together (with recourse, for example, to forensic accountants or other asset-tracing professionals where needed). Indeed, there is no pre-trial discovery in Switzerland, and the production of documents during trial is usually limited to evidence that can be precisely designated by the party requesting it.

The rules are different if the civil claim results in an enforceable judgment or an arbitral award and if the judgment creditor commences enforcement proceedings on this basis. In such a case, a debtor may be the subject of a search and seizure of assets, if necessary, with the help of the police. The debtor, as well as affected third parties (eg, banks) will also have a duty to provide relevant information to the enforcement authorities (see **5.1 Methods of Enforcement**).

Criminal Claims

In contrast to civil avenues, the Swiss criminal authorities have extensive investigatory powers and can obtain information on assets in Switzerland belonging to a defendant (or of which the defendant is a beneficial owner), at any stage of the investigation or ensuing criminal trial. The criminal authorities may conduct a search and seizure of documents or data at the defendant's residence or place of business. The criminal authorities may also freeze assets (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**).

For this reason, where the victim of a criminal offence is not in possession of sufficient information to commence a civil claim or file for an attachment order, it may be advisable to seek evidence and secure assets with the help of a criminal investigation (see also **2.5 Criminal Redress**).

2.2 Preserving Evidence

The Swiss rules of civil procedure do not provide for pre-trial discovery, which means that, to obtain evidence in Switzerland, a party must, as a rule, commence litigation.

An exception to this rule allows evidence to be taken on a precautionary basis; ie, before the initiation of a civil trial in Switzerland or abroad. This tool allows a claimant to assess the chances of success of a contemplated substantive claim and/or to quickly secure evidence that is at risk in view of a potential civil action.

The applicant must show on a prima facie basis that:

- evidence is at risk; and
- the applicant has a legitimate interest in obtaining the evidence pre-trial.

Examples include collecting witness or material evidence that must be secured quickly (eg, evidence that is likely to be destroyed, to disappear or to perish soon); or a current situation that needs to be assessed by an expert and recorded judicially before it deteriorates irreversibly.

The evidence is gathered in summary (ie, accelerated) proceedings, conducted inter partes. The scope of evidence-gathering measures available to the civil court are limited to those generally available to the court at trial, which are:

- witness testimony;
- the questioning of parties;
- the gathering of documentary evidence;
- judicial inspections (eg, on-site visits);

- expert opinions; and
- requests for written evidence/information from third parties.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

The Evidentiary Process in Civil Trials

As mentioned in **2.2 Preserving Evidence**, there is no pre-trial discovery under Swiss law (apart from the limited exception discussed therein).

During trial, evidence is either produced voluntarily by a party (in support of a submission) or its production is ordered by the court. A party can request an order from the court directing the opposing party or a third party to disclose certain specifically identified documents or electronic data in their possession. The court will grant such a request if it holds that the evidence is needed to establish legally relevant facts of the dispute. Open-ended requests for document production (so-called "fishing expeditions") are, however, prohibited.

The Duty to Co-operate and the Right of Refusal

As a rule, parties to a civil trial as well as third parties (including witnesses), are required to assist the court in establishing the facts of the dispute and to co-operate in the taking of evidence. In particular, they must make truthful witness statements, produce documents or physical records and permit an inspection of their person or property by an expert.

- Under certain conditions, third parties may refuse to co-operate. The right to refuse co-operation is absolute if third parties have a family connection or a close personal relationship to one of the parties, or if the party is requested to produce documents covered by attorney-client privilege (see **6. Privileges**).
- Other grounds provide a relative (or limited) right of refusal, which must be justified in the eyes of the court. This includes, for example, cases where witnesses would, in establishing facts, expose themselves or someone close to them to criminal prosecution or civil liability, or where a witness is bound by professional secrecy.
- Regarding this latter point, with the exception of the clergy and lawyers, who maintain absolute control over the secrets entrusted to them and can refuse to co-operate on this basis, other custodians of secrets protected by Swiss law (such as public officials, doctors and bankers, among others) cannot legitimately resist co-operation if they are under a duty to disclose and/or if they have been duly released from their duty to maintain secrecy, unless they show credibly that the interest in protecting the secret outweighs the interest in establishing the truth. This rule thus applies to bankers bound by banking secrecy (see **7.2 Laws to Protect "Banking Secrecy"**).

Consequences of a Refusal to Co-operate and Means to Compel Co-operation

A justified refusal to produce documents by a trial party or third party does not affect the court's assessment of the facts of the case.

In contrast, a refusal to co-operate that the court deems unjustified will have procedural consequences depending on the status of the party in question.

- A failure to comply by a trial party is not sanctioned as such, but the court will be entitled to take it into account when assessing the facts (eg, adverse inference).
- A refusal to co-operate by a third party/witness is punishable by a disciplinary fine, an order to comply under the threat of criminal penalties, compulsory measures or an order obliging the third party to bear costs arising from the collection of the evidence requested

from it. These measures aim at compelling the third party to co-operate.

A failure to produce evidence or appear at a hearing despite a summons is equated to an unjustified refusal to co-operate (on the rules on default, see **2.6 Judgment without Trial**).

Restrictions on Resulting Evidence

Evidence obtained at trial is generally available to the trial parties and its use outside of the civil proceedings is normally unrestricted. However, in certain cases, a court can order appropriate measures to ensure that the taking of evidence does not infringe the legitimate interests of the parties. The court can, for example, issue a confidentiality order (not unlike a gag order) prohibiting the parties from divulging certain protected information obtained at trial, such as business secrets (eg, know-how or client-identifying data) or strictly personal information, among others.

2.4 Procedural Orders

See **1.7 Prevention of Defendants Dissipating or Secreting Assets**.

2.5 Criminal Redress

The Benefit of Criminal Proceedings

In the absence of pre-trial discovery in Switzerland, civil trials in fraud-related matters are often complemented by criminal proceedings so as to secure evidence and locate/freeze assets in a timely fashion.

Criminal authorities are under a duty to investigate (ex officio or upon a criminal complaint) and to prosecute offences falling under their jurisdiction. Their powers include identifying, tracing and seizing/freezing the proceeds of offences (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**) as well as securing evidence through searches, seizure of documents/data or orders for the production of evidence (see **2.1 Disclosure of Defendants' Assets**). The resulting evidence is, as a rule, added to the file of the criminal investigation, which the victim can then inspect and rely upon to substantiate a tort claim for the damage suffered as a result of the criminal offence.

In addition to the above, the criminal authorities can also take remedial measures to compensate victims of criminal offences, for example, by returning assets to the victim directly (see **1.5 Proprietary Claims against Property**).

The institution of criminal proceedings thus enables a victim of fraud to benefit from the extensive coercive powers available to the criminal authorities, normally without having to bear the costs arising from evidence-gathering measures (as opposed to civil trials), unless the victim is deemed to have triggered the criminal proceedings abusively or has otherwise acted in a grossly negligent way.

Interaction between Civil and Criminal Proceedings

A civil trial can be conducted in parallel with, in advance of or following the closing of criminal proceedings. Swiss law provides for several procedural means by which civil and criminal proceedings can be co-ordinated. Co-ordination can be ensured, for example, through a stay of the civil trial pending the outcome of the criminal investigation.

Civil claims can also be filed in the framework of the criminal investigation itself, since criminal authorities can adjudicate certain civil claims without referring them to a civil court. A harmed party can thus assert its civil claims in the capacity of a so-called "private plaintiff" in the framework of criminal proceedings.

Where the criminal authorities consider that the civil courts are better suited to adjudicate the civil claims in question, the victim will be invited

to file its claim before the civil courts instead. Civil claims will also need to be asserted before the civil courts if:

- the criminal investigation is discontinued or closed by way of a summary penalty order;
- the accused is acquitted and the factual situation is not sufficiently ascertained for civil claims to be ruled upon; or
- the private plaintiff has failed to sufficiently substantiate or quantify its claim or to pay security in respect of such claim.

2.6 Judgment without Trial

In a civil trial, a judgment without a full trial may occur where the defendant fails to make an appearance or participate in the proceedings as required by the law. In particular:

- where the defendant fails to file its statement of defence by the allocated deadline (and in an additional grace period thereafter), the court can issue its final decision, provided the case is ripe for decision and the court is in a position to rule without any further gathering of evidence; or
- where a defendant fails to duly attend the trial, the court can rule on the basis of the pre-trial submissions made by the parties and rely on the allegations of the claimant as well as the information on file.

2.7 Rules for Pleading Fraud

In a civil trial, the claimant carries the burden of proof in alleging the facts in support of its claim. Unlike certain jurisdictions, in Switzerland there is no special evidentiary standard for fraud claims as opposed to other torts.

However, the required standard of proof is very high in Swiss courts. All facts alleged in support of the claim must be proven to the full conviction of the court. A preponderance of evidence or balance of probability is insufficient. This includes in particular the substantiation and proving of alleged damages. While the law enables the courts to estimate losses, where such cannot be quantified in numbers, the courts rarely make use of it.

Moreover, besides the professional rules of conduct applicable to lawyers in general, Swiss law does not impose any special duties on lawyers when pleading fraud in a civil trial.

2.8 Claims against "Unknown" Fraudsters

In cases where the victim of fraudulent and criminal conduct is not in possession of sufficient information to file a tort claim in civil court against a specific person, it may be advisable to seek evidence and secure assets with the help of a criminal investigation.

In such a case, the victim can file a criminal complaint against "unknown persons", and declare itself private plaintiff in the criminal proceedings, relying on the powers of the criminal authorities to identify the perpetrators of the criminal offence in question.

2.9 Compelling Witnesses to Give Evidence

See **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Several key provisions of Swiss law govern the basis on which a legal entity can be held liable for the unlawful conduct of its employees, agents or directors.

Civil Corporate Liability for Unlawful Acts of Management

In the Swiss conception of corporate civil liability, the conduct of corporate bodies/directors is directly attributable to the company. Indeed, the governing officers express the will of the company and bind the company by actions carried out within the scope of their functions, namely, by concluding transactions on the company's behalf.

Swiss law also provides an alternative legal basis for liability of a company limited by shares ("SA", "AG" or "Ltd"), under which, such company is liable for any damage caused by unlawful acts carried out in the exercise of its functions by a person with authority to represent the company or to manage its business.

A company is thus liable vis-à-vis a victim of unlawful fraudulent behaviour where two conditions are met.

- If the unlawful act was committed by a corporate body/director in the exercise of its functions, such as the representation or management of the company; this includes the acts of formal or de jure directors within a company but also de facto directors (eg, a sole beneficial owner who exercises decisive powers in the management of the company) and apparent directors (eg, a person who is neither a formal nor a de facto director but appears as such to a reasonable third party).
- Provided the general conditions for liability in tort are met (conditions detailed in **1.1 General Characteristics of Fraud Claims**).

Civil Corporate Liability for Unlawful Acts of Employees or Auxiliaries

If the perpetrator is not a corporate body/director within a company, but rather an employee or auxiliary (ie, an agent who, without being a director, is involved in the representation or management of the company), the company may be liable in its capacity as employer.

Unlike the liability for the acts of management, the company does not respond automatically to its employees' or auxiliaries' conduct. Indeed, the company can be released from liability if it can rely on an exonerating defence, particularly where:

- the employer is able to prove that it had exercised the necessary diligence, in particular in the selection, instruction and supervision of the employee; and
- the employer is able to show that there was no causal link between the damage caused by the employee or auxiliary and the lack of diligence on the employer's part.

Personal Liability of Management and Auxiliaries or Employees

In addition to the company, directors are personally liable for their unlawful acts vis-à-vis the victim (see **3.3 Shareholders' Claims against Fraudulent Directors**). Auxiliaries or employees of a company are also personally liable.

The individual in question may thus be held jointly and severally liable with the company vis-à-vis the victim (see **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts**). The company may then be entitled to seek recourse against the individual pursuant to the provisions (statutory and/or contractual) governing their relationship.

Criminal Corporate Liability

In addition to civil liability, the company can be held criminally liable for the fraudulent conduct of its corporate bodies/directors, agents and employees under certain conditions.

Swiss law distinguishes between two types of corporate criminal liability: secondary and primary liability.

- Secondary corporate criminal liability is relevant only if the underlying offence cannot be attributed to a specific individual due to the company's deficient organisation.
- In contrast, primary liability is a direct, autonomous and joint liability, and may be triggered alongside the criminal liability of an individual; this type of liability is given where a company has failed to take all reasonable organisational measures to prevent the commission of any of the offences exhaustively listed in the law (eg, money laundering, bribery of public officials and bribery of private individuals).

Where criminal liability is ascertained, the company can be the subject of remedial measures ordered against it to the victim's benefit (see **2.5 Criminal Redress**).

3.2 Claims against Ultimate Beneficial Owners

The company and its shareholder are two legally distinct subjects of law. However, Swiss law recognises that certain exceptional circumstances may warrant a piercing of the corporate veil, based on the principle of transparency (*Durchgriff*).

Swiss case law distinguishes between direct transparency and reverse transparency. The first allows a creditor to enforce the debt of the company against the shareholder, while the second allows a creditor to do the opposite; ie, enforce the debts of the shareholder against the company. Generally speaking, transparency relates as much to claims arising from unlawful acts as from a contract.

The case law of the Swiss Federal Supreme Court admits such piercing restrictively and on an exceptional basis, essentially where:

- a debtor and the legal entity share the same identity from an economic point of view (identity of persons), or where there is economic domination of the first over the second; and
- the reliance on the legal independence between the two legal subjects appears manifestly abusive.

Where the above conditions are met, the claimant could rely upon it to bring an action before the civil courts and/or apply for interim measures (such as an attachment of assets).

In addition to the above, where a beneficial owner (eg, sole shareholder or ultimate beneficial owner – UBO) is not formally appointed as a corporate body within the company, but makes decisions that are normally reserved for de jure directors, the beneficial owner may qualify as a de facto director. As such, they could be held personally liable for the company's unlawful conduct (see **3.1 Imposing Liability for Fraud on to a Corporate Entity**), namely, where the company has been used as a vehicle for fraud. In such a scenario, the victim could direct its civil action as much against the de facto director as against the company.

3.3 Shareholders' Claims against Fraudulent Directors

Personal Liability of Fraudulent Directors

In a company limited by shares, directors as well as all other persons involved in the management of a company (eg, de facto directors) are personally liable to the company, to each shareholder and to the company's creditors for the damage caused by an intentional or negligent breach of their duties.

If several directors are liable for damage, any one of them is jointly and severally liable along with the others, to the extent that the damage is attributable to the director in question based on their own fault and the circumstances of the case at hand.

The civil liability of directors is subject to four cumulative requirements, for which the claimant bears the burden of proof:

- a breach of duty (ie, unlawful nature of the conduct);
- damage;
- a causal link between the breach of duty and the damage; and
- the fault of the director (ie, intentional or negligent breach of their duties).

Standing to Sue

Individual claims of shareholders or creditors against a director

Where a creditor or a shareholder are the only ones to suffer direct damage caused by the unlawful conduct of a director (ie, the company itself is not harmed), the creditor or shareholder have standing to sue by way of an autonomous claim.

On the other hand, a creditor or shareholder has no right to bring an autonomous claim if their damage is merely indirect; ie, if they suffered damage only as an indirect consequence of the director's unlawful conduct.

Where both the creditor or shareholder and the company suffer direct damage arising from the director's unlawful conduct, Swiss case law permits a creditor or shareholder to bring an autonomous claim but only in rare and exceptional cases.

Claims of the company for damage suffered

Where a company is not insolvent (ie, outside of bankruptcy proceedings), both the company and each individual shareholder are entitled to sue the director for any losses caused to the company. The shareholder's claim must request for compensation to be paid to the company.

In contrast, where the company is bankrupt, its creditors are entitled to request that the company be compensated for the losses suffered. It is primarily up to the insolvency administrators to assert the claims of the shareholders and the company's creditors.

Where the insolvency administrators, acting on behalf of the company's estate, waive their right to assert such claims, any shareholder or creditor is entitled to bring them in their stead. The SDEBA provides for an order in which the proceeds of a successful claim will then be used. The estate may, however, also assign such claims to creditors who may then pursue them on their own behalf to cover their remaining losses.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

The Swiss civil courts have jurisdiction over overseas parties only if and to the extent it is provided for in the Swiss Private International Law Act or the applicable conventions (such as the Lugano Convention).

However, exceptionally, where jurisdiction is given with respect to one defendant, a Swiss court may also have jurisdiction with regard to all the other defendants against whom a claim is brought; eg, where there is such a close con-

nection between the claims that it is expedient to hear them together.

Jurisdiction of the Swiss courts will also be given in so-called "third party actions"; ie, where a defendant brings a third party into the proceedings in order to assert a recourse claim against said third party, which would arise in case of an unfavourable judgment on the main claim. In other words, a third party can be added into the proceedings if the defendant believes that said third party is (also) liable. In such cases, the Swiss court that has jurisdiction to rule on the main claim can also have jurisdiction with respect to the third-party action.

Finally, third parties to the trial who reside overseas and whose assistance is required for the gathering of evidence (eg, witnesses or other third parties in possession of relevant data or documents) can be questioned or requested to produce evidence via international judicial legal assistance channels, in particular, based on the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, to which Switzerland is a signatory state.

As for the Swiss criminal authorities, they have jurisdiction to prosecute overseas parties and adjudicate tort claims if they have jurisdiction to prosecute the suspected offence, particularly where the offence took place or the result occurred in Switzerland.

