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International Fraud & Asset Tracing 2026

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Global Practice Guides

International Fraud & Asset Tracing

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2026

Chambers Global Practice Guides

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Published by

Chambers and Partners

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London

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Fax +44 20 7831 5662

Web www.chambers.com

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INTRODUCTION

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Seladore Legal is an international disputes law firm specialising in complex litigation and arbitration. The firm acts for corporates, financial institutions, investors, state entities and high net worth individuals in high-value and often multi-jurisdictional disputes. With offices in London, Singapore, and Milan, Seladore combines the agility of a focused disputes practice with the experience of lawyers who have previously held senior roles at leading international firms. The team advises across a broad range of disputes,

including international arbitration, civil fraud and asset tracing, shareholder and joint venture disputes, sanctions and regulatory matters, and investigations. Seladore regularly acts in proceedings before major arbitral institutions and courts around the world. Its lawyers bring deep experience of cross-border disputes and work together as a unified international team, particularly in matters involving Europe, the Middle East and the Asia-Pacific region.

Contributing Editor



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INTRODUCTION

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The Contemporary Setting

Fraud and asset tracing disputes increasingly involve events, people, assets and information spread across multiple jurisdictions. The conduct alleged to constitute the fraud, the individuals or entities exercising control over the relevant corporate or financial structures, the repositories of information, the assets themselves, and the courts capable of granting effective relief are frequently located in different jurisdictions.

For commercial parties, financial institutions, insolvency office holders, investment vehicles and fiduciaries, the practical task is therefore not limited to establishing that a fraud has occurred. It also requires identifying where assets are held, through which legal or corporate structures they are controlled, what information can be obtained at an early stage, and which forum (or fora in many cases) is capable of granting relief that will have practical effect. Modern civil fraud practice has consequently become closely intertwined with questions of jurisdiction, interim protection, disclosure, enforcement and, in some cases, sanctions and regulatory constraint.

A related feature of modern cases is that assets are often concealed through complex legal and corporate structures. In substantial civil fraud matters, the difficulty commonly lies in the relationship between nominal ownership and actual control. Analysis published by Open Ownership has noted that more than one hundred countries now maintain some form of beneficial ownership register (although many of these are not public), while also emphasising the increasing importance of effective cross-border data-sharing frameworks. That development is significant, but it also illustrates the point that recovery work increasingly proceeds through the analysis of corporate networks, open-source intelligence, control arrangements and intermediated holdings rather than through the tracing of a single, isolated transfer.

Information, Interim Relief and Forum

It follows that information is often the first substantive objective of a civil fraud claim. In major disputes, the principal difficulty at the outset may be that the claimant cannot yet identify all the appropriate defendants, cannot confidently locate the assets in issue, and cannot determine with certainty which jurisdiction ought

to serve as the principal forum. Analysis undertaken by the Law Commission of England and Wales in its work on digital assets and private international law has articulated a broader procedural problem in this regard. In a number of cases, courts have been asked to grant interim orders in circumstances where the claimant is unable, at the outset, to formulate a fully pleaded claim because the relevant information is held by intermediaries or concealed within complex technological or corporate structures. The proposed development of more flexible information orders reflects a recognition that, in sophisticated civil fraud litigation, information from third parties may determine not merely the strength of a claim, but whether it can properly be commenced at all.

This is one reason why jurisdictions with mature systems of interim relief continue to occupy a prominent place in cross-border recovery strategies. The courts of England and Wales therefore remain influential in that regard, not because every dispute belongs in England and Wales, but because the courts have traditionally accepted that freezing relief and ancillary disclosure are practical instruments of asset preservation and case management and can be used in support of proceedings in other parts of the world (in appropriate cases). Recent litigation concerning breaches of freezing orders in the English courts (see *SIA Investment Industry v Pardus Wealth and Bryce* (2025)) illustrates the continuing importance of disclosure obligations that accompany such orders. These obligations are intended to enable parties to police court injunctions effectively and to facilitate the tracing and preservation of assets. Their practical significance lies in the fact that the effectiveness of interim relief depends heavily upon the court's willingness to insist upon candid disclosure and to respond firmly to deliberate non-compliance.

The importance of forum should also never be underestimated. Cross-border disputes frequently require careful analysis of jurisdiction, applicable law and the recognition and enforcement of judgments. In practice, the selection of forum may be inseparable from questions of the availability of information, interim protection and the likely ease with which a judgment or order can later be deployed elsewhere. In a modern world, where documents are electronic and can be

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moved at the push of a button, and evidence by video link is commonplace and facilitated, certain of the factors which previously anchored claims in a particular jurisdiction are of less weight.

Enforcement and the Circulation of Judgments

At the enforcement stage, recent developments in the international recognition of civil judgments have attracted attention – including the Hague Judgments Convention coming into effect in the United Kingdom in July 2025. The continuing expansion of international frameworks governing the recognition and enforcement of judgments suggests a gradual movement towards a somewhat more orderly environment for the circulation of civil and commercial judgments across borders, in particular, in the jurisdictions in which assets are commonly located. It would nevertheless be mistaken to assume that enforcement has become straightforward. Careful analysis is still required in each individual case and the enforceability of judgments and awards can vary significantly across the world.

International civil fraud practice also extends beyond the straightforward enforcement of judgments. In some cases, litigation concerns the allegation that a judgment or enforcement instrument has itself been procured by fraud. Proceedings of that kind, whilst rare, illustrate that modern civil fraud practitioners have tools available to them even to challenge judgments and awards, an example being the English High Court overturning a USD11 billion arbitration award on the grounds that it had been obtained through false evidence and corrupt payments.

Digital Assets as Part of Mainstream Recovery Work

Digital assets now form part of this landscape, although they no longer warrant treatment as an exotic category. The more significant development is that digital assets are increasingly being treated within ordinary private-law frameworks. Legislative developments in England, including the enactment of the Property (Digital Assets etc) Act 2025, have clarified that a digital asset is not prevented from being the object of personal property rights merely because it does not fall within the traditional categories of a thing in possession or a thing in action. The legal importance

of that clarification lies in its confirmation that novel forms of value may be protected, traced and litigated over within an established proprietary framework. The practical challenge for civil fraud practitioners lies not simply in recognising the existence of digital assets, but in addressing the jurisdictional, evidential and procedural questions that accompany them. This is still an evolving area, but one in which principles are starting to solidify.

Transparency and Beneficial Ownership

Beneficial ownership reform continues to play an important role in the wider evidential environment in which asset tracing occurs. Transparency initiatives over the past decade have sought to address the longstanding difficulty created by the separation between legal title and actual control. In many jurisdictions, beneficial ownership registers now exist, and additional reforms have sought to improve the verification of corporate information and the identification of controlling individuals.

In the United Kingdom, recent reforms have introduced identity verification requirements for directors and persons with significant control, forming part of a broader effort to strengthen the reliability of corporate information held on the public register. Such measures do not eliminate the use of corporate structures to obscure ownership, nor do they resolve the uneven quality of transparency across jurisdictions. They do, however, represent a gradual movement towards a more transparent regime for corporate control arrangements. Whether this will simply drive bad actors elsewhere remains to be seen.

Developments within the European regulatory framework are also relevant. The establishment of the EU's Anti-Money Laundering Authority (AMLA), created under the EU's 2024–2025 AML legislative package, forms part of a broader attempt to reduce fragmentation within the European system and to improve supervisory co-ordination. Although these developments arise primarily within the public law sphere, they influence the wider environment in which civil asset recovery takes place by shaping the availability and reliability of financial information.

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Sanctions as a Source of Procedural and Practical Friction

Sanctions regimes increasingly intersect with disputes, particularly where assets or counterparties are connected with sanctioned individuals, entities or jurisdictions. They may affect the identification of assets, the conduct of financial institutions or custodians, and the mechanics of payments into or out of court. Licensing requirements and reporting obligations may also impact the procedural conduct of litigation, including resulting in stays or delays to timetables.

Funding and the Economics of Recovery

The economics of civil fraud litigation also merit consideration. Asset tracing and recovery are frequently resource-intensive exercises involving extensive investigation, interim applications, and, in many cases, enforcement proceedings across multiple jurisdictions. As a consequence, litigation funding has become an increasingly visible element of the commercial litigation landscape.

The Civil Justice Council's 2025 review of litigation funding in England and Wales addressed the regulatory framework governing litigation funding, including proposals for disclosure requirements, capital adequacy standards and limits on the degree of control that funders may exercise over litigation strategy. Whatever form those reforms ultimately take, they reflect the extent to which funding is now regarded as an established feature of complex civil disputes, including fraud litigation, in particular, claims by officeholders (such as liquidators).

Concluding Observations

International civil fraud and asset tracing increasingly intersect with adjacent areas of law and regulation. They draw upon private international law, interim relief, corporate transparency frameworks, sanctions analysis and the financing of large-scale litigation.

The jurisdictional chapters in this guide necessarily address those matters within the context of particular legal systems. Nevertheless, certain broader themes can already be identified. Early access to information is frequently decisive. Interim relief remains central, but its effectiveness depends upon rigorous disclosure and compliance. Enforcement strategy must often be considered at the outset rather than at the conclusion of proceedings. Transparency reforms may also improve the evidential environment, although unevenly. Sanctions regimes may complicate otherwise straightforward recovery steps.

The result is a field in which successful asset recovery increasingly depends upon procedural speed, cross-border co-ordination and a detailed understanding of the legal and corporate structures through which value is held and controlled, and the means of unravelling those structures.



Law and Practice

Contributed by:

Joachim Delaney and Ranjani Sundar

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group comprises experienced commercial litigators with a particular focus on dealing with high-value, cross-border matters. The team's expertise spans a wide range of sectors and industries, and includes litigation on behalf of administrators, liquidators, provisional liquidators and other office-holders, fraud-related insolvencies, fraud investigations and asset tracing.

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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 43AGA and 43AH-L; 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 shown 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 77A of the Treasury Laws Amendment (Acquisition as Consumer – Financial Thresholds) Regulations 2020).

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; *REA Group Ltd v Fairfax Media Ltd* [2017] FCA 91, [13]) 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 it is likely that the findings in the FHR case would apply equally in Australia. An example of the application of this principle is found in *Twigg v Twigg* (2022) 402 ALR 119 at 186; [2022] NSWCA 68 [184] where it was observed by Brereton JA (Bell CJ and Payne JA, agreeing) that “In my judgment, a claim for proprietary relief against an accessory is within the analogy: it is a claim for the accessory to account for the trust property it has received, by restoring it to the trust. As the Supreme Court of the United Kingdom has observed, ‘the expression equitable accounting can encompass both proprietary and non-proprietary claims’. The defaulting party is ‘liable, at the option of

the cestuis que trust, to account either for the value... or... for the thing itself...’ (emphasis added).”

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.

The Victorian Court of Appeal case, *Harstedt Pty Ltd v Tomanek* [2018] VSCA 84 (“*Tomanek*”), has recently 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.

In *Tomanek*, the Court of Appeal held that, while the respondent (being the company secretary of the trustee company) had knowledge of the trustee company’s dishonest and fraudulent scheme, such knowledge of itself did not equate to assistance with the breach of trust. The applicant company failed to establish any “active involvement” on the part of the respondent. However, in the recent case of *Lin v Chu* [2025] FCAFC 130, the appellant directors of the trustee company were found to have negotiated, executed and implemented loans that constituted breaches of trust. The Full Federal Court (at [186]) unanimously agreed that directors who intentionally cause a trustee company to engage in conduct in breach of trust can be personally liable for knowing assistance or knowing inducement where they acted in their own personal interest and contrary to the interests of the company.

With respect to breach of fiduciary duty and knowing assistance claims, a question that may arise is whether a plaintiff is entitled to obtain both the remedies of equitable compensation and an account of profits from multiple wrongdoers. In *Xiao v BCEG International (Australia) Pty Ltd* [2023] NSWCA 48, the New South Wales Court of Appeal recently determined that although a plaintiff cannot obtain both equitable compensation and an account of profits from a single defendant, where multiple defendants are involved, a plaintiff is entitled to make a “split election” seeking different remedies from different wrongdoers. This is because the liability of the knowing recipient (who profited from their own misconduct) is different in nature and extent from the liability of the fiduciary (who made no profit from the default), particularly given that the knowing recipient does not owe a duty of loyalty to the principal. For this reason, seeking “a gain-based remedy from a knowing recipient is not inconsistent with a compensation remedy against the defaulting fiduciary” (at [69]). This principle was also confirmed in *DC Rd DC Pty Ltd v Zhang* (Trial Judgment) [2026] FCA 16 (at [259]).

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; and
- one year for offences where punishment is a pecuniary penalty and no imprisonment (Crimes Act 1914 (Cth) Section 15B).

Recently, the *Full Federal Court in Walker v Members Equity Bank Ltd* [2022] FCAFC 184 also confirmed that there is a three-year limitation period on criminal prosecutions brought by the Australian Securities & Investments Commission (ASIC) for false or misleading representations under the Australian Securities and Investments Commission Act 2001 (Cth), where time starts to run from when the alleged offence occurs.

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 (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 other persons) 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.

In *RnD Funding Pty Limited v Roncane Pty Limited* [2023] FCAFC 28, the Federal Court of Australia recently confirmed that a pre-existing fiduciary duty between the party asserting the equitable proprietary right and the party who holds or has disposed of the original property is not a requirement for tracing in equity. Rather, it is the nature of the equitable property rights that forms the foundation of tracing.

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 a charge on the asset purchased, provided the asset is identifiable (*Re Oatway* [1903] 2 Ch 356 applied recently in *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 DiplockDiplock 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 DiplockDiplock 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). Section 4 (1) of the CDRA outlines examples of genuine steps that a person can take to resolve a dispute, including:

- notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute;
- responding appropriately to any such notification;
- providing relevant information and documents to the other person to enable the other to understand the issues involved and how the dispute might be resolved;
- considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process;
- if such a process is agreed to:
 - (a) agreeing on a particular person to facilitate the process; and
 - (b) attending the process;
- if such a process is conducted but does not result in resolution of the dispute – considering a different process; and
- attempting to negotiate with the other person, with a view to resolving some or all of the issues in dispute, or authorising a representative to do so.

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) Order 52A; 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* (1998) 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 (NSW), 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 interme-

diaries 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. In *First Class Securities Limited v Global Future Holdings Pty Ltd (Freezing Orders)* [2026] FCA 48, the Federal Court referred to commentary by Moore J in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1587; 228 ALR 174 at [20] as to the importance of asset disclosure to give efficacy to a freezing order and that failure to comply with orders requiring a party to provide such disclosure may expose a party to contempt orders. Ultimately, the court found that the respondent's pattern of non-compliance and dishonesty (including failure to comply with orders requiring asset disclosure) supported the making of freezing orders.

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 **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 docu-

ments 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.

It is incumbent on the applicant of an ex parte search order (or a freezing order) to ensure they have fully disclosed all facts material to the determination of the application to the court, including any defences available to the respondent and any correspondence exchanged between the parties relating to the dispute. This was emphasised in *Direct Flow Pty Ltd t/a Arthur Rubber v Andrew Peterson t/a Maxx Rubber* [2023] NSWSC 318, where the New South Wales Court of Appeal refused to grant the plaintiff access to materials collected on the execution of a search order. The court considered that the plaintiff's non-disclosure to the court of communications between the parties prior to the application of the search order was material in that (i) it did not bring to the court's attention matters which the defendant may have tendered as evidence; and (ii) if the relevant information had been disclosed, there was a high probability that the court would have dismissed the original search order application. In *Element Zero Pty Ltd v Fortescue Ltd* [2025] FCA 206, the Federal Court noted that courts have discretion upon discovering a material non-disclosure to set aside search orders, although "different courts and commentators have identified there to be different approaches to the exercise of the relevant discretion, some adopting a narrower approach and others a broader approach" (at [19]).

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, which will occur following satisfaction of the three threshold conditions (see *A Nelson & Co Limited v Martin & Pleasance Pty Ltd* [2021] FCA 228, [76] citing Popplewell J in *Orb ARL v Fiddler* [2016] EWHC 361 at [82]–[88]), 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 **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 25.11 (1)).

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 particularity" (*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 rescission 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

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3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on 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 Natrass* [1972] AC 153; *Mousell Brothers Ltd v London and North-Western Railway Co* [1917] 2 KB 836) applied in *Perpetual Trustee Company Ltd v Pascoe Partners Custodian Services Pty Ltd* [2025] WASC 82 at [24], [39]–[40]. 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 advisers to a company may also be liable where their advice amounts to aiding, abetting, coun-

selling, 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 Trading) 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 un rebutted 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). However, mere control of a subsidiary by a parent company is not sufficient to pierce the corporate veil (*Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd* [2021] NSWCA 148 at [124]–[127]).

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, recently discussed in *Sunny International Hardware Group Pty Ltd, Re* [2025] NSWSC 254 at [46]). 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. As to considerations in respect of whether there is a serious question to be tried, the court may also consider the prospects of success of the action if leave is to be granted (*Pesec v Consolidated Builders Limited* [2021] ACTCA 25, at [61]–[78]).

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 NSW, 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), extend 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]).

Nonetheless, whether a party is carrying on business in Australia is a question of fact (*LK Law Pty Ltd v Karas* (No 4) [2025] FCA 1461 at [1960] “*LK Law*”). In *LK Law*, the Federal Court considered whether a law firm registered in England and Wales (“MdR”) was liable as an accessory to Mr Karas’ breaches under the ACL and/or the Corporations Act 2001 (Cth). The court held that evidence of a consultancy agreement and invoices between MdR and an Australian law firm, and MdR having advised Australian clients or advised non-Australian clients in connection with Australian matters was not sufficient to show that MdR was carrying on business in Australia. Like many global firms, MdR was simply “capable of providing advice on Australian law... notwithstanding they do not practise in Australia” (at [1984]).

It should be noted that despite the express intention of Parliament for 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 (the “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.

4.2 Service of Proceedings 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, providing a set of uniform rules concern-

ing the service of Australian judicial documents in civil and commercial matters to parties in countries which are subject to the Hague 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.

Under Part 11A.4 of the UCPR, a party seeking to serve a document overseas must make an application requesting overseas service of a local judicial document to the Registrar of the Supreme Court of NSW. The application must be accompanied by three copies of: (i) the draft request for service abroad in the approved form, (ii) the document to be served, (iii) a summary of the document to be served in the approved form, and (iv) if required, a translation of the document to be served and the summary document in the official language of the country in which the document is to be served. The draft request for service abroad needs to be addressed to the “Central Authority”, being the authority that is, for the time being, designated by the relevant Hague Convention country, under Article 2 of the Hague Convention, to be the Central Authority for that country, or to an additional authority.

Similar procedures apply under the court procedure rules for other Australian jurisdictions (see Supreme Court (General Procedure) Rules 2015 (Vic), Order 80; Uniform Civil Procedure Rules 1999 (Qld), Ch 4, Pt 7, Div 3; Rules of the Supreme Court 1971 (WA), Order 11A; Uniform Civil Rules 2020 (SA) Sch 1, Pt 1, Div 3 & Sch 1, Pt 3, Div 1; Supreme Court Rules (Tas), Pt 38A; Court Procedure Rules 2006 (ACT), Pt 6, Div 6.8.12; Supreme Court Amendment Rules 2016 (NT), Order 7A).

For matters in the Federal Court of Australia, overseas service is permitted under Division 10.4 of the Federal Court Rules 2011 (Cth) (the “Federal Court Rules”) and assisted by Division 10.6 of the Federal Court Rules. Rule 10.42 provides a list of the kinds of proceedings in which an originating application may be served outside of Australia. Otherwise, leave must be obtained prior to serving any originating application outside of Australia in accordance with Rule 10.43.

Any leave application should be accompanied by an affidavit or evidence in support. Similar to Part 11A of the UCPR, Division 10.6 deals with the operation of the Hague Convention on the service of an originating process in the Federal Court of Australia, offering an alternative method of service of judicial documents outside Australia in countries that are a party to the Hague Convention.

Alternatively, for countries that are not a party to the Hague Convention, service of judicial documents will need to be made through a private process server or local agent if this method of service is accepted by the receiving country. If this method of service is not accepted by the receiving country, diplomatic channels or bilateral agreements will need to be utilised through the assistance of the Department of Foreign Affairs and Trade.

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; and
- 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 judgment 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 and 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.

5.2 Enforcement of Foreign Judgments

No response has been provided in this jurisdiction.

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

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. This principle was recently referred to in *Care A2 Plus Pty Ltd v Pichardo* [2024] NSWCA 35 [127]–[130].

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 custom-

ers' 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 pecuniary 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) (the "AML/CTF Act"), 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, 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 Corporations Act 2001 (Cth).

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 cryptocurrency 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.

The Supreme Court of Victoria in *Blockchain Tech Pty Ltd* [2024] VSC 690, established that an interest in cryptocurrency (in this case Bitcoin) is characterised as an interest in property under Australian law ([383]–[389]). Ultimately, the court found that some of the Bitcoin were the subject of an express trust which was breached, entitling Blockchain Tech to equitable compensation. This decision brought Australian law in line with other common law jurisdictions, such as the UK, New Zealand and Singapore, which have recognised cryptocurrencies as property ([372]).

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 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.

BAHAMAS

Law and Practice

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Graham Thompson has been one of the premier law firms in The Bahamas for over 75 years. The firm operates four offices – one in each of the main economic centres in The Bahamas. Graham Thompson has more than 40 attorneys who provide wide-ranging specialties across the firm's six core practice areas: corporate and financial services, dispute resolution, private clients and trusts, property, shipping and aviation, and tax. The dispute resolution team has extensive trial experience in all courts of The Baha-

mas. They work regularly with advisers on domestic and cross-border matters in all sectors. Specialties include fraud and asset tracing, arbitration, alternative dispute resolution, corporate and commercial, finance, insolvency and restructuring, libel, slander and defamation, trusts and probate, and other key areas. The team is known for their commercially sensible, strategically savvy and focused approach to helping clients achieve their objectives – whether through settlement, litigation or arbitration.

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1. Fraud Claims

1.1 General Characteristics of Fraud Claims

While civil fraud actions in The Bahamas can take many forms, at common law such claims are generally rooted in the tort of deceit by way of claims of fraudulent misrepresentation. Alternative claims are frequently pursued in the tort of conspiracy.

Generally, such claims involve allegations of dishonesty, false statements, corrupt payments, misappropriation of property and concealment, all with an intention to cause financial harm to the victims, and result in an unlawful gain to the perpetrator(s).

Fraudulent Misrepresentation

A common claim in fraud actions, fraudulent misrepresentation is predicated on false statements. To succeed on the claim, there are three key elements that must be made out for the court – ie, that:

- the misrepresentation was knowingly false, or recklessly made without regard as to whether it was true or false;
- it was intended that the misrepresentation would be acted upon; and
- there was reliance on the misrepresentation resulting in loss.

Conspiracy

By contrast, conspiracy is an economic tort that has two forms:

- lawful means conspiracy; and
- unlawful means conspiracy.

Both forms involve two or more persons acting together with the intention to cause harm to another. The main distinction between the two is that with respect to an unlawful means conspiracy, the intention to cause harm to another need not be the predominant purpose of the conspiracy.

1.2 Causes of Action After Receipt of a Bribe

Pursuant to the Prevention of Bribery Act of The Bahamas, bribery is only a criminal offence in The Bahamas in relation to acts involving public officials, local and foreign.

An agent who receives a bribe may be subject to a number of equitable and common law claims from his or her principal. These include claims of breach of fiduciary duty, damages for fraud or deceit, and forfeiture of the agent's remuneration.

Breach of Fiduciary Duty

This cause of action is based on the duty of loyalty owed by the agent to act in, and avoid any conflict with, the interests of their principal. Under this cause of action, a principal can pursue the agent for an account of the profits received, or equitable compensation for the losses suffered as a result of the breach.

Proprietary Claim

The receipt of the bribe by the agent results in the bribe being held on constructive trust for the principal. The creation of a constructive trust is important as it offers protection against unsecured creditors in the event of the agent becoming insolvent. Additionally, the constructive trust would allow for tracing claims by the principal where the bribe is used to acquire other property, or comes into the hands of other parties who may have knowingly assisted with the bribe.

Damages for Fraud and Deceit

A claim can be pursued by a principal for losses suffered beyond the amount of the bribe itself. The onus will be on the claimant to establish that it has suffered such losses.

Forfeiture of the Agent's Remuneration

Where the agent received remuneration or commission for any work connected to the bribe, it follows that they should not be entitled to the remuneration or commission. The principal is therefore able to seek recovery of the remuneration paid to the agent in respect of the work connected to the bribe.

1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts

Parties who assist or facilitate fraudulent acts can be pursued by claims of knowing receipt and dishonest assistance.

Knowing receipt claims are applicable when a party receives property that was held on trust or by a fiduciary, with knowledge that the property was transferred

to that party in breach of trust or fiduciary duty. It therefore operates as an equitable claim whereby a claimant can hold a party personally liable to account for or provide compensation for any property that they dispose of despite knowledge of the breach of trust or fiduciary duty. A claimant does not have to establish dishonesty on the part of the recipient of the property but must satisfy the court that the knowledge of the recipient would make it unconscionable for the recipient to retain the benefit of the property.

Conversely, a claim of dishonest assistance requires an element of dishonesty. However, as the claim can be pursued even where there is no receipt by the defendant of property in breach of trust or a fiduciary obligation, the dishonesty element must arise from the acts of the defendant that facilitated, induced or procured the breach. The test for whether the defendant acted dishonestly is an objective one based on what the defendant actually knew at the time, and not what a reasonable person ought to have known.

1.4 Limitation Periods

Section 41 (1) of the Limitation Act of the Bahamas postpones the running of the period of limitation for a claim based on fraud until the claimant has:

- discovered the fraud; or
- with reasonable diligence, could have discovered the fraud.

This provision operates to limit the instances in which a party, by themselves, their agent or any other person, can rely on its intentional concealment of material fact to assert that the limitation period for a claim has expired.

1.5 Proprietary Claims Against Property

A claimant who seeks the recovery of property misappropriated or transferred by fraud can assert a proprietary claim against the converted proceeds of the original fraud. This is subject to there being:

- a continuing enforceable proprietary interest;
- an ability to trace that interest to identifiable assets; and

- no dissipation of the proceeds or presence of a bona fide purchaser for value without notice of the fraud.

At common law, tracing is not available where the proceeds have become co-mingled with other funds. Equity, however, will also allow for tracing of proceeds that have become co-mingled with other funds, provided that there is a fiduciary relationship.

1.6 Rules of Pre-Action Conduct

The Supreme Court (Civil Procedure) Rules 2022 (CPR), which govern the commencement and prosecution of civil claims in The Bahamas, do not prescribe any pre-action protocols for fraud claims.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Freezing orders can be sought under Part 17 of the CPR to restrain a party from dissipating assets. If granted, a freezing order will operate to restrain a party from dealing with any assets, including seeking to remove the assets from the jurisdiction. A cross-undertaking in damages is required upon seeking a freezing order.

Non-Compliance

A defendant's failure to comply with a freezing injunction may lead to contempt proceedings. In determining whether a defendant is in contempt, the court will consider whether the defendant knew of the freezing injunction, was aware of its terms and still knowingly refused to comply with the order. If the answer is yes, the defendant will face sanctions, which may be a fine but could also be a committal to prison.

The nature and extent of any sanctions is at the discretion of the court. In weighing what sanctions, if any, to impose, the court can consider all of the circumstances of the non-compliance. It is likely that the court would place significant weight on anything that suggests that the defiance of the freezing order was not a one-off but likely to be repeated.

Third Parties

Freezing orders are usually endorsed with a penal notice warning any third parties against knowingly facilitating a breach of the order. If that admonition is

ignored, third parties run the same risk of committal proceedings faced by defendants who defy the order.

Fees

Filing fees are payable on the commencement of all actions. The fee structure is tiered and increases with the value of the claim.

2. Procedures and Trials

2.1 Disclosure of Defendants' Assets

There is no mechanism under the CPR to compel a defendant to disclose his or her assets prior to a judgment. Post-judgment, Part 44 of the CPR provides for information to be obtained from a judgment debtor, including the disclosure of assets.

2.2 Preserving Evidence

Preservation of evidence is possible via Part 17 of the CPR, which governs interim remedies. This part of the CPR allows, among other things, for the grant of an interim injunction, freezing and search orders, and orders for the detention, custody, preservation and procuring a sample of "relevant property".

An applicant for a search order is required to give an undertaking in damages. If the assets that the applicant has are deemed insufficient to satisfy the undertaking, the court may require the application to fortify the undertaking by providing security. The form and amount of the security is to be fixed by the judge.

2.3 Obtaining Disclosure of Documents and Evidence From Third Parties

Prior to commencing a claim, the ability to obtain documents from third parties is limited. Recourse may be had to a Norwich Pharmacal Order (NPO), which is invoked to seek a court-ordered disclosure from third parties, who may have become caught up, unwittingly, in acts of wrongdoing by other parties.

The restrictions on the use of information obtained via an NPO will depend on the information relayed to the court in the course of the application, and any specific purpose identified. If for example, the NPO was sought to assist in identifying a fraudster, against whom proceedings would be brought, the applicant

would be constrained to use any information for that purpose. This constraint would likely be underpinned by an undertaking given to the court as to the purpose for which the obtained information would be used, warranting an application to the court to make any use of the information for any other purpose.

Post-Commencement

Once proceedings are commenced, obtaining documents from third parties is possible by way of a witness summons. This procedure is under Part 33 of the CPR, and enables a party to seek the issuance of a witness summons to produce documents to the court (as opposed to any of the parties). The leave of the court is required for the issuance of a witness summons:

- less than 21 days before the hearing; or
- requiring a party to give evidence or produce documents on any date other than one fixed for trial, or the hearing of an application.

2.4 Procedural Orders

Whether an application for any of the relief under Part 17 of the CPR proceeds on ex parte basis is entirely up to the discretion of the judge hearing the matter. While permissible, ex parte applications are the exception and should only be allowed by the judge where:

- the relief being sought would be defeated by notice; or
- the urgency of the application makes it impossible to provide notice.

On obtaining an order on an ex parte basis, the applicant must provide the respondent with a copy of the application, all supporting evidence and any written submissions relied upon at the hearing. The applicant must also provide a copy of the transcript of the ex parte hearing, or if none exists, the attorney's notes of the hearing.

2.5 Criminal Redress

Victims of fraud typically lodge fraud complaints with the Financial Crimes Unit of the Royal Bahamas Police Force. The prosecution of a criminal complaint does not automatically preclude the prosecution of a civil fraud claim. However, the courts have recognised that

an extant criminal complaint proceeding relating to fraud can provide a basis for an application to stay a parallel civil claim in respect of the fraud.

2.6 Judgment Without Trial

Where a defendant is not participating in a matter, by failing to file either an acknowledgement of service or a defence, a default judgment may be obtained. The main prerequisites for both are:

- proof of service of the claim form and statement of claim on the defendant;
- the expiry of the period for filing an acknowledgement of service or defence; and
- failure to satisfy the claim on which judgment is sought. Default judgments may be set aside if wrongly entered because any of the prerequisites were not satisfied, or if the defendant promptly applies, offers a good explanation for the default and has a real prospect of successfully defending the claim.

Where a defence is wholly unmeritorious, judgment can be obtained without a trial by way of an application for summary judgment. To accede to an application for summary judgment, the court must be satisfied that there is no prospect of successfully defending the claim. This is a discretionary exercise that does not entail the court conducting a mini-trial but rather reviewing the evidence to determine whether the prospects of success are realistic or fanciful.

2.7 Rules for Pleading Fraud

The Bahamas has recognised the well-established common law position that allegations of fraud must be expressly pleaded and sufficiently particularised. This requirement has been interpreted as rendering it inadequate for a party to make a mere, bare or vague reference to fraud in their pleadings. Instead, there is an obligation on a party to set out, in their statements of case, all of the material facts and circumstances upon which they rely to assert fraud. To the extent that documents are critical to the allegations of fraud, they should be identified in the party's pleadings.

A party's failure to provide sufficient particulars of fraud, or identify crucial documents in their statement of case, can have significant consequences. The

pleading may be susceptible to a strike-out challenge on the ground that it is frivolous and vexatious, or fail at trial, having only set out a mere reference to fraud.

2.8 Claims Against "Unknown" Fraudsters

At common law, claims can be commenced in The Bahamas against unknown persons. If these unknown persons are anonymous but identifiable, issues such as the court's jurisdiction and effecting service of the originating process can be readily addressed. In turn, the court may also be prepared to grant an interim order under Part 17 of the CPR.

The considerations for the court in granting an interim order against unknown persons are that:

- the class of unknown persons is properly defined;
- the acts being restrained relate to the matters complained of;
- the defendants must be identifiable and capable of service; and
- the order must be clear and precise and not extend to acts that are lawful.

2.9 Compelling Witnesses to Give Evidence

The court can issue a witness summons under Part 33 of the CPR to compel a witness to give evidence. This power can be invoked in respect of inferior courts or tribunal, provided there is no such power vested in that inferior court or tribunal.

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on a Corporate Entity

Liability for fraud may be imposed on a limited liability company or other corporate entity, in a civil context, where the fraudulent acts are committed by individuals who, acting within the scope of their authority, control and represent the company's decision-making and are therefore considered to have "directing mind and will" of the company itself.

However, where the company is itself the victim of fraud, the fraudulent conduct will not be attributed to the company, and the company may pursue claims

against the responsible individuals, as discussed in **3.3 Shareholders' Claims Against Fraudulent Directors**. This issue is further addressed in **3.2 Claims Against Ultimate Beneficial Owners**.

3.2 Claims Against Ultimate Beneficial Owners

In The Bahamas, the general principle is that a company is treated as a separate legal personality, distinct from its directors, shareholders and ultimate beneficial owner(s) (see *Salomon v Salomon & Co Limited* [1897] AC 22). This means that a company has distinct legal rights and obligations from those who stand behind the company. Further, these individuals are ordinarily shielded from personal liability by the “corporate veil”.

Accordingly, directors are generally protected by the “corporate veil” from personal claims based on acts properly done in the course of the company’s management. This protection is reinforced under Section 55 of the International Business Companies Act, which states that in performing such functions, the directors of a company must act honestly and in good faith with a view to the best interest of the company and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. However, this protection is not absolute. Bahamian law, applying common law principles, recognises circumstances upon which it is necessary to look beyond the corporate veil.

Courts have lifted the veil to prevent misuse of corporate structures for fraud, concealment or avoidance of obligations (see *Re a Company* [1985] BCLC 333). Similarly, Bahamian law recognises piercing the corporate veil but emphasises flexibility rather than a rigid approach, concluding that the separate entity principle is not applied where it yields a result “too flagrantly opposed to justice”.

Therefore, where a company is merely a sham, façade or alter ego of its beneficial owner, and is being used to perpetuate fraud, the Bahamian court may not apply the separate legal personality principle and impose liability directly on the controlling individual.

Nevertheless, in circumstances where the corporate veil is not “pierced” or “lifted”, individuals behind a

company may incur direct personal liability, namely where these individuals:

- personally participate in fraudulent misrepresentations;
- procure or direct the commission of a tort; and
- breach fiduciary duties owed.

3.3 Shareholders' Claims Against Fraudulent Directors

As a general rule, for breach of directors’ duties, where the company suffers loss as a result, the only “person” with legal standing to pursue a claim on behalf of the company is the company itself. Under Section 79 of the Companies Act and Section 40 of the International Business Companies Act, subject to any limitations in its memorandum or articles or any unanimous shareholder agreement, directors have the authority to manage the business and affairs. In exercising such authority, directors and officers must act honestly and in good faith, with a view to the best interests of the company. Where such duties are breached, particularly in cases involving fraud, the company is the entity that suffers the loss and is therefore typically the property party to bring proceedings.

There are of course exceptions to address issues where the alleged wrongdoers are in control of the company and therefore would not, in practice, vote in favour of issuing proceedings against themselves. To address the difficulty that may arise in circumstances where the alleged wrongdoers are themselves in control of the company, common law has developed the mechanism of the derivative action, which permits shareholders to bring proceedings on behalf of the company.

Derivative Actions

A derivative action allows a shareholder to pursue claims in respect of wrongs done to the company where those in control have failed or refuse to act. This ensures that directors cannot rely on their control of the company to protect themselves from the consequences of their breaches and avoid liability.

Double Derivative Actions

Bahamian law, through common law, also recognises instances where members of a company’s holding

company may pursue the company's cause of action where the holding company was itself subject to the same wrongdoer control as the company. Common law has therefore permitted an extended form of derivative claim where a shareholder of a parent company wants to pursue a claim vested in a subsidiary of that parent company (a double derivative claim), or in subsidiaries of the subsidiary (a triple derivative claim). The test to be applied by the court is that of a common law derivative action.

Common law recognises double derivative actions where:

- the wrong lies in a subsidiary company;
- the parent company, whose members include the claimant, will not act because it is controlled by the wrongdoer; and
- justice requires intervention.

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims

A claimant may add a new defendant to proceedings without the court's permission at any time before the case management conference by filing, at the court office, an amended claim form and statement of claim.

An application for permission to add a party may be made by:

- an existing party; or
- a person who wishes to become a party.

The Computer Misuse Act 2003 (CMA) provides an example in which the Bahamian courts are empowered to exercise extraterritorial jurisdiction. By virtue of Section 11 of the CMA, the Bahamian courts are empowered to try offences under the CMA that are committed outside of The Bahamas.

4.2 Service of Proceedings out of the Jurisdiction

The service of proceedings on parties out of the jurisdiction is governed by Part 7 of the CPR, which has streamlined the process surrounding the service of court process out of the jurisdiction, making the

involvement of foreign parties more efficient than previous procedural requirements.

Part 7 of the CPR sets out instances where a party may be served out of the jurisdiction without the court's permission, that is "without leave", and where the court's permission is required. In cases that fall within CPR Rule 7.2, a claim form may be served out of The Bahamas without leave of the court. However, where service is not allowed under CPR Rule 7.2, a claim form may be served outside of The Bahamas, with the court's permission.

An application for leave under CPR Rule 7.3 must be made on notice to every party to the proceedings, other than the party intended to be served. Typically, such an application is made by way of notice of application, with a supporting affidavit stating any facts or matters related to the desirability of the court assuming jurisdiction, including the grounds on which the application is made, the place or country in which the person to be served is or possibly may be found, whether or not the person to be served is a citizen of The Bahamas and a statement that, in the deponent's view, there is a serious issue to be tried on the merits.

The court will consider whether the applicant establishes:

- that the claim has a real and substantial connection with The Bahamas;
- that there is a serious issue to be tried on the merits;
- that The Bahamas is the appropriate forum for the trial; and
- any other relevant circumstances to support an assumption of jurisdiction.

Alternate Service

There is an availability of alternative service procedures that address difficulties where traditional service methods are not feasible and provide for expedience.

Where service on a defendant who is to be served out of The Bahamas is impracticable, the claimant may apply to the court for an order under CPR Rule 7.12 that the claim form be served by an alternative method. This order must specify the date on which service

of the claim form is deemed to have been effected, and such service shall be deemed to be good service. However, where any method of service specified in an order for service by alternative method is subsequently shown to be contrary to the law of the country in which the claim was purportedly served, such service shall be invalid.

An order for service by an alternative method can be made only where none of the methods provided in an order for service by an alternative method can be made only where none of the methods provided has been successfully adopted, including of course service by a method permitted by the law of the country in which the claim form or document is to be served.

Court's power to dispense with service

The court may also dispense with service of a claim form in exceptional circumstances. An application to dispense with service may be made without notice at any time and must be supported by affidavit evidence. The court's power to dispense with service can be exercised retrospectively as well as prospectively.

5. Enforcement

5.1 Methods of Enforcement

The method of enforcement will generally depend on the nature of the judgment. Except where an enactment or rule provides otherwise, a person who has obtained or is entitled to enforce a judgment or order ("judgment creditor") may pursue multiple methods of enforcement that are available, concurrently or sequentially.

Methods of Enforcing Judgments or Orders

Under CPR Rule 43.11, the judgment creditor may enforce a judgment or order for the payment of money by any of the following methods:

- a writ of fieri facias (writ of execution) or warrant of execution under CPR Part 48;
- a third-party debt order under CPR Part 45;
- in relation to securities, a charging order, stop order or stop notice under CPR Part 47;

- in relation to land, by a fixed date claim to enforce the equitable charge created by Section 63 of the Supreme Court Act (Chapter 53) under Part 50;
- the appointment of a receiver under CPR Part 53; or
- a writ of sequestration under CPR Part 50.

Enforcement of Judgment for Possession of Land

Under CPR Rule 50.1, a judgment or order for the giving of possession of land may be enforced by:

- writ of possession;
- an order of committal (where CPR Rule 50.3 applies); or
- writ of sequestration.

Leave of the court is generally required to issue a writ of possession to enforce a judgment or order for the giving of possession of any land, except where the judgment or order was given or made in a mortgage action. The court will not grant leave unless it is shown that every person in actual possession of the whole or any part of the land has received notice of the proceedings sufficiently enabling him or her to apply to the court for any relief to which they may be entitled.

Enforcement of Judgment for Delivery of Goods

A judgment or order for the delivery of any goods that does not provide the alternative of paying the assessed value of the goods may be enforced by:

- writ of delivery to recover the goods without alternative provisions for recovery of their assessed value ("writ of specific delivery");
- an order of committal; or
- writ of sequestration.

Enforcement of Judgment To Do or Abstain From Doing Any Act

Where a person (i) required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time, or, as the case may be, within that time as extended or abridged under these Rules or (ii) disobeys a judgment or order requiring him or her to abstain from doing an act, then, subject to the provisions of these Rules, the judgment or order may be enforced by:

- a writ of sequestration against the property of that person, having obtained leave of the court;
- a writ of sequestration against the property of any director or other officer of the body, where that person is a body corporate and having obtained leave of the court; or
- an order of committal against that person or, where that person is a body corporate, against any such officer, subject to the provisions of the Debtors Act (Chapter 70).

This rule must be read together with CPR Rule 50.5, under which as a general rule, enforcement cannot be obtained unless a copy of the order is served personally on the person in default with the requisite penal notice indorsed thereon.

5.2 Enforcement of Foreign Judgments

Registration of Foreign Judgment by Way of the Reciprocal Enforcement of Judgments Act

The Reciprocal Enforcement of Judgments Act (REJA) enables the registration of foreign judgments, orders and awards in the Supreme Court. REJA applies solely to jurisdictions of reciprocity, namely Barbados, Bermuda, Jamaica, the Leeward Islands, St Lucia and Trinidad, British Guiana, British Honduras, Australia and the United Kingdom.

Under Section 2 of REJA, a judgment means “any judgment or order given or made by a court in any civil proceedings whether before or after the passing of this Act and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place”.

To enforce a judgment obtained outside of The Bahamas under REJA, the person by whom the judgment was obtained (including the successors and assigns of that person) applies to the Supreme Court, at any time within 12 months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court. The court will consider whether it thinks it is just and convenient that the judgment should be enforced in The Bahamas. Nevertheless, no judgment shall be ordered to be registered under REJA if:

- the original court acted without jurisdiction;
- the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court;
- the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he or she was ordinarily resident or was carrying on business within the jurisdiction of that court, or agreed to submit to the jurisdiction of that court;
- the judgment was obtained by fraud;
- the judgment debtor satisfies the registering court either that an appeal is pending or that he is or she entitled or intends to appeal against the judgment; or
- the judgment was in respect of a cause of action that, for reasons of public policy or for some other similar reason, could not have been entertained by the registering court.

Common Law

Foreign judgments may also be enforced by an action at common law. Judgment from any country to which REJA has not been extended can be enforced at common law. The method of such enforcement is by way of commencement of an action in the Supreme Court by which a party may seek to have recognised or domesticated the order of the foreign court by an order of the Bahamian court. The foreign judgment constitutes a cause of action that can only be opposed on limited grounds, namely:

- the foreign court lacked competent jurisdiction;
- the rules of natural justice had not been complied with in the foreign proceedings;
- the foreign judgment was not final and conclusive;
- the judgment debt was not definite or ascertainable;
- the foreign judgment was obtained by fraud; and
- recognition of the foreign judgment would be contrary to public policy in The Bahamas.

Enforcement of Foreign Arbitral Award Under the Arbitration (Foreign Arbitral Awards) Act

The Bahamas, by way of the Arbitration (Foreign Arbitral Awards) Act (the “AFAA Act”), has given effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (“the New York Convention”), which allows foreign arbitral awards awarded in member states of the New York Convention to be enforced domestically.

An application before the Supreme Court of the Commonwealth of The Bahamas for the enforcement of a foreign arbitral award is made by a fixed date claim form along with a statement of claim. All such particulars and evidence as may be necessary in relation to such order or orders for enforcement must be included in the fix date claim form, statement of claim or affidavit, particularly:

- the duly authenticated original award or a duly certified copy of it;
- the original arbitration agreement or a duly certified copy of it; and
- a translation of the award or agreement certified by an official or sworn translator or by a diplomatic or consular agent, if the award or agreement is in a language other than English.