5. ENFORCEMENT

5.1 Methods of Enforcement

A creditor who obtains a favourable court judgment or arbitral award can execute it in Switzerland. Swiss law makes a distinction between the enforcement of monetary claims (eg, claims for damages or monetary compensation) and non-monetary claims (eg, claims to return property or claims for specific performance).

Enforcement of Monetary Claims

A judgment creditor is entitled to execute its monetary claim against the debtor's assets in Switzerland under the SDEBA. To secure its position, attachment orders are an essential tool and often the first step in the enforcement process (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**).

The enforcement process begins with a debt enforcement request filed by the creditor, normally at the place of the debtor's seat or residence, and the service of a payment order to the debtor by the debt-enforcement authorities. The debtor may object to the claim, in which case, the creditor would have to initiate judicial proceedings to set aside the objection.

The ensuing enforcement proceedings for the majority of monetary claims (with a few exceptions to the rule, namely, for secured claims) will be carried out by way of asset seizure and forced sale for natural persons, or by way of bankruptcy for legal entities.

Enforcement of Non-monetary Claims

Enforcement of non-monetary claims is based on the rules of civil procedure. Judgments can be enforced if they have come into force or, failing such, if the court has ordered their anticipated enforcement.

If the judgment does not directly order enforcement measures in its operative part, a judgment creditor can apply for enforcement measures, such as:

- enforcement under the threat of criminal penalties, a disciplinary fine of up to CHF5,000 or up to CHF1,000 per day of non-compliance;

- a compulsory measure such as the confiscation of movable property or vacating of immovable property; and/or
- order for performance by a third party.

The enforcement authorities can call on the police to secure enforcement. Moreover, the parties against whom enforcement is sought, as well as the affected third parties, must provide the required information to the authorities and tolerate any necessary searches.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

Parties to a civil trial are generally required to produce evidence and collaborate in the gathering of evidence where directed to do so by the civil court, except where (among others) the documents and information concerned relate to contact between a lawyer (or patent lawyer) and their client; ie, attorney-client privilege (see **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**).

In criminal proceedings, the parties and the other persons involved in the proceedings have a right to invoke the privilege against self-incrimination. While, on the one hand, the accused may not be compelled to incriminate themselves, on the other hand, the private claimant and the other persons involved in the proceedings may also refuse to testify if by doing so they would incriminate themselves (by testifying such that they could be found guilty of an offence or held liable under civil law), provided, in the latter case, that the interest in protection outweighs the interest in prosecution.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

Privilege covers only the typical activities of a lawyer, which means that non-typical activities (such as investment advice, financial intermediation or management of companies) are not protected. Likewise, exchanges with in-house counsel are not covered to date.

The client is free to waive attorney-client privilege. However, even if a waiver has been given by a client, a lawyer remains entitled to refuse disclosure. The rule, therefore, is that a lawyer cannot be compelled against their will to break attorney-client privilege.

Similarly, in criminal proceedings, privileged documents cannot be seized or used as evidence by the criminal authorities against an accused or a defendant.

There are exceptional circumstances, however, in which a lawyer may be legally compelled to reveal privileged information. This includes cases where attorney-client privilege is raised by the lawyer in an abusive fashion and for criminal purposes (eg, to conceal evidence from the authorities). In criminal proceedings, privileged documents can also be seized and used as evidence if the lawyer is themselves a suspect in a criminal investigation and the privileged information relates to the investigated facts.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

As a rule, the amount of damages awarded to a claimant in Switzerland must compensate the actual loss suffered by the claimant, plus interest of 5% per annum. In certain circumstances,

moral compensation can also be awarded, but is typically low in value.

Punitive or exemplary damages are not available in Switzerland. Swiss courts will refuse to award punitive damages even if a Swiss court must apply, by virtue of the Swiss conflict of laws provisions, a foreign law that provides for such damages.

7.2 Laws to Protect "Banking Secrecy"

Banking secrecy in Switzerland stems from the contractual relationship between the client and the bank, as well as the client's civil right to personal privacy. Banking institutions, as well as their directors and employees, are generally prohibited from disclosing client data to third parties. Unauthorised disclosure is punishable under the Swiss Federal Act on Banks and Savings Banks, and is a criminal offence.

As mentioned in **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**, trial parties or third parties to a civil trial who are bound by banking secrecy are generally required to co-operate in the gathering of evidence, but may refuse to co-operate if they can show that the interest in protecting the secret outweighs the interest in establishing the truth. The situation is similar in criminal proceedings.

7.3 Crypto-assets

It should first and foremost be mentioned that Swiss law is largely technology neutral. Therefore, the general approach is to treat new technological developments similarly to existing instruments or situations.

Over time, some areas of law have been amended to provide greater clarity and legal certainty with regard to novel technologies, but this is not yet the case for property law which does not consider crypto-assets as property, but rather as sui generis factual assets.

For the same reasons, it is also complicated – on a practical level – to freeze such assets, all the more so if the person prefers to manage their wallet themselves rather than opting for a wallet provider. The difficulty related to the freezing of such assets lies in the difficulty of assessing where the same are located and to then ensure enforcement of the measure.

Although the use of crypto-assets to commit fraud is conceivable, as it has happened in the past with certain initial coin offerings (ICOs), the authors of this chapter are currently not aware of any prominent public case relating to crypto-asset fraud in Switzerland. Similarly, there is not yet any case law regarding the freezing of crypto-assets. However, it is likely to be only a matter of time before there is, and it is expected that such cases will rigger new case law in the near future.

Bär & Karrer Ltd is a leading Swiss law firm with more than 170 lawyers in Zurich, Geneva, Lugano, Zug and Basel. The firm's core business is advising clients on innovative and complex transactions and representing them in litigation, arbitration and regulatory proceedings. Clients range from multinational corporations to private individuals in Switzerland and around the world. Most of the firm's work has an international component, and its extensive network consists of correspondent law firms that are all market leaders in their jurisdictions. The team has broad experience in handling cross-border proceedings and transactions.

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Trends and Developments

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Pitfalls of Securing Cryptocurrencies under Swiss Law

Introduction

Initially only traded by a niche community, cryptocurrencies such as Bitcoin, Ether, Ripple, Litecoin, to name a few, are growing in acceptance. Developments such as leading banks planning to offer their clients access to crypto-investments, Tesla's recent USD1 billion investment in Bitcoin and accepting it as payment for their cars, as well as Coinbase's recent IPO, means the relevance of cryptocurrencies will inevitably also increase in asset recovery proceedings.

Determining the available means for the securing of cryptocurrencies in Switzerland hinges on its legal qualification under Swiss law, which in the absence of any case law remains controversial amongst Swiss legal practitioners. While certain jurisdictions consider cryptocurrency as property, the situation is less clear under Swiss law, where a minority view would like to qualify cryptocurrency as a chattel according to the Swiss Civil Code. The majority view, however, qualifies cryptocurrencies as a new asset category (assets sui generis). The prevailing qualification is similar under Swiss criminal law.

This provides an overview of the most frequent practical pitfalls when attempting to recover cryptocurrencies by way of attachment in civil proceedings (see the Attachment in Civil Proceedings section) and/or criminal proceedings (see the Attachment in Criminal Proceedings section), which are some of the most common recovery instruments.

Attachment in civil proceedings

The majority view considers cryptocurrencies as assets sui generis, and it is generally acknowledged that cryptocurrencies can be secured by way of civil attachment under the Swiss Debt Enforcement and Bankruptcy Law (DEBA).

According to Article 271 et seq, DEBA, a Swiss court grants a civil attachment if the applicant can provide prima facie evidence that:

- it has an unsecured and due claim against the debtor;
- that there is a statutory ground for attachment; and
- there are assets of the debtor located in Switzerland.

The first two prerequisites usually do not raise any issues. From practical experience however, a creditor frequently faces difficulties in providing the required prima facie evidence that the debtor indeed holds attachable assets in Switzerland. This is even more difficult for cryptocurrencies. On the one hand, a debtor is not obliged to disclose their assets to the creditor or court in attachment proceedings. Also, a court dealing with an attachment request will not undertake any investigation, but only rely on evidence provided by the applicant. An additional hurdle for an applicant is that courts will, in principle, only admit documentary evidence in attachment proceedings. For traditional commercial transactions, a creditor will typically more likely succeed by submitting correspondence referring to a debtor's bank account in Switzerland. For cryptocurrencies, the situation is inherently more difficult, and in practice most applicants may therefore already fail at the level of demonstrat-

ing that the debtor holds cryptocurrencies. On the one hand, commercial transactions are not (yet) ordinarily settled by cryptocurrencies. Even if the creditor finds an alphanumeric address, this will be of little help in identifying the location of cryptocurrencies, which, as assets sui generis, are not considered chattels and therefore cannot be physically located. Indeed, by virtue of distributed ledger technology, cryptocurrencies are "located" on the blockchain and hence are ubiquitous.

Swiss legal doctrine primarily focuses on the private key when determining where cryptocurrencies are located. In the case of cold storage, that is, storing the cryptocurrencies' private keys in an offline environment, for example on a private storage device such as a USB-stick (hardware wallet) or a piece of paper (paper wallet), the cryptocurrencies are arguably located at the physical location of the private key. In that case, the private key is technically a movable object, but not the cryptocurrency itself. If located in Switzerland, the private key may be attached according to the Swiss DEBA and taken into custody by the competent Swiss debt collection office; however, this does not amount to an attachment of the cryptocurrencies themselves.

In the case of hot storage, that is, online, the debtor is either using the services of a third-party provider (online wallet) or installing a software on the computer (desktop wallet) to manage access to the cryptocurrencies. In the case of a desktop wallet, the private key is saved locally on the hard disk, which can be attached if located in Switzerland and taken into custody; in the case of an online wallet, the private key is saved on the server of the third-party provider. Taking the private key into custody may only be possible in this case if the server is located in Switzerland. Again, attaching the private key does not amount to an attachment of the cryptocurrencies themselves. Attaching the private key is therefore only half of the equation.

In general, a wallet is also password-protected. If a debtor does not provide the password, the means available to a Swiss debt collection office to force a debtor to release the password are limited. Although a debtor refusing to provide the password may become criminally liable for fraud against seizure under Article 163 of the Swiss Criminal Code, this may only be the case after unsuccessful debt collection proceedings against the debtor, which can take years.

Without actual access to the private key by the debt collection office and preservation of the cryptocurrencies by moving them to another public address in control of the Swiss debt collection office, the attachment of the private key may be a moot point if the debtor can still dispose of the assets (for example, by keeping a spare copy of the private key).

A creditor may not always hold a private key to the cryptocurrencies, but have it managed by specialised third-party providers (vault providers). In such a case, a holder of cryptocurrencies merely has a claim against the provider for delivery of its virtual currency units. If such a claim is known to a creditor, and they are able to produce corresponding prima facie evidence, it can be attached as any other claim of a debtor, either at the debtor's Swiss domicile, or in the absence of such a domicile, at the Swiss seat of the vault provider.

Attachment in criminal proceedings

In criminal proceedings, cryptocurrencies arguably also qualify as assets sui generis. As such, they cannot be confiscated as chattels, which might be possible in the case of a private key in the form of a USB-stick or a piece of paper. However, according to Swiss doctrine, cryptocurrencies may be qualified as assets according

to the definition in Article 70 of the Swiss Criminal Code. As such, under Article 263(1)(d) of the Swiss Criminal Procedure Code, in conjunction with Article 70 of the Swiss Criminal Code, they can be (provisionally) confiscated if they have been acquired through the commission of an offence or are intended to be used in the commission of an offence or as payment therefor. By way of (provisional) confiscation, the relevant Swiss criminal authority prevents an accused from disposing of an asset.

The criminal authority will however face the same practical problems as the debt collection office. First, it must learn about the existence of cryptocurrencies. In practice, a public prosecutor usually does so as a result of a house search, or the analysis of further (documentary) evidence available, for example (email) correspondence, records from WhatsApp, or phone conversations. However, even if the criminal authority has established the existence of cryptocurrencies, the location of the private key will remain an unknown. As explained above, even confiscating a private key does not ensure access to the cryptocurrencies if the wallet is password-protected. The accused will (again) be of little help as they are neither obliged to disclose any holdings in cryptocurrencies, the private key or its location, nor the password to the wallet.

In practice, if the cryptocurrencies presumably originate from a felony or aggravated tax crime, the interesting question comes up as to whether a recalcitrant cryptocurrency holder could then be considered as frustrating the identification of the origin or the tracing or the forfeiture of these assets, which they know or should know originate from a felony or aggravated tax crime. Such behaviour may qualify as money laundering under Article 305bis of the Swiss Criminal Code and the cryptocurrency holder may be prosecuted.

In order to fulfil Article 305bis of the Criminal Code under Swiss law, the paper trail and thus the tracking of asset history must be interrupted, which is arguably the case if an accused refuses to release the password. As a consequence, pressing charges for money laundering may provide for an alternative avenue of prosecution, should an accused resist confiscation of cryptocurrencies, or refuse to provide the password to the wallet. However, this has never been tested in court.

The situation is slightly different from a criminal perspective, where an accused makes use of a specialised vault provider, as outlined previously in the Attachment in Civil Proceedings section. In such a case, the specialised vault provider may be under an obligation to disclose information upon the request of the criminal authority, and perhaps even to transfer cryptocurrencies to them.

LALIVE is an international law firm with offices in Geneva, Zurich and London, renowned for its expertise in international legal matters. Its core areas of practice include asset recovery, litigation, white-collar crime and compliance, commercial and investment arbitration, art and cultural property law, corporate and commercial law, real estate and construction. The firm's litigation team of 11 partners and 35 counsel and associates has an established practice in complex, multi-jurisdictional, cross-border matters, including in the tracing and recovery of assets, misappropriated or otherwise. It also represents clients before Swiss courts for the purpose of obtaining interim measures of protection and in criminal and mutual legal assistance matters. LALIVE has a strong banking litigation practice and is unique in Switzerland in that it is conflict-free to act against banks and financial institutions. Its recent work includes representing clients in large-scale investigations, tracing and recovery of illicit assets totalling over USD1 billion, and in claims of criminal mismanagement and fraud.

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

In the UAE, there is close interaction between the civil and criminal justice systems, and this is particularly the case in relation to matters involving fraud. A victim of fraud may choose whether to bring a civil claim for damages arising from the fraudulent conduct before the civil courts, or to report the fraud to the police and later to join a civil claim to the criminal proceedings before the criminal court.

Criminal Liability

Fraud

In the UAE, fraud is primarily treated as a criminal offence and there are fewer provisions specifically dealing with it under civil law. The crime of fraud is codified in the UAE Penal Code (Federal Decree Law No 31 of 2021). There is a requirement of a material element and moral element. The material element of a crime consists of a criminal act committed or omitted in violation of a law forbidding or requiring it. The moral element of the crime consists of the intention or the error.

Article 451 of the Penal Code provides punishment for a company which:

- uses fraudulent practices and assumes a false name;
- takes possession for itself or for others of any movable property or written instrument; or
- obtains any signature upon such instrument, its revocation or amendment, whenever it is intended to deceive a victim and bring them to surrender the instrument.

In addition, a company, or any of its representatives, shall be punished if they transfer or dispose of any real or movable property in the following circumstances:

- being fully aware that it is not owned by the company;
- being fully aware that they have no right to dispose of the property;
- disposing of the property with the knowledge that another person has already disposed of it, or contracted to dispose it, which operates to injure others.

Merely making false statements is not sufficient for a crime of fraud to have occurred. The false statements should be accompanied with material acts.

Cyberfraud

A crime of fraud can also arise under Federal Decree Law No 34 of 2021 (the "Cyber Crimes Law"). The offences under the Cyber Crimes Law include:

- forgery of an electronic document (including modifying its contents on an electronic site);
- using a forged electronic document with knowledge of the forgery;
- using an IT system to obtain for themself or for a third party, without any right, an asset, benefit, document or a signature by using any fraudulent method; and
- accessing IT systems without permission.

Commercial fraud

Federal Law No 19 of 2016 on Commercial Fraud (the "Commercial Fraud Law") criminalises commercial fraud, being any of the following acts:

- the import, export, re-export, manufacturing, sale, display or acquisition for the purpose of sale, storage, lease, marketing or trading, fake, corrupt or counterfeit commodities;
- advertising fake or unreal prizes or reductions;
- exploiting commercials, submitting the same or promising to submit the same in mislead-

ing promotions or promoting adulterated, corrupted or counterfeit commodities; or
- offering, submitting, promoting or advertising adulterated commercial services.

Bribery

The Penal Code prohibits a person or company from directly or indirectly promising, offering or granting a bribe to a public servant, a person assigned to a public service, a foreign public servant or an employee of an international organisation for the following purposes:

- in return for performing or not performing an act which is in violation of the duties of their job;
- to incite any such person to use their actual or assumed power for the purpose of obtaining an undeserved advantage in favour of the principal inciter, or in favour of any other person in a public department or authority; or
- to use their actual or assumed power for the purpose of obtaining an undeserved advantage from a public department or authority.

Similarly, it is prohibited for a manager of a private sector entity or establishment, or an individual who is employed by such person in any capacity, to solicit or accept a bribe, directly or indirectly, for themself or for another person, in return for the following:

- the performance or the refraining from the performance of an act of their duties; or
- defaulting on the duties of their job, even if they do not intend to effect the act or not to refrain from it, or if the demand or acceptance or promise comes subsequent to the performance of the act or the refraining from its performance.