Further, as these proceedings would involve an order against a government department, the statement of claim should include a statement of the circumstances in respect of which the Crown liability is alleged, and the government department and officer of the Crown concerned with the stated allegation. The affidavit must be filed and served on all respondents.

A respondent who wishes to oppose an application to enforce under the AFAA 2009 must file and serve an affidavit setting out the grounds upon which the enforcement of the award is opposed within 14 days from the date of service of the applicant’s affidavit.

The leave application and an application for an order, or orders, for the enforcement of the award may be made simultaneously. The court may, at the time of hearing the leave application, make an order as to the enforcement.

There are circumstances upon which the court may refuse the enforcement of a foreign arbitral award, namely where it is proven that:

- a party to the arbitration agreement is under some incapacity;
- the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the state where the award was made;
- the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his or her case;
- the award deals with a difference not contemplated by or falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties or – failing such agreement, with the law of the state where the arbitration took place;
- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority in the state in which, or under the law of which, the award was made;
- the award is in respect of a matter that is not capable of settlement by arbitration; or
- the enforcement of the award is contrary to public policy.

There are also special considerations under CPR Part 65, and Sections 15 and 19 of the Crown Proceedings Act, to consider as the present circumstances concern potential proceedings involving the Crown.

Service Outside of the Jurisdiction

If in these circumstances a party must be served outside of the jurisdiction, where a party is seeking to enforce a judgment or arbitral award CPR 7.2 (m) and/or when a claim is made for interim relief in support of judicial or arbitral proceedings commenced – or to be commenced – outside the jurisdiction (CPR 7.2 (q)), proceedings may be served out of The Bahamas without leave of the court (CPR 7.2 (m) and (q)).

Jurisdiction of Foreign Court

The Bahamian court has noted that, ordinarily, while foreign courts could make in personam orders, they could not make in rem orders (orders concerning the actual transfer of Bahamian property or proprietary rights); this can only be done by a Bahamian court. In rem judgments bind the whole world, whereas in personam judgments merely bind the parties in the litigation.

6. Privileges

6.1 Invoking the Privilege Against Self-Incrimination

In The Bahamas, the privilege against self-incrimination is protected in criminal proceedings under the Constitution of the Commonwealth of The Bahamas (“the Constitution of The Bahamas”), as well as by common law principles and statute.

Pursuant to Article 20 (1) of the Constitution of The Bahamas, any person charged with a criminal offence, unless the charge is withdrawn, is guaranteed a fair hearing within a reasonable time by an independent and impartial court established by law. Furthermore, paragraph (7) of Article 20 of the Constitution of The Bahamas states that “No person who is tried for a criminal offence shall be compelled to give evidence at the trial.”

The Bahamian courts have given a purposive interpretation to paragraphs (1) and (2) of Article 20 of the Constitution of The Bahamas, concluding that this Article does not simply encompass the right to refuse to testify in a court but must also apply to bodies endowed by the law with inquisitional power; and the right to refuse to answer questions that may open an incriminating line of enquiry (per Osadebay, JA, in *The Attorney General v Financial Clearing Corporation*, Civil Appeal No 70 of 2001).

In addition, Sections 44 (b) and 138 of the Evidence Act (Chapter 65) provide that a witness shall not be compelled to produce any document in his or her possession or power nor answer any question where the production of the document or such answer may tend to expose that person or the husband or wife of

such person to a criminal charge or to any penalty or forfeiture.

In civil proceedings, including fraud claims, no person can be compelled to self incriminate. A person may therefore refuse to answer any question, or produce any document or thing, if to do so would create a real risk of criminal prosecution.

While a defendant may invoke this privilege, in certain contexts, the court may draw an adverse inference from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action. This adverse inference may strengthen the evidence adduced by the other party or weaken the evidence, if any, adduced by the defendant. Nevertheless, this cannot itself establish liability.

The firm is not aware of any decisions on whether a defendant in a civil fraud claim may be able to invoke a right against self-incrimination in response to a court order.

6.2 Undermining the Privilege Over Communications Exempt From Discovery

The Bahamas, like most jurisdictions, recognises that confidential communications between a lawyer and client are to be protected under the doctrine of legal professional privilege.

There is a fraud exception to this privilege, typically seen in applications for discovery and inspection. The exception dictates that correspondence between a lawyer and client can be disclosed if the correspondence was in furtherance of a criminal purpose. The common law authority for this fraud exception, which has been recognised within The Bahamas, is the seminal decision of *Kuwait Airways Corp v Iraqi Airways Co* (No 6) [2005] 1 WLR 2734, [2005] 1 WLR 2734.

7. Special Rules and Laws

7.1 Rules for Claiming Punitive or Exemplary Damages

The CPR addresses exemplary or punitive damages at Part 8 of the CPR; specifically, this addresses the requirements for a claim form. In addition to setting

out a short description of the nature of the claim, and the remedy sought, a claimant must expressly state in the claim form that exemplary damages are being sought.

7.2 Laws to Protect “Banking Secrecy”

The Bahamas has a legislative framework that, while providing some protection against disclosure of customer information, balances the jurisdiction’s obligations with international standards for providing information to aid in the investigation of crimes and anti-money laundering policies.

7.3 Crypto-Assets

The firm is not aware of any Bahamian jurisprudence on crypto-assets.

BRAZIL

Law and Practice

Contributed by:

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Duarte Forssell Advogados (DFA) is a boutique law firm composed of four partners and 25 lawyers specialised in complex litigation, international asset recovery and transnational insolvency. The firm's professionals have over 20 years' experience in complex multi-jurisdiction claims and transactions. The team advises financial institutions, trustees, foreign liquidators and Brazilian and foreign business groups in

legal matters involving commercial, banking, bankruptcy, succession, corporate and contractual law. Headquartered in São Paulo, the firm operates in over 50 countries by means of an international network of legal professionals. DFA is the only law firm based in São Paulo that integrates FraudNet, an international network of lawyers created by the International Chamber of Commerce (ICC).

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1. Fraud Claims

1.1 General Characteristics of Fraud Claims

Brazilian substantive and procedural law establish several rules that address fraudulent transactions such as the making of false statements, the making of corrupt payments, conspiracy and misappropriation. The specific fraud claim applicable will vary depending on the parties involved – both the perpetrator and the harmed party. In general, the following fraud claims can be pursued by the victim.

Civil and Commercial Claims

Fraud against creditors

Fraud against creditors (in Portuguese, *fraude contra credores*), as provided for in the Brazilian Civil Code, is applicable to private creditors in general. Unsecured creditors have the right to challenge an onerous sale of assets and may be able to reclaim the sale proceeds if the seller was notoriously insolvent at the time of the transaction or if the buyer had reason to know about the debtor's insolvency.

Fraud upon the execution of judgment

In general, fraud upon the execution of judgment (or *fraude à execução* in Portuguese) occurs when, at the time of the transfer or encumbrance of assets, there were lawsuits pending against the debtor. Any creditor that filed an enforcement proceeding (or any other legal action against the debtor that could lead the latter to insolvency) before the transaction may challenge the transaction and seek to reclaim the assets, provided certain requirements are met.

Abuse of legal personality

Under certain circumstances, the making of false statements, the making of corrupt payments, conspiracy and misappropriation can be considered an act of abuse of legal personality.

Under the doctrine of piercing of the corporate veil, shareholders, directors, officers and third parties within the same economic group may be held liable for the debts of a company, when they have committed an act of abuse of legal personality. According to the Brazilian Civil Code, abuse of legal personality occurs when there is commingling of assets or deviation from the corporate purpose.

Bankruptcy Fraud

If the victim of a fraudulent conveyance is the estate of an insolvent company, a creditor, the judicial administrator or the Public Prosecutor's Office may seek to claw back the assets of the transaction. Pursuant to Brazil's Bankruptcy Law (Law No 11,101/2005) as amended, this can be achieved by means of the following.

Revocatory action

This action can be brought by any creditor to render a past transaction ineffective. It is predicated on the fraudulent behaviour of the debtor and the counterparty of the transaction, resulting in losses to the bankruptcy estate.

Objective ineffectiveness claim

This action is grounded on acts considered fraudulent per se regardless of the parties' intention. Examples include:

- payment of debts before the maturity date within the look-back period;
- payment of debts in conditions not contractually agreed also within the look-back period; and
- performance of gratuitous acts two years before the bankruptcy.

Criminal Offences

The Brazilian Criminal Code addresses fraud through various provisions that criminalise deceptive or fraudulent conduct in different contexts.

Corruption offences

The Brazilian Criminal Code contains provisions addressing corruption offences, including active corruption (Article 333), passive corruption (Article 317) and influence-peddling (Article 332). These offences involve actions that affect public interest and involve individuals vested with public authority.

Fraudulent appropriation

Article 168 of the Criminal Code criminalises fraudulent appropriation, which includes the act of misappropriating someone else's property or money entrusted to the offender for a specific purpose. This provision aims to protect against wrongful deprivation of property.

Fraudulent misrepresentation

Article 171 of the Criminal Code covers fraudulent misrepresentation or deceitful conduct aimed at obtaining an unjust advantage or causing a financial loss to another person. This offence encompasses actions such as using false pretences or deceit to deceive others into transferring money or property.

Anti-Corruption Law

Under the Anti-Corruption Law in Brazil, companies can be held liable for bribery and corruption offences committed by their shareholders, directors, officers and employees. The law imposes civil and administrative sanctions, some of which can be severe, for a wide range of prohibited conducts.

These prohibited conducts include offering or giving undue advantages to government officials or related third parties, financing or sponsoring harmful acts under the law, and using third parties to conceal the real interests or beneficiaries of the conduct. Any such conduct deemed harmful under the law may lead to administrative or civil liability for the company involved.

Companies may face individual or cumulative penalties, such as fines of up to 20% of their revenues, confiscation of assets gained from illegal acts, partial suspension or prohibition from business activities, and the prohibition from receiving benefits or credit from government entities.

The Anti-Corruption Law applies to bribery offences committed against both Brazilian and foreign governments and establishes a strict liability regime for companies involved in such offences. Only the Brazilian government has the authority to pursue civil and administrative sanctions against companies and individuals that violate the Anti-Corruption Law.

Administrative Improbity Law

A fraud claim may also be brought by means of an administrative improbity lawsuit, as provided for in Law No 8,429/1992, which enforces wrongful behaviour by public officials and private entities. This Law aims to protect the integrity of public assets and the principles applicable to public administration.

Claims based on administrative improbity may refer inter alia to causing damages to the public treasury, unlawful enrichment of public officials or third parties, as well as violations of the principles applicable to public administration.

Under Article 12 of Law No 8,429/1992, the improbity acts may be punished through several penalties, such as fines, prohibition from entering into contracts with the public administration, prohibition from benefiting from special tax treatments and loss of public function, without prejudice to claims seeking to obtain compensation for damage caused to the public administration.

1.2 Causes of Action After Receipt of a Bribe

The following causes of action may be available in Brazil to a claimant whose agent has received a bribe.

- Civil liability claims – Claimants may pursue civil liability claims under the Brazilian Civil Code, which provides remedies for damages caused by unlawful acts. A claimant whose agent received a bribe can seek compensation for losses suffered as a result of the agent's actions.
- Claims against officers and directors – Brazilian entities and shareholders can pursue damages against officers or directors who took bribes or misappropriated company funds. Law No 6,404/1976 (Brazilian Corporations Law) allows companies to bring civil liability actions seeking compensation for losses caused by officers or directors.
- Annulment of fraudulent transaction – Transactions involving bribery and illicit transfers of assets disguised as legitimate business payments can be challenged through annulment actions under the Brazilian Civil Code. This allows claimants to void fraudulent transactions and recover assets obtained through bribery.
- Criminal complaints – Claimants also have the option to file criminal complaints against public officials for bribery-related offences. Brazilian criminal law prohibits public officials from giving and receiving bribes, with individuals found guilty facing imprisonment and fines. Private corruption, which involves bribery of private agents, is currently not punishable under Brazilian criminal law.

1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts

In Brazil, there are several legal claims available against parties who assist or facilitate fraudulent acts of another, such as the following.

Accessory Liability

Article 942 of the Brazilian Civil Code establishes that the assets of the individual or entity held liable for the offence or violation of another's rights will guarantee the payment of the losses caused; and, if the offence has more than one perpetrator, they will be jointly and severally liable for the compensation.

Joint Liability With Officers and Directors

Article 158 (§5) of the Brazilian Corporations Law imposes joint liability on individuals who concur in acts contrary to the law or by-laws with the intention of obtaining advantages for themselves or third parties, along with officers or directors.

Participation in Bankruptcy Fraud

Brazil's Bankruptcy Law provides that claw-back actions (such as the revocatory actions and objective ineffectiveness actions discussed above) can be filed against all third parties who participated in the transaction, benefitted from it and/or knew of the debtor's intention to harm the creditors.

Participation in a Crime

Under the principle of co-authorship in the Brazilian Criminal Code, individuals who directly participate in the commission of a crime are considered co-authors or co-perpetrators. The penalties for these individuals will depend on their specific role or degree of involvement in the crime.

1.4 Limitation Periods

In Brazil, there are two distinct legal concepts to consider regarding limitation periods: *prescrição* (which can be translated as "statute of limitations") and *decadência* (often translated as "lapse" or "forfeiture"). Unlike *prescrição*, which pertains to the time limit for initiating legal action, *decadência* typically involves the expiration of a substantive right or entitlement.

The *prescrição* limitation period can be tolled under certain circumstances. The party entitled to a claim may unilaterally interrupt the statute of limitations for actions subject to *prescrição*, allowing the limitation period to start running again. In contrast, the *decadência* limitation period cannot be tolled and expires irreversibly once it begins, except if otherwise provided by statutory law.

Brazilian law establishes several rules that deal with fraud and fraudulent diversion of assets. Depending on who engaged in these fraudulent acts and who was harmed by these fraudulent acts, the limitation period will vary according to the rules of substantive law.

Therefore, there are multiple time limits for bringing fraud claims in Brazil. There are also fraud claims that are not subject to any limitation periods. According to the Brazilian Civil Code, if the specific law does not specify what statutory period is applicable to a certain case, the statutory limit for bringing a claim will be ten years.

Specific limitation periods for bringing fraud claims based on different causes of action include the following:

- claims based on extracontractual civil liability – generally, three-year limitation period (*prescrição*);
- fraud against creditors (*fraude contra credores*) – four-year limitation period (*decadência*);
- revocatory actions – three-year limitation period (*decadência*) from the bankruptcy decree;
- under the case law of the Superior Court of Justice, piercing of the corporate veil is generally regarded as an incidental procedural mechanism that is not subject to a limitation period of its own, distinct from that governing the underlying claim;
- claims by shareholders or entities against directors and officers – two-year *decadência* from the date of the general or special meeting that approved the directors' and officers' accounts; and
- claims by government authorities based on the Anti-Corruption Law – five-year *prescrição* from the date on which the violation becomes known to the company or, in some cases, from the date on which the violation ceased.

Unless otherwise provided in the relevant statute, as a rule the limitations period starts to run from the date on which the fraudulent transaction was effected (although in some cases the limitation period arguably starts from the date of the party's knowledge of the fraudulent transaction, based on the *actio nata* doctrine).

1.5 Proprietary Claims Against Property

Where a claimant seeks the recovery of property misappropriated or induced by fraud to transfer, a proprietary claim can be asserted based inter alia on the annulment of the underlying transaction.

If the property reclaimed is in the possession of a bankruptcy estate, a claimant may file a Request for Restitution (*Pedido de Restituição*) within the bankruptcy proceeding, thereby recovering the property with preference over other creditors.

However, under Brazilian law, it is generally not possible to establish a proprietary claim with precedence over unsecured creditors against property that represents the converted proceeds of the original fraud. This limitation reflects legal principles aimed at preserving the integrity of insolvency proceedings and equitable distribution of assets among creditors.

1.6 Rules of Pre-Action Conduct

In Brazil, there are no specific rules of pre-action conduct that apply exclusively to fraud claims. However, certain general principles and procedural rules may be relevant when initiating legal proceedings involving fraud allegations. These principles aim to ensure fairness, efficiency and the protection of the parties' rights throughout the litigation process.

Brazilian law imposes a duty of good faith on parties involved in legal proceedings. This includes a duty to act honestly, fairly and co-operatively throughout the litigation process. Parties are expected to disclose relevant information and evidence in a timely manner and to refrain from engaging in fraudulent or deceptive conduct.

Prior to initiating formal legal proceedings, parties may engage in pre-litigation investigation and informal dispute resolution efforts to gather information, assess the strength of their claims or defences, and explore potential avenues for settlement.

1.7 Prevention of Defendants Dissipating or Secreting Assets

In Brazil, victims of fraud have access to some of the most sophisticated tools and legal recourse to prevent defendants from dissipating or secreting assets with the intention of avoiding the consequences of a judgment.

Preliminary Injunction or Seizure

Under Brazilian law, the claimant may petition the court for a preliminary injunction or seizure order

to prevent the defendant from dissipating assets or concealing them. This involves presenting evidence to substantiate a risk of asset dissipation or concealment and demonstrating a likelihood of success on the merits. Brazilian courts typically consider factors such as the strength of the claimant's legal arguments, the availability of evidence and the potential harm to both parties when assessing the likelihood of success.

Non-compliance with a court order may result in freezing orders, monetary penalties, criminal prosecution or other consequences, for parties to judicial proceedings as well as third parties.

SISBAJUD (Freezing of Bank Accounts)

SISBAJUD, which stands for “*Sistema de Busca de Ativos do Poder Judiciário*” (Judiciary Asset Search System), is a centralised electronic system used by the Brazilian Judiciary to facilitate the search and freezing of assets held in financial institutions. It is primarily utilised in civil and enforcement proceedings to enforce court orders, judgments and other legal obligations.

The SISBAJUD system covers all financial institutions operating in Brazil, including banks, credit unions, investment firms and other financial entities. It allows judicial authorities to search for and identify assets held in accounts belonging to debtors or defendants named in legal proceedings.

Judges access the SISBAJUD system through a secure online portal. They can input specific search criteria, such as the name of the debtor or defendant, taxpayer identification number (CPF or CNPJ), or other identifying information, to initiate a search for assets held in financial institutions. Once a search is initiated and assets are identified, judicial authorities can issue electronic orders through the SISBAJUD system to freeze bank accounts and other financial assets belonging to the debtor or defendant. The freezing order is transmitted electronically to the relevant financial institutions, which are required to comply with the order immediately and block access to the frozen assets.

RENAJUD (Freezing of Vehicles)

RENAJUD is an electronic system used in Brazil for the automated search and blocking of vehicles to enforce judicial decisions. The system is operated by the Brazilian National Traffic Department (DETRAN) and allows judicial authorities to identify vehicles owned by debtors and block them from being sold or transferred.

Judicial Bond

A Brazilian court may exercise discretion to order the plaintiff to provide a judicial bond, such as a bond or cash deposit, to secure the defendant against potential losses resulting from precautionary measures, such as asset freezes or injunctions. The purpose of a judicial bond is to provide security for the defendant in cases where there is a risk that the precautionary measure may not be reversible or may generate damages if revoked.

2. Procedures and Trials

2.1 Disclosure of Defendants' Assets

Disclosure of Assets in Legal Proceedings

In addition to information obtainable via public sources (see below), a claimant in a civil proceeding can petition the court to order the defendant to disclose their assets and notify third parties to provide any information available about the assets held by the defendant.

In enforcement proceedings, where the defendant fails to disclose its assets after being duly summoned, the judge may impose a fine of no more than 20% of the updated debt (Article 774 of the Civil Procedure Code). Generally, to obtain disclosure of assets held by nominees on the defendant's behalf, the plaintiff must present strong evidence that the assets belong to the defendant.

As a rule, there is no cross-undertaking in damages for applications for disclosure of assets.

Breach of Fiscal and Banking Secrecy

Breach of fiscal (tax) and banking secrecy of a debtor is a legal measure that can be applied under certain circumstances, typically in the context of legal proceedings involving debt collection, enforcement of

judgments or investigation of financial crimes, when there is suspicion of dissipation of assets. In Brazil, judges have access to electronic systems whereby they can instantly obtain the tax returns of a debtor and order financial institutions to provide any relevant bank statements.

INFOJUD is a system used in Brazil to obtain tax-related information from government databases. It is primarily utilised by judicial authorities in civil and criminal proceedings to access tax records and financial information related to individuals and entities involved in legal disputes.

Information Available From Public Sources

In Brazil, a wide range of public sources can provide information about the defendant's assets, including the following, among others:

- land registry – holds information on real property ownership;
- registry of vehicles – holds information on vehicle ownership;
- commercial registry (trade board) – holds information on share ownership; and
- aircraft registry – holds information on aircraft ownership.

2.2 Preserving Evidence

Early Production of Evidence

In the Brazilian legal system, parties have an independent right to obtain evidence regardless of a previous legal proceeding. Such right can be initiated through a standalone proceeding known as the Early Production of Evidence (Article 381 of the Civil Procedure Code). This procedure aims to preserve evidence in various circumstances:

- there is a substantiated risk that it could become impossible or very hard to verify certain facts after filing the lawsuit;
- such evidence might enable the parties to settle the case or reach some other solution to the dispute;
- the prior knowledge of such facts will have a bearing on whether or not a suit needs to be filed; and/or

- the party needs to justify the existence of a fact or legal relationship for documentation purposes.

Precautionary Measures

In addition, under Articles 300 and 301 of the Civil Procedure Code, a party may petition the court for a preliminary injunction to preserve evidence if it can demonstrate both the likelihood of success of its claims and the risk of losses where the evidence is not produced as requested. This measure allows for the preservation of specific types of evidence, such as documents or other tangible items, that are believed to be in the defendant's possession.

To support the request for a preliminary injunction, the applicant must specifically describe the evidence sought and provide sufficient justification for the belief that it is in the defendant's possession. This may include presenting relevant facts or circumstances that indicate the likelihood of the evidence being within the defendant's control.

The judge will review the grounds of the request and assess whether the evidence sought should be preserved through a preliminary injunction. Factors considered may include the likelihood of success of the claims, the potential harm to the claimant if the evidence is not preserved, and any other relevant circumstances of the case.

Other Considerations

In Brazil, the plaintiff is not permitted to conduct a physical search of documents at the defendant's residence or place of business. However, the claimant may petition the court for a judicial order authorising a judicial bailiff to conduct the search and seizure if the need to preserve the evidence is proven.

Any court authorisation for the use of police force should be motivated and preceded by a demonstration of the necessity and appropriateness of the measure. Factors such as the importance of the evidence, the potential harm if it is not preserved, and the availability of alternative means of obtaining the evidence may be considered in assessing the request.

In preserving evidence proceedings, as a general rule no cross-undertaking in damages is required.

2.3 Obtaining Disclosure of Documents and Evidence From Third Parties

As discussed in 2.2 Preserving Evidence, it is possible to obtain evidence through a standalone lawsuit referred to as an Early Production of Evidence. This procedure serves several purposes, including preserving evidence obtained from third parties. There are no restrictions placed on the use of such material in civil claims, save for confidentiality provisions or judicial secrecy ordered by the court.

Under Brazilian law, for evidence to be considered admissible in court proceedings, it must meet certain requirements, such as the following.

- **Lawfulness** – The evidence must have been obtained lawfully, meaning it must have been obtained in accordance with applicable laws and regulations. Evidence obtained through illegal or unlawful means may be deemed inadmissible by the court.
- **Authenticity** – The evidence must be authentic and accurately represent the facts it purports to depict. This may require verifying the authenticity of documents or other forms of evidence through appropriate means, such as expert analysis or testimony.
- **Admissibility under the law** – The evidence must be admissible under the rules of evidence set forth in the Brazilian Civil Procedure Code and other relevant laws and regulations. Certain types of evidence may be excluded or restricted based on legal principles or public policy considerations.

2.4 Procedural Orders

Under the Brazilian legal framework, a decision cannot be rendered against one party before its hearing, as stipulated in Article 9 of the Civil Procedure Code. However, exceptions to this rule exist, permitting the granting of preliminary injunctions without notice (*inaudita altera pars*).

Such exceptions arise when the presence of the other party could jeopardise the effective outcome of the procedural act, particularly when there are grounds to believe that the defendant may frustrate the proceeding if made aware of the request. To request a preliminary injunction without notice, it is necessary to demonstrate urgency (*periculum in mora*), necessity or

exceptional circumstances that justify conducting the procedural act without the presence of the other party.

2.5 Criminal Redress

Compensation Under Criminal Proceedings

When handing down a conviction, the judge shall set a minimum amount to compensate for the damage caused by the offence, considering the losses suffered by the offended party (Article 387, IV, of the Criminal Procedure Code). This is without prejudice to the possibility of the victim filing a separate civil lawsuit.

Although there is academic discussion regarding the legality, breadth and scope of setting compensation in the criminal sphere, it is certain that the wording of the above provision is clear and allows the judge to set the minimum compensation.

Possibility to Act as a Prosecution Assistant for the Public Prosecutor's Office

In Brazil, as a rule the plaintiff of a public criminal action is the Public Prosecutor's Office. The victim is given the possibility of requesting intervention in the criminal process to assist the Public Prosecutor's Office, as an assistant to the prosecution. This role is accepted only during the criminal proceeding, and there is no role as an assistant to the prosecution during the police investigation phase. Nothing prevents the victim of fraud, even if deprived of the status of assistant prosecutor, from assisting the police in investigations.

Intervention as an assistant to the prosecution may occur at any time during the criminal action as long as there has not yet been a final judgment (Article 269 of Criminal Procedure Code).

Among the possible actions, the prosecution assistant may propose means of proof, such as requesting expert examinations, confrontations or search and seizure. The assistant is also able to put questions to witnesses, always after the Public Prosecutor's Office, and participate in oral debates. The prosecutor's assistant may also reason the appeals filed by them or the Public Prosecutor's Office.

Civil Actions Ex Delicto

If a conviction is handed down in a definitive sentence, within the records of any criminal action, the convicted person becomes obliged to compensate the victim (Article 91, I, of the Criminal Code).

Regarding the legal duty to indemnify, it is possible to file a civil action ex delicto, an action defined by scholars as “the judicial procedure aimed at recovering the civil damage caused by the crime”. Only individuals who have been convicted in the criminal court can be the subject (on the defendant side) of a civil action ex delicto. Any joint and several liability may only be recognised in specific actions filed in the civil court.

The acquittal sentence does not constitute *res judicata* in civil matters, unless the non-existence of the fact has been recognised (Article 66 of Criminal Procedure Code).

Parallel Claims

The instigation of a criminal prosecution does not impede the progression of parallel civil claims. However, there can be instances where the progression of one case affects the other. In some situations, a civil court may decide to stay civil proceedings for a period up to one year if there is an ongoing criminal investigation or prosecution involving the same parties and issues (Article 315 of Civil Procedure Code). This decision aims to avoid potential conflicts between the civil and criminal processes and ensure a fair resolution of the case.

2.6 Judgment Without Trial

As a rule, Brazilian law requires a full trial where the defendant has been given the right to fully defend themselves. However, in certain circumstances in civil proceedings, the judgment can be rendered without a full trial.

- Summary judgment (Article 332 of Civil Procedure Code) – If the case does not require evidence to be produced apart from documentary evidence, it may be summarily dismissed, even before the defendant has been served, when the plaintiff’s requests are against the binding precedents of the Superior Court of Justice or Supreme Federal Tribunal in matters of Federal or Constitutional law; or when

against the binding precedents of the State Court in matters of local law. A summary judgment dismissing the case may also be rendered if the judge recognises the statute of limitation.

- Default judgment (Article 355 of Civil Procedure Code) – If the defendant, once duly served, fails to appear or to file a defence within the applicable time limit, the court may declare the defendant in default (*revelia*). As a general rule, default gives rise to a presumption that the factual allegations made by the plaintiff are true. This presumption is not absolute, however, and does not apply in certain circumstances, including where the dispute concerns non-disposable rights, where the claim lacks a minimum evidentiary basis, or where the allegations are implausible or contradicted by the record. If, in light of the default, no further evidence is required, the court may render an early judgment on the merits under Article 355 of the Civil Procedure Code. Even in such cases, the court must still satisfy itself that the claim is legally grounded and sufficiently supported by the evidence available.
- Relief granted on the basis of *prima facie* evidence (Article 311 of Civil Procedure Code) – Relief based on *prima facie* evidence is to be granted when:
 - (a) there is an abuse of the right of defence or the party demonstrates clear intentions of delaying the proceedings;
 - (b) the allegation can be proven only by means of documental evidence and when there is a rule based on the trial of multiple claims on the same point of law or a “*súmula*”, a binding statement;
 - (c) it is an action to reclaim the possession of property based on the documental evidence of a bailment contract, in which case an order shall be issued to return the object held by the bailee for safekeeping, under a fine; or
 - (d) the initial complaint is supported by sufficiently robust documentary evidence of the facts constituting the plaintiff’s right, and the defendant does not produce evidence capable of raising a relevant factual dispute, so that the matter may be decided without further taking of evidence.

2.7 Rules for Pleading Fraud

Although Brazil lacks special legal rules for pleading fraud, there are certain rules and professional conduct

considerations that lawyers must adhere to, including the following.

- **Substantiation** – When pleading fraud, it is essential to provide specific and detailed allegations supported by evidence. Brazilian courts typically require plaintiffs to substantiate their claims with sufficient factual and legal basis. Vague or unsubstantiated allegations of fraud may be dismissed by the court.
- **Ethical considerations** – Lawyers must adhere to ethical standards when pleading fraud. This includes avoiding making false or misleading statements to the court or opposing parties. Lawyers should present their case honestly and accurately, and refrain from engaging in tactics intended to deceive or manipulate the legal process. Lawyers have a duty to act in the best interests of their clients while also upholding the integrity of the legal profession.
- **Consequences of frivolous claims** – Filing frivolous or meritless claims of fraud can have serious consequences, including sanctions for bad faith litigation.

2.8 Claims Against “Unknown” Fraudsters

As a general rule, an initial complaint that initiates a legal action must properly identify the defendant, including their particulars and known address. However, in exceptional circumstances, the Brazilian legal system allows the filing of claims against unknown or uncertain defendants. For instance, Article 256 of the Code of Civil Procedure permits service by publication of a notice when “the person being cited is unknown or uncertain”. Furthermore, Article 319 (§3) of the Code of Civil Procedure provides that the initial complaint cannot be rejected when information regarding the defendant’s particulars is impossible to obtain.

Regarding proprietary measures qualified as *ações reipersecutórias*, there are judicial precedents allowing the commencement of legal cases against defendants not currently known but identifiable. This can be particularly relevant for fraud claims involving cryptocurrency.

2.9 Compelling Witnesses to Give Evidence Testimonial Evidence

According to Brazilian law, any person with knowledge of the circumstances of the claim may be compelled to provide evidence to the court through their testimony. Issuing the witness summons is the duty of the lawyer and should be effected at least three days before the trial (Article 455, § 1º of the Civil Procedure Code).

The court may issue the witness summons under certain circumstances, including:

- if the lawyer’s attempt to summon the witness is unsuccessful;
- if the need for the witness’s testimony is proven to the judge;
- if the witness holds certain public positions; or
- if the witness has been called by the Public Prosecutor’s Office or the Public Defender’s Office.

Once properly summoned, the witness is obligated to attend the trial and truthfully answer questions posed by the judge or the parties.

Additional Aspects

It is worth noting that the witness may be entitled to refuse to answer questions based on certain privileges, such as legal professional privilege or privilege against self-incrimination. If the witness, summoned in accordance with legal requirements, fails to attend the hearing without a valid reason, they will be coercively conducted and will bear the costs of rescheduling the hearing (Article 455, § 5º of the Civil Procedure Code). Any breach of the duty to truthfully give testimony may render the witness criminally liable for perjury.

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on a Corporate Entity

The Brazilian Anti-Corruption Law imposes penalties on legal entities in cases of corruption or acts that harm the government and government assets, regardless of whether managers were held criminally liable. However, the law does not absolve managers or any

other individuals, whether they are perpetrators, co-perpetrators or participants in the crime, from personal liability. Punishment is based on the principle of strict liability, meaning that investigators are not required to prove that the legal entity intended to commit a crime. It is sufficient to establish a connection between the legal entity and the crime under investigation.

The scope of the law encompasses all legal entities, associations, and foundations with headquarters, branches or representation in Brazil, regardless of whether this connection is temporary.

Furthermore, leniency agreements may be offered to legal entities that voluntarily come forward and offer their co-operation with investigations.

3.2 Claims Against Ultimate Beneficial Owners

As a rule, a company's liabilities are typically confined to its own assets. However, shareholders or ultimate beneficial owners can be held liable in cases of "abuse of legal personality", a legal concept referring to situations where the company is exploited as a vehicle for fraud.

As discussed above, to establish liability in such cases, it is necessary to file a motion to pierce the corporate veil and provide evidence of abuse of legal personality in the form of commingling of assets or deviation from the corporate purpose. Any aggrieved party has legal standing to bring forth this claim. In the case of bankrupt companies, the claim is normally filed by the judicial administrators for the benefit of all creditors.

The claimant typically bears the burden of specifying, to the extent possible, the liability attributable to the shareholder or ultimate beneficial owners, aiming to repair or compensate for all damages caused by the fraud. However, in cases of systemic and widespread fraud (eg, the use of entirely fictitious companies to structure financial pyramid schemes), there are precedents where shareholders and beneficiaries became liable for all the liabilities of the legal entity.

3.3 Shareholders' Claims Against Fraudulent Directors

See 1.1 General Characteristics of Fraud Claims, 1.2 Causes of Action After Receipt of a Bribe, 1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts and 1.4 Limitation Periods.

Under Brazilian corporate law, directors are bound by a statutory duty to exercise reasonable care, skill and diligence in their roles, alongside a fiduciary duty to act in the company's best interests. Should the company or shareholders determine that directors have breached these duties, they have the right to pursue actions for damages against these individuals.

Directors and officers are not ordinarily liable for the company's debts. They may, however, incur personal liability where they engage in fraud, abuse of powers, asset diversion, conflicts of interest, or other acts carried out in violation of the law or the company's constitutional documents. In the insolvency context, acts detrimental to creditors may also be challenged under the specific rules of Brazilian insolvency law, including those governing ineffective acts and revocatory actions.

In judicial reorganisation, bankruptcy and similar proceedings, the relevant office-holder may investigate the conduct of directors and officers and, where appropriate, bring claims to recover losses, unwind unlawful transactions and seek redress for harm caused to the estate or its creditors.

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims

Under Brazilian law, defendants have several mechanisms available to involve other parties in legal proceedings or initiate separate actions against third parties based on subsidiary liability. These mechanisms include:

- joinder of parties;
- intervention of third parties; and
- the filing of counterclaims.

Joinder of parties typically occurs when a defendant requests the inclusion of additional parties who may also be liable for the claims asserted in the complaint. This request is made in the defendant's answer to the complaint, and, if granted, allows all relevant parties to be joined in the same proceedings.

Similarly, intervention of third parties allows individuals or entities with a legitimate interest in the outcome of the proceedings to participate in the case as either plaintiffs or defendants. This intervention can occur at various stages of the proceedings and is subject to judicial approval based on the relevance of the third party's involvement.

In addition to these mechanisms, defendants may also file claims against third parties who may bear subsidiary liability for the claims asserted against them. By initiating a separate action, defendants can hold these third parties accountable for their role in the underlying legal dispute.

4.2 Service of Proceedings out of the Jurisdiction

There are two different methods for serving parties out of jurisdiction. For defendants resident or incorporated in foreign jurisdictions, the claimant must analyse whether the foreign jurisdiction had adhered (or not) to the Hague Convention.

Hague Service Convention

Brazil is a party to the Hague Service Convention. When serving a foreign party in a Brazilian legal proceeding via the Hague Convention, the process involves:

- preparing a formal request for service;
- submitting the request to the central authority in Brazil (Ministry of Justice);
- transferring the request to the central authority in the foreign country;
- arranging for service by the foreign central authority;
- providing proof of service to the Brazilian central authority;
- notifying the requesting party of the outcome; and
- taking further steps in the legal proceeding as necessary.

Letter Rogatory

However, if the defendant is resident or incorporated in a jurisdiction that has not adhered to the Hague Service Convention, and assuming that there are no treaties between Brazil and such foreign country regulating service of process, the claimant must follow the ordinary rules of service via a letter rogatory.

5. Enforcement

5.1 Methods of Enforcement

Attachment Orders

Enforcement in Brazil typically involves obtaining attachment orders issued by Brazilian courts. These orders are commonly sought in enforcement proceedings and can be obtained against a debtor's free assets. However, attachment orders against third parties are only granted in specific cases, such as when fraud occurs or when the legal requirements of the disregard doctrine (piercing of the corporate veil) are met.

To obtain an attachment order, the applicant must disclose the nature and location of the assets they seek to attach and demonstrate ownership by the debtor. This request should be included in the initial complaint of the enforcement proceeding (or in subsequent petitions) and must fulfil all legal requirements.

Further Enforcement Measures

In addition to the methods discussed earlier, the applicant can request that the court issue official orders to various entities, including the following:

- the Central Depositary of Shares, to register attachment over shares of public companies, quotas of investment funds and/or other bonds that may exist in the name of the debtor;
- the Real Estate Registry, to register attachment over real estate that may be available in the name of the debtor; and
- the Commercial Registry, to receive information regarding the ownership and location of the defendant's assets, as well as to register attachment over any shares in the name of the debtor.

Attachment of bank accounts is typically automatic upon the granting of the attachment order and is executed directly by the judge via the SISBAJUD system, without the need for further information. However, the court may grant exceptions to the attachment order if the defendant demonstrates that it may jeopardise the payment of their daily living expenses.

Attachment of vehicles can be effected via the RENA-JUD system, which is used in Brazil for the automated search and blocking of vehicles to enforce judicial decisions.

Liens Over the Assets Attached

Once executed, the attachment order creates a lien over the attached assets. If multiple attachment orders are concurrent over the same assets, priority among creditors is generally determined by the date the attachment orders were issued, with a few exceptions. In cases where the same assets are subject to multiple liens, each creditor will have priority over the proceeds from the execution of the asset based on the order in which the lien of execution was established.

However, this priority ceases in the event of the debtor's insolvency. In such cases, liens lose their effect, and all assets become subject to the collective or concurrent execution of all the debtor's property, treating all creditors equally based on their respective class.

5.2 Enforcement of Foreign Judgments

As a general rule, judgments rendered outside Brazilian territory must be previously recognised by the Superior Court of Justice (STJ) to be valid in Brazil. During the recognition/homologation process, the Superior Court of Justice will examine the validity of the foreign award, as well as its compatibility with national public policy, ultimately deciding whether to grant the exequatur requested by the interested party.

The homologation action must be filed by the plaintiff and adhere to the internal rules of the Superior Court of Justice, the Code of Civil Procedure, and the Rules of Introduction to Brazilian Law. These requirements include:

- filing of the original or authenticated copy of the foreign award and relevant documents, all duly translated by a sworn translator in Brazil;
- certification by Brazilian consular authorities (when applicable) or legalisation with an apostille under the Hague Convention;
- issuance of the award by a competent authority;
- evidence that the parties were validly served;
- effectiveness of the award; and
- the award must not violate sovereignty, human dignity, public policy or good customs.

If the application for recognition is dismissed due to formal deficiencies, the requesting party may resubmit the request after addressing the issues.

If the STJ homologates the foreign award, recognising its enforceability, it will grant the exequatur. Once the foreign judgment is homologated by the STJ, it will be treated as a domestic court award and will follow the enforcement procedures established in the Code of Civil Procedure.

6. Privileges

6.1 Invoking the Privilege Against Self-Incrimination

The privilege against self-incrimination is enshrined in both the Brazilian Federal Constitution and the Criminal Procedure Code. This privilege protects individuals from being compelled by public authorities to incriminate themselves. Its primary legal effects include:

- the entitlement to remain silent when pressured, with this silence not being held against the individual; and
- the right to refuse to produce self-incriminatory evidence.

When a defendant invokes this privilege, no inference is allowed to be drawn.

6.2 Undermining the Privilege Over Communications Exempt From Discovery

Under Brazilian law, attorney-client privilege safeguards all communications related to the lawyer's professional activity with a client, including the inviola-

bility of lawyers' offices and related work documents. These protections extend to any attorney registered with the appropriate Brazilian Bar Association.

Due to this constitutional safeguard, any written correspondence exchanged between a client and their attorney (who is duly registered with the relevant bar association), whether in physical or digital format, is considered confidential and cannot be disclosed to third parties. Moreover, lawyers are typically prohibited from acting as witnesses in legal proceedings unless authorised by the client. Beyond constitutional provisions, various laws and regulations extend similar protections to attorney–client communications in Brazil, including:

- Code of Ethical Conduct issued by the Brazilian Bar Association;
- Federal Law No 8,906/94, which governs the Brazilian legal profession;
- Civil Procedure Code;
- Criminal Procedure Code; and
- Criminal Code.

Exceptions to the confidentiality rule are rare and require thorough examination on a case-by-case basis. Generally, lawyers may breach client confidentiality in limited circumstances, such as when there is a risk to life or reputation, for the lawyer's own protection against the client, or with explicit authorisation from the client (waiver).

It is also possible to waive the attorney's inviolability if there is proof indicating that a lawyer has engaged in criminal activity. In such cases, a judge has the authority to revoke confidentiality to enforce a search and seizure warrant, with a representative from the Brazilian Bar Association present. However, it is prohibited to utilise documents or items owned by clients, as well as any other tools of the trade containing client information, during this process.

7. Special Rules and Laws

7.1 Rules for Claiming Punitive or Exemplary Damages

In the Brazilian legal framework, explicit provisions for the application of punitive or exemplary damages are absent. This is due to the civil liability theory adopted by the Brazilian Civil Code, which measures liability based on the extent of damages (Article 944 of the Civil Code).

Despite the lack of legal provisions, case law has recognised a punitive aspect in the determination of moral damages. This serves as a means to punish illicit acts and deter future abuses.

7.2 Laws to Protect “Banking Secrecy”

Banking secrecy is a right guaranteed by the Federal Constitution and federal legislation. However, Law No 105/01 allows for the lifting of bank secrecy when necessary to ascertain the occurrence of any unlawful act, at any stage of the investigation or judicial proceedings. The law provides non-exhaustive examples of situations in which this measure is allowed, such as in crimes committed against the national financial system, the public administration, Brazil's tax system, and social security, as well as in cases of money laundering or concealment of assets.

Brazilian courts also authorise the lifting of secrecy in cases of corporate fraud that have seriously harmed creditors and other stakeholders, such as financial pyramids, de facto groups structured with the aim of defrauding creditors, and large embezzlements of money and other assets. In these cases, the lifting of secrecy requires strong evidence of financial fraud.

Furthermore, in the context of bankruptcy proceedings, when bankruptcy is decreed, the judicial administrator takes the place of the company's former management. This grants the judicial administrator the right and duty to access all of the company's documents, including financial and bank statements, which is crucial for investigating fraud against creditors.

7.3 Crypto-Assets

In December 2022, the Brazilian Congress enacted Law No 14,478, which defines cryptocurrencies

(referred to as “virtual assets” in the law) and regulates significant aspects of this market. According to Law 14,478, a virtual asset is defined as a digital representation of value that can be traded or transferred by electronic means and used to make payments or for investment purposes. This explicit definition establishes cryptocurrencies as property under Brazilian law.

The law also introduces important regulations regarding the operations of crypto-asset exchanges. Exchanges now require authorisation from a specialised federal body to operate. Additionally, certain corporate transactions, such as transfers of control, mergers and demergers of exchanges, must receive prior approval. Furthermore, the law defines the crime of “fraud using virtual assets, securities, or financial assets”, which carries a potential prison sentence of up to eight years.

In cases involving fraud and where there is a risk of asset dissipation, parties can seek precautionary measures from civil and corporate courts to compel exchanges to provide information on suspicious transactions (such as wallet identification numbers, holder and beneficiary information, transaction hashes, etc). Freezing orders can also be requested, which, once granted, are binding on exchanges based in Brazil, obliging them to enforce the order.

A particular challenge related to crypto-assets concerns the implementation of freezing orders. As Law No 14,478 has been in effect for a short time, not all Brazilian exchanges obtained proper authorisation to operate. Moreover, fraudulent transfers often involve wallets located in other jurisdictions, and many transactions are conducted through clandestine exchanges or by individuals maintaining anonymity. To address this challenge, co-operation with the Public Prosecutor’s Office and foreign judicial and governmental authorities is crucial.

In 2024, the National Justice Council signed the Technical Cooperation Agreement No 133/2024 with the Brazilian Association of Cryptoassets and Blockchain (ABCripto), aimed at integrating the cryptocurrency market with the judiciary. One of the objectives is to facilitate the processing of orders between the judiciary and exchanges to expedite the seizure of bitcoin and other cryptocurrencies held by exchanges in Brazil. This agreement is a significant step towards the implementation of CriptoJud, a tool similar to SISBAJUD, which will enable judicial authorities to search for, identify and seize crypto-assets held in wallets belonging to debtors or defendants involved in legal proceedings.