Under Article 283 of the Penal Code, a bribery conviction will lead to a fine equivalent to what has been demanded or offered or accepted (provided that the fine is not less than AED5,000, in which case a fine of AED5,000 shall apply). A person convicted of bribery can be imprisoned for a maximum period of five years.

The bribe itself will also be subject to confiscation. The Penal Code also provides for punishment of any individual who acts as an intermediary in the giving or receiving of the bribe.

However, under the Penal Code, an exemption may be provided if the individual informs the authorities of the crime before it is discovered.

There are also some individual emirate-level provisions. Under the Abu Dhabi Penal Code, it is a criminal offence to offer or give a bribe to a public official, if the public official abuses their official position in return for the bribe.

Under the Dubai Penal Code, it is a criminal offence to offer or provide any gift or benefit to a Dubai public official, even if the offeror has no intention to procure an act, or omission of an act, in violation of the duties of the public official's function.

Conspiracy

Under Articles 45 and 46 of the Penal Code, individuals who conduct the following acts will be deemed to be accomplices to the crime:

- committing a crime in association with others;
- committing one of a series of acts which constitute a crime;
- making use of another person for the perpetration of an act constituting a crime;
- instigating or agreeing with the offender to commit a crime;
- giving the offender the necessary tools knowing they would be used in the commission of a crime; or

- intentionally aiding the offender in any other way in the preparation, facilitation or completion of a crime.

Misappropriation

Article 454 of the Penal Code provides that an individual who knowingly misappropriated, with the intention to own lost property owned by someone else, or property in their possession by mistake or by force majeure, can be subject to a jail sentence not exceeding two years or to a fine.

Civil Liability

Civil liability for fraud arises under the Federal Law Concerning Civil Transactions (Federal Law No 5 of 1985, as amended) (the "Civil Code").

Misrepresentation

Articles 185 to 192 of the Civil Code include liability for misrepresentation. Misrepresentation arises when one of the contracting parties deceives the other by means of trickery of word or deed which leads the other to consent to what they would not otherwise have consented to. Deliberate silence concerning a fact or set of circumstances can also be considered to be a misrepresentation if it is proved that the person misled the victim.

Tort

Articles 282 to 298 of the Civil Code provide that a person causing harm, or a person deceiving another, must make good the harm resulting from that deception. Harm may be direct or consequential. If the harm is direct, it must unconditionally be made good, and if it is consequential there must be a wrongful or deliberate element and the act must have led to the damage, which will typically be the case in fraud matters.

In all cases the compensation shall be assessed on the basis of the amount of harm suffered by the victim, together with loss of profit, provided that it was caused by the harmful act.

Misappropriation

Articles 304 to 312 of the Civil Code include provisions which give rise to liability as a result of misappropriation of property. Whoever misappropriates property belonging to another must restore it and/or repay any losses.

The wrongdoer must also hand over any benefits or increase they have obtained from such property.

1.2 Causes of Action after Receipt of a Bribe

Criminal Claims

A claimant whose agent has received a bribe may make a complaint against the agent under the Penal Code. According to Article 278 of the Penal Code, an individual who manages or works in any entity or establishment and solicits or accepts or promises, directly or indirectly, any undeserved gift/bribe in return for the performance of or the refrainment from the performance of an act of their duties shall be imprisoned for a period not exceeding five years.

Similarly, the same penalty shall be imposed on any public official or any other person who demands or accepts any undeserved advantage, gift or grant for themself or for another person, directly or indirectly, in order for a public official or person to use their actual or assumed power for the purpose of obtaining an undeserved advantage from a public department or authority.

Federal Law by Decree No 11 of 2008, regarding the Human Resources in the Federal Government, also provides that a federal government employee who has requested or received a bribe shall be referred to the judicial authorities.

Onshore UAE – Civil Claims

There are a number of civil remedies available (in addition to criminal liability) that a person involved in bribery may be exposed to.

In onshore UAE, and under Federal Decree Law No 32/2021 on Commercial Companies (CCL) each manager of a limited liability company shall be liable to the company, shareholders and third parties for any fraudulent acts. Further, they shall be required to compensate the company for any losses or expenses incurred due to abuse of power or violation of the provisions of any law in force or the company's memorandum of association or their contract of appointment or due to gross error by the manager.

Similarly, under the CCL, the members of the board of directors and executive management shall be responsible towards the company, the shareholders and the third parties for all acts of fraud, misuse of power, and violation of the provisions of the CCL and the articles of association of the company.

A director who has breached the CCL may be subject to financial penalties and/or criminal sanctions.

DIFC and ADGM – Civil Claims

In the DIFC and ADGM, a director of a company cannot accept a benefit from a third party where the benefit is conferred on them due to their position as a director of the company for them doing (or not doing) anything as a director, unless the acceptance of such benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.

Any breach of these duties may result in disqualification, personal civil liability, damages payable to the company in respect of losses suffered, in addition to the criminal liability already discussed at **1.1 General Characteristics of Fraud Claims**.

In onshore UAE and DIFC/ADGM, it is likely to be possible to establish that an act of bribery gives rise to a cause of action, unlike general tort/harmful act principles.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Criminal Liability

Accomplices, or individuals who assist or facilitate fraudulent acts will be subject to the same punishment as imposed on the principal offender.

The provisions of Articles 45 and 46 of the Penal Code apply when determining whether an individual is an accomplice.

However, under Article 53 of the Penal Code, where the characterisation of the crime or penalty may vary according to the offender's intention or knowledge of the circumstances, accomplices will be punished only according to their knowledge and intention.

1.4 Limitation Periods

Limitations Period under the Penal Procedures Law

The Penal Procedures Law, provides that:

- for criminal cases the limitation period for felonies is 20 years;
- for misdemeanours it is five years; and
- for contraventions it is one year starting from the date on which the crime was committed (Article 20).

Depending on the seriousness of the fraud, either the limitation period for felony or misdemeanour may apply.

Limitation Periods under the Civil Code

Article 298 of the Civil Code provides that the general limitation period for such claims arising is three years from the date on which the victim became aware of the harmful event and the identity of the perpetrator, subject to a maximum of 15 years from the date on which the harm occurred. If criminal proceedings in relation to the relevant events are pending at the time the three-year period expires, the limitation period is extended.

ADGM and DIFC

In the ADGM, the limitation period is for six years from when the fraud was discovered or when it could have been discovered, with reasonable diligence. In the DIFC, where a cause of action arises as a result of fraud by the defendant, there is no time limit before an action must be commenced for fraud. In relation to claims of misrepresentation, a cause of action arises on the earliest date on which the claimant knows or ought reasonably to know about the loss that gives rise to the cause of action, and this action must be commenced within 15 years of the date on which the cause of action arose.

1.5 Proprietary Claims against Property

Onshore UAE – Criminal

Article 83 of the Penal Code provides that once the commission of a criminal offence has been established:

- property caught and connected with, or acquired as a result of, the offence may be confiscated if such confiscation does not prejudice the rights of bona fide third parties;
- if the production, use, possession, sale or offer for sale of the property by a bona fide third party would constitute a separate offence to the primary offence, then the property must be confiscated regardless of the rights of the bona fide third party;
- if it would be impossible to confiscate the property due to the rights of bona fide third parties, then the courts will impose a fine equal to the property's value at the time the crime was committed.

If the assets recovered in connection with the crime are returned to the court, they are then managed by the public prosecutor at their discretion, so there is no certainty that confiscation will benefit a victim.

Onshore UAE – Civil

There are no proprietary claims against property obtained as a result of fraud.

An attachment order can be obtained over assets in the civil courts in civil matters, although this is an interim remedy and does not provide a proprietary interest.

DIFC and ADGM

The common law principle of knowing receipt and dishonest assistance are likely to be recognised by the DIFC and ADGM courts.

1.6 Rules of Pre-action Conduct

There are no pre-action conduct rules that apply to fraud claims.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Onshore UAE

Whilst there is no concept of an "injunction" in onshore UAE, Article 111 of Cabinet Decision No 57/2018 (issuing the implementing regulations of the UAE Civil Procedure Law No 11/1992) provides that a claimant may apply to the court for a precautionary attachment order (in rem), the effect of which is to seize or attach the defendant's property in order to preserve it pending trial. Attachment orders may also be made over assets that are in the possession of third parties (for example, bank accounts). For an order to be

made, it must be apparent from the documents submitted to the judge that there is a serious question to be tried.

Article 111 provides that a person can apply for such order in any circumstance in which it is feared that an asset may be lost and as a result a claim may go unsatisfied, such as in the following circumstances:

- if the obligor has no permanent residence in the state;
- if the obligee fears that the obligor may abscond, remove or conceal their property; or
- if the assets or securities for the debt are at risk of dissipation.

Such an attachment order must be accompanied with a signed undertaking to indemnify the defendant in the event that the order was obtained on fraudulent grounds.

An application for a precautionary attachment order may be made without notice to the defendant, but it must be followed by a substantive claim filed at court within eight days from the date that the order is made, which addresses the validity of the precautionary attachment and allows the defendant an opportunity to raise objections. Failure to comply with the court orders may lead to fines.

Article 188 provides that, under certain conditions, a travel ban can be requested against the defendant. However, the court must be satisfied with the following conditions before imposing a travel plan:

- there must be serious reasons to believe that the defendant will flee the country;
- the debt must not be less than AED1,000 where the substantive case has been filed, or AED10,000 where the substantive case has not yet been filed; and
- the debt must be known, due for payment and unconditional, or if an unspecified amount, the claim must be based on written evidence and accompanied by a guarantee for any damages caused by the travel ban if not rightfully imposed.

DIFC and ADGM

Both the DIFC and ADGM courts have power to grant interim orders prior to the commencement of proceedings and without notice to the defendant. In the DIFC and ADGM, a victim of fraud, may be able to apply for injunctions, property preservation orders and freezing orders.

It is necessary to prove certain elements before a freezing injunction can be granted. These are as follows:

- the existence of assets in the jurisdiction and the real risk of the dissipation of assets;
- a good arguable case;
- whether there is a serious question to be tried;
- whether damages would be an adequate remedy; and
- the balance of convenience between the parties.

A claimant is generally required to provide a cross-undertaking in damages when applying for freezing orders in the DIFC. Court fees are generally paid by the claimant and vary depending on the nature and type of case.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

DIFC and ADGM

Article 25.1 of the Rules of the DIFC courts ("the DIFC Rules") and Rule 71 of the ADGM Court Procedure Rules 2016 ("the ADGM Rules") set

out a number of interim remedies that the DIFC and ADGM courts can order.

Under Article 25.1(6) of the DIFC Rules and Rule 71.1(f) of the ADGM Rules, a claimant is able to obtain a freezing order which either restrains a party from removing from the jurisdiction assets located there or restrains a party from dealing with any assets whether located within the jurisdiction or not.

Related to the ability of the claimant to obtain a freezing order, the courts, under Article 25.1(7) of the DIFC Rules and Rule 71.1(g) of the ADGM Rules, may direct a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing order.

UAE Onshore

There is no regime in the UAE courts to require a defendant to disclose its assets pre-judgment.

2.2 Preserving Evidence

Onshore – Criminal

The Public Prosecutor has broad powers when conducting a criminal investigation. These powers include the ability to enter a place to determine the status of the persons, places and objects related to the crime and to search the place and seize anything which may likely be used in the perpetration of the crime.

Onshore – Civil

The procedures available for preserving evidence are similar to what has been described above at **1.7 Prevention of Defendants Dissipating or Secreting Assets**.

A party will not be permitted to conduct a physical search of documents at the defendant's residence or place of business, but may request documents (as described in **2.1 Disclosure of Defendants' Assets**) in onshore UAE.

In arbitration, pursuant to the UAE Federal Arbitration Law, the UAE courts may enforce an order from an arbitral tribunal to preserve evidence that may be relevant and material to the resolution of the dispute. Under Article 21(2), the party requesting the order for this conservatory measure may be required by the arbitral tribunal to provide appropriate security to cover the costs of the measures, and, further, that the requesting party should bear the damages arising in connection with enforcement in the event that it is decided that such party is not entitled to such measures.

DIFC and ADGM

As outlined in **2.1 Disclosure of Defendants' Assets**, the DIFC Rules and ADGM Rules provide for interim remedies which may be ordered by the DIFC courts and the ADGM courts respectively.

In instances where it is feared that important evidence might be destroyed or suppressed, parties may seek under Article 25.1(3)(a) of the DIFC Rules and Rule 71(1)(c)(i) of the ADGM Rules the detention, custody or preservation of relevant property. Rule 71(1)(c)(i) of the ADGM Rules goes one step further and also provides for an order permitting the inspection of the relevant property. To assist the party in possession of a preservation order, Article 25.1(4) of the DIFC Rules and Rule 71(1)(d) allows a party in possession of that order to enter any land or building for the purposes of carrying it out. Under Rule 71(1)(d) of the ADGM Rules, the party in possession of a preservation order may also enter any real property, with an officer of the court supervising, for the purposes of carrying out that order.

Parties may also apply for a search order under Rule 25.1(8) of the DIFC Rules and Rule 71(1)(h)

of the ADGM Rules for the purpose of preserving evidence. These applications must be supported by affidavit evidence in both the DIFC and ADGM courts.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

Onshore – Criminal

Federal Law No 35 of 1992 (Penal Procedures Law) provides the judicial police with broad powers to obtain evidence. Under Article 30, they are given the ability to "inquire about crimes, search for their perpetrators and collect the necessary information and evidence for investigation and indictment".

Onshore – Civil

The UAE courts have broad and general powers to compel parties to produce documents in their possession. A court may, in the course of examination of the case, give permission to join a third party to the proceedings in order to compel them to prepare and produce a written instrument or provide information that is in their possession or under their control. It may also order to join any administrative entity to produce or furnish any written instrument or information that lies in its possession and which is deemed necessary for proceeding with the case.

DIFC and ADGM

In the DIFC, an application for production of documents by a person who is not a party to the proceedings must be supported by evidence.

The court may make an order under this rule only where: (i) the documents of which production is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and (ii) production is necessary in order to dispose fairly of the claim or to save costs. Such an order may specify the time and place for production.

Similarly, in the ADGM, where an application is made to the court under any ADGM enactment for disclosure by a person who is not a party to the proceedings, the application must be supported by evidence and served according to practice directions.

There are no standard restrictions placed on the use of such materials.

2.4 Procedural Orders

Onshore – Criminal

See **1.7 Prevention of Defendants Dissipating or Secreting Assets**.

DIFC and ADGM

Under Article 25.8 of the DIFC Rules and Rule 64 of the ADGM Rules, application for interim relief may be made on an ex parte basis or by giving notice. The permission of the DIFC and ADGM courts is required in instances where the application is to be made without service of an application notice to the respondent. Permission will only be granted where there is exceptional urgency or where there are good reasons for making the application without notice – for example, because notice would or might defeat the object of the application. In the case of the DIFC courts, permission for a without notice application will also be granted in cases where the overriding objective is best furthered by doing so.

For all applications made without notice, it is the duty of the applicant and those representing them to make full disclosure of all matters relevant to the application including, in particular, disclosure of any possible defences that may be available to the respondent to the application.

2.5 Criminal Redress

Onshore – Criminal

A victim of a crime may request that a claim for compensation be annexed to the criminal charg-

es and considered by the criminal court, which would be determined when criminal liability has been established.

Onshore – Civil

Where there is a parallel civil claim by the victim, the criminal court will generally transfer the civil claim to the civil court upon conviction and sentence in the criminal claim in accordance with Article 26 of the Criminal Procedures Code. The civil court will assess the quantum of damages, as the fact of the conviction allows the civil court to assume the liability of the defendant and therefore the only remaining issue left for the civil court to determine is ordinarily the quantum of damages.

The pursuit of criminal proceedings in fraud cases is common in the UAE since the criminal courts have wide powers, such as to prevent a suspected wrongdoer from travelling abroad pending conclusion of an investigation.

2.6 Judgment without Trial

Onshore UAE

The UAE courts may pass a default judgment if the defendant has been duly served and fails to attend without providing an acceptable excuse.

DIFC and ADGM

Similar rules apply in the DIFC and ADGM courts, wherein a claimant may apply for default judgment if the defendant has failed to acknowledge the claim or acknowledged a claim but failed to file a defence in time.

A defendant will then have the option to either seek to set aside or vary the court's ruling. However, they will not be able to appeal the judgment.

The DIFC and ADGM courts may give summary judgment (known as "immediate judgment" in the DIFC courts) against the claimant or defendant on the whole of a claim, part of a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue or if the defendant has no real prospect of defending the claim or issue and there is no other compelling reason why the case or issue should be disposed of at trial.

2.7 Rules for Pleading Fraud

There are no special rules or professional conduct considerations for pleading fraud. However, under the code of ethics and professional conduct of the legal profession in the UAE, there is a requirement for a lawyer to maintain integrity.

Further, in the DIFC and ADGM a legal practitioner has a duty to never knowingly or recklessly make any incorrect or misleading statement of fact or law to the court.

2.8 Claims against "Unknown" Fraudsters

Onshore UAE

There are no special rules to deal with claims against unknown fraudsters. A claimant may commence a criminal claim and the prosecution authority may then be able to assist using the broad powers given to them to identify unknown fraudsters as they are investigating the claim. However, there is no right to such assistance.