Trends and Developments

Contributed by:

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Duarte Forssell Advogados (DFA) is a boutique law firm composed of four partners and 25 lawyers specialised in complex litigation, international asset recovery and transnational insolvency. The firm's professionals have over 20 years' experience in complex multi-jurisdiction claims and transactions. The team advises financial institutions, trustees, foreign liquidators and Brazilian and foreign business groups in

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Leveraging Brazil's New Cross-Border Insolvency Law for Enhanced Asset Recovery Efforts

Law No 14,112/2020 modified several provisions of Law No 11,101/2005 (Brazilian Bankruptcy Law) concerning judicial reorganisation and bankruptcy (liquidation) proceedings.

The new legislation largely incorporates the provisions relating to cross-border insolvency set forth in the UNCITRAL Model Law, including the recognition of foreign insolvency proceedings in Brazil and the co-operation with foreign authorities.

Previously, the recognition of a judgment relating to a debtor's foreign insolvency required homologation through the Superior Court of Justice. This procedure was time-consuming and faced the risk of denial on grounds of violation of public policy. However, with the recent reforms, the recognition of foreign proceedings is expected to be straightforward and fast.

Since the new legislation came into force, foreign creditors and liquidators are starting to seek assistance from Brazilian courts to obtain recognition of foreign insolvency proceedings as a method to take possession of assets in Brazilian territory. At the same time, other foreign creditors have opted to rely on traditional asset recovery measures available in Brazil, without seeking recognition. As discussed below, the best route will depend on the circumstances of the case.

Who can apply for recognition in Brazil?

A foreign representative is entitled to apply to Brazilian courts for the recognition of a foreign insolvency proceeding. As a rule, the application must be made to the court with jurisdiction over the main establishment of the debtor in Brazil.

Similar to the UNCITRAL Model Law, foreign proceedings are collective judicial or administrative proceedings in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign authority, for the purpose of reorganisation or liquidation.

Foreign representative means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

Does the application subject the foreign representative to the jurisdiction of the Brazilian courts?

The new legislation provides that an application made to the Brazilian judge does not subject the foreign representative or the debtor, their assets and activities to the Brazilian jurisdiction, except with respect to the strict limits of the application.

The Brazilian judge may authorise the foreign representative to distribute the assets of the debtor that are located in Brazil, as long as the creditors domiciled in Brazil are duly protected.

What are the benefits of obtaining recognition in Brazil?

Upon recognition of a foreign proceeding:

- all execution proceedings against the debtor or property of the debtor are automatically stayed, subject to the provisions of the Bankruptcy Law;
- any transfer, encumbrance or disposal of any non-current assets of the debtor shall be considered “ineffective” if made without the court’s authorisation; and
- all time limitations in connection with all judicial executions against the debtor are suspended, subject to the provisions of the Bankruptcy Law.

Furthermore, where necessary to protect the assets of the debtor or the interests of the creditors, the Brazilian court may, at the request of the foreign representative, grant any appropriate relief, including:

- avoidance of any act of disposal of the debtor’s non-current assets made without court approval;
- the examination of witnesses, the production of evidence or the delivery of information concerning the debtor’s assets, affairs, rights, obligations or liabilities;
- entrusting the administration or realisation of all or part of the debtor’s assets located in Brazil to the foreign representative; and
- granting any additional relief that may be necessary under the laws of Brazil.

Recognition further allows the foreign representative to avoid fraudulent transactions by bringing the legal actions referred to in Articles 129 and 130 of the Brazilian Bankruptcy Law.

Article 130 of the Brazilian Bankruptcy Law refers to a revocatory action, which can be brought by any creditor to render a past transaction ineffective. This action is predicated on fraudulent behaviour of the debtor and the counterparty of the transaction, resulting in losses to the bankruptcy estate.

An action under Article 129 of the Brazilian Bankruptcy Law is grounded on acts considered fraudulent per se regardless of the parties’ intention. Examples include:

- payment of debts before the maturity date within the look-back period;
- payment of debts in conditions not contractually agreed, also within the look-back period; and
- performance of gratuitous acts two years before the bankruptcy.

Distribution of assets

The new legislation also introduced additional rules concerning the co-ordination of multiple insolvency proceedings. According to Article 167-V of the Brazilian Bankruptcy Law, the bankruptcy court responsible for non-main foreign proceedings must provide the main court with at least the following information:

- value of assets collected and liabilities;
- value of credits admitted and their classification;
- classification, according to national law, of creditors not domiciled or based in countries holding credits subject to foreign law;
- list of ongoing legal actions to which the bankrupt is a party, as plaintiff, defendant or interested party; and
- information on the end of the liquidation and the balance thereof, as well as any remaining assets.

The legislation further provides that no assets or proceeds remaining from the liquidation will be delivered to the debtor if there are still unsatisfied liabilities in any other insolvency proceedings. In addition, the legislation provides that the main insolvency proceeding can only be finalised after the termination of the non-main proceedings or after it is verified that, in the latter, there are no remaining liquid assets.

In this context, recognition in Brazil may also facilitate the co-ordinated transfer, repatriation or distribution of assets and proceeds located in Brazil to the foreign representative, where appropriate under the applicable insolvency framework and subject to the protection of local creditors and the supervision of the Brazilian court. This mechanism reinforces the ancillary function of recognition proceedings, not only as a means of obtaining information and preserving assets, but also as a tool to support the orderly administration and distribution of the insolvency estate across jurisdictions.

Co-operation between courts

Upon recognition of a foreign proceeding, the Brazilian court shall co-operate to the maximum extent possible with foreign courts or foreign representatives. The Brazilian court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

How are Brazilian courts reacting to the new legislation?

Since the new legislation came into force, Brazilian courts have been receptive to the recognition of foreign insolvency proceedings, although a few questions remain.

Freezing order over assets of Scottish debtor

In a 2024 ruling, Judge Rapporteur Osmar Mohr from the State Court of Santa Catarina issued an order freezing all known assets of a Scottish individual who was subject to insolvency proceedings in Scotland and was accused of dissipating and concealing assets worldwide.

In the case, a liquidator appointed by a Scottish court applied for recognition of a sequestration proceeding in Brazil. Before the recognition in Brazil, this insolvency proceeding had already been recognised in the United States, England and Switzerland.

However, the recognition was initially rejected on the grounds that it would require prior homologation from the Superior Court of Justice. By reviewing the interlocutory appeal filed by the liquidator, the State Court of Santa Catarina clarified that the underlying application did not require prior homologation, as expressly established in the legislation recently enacted, and therefore ordered that all real estate of the debtor in Brazil should be frozen, inasmuch as it was part of the insolvent estate.

Coffee trader obtains Chapter 11 recognition in Brazil

In 2023, a global coffee trader filed for Chapter 11 bankruptcy in New York on the grounds that market conditions such as supply disruptions and higher costs to raise financing throughout the pandemic jeopardised the company's ability to pay its debt on time.

In 2024, the group secured recognition of its Chapter 11 bankruptcy in Brazil. The measure was meant to prevent creditors from enforcing their rights in Brazil, as the debtor declared over USD500 million in liabilities. With the recognition, the debtor obtained a moratorium suspending all execution proceedings in Brazil, as the group pursued its reorganisation in the United States.

BVI liquidation recognised in Brazil

A Brazilian court has also granted the recognition of a British Virgin Islands liquidation of an entity which has an operational subsidiary in Brazil. In this case, the Brazilian subsidiary is under judicial reorganisation and is in the process of implementing its reorganisation plan. The application for recognition of the foreign parent company was filed before the same bankruptcy court.

However, the Paraná State Court overturned the recognition order issued by the bankruptcy court, on the grounds that, due to the particularities of the case, the Brazilian subsidiary should have been heard in advance of the order. Counsel to the British Virgin Islands liquidator argued that the Brazilian legislation does not require prior intervention from related parties prior to the granting of a recognition order. The matter was appealed to the Superior Court of Justice, which is expected to settle the argument.

Foreign liquidation linked to major sovereign fund fraud seeks recognition in Brazil

In 2026, the foreign representatives of an offshore company linked to a major sovereign fund fraud sought recognition in Brazil of a foreign insolvency proceeding connected to a large-scale international asset-tracing effort. The case forms part of broader attempts to recover assets allegedly diverted through complex cross-border transactions involving financial institutions and corporate structures in multiple jurisdictions.

The recognition application was aimed at obtaining judicial assistance in Brazil in support of the foreign office-holders' investigatory efforts. The foreign representatives were authorised to seek evidence, information and related relief in Brazil concerning assets, liabilities and potential claims connected to the for-

foreign insolvency estate. The case illustrates how Brazil's cross-border insolvency framework can serve as an ancillary tool in complex multinational fraud and asset-recovery matters.

What alternatives to recognition are there?

Although recognition increasingly appears to be a viable choice, foreign creditors and liquidators also have access to the Brazilian jurisdiction by a number of alternative methods, such as the following.

Enforcement of foreign judgments

Foreign creditors can enforce their judgments obtained outside Brazil through the Brazilian judicial system. The process typically involves filing a petition for recognition of the foreign order with the Superior Court of Justice. Under the standards adopted by Brazilian International Law, in the absence of a specific treaty, the recognition and enforcement of a foreign interlocutory decision (such as a freezing injunction) is based on the principle of reciprocity, which states that favours, benefits or penalties that are granted by one state to the citizens or legal entities of another should be returned in kind. After recognition, the creditor is entitled to file an enforcement proceeding with the Brazilian courts.

Filing enforcement proceedings directly in Brazil

The legal framework in Brazil provides mechanisms to facilitate cross-border enforcement and ensures that foreign creditors have avenues to pursue their claims effectively. Enforcement in Brazil typically involves obtaining attachment orders issued by Brazilian courts. These orders are commonly sought in enforcement proceedings and can be obtained against a debtor's free assets. However, attachment orders against third parties are only granted in specific cases, such as when fraud occurs or when the legal requirements of the disregard doctrine (piercing of the corporate veil) are met.

Obtaining recognition of freezing orders

Historically, the Brazilian courts did not grant "exequatur" to letters rogatory involving "measures of compulsion", which would include freezing injunctions. However, since 2015, the Code of Civil Procedure expressly states that "the enforcement... of a foreign interlocutory decision granting urgent measures shall be made by means of a letter rogatory". The Code of Civil Procedure further provides that "[t]he judgment regarding the urgency of the relief falls exclusively to the judicial authority that rendered the foreign decision". In fact, the Superior Court of Justice has recently recognised a worldwide freezing order originating from a British Virgin Islands court in a civil matter.

Obtaining disclosure of information from third parties

The same standards for a Brazilian party to obtain disclosure apply to a foreign party. In the Brazilian legal system, parties have an independent right to obtain evidence regardless of a previous legal proceeding. Such right can be initiated through a standalone proceeding known as the Early Production of Evidence (Article 381 of the Civil Procedure Code). The breach of fiscal (tax) and banking secrecy of a debtor is a legal measure that can be applied under certain circumstances, typically in the context of legal proceedings involving debt collection, enforcement of judgments or investigation of financial crimes, when there is suspicion of dissipation of assets. In Brazil, judges have access to electronic systems whereby they can instantly obtain the tax returns of a debtor and order financial institutions to provide any relevant bank statements.

CAMEROON

Law and Practice

Contributed by:

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1. Fraud Claims

1.1 General Characteristics of Fraud Claims

Cameroon operates a bijural legal system combining the French civil-law tradition with English common law, applied respectively in the eight francophone regions and in the two anglophone regions (North-west and Southwest). At the supranational level, Cameroon is a founding member of the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA). OHADA Uniform Acts are directly and uniformly applicable in all 17 member States and take precedence over conflicting national legislation (Article 10 OHADA Treaty of Port-Louis, 17 October 1993, as revised in Quebec, 17 October 2008).

Fraud (Escroquerie)

Fraud is criminalised under Articles 318 to 321 of the Cameroonian Penal Code (Law No 2016/007 of 12 July 2016, hereinafter "Penal Code"). Article 318 (1) of the Penal Code defines fraud as the obtaining of money, valuables, an obligation-creating or obligation-discharging document, or any other goods by: (i) use of a false name or capacity; (ii) making false statements or creating false beliefs about a past or present fact; or (iii) use of deceptive manoeuvres, including the production of forged documents. The penalty is ten to 20 years' imprisonment and/or a fine of XAF500,000 to XAF10 million (Article 318 (2) Penal Code). Aggravated fraud committed against a public institution or by a manager entrusted with another's assets carries enhanced penalties under Article 319 of the Penal Code.

False Statements

The making of false statements constitutes fraud under Article 318 (1)(b) of the Penal Code when it induces another to part with property. Separately, the offence of false testimony is punishable under Article 162 of the Penal Code (three to ten years' imprisonment). Forgery of public or private documents is punishable under Articles 155 to 160 of the Penal Code, with aggravated penalties where the forgery is committed by a public official.

Corrupt Payments

Active corruption (offering or giving an undue advantage) is punishable by five to ten years' imprisonment and a fine equal to the value of the bribe, not less than XAF500,000 (Article 134-1 Penal Code). Passive corruption (soliciting or receiving an undue advantage) carries identical penalties (Article 134-2 Penal Code). In commercial matters, the misuse of corporate assets ("*abus de biens sociaux*") by a director constitutes a criminal offence under Article 891 of the OHADA Uniform Act on Commercial Companies and Economic Interest Groups (AUSCGIE, revised 30 January 2014), sanctioned under national implementing legislation.

Conspiracy

Criminal conspiracy ("*association de malfaiteurs*") is punishable under Article 278 of the Penal Code with one to five years' imprisonment, independently of whether the planned offence is ultimately committed.

Co-perpetration and instigation are also punishable as autonomous forms of participation under Articles 95 to 97 of the Penal Code.

Misappropriation

Misappropriation of public funds is an aggravated offence under Article 184 Penal Code, carrying life imprisonment where the amount exceeds XAF500,000. Embezzlement by a corporate officer is governed by Article 891 of the AUSCGIE. The National Anti-Corruption Commission (CONAC), established by Decree No 2006/088, is empowered to investigate and refer cases of public corruption and misappropriation to the competent courts.

1.2 Causes of Action After Receipt of a Bribe

Where a claimant's agent has received a bribe, Cameroonian law provides the following cumulative causes of action.

Criminal Complaint With Civil Party Status

The claimant may file a complaint ("*plainte avec constitution de partie civile*") before the examining magistrate ("*juge d'instruction*") pursuant to Articles 134, 134-1 and 134-2 of the Penal Code and Article 61 of the Code of Criminal Procedure (Law No 2005/007 of 27 July 2005, hereinafter CPP). Constituting as a civil party triggers a criminal investigation and entitles the victim to claim full reparation before the criminal court without instituting separate civil proceedings (Article 357 CPP).

Civil Action for Unjust Enrichment

An action for unjust enrichment ("*enrichissement sans cause*") lies under Articles 1371 et seq of the Civil Code (applicable in francophone regions) against the bribe-taker. The claimant must demonstrate that the agent was enriched at the claimant's expense without lawful cause. Recovery extends to the full amount of the bribe and all identifiable consequential losses.

Action for Breach of Mandate

Under Articles 1984 to 2010 of the Civil Code, an agent owes a duty of loyalty to their principal. Receipt of a bribe constitutes a fundamental breach of the agency relationship. The principal may demand restitution of the bribe amount, rescission of any contract tainted by the bribe, and full damages (Article 1991 Civil Code).

Corporate Action Under OHADA

Where the agent is a corporate director or officer, the company may bring a derivative social action ("*action*

sociale") under Article 165 of the AUSCGIE to recover losses flowing from the director's breach of duty. Individual shareholders holding at least 1% of the share capital may bring an "*action sociale ut singuli*" on the company's behalf (Article 166 AUSCGIE).

Asset Recovery

The claimant may simultaneously seek a conservatory attachment ("*saisie conservatoire*") over the agent's assets under Articles 54 to 61 of the OHADA Uniform Act on Simplified Recovery Procedures and Measures of Execution (AUPSRVE, revised 10 September 2015) to secure future enforcement of any damages award.

1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts

Criminal Liability of Accessories and Co-Perpetrators

Under Articles 95 to 97 of the Penal Code, co-perpetrators (*coauteurs*) and accessories (*complices*) who assist, facilitate or instigate a fraud are liable to the same penalties as the principal offender. A person who knowingly provides assistance, financing or professional services to a fraudster – including lawyers, accountants and bankers acting in bad faith – may be charged as an accessory under Article 97 of the Penal Code. The fraud victim may constitute as a civil party in the criminal proceedings against all accused persons, including accessories (Article 357 CPP), and recover damages from each jointly and severally.

Civil Liability: Knowing Receipt and Dishonest Assistance

Although Cameroonian civil law does not recognise the common law equitable doctrines of knowing receipt or dishonest assistance as autonomous causes of action, equivalent protection is achieved through the civilian concepts of *faute quasi-délictuelle* under Article 1382 of the Civil Code and unjust enrichment under Articles 1371 et seq of the Civil Code. A third party who receives assets knowing them to be proceeds of fraud, or who provides professional assistance to a fraudster with knowledge of the fraud, may be held liable in tort for all losses caused and required to disgorge any benefit received. Bad-faith knowledge is presumed where the circumstances were such that a reasonable person would have made further enquiries.

Money Laundering Liability

A third party who receives, converts, transfers or conceals assets knowing or suspecting them to be proceeds of fraud commits the offence of money laundering under CEMAC Regulation No 01/03/CEMAC/UMAC/CM of 4 April 2003 and Law No 2005/006 of 27 July 2005 on the Prevention and Suppression of Money Laundering and Financing of Terrorism. The penalties include ten to 20 years' imprisonment and confiscation of the laundered assets. Financial institutions and other regulated entities that fail to comply with their due diligence or reporting obligations and thereby facilitate the laundering of fraud proceeds may also be exposed to regulatory sanctions and civil liability to the defrauded party under the general law of tort.

Liability of Corporate Facilitators Under OHADA

Where a corporate vehicle has been used to facilitate a fraud, OHADA law provides tools to hold all participating parties liable. Directors who knowingly assist in the misappropriation of assets are personally liable under Article 891 of the AUSCGIE. Where a company has been used as an instrument of fraud by its controlling shareholders or directors, the court may pierce the corporate veil under Article 27 of the AUSCGIE and the doctrine of simulation (Article 1321 Civil Code) to reach the individuals behind it. Third-party companies that knowingly participate in fraudulent corporate structures may themselves be subject to conservatory attachment of their assets under the AUPSRVE.

Tracing and Recovery Against Third-Party Recipients

A fraud victim may pursue assets in the hands of third-party recipients by means of a *saisie conservatoire* under Articles 54 to 61 of the AUPSRVE against assets traceable to the fraud, regardless of who currently holds them, provided the recipient is not a bona fide purchaser for value without notice. Where assets have been commingled, courts apply proportionality analysis to identify the victim's share (Articles 565 to 577 Civil Code). The action for ownership recovery (*action en revendication*) under Articles 544 and 2279 of the Civil Code is available against any third-party holder of misappropriated assets where fraud is established.

1.4 Limitation Periods

Criminal Limitation Periods

Under Article 66 of the CPP, the limitation period for public prosecution is ten years for felonies ("*crimes*"), three years for misdemeanours ("*délits*") and one year for contraventions. Fraud ("*escroquerie*") is a misdemeanour, subject to a three-year period running from the date of the offence or, in cases of concealment, from the date the victim could reasonably have discovered it. The period is suspended during any period of criminal investigation (Article 66 (3) CPP) and interrupted by any act of investigation or prosecution (Article 66 (2) CPP).

Civil Limitation Periods

The general civil limitation period is 30 years under Article 2262 of the Civil Code. Commercial obligations under the OHADA Uniform Act on General Commercial Law (AUDCG, revised 15 December 2010) are subject to a five-year prescription period from the date the creditor knew or ought to have known of the right (Article 18 AUDCG). Where criminal and civil proceedings concern the same facts, the principle "*Le criminel tient le civil en l'état*" (Article 4 CPP) suspends the civil limitation period for the duration of the criminal proceedings.

Restitution Actions

Actions in unjust enrichment are not subject to a specific limitation period and fall under the general 30-year regime of the Civil Code, unless the commercial five-year period under Article 18 of the AUDCG is applicable to the underlying transaction.

1.5 Proprietary Claims Against Property

Cameroonian law does not recognise the English law concept of a constructive trust. However, several mechanisms enable a fraud victim to assert proprietary claims over misappropriated assets, as listed below.

Ownership Recovery (Action en Revendication)

Under Articles 544 and 2279 of the Civil Code, the owner of property may recover it from any third party, including a bona fide purchaser of movable property where fraud was involved. For immovable property, the limitation period is imprescriptible as between the original parties and runs for 30 years against third par-

ties (Article 2262 Civil Code). Where assets have been converted into substitute property, the victim may claim the substitute as representing the converted proceeds of the original fraud under the doctrine of real subrogation (“*subrogation réelle*”).

Priority in Insolvency (OHADA)

The OHADA Uniform Act Organising Collective Proceedings for the Clearing of Debts (AUPC, revised 10 September 2015) provides priority to creditors holding real security (“*sûretés réelles*”) over unsecured creditors (Articles 166 to 168 AUPC). A fraud victim who can identify specific assets as proceeds of the fraud may assert a proprietary claim that ranks above the general body of creditors in insolvency proceedings.

Mixed Funds

Where the proceeds of fraud have been commingled with the defendant’s own funds, Cameroonian courts apply a proportionality analysis. The victim is entitled to claim a proportionate share of the mixed fund corresponding to the traced fraud proceeds, by analogy with the civilian rules on accession and commingling (Articles 565 to 577 Civil Code). Courts have demonstrated a willingness to use financial expert evidence to trace and apportion mixed funds.

Treatment of Gains

Gains generated by the fraudster through the investment of fraud proceeds before recovery are treated as the civil fruits (“*fruits civils*”) of the victim’s property. Under Article 547 of the Civil Code, a possessor in bad faith is required to account for all fruits from the date of fraudulent acquisition. Since a fraudster is always in bad faith, the victim is entitled to all profits generated from the proceeds from the date of the fraud, including interest and investment returns.

1.6 Rules of Pre-Action Conduct

Cameroonian law does not prescribe a formal pre-action protocol for fraud claims equivalent to the English pre-action protocols. However, the following pre-action steps are available and frequently deployed.

Conservatory Attachment (Saisie Conservatoire)

Before formal proceedings, an applicant may seek an ex parte *saisie conservatoire* under Articles 54 to 61 of the AUPSRVE, upon demonstrating an apparently

well-founded claim (“*créance paraissant fondée en son principe*”) and a risk of dissipation. No prior notice to the defendant is required. The order may attach bank accounts, receivables and movable assets.