DIFC and ADGM

A "Norwich Pharmacal" order may also be made under the ADGM and DIFC courts' jurisdiction in instances where the party knows that a fraud has taken place against it but it does not know the identity of the wrongdoer, but is able to identify a third party who has this information (whether this third party is innocent or not). This order enables a party to plead its case against the wrongdoer, to trace assets or to bring proprietary claims.

2.9 Compelling Witnesses to Give Evidence

Onshore – Criminal

If a witness is summoned to appear before the public prosecution and fails to attend without an excuse, the prosecution has the ability to issue a warrant for the arrest of that witness and make them appear before the prosecution to give their testimony.

Onshore – Civil

The Civil Evidence Law provides measures to be applied in respect of witnesses that fail to appear before the court when they have been summoned.

This is provided in Article 42(3) which states that if a witness is duly summoned to appear and fails to comply, the court or supervising judge shall impose a fine and, after being fined, if the witness still fails to appear in court, may impose a second fine for persistent refusal.

However, the witness may be exempt from the fine if they appear and provide an acceptable reason regarding their failure to appear previously.

DIFC and ADGM

In the DIFC and ADGM, a witness summons may be issued by the court. Failure to comply with such summons may result in contempt of court, which typically results in a referral to a prosecuting authority.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Onshore UAE

The CCL provides for a company to "acquire a legal personality" upon incorporation. This means that there is a corporate veil between the company and its shareholders and directors. Article 66 of the Penal Code provides that juristic persons, with the exception of governmental agencies, are responsible for any criminal act committed for their account or in their name by their representative, director or agent. Therefore, a limited liability company or other corporate entity may be liable in such circumstances.

The penalty that may be imposed against a convicted corporation is limited to a maximum fine of AED5 million. However, the Civil Procedure Law also allows the victim to make a claim against the company for civil compensation.

Under Article 22 of the CCL, a manager of a company is required to "act with due care" and carry out all acts consistently with the object of the company and within the powers vested in them by virtue of an authorisation issued by the company.

In the Dubai Court of First Instance Judgment 207 of 2020, it was held that a manager of a limited liability company who acts in breach of their managerial duties, the law or the company's memorandum or articles of association shall be liable in tort for fraudulent acts. As an exception to the standard rules of corporate personality, where a manager has engaged in fraudulent acts, they are personally liable for any debts assumed by the company. In its judgment, the court held that the managers conduct satis-

fied those elements for fraud of Article 282 of the Civil Code and therefore the manager was personally liable to pay compensation to the claimant.

DIFC and ADGM

Under the DIFC Companies Law, a company incorporated in the DIFC shall have a separate legal personality from that of its shareholders. The liabilities of a company, whether arising in contract, tort or otherwise, are the company's liabilities and not the personal liabilities of any shareholder or officer of the company.

Under the DIFC Law of Obligations, a principal is jointly liable with their agent in respect of liability of the agent arising in the course of the agency, provided that the act or omission of the agent which gives rise to such liability is within the authority of the agent. Accordingly, an individual corporate director or officer's knowledge can be attributed to the company they represent, and such person may be held jointly liable together with the company if their actions arise out of the ordinary course of the agency.

In the ADGM, if any business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, a contravention is committed by every person who is knowingly a party to the carrying on of the business in that manner.

3.2 Claims against Ultimate Beneficial Owners

Onshore UAE

The CCL dictates that the corporate veil may be pierced where shareholders, managers, directors and auditors provide false statements as to the company's finances. An individual guilty of providing false statements may be punished by imprisonment for a period between six months and three years and/or a fine between AED200,000 and AED1 million.

DIFC and ADGM

Under the DIFC Companies Law, a company incorporated in the DIFC shall have a separate legal personality from that of its shareholders. The liabilities of a company, whether arising in contract, tort or otherwise, are the company's liabilities and not the personal liabilities of any shareholder or officer of the company. Under the legal framework of the ADGM, the liability of a shareholder is limited to the amount, if any, unpaid on its shares.

3.3 Shareholders' Claims against Fraudulent Directors

Onshore UAE

Managers of a company have a statutory duty of care. In the event that a manager acts fraudulently or fails to act within the statutory duty of care, shareholders of the company may bring claims against the fraudulent directors.

Article 84 of the CCL provides that every manager in a limited liability company (LLC) shall be liable to the company, the shareholders and third parties for any fraudulent acts by such manager and shall also be liable for any losses or expenses incurred due to improper use of the power or the contravention of the provisions of any applicable law, the memorandum of association of the company or the contract appointing the manager or for any gross error by the manager.

Similarly, the board of directors shall be liable towards the company, the shareholders and third parties for all acts of fraud, misuse of power, and violation of the law or the articles of association of the company or an error in management.

Article 166 of the CCL states that shareholders may individually pursue a liability claim against the board of directors of the company if they have suffered harm as a result of any act carried out by any of them in violation of the provisions of the CCL.

Under the Civil Code, directors may only act within their authority and will be personally liable for exceeding it.

DIFC and ADGM

In the DIFC, a director is considered a fiduciary. A person is the fiduciary of another if they have undertaken (whether or not under contract) to act for or on behalf of another in circumstances which give rise to a relationship of trust and confidence.

Where a fiduciary breaches their obligation of loyalty they are liable to: (i) pay damages to their principal in respect of any loss suffered by the principal in accordance with the Law on Damages and Remedies; and (ii) account to their principal for any benefit they have acquired in consequence of the breach.

Further, under the DIFC Companies Law, a director has the following duties:

- to act honestly, in good faith and lawfully with a view to the interests of the company;
- to act with care diligence and skill that a reasonably prudent person would exercise in comparable circumstances;
- to avoid conflicts of interest;
- to not use the company's property, information or opportunities for their own benefit unless approved by the company;
- a duty of confidentiality – to only use information obtained in confidence from the company for the benefit of the company and not for their own or anyone else's advantage.

Furthermore, under Article 149 of the DIFC Companies Law, a shareholder is able to seek a court order requiring the company to take an action or refrain from taking an action. Under Article 149(1)(c), this includes an order authorising proceedings to be brought in the name of an on behalf of the company by such person or persons and on such terms as the court may direct.

In the ADGM, a director has a duty:

- to act within their allocated powers;
- to promote the success of the company;
- to exercise independent judgment.

The ADGM Regulations provide for derivative claims which allow a member of the company to seek relief on behalf of the company and will be in relation to a cause of action arising from an actual or proposed act or omission involving default, negligence, breach of trust or breach of duty by a director of the company. This right is restricted to those eligible members holding 5% of the share capital.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

Criminal

The rules to facilitate joinder of overseas parties is provided for in Article 21 of the Penal Code, which provides for joinder in limited circumstances such as:

- crimes committed against the internal or external security of the state, or against its constitutional regime or its stocks and bonds issued under legal licence, or in connection with its stamps, or crimes of falsification or counterfeiting of its official documents or seals;
- crimes of falsifications, counterfeiting or forgery of money belonging to the state, no matter whether such acts are committed in or out of the state;
- crimes of falsification, counterfeiting or forgery of coined or paper money which is

legally in circulation in the state, or crimes of putting such money into circulation in the state or the possession thereof with the intention of putting it into circulation; and
- deliberate murder committed against a UAE citizen.

The Penal Code's provisions also apply outside the UAE, in the following instances:

- to a person who commits a bribery offence if either the offender or victim is a UAE citizen;
- if the crime is committed by an employee in the UAE public or private sector; or
- if it involves UAE public property.

Onshore – Civil Claims

This can be done both in DIFC/ADGM and onshore, although the latter is less common.

5. ENFORCEMENT

5.1 Methods of Enforcement

UAE Judgments

In order to enforce a UAE judgment, the claimant is required to start execution proceedings in the courts of the relevant emirate. The judgment has to be final and certified by the execution court.

The debt must be settled within 15 days. If the debtor fails to do so, a request can be made to the execution judge to enforce the judgment. Usually a UAE judgment is enforced in the form of an attachment order. The attachment could be to property, stocks, bonds, shares or real estate. Other methods of enforcement may include bankruptcy proceedings. However, debtors will usually appeal such judgments to achieve delay.

Process of Deputation

Enforcement for inter-emirate judgments (and previously the enforcement of DIFC court judgments and orders outside Dubai but in the UAE), has to be pursued through the process of "deputation" or "referral" as provided under Article 71 of Cabinet Decision No 57/2018.

Article 71 provides that the execution court shall refer the judgment or order to the execution judge for the area in which the judgment or order is sought to be enforced, and provide the latter with all the legal documents required for execution. The execution judge to whom the referral is made would then take all the decisions necessary to execute the referral and rule on procedural objections relating to the execution.

The execution judge who has carried out the execution shall inform the execution court which made the referral of what has happened and transfer any items or property received by them as if the execution judge to whom the matter has been referred finds legal reasons precluding the execution, they must notify the execution court.

Dubai and DIFC

In Dubai, there is a reciprocal protocol of enforcement between the courts of the DIFC and onshore Dubai, pursuant to which a judgment of the Dubai courts (or DIFC court) can, subject to certain procedural formalities being met, be enforced in the DIFC as if it were a DIFC court judgment (or enforced in the Dubai courts as if it were a Dubai court judgment).

Abu Dhabi and ADGM

In Abu Dhabi, a memorandum of understanding (MoU) with the Abu Dhabi Judicial Department and ADGM has been signed for the reciprocal enforcement of their judgments, decisions and orders.

MoU between DIFC/ADGM and Ras Al Khaimah

Similarly, an MoU between DIFC courts and Ras Al Khaimah courts and an MoU between Ras Al

Khaimah courts and ADGM courts for enforcement of judgments has been signed.

Bilateral and Multilateral Conventions

The UAE has entered into a number of treaties with other countries which govern the reciprocal enforcement of judgments. The most commonly used in the Middle East is the Riyadh Arab Convention for Judicial Cooperation of 1983 ("the Riyadh Convention") for enforcing foreign judgments and awards. The other commonly used treaty is the GCC Convention of 1996 which allows the recognition and enforcement of judgments and awards without any review of the merits. The other signatories to the GCC Convention are Bahrain, Saudi Arabia, Oman, Qatar and Kuwait.

The UAE has also entered into a number of international treaties for enforcement of judgments with Tunisia, France, India, Egypt, China and Kazakhstan, for example.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

Onshore UAE

In criminal and civil matters, there is no concept of privilege against self-incrimination. However there is a general right for the accused to remain silent when responding to allegations against them; as such, no inferences may be drawn if a defendant decides to remain silent.

DIFC and ADGM

In DIFC and ADGM, common law principles of privilege apply, including privilege against self-incrimination.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

Onshore UAE

Under the UAE Advocacy Law, a lawyer is not permitted to reveal a secret confided in them, or which comes to their knowledge through their profession, provided its revelation is not in order to prevent the perpetration of crime.

A lawyer may be criminally liable if they disclose confidential information obtained during the course of their services under the Penal code. Article 432 of the Penal Code prohibits the disclosure of confidential information by any person who by their profession is entrusted with a secret.

DIFC

In Practice Direction No 2 of 2009, DIFC Courts' Code of Professional Conduct for Legal Practitioners, it is provided that practitioners are required to keep information communicated to them by their client confidential unless such disclosure is authorised by the client, ordered by the court or required by law. This duty extends to all partners and employees of a practitioner and continues even after the practitioner has ceased to act for the client.

ADGM

Similarly, in the ADGM, there is a duty of confidentiality that is imposed on lawyers. Disclosure is only permitted if it is authorised by the client, ordered by the court or otherwise required by law as provided in the ADGM Courts Rules Of Conduct 2016.

In DIFC and ADGM, the common law principle that privilege may be lost if the communication or document in question came into being for the purpose of furthering a criminal or fraudulent design will apply. This is sometimes known as

"the fraud exception" or "the iniquity principle", which is founded on public policy.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

Onshore UAE and ADGM

The concepts of punitive damages and exemplary damages are not recognised by UAE law.

DIFC

In the DIFC, courts may order punitive damages when the defendant's conduct has been deliberate and particularly egregious. Article 40(2) of the DIFC Law of Damages and Remedies provides: "The Court may in its discretion on application of a claimant, and where warranted in the circumstances, award damages to an aggrieved party in an amount no greater than three (3) times the actual damages where it appears to the Court that the defendant's conduct producing actual damages was deliberate and particularly egregious or offensive."

7.2 Laws to Protect "Banking Secrecy"

Onshore UAE

Banking documents are confidential and disclosure without consent is likely to be unlawful. This is provided in Article 120 of the Central Bank and the Organisation of Financial Facilities and Activities Law which states that all data and information relating to customers' accounts, deposits, safe deposit boxes and trusts with licensed financial institutions – in addition to all relevant transactions with customers – shall be considered confidential in nature, and may not be made available or disclosed, directly or indirectly, to any third party without the written permission of the owner of the account or deposit, their lawyer or their authorised agent.

A court can order production where relevant to a claim in certain situations, as discussed in **2. Procedures and Trials**.

DIFC and ADGM

Similarly, in the DIFC and ADGM banking documents are confidential and disclosure without consent is likely to be unlawful. However, production can be ordered in certain circumstances as discussed in **2. Procedures and Trials**.

7.3 Crypto-assets

The UAE Central Bank does not currently recognise crypto-assets as legal tender.

Crypto-assets are regulated in the UAE under Securities and Commodities Authority Decision No 23/RM/2020 Concerning Crypto Assets Activities Regulation (CAAR).

- Crypto-assets are defined as records within an electronic network which function as mediums for exchange, units, representations of ownership, economic rights or access or utility rights, capable of being transferred electronically.
- The CAAR regulates the trade of crypto-assets and the licensing of companies carrying out financial activities related to crypto-assets, which attract enhanced anti-money laundering and monitoring obligations. For example, under Article 21 additional screening must be carried out where unverifiable geographical locations are used or the identity of users is designed to be hidden.
- It is a criminal offence to advertise or deal in crypto-currency without a licence, under Article 48 of the Cyber Crimes Law.
- The CAAR does not apply to state-issued crypto-assets or digital currencies that are already regulated by the UAE Central Bank.

In Dubai, Law No 4/2022 was issued on 11 March 2022 which will create the Dubai Virtual

Asset Regulation Authority with the aim of enabling and promoting the use of virtual assets in the emirate.

In the DIFC, the Dubai Financial Services Authority is proposing various steps to regulate the use of crypto-assets in the financial free zone, contained in a consultation paper released on 8 March 2022. In the ADGM, crypto-assets are regulated under the Financial Services and Markets Regulations 2015.

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Trends and Developments

Contributed by:
Stuart Paterson and Sophia Fothergill
Herbert Smith Freehills see p.465

Introduction

The last year has seen many interesting trends and developments in the realm of fraud and asset tracing in the United Arab Emirates (UAE), as a result of significant legislative reform implemented in celebration of the country's 50th anniversary, as well as global events such as the outbreak of conflict in Ukraine.

Fraud

A number of new laws were announced in the UAE in September 2021, largely coming into force in January 2022. This included a new Labour Law (Federal Decree Law No 33/2021) and Data Protection Law (Federal Decree Law No 45/2021) which introduced various new legal protections for individuals, but more importantly with respect to fraud and asset tracing, a new Penal Code (Federal Decree Law No 31/2021) and Cyber Crimes Law (Federal Decree Law No 34/2021). We have also seen new whistleblowing measures introduced at state level and in one of the UAE's commercial and financial free trade zones ("freezones").

Crime

Whilst many of the offences in the Cyber Crimes Law replicate those in the previous legislation (Federal Decree Law No 5/2012), Article 11 establishes a new crime relevant to fraud – that of fabricating emails, websites or electronic accounts which are falsely attributed to an individual or company. The penalties include a fine of between AED50,000 and AED2 million, imprisonment of at least two years where the fabrication causes harm to someone, and up to five years' imprisonment if a state institution is impersonated.

The Penal Code implements extensive reform to the criminal landscape in the UAE, such as in relation to pre-marital relationships and alcohol consumption. However, the offences relating to bribery and fraud mirror those in the previous law, Federal Law No 3/1987, demonstrating these were not deemed to be in need of amendment.

Also in the criminal sphere, in August 2021 it was announced that a new court would be established in Dubai to combat financial crime, specifically money laundering and terrorist financing. Any cases filed in the Dubai Court of First Instance or the Dubai Court of Appeal which appear to involve such crimes will be transferred to this new court, with specialist judges. This move sends a clear signal that Dubai is keen to combat financial crime.

Whistleblowing

There has also been a move towards encouraging whistleblowing disclosures and offering protections to those making them. At the federal level, in June 2021 the UAE Central Bank announced the introduction of a new whistleblowing mechanism which allows bank stakeholders and members of the public to submit concerns about a bank's employees, representatives or licensed entities via an online portal, by phone, in writing or in person. Its expressed aim was to avert "fraud and corruption" and protect reputations by ensuring information can be received and acted on quickly. This can be done anonymously if desired. Similarly, in April 2022, the UAE's Federal Tax Authority announced the launch of a new whistleblowing system for reporting suspected tax evasion or violations.

In the Dubai International Financial Centre (DIFC), for entities regulated by the Dubai Financial Services Authority (DFSA), a comprehensive new whistleblowing regime has been introduced following a consultation underway since July 2021. This came into effect on 7 April 2022, through amendments to the DIFC Regulatory Law (DIFC Law No 1/2004) and new Rules and Guidance contained in Section GEN 5.4 of the DFSA Rulebook.

Entities subject to this new regime will, for the first time, be required by law to establish whistleblowing policies and procedures, which must be in writing and reviewed periodically. The amendments to the DIFC Regulatory Law create a new Article 68A which protects individuals making qualifying disclosures from dismissal or any detrimental action by their employer, as well as from civil and contractual liability (but notably, not criminal liability).

One type of disclosure which qualifies for such protection is concerning a suspicion that a DFSA regulated entity or one of its employees has engaged in fraud or other financial crime, provided this is made in good faith. The new regime is therefore a clear step towards combating wrongdoing such as fraud within financial services firms in the DIFC.

Asset Tracing

Asset tracing in the UAE has historically been particularly difficult due to a number of factors. While major challenges still remain, steps have been taken in recent years which offer cause for optimism.

Key obstacles

Asset tracing is particularly challenging in the UAE, due in large part to its complex legal system. The UAE is made up of seven emirates ("onshore UAE"). Although the UAE's legal system is federal, each emirate also has its own legislative and administrative powers and, therefore, priorities. These differences can be exploited to make the identification of assets and their recovery more difficult.

The UAE is also home to various freezones which allow businesses in specified industries to operate with greater freedom than those established elsewhere; the most significant freezones are the DIFC and the Abu Dhabi Global Market (ADGM). Although many onshore UAE laws apply, the freezones also have separate regulations, and the DIFC and AGDM have their own entirely independent systems of law, based on English law (in contrast to the civil law regime which applies in onshore UAE). In addition, there are large trading freezones such as Jebel Ali Freezone – a port-based freezone and the home of a wide range of companies and commercial activity connected to the transportation, processing and trans-shipment of goods. The freezones typically afford a high level of privacy to their users, such that funds that are transferred to companies within them may be very difficult to trace.

Public registers

As part of the recent legislative overhaul discussed above, a new Commercial Register and Economic Register are being established under Federal Decree Law No 37/2021, which will come into force six months after the awaited accompanying Implementing Regulations. This law will unify the various registers of companies which currently exist across the emirates and regulatory bodies of the UAE, with the exception of the DIFC and the AGDM. This is potentially a significant step forward in fighting fraud and other crime in the UAE.

Companies will need to be registered on the Commercial Register, which will include various information such as the identity of shareholders, details of security registered against a company's assets and decisions of any bank-

ruptcy filings against a company. The Economic Register will be maintained by the Ministry of Economy and will contain the same information as the Commercial Register, as well as additional information to be specified in the Implementing Regulations – perhaps, for example, audited accounts or tax registrations.

Importantly, certain information contained in the registers will be publicly available, making it much easier to gather information to assist in recovering assets.

Assistance available from courts

The civil law courts of onshore UAE are not as familiar with the types of relief that are often sought in common law courts in aid of asset tracing. Interim remedies such as precautionary attachment orders are available, but traditional common law interim remedies such as freezing orders, search orders or asset/information disclosure orders are not (outside of the DIFC and ADGM).

The DIFC has separate courts to the onshore UAE courts. These courts are modelled on English and other common law courts and are served by Emirati and international judges with common law experience. The DIFC also enjoys a codified, English language commercial legal system based on English law, although with some important differences such as the inclusion of an obligation to act in good faith in contractual matters. The DIFC courts are therefore an attractive forum for many international parties who do business in the region and who are less familiar with (and less confident in dealing with) the Arabic language civil law courts in onshore UAE.

In order to support the introduction of the DIFC and its courts into the Dubai legal system, a protocol was put in place which provides for the automatic mutual recognition and enforcement of Dubai court and DIFC court judgments, without review of the merits.

This system works well in regard to domestic DIFC–Dubai court matters. However, the arrangement has been used by foreign judgment creditors as well. Such creditors would bring their judgment to the DIFC court for ratification and then seek to enforce the DIFC court ratification order (rather than the original foreign judgment directly) in the Dubai courts. There was initially a perception that this would make ultimate enforcement more straightforward as the onshore courts would not scrutinise the DIFC court order in the same way as the foreign judgment, and dealing with the DIFC court would be a familiar and less challenging experience for a foreign judgment creditor. This worked for a while and gave foreign parties greater confidence in the UAE as a place where foreign judgments could, in both theory and in practice, be readily enforced.

However, this approach was often taken in circumstances where there were no assets in the DIFC against which the judgment creditor could enforce, and no other nexus existed to the DIFC. The strategy of using the DIFC court to circumvent the onshore court's review of the judgment it was being asked to enforce therefore started to attract criticism. These cases were known as "conduit jurisdiction" cases.

In 2016, the Ruler of Dubai established a special tribunal to decide issues of jurisdiction between Dubai and the DIFC courts. Now, after a long line of decisions, the use of the DIFC courts as a "conduit jurisdiction" to enforce foreign judgments in onshore Dubai/UAE has been significantly curtailed. There still remains an element of uncertainty as to the circumstances in which the DIFC courts may have a role to play in respect of the enforcement of foreign judgments absent a substantive connection to the DIFC, but the

overall trend is clear – if the asset in question is not in the DIFC, a creditor must go directly to the onshore UAE courts. This inevitably acts as a deterrent to the asset-tracer, given the more limited range of court remedies available and the perceived challenges of dealing with an Arabic language court that is much less familiar to international parties.

It is also important to note that the UAE is a party to a small number of international treaties which provide for mutual co-operation and assistance in legal matters, as well as for the enforcement of judgments. For example, the UAE is party to the Riyadh Convention, the GCC Convention and individual treaties with countries such as China, India and France. Extending the range of treaties would be valuable in assisting with asset-tracing and enforcement.

Recent Trends

Money laundering

Despite the new measures relating to financial crime and money laundering outlined above, on 4 March 2022 the Financial Action Task Force (FATF) added the UAE to its "grey list" of jurisdictions under increased monitoring. The FATF is an inter-governmental money laundering and terrorist financing watchdog which sets international standards implemented in several countries and jurisdictions.

The inclusion of the UAE on this list will create an additional compliance burden for financial institutions and professional services firms doing business with companies established in the UAE, due to the likely need to increase due diligence and monitoring. The UAE has, however, committed to implementing reform in order to be removed from the grey list, and we expect to see increased investigations and prosecutions in the coming year in this regard.

Crypto-currencies

The recent increase in use of crypto-currencies in the UAE, encouraged through changes to the legal landscape, is likely to lead to an increase in financial crime. This is because crypto-currencies typically offer anonymity and easier cross-border transfers which can evade international regulation.

One such legal change in the last year is Dubai Law No 4/2022, issued on 11 March 2022, which establishes a Dubai Virtual Asset Regulation Authority. A number of its expressed aims contained in Article 5 relate to the promotion of crypto-assets within the Emirate, for example "improving the Emirate's position as a regional and global destination in the field of virtual assets" and "attracting investments and companies" operating in that field. In order to mitigate the inevitable increased risk associated with this promotion, the law also has stated aims relating to increased regulation, such as "protecting investors and dealers in virtual assets" and providing the necessary "systems, rules and standards necessary" for doing so.

Extradition

The UAE has extradited several high-profile alleged criminals, including in the absence of a treaty with the requesting state. This approach indicates an increased level of cross-border co-operation to bring serious criminals to justice, and may help to make the UAE a less attractive place for criminals to move to in the hope of evading law enforcement authorities elsewhere.

International transfers

As a result of sanctions imposed by many countries across the globe following the conflict breaking out in Ukraine in early 2022, financial institutions have in many cases refused to service transfers of money from Russian clients. This has led to an increased use of illegal hawala money exchange operations in the UAE.

Hawala is a traditional money transfer system which is particularly vulnerable to financial crime, whereby money is paid to an agent who in turn instructs an associate in the relevant jurisdiction to provide the funds to the final recipient. The UAE Central Bank has been driving registration and reporting of hawala operators – however, in the wake of the Ukraine conflict, the system has reportedly been increasingly used by Russian clients to import cash into the UAE. Due to the nature of hawala, it is difficult to identify when these transfers are taking place, but greater scrutiny of the sources of funds in transactions such as real estate purchases, and the increased investigations expected as a result of the FATF grey listing, may help to combat this practice.

Conclusion

Overall, the last year has shown that the UAE is committed to becoming a more regulated jurisdiction, with clear frameworks being put in place to combat fraud and improve the ability to trace assets. The country has entered an ambitious period of reform, and over the next 12 months it will be interesting to observe how patterns of business and investment transform as this is recognised globally.

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

In the United States, fraud claims can be brought under federal or state law, by federal or state prosecutors when criminal in nature, or by private litigants when civil in nature. Although there are similarities between federal and state law, there is no uniform law governing fraud claims, and no single entity is responsible for enforcement. Generally, both federal and state law allow a private litigant to pursue fraud claims when one party deliberately deceives another party for some financial advantage or benefit, causing harm to the other party in the process.

Elements of Fraud

Generally, a civil fraud claim brought pursuant to US federal or state law must allege:

- a false statement or omission of material fact;
- the intent to deceive;
- justifiable reliance by the victim on the false statement or omission; and
- harm or injury to the victim as a result.

The specific elements of a fraud claim may vary by jurisdiction and by the specific type of fraud alleged.

In general, fraud claims are subject to a heightened pleading standard, meaning that the specific allegations of fraud – who, what, where and when – must be described "with particularity" in the civil complaint that initiates a private lawsuit.

Who May Bring a Fraud Claim

Criminal

Federal prosecutors with the US Department of Justice (DOJ) and state and local prosecutors bring criminal charges against defendants who engage in fraud. Federal prosecutors commonly charge defendants in a variety of financial fraud schemes, including bank fraud, government contracting fraud, healthcare fraud, mortgage fraud, tax fraud, embezzlement and misappropriation, bribery, and corrupt payments to foreign officials.

Private litigants cannot directly prosecute criminal charges but may help initiate criminal investigations by reporting fraud to law enforcement. Private litigants who act as whistle-blowers and bring certain information regarding fraud and corruption to the attention of law enforcement may also recover a percentage of any settlement or financial penalty resulting from the investigation or prosecution.

Civil

Federal prosecutors in the DOJ are also responsible for investigating and litigating civil fraud claims brought on behalf of the federal government. State and local prosecutors also pursue civil fraud claims on behalf of their local governments and citizens.

Private litigants may also bring civil fraud claims in lawsuits filed in federal or state court, depending on the circumstances, and allege fraud based on federal or state law. Some of the specific types of fraud claims are addressed more fully below.

Fraudulent Misrepresentation/False Statements

Fraudulent misrepresentation – fraud arising from a false statement – is the offense commonly understood to be a claim for fraud. To state a claim for fraudulent misrepresentation, and using New York law as an example, a plaintiff must allege that:

- the defendant made a false statement of material fact;
- the defendant knew the statement was false;

- the false statement was made for the purpose of inducing the plaintiff to rely on it;
- the plaintiff was reasonable in relying on the false statement; and
- the plaintiff was injured as a result of relying on the false statement.

A plaintiff must also have taken reasonable steps to protect itself against reliance on false statements. In other words, a plaintiff must exercise due diligence in discovering the fraud. Only where the plaintiff is justified in relying on the false statement can it succeed in such a claim.

False Claims

Another form of fraud arises under the False Claims Act (31 USC §§3729–3733 – FCA), which is a federal statute that is often invoked in the context of government contractor fraud. The FCA provides that any person who knowingly submits a false claim for payment to the government is liable for double the government's damages plus a penalty for each false claim. While the FCA allows the United States government to institute actions alleging such claims, it also allows private whistle-blowers to bring lawsuits on the government's behalf against those who have defrauded the government. These are called "qui tam" suits. The whistle-blower may receive a percentage of any funds recovered.

Corrupt Payments

The Foreign Corrupt Practices Act of 1977 (15 USC §§78dd-1, et seq – FCPA) makes it unlawful for certain people and entities to make payments to foreign officials in order to obtain or retain business. While the FCPA is widely known for its criminal provisions, it also provides for civil enforcement actions.

Only the DOJ has authority to pursue criminal actions under the FCPA, but both the DOJ and the US Securities and Exchange Commission (SEC) have civil enforcement authority. The DOJ and SEC routinely co-operate in parallel criminal and civil investigations of FCPA violations. The DOJ and SEC also bring civil lawsuits for violations of the FCPA against companies and individuals who aided and abetted or recklessly provided substantial assistance to an FCPA violator.

In most US jurisdictions, there is no express private cause of action for giving or receiving corrupt payments. Nonetheless, allegations that an individual or entity received or provided corrupt payments may help to establish fraudulent intent in a civil lawsuit.

Conspiracy to Commit Fraud

Under both federal and state law, a conspiracy is an agreement between two or more people to commit an illegal act. To prove a conspiracy to commit fraud under federal law, a party must establish the elements of conspiracy and its underlying fraudulent purpose.

The typical elements of a conspiracy to commit fraud are:

- an agreement between two or more people to commit a fraudulent act;
- an overt act in furtherance of the conspiracy; and
- damages or injury resulting from the overt act.

A victim of a conspiracy may sue and recover damages from each participant involved in the conspiracy, regardless of the participant's level of participation. A civil conspiracy claim allows a victim to pursue participants in the conspiracy who may have more funds or higher insurance policy limits, even if those participants played a minor role in the conspiracy.

Misappropriation

Misappropriation is the intentional use of another person's funds for unauthorised purposes. Misappropriation most commonly refers to situ-

ations in which the defendant was in a position of trust or a fiduciary, such as a trustee of a trust or an administrator of an estate.

1.2 Causes of Action after Receipt of a Bribe

If a party comes to the unfortunate realisation that its agent has accepted a bribe, it may pursue certain civil claims against its agent as the recipient of the bribe, as well as the payor of the bribe.

For example, if a US corporation learns that its CEO has accepted bribes from a vendor in exchange for steering contracts to that vendor, it may file suit against its CEO and the vendor. It could allege claims for fraud or fraudulent misrepresentation, conspiracy to commit fraud, breach of fiduciary duty, or inducement to breach fiduciary duty, among others.

Civil Causes of Action: State

While there is no express private right of action under most federal and state anti-bribery statutes, many states recognise a civil cause of action for fraud based on bribery-related allegations.

Civil Causes of Action: Federal

Federal law does not establish a general private right of action for bribery. Private litigants may file suit under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (18 USC §1964 – RICO) if the bribe payments were made as part of a pattern of "racketeering activity". If the bribery was part of a scheme to induce anti-competitive conduct such as price-fixing, a private litigant may sue under the Clayton Act (15 USC §13(c)). RICO and the Clayton Act provide for treble damages and attorney's fees to successful plaintiffs. Most often, however, businesses injured by bribery sue for damages using common law fraud claims.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Under most state laws, facilitating or assisting the commission of fraud gives rise to an independent cause of action for aiding and abetting fraud. The typical elements of a claim for aiding and abetting fraud are:

- an underlying fraud;
- the defendant's knowledge of that fraud; and
- the defendant's substantial assistance in the achievement of the fraud.

Actual Knowledge

Allegations that the defendant should have known about the fraud are not enough. Instead, state law typically requires the plaintiff to show actual knowledge of the fraud.

Substantial Assistance

To succeed with an aiding and abetting claim, the plaintiff must also show that the defendant provided substantial assistance. Substantial assistance exists where the defendant takes an affirmative action that allows the fraud to proceed, and that action proximately causes the harm alleged. Providing routine business services for an alleged fraudster ordinarily does not constitute substantial assistance.

Examples

In one case, the plaintiff, a business investor, sued a bank that allowed its customer to deposit USD750,000 he stole from the plaintiff. The customer defrauded the plaintiff in a scheme involving the deposit of funds into an escrow account at the bank, which the customer claimed would be used to secure loans from other banking institutions and underwriters. The bank's vice president allowed the customer to name the account an escrow account even though the procedures for setting up an escrow account were not followed. The vice president wrote a letter on the bank's letterhead, falsely inflating

the account balance. The customer also paid the vice president USD100,000 for his assistance. Under these facts, the court found that the bank's inaction was sufficient to show "substantial assistance" to state a claim for aiding and abetting fraud because banks have a duty to safeguard deposited funds when confronted with clear evidence that those funds are being mishandled.

In another instance, a court found that the plaintiff failed to state a claim for aiding and abetting fraud where a bank allowed its customer, the perpetrator of a Ponzi scheme, to transfer funds between various accounts. The court held that allowing a customer to transfer funds was a routine business service and not "substantial assistance".

1.4 Limitation Periods

Each state in the United States has its own statute of limitations for fraud, ranging anywhere from two to six years. Under New York law, an action for fraud must be commenced either within six years of the date of the alleged fraud, or within two years of the date the plaintiff discovered the fraud or could with reasonable diligence have discovered it.

Federal law also imposes limitation periods that vary by statute. For example, the Securities Exchange Act of 1934 (15 USC §§78a et seq) requires that an action be brought two years after the discovery of the fraud, or five years after the fraud occurred, whichever is earlier.

1.5 Proprietary Claims against Property

In general, a plaintiff who obtains a judgment for fraud against a defendant is on par with other unsecured creditors and does not have any special priority over the defendant's assets. In addition, a plaintiff in a civil action normally cannot recover proceeds of fraud beyond the damages it suffered. Where the government has instituted a civil or criminal action for fraud, a defendant may be required to disgorge the proceeds of the alleged fraud. Those funds may be used as restitution to compensate victims.