Formal Demand Letter (Mise en Demeure)

It is standard practice to serve a formal demand letter (“*mise en demeure*”) under Article 1139 of the Civil Code before commencing civil proceedings. This puts the debtor in default, triggers the running of interest (Article 1153 Civil Code) and establishes the claimant’s good faith for cost purposes.

Criminal Complaint

Filing a criminal complaint with the Public Prosecutor (“*Parquet*”) or directly with the examining magistrate (Articles 135 to 161 CPP) is a powerful pre-action measure that triggers a state-funded investigation. The criminal investigation may yield evidence (search and seizure, banking records, expert reports) that strengthens the parallel civil action.

ANIF Referral

Where money laundering is suspected, a referral to the Financial Intelligence Unit (ANIF) may result in administrative freezing of suspicious transactions under CEMAC Regulation No 01/03/CEMAC/UMAC/CM of 4 April 2003 on the Prevention and Suppression of Money Laundering and Financing Terrorism in Central Africa, providing immediate protection without court intervention.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Conservatory Attachment (Saisie Conservatoire)

Under Articles 54 to 61 of the AUPSRVE, a creditor holding an apparently well-founded claim may obtain an ex parte court order attaching the debtor’s movable assets (bank accounts, receivables, commercial stock). The order operates in rem and binds all third-party holders from the date of service. No prior judgment is required. The order must be served on the debtor within eight days of the attachment (Article 55 AUPSRVE).

Judicial Security (Sûreté Judiciaire)

Under Articles 62 to 74 of the AUPSRVE, a creditor may obtain a provisional judicial mortgage (“*hypothèque*”).

judiciaire provisoire”) over the debtor’s immovable property or a pledge over specified movable assets. This creates a priority security interest over subsequently registered encumbrances, effective from the date of inscription at the Land Registry.

Criminal Asset Seizure (Saisie Pénale)

In criminal proceedings, the examining magistrate may order the seizure of all property suspected to be the proceeds of crime under Articles 218 to 224 of the CPP. The seizure operates both in personam (against the defendant) and in rem (against the specific assets). Financial institutions and other third parties are legally bound to comply and may be held criminally liable for obstruction (Article 181 CPP).

Operation: In Rem or In Personam

The civil *saisie conservatoire* operates in rem against identified assets. The criminal *saisie pénale* operates both in rem and in personam. There is no pure equivalent of the English Mareva/freezing injunction operating solely in personam, but the combined civil and criminal mechanisms achieve a comparable practical effect.

Court Fees

Court fees for conservatory measures are assessed at a fixed tariff under the Cameroonian Courts Act and are not proportional to the amount of the claim. They are relatively modest and do not present a barrier to access.

Sanctions for Non-Compliance

Violation of a conservatory order by the defendant constitutes the offence of misappropriation of seized goods (“*détournement d’objets saisis*”) under Article 184 (2) of the Penal Code, punishable by imprisonment and fines. A third party (eg, bank) that fails to comply with a garnishment order (“*saisie-attribution*”) is rendered jointly and severally liable for the full amount of the secured debt under Article 156 of the AUPSRVE.

Cross-Undertaking in Damages

Cameroonian law does not require a formal cross-undertaking in damages as a condition for obtaining a *saisie conservatoire*. However, the court has discretion to require the applicant to provide security (“*caution*”)

where the risk of wrongful attachment is significant (Article 57 AUPSRVE).

Effect on Third Parties

Once validly served, a *saisie conservatoire* or *saisie-attribution* is binding on any third-party holder of the attached assets. A bank that releases funds after valid service is rendered jointly and severally liable under Article 156 of the AUPSRVE. The OHADA enforcement framework ensures uniform application and recognition across all 17 member States.

2. Procedures and Trials

2.1 Disclosure of Defendants’ Assets

Cameroonian procedural law provides several mechanisms to compel or facilitate disclosure of a defendant’s assets, as listed below.

Declaration of Assets in Enforcement Proceedings

Under Article 36 of the AUPSRVE, once a writ of execution exists, the creditor may compel the debtor to declare the composition, location and value of all its assets. Failure to make a truthful and complete declaration constitutes a criminal offence under Article 185 of the Penal Code (breach of a court order).

Judicial Interrogation

In the context of criminal proceedings, the examining magistrate may interrogate the defendant as to their assets and require the production of bank statements, property registers and company records under Articles 162 to 185 of the CPP. Silence or false answers may be treated as corroborating evidence of guilt.

Nominee Assets

Cameroonian law does not distinguish formally between assets held in the defendant’s name and those held by nominees. However, courts will pierce the veil of nominee arrangements where there is evidence that the nominee holds assets on behalf of the defendant, applying the principle of simulation under Article 1321 of the Civil Code. Assets held through sham transactions or straw-man nominees are considered the defendant’s assets for enforcement purposes.

Sanctions for Non-Disclosure

Deliberate non-disclosure or false declaration of assets is punishable under Article 185 of the Penal Code. Additionally, a defendant who absconds or conceals assets after service of a conservatory order commits the offence under Article 184 (2) of the Penal Code. The claimant is not required to give a cross-undertaking in damages to obtain a disclosure order in enforcement proceedings.

2.2 Preserving Evidence

Criminal Search and Seizure

The most effective mechanism for preserving evidence in Cameroon is the criminal search and seizure order. Under Articles 217 to 224 of the CPP, the examining magistrate may authorise the judicial police to conduct searches at the defendant's residence, business premises and any other location where relevant evidence may be found. Searches must generally be conducted between 6am and 9pm unless urgency requires otherwise (Article 218 CPP). All seized items are inventoried and deposited with the court registry.

Civil Interim Orders

In civil proceedings, the court may appoint a bailiff ("*huissier de justice*") to conduct a constatory visit ("*constat d'huissier*") and preserve evidence of fraudulent transactions. Under Article 187 of the Code of Civil and Commercial Procedure (CCPC), an emergency judge (*juge des référés*) may order any measure necessary to prevent imminent damage, including the seizure of documents and business records.

Cross-Undertaking

As noted in 1.7 **Prevention of Defendants Dissipating or Secreting Assets**, Cameroonian law does not impose a mandatory cross-undertaking in damages for interim measures. The court retains discretion to require security where the balance of harm so dictates.

Electronic Evidence

Cameroon's Law No 2010/012 of 21 December 2010 on Cybersecurity and Cybercrime recognises electronic evidence and authorises the seizure of electronic devices and data in criminal proceedings (Articles 42 to 46). Courts have increasingly relied on electronic forensic evidence in complex fraud cases.

2.3 Obtaining Disclosure of Documents and Evidence From Third Parties

Criminal Rogatory Orders

The examining magistrate may address rogatory orders ("*commissions rogatoires*") to any person or institution in possession of relevant evidence, including banks, telecommunications companies and public registries, under Articles 163 to 175 of the CPP. Compliance is mandatory; refusal constitutes an offence under Article 181 of the CPP.

Civil Court Orders

In civil proceedings, Article 9 of the CCPC empowers the court to order any third party to produce documents in their possession that are relevant to the dispute. A party may also request the appointment of a judicial expert ("*expert judiciaire*") under Articles 54 to 75 of the CCPC to examine third-party financial records. Refusal by a third party to comply may give rise to contempt sanctions and adverse inferences.

Pre-Proceedings Evidence Gathering

A constatory visit by a bailiff ("*constat d'huissier*") may be requested before the commencement of proceedings to preserve evidence that is at risk of destruction. This is recognised under Article 186 of the CCPC and Cameroonian bailiff practice. The resulting official report ("*procès-verbal de constat*") is admissible as evidence in subsequent proceedings.

Restrictions on Use

Documents obtained through court orders or criminal investigation procedures may only be used for the proceedings for which they were obtained. Their disclosure to third parties or use in foreign proceedings requires specific judicial authorisation. Banking secrecy rules (see 7.2 **Laws to Protect "Banking Secrecy"**) may limit the scope of third-party disclosure absent a court order.

2.4 Procedural Orders

Cameroonian procedural law expressly provides for ex parte (without notice) interim orders in fraud matters, as described below.

Ex Parte Saisie Conservatoire

By design, the *saisie conservatoire* under Articles 54 to 61 of the AUPSRVE is obtained ex parte. The appli-

cant must demonstrate an apparently well-founded claim and a risk of dissipation. The element of surprise is essential to the effectiveness of the measure; prior notification would enable the respondent to dissipate assets. The court must be satisfied on both conditions and will conduct a summary review of the evidence presented.

Ex Parte Criminal Seizure

Criminal asset seizures under Articles 218 to 224 of the CPP are inherently ex parte, effected by judicial police officers acting under the authority of the examining magistrate. The defendant is notified only after the seizure has been executed.

Additional Burden on Applicant

Since the respondent is not present, the applicant bears a heightened duty of candour and must disclose all material facts, including those adverse to the application (“duty of full and frank disclosure” by analogy with good-faith obligations under Article 1134 of the Civil Code). Misrepresentation or non-disclosure may result in the discharge of the order and an award of costs against the applicant. Courts will set a return date for the respondent to challenge the order on notice.

Emergency Orders (Référé d’Urgence)

Under Article 187 of the CCPC, emergency orders (“*référé d’urgence*”) may also be obtained on short notice (rather than full ex parte) where a degree of urgency permits notifying the defendant at short notice. The judge sits as a single judge and may grant immediate relief pending a full hearing.

2.5 Criminal Redress

Criminal prosecution is extensively used by fraud victims in Cameroon and constitutes an integral component of most fraud recovery strategies. The primary mechanisms are as follows.

Plainte Simple and Plainte Avec Constitution de Partie Civile

A victim may file either a simple complaint (“*plainte simple*”) with the Public Prosecutor or a complaint with civil party status (“*plainte avec constitution de partie civile*”) directly with the examining magistrate (Articles 61 and 135 CPP). The latter triggers a man-

datory judicial investigation and entitles the victim to seek damages before the criminal court (Article 357 CPP), avoiding the cost and delay of separate civil litigation.

Practical Interaction Between Criminal and Civil Proceedings

The principle “*Le criminel tient le civil en l’état*” (Article 4 CPP) requires civil proceedings to be stayed where the same facts are the subject of a pending criminal prosecution. However, this is not an absolute rule: courts will permit civil proceedings to continue on a different legal basis (eg, contract claims not dependent on establishing the criminal offence). In practice, the criminal investigation provides valuable evidence (banking records, expert reports, witness statements) that is subsequently relied upon in civil proceedings.

Confiscation

Courts may order the confiscation of all property derived from the fraud pursuant to Article 35 of the Penal Code and Article 224 of the CPP. Confiscated assets are transferred to the State, which does not automatically compensate the victim; the victim must separately enforce any civil damages award against the defendant’s remaining assets.

2.6 Judgment Without Trial

Default Judgment

Under Article 179 of the CCPC, a court may enter judgment by default (“*jugement par défaut*”) where the defendant has been duly served but fails to appear. Default judgment may be granted on the merits of the claimant’s case without a full contested trial. The defendant may apply to set aside a default judgment (“*opposition*”) within 30 days of service (Article 181 CCPC).

Summary Judgment

Under Article 191 of the CCPC, a claimant may seek a provisional payment order (“*référé-provision*”) where the obligation is not seriously contestable. The judge may grant a provisional award without a full hearing on the merits. This is particularly useful where the defendant has acknowledged the debt or where the documentary evidence is overwhelming.

OHADA Payment Injunction (*Injonction de Payer*)

For commercial debts, the OHADA Uniform Act on Simplified Recovery Procedures (Articles 1 to 18 AUP-SRVE) provides a rapid summary procedure enabling a creditor to obtain a payment order without a full trial, provided the debt is certain, liquid and due. The order is granted *ex parte* and the debtor may file an opposition within 15 days of service (Article 10 AUPSRVE).

2.7 Rules for Pleading Fraud

Cameroonian law and professional rules impose specific requirements on the pleading of fraud, as listed below.

Specificity Requirement

In both civil and criminal proceedings, allegations of fraud must be pleaded with particularity. In criminal proceedings, the examining magistrate will only open an investigation where the complaint contains sufficiently specific and plausible factual allegations (Articles 135 to 138 CPP). Vague or speculative complaints will be dismissed as manifestly inadmissible.

Evidence Threshold

Under Cameroonian criminal procedure, the standard for ordering a judicial investigation is sufficient grounds (“*charges suffisantes*”), which requires *credible evidence supporting each element of the alleged offence (Article 202 CPP). Courts are vigilant against abusive use of criminal proceedings as a debt recovery tool (“instrumentalisation du pénal”).*

Professional Conduct

Cameroonian Bar rules (*Règlement Intérieur du Barreau du Cameroun*) impose a duty of probity and truthfulness on counsel. An advocate who advances reckless or bad-faith allegations of fraud may be subject to disciplinary sanctions.

2.8 Claims Against “Unknown” Fraudsters

Cameroonian law permits proceedings against unknown perpetrators in the following circumstances.

Criminal Complaint “Contre X”

A criminal complaint may be lodged “against person or persons unknown” (“*contre X*”) under Article 135 of the CPP. This triggers a criminal investigation aimed at identifying the perpetrators. The State bears the

cost of the investigation. The examining magistrate has broad powers to gather evidence, identify suspects and issue international arrest warrants (Article 627 CPP).

Civil Proceedings

Under Cameroonian civil procedure, it is not generally possible to issue civil proceedings against a completely unidentified defendant, as the court requires a named defendant for service of process. However, where the claimant can identify a known intermediary (eg, a bank through which fraudulent proceeds passed), civil proceedings may be brought against that party while the identity of the principal fraudster is established through criminal investigation.

Provisional Attachment

Pending identification of the perpetrator, the claimant may obtain a *saisie conservatoire* over identified assets linked to the fraud, even where the ownership of those assets is disputed or obscure, provided the applicant can demonstrate a sufficient factual nexus between the assets and the fraud (Article 54 AUP-SRVE).

2.9 Compelling Witnesses to Give Evidence

Criminal Proceedings

In criminal proceedings, the examining magistrate has the power to summon (“*convoquer*”) any witness under Articles 196 to 213 of the CPP. Witnesses who fail to attend without lawful excuse may be brought before the court by compulsion (“*mandat d’amener*”, Article 135 CPP). A witness who refuses to take the oath or give evidence without justification commits an offence under Article 162 of the Penal Code and may be fined and imprisoned.

Civil Proceedings

Under Article 119 of the CCPC, the civil court may order the compulsory attendance of recalcitrant witnesses (“*témoins récalcitrants*”). Witnesses who refuse to attend or refuse to answer may be held in civil contempt and fined. The court may also draw adverse inferences from a witness’s unjustified refusal to testify.

Expert Witnesses

The court may appoint a judicial expert (*“expert judiciaire”*) under Articles 54 to 75 of the CCPC to provide specialist opinion on financial, accounting or technical matters relevant to fraud claims. Expert witnesses are officers of the court and have an overriding duty to the court, not to the parties.

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on a Corporate Entity

Under OHADA law and Cameroonian national law, corporate criminal liability and attribution of individual knowledge to the company are governed as follows.

Criminal Liability of Legal Persons

Article 74-1 of the Penal Code (as amended by Law No 2016/007) expressly provides for the criminal liability of legal persons (*“personnes morales”*), including companies, for offences committed on their behalf by their organs or representatives. The company may be subject to criminal fines, prohibition from certain activities, and dissolution. Individual officers remain concurrently liable.

Attribution of Director Knowledge

Under Article 121 of the AUSCGIE, directors act as agents of the company (*“mandataires sociaux”*) and their knowledge is attributed to the company for all acts within their authority. Where a director commits fraud in the exercise of their corporate functions, the company is vicariously liable to third parties for the resulting damage (Article 1384 Civil Code), without prejudice to the company’s right to seek indemnification from the director.

De Facto Managers

Article 277 of the AUSCGIE extends liability to de facto managers (*“dirigeants de fait”*) who exercise effective control over the company without formal appointment. Cameroonian courts have applied this provision to pierce nominee arrangements and hold beneficial controllers liable for corporate fraud.

3.2 Claims Against Ultimate Beneficial Owners

Lifting the Corporate Veil

Cameroonian courts will lift the corporate veil where a company has been used as a mere instrument (*“instrument”*) of fraud, applying Article 1832 of the Civil Code (requirement of genuine corporate purpose) and the doctrine of simulation (Article 1321 Civil Code). Where the corporate form is fictitious or is used to conceal personal liability, the court will disregard the separate legal personality and hold the ultimate beneficial owner (UBO) directly liable.

Liability of Controlling Shareholders

Under Article 740 of the AUSCGIE, controlling shareholders of a subsidiary that is placed in liquidation may be held liable for the subsidiary’s debts where they have caused the subsidiary’s insolvency through fraudulent management. This provision is directly applicable in Cameroon.

FATF/AML Beneficial Ownership Requirements

Cameroon’s anti-money laundering (AML) legislation requires companies to maintain a register of UBOs, accessible to ANIF and to courts in the context of criminal investigations. CEMAC Regulation No 01/03 and Law No 2003/004 on the Prevention and Suppression of Money Laundering require financial institutions to identify and verify UBO identity as part of their know-your-customer obligations.

3.3 Shareholders’ Claims Against Fraudulent Directors

Derivative Action (Action Sociale)

Under Articles 165 and 166 of the AUSCGIE, shareholders may bring a derivative social action (*“action sociale ut singuli”*) on behalf of the company against fraudulent directors to recover losses caused by the directors’ misconduct. Individual shareholders or groups holding a minimum of 1% of the share capital (or XAF5 million in share value) may bring such an action where the company’s board declines to act (Article 166 AUSCGIE).

Criminal Complaint

Shareholders may also file a criminal complaint against directors for misuse of corporate assets (*“abus de biens sociaux”*) under Article 891 of the AUSCGIE and

the Penal Code. The criminal investigation will examine the directors' conduct and may result in seizure of assets and conviction.

Emergency Judicial Administration

Under Articles 253 et seq of the AUSCGIE, any shareholder may petition the court for the appointment of a judicial administrator ("*mandataire ad hoc*") or for the suspension of fraudulent corporate decisions. These emergency measures are available on short notice and do not require a prior finding of liability.

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims Jurisdiction Over Foreign Defendants

Cameroonian courts assert jurisdiction over foreign defendants where: (i) the fraudulent act was wholly or partly committed in Cameroon; (ii) the victim is a Cameroonian national or a company incorporated under Cameroonian law; or (iii) the fraud produced effects in Cameroon (Articles 4 to 6 CPP for criminal jurisdiction; Articles 42 to 44 CCPC for civil jurisdiction). This mirrors the internationally recognised "effects doctrine" and the principle of passive personality.

OHADA Courts

The OHADA Common Court of Justice and Arbitration (CCJA), seated in Abidjan, exercises final appellate jurisdiction over all disputes relating to the OHADA Uniform Acts across all 17 member States. Where a fraud claim involves OHADA commercial law, the CCJA's jurisdiction extends to all member States, simplifying the joinder of overseas OHADA parties.

Extraterritorial Criminal Jurisdiction

Under Article 7 of the CPP, Cameroonian criminal law applies to offences committed abroad where: (i) the accused is a Cameroonian national; or (ii) the offence targets Cameroonian nationals or the Cameroonian State. This broad extraterritorial reach is regularly invoked in cross-border fraud cases.

4.2 Service of Proceedings out of the Jurisdiction

Service via Diplomatic Channels

Service on foreign defendants is effected through diplomatic channels (via the Ministry of External Relations) pursuant to Article 37 of the CCPC and, where applicable, under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (which Cameroon has not signed as at the date of this guide, but which is given effect by bilateral conventions with certain States).

OHADA Zone Service

Within the OHADA zone, service of process may be effected through the simplified channels provided for under the national civil procedure codes of each member State, on the basis of mutual recognition. Cameroonian courts have recognised service effected in accordance with the law of the place of service.

Alternative Service

Where conventional service is impracticable, the court may authorise alternative service (service by publication, service on a local representative or agent, or service by any other means calculated to bring the proceedings to the defendant's notice) under Article 39 of the CCPC. Courts will grant alternative service orders where the claimant demonstrates genuine difficulty in effecting conventional service.

5. Enforcement

5.1 Methods of Enforcement

The AUPSRVE provides a comprehensive and directly applicable enforcement framework across all OHADA member States, including Cameroon. The principal methods of enforcement are the following.

Attachment of Debts/Bank Accounts (Saisie-Attribution)

Under Articles 153 to 172 of the AUPSRVE, a judgment creditor may garnish bank accounts and receivables due to the judgment debtor. Service on the garnishee (eg, bank) freezes the attached amounts immediately. The garnishee must declare the position of the debtor's account within five days (Article 156 AUPSRVE).

A garnishee that fails to comply is rendered jointly and severally liable for the judgment debt.

Seizure and Sale of Movable (Saisie-Vente)

Under Articles 91 to 152 of the AUPSRVE, a bailiff may seize and sell the judgment debtor's movable assets at public auction. A notice period of eight days from service of the attachment order is required before sale (Article 144 AUPSRVE).

Enforcement Against Immovable Property (Saisie Immobilière)

Enforcement against immovable property is governed by Articles 246 to 300 of the AUPSRVE. The process involves registration of the charge, a pre-sale period of at least three months, and public auction conducted by the court. This is the most powerful enforcement mechanism for high-value fraud recovery.

Periodic Penalty (Astreinte)

Courts may impose a financial penalty ("*astreinte*") for each day of non-compliance with a court order under Article 39 of the AUPSRVE. The *astreinte* mechanism is a powerful tool to compel compliance with disclosure and performance orders.

5.2 Enforcement of Foreign Judgments

Exequatur Procedure

Foreign judgments are enforced in Cameroon through the "exequatur" procedure under Articles 299 to 302 of the CCPC. The applicant must file a petition before the High Court, accompanied by: (i) a certified copy of the foreign judgment; (ii) proof that the judgment is final and enforceable in the country of origin; (iii) proof of service on the judgment debtor; and (iv) a certified translation into French or English.

Conditions for Recognition

The court will grant exequatur unless: (i) the foreign court lacked jurisdiction under Cameroonian private international law principles; (ii) the judgment was obtained by fraud or in violation of due process; (iii) the judgment is contrary to Cameroonian public policy ("*ordre public*"); or (iv) the judgment is irreconcilable with a prior Cameroonian judgment on the same issue (Article 301 CCPC).

OHADA Zone Judgments

Judgments of the CCJA are directly enforceable in all OHADA member States without the need for exequatur, pursuant to Article 20 of the OHADA Treaty. This provides a seamless enforcement mechanism across the 17-member OHADA zone.

Bilateral Treaties

Cameroon has concluded bilateral judicial assistance and enforcement treaties with several countries, particularly within the franc zone, which simplify and expedite the exequatur procedure.