Where the entity or individual alleged to have engaged in fraud is insolvent, different rules govern. For example, dozens of states have enacted the Uniform Fraudulent Transfer Act (UFTA), now known as the Uniform Voidable Transactions Act (UVTA), which permits creditors to void a debtor's transaction when the debtor engaged in a transaction with the intent to defraud a creditor, or when the debtor made a transfer without receiving "reasonably equivalent value" in certain circumstances. The US Bankruptcy Code also provides recourse to creditors seeking to avoid fraudulent transfers.

Under those laws, a victim of fraud may, in some instances, take priority over other creditors seeking to recover from the fraudulent actor. For example, under federal bankruptcy law, a trustee may avoid a transfer of a debtor made with the intention to defraud a creditor so long as the transfer occurred within the two years prior to the debtor's bankruptcy filing. Either the trustee or an individual creditor may bring an action seeking to avoid the fraudulent transfer. If a fraudulent conveyance is shown, the creditor will be able to claw back the portion of the fraudulent transaction that satisfies its individual claim.

The preference or priority of a fraud victim may depend on whether the property it seeks to claw back is traceable or identifiable. In many instances, the victim of fraud does not take priority over other creditors.

A victim of fraud may also bring other claims arising out of the fraud to recoup lost property or damages. Those claims include unjust enrichment or conversion, for example.

Unjust Enrichment

An action for unjust enrichment allows a plaintiff to try to recoup a benefit that was wrongfully retained by a fraudulent party. Although the elements differ slightly from jurisdiction to jurisdiction, in general a plaintiff must prove that:

- there was a benefit conferred on the defendant;
- the defendant was aware of the benefit; and
- acceptance or retention by the defendant of the benefit would be inequitable under the circumstances.

A claim for unjust enrichment sounds in equity. An essential inquiry is whether it is against equity to allow the defendant to retain what is sought to be recovered.

Conversion

Where a fraudster has intentionally and without authority taken personal property belonging to someone else, the owner may allege a claim for conversion to have the property returned. The plaintiff must allege that:

- the property taken is a specific, identifiable thing;
- the plaintiff owned, possessed or had control over the property before it was taken; and
- the defendant now has unauthorised control over the property.

Although exceptions exist, generally an action for conversion can only proceed where the property taken is tangible – for example, a bond, promissory note, check, deed or manuscript. In some instances, an action for conversion of money may be brought where it relates to specifically identified funds.

1.6 Rules of Pre-action Conduct

No specific rules of pre-action conduct apply in relation to fraud claims. Certain related claims, such as conversion, require the plaintiff to make a demand on the defendant for the return of the property. In general, however, there are no set requirements of pre-action conduct prior to the filing of a claim for fraud.

1.7 Prevention of Defendants Dissipating or Secreting Assets

A victim of fraud has several options to prevent a defendant from dissipating or secreting assets prior to a judgment. Depending on the underlying cause of action, a fraud victim may be able to obtain a preliminary injunction or restraining order preventing the pre-judgment dissipation of assets. A plaintiff may also be able to obtain a pre-judgment attachment order under state law.

Fees for filing such motions vary from jurisdiction to jurisdiction. In addition, the plaintiff must often post security when seeking to restrain assets prior to judgment. The amount of security is typically within the discretion of the court and may vary with the amount restrained.

Federal Relief

Under Rule 65 of the Federal Rules of Civil Procedure, a plaintiff may move for a preliminary injunction or temporary restraining order to restrain a fraudster from dissipating assets. These are in personam remedies that operate against the defendant and, in some circumstances, third parties acting in concert with the defendant.

Where the plaintiff seeks only a general award of money damages, neither a preliminary injunction nor a temporary restraining order is available. The US Supreme Court has held that a federal court may not issue a preliminary injunction preventing defendants from disposing of their assets pending adjudication of a claim for money damages. By contrast, where a plaintiff seeks equitable relief such as the return of spe-

cifically identified property, those pre-judgment restraints may be available.

A plaintiff seeking a preliminary injunction or temporary restraining order may make a motion ex parte against the defendant, but faces a high bar in doing so. A party seeking a preliminary injunction or temporary restraining order must show:

- the likelihood of success on the merits of the underlying action;
- that there would be irreparable harm without the injunction; and
- a balance of interests that favours the movant.

Federal courts have found preliminary injunctions appropriate where the defendant intends to frustrate the judgment by transferring assets out of the jurisdiction.

State Relief

Different states provide different mechanisms to prevent the dissipation of assets. Most states provide procedures for pre-judgment attachment. Under New York law, for example, an order of attachment may be granted in certain circumstances where the plaintiff shows it is entitled to a money judgment and the defendant has taken steps to dispose of or secrete property to frustrate the judgment. Attachment orders may operate either in personam or in rem, depending on the circumstances.

Mere allegations of fraud do not justify pre-judgment attachment. Instead, the plaintiff must present evidence of intent to defraud.

Failure to Abide by Injunction or Attachment

If a defendant fails to abide by a preliminary injunction, temporary restraining order or pre-judgment attachment, the plaintiff may move for an order holding the defendant in contempt. A contempt order may include a requirement for the defendant to pay a fine for failing to abide by the court's prior order.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

Federal Rule of Civil Procedure 26 allows parties to obtain discovery "regarding any matter, not privileged, that is relevant to the claim or defense of any party." The US Supreme Court has liberally construed this standard to encompass any matter that could reasonably bear on any issue that is or may be in the case. To the extent a party's financial information relates to specific elements of a claim or defense, a defendant may be required to disclose his or her assets. A plaintiff may seek discovery through both the production of documents and the provision of testimony at a deposition.

Ordinarily, a party seeks asset discovery from the defendant or from third parties once the court has entered judgment on the claim. In those circumstances, the plaintiff has broad rights to seek discovery without any prior approval from the court, and may even seek discovery of assets located in other jurisdictions.

Courts also have discretion to permit asset discovery even before judgment. Typically, a plaintiff seeking pre-judgment asset discovery has filed a motion for preliminary injunction or sought pre-judgment attachment and is seeking asset discovery in aid of that motion. Discovery seeking asset disclosure ordinarily does not require an undertaking by the claimant.

If the defendant fails to respond to discovery demands, the plaintiff must first attempt to resolve the issue by conferring with the defendant. It may then file a motion to compel under

Federal Rule of Civil Procedure 37(a). If the court grants the motion to compel but the defendant still refuses to produce the discovery, the plaintiff may then seek sanctions, which may include significant daily fines until the defendant complies.

2.2 Preserving Evidence

Under US law, the duty to preserve evidence exists independent of a court order directing such preservation. Federal Rule of Civil Procedure 37(e) imposes a duty on a party to preserve evidence from the time litigation can reasonably be anticipated. Often, once litigation is reasonably anticipated, a party will issue what is known as a "litigation hold" to custodians who may have relevant documents.

If a party fears that evidence may be destroyed or suppressed despite the obligation to preserve it, the party may move for a preservation order. It must demonstrate that the order is necessary and not unduly burdensome. First, the movant must show that without a court order there is a risk that relevant evidence will be lost or destroyed. This is often shown by demonstrating that the opposing party has previously destroyed evidence or has inadequate retention policies. Second, the movant must also show that the proposed preservation steps will be effective but not overly broad.

In general, courts are not inclined to wade into discovery disputes between parties. However, where necessary and upon the requisite showing, courts will order relief.

Courts in the United States are not likely to allow a physical search of an opposing party's documents by another party. Generally, parties and their attorneys are responsible for collecting and disclosing relevant documents. If there is a dispute as to whether certain documents are relevant and required to be disclosed, a court may order that they be reviewed in camera by the court.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

Subject to certain requirements, a party may serve a subpoena upon a non-party commanding the production of documents or the provision of testimony at a deposition. Courts are sensitive to non-party discovery and seek to balance the burden placed on non-parties with the need for the requested documents or testimony. Courts will quash or modify a subpoena to a non-party if it imposes an undue burden or expense.

Whether a subpoena imposes an undue burden is decided on a case-by-case basis and involves a number of factors, including:

- the relevance of the requested information;
- the requesting party's need for the documents;
- the breadth of the request;
- the time period covered by the request;
- the particularity with which the documents are described;
- the burden imposed; and
- the recipient's status as a non-party.

Although the court considers all of these factors in determining whether a subpoena is overly burdensome, successful challenges to a subpoena often focus on the breadth of the request. In requesting documents from a third party, it is therefore advisable to narrowly tailor the request so it is not quashed or modified on grounds of overbreadth.

In many cases, a protective order will govern how documents may be used and with whom they may be shared. Typically, those orders limit the use of documents to the litigation at issue, although they may also permit use of the documents in related foreign proceedings.

Pre-litigation Discovery

Under Federal Rule of Civil Procedure 27, before an action is filed, a party may petition the court to "perpetuate testimony about any matter." The petition must show:

- that the petitioner expects to be a party to litigation but cannot presently bring such an action;
- that the court in which the petition is filed has jurisdiction over the possible action;
- the facts the petitioner hopes to establish by the proposed testimony and the reasons to perpetuate it;
- the names and addresses of whom the petitioner expects to be adverse parties; and
- the name, address and expected substance of the testimony of each deponent.

Because the primary purpose of Rule 27 is to preserve evidence that is otherwise likely to be lost, most courts have not permitted Rule 27 to be used as a fact-finding tool.

Many states also have pre-litigation discovery rules, some of which are broader or narrower than the federal rule. In New York, CPLR Rule 3102(c) provides that, before an action is commenced, disclosure to aid in bringing an action or to preserve information may be obtained by court order. Despite the seemingly broad language, courts in New York have interpreted the rule narrowly to allow for discovery only where a putative plaintiff needs to obtain the identity of a necessary party or where pre-litigation discovery is needed to preserve evidence. New York courts have rejected pre-litigation discovery where it was sought to uncover proof of an intended cause of action or to determine if that cause of action might exist.

2.4 Procedural Orders

In general, motions made without notice to an adverse party are disfavoured, and are appropriate only in a narrow set of circumstances. These include instances of urgency, such as where immediate and irreparable loss will result before the adverse party can be heard to oppose a motion, or where there is a danger that notice to an adverse party will result in that party's flight, the destruction of evidence or the secretion of assets.

Certain types of motions, such as preliminary injunctions or temporary restraining orders, better lend themselves to being filed ex parte, as the relief requested may concern an opposing party's destruction of evidence or secretion of assets. Nevertheless, in filing a motion ex parte, counsel should be aware of the additional hurdles necessary to justify granting relief without notice to the opposing party.

2.5 Criminal Redress

In the United States, the DOJ and state prosecutors are responsible for prosecuting criminal cases. While victims of fraud may inform the relevant investigating bodies – such as the FBI or state investigators – of possible fraud, there is no formal method for victims to commence a criminal action.

Parallel proceedings may occur if the government has instituted criminal proceedings at the same time as a civil proceeding, or vice versa. Civil and criminal litigation have different discovery rules, leading to questions about what kind of discovery can be used in which matter. A court may also stay one action until the conclusion of the other. Because of the rules governing criminal prosecutions, it is extremely unlikely that a criminal case would be paused to allow for the continuance of a civil case, so stays in parallel proceedings generally concern civil cases.

Whether a stay of civil proceedings is appropriate turns on the particular circumstances of the case. A civil case may be stayed where continu-

ing would result in undue prejudice or a substantial interference with a defendant's constitutional rights. The mere existence of a criminal case will not automatically stay a civil proceeding; the civil case will only be stayed if there are unreasonable conflicts between the parallel proceedings.

2.6 Judgment without Trial

Where a defendant fails to appear within the required time or fails to answer a complaint, a plaintiff may seek a default judgment, which is a binding judgment in favour of the plaintiff and does not require a trial. The default judgment may be set aside by the court in limited circumstances, such as where the defendant was not given proper notice of the proceeding.

A plaintiff may move for summary judgment prior to trial. If the plaintiff can show there is no genuine dispute as to any material fact and the plaintiff is entitled to judgment as a matter of law, the court will grant summary judgment in favour of the plaintiff without a trial. A motion for summary judgment may ordinarily be filed at any time until 30 days after the close of discovery.

2.7 Rules for Pleading Fraud

As discussed in **1.1 General Characteristics of Fraud Claims**, claims sounding in fraud are subject to a heightened pleading standard. Federal Rule of Civil Procedure 9(b) requires allegations of fraud to "state with particularity the circumstances constituting" the fraud. State rules generally impose a similar heightened pleading requirement.

Fraud claims therefore require more detail than other types of claims. Merely alleging that some type of fraud took place is not enough – the allegations must be supported by particular details describing the fraud.

2.8 Claims against "Unknown" Fraudsters

A plaintiff can sue "John Doe" or "Jane Doe" defendants for fraud. These fictitious defendants are persons that cannot be identified by the plaintiff before a lawsuit is filed. Given that the statute of limitations for fraud can be short, a litigant is under a certain amount of pressure to file a claim, even if all the alleged fraudsters are not known at the time of filing.

Generally, filing a claim against a fictitious defendant tolls the statute of limitations. The plaintiff may later substitute the name of the true defendant for the fictitious defendant once that information is known. Once the complaint is filed, however, a plaintiff must work quickly to determine the true identity of the fraudsters. If the plaintiff's delay in doing so is unreasonable, the court may not allow amendment of the complaint, and any claim may become barred by the statute of limitations.

2.9 Compelling Witnesses to Give Evidence

A party may serve a subpoena on a non-party, compelling him or her to testify or produce documents or other evidence, either before or at trial. If a witness defies the subpoena, including by refusing to give testimony or produce documents, he or she can be held in contempt.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Under US law, corporations that commit fraud may be held liable in the same manner as an individual who committed fraud. The doctrine of respondeat superior is applicable to corpora-

tions, so a corporation can be held criminally and civilly liable for actions taken by its employees or agents – including its officers or directors – as long as the action occurs within the scope of the employee's employment and is for the benefit of the corporation. This rule reflects the basic idea that a corporation can only act through its employees and agents.

A corporation is not liable, however, for fraudulent acts of an officer, agent or employee taken outside the scope of the person's employment, unless they were ratified by the corporation. Likewise, if a fraudulent action was taken solely to benefit the individual and not the corporation, the corporation ordinarily will not be held liable.

3.2 Claims against Ultimate Beneficial Owners

A fundamental tenet of US corporate law is that a company – which includes not only corporations, but also limited liability companies and limited liability partnerships – is separate and distinct from its owners. The corporate form was created to allow shareholders and owners to invest without incurring personal liability for actions taken by the corporate entity.

In certain instances, however, courts may exercise the equitable doctrine known as "piercing the corporate veil" to disregard the separation between entity and individual, and hold the owners liable for the actions of the company. The doctrine of piercing the corporate veil is rarely invoked and applies only in exceptional circumstances, including cases where the corporate form was abused to effect fraud or injustice.

Claims seeking to pierce the corporate veil and hold individuals liable for the actions of the company are governed by the law of the state of incorporation. Most jurisdictions have recognised multi-factor tests that must be met to determine if veil-piercing is appropriate.

Under New York law, a plaintiff seeking to pierce the corporate veil must show that the owners exercised complete domination over the corporation with respect to the complained-of transaction or action, and that such domination was used to commit a fraud or wrong against the plaintiff that resulted in injury. The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene.

3.3 Shareholders' Claims against Fraudulent Directors

A shareholder derivative action is a lawsuit brought by a shareholder, or group of shareholders, on behalf of a corporation. Shareholder derivative actions allow individual shareholders to bring a lawsuit to enforce a corporate cause of action against officers, directors or third parties. Generally, a shareholder can only bring a suit on behalf of a corporation when the corporation itself has refused to bring a valid cause of action, unless the shareholder can show adequate grounds for not demanding action from the corporation first. This most frequently occurs when the defendants are corporate directors or officers. If a derivative action is successful, any damages or proceeds go to the corporation and not directly to the shareholder who brought the lawsuit.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

The Federal Rules of Civil Procedure allow for flexibility in pursuing fraud claims against multiple parties, including those outside the United States, as long as jurisdictional requirements are

met and the party is properly served. Indeed, where an absent party holds a significant interest in the case, joinder of the party may be required.

Jurisdiction

A US court may exercise jurisdiction over a person or company located outside the relevant state only if it has personal jurisdiction over that person. State statutes known as "long-arm" statutes prescribe the circumstances where a court may exercise jurisdiction over a foreign person or company. For example, New York's statute permits jurisdiction where:

- the claim arises out of the defendant's transaction of business in the state or a contract to supply goods or services in the state;
- the defendant commits a fraud or other tort within the state;
- the defendant commits a fraud or other tort outside the state that harms someone in the state, and other requirements are met; or
- the claim arises out of the defendant's real property in the state.

Federal courts may exercise personal jurisdiction when authorised by the applicable state long-arm statute and in certain other cases.

In addition to satisfying statutory requirements, the plaintiff must show that exercising jurisdiction is consistent with constitutional due process. The Due Process Clause generally requires that the defendant have certain minimum contacts with the state relating to the underlying controversy, and that exercising jurisdiction would not offend the traditional notions of fair play and substantial justice.