6. Privileges

6.1 Invoking the Privilege Against Self-Incrimination

Constitutional and Statutory Basis

The right to silence and the privilege against self-incrimination are guaranteed by Article 1 (2) of the Cameroonian Constitution (Law No 96/06 of 18 January 1996) and given effect by Articles 116 and 305 of the CPP. A defendant may refuse to answer questions in criminal proceedings without this silence being treated as an admission of guilt.

Scope in Civil Proceedings

In civil proceedings, the privilege against self-incrimination has narrower application. A civil defendant may invoke the privilege where answering a court order would expose them to criminal liability, but the court may draw adverse inferences from such refusal under Article 1353 of the Civil Code (judicial presumptions). Courts balance the right of the claimant to disclosure against the risk of self-incrimination on a case-by-case basis.

Inferences From Silence

In criminal proceedings, silence cannot be used as evidence of guilt (Article 305 CPP). However, in civil proceedings, a defendant's unexplained refusal to disclose information relevant to the claim may give rise to adverse inferences under the doctrine of "*présomptions graves, précises et concordantes*" (Article 1353 Civil Code), which may be sufficient to establish civil liability in the absence of other evidence.

6.2 Undermining the Privilege Over Communications Exempt From Discovery Legal Professional Privilege in Cameroon

Communications between a lawyer and their client are protected by professional secrecy (“*secret professionnel*”) under Article 53 of the Cameroonian Bar Act (Law No 90/059 of 19 December 1990) and Article 310 of the CPP. Lawyers are prohibited from disclosing client communications made in the course of the professional relationship. Breach of professional secrecy is a criminal offence under Article 310 of the Penal Code.

Crime/Fraud Exception

The privilege does not extend to communications made for the purpose of facilitating or committing a crime or fraud. Under Article 310 of the CPP, a lawyer who is a participant in or an instrument of a fraud cannot invoke professional secrecy to shield those communications. Courts apply a two-stage test: (i) whether there is sufficient *prima facie* evidence that the lawyer’s advice or assistance was directed at enabling the fraud; and (ii) whether the specific communication sought falls within the scope of that fraudulent purpose.

Practical Application

In practice, Cameroonian courts are cautious in overriding legal professional privilege and will require strong evidence that the crime/fraud exception applies before ordering disclosure.

7. Special Rules and Laws

7.1 Rules for Claiming Punitive or Exemplary Damages

Cameroonian civil law follows the French compensatory tradition and does not recognise punitive or exemplary damages as a distinct category of relief. The fundamental principle is that civil damages must be equivalent to the actual loss suffered (“*réparation intégrale du préjudice*”) and may not exceed it (Article 1149 Civil Code). Moral damages (“*dommages moraux*”) are, however, recoverable in addition to patrimonial loss, and courts have awarded substantial moral damages in fraud cases involving egregious conduct.

Aggravated Awards in Criminal Proceedings

While civil law does not permit punitive damages, the criminal courts may impose enhanced criminal fines that serve a punitive purpose. In cases of aggravated fraud under Article 319 of the Penal Code, fines may significantly exceed the amount of the fraud. The criminal court may also order the confiscation of all illicit gains under Article 35 of the Penal Code, which goes beyond mere compensation.

OHADA Context

No OHADA Uniform Act provides for punitive damages. However, courts have awarded full contractual penalties (“*clauses pénales*” under Articles 1226 to 1233 Civil Code) as a form of agreed pre-estimated damages, which may substantially exceed actual loss where contractually provided.

7.2 Laws to Protect “Banking Secrecy” Statutory Banking Secrecy

Banking secrecy in Cameroon is protected by Article 9 of COBAC Regulation R-2016/01 on the Conditions of Exercise of Credit Institution Activities and by Law No 2003/004 on the Prevention and Suppression of Money Laundering. Banks are prohibited from disclosing customer information to third parties without the customer’s consent or a legal obligation to do so.

Exceptions – Court Orders

Banking secrecy is lifted where a court order is served on the bank. Under Article 168 of the CPP, a bank is obliged to produce account records and other information in response to a rogatory commission from an examining magistrate, notwithstanding banking secrecy rules. Similarly, a *saisie-attribution* under Article 153 of the AUPSRVE overrides banking secrecy and requires the bank to disclose the state of the debtor’s accounts.

ANIF and AML

ANIF, established under Law No 2005/006 of 27 July 2005, has the power to require banks to provide any information relevant to a money laundering investigation, overriding banking secrecy obligations. Banks are subject to a mandatory suspicious transaction reporting obligation to ANIF (Article 17 CEMAC Regulation No 01/03).

Practical Implications for Fraud Claims

In practice, banking secrecy is not an obstacle to evidence gathering in fraud proceedings where a criminal complaint has been filed or a conservatory measure obtained.

7.3 Crypto-Assets

Legal Status of Crypto-Assets

Cameroon does not yet have dedicated legislation specifically classifying crypto-assets as legal property. However, CEMAC Regulation No 02/18/CEMAC/UMAC/CM of 21 December 2018 on the Prevention and Suppression of Money Laundering and Terrorist Financing (as updated) extends AML obligations to virtual asset service providers. Courts have, on a case-by-case basis, treated cryptoassets as assets susceptible to seizure and attachment in enforcement proceedings, applying general property law principles under the Civil Code and the AUPSRVE.

Freezing Relief

The absence of specific crypto-asset legislation creates practical challenges for obtaining freezing orders. However, Cameroonian courts have demonstrated flexibility in applying the *saisie conservatoire* mechanism under Article 54 of the AUPSRVE to crypto-assets held in identified wallets, where the applicant can provide sufficient technical evidence identifying the wallet and establishing the nexus to the fraud. ANIF has also issued administrative freezing orders in relation to transactions involving crypto-assets suspected of being proceeds of crime.

Particular Issues in Crypto Fraud

Crypto-asset fraud presents specific challenges in Cameroon: (i) tracing is technically complex and requires specialist blockchain forensic expertise; (ii) the anonymity of transactions makes identification of fraudsters difficult; and (iii) cross-border recovery is hampered by the absence of specific OHADA or CEMAC rules on crypto-assets.

Regulatory Developments

Cameroon and the CEMAC zone are actively developing regulatory frameworks for crypto-assets. Practitioners and clients are advised to monitor developments by the Banking Commission (COBAC), the Central Bank (BEAC) and the Financial Action Task Force (FATF), which are expected to result in comprehensive legislation in the near future.

Trends and Developments

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Maaron Law Firm is a premier business law firm based in Douala, Cameroon, serving as the strategic gateway to the OHADA and CEMAC zones. The firm advises multinational corporations, financial institutions and public bodies on complex fraud, asset tracing and recovery matters involving cross-border structures across Central Africa and between OHADA jurisdictions and Europe. Its multidisciplinary team – combining legal, financial and forensic expertise – integrates litigation, regulatory, corporate and financial analysis to act in cases involving misappropriation,

banking fraud, corporate governance failures and enforcement of foreign judgments. Key office locations include Douala as the regional hub, with cross-border reach across all 17 OHADA member States through its membership of Legalink (60+ countries) and the International Fraud Group. The firm's managing partner holds dual qualification as a solicitor (England and Wales) and barrister (Cameroon Bar), combined with Fellow-level accountancy credentials and corporate finance certification, enabling a uniquely integrated approach to financial crime mandates.

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Introduction

Cameroon occupies a pivotal position in the landscape of international fraud and asset recovery in Africa. As the largest economy in the CEMAC (Economic and Monetary Community of Central Africa) zone and a founding member of OHADA – the Organisation for the Harmonisation of Business Law in Africa – Cameroon sits at the intersection of two of the continent’s most important legal and economic frameworks. The country’s unique bijural heritage, combining French civil law with English common law across its ten regions, adds a further layer of complexity that distinguishes its fraud landscape from virtually any other jurisdiction in the world.

The years 2024 to 2026 have seen a marked acceleration in the volume, sophistication and cross-border dimension of fraud and financial crime cases involving Cameroon. This article identifies the principal trends shaping the practice of fraud litigation and asset recovery in Cameroon, examines the structural and regulatory developments that are redefining the legal landscape, and draws out the practical implications for clients and counsel engaged in this space.

The Rise of Cross-Border Financial Crime With a Central African Nexus

The most significant development in fraud practice in Cameroon over the past two years has been the dramatic increase in cross-border fraud mandates – cases in which fraudulent conduct originates or is executed in Cameroon but produces consequences in Europe, North America or elsewhere in Africa, and vice versa. This trend reflects Cameroon’s growing integration into international financial flows, the expansion of

foreign direct investment in the energy, infrastructure and telecoms sectors, and the increasing sophistication of fraud schemes that deliberately exploit jurisdictional complexity to obstruct recovery.

Practitioners are encountering a new generation of fraud structures that layer multiple corporate vehicles across OHADA jurisdictions, route funds through the CEMAC banking system, and ultimately park assets in European jurisdictions with strong banking secrecy traditions. The challenge for victims and their advisers is to deploy recovery strategies that are legally effective simultaneously in all relevant jurisdictions – requiring deep expertise in OHADA law, CEMAC regulation, Cameroonian criminal procedure and the enforcement laws of the destination jurisdictions.

The practical consequence is that international counsel increasingly need a counterpart in the OHADA zone who can do more than simply serve process or file a local complaint. They need a practitioner who understands the interaction between OHADA Uniform Acts, CEMAC Regulations and Cameroonian national law; who can operate in both French and English; and who has the financial literacy to understand the structures being investigated. This integrated profile is increasingly the defining criterion for effective cross-border fraud work with a Central African dimension.

OHADA Law as a Fraud Recovery Instrument: An Underused Asset

One of the most important and still under-appreciated developments in fraud recovery practice in the OHADA zone is the growing recognition by international practitioners that the OHADA framework – far from

being an obstacle to recovery – is in fact a powerful asset recovery toolkit, directly applicable and enforceable across all 17 member States without the need for exequatur.

The AUPSRVE: a unified enforcement mechanism

The OHADA Uniform Act on Simplified Recovery Procedures and Measures of Execution (AUPSRVE, as revised in September 2015) provides creditors with a suite of remedies that compares favourably with any civil law enforcement system in the world. The conservatory attachment (*saisie conservatoire*), judicial mortgage (*hypothèque judiciaire provisoire*), attachment of bank accounts (*saisie-attribution*) and seizure and sale of movable assets (*saisie-vente*) are all available ex parte on the basis of an apparently well-founded claim, without the need for a prior judgment. Third parties – including banks – that fail to comply with a validly served attachment order are rendered jointly and severally liable for the full amount of the creditor's claim.

What makes the AUPSRVE particularly powerful in fraud cases is its direct applicability across the entire OHADA zone. A conservatory attachment obtained before a Cameroonian court can be enforced in Côte d'Ivoire, Senegal, Gabon or any other OHADA member State by simple notification, without further judicial proceedings. For fraudsters who have dispersed assets across multiple OHADA jurisdictions – a common defensive strategy – this creates a unified recovery front that is difficult to resist.

The CCJA: a supranational appellate court

The OHADA Common Court of Justice and Arbitration (CCJA), seated in Abidjan, exercises final appellate jurisdiction over all disputes relating to OHADA Uniform Acts across all 17 member States. Judgments of the CCJA are directly enforceable throughout the OHADA zone without exequatur. For complex multi-jurisdictional fraud cases, the ability to obtain a single binding ruling from the CCJA – applicable simultaneously across 17 jurisdictions – is a strategic advantage that few international frameworks can match.

The Digitalisation of Fraud: Cyber-Enabled Financial Crime and the Legal Response

Cameroon has experienced a sharp increase in cyber-enabled fraud over the past three years, encompassing business email compromise, online investment fraud, identity theft and the misappropriation of digital financial assets. The CEMAC zone's expanding mobile money ecosystem – with Cameroon hosting the region's largest mobile money market – has created new attack surfaces that fraudsters are increasingly exploiting.

The legal framework

The primary legislative response is Law No 2010/012 of 21 December 2010 on Cybersecurity and Cybercrime, which criminalises computer fraud, illegal access to information systems, and electronic data manipulation. The law provides prosecutors with the authority to seize electronic devices, compel telecommunications providers to produce metadata, and request international co-operation in cybercrime investigations. Courts have increasingly relied on electronic forensic evidence in fraud proceedings, and the competent authorities have developed dedicated cybercrime investigation units.

However, significant gaps remain. The 2010 law predates the current generation of fraud schemes and does not specifically address decentralised finance, blockchain-based fraud or AI-assisted manipulation. Practitioners advising victims of cyber-enabled fraud must therefore navigate a framework that was not designed for the instruments being misused – requiring creative application of general fraud, forgery and misappropriation provisions of the Penal Code alongside the specific cybercrime provisions.

Crypto-assets: a regulatory frontier

Cameroon does not yet have dedicated legislation classifying crypto-assets as property for legal purposes. However, CEMAC Regulation No 02/18/CEMAC/UMAC/CM of 21 December 2018 extended anti-money laundering obligations to virtual asset service providers, and courts have demonstrated a willingness to treat crypto-assets as attachable assets in enforcement proceedings. The Financial Intelligence Unit (ANIF) has issued administrative freezing orders

in relation to transactions suspected of involving crypto-to-asset-based fraud.

The practical challenge in crypto-fraud cases is tracing. Blockchain forensic analysis is now an indispensable tool in complex crypto-fraud investigations, and practitioners must be prepared to engage specialist technical experts alongside legal counsel. The absence of specific OHADA or CEMAC rules on crypto-asset recovery means that practitioners must currently rely on general property law principles and the broad language of the AUPSRVE to attach identified wallets – an approach that has succeeded in practice but introduces uncertainty.

Regulatory developments are anticipated. The COBAC (Central African Banking Commission) and the BEAC (Bank of Central African States) are actively developing a regulatory framework for crypto-assets and virtual asset service providers. Practitioners and clients should monitor these developments closely, as they are expected to significantly alter the recovery landscape for crypto-fraud cases in the near term.

Corporate Governance Failures and the Weaponisation of OHADA Company Law

A significant proportion of the fraud mandates handled in Cameroon involve corporate governance failures – cases in which directors or controlling shareholders have misused their positions to misappropriate company assets, divert business opportunities or manipulate corporate structures to the detriment of minority shareholders, creditors or investors. The OHADA framework provides a comprehensive and increasingly effective set of tools for addressing this category of fraud.

Misuse of corporate assets (*abus de biens sociaux*)

Article 891 of the OHADA Uniform Act on Commercial Companies and Economic Interest Groups (AUSCGIE, revised on 30 January 2014) criminalises the misuse of corporate assets by directors – a provision that has seen growing use in Cameroon as investors and minority shareholders become more assertive in pursuing fraudulent management. The criminal complaint route, combined with a civil party constitution before the examining magistrate, provides a powerful and cost-effective mechanism for investigation and

recovery that bypasses the limitations of purely civil proceedings.

Derivative actions and shareholder remedies

Articles 165 and 166 of AUSCGIE provide shareholders holding at least 1% of the share capital with the right to bring a derivative social action (*action sociale ut singuli*) on behalf of the company against fraudulent directors. This provision is increasingly being invoked in cases involving private equity investments, joint ventures and publicly listed companies on the BVMAC (the CEMAC securities market), where minority investor protections have historically been under-enforced.

Lifting the corporate veil

Cameroonian courts have shown increasing willingness to pierce the corporate veil and hold ultimate beneficial owners directly liable where companies have been used as instruments of fraud. The doctrines of simulation (Article 1321 Civil Code) and de facto management (Article 27 AUSCGIE) are being applied with greater frequency and rigour, reflecting a judicial culture that is becoming less tolerant of nominee arrangements designed to obscure fraudulent liability.

The Interaction of Criminal and Civil Proceedings: Strategic Sequencing

A defining feature of fraud practice in Cameroon – and one that distinguishes it from purely common law jurisdictions – is the richness and complexity of the interaction between criminal and civil proceedings. Understanding how to sequence and co-ordinate these two tracks is perhaps the most important practical skill in Cameroonian fraud litigation.

The principle “*Le criminel tient le civil en l’état*” (Article 4 Code of Criminal Procedure) requires civil proceedings to be stayed where the same facts are the subject of a pending criminal prosecution and the two proceedings involve the same parties. This rule – which has no direct equivalent in common law systems – can operate as both a sword and a shield: a strategic criminal complaint can pause adverse civil proceedings brought by the opposing party, while the criminal investigation simultaneously generates evidence (banking records, expert reports, witness testimony) that strengthens the claimant’s civil position.

The key insight is that the criminal investigation, if properly initiated and managed, effectively outsources the evidence-gathering phase of the fraud claim to the State – at no additional cost to the victim – while simultaneously creating an asset preservation framework through criminal seizures that operates in parallel with civil conservatory measures.

The role of ANIF and AML referrals

The Financial Intelligence Unit (ANIF), established under Law No 2005/006, has emerged as an increasingly important actor in complex fraud cases. An ANIF referral – triggered where there are reasonable grounds to suspect money laundering – can result in the administrative freezing of suspicious transactions within 72 hours, without any court involvement. This speed advantage makes ANIF referrals an attractive first step in time-critical cases where assets are at immediate risk of dissipation. Practitioners who understand how to combine ANIF referrals with parallel criminal complaints and civil conservatory attachments can construct a multi-layered asset preservation strategy that is very difficult for a respondent to circumvent.

Enforcement of Foreign Judgments: OHADA as a Bridge

The enforcement of foreign judgments in Cameroon has historically been a slow and uncertain process, dependent on the exequatur procedure under Articles 299 to 302 of the Code of Civil and Commercial Procedure. However, recent years have seen a number of developments that are improving the practical effectiveness of foreign judgment enforcement, particularly within the OHADA zone.

The most significant development is the growing awareness and utilisation of the direct enforceability of CCJA judgments under Article 20 of the OHADA Treaty. For fraud victims who can bring their claims within the framework of OHADA Uniform Acts, obtaining a CCJA ruling provides automatic enforceability across all 17 member States without any further procedure. This is a transformative advantage in multi-jurisdictional recovery cases involving OHADA-domestic defendants.

Outside the OHADA zone, the exequatur process remains the primary route. Cameroonian courts have demonstrated increasing willingness to grant exequatur to judgments from European jurisdictions – particularly France, the UK and Switzerland – where the conditions of jurisdiction, due process and public policy are satisfied. Bilateral judicial assistance treaties with a number of francophone African states further simplify the enforcement process within the franc zone.

Practical considerations for foreign counsel

For foreign counsel seeking to enforce judgments or arbitral awards in Cameroon, the key practical considerations are: (i) ensuring the judgment is certified as final and enforceable in the jurisdiction of origin; (ii) obtaining a certified French or English translation; (iii) demonstrating that the judgment debtor was properly served in the original proceedings; and (iv) establishing that no Cameroonian judgment exists on the same issue. Where these conditions are met, Cameroonian courts have generally been receptive to exequatur applications, particularly where the underlying claim involves fraud and the enforcement is sought in the public interest.

Outlook: Key Developments to Watch

Several developments are expected to significantly shape the fraud and asset recovery landscape in Cameroon and the broader OHADA zone over the coming years:

- *Crypto-asset regulation:* The COBAC and BEAC are expected to introduce specific regulatory frameworks for virtual assets and virtual asset service providers. This will create clearer legal bases for asset tracing and recovery in crypto-fraud cases and is likely to trigger a significant increase in this category of work.
- *OHADA reform:* The OHADA Secretariat is actively reviewing several Uniform Acts, including the AUP-SRVE and the AUSCGIE, with a view to modernising them to address digital commerce, fintech and data-driven financial services. Practitioners should monitor these reform processes closely.
- *Enhanced AML enforcement:* The FATF mutual evaluation process and GABAC (the CEMAC AML/CFT body) are placing increasing pressure on

Cameroonian financial institutions and authorities to improve AML compliance and enforcement. This is expected to result in more active use of ANIF powers and a higher volume of money laundering prosecutions, creating both opportunities and risks for clients active in the region.

- *Judicial capacity development:* Sustained investment in the training of Cameroonian judges and prosecutors – including through ERSUMA and national judicial training institutes – is improving the technical capacity of the judiciary to handle complex fraud and financial crime cases. This trend is increasing the reliability and sophistication of judicial outcomes in this area.
- *Cross-border co-operation:* Cameroon is deepening its engagement with international asset recovery networks, including the ARINSA (Asset Recovery Inter-Agency Network for Southern Africa) and GABAC frameworks. This is improving the practical effectiveness of cross-border recovery operations involving multiple OHADA and non-OHADA jurisdictions.

Conclusion

The fraud and asset recovery landscape in Cameroon is undergoing a period of rapid evolution, driven by the digitalisation of financial crime, the growing sophistication of cross-border fraud structures, and the progressive development of the OHADA and CEMAC regulatory frameworks. For international clients and counsel, Cameroon is no longer simply a peripheral jurisdiction to be navigated with difficulty – it is a jurisdiction with a powerful and increasingly sophisticated legal framework for fraud recovery that, when properly deployed, offers compelling advantages.

The critical success factors in Cameroonian fraud work are: a deep understanding of the interaction between OHADA law, CEMAC regulation and Cameroonian national law; the ability to operate across the civil/criminal interface with strategic precision; the financial and forensic expertise to analyse complex corporate and financial structures; and the global network to co-ordinate recovery operations across multiple jurisdictions simultaneously. Practitioners who combine these capabilities are positioned to deliver outcomes that would be difficult or impossible to achieve through a purely litigious approach in any single jurisdiction.



Law and Practice

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Baker McKenzie

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Baker McKenzie is a leading global law firm with more than 75 global offices. The Canadian team has acted on some of the country's most important fraud and enforcement cases in the past three decades. The firm's Canadian lawyers are fully integrated with other Baker McKenzie advocates located worldwide. The firm has a highly regarded disputes and white-collar group in Canada, with particular expertise in

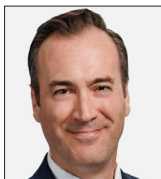
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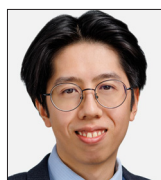
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1. Fraud Claims

1.1 General Characteristics of Fraud Claims

Overview of Fraud Claims in Canada

Fraud claims can arise under both criminal and civil law. They are governed by a combination of federal and provincial statutes, as well as case law. The legal framework includes Canada's Criminal Code, which establishes a range of criminal offences, as well as other federal and provincial laws addressing areas including competition law, consumer protection and the regulation of securities. Civil claims for fraud can also arise under common law torts such as fraudulent misrepresentation, deceit and conspiracy, typically requiring proof of intentional or reckless deception, reliance and resulting harm.

False Statements

A false statement occurs when a person knowingly or recklessly misrepresents a material fact with the intent to mislead another. To establish liability under either statutory or common law principles, the claimant must show that the statement was false, was made with knowledge or disregard for the truth, was relied upon by the victim and resulted in measurable harm.