Service

Plaintiffs seeking to join overseas parties must comply with the service of process requirements. Federal Rule of Civil Procedure 4(f) provides for service upon an individual outside the United States pursuant to the Hague Service Convention or another internationally agreed means of service. Where there is no such service treaty between the United States and the foreign country, Rule 4(f) requires that service be "reasonably calculated to give notice" of the suit by one of the following means.

- As the foreign country's law prescribes.
- As the foreign authority directs in response to a letter rogatory.
- Unless prohibited by the foreign country's law, by:
  (a) personal delivery;
  (b) mail sent by the court clerk, return receipt; or
  (c) other means ordered by the court.

If a party maintains a presence in multiple countries, it may make sense to choose the country in which to effect service based on the ease of satisfying the applicable service requirements for that country.

Permissive Joinder

Rule 20 of the Federal Rules of Civil Procedure allows for the joinder of additional parties after the litigation has begun, as long as the claims relating to the party arose from the same transaction or occurrence and involve common questions of law or fact. Under Rule 14, a defendant may implead an absent third party who may be liable to the defendant for the plaintiff's claim. Finally, other interested parties may intervene in the action under Rule 24.

Required Joinder

Federal Rule of Civil Procedure 19 may require the joinder of other parties to the case. That rule serves to protect the interests of absent parties, and also protects the parties from being sued in multiple jurisdictions.

Courts consider a number of factors in determining whether an absent party should be joined in the action, and the effects of not joining the party if doing so is impossible or impractical. For example, a court considers:

- whether the party's absence would prevent complete relief among the existing parties;
- whether the party claims an interest relating to the subject of the lawsuit and is situated in a way that the party's absence would prevent that party from protecting that interest; and
- whether failure to join the party may expose another party to multiple or inconsistent obligations.

If the court is unable to join a foreign required party – for example, because it lacks jurisdiction – it might be required to dismiss the action.

5. ENFORCEMENT

5.1 Methods of Enforcement

Once the plaintiff obtains a judgment in a fraud action, the plaintiff may seek to execute the judgment against the defendant's assets in several ways. Execution procedures vary from state to state. Federal courts follow the state law procedures of the state where they are located.

In New York, for example, a party with a judgment may serve restraining notices on the defendant or other parties with custody of the defendant's assets. Those notices have the effect of freezing assets while the plaintiff pursues further execution procedures. Parties may serve those notices without any prior approval from the court.

A plaintiff then executes against the assets by arranging for the marshal or sheriff to serve a writ of execution on the party with custody of the assets. The same process may be used to collect a debt that a third party owes to the judgment-debtor in satisfaction of the judgment. If the custodian refuses to turn over the property, the plaintiff may file a "turnover" action asking the court to order the custodian to comply.

In New York, a plaintiff may file a turnover action against a third-party custodian of property even if the property itself is located outside the United States. Because a turnover proceeding is an in personam proceeding against the custodian, New York requires only that the custodian itself be subject to the court's jurisdiction. Other states are divided on whether they permit extraterritorial turnover actions.

As noted in **2.1 Disclosure of Defendants' Assets**, after the plaintiff obtains a judgment, United States law permits liberal discovery into the judgment-debtor's assets, even those located overseas. Asset discovery is therefore a major component of most post-judgment collection efforts.

Enforcement of Foreign Judgments

Where a plaintiff holds a foreign judgment against a defendant, the plaintiff must obtain recognition of the judgment in the United States before seeking to execute it. Unlike with arbitral awards, the United States is not a party to any international treaty governing the recognition of foreign judgments, and there is no general federal law that applies. Recognition of foreign judgments is therefore almost entirely a matter of state law.

Each state has its own statutes or principles governing the recognition of foreign judgments. Most states, however, have adopted some version of the Uniform Foreign-Country Money Judgments Recognition Act, a model law that provides uniform standards and procedures for courts to follow. The Uniform Act generally prohibits courts from re-examining the merits of a foreign judgment. Nonetheless, courts may

decline to recognise a foreign judgment, for example, if the foreign court lacked jurisdiction, if the defendant did not have proper notice of the proceedings, or if enforcing the judgment would violate US public policy.

New York state courts are often a good forum for seeking recognition of foreign judgments. New York has relatively narrow grounds for non-enforcement; it has expedited procedures for obtaining summary judgment in a recognition action; it takes a broad view of post-judgment asset discovery and execution; and many financial institutions and commercial counterparties with custody of the defendant's assets are located there. Once a plaintiff obtains recognition of a foreign judgment in one US state, it is relatively easy to have that judgment recognised in other US states as well.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

The Fifth Amendment to the US Constitution provides individuals with a privilege against compelled self-incrimination. Individuals cannot be forced to give testimony, in the form of answering questions or providing information, that could implicate them in a crime. Invoking that right is often referred to as "taking the Fifth".

Invoking the Fifth Amendment

An individual may invoke the Fifth Amendment if the following three conditions are met:

- the communication is testimonial – the act of producing documents may be considered testimonial if the act of production is incriminating in itself, because it establishes the existence of the documents, the producer's possession of the documents or the authenticity of the documents;
- the testimony is compelled – for example, information or documents sought by a subpoena or court order would be considered compelled testimony, and compelled testimony also encompasses responding to questions during an investigation, at a deposition or at trial; and
- the testimony is self-incriminating – in other words, the testimony would supply evidence, or lead to the discovery of evidence, that could be used to prosecute the individual for a crime.

The self-incrimination requirement means that individuals who have received immunity or a pardon for a crime, or who have already been convicted and sentenced, may not invoke the Fifth Amendment to avoid giving testimony. Such testimony could not be used to prosecute the individual, and thus is not incriminating.

Consequences of Invoking the Fifth Amendment

The consequences of invoking the Fifth Amendment differ in criminal and civil cases.

In a criminal case, a defendant's silence or refusal to testify on Fifth Amendment grounds cannot be used as evidence. A prosecutor cannot make the argument that the defendant's silence implies guilt.

In a civil case, however, the judge or jury can draw an adverse inference from a party's invocation of the Fifth Amendment. The individual's silence can be interpreted to support liability.

As discussed in **2.5 Criminal Redress**, that different treatment is a complicating factor in the case of parallel civil and criminal proceedings. It may lead to a stay in the civil case until the criminal case is resolved.

Complications in the Corporate Context

The Fifth Amendment's self-incrimination clause does not apply to corporations. As a result, a corporation may not refuse to comply with a discovery obligation or answer questions on Fifth Amendment grounds, and can be compelled to provide testimony against itself. When a subpoena requests corporate records, those records must be produced, even if the corporate representative who is facilitating the response would be personally incriminated by that information.

A corporate representative can invoke the Fifth Amendment personally, and his or her silence cannot be used against him or her in a criminal matter. An employee may invoke the Fifth Amendment in response to a subpoena for oral testimony, even in his or her capacity as an employee of the corporation.

In both cases, however, the silence can lead to an adverse inference to support the liability of the corporation.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

Despite the broad discovery procedures available in civil litigation in the United States, a foundational principle of the legal system is that the attorney-client privilege protects from disclosure of confidential communications between attorneys and clients made for the purpose of seeking or providing legal advice. This privilege promotes open and honest communication between attorneys and their clients.

Attorney work product – documents containing an attorney's thoughts, impressions, opinions and legal conclusions – is also protected from discovery in most situations, although to a lesser extent than an attorney-client communication. The work product doctrine also provides protection for materials prepared by or for a party in anticipation of litigation.

The Crime-Fraud Exception

The attorney-client privilege does not apply to communications between the lawyer or client made for the purpose of committing or continuing a crime or fraud. This is known as the "crime-fraud exception", and it prevents the abuse of the attorney-client privilege that would otherwise undermine the administration of justice. The same exception applies, in most respects, to the work product doctrine as well.

Courts construe the crime-fraud exception narrowly. The party invoking it must show two elements:

- the existence of a future crime or fraud; and
- that the communication or work product was made to further or induce that future crime or fraud.

To determine the existence of a future crime or fraud, courts consider factors including:

- whether the client was planning a criminal or fraudulent act when he or she sought the legal advice;
- whether the client committed or attempted to commit a crime or fraud after receiving the advice;
- whether the lawyer who provided the advice also engaged in misconduct in connection with the topic of the advice; and
- whether the evidence shows the elements of a crime or fraud that was ongoing or imminent at the time of the communication.

The second element – whether the communication was made to further or induce the illegal act – often turns on the client's intent in communicating with his or her attorney. The crime-fraud exception applies even if the attorney had no

knowledge of the client's intent when the communication was made. With respect to work product protection, the exception applies where the work product was created in aid or furtherance of criminal or fraudulent activity.

The crime-fraud exception may apply within the context of the litigation itself. For example, if a party to litigation represented through counsel that it could not find documents that had been requested in discovery, and that statement is revealed to be a misrepresentation, the opposing party may seek discovery into matters that would otherwise be protected from disclosure. In that scenario, a court may find waiver of the attorney-client privilege with respect to the party's communications with counsel regarding the preservation, destruction or location of the documents.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

Punitive or exemplary damages may be available in a civil fraud action in the United States, provided that additional requirements are met.

In New York, for example, courts may allow the recovery of punitive or exemplary damages where the defendant's conduct was malicious, gross, willful or wanton, or evinced a high degree of moral turpitude. Some decisions also indicate that the fraud must have been aimed at the general public, not just at the plaintiff alone. Federal due process principles generally require the amount of punitive damages to bear a reasonable relationship to the compensatory award.

As described in **1.2 Causes of Action after Receipt of a Bribe**, federal civil RICO claims and antitrust claims allow for treble damages and attorney's fees. While such damages are not explicitly punitive, many courts and legal scholars have noted that they are at least partly punitive in nature.

7.2 Laws to Protect "Banking Secrecy"

In the United States, there is no general protection from disclosure for communications between banks and their clients; banks and other financial institutions are subject to the same discovery mechanisms as any other party. As discussed in **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**, third-party financial institutions may be subject to subpoenas.

Nonetheless, certain laws aimed at protecting consumers govern the disclosure of financial information. Under the Gramm-Leach-Bliley Act, parties may be required to redact certain personal, non-public information such as account numbers and Social Security numbers before disclosing documents in discovery. Parties to litigation also often agree to a protective order limiting the use or disclosure of such information.

The federal Bank Secrecy Act protects from disclosure certain documents that banks generate when reporting suspicious or fraudulent activities to the government. Courts have also recognised a "bank examiner privilege" that protects certain communications between banks and their regulators from disclosure. Organisations such as the Federal Trade Commission and the Financial Industry Regulatory Authority also regulate the disclosure of financial information in certain situations.

7.3 Crypto-assets

US regulators treat crypto-assets as property, as well as securities, commodities, and money, depending on context. Crypto-assets, which are also commonly known as virtual currency, digital

currency, cryptocurrency, or crypto, are a digital representation of value and, in many instances, convertible, meaning they have an equivalent value in real currency or act as a substitute for real currency. They are subject to taxation, freezing, and regulation, although a comprehensive federal regulatory regime for crypto-assets is still emerging. It is also worth noting that states have their own laws and regulations that may apply to crypto-assets and transactions.

Federal regulators, including the Internal Revenue Service (IRS), the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), and the Financial Crimes Enforcement Network (FinCEN), have issued overlapping regulations that subject issuers, owners, and traders of crypto-assets to different requirements depending on the transaction or circumstances at issue. For example, the IRS classifies virtual currency as property for the purposes of federal income tax laws, while the SEC has found that offers and sales of digital assets, such as "Initial Coin Offerings" and "Token Sales," are securities offerings subject to the federal securities laws. The CFTC defines "commodity" to include virtual currencies subject to its regulation, while FinCEN regulates businesses involved in the exchange of crypto-assets as "money" exchangers.

Recently, the Infrastructure Investment and Jobs Act of 2021 created new reporting requirements for certain crypto-transactions. The Act expanded the definition of a "broker" subject to IRS reporting requirements to include those who help effectuate transfers of digital assets. It also expanded the definition of "digital assets" to include virtual currencies that are "recorded on a cryptographically secured distributed ledger or any similar technology." Additionally, the Act expanded IRS rules requiring businesses to report cash transactions over USD10,000 to cover transactions involving digital assets.

In March 2022, President Biden signed an executive order directing the Consumer Financial Protection Bureau and the Federal Trade Commission to evaluate how they can use their enforcement tools to protect against fraud and abuse of crypto-transactions. The executive order also encouraged the SEC, CFTC, Federal Reserve, Federal Deposit Insurance Corporation, and Comptroller of the Currency to consider additional measures to protect crypto-asset markets and investors.

Federal regulators and law enforcement have issued warnings to the public regarding fraud and scams relating to crypto-assets. Although crypto-assets provide a new means of perpetrating common fraud schemes, the recovery of funds involved in such schemes is more difficult than in other fraud schemes, and many victims may never recover their losses.

For instance, although enforcement officials have obtained court orders to restrain or freeze crypto-assets, successfully freezing crypto-assets can prove difficult in practice. Digital assets are difficult to locate because they are typically held in encrypted digital wallets rather than in a bank or brokerage account. Regulators have thus attempted to freeze virtual assets as they are transferred through digital "exchanges" or online platforms. However, that approach also poses challenges where the currency passes through non-regulated exchanges and then into overseas bank accounts.

Questions will continue to emerge regarding the federal regulation of crypto-assets, including their scope, as there are hundreds of different types of crypto-assets. How federal regulators will expand their purview of crypto-asset regulation and co-ordinate with each other remains to be seen.

MoloLamken LLP focuses exclusively on representing clients in complex disputes. It handles civil, criminal and regulatory matters, as well as appeals, across the United States. Its clients span the globe, and MoloLamken is involved in some of the most significant disputes of the day. The firm's founding partners, Steven Molo and Jeffrey Lamken, developed national reputations based on their courtroom successes while partners at large full-service firms, where they held leadership positions. With an abiding belief that complex disputes are most effectively handled by smaller teams comprised of smart, highly experienced lawyers focused on results rather than process, they formed MoloLamken. The firm provides experienced advocacy – for claimants as well as defendants – before judges, juries, arbitral forums and courts of appeals, including the Supreme Court of the United States. It also represents clients in regulatory and criminal investigations, and conducts internal investigations.

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Trends and Developments

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Kobre & Kim see p.493

Old Dog, New Tricks: Innovating Traditional Asset Recovery Tools to Recover Crypto-assets

Whether through civil channels or government seizure, it is getting easier for private parties to claw back fraudulently obtained cryptocurrency and make their asset portfolios whole again. For example, just recently, in February 2022, the US Department of Justice (DOJ) announced that they had seized USD3.6 billion in stolen cryptocurrency that was directly linked to the 2016 hack of the British Virgin Islands (BVI)-based crypto-exchange, Bitfinex (the now-infamous "Croc of Wall Street" case); victims of the hack are likely to eventually recover their lost funds through criminal restitution proceedings. The DOJ was able to trace the funds using blockchain analysis tools that pointed them directly to the couple accused of laundering the crypto-assets obtained from the Bitfinex hack. While this type of blockchain analysis uses new technology, it employs classic principles of asset tracing that follows implicated funds from their current location all the way back to the original wrongdoer. As these tools become more readily available to the legal community, the path for private individuals and companies to use them to recover stolen or wrongfully obtained cryptocurrency becomes clearer and easier to follow.

Because of cryptocurrency's intrinsic nature on a public and historically accurate blockchain, most cryptocurrency transactions that happen on-chain can be efficiently and effectively traced with advanced forensic toolkits. The blockchains for the most popular cryptocurrency networks such as Bitcoin and Ethereum serve as a ledger of every transaction that has occurred using that particular network, including the sending and receiving of addresses, among other information. This data can be used in conjunction with forensics tools to group addresses under common control, graphically display connections among addresses, and, in many cases, identify which entities control those addresses.

Fundamentally, tracing cryptocurrency transactions is not all that different from tracing transactions involving traditional assets. While traditional asset tracing includes "following the money" by pouring over financial records such as bank account statements, payment ledgers, and trading history, tracing cryptocurrency assets uses the same principles but employs sophisticated software that analyses and graphically displays transactions on the blockchain in a fraction of the time. Proper use of such tools can efficiently lead to the identification of entities and/or individuals, and produce compelling evidence for use in civil and criminal litigation, which may ultimately provide the basis for victims to recover their assets.

Undoubtedly, tracing crypto-transactions comes with its own challenges. Certain techniques exist to try to cover one's tracks on the blockchain. Additionally, not all cryptocurrency exchanges (or other crypto-services) collect quality "Know Your Customer" (KYC) information or comply with legal requests, which can impede the ability to ultimately link transactions to persons of interest.

In addition, because of the industry's nascency, international governance rules related to crypto-currency are constantly evolving. In the United

States, the Securities and Exchange Commission (SEC), Commodity Futures Trading Commission (CFTC), DOJ and Financial Crimes Enforcement Network (FinCEN) – among various other agencies – have jostled over authority and competed with each other for scarce enforcement resources. Even more so, internationally, the lines delineating jurisdictional responsibilities are not neatly drawn.

However, regardless of these challenges, effective recovery and enforcement mechanisms do exist and are being deployed with increasing effectiveness. In 2021 alone, the Internal Revenue Service (IRS) announced that they had seized USD3.5 billion worth of cryptocurrency, with the DOJ instituting a significant number of investigations and successful seizures of stolen cryptocurrency. The US government has already recovered USD3.6 billion from the Bitfinex seizure at the beginning of this year. Both globally and domestically, successful asset recovery campaigns are only increasing in number, demonstrating that traditional jurisprudential frameworks relating to asset recovery are continuing to be repurposed and developed for the recovery of cryptocurrency. As such, while challenges remain present, the various methods outlined below exist for obtaining compelling evidence as a basis for recovery efforts, and identifying practical uses of the law and the government to assist victims in swiftly recovering their assets.

Civil Asset Recovery

While the DOJ has seized increasing amounts of cryptocurrency over the years and generated flashy headlines in the process (ie, the takedown of Silk Road in 2013, the "Croc of Wall Street" case, etc), even the DOJ has limited resources when it comes to crypto-asset recovery campaigns. As such, victims are well advised to consider civil recovery options as part of an overall recovery strategy.

Civil asset recovery procedures

One such strategy involves the use of freeze letters and civil complaints, which – in tandem – can be used to warn fraudsters and custodians against dissipating assets and initiate legal action against those assets for eventual recovery. Even in cases where the identity of the fraudster may remain anonymous, victims may file "John Doe" complaints (ie, a complaint against persons unknown), in order to encourage or compel cryptocurrency exchanges to assist with identifying the wrongdoer. For example, in White v Sharabati, the plaintiff, Elizabeth White, a resident of New York, agreed to sell Ripple to Mr Sharabati (who was anonymous to her at the time) in exchange for bitcoin. While she sent her Ripple, she never received bitcoin in exchange. White realised she had been duped, but she didn't know the identity of the person who had duped her. With the assistance of Kobre & Kim, White immediately filed a "John Doe" complaint describing the fact pattern and drawing upon statutes permitting the recovery of treble damages and attorneys' fees to amplify her civil claims. After conducting further forensic analysis and tracing the funds to two crypto-exchanges, Bittrex and Poloniex, White subpoenaed the exchanges to determine Mr Sharabati's identity and amended the "John Doe" complaint to specify and name Mr Sharabati as a defendant. After obtaining a default judgment in her favor, White sought enforcement of her judgment and ultimately made a sizeable recovery.

Relatedly, temporary restraining orders (TROs) and preliminary injunctions have also shown merit as US court-ordered legal instruments that can prevent the movement of fraudulently siphoned crypto-assets. In contrast to freeze letters and "John Doe" complaints, TROs and preliminary injunctions have proven useful when the identity of the perpetrator is already known and they are directed against a known custodian of the cryptocurrency, such as an exchange or a

hosted wallet site. However, obtaining this type of relief requires a substantial showing. Indeed, to succeed in obtaining a preliminary injunction, a plaintiff must "establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest."

Relatedly, in common law jurisdictions – such as the United Kingdom – similar remedies have led to similarly successful results. For example, in ION Science Ltd and Duncan Johns v Persons Unknown, Binance Holdings Limited and Payward Limited, the claimants – alleging fraud of over GBP570,000 through various crypto-investments – filed an ex parte application for a worldwide freezing order against the assets and a disclosure order against Binance and Payward. The court granted the freezing order and disclosure orders compelling the exchanges to disclose the identities of the alleged fraudsters. The judgment was also significant because it considered the lex situs (location) of Bitcoin, holding that because the defrauded crypto-asset owner was domiciled in the UK and therefore the relevant participant in the Bitcoin network controlling the assets was located in the UK, the lex situs of a cryptocurrency is the jurisdiction in which the owner is domiciled. Furthermore, in the BVI, Norwich Pharmacal orders (court orders that force the disclosure of documents or information), which are also obtained ex parte, may be a similarly utilised means of securing key intelligence related to the beneficial ownership of a given entity. Importantly, the information gathered from such orders may be used to pursue a fraudster without notice to the wrongdoer, so long as the applicant applies, and the court agrees, to append a seal and gagging provision to the order.

Think globally

It is important to think about how these procedural mechanisms can tie in to a globally coordinated effort to recover assets. For example, the strategies outlined above were implemented by Kobre & Kim to bring a lawsuit in the US on behalf of a Swiss company while local Swiss counsel pursued criminal charges in Switzerland. In this case, the clients sought the recovery of over USD50 million-worth of Ethereum sitting in their former CEO's cold wallet. With the help of in-house blockchain forensics tools to identify where the assets were located and who had access to the wallet, Kobre & Kim filed a complaint in the Southern District of New York (SDNY) requesting that the cold wallet (and therefore, the funds) be returned to the exchange immediately. Although the representation was for a Swiss company, the SDNY was the appropriate jurisdiction because (a) the former CEO resided in New York City, and (b) an affiliated entity of the company that was involved in the dispute was also based in New York City. In tandem with the complaint, the legal team filed a preliminary injunction and a temporary restraining order to immediately prohibit the former CEO from intentionally dissipating the assets. At the same time, Swiss counsel aggressively pursued local criminal proceedings to inflict further lawful pressure. Due to the lawful pressure exerted on the former CEO, they were forced to come to the settlement table, turn over the cold wallet, and eventually provide a full recovery of the assets. This example shows that when victims have been defrauded of their cryptocurrency in a foreign jurisdiction, it is important to think strategically about how to leverage multiple pressure points quickly and efficiently.

An application pursuant to 28 US Code 1782 ("1782") provides an additional method for victims of a given crypto-related fraud to obtain key evidence in support of cross-border enforcement and recovery campaigns. More specifically, a

1782 application may be deployed in connection with a foreign proceeding to obtain discovery in the US and gather evidence from exchanges, individuals, or any related party located in the US. Although the evidence is obtained in the US, the 1782 application grants victims the opportunity to submit key findings as evidence in a non-US proceeding where the fraudster or other players may be located. Alternatively, because 1782 applications may subject targets to subpoenas or force them to give testimony, they may be utilised defensively when entities or individuals have suspicious claims lodged against them. For example, in its representation of a cryptocurrency fund based outside the US, Kobre & Kim filed a 1782 application in the relevant federal district in order to force the other party to face a subpoena to support their factual contentions. As a result, the legal team used its expertise in cross-border discovery proceedings to identify the tight window in which the target would be traveling to the US and served the subpoena on them then.

Finally, where a plaintiff or victim is looking to trace or seize assets from a bankrupt adversary, there are a number of useful tools that US Bankruptcy Code Chapter 15 ("Chapter 15") may provide in domestic and foreign bankruptcy proceedings. For example, when an exchange has been hacked and cryptocurrency is believed to have been directed to (or through) the US and there is a foreign insolvency proceeding pending, Chapter 15 may allow foreign insolvency representatives to obtain discovery rights in the US via Rule 2004 Discovery, which grants interested parties in bankruptcy proceedings the right to obtain broad discovery from adversarial parties. Moreover, with respect to recovery efforts, Chapter 15 allows foreign insolvency representatives to assert avoidance actions under the insolvency laws of foreign jurisdictions in an effort to recover crypto-assets or other property that were once transferred into the US.

In its representation of a UK-based crypto-exchange, Kobre & Kim – in part – utilised Chapter 15 filings and related discovery measures in order to bolster the exchange's international recovery efforts. Specifically, the Chapter 15 petition requested recognition of the client's ongoing UK creditors' voluntary liquidation proceedings as the "foreign main proceeding" for the purposes of obtaining relief under Chapter 15 of the US Bankruptcy Code. The petition was granted by the judge after receiving no objections to the recognition request, and thus, the liquidators were granted relief in a USD32 million cybertheft.

It should be noted that Chapter 15 proceedings may also be used defensively. For example, a foreign creditor can apply for an automatic stay of the bankruptcy proceeding or other litigation within the US, and block attempts to seize the debtor's assets in the US. More concretely, in the middle of US proceedings against Mt. Gox – a Japan-based bitcoin exchange that ceased operations in 2014 due to extensive losses and theft – it filed for Chapter 15 bankruptcy protection, which supplemented the primary court proceedings in Japan and stayed the ongoing US litigation against the exchange, including a class action filed on behalf of US customers.

Government Seizures

While recovering stolen crypto-assets through traditional civil litigation mechanisms has proven successful in many instances, plaintiffs or victims may also benefit from seeking to have the US government file charges and/or seize assets against a given fraudster or wrongdoer. Importantly, choosing to present the case to law enforcement allows victims to pursue recovery of their stolen assets and take advantage of the government's jurisdictional reach and discovery resources without the burden of civil litigation expenses.

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While the United States remains the global leader in crypto-asset seizures and has shown an even greater commitment to further asset recovery efforts, as evidenced by the launch of the National Cryptocurrency Enforcement Team in February 2022, other foreign jurisdictions, such as the United Kingdom and Hong Kong, are actively – in conjunction with the DOJ – looking to develop jurisprudence and increase resources given the growing prevalence of global crypto-fraud.

In the United States, perpetrators of crypto-fraud may be held criminally liable for stealing assets, laundering stolen funds, misrepresenting the nature of cryptocurrency-related investments, or otherwise violating securities laws. Often, the government will institute an investigation and immediately seize or freeze certain assets at issue. Under general asset forfeiture provisions, "any property, real or personal, which constitutes or is derived from proceeds traceable," to a violation of Section 1030 (relating to computer fraud) or Section 1343 (relating to wire fraud) is subject to confiscation by the US under either the general civil or criminal forfeiture provisions. Furthermore, if a crypto-asset is deemed to be "involved in" a violation of the US money laundering laws, then it, too, may be subject to criminal asset forfeiture proceedings by the US government (and laundering offenses allow commingled assets to be forfeited alongside the traceable proceeds).

Unlike an individual plaintiff who may not be able to afford to launch a full-scale investigation into a hack that targets hundreds or thousands of people, the government can use the vast investigative resources (including international co-operation treaties) at its disposal to benefit all victims. For example, if the perpetrators – or the assets themselves – are in a foreign jurisdiction, the government may seek assistance of those jurisdictions through traditional mutual legal assistance treaty (MLAT) requests, which allow the government to obtain documentary evidence that may otherwise be unavailable to an individual plaintiff. As just one of many examples, in November 2020, pursuant to an official MLAT request by the Brazilian federal authorities for assistance in a major internet fraud investigation, the US government seized crypto-assets valued at USD24 million that was sitting in the US. In Kobre & Kim's own experience representing a UK-based insurance company that was targeted by a ransomware attack – which resulted in its company's clients losing significant sums of cryptocurrency – the DOJ initially seized a de minimis value of assets domestically in the US. However, through MLATs and other foreign co-operation channels with Canada, the DOJ and Canadian authorities were able to freeze upwards of USD15 million in ransom funds.

Once the government identifies and charges an individual or entity who is allegedly engaged in criminal activity, victims may pursue the recovery of their assets through the government's criminal restitution proceedings. Victims may formally seek "victim status," which allows for victims to be granted statutorily mandated crime victim rights and permits them to have a more open line of communication with the prosecution team. Additionally, unlike narcotics matters – for example – once a criminal defendant is convicted of a crime involving seized assets, the US government is obliged to return the assets to the victims.

The US government's obligatory return of seized funds may come in one of three flavors:

- remission – when the Attorney General exercises discretion in returning recovered funds to a given victim of the fraud underlying the seizure or forfeiture;
- restoration – when the Attorney General permits the transfer of forfeited funds to a

criminal court for the ultimate fulfillment of a restitution order; and
- restitution – when a court orders a given defendant to directly compensate the victim for damage and injury, often paid for by the forfeited funds.

In total, since 2000, the DOJ has returned upward of USD11 billion in assets to victims of fraud. Specifically with respect to crypto-related fraud, the DOJ has outwardly highlighted that their 2022 budget requests include USD150.9 million more in resources to expand crypto-enforcement capabilities. Motivated by the proliferation of crypto-hacks and associated extortion activity in 2020, in April 2021 the DOJ formed a targeted task force to curtail ransomware attacks affecting the US. Beyond the expansion of resources dedicated to stopping crypto-related crimes, the DOJ has demonstrated success in recovering assets in high-profile matters. In addition to the Colonial Pipeline matter and the Bitfinex matter, in November 2020 the DOJ seized more than USD1 billion-worth of bitcoin in relation to Silk Road, the dark web marketplace on which users were able to buy and sell illicit goods – like narcotics and ransomware – with bitcoin.

As an advocate for a victim of a crypto-related crime, strategising regarding the right time to approach the government about an ongoing criminal action is crucial to an engagement's success. Unsurprisingly, earlier is always better. Generally, if a government investigation stalls, the government will have limited resources and reduced interest in re-engaging their recovery efforts. Thus, when it comes to recovering stolen assets, time is of the essence, and engaging counsel to assist in a given asset recovery campaign should come as soon as possible after the fraud occurs, in order to preserve all available recovery options.

As an added challenge with respect to government investigations, individual actors may often have little to no control over the investigation, its timing, or the manner in which the government makes its decisions. Furthermore, although the government's seizure powers are strong, the pace at which victims will actually receive their stolen crypto-assets may be slow, as it could take years for a criminal case to result in a conviction or for a civil forfeiture to be fully adjudicated. All of this is to say that – to mitigate the risks of recovering crypto-assets solely through government action – victims should consider parallel civil asset-recovery efforts for an added layer of security and efficiency.

Often, the public-private co-operation mentioned above has led to some of the most fruitful results for Kobre & Kim's clients. For example, in its representation of the liquidators to a New Zealand-based crypto-exchange, Kobre & Kim was able to assist the government in identifying the relevant fraudsters and lead the authorities to the stolen, laundered crypto-assets, by utilising enhanced forensic tracing capabilities and existing co-operation channels with the government.

Conclusion

As detailed above, when it comes to recovering stolen crypto-assets, victims and potential plaintiffs have many options at their disposal. Enhanced blockchain forensic tracing capabilities have made it easier to identify relevant fund flows and pathways for recovery. In addition, from a civil litigation standpoint, many of the traditional instruments in the asset recovery toolkit with which practitioners are already familiar may be applied to crypto-asset recovery as well, so long as the advocate understands blockchain technology and the forensics tools available. The future of asset recovery will necessarily include merging the old with the new and continuing to innovate as the technology rapidly develops.

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Identifying counsel who has deep experience with asset recovery strategies and emerging blockchain technology is key to assessing the most viable criminal and civil litigation solutions for clients seeking to recover cryptocurrency assets.

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Kobre & Kim is an Am Law 200 global law firm focused exclusively on disputes and investigations, often involving fraud and misconduct. Recognised as the premier firm for high-stakes cross-border disputes, the firm has a particular focus on financial products and services litigation (including digital currencies), insolvency disputes, intellectual property litigation, international judgment enforcement and asset recovery, and US government enforcement and regulatory investigations. Its specialised, integrated product offerings – International Private Client and Claim Monetization & Dilution – allow the firm to pursue aggressive and creative solutions to clients' underlying problems, whether they are financial, commercial or reputational. With more than 150 lawyers and analysts located in multiple jurisdictions throughout its 16 locations around the world, Kobre & Kim recognises the value of incorporating diverse perspectives and professional disciplines to generate the most effective solutions for its clients.

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Evelyn Baltodano-Sheehan is a former US Department of Justice (DOJ) prosecutor who focuses her practice on advising high-net-worth individuals, institutional clients and their executives in cross-border investigations, government enforcement actions and related asset forfeiture matters. She has experience in high-stakes matters where there is tension between parallel asset forfeiture and insolvency proceedings. Ms Sheehan also has an active international asset recovery practice, including the enforcement of judgments and arbitration awards and the representation of victims of crime. Her matters regularly involve legal actions across multiple jurisdictions and mobilising both public and private remedies. She has unique experience designing recovery strategies for claimants and insurers in the cryptocurrency industry.

David H McGill is a versatile litigator and investigator whose practice resides at the intersection of finance and technology. He frequently acts as lead counsel for companies and individuals involved in complex disputes, often with significant regulatory implications. His practice also includes conducting confidential internal investigations in response to whistle-blower claims and defending clients in government enforcement matters. Known as an aggressive advocate, he is often retained by hedge funds and proprietary trading firms in disputes involving allegations of spoofing and market manipulation, as well as other matters involving financial products. He recently obtained the first-ever dismissal of a criminal spoofing scheme charge in United States v Bases and Pacilio, No 18 CR 48 (ND Ill), and leading publications regularly quote him as a thought leader on matters involving algorithmic trading and digital currency regulation.

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Benjamin J A Sauter aggressively defends clients in the cryptocurrency and commodity derivatives industries against high-stakes government enforcement actions. He has represented many of the most important companies and individuals in this space in many of the most important enforcement matters over the last several years. Clients, ranging from major cryptocurrency exchanges to leading proprietary trading firms, company founders and executives, turn to him for creative defence strategies when government investigations have festered or escalated and they are ready to adopt a more aggressive, trial-ready stance. In these representations, Mr Sauter is often deployed in a special-counsel role to enhance negotiation dynamics with regulators and prepare for contested litigation.

Amanda Tuminelli aggressively defends institutional clients and high-net-worth individuals against high-stakes criminal and regulatory investigations and enforcement actions. She also advises and defends clients in the digital currency industry, with particular focus on investigations relating to fraud and other allegations of misconduct. Ms Tuminelli also has an active asset recovery practice. She regularly designs aggressive and creative strategies to increase leverage and monetise high-value claims, and to plan and pursue global asset recovery campaigns. These strategies often include co-ordinating efforts across multiple international jurisdictions, analysing litigation risks posed by different governing bodies, and leveraging her experience tracing digital assets and cryptocurrency to arrive at public and private remedies.

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