Corrupt Payments (Bribery)

Bribery involves the exchange of money, gifts or other benefits to improperly influence someone in a position of authority or trust. It is a criminal offence under the Criminal Code and the Corruption of Foreign Public Officials Act (CFPOA). In the civil context, such conduct may also give rise to actionable claims.

Conspiracy

Fraudulent conspiracy refers to an agreement between two or more individuals to commit an unlawful act or to use unlawful means to achieve a lawful goal. It requires proof of the agreement, intent to cause harm or to use unlawful means and measurable harm. This is both a criminal offence and a civil claim in Canada.

Misappropriation

Misappropriation involves the unauthorised use or diversion of funds or property. It is both a criminal offence and a civil claim referred to as conversion.

1.2 Causes of Action After Receipt of a Bribe

There is potential liability in both tort and contract for accepting a bribe. A common claim against an agent accepting a bribe is typically for breach of fiduciary duty, since agents must act loyally and in good faith. In the right circumstances the principal can recover ill-gotten profits from the bribe and compensation for any losses.

Courts may also impose a constructive trust, treating the proceeds as belonging to the principal. If the agent or another party was unjustly enriched, the principal can claim restitution. Other possible claims include civil conspiracy (if there was collusion), fraud (if the bribe was concealed) and tortious interference (if a third party encouraged the breach).

Bribery is also a criminal offence. Section 426 of the Criminal Code bans secret commissions, and the CFPOA makes it illegal to bribe foreign officials for business advantages.

1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts

Actions against third parties are based on the doctrines of knowing assistance and knowing receipt that permit a court to impose a constructive trust for the purposes of asset recovery. These two doctrines allow victims to recover misappropriated assets or their value from third parties who were not directly involved in the original fraud.

Knowing assistance applies when a third party knowingly helps someone commit a dishonest breach of trust or fiduciary duty. To succeed, the claimant must show that the third party had actual knowledge of the fraudulent conduct and actively participated in it. This is a fault-based claim focused on the third party's involvement.

Knowing receipt applies when a third party receives property or funds for their use that were misappropriated through a breach of trust or fiduciary duty, and the third party knew or ought to have known that the assets were wrongfully obtained.

Those who assist in committing fraud can also be charged under the Criminal Code for aiding and abetting. The Criminal Code also has offences that apply to third parties who knowingly receive or handle the proceeds of fraud, including offences like possession, trafficking or possession for the purpose of trafficking property obtained by crime. Liability generally requires knowledge that the property was criminally obtained.

1.4 Limitation Periods

Limitation periods differ between criminal and civil legal regimes. Under the Criminal Code, fraud is categorised based on the amount involved. Fraud over CAD5,000 is an indictable offence with no limitation period. Fraud under CAD5,000 is a hybrid offence; if prosecuted summarily (as a less serious crime), there is a one-year limitation from the date of the offence. Offences under the CFPOA are also indictable and not subject to any limitation period, allowing charges to be laid at any time.

In the civil context, most provinces and territories impose a two-year limitation period from the date the fraud is discovered or reasonably should have been

discovered. Quebec allows three years. Additionally, many jurisdictions have an ultimate limitation period typically between six and 15 years – which bars claims regardless of discovery. In some circumstances, the doctrine of fraudulent concealment can suspend these periods to ensure that concealment does not shield a wrongdoer from liability.

1.5 Proprietary Claims Against Property

A proprietary claim allows a victim of fraud to recover specific property or its traceable proceeds, rather than simply receiving compensation. This type of claim is based on the principle that the property still belongs to the victim, even if it has changed form. Proprietary claims can arise under common law, equity or statutory provisions such as the Fraudulent Conveyances Act or the Bankruptcy and Insolvency Act. Courts often use equitable remedies like constructive trusts to recognise the victim's continuing ownership. Fraud judgments (and some breach of fiduciary duty or trust judgments) will also typically survive any bankruptcy proceeding that the fraudster(s) might undertake.

Tracing Misappropriated Property

Tracing is the legal process used to follow misappropriated property or funds as they change form or move through different accounts or hands. It allows a victim to identify and claim substitute assets – such as when fraudulently obtained funds are used to buy a piece of art or invest in stocks. Equitable tracing, which is more flexible than common law tracing, can follow property even when it has been mixed with other funds, if the victim can show a clear and continuous link between the original asset and its current form. A “bona fide purchaser for value without notice” who buys the property in good faith, pays fair value and has no knowledge that it was obtained through fraud will break the link such that if such a person acquires the asset, then the original owner cannot recover it, although there will be a claim against the funds paid to acquire the asset.

Mixed Funds and Recovery

When stolen funds are mixed with other money, in the right circumstances courts will apply equitable rules to protect the victim's interest. These include the presumption that the fraudster spent their own money first, and the “lowest intermediate balance”

rule, which will sometimes limit recovery to the lowest amount the account held after the fraud. If multiple victims are involved, courts may divide the remaining funds proportionally.

Wrongful Profits

If the fraudulently obtained funds generated profits, the victim may also claim those profits through the doctrine of disgorgement, which refers to judgments/awards that are calculated by reference to the wrongdoer's gain, irrespective of whether it corresponds to damage suffered by the victim.

1.6 Rules of Pre-Action Conduct

There are no specific rules of pre-action conduct in Canadian fraud law claims. However, a written demand for payment will frequently be made before commencing a claim.

1.7 Prevention of Defendants Dissipating or Secreting Assets

A claimant alleging fraud can apply to the court for a Mareva injunction to prevent a wrongdoer from dissipating assets before or after judgment. This remedy is in personam, meaning it binds the defendant personally rather than attaching to specific property. To obtain a Mareva injunction, the claimant must demonstrate a strong prima facie case, a real risk of asset dissipation and that the balance of convenience favours the injunction. The court also requires an undertaking from the party seeking the injunction for any damages that may be caused to the defendant if the injunction is later found to be unjustified. There are minor filing fees associated with seeking an injunction which vary across Canada, but they are not linked to the amount of the claim.

Non-compliance with a Mareva order can result in a contempt of court finding, leading to fines or imprisonment. Courts may also issue ancillary terms or orders requiring production of sworn world-wide asset statements by the defendant(s), cross-examination on same, disclosure of asset locations and third-party co-operation requirements for the enforcement of the injunction.

2. Procedures and Trials

2.1 Disclosure of Defendants' Assets

Typically, upon granting an asset freezing or Mareva order, the court will also order the defendant to provide a sworn asset disclosure affidavit. In the affidavit, the defendant is required to describe the full value, nature and location of all assets held, directly or indirectly, worldwide. The order often specifies that it applies to assets whether in the defendant's name or not, and whether solely or jointly owned. The claimant has the right to cross-examine the defendant on the asset affidavit.

Failure by the defendant to comply with a Mareva order, including the delivery of the asset disclosure affidavit, will expose the defendant to cost consequences or even potential penal sanction through a contempt proceeding.

2.2 Preserving Evidence

Canadian courts may issue what is known as an "Anton Piller" order to preserve evidence in circumstances where there is a real danger that evidence might be destroyed, dispersed or altered. Anton Piller orders direct a defendant to permit the claimant or its lawyers to enter the defendant's premises to secure such evidence.

Anton Piller orders are discretionary and will only be granted when there is no other reasonable alternative. To obtain an Anton Piller order, the claimant must demonstrate:

- a strong prima facie case;
- that the damage to the claimant arising from the defendant's alleged misconduct, potential or actual, must be very serious;
- that, on convincing evidence, the defendant had in its possession incriminating documents or things; and
- that there is a real possibility that the defendant may destroy the material.

Absent unusual circumstances, the claimant is generally required to provide an undertaking and/or security to pay damages in the event the order turns out to be unjustified or wrongfully executed. To reduce the risk

of privileged information being obtained, the court will typically appoint an independent supervising solicitor to oversee the search and ensure privileged materials are not disclosed.

2.3 Obtaining Disclosure of Documents and Evidence From Third Parties

Parties may seek what is known as a “Norwich” or “Norwich Pharmacal” order to require third parties to produce information before a lawsuit has been initiated or served. Norwich orders have been used by parties to obtain information necessary to determine the identity of a wrongdoer, to evaluate whether a cause of action exists, to plead a known cause of action, to trace assets or to preserve evidence or property.

To obtain a Norwich order, the claimant must:

- provide sufficient evidence to raise a bona fide claim;
- demonstrate that the third party from whom the information is sought is involved in the acts complained of;
- prove that the third party is the only practicable source of the information available;
- confirm that it will indemnify the third party for costs and expenses arising out of compliance with the order (in addition to its legal costs); and
- demonstrate that the interests of justice favour the disclosure.

Norwich orders are increasingly being used by claimants who have been victimised/defrauded by anonymous parties online and thus require information from, for example, internet service providers to identify the perpetrator.

2.4 Procedural Orders

The procedural orders discussed previously, including Mareva injunctions and Anton Piller orders, are often sought ex parte – that is, without notice to the defendant. When a claimant seeks these orders on an ex parte basis, they are under a continuing duty to provide full, frank and fair disclosure. In effect, this means that the party seeking the order must be forthright with all the evidence – particularly in respect of evidence that might be considered helpful to the litigation opponent.

This obligation extends to providing the court with any law adverse to the claimant’s position.

Failure to provide full and frank disclosure may result in the ex parte order being set aside and/or significant costs (up to full indemnification) being awarded to the defendant. As noted previously, generally, the party seeking the order will also need to provide an undertaking for damages to the defendant, which may be significant if it is later determined the order was unjustified.

2.5 Criminal Redress

Concurrent criminal complaints and civil actions are commonplace in cases of fraud. To maximise recovery potential, experienced fraud counsel can advise on timing issues with respect to the sequence of commencing civil claims (with any related freeze or injunctive relief) and law enforcement reporting. Victims of fraud must be careful not to use the threat of criminal proceedings (or the withdrawal of complaints) as leverage within a civil proceeding, and should be mindful of the implied/deemed undertaking rule which provides that evidence or information obtained in discovery during a civil proceeding can only be used for that proceeding. Under the Canadian Victims’ Bill of Rights, victims of fraud in Canada may seek an order for restitution in criminal proceedings as an additional method of redress.

Criminal prosecution may in some cases delay the progression of parallel civil claims. A defendant may apply to stay the civil action pending resolution of criminal charges.

2.6 Judgment Without Trial

Judgments can be rendered without the necessity of a trial through either default judgment or summary judgment. The specific procedures vary between Canadian provinces and territories, but generally, a claimant may move for default judgment where a defendant fails to file a defence. Where the claim is for unliquidated damages, which is generally the case in fraud cases, the claimant may need to prove its allegations by way of affidavit evidence.

Similarly, the rules of civil procedure in the different provinces and territories provide mechanisms for

dealing with defences that are wholly unmeritorious. For example, under Ontario's Rules of Civil Procedure, a motion for summary judgment may succeed where the court is satisfied that there is no genuine issue requiring a trial. The threshold for summary judgment is high and, typically, questions of credibility requiring live testimony (often at issue in fraud cases) will render the claim unsuitable for summary judgment.

2.7 Rules for Pleading Fraud

Given the serious nature of allegations of fraud, full particulars are required when pleading. In Ontario, for example, the Rules of Civil Procedure provide that where fraud or misrepresentation is alleged, full particulars of the allegation must be pleaded. This has been clarified by the court in Ontario to mean that the pleading must set out with careful particularity the elements of the misrepresentation relied upon, including:

- the alleged misrepresentation itself;
- when, where, how, by whom and to whom it was made;
- its falsity;
- the inducement;
- the intention that the claimant should rely upon it;
- the alteration by the claimant of his or her position relying on the misrepresentation;
- the resulting loss or damage to the claimant; and
- that the defendant knew of the falsity of his or her statement.

While evidence is not pleaded, counsel must (under the Rules of Professional Conduct) ensure that fraud allegations are capable of being supported by reasonable evidence. Further, claims of fraud that are determined to be unfounded may result in heightened cost consequences against the claimant.

2.8 Claims Against “Unknown” Fraudsters

A claim can be brought against “unknown” fraudsters using pseudonyms such as John or Jane Doe. Pseudonyms cannot be used simply as a placeholder in the event a cause of action is subsequently discovered against someone else. Rather, the intention to sue the unidentified party and the basis of the claim against that unidentified party must be apparent from the pleading.

2.9 Compelling Witnesses to Give Evidence

The applicable provincial or territorial rules of civil procedure generally provide methods to compel non-party witnesses to give evidence. In Ontario, for example, a party can seek leave of the court to examine non-party witnesses before trial and can compel any individuals with relevant evidence to attend at trial by issuing a summons. A summons may also require the witness to attend at trial and to produce documents or other things in his or her possession, control or power relating to the action that are specified in the summons. Failure to respond to a summons may ultimately result in an arrest warrant to compel the witness be brought before the court.

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on a Corporate Entity

A corporation may be held liable for the fraudulent conduct of an individual director or officer through the corporate attribution doctrine. Under this doctrine, the individual director/officer's mental state may be imputed to a corporation.

The Supreme Court of Canada has set out the following guiding principles regarding the applicability of the doctrine:

- an individual's fraudulent acts may be attributed to a corporation where the wrongdoer was the directing mind of the corporation, and the wrongful actions were performed within their scope of their corporate responsibility;
- the corporate attribution doctrine will not apply when the directing mind acted in fraud of the corporation and where the acts were not designed to benefit the corporation;
- courts have the discretion to refuse to apply corporate attribution if it would be contrary to the public interest; and
- in all cases, the court must apply the doctrine purposively, contextually and pragmatically.

3.2 Claims Against Ultimate Beneficial Owners

Claims can be brought against individuals standing behind companies when the company is being used as a vehicle for fraud by piercing the corporate veil. A court will consider whether the corporation is: (i) completely dominated and controlled; and (ii) being used as a shield for fraudulent or improper conduct. When the two elements are present, the corporate veil will be lifted to prevent the individual from being shielded from liability.

Additionally, company principals (including directors, officers and shareholders) may be held personally liable for their own tortious conduct when civil fraud has been pled and proven, and/or when their conduct exhibits a separate identity or interest from that of the company so as to make the act or conduct their own. Where the tortious conduct at issue is a fraudulent misrepresentation, it may be presumed that the act was that of the individual, even where that individual was acting as a representative of the company.

3.3 Shareholders' Claims Against Fraudulent Directors

Under various provincial, territorial and federal corporation acts, shareholders may apply to the court for permission to bring a derivative action on behalf of a company, including against fraudulent directors. The goal in a derivative action is to recover for wrongs done to the company itself. To obtain leave to bring a derivative action the court will need to be satisfied that:

- the corporate directors will not pursue the claim;
- the complainant is acting in good faith; and
- it appears in the best interests of the corporation that the action be brought.

Shareholders and other complainants may also seek redress against fraudulent directors through the oppression remedy. Unlike the derivative action, an individual complainant does not need to obtain leave from the court to pursue an oppression claim. It allows the individual complainant to recover for wrongs done by the company or because the affairs of the company are being conducted in manner that is oppressive or

unfairly prejudicial to, or that unfairly disregards the interest of, the complainant.

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims

The rules applicable to joining overseas parties may depend on the rules of procedure in the province. Generally, a Canadian court may add additional parties where the claims for relief arise from the same occurrence, there is doubt as to the persons from whom the applicant is entitled relief or where doing so would promote the convenient administration of justice.

Canadian courts apply a two-stage “real and substantial connection” test for taking jurisdiction over a foreign party. At the first stage, the claimant must establish a “connecting factor” between the subject matter of the litigation and the forum, which creates a presumption of jurisdiction. Such a presumption can be based on factors such as residence, carrying on business activity, committing torts or forming contracts in the specific jurisdiction within Canada.

At the second stage, the defendant can seek to rebut the presumption by demonstrating the weakness of the connection. The test is designed to prevent judicial overreach and reconcile fairness with the need for security, stability and efficiency in conflict of laws. The focus is on the defendant's connection to the jurisdiction, not the relationship of the dispute to the jurisdiction.

Finally, even after jurisdiction is established, a court may nonetheless opt not to exercise its jurisdiction if adjudication in another jurisdiction is determined to be more appropriate under the doctrine of forum non conveniens.

4.2 Service of Proceedings out of the Jurisdiction

Service of proceedings out of the jurisdiction may be made without leave of a court. By way of example, in the province of Ontario, there is a list of specific categories of types of claims connected to Ontario for which service ex juris may be made without leave,

including contracts made in Ontario, torts committed in Ontario and claims in respect of real or personal property in Ontario.

If the foreign litigant is resident in a country that is party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the “Convention”), compliance with the requirements of the Convention is mandatory.

If the litigant resides in a country that is not party to the Convention, service must be carried out in accordance with the local rules of procedure in the jurisdiction within Canada in which the proceedings are commenced. In an Ontario-based proceeding, this would include service in a manner provided by the rules of service in Ontario, or service in a manner provided by the law of the foreign jurisdiction where service is made, if service in that manner could reasonably be expected to come to the notice of the person to be served.

5. Enforcement

5.1 Methods of Enforcement

There are a range of enforcement methods available to judgement creditors in Canada, including:

- garnishment, by which a third-party, including an employer or other party who might owe money to the debtor, is required to pay such monies directly to the court or the creditor;
- writs of seizure and sale for personal property, by which a government official in the form of a sheriff or other similar official is empowered to seize an asset;
- a writ of seizure and sale for real property, by which a registration is filed against land, establishing a lien on the property, which can have the effect of preventing the debtor from selling or encumbering the property and which can lead to its sale;
- conducting an examination in aid of execution, by which a creditor can require a debtor to disclose details assets, debts, income, etc, under oath; and
- the appointment of a receiver, particularly if the debtor is attempting to conceal assets, or in more complex cases that call for such measures.

5.2 Enforcement of Foreign Judgments

A party seeking to enforce a foreign judgment would need to commence a proceeding for recognition and enforcement. In such enforcement proceedings, Canadian courts will generally enforce a foreign money judgment under the following circumstances.

- The court giving judgment is a judicial body or tribunal regularly established and exercising the jurisdiction conferred upon it by the relevant competent authority.
- The foreign court had proper personal and subject-matter jurisdiction according to Canadian rules regarding the conflict of laws. Jurisdiction is viewed as being properly taken if:
 - (a) the foreign court had proper in personam jurisdiction over the defendant;
 - (b) there is a real and substantial connection between the foreign jurisdiction and the subject matter of the proceeding; or
 - (c) the defendant attorned to or by contract agreed to the jurisdiction of the foreign court.
- The foreign judgment is for a debt or a definite sum of money.
- The judgment is final and conclusive with respect to the rights and liabilities of the parties to it so as to be res judicata in a foreign jurisdiction, although Canadian courts may recognise and enforce interlocutory orders if they meet the requirement of finality. For an interlocutory order to be recognised and enforced, the foreign court’s jurisdiction to vary or set aside the judgment must be exhausted.

Certain Canadian provinces have passed reciprocal enforcement of judgment statutes that apply to foreign judgments. However, the scope of such legislation varies from province to province and tends to be limited to other Canadian provinces, the UK, a few select US states and parts of Australia.

6. Privileges

6.1 Invoking the Privilege Against Self-Incrimination

Under the Canada Evidence Act, where a person is compelled to answer incriminating questions, that testimony cannot be used against them in future pro-

ceedings except if it involves perjury or the impeachment of contradictory evidence. In a civil proceeding, a witness can be compelled by court order to answer incriminating questions, but that testimony cannot be used against them in other or future proceedings. In criminal proceeding, the right to silence ensures that defendants cannot be required to testify, and no adverse inference can be drawn from this choice.

6.2 Undermining the Privilege Over Communications Exempt From Discovery

If a client seeks legal advice to facilitate or further a crime or fraud then solicitor client privilege can be lost. The exception is narrow, and it must be shown that the client intended an illegal purpose and the lawyer either shared or was deceived concerning that purpose.

7. Special Rules and Laws

7.1 Rules for Claiming Punitive or Exemplary Damages

Punitive/exemplary damages are primarily governed by common law principles but there are specific statutory provisions that permit them in cases involving human trafficking, consumer protection or discriminatory business practices. Punitive/exemplary damages are often awarded in intentional tort cases such as fraud or breach of fiduciary duty.

7.2 Laws to Protect “Banking Secrecy”

Banks are precluded from sharing customer information with third parties without consent under their duty of confidentiality, as well as under privacy legislation. Exceptions include disclosures compelled by court order, required by law or justified by a public duty, such as prevention of a crime or fraud.

7.3 Crypto-Assets

Canada is lagging other countries in developing a comprehensive legal framework governing crypto-assets, but guidance for crypto-assets has been issued by securities regulators across Canada, the Canadian Securities Administrators (which assist regulators in developing a harmonised approach across Canada) and the Investment Industry Regulatory Organization of Canada (IIROC), which oversees investment dealers, brokers and trading activity in Canada. This guidance has been intended to adopt existing Canadian securities laws to the unique issues that apply to crypto-asset trading platforms.

Crypto-assets are treated as property for tax purposes in Canada and Canadian civil courts have adopted a similar approach.

In several recent disputes including cases where fraud has been alleged, Canadian courts have issued freezing orders over crypto-assets, and Canadian courts have been receptive to treating crypto-assets like other assets that can be traced and seized by court orders. However, the decentralised and anonymous nature of crypto-assets makes tracing and recovering the fraudulently stolen crypto-assets difficult, particularly where the defendants are out of the jurisdiction and the passwords for access to the crypto-assets cannot be obtained.

CAYMAN ISLANDS



Law and Practice

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Appleby is one of the world's leading full-service international law firms, with global teams of legal specialists advising public and private companies, financial institutions, and private individuals. Appleby has offices in ten highly regarded, well-regulated global locations, including the key international jurisdictions of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, the Isle of Man, Jersey, Mauritius, and the Seychelles, as well as the international financial centres of Hong Kong and Shanghai. Appleby's Cayman Islands dispute resolution team has six part-

ners and 12 other lawyers, and is a specialist team known for acting on the largest, most sensitive cases before the Cayman Islands courts. The team acts for clients from across the globe as well as for important clients in the Cayman Islands and regularly represents blue-chip firms and high net worth individuals in the highest-profile and highest-stakes litigation. This ranges across a number of practice areas, including fraud, insolvency, professional liability, funds, and cryptocurrency.

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APPLEBY

1. Fraud Claims

1.1 General Characteristics of Fraud Claims

Fraud claims under Cayman Islands law are governed by principles of equity and common law. They generally involve the need to prove deliberate or reckless deception and loss sustained as a result. Civil fraud claims can be framed in various ways and are not confined to a single cause of action.

False Statements

The making of a false statement can give rise to a claim in the tort of deceit when a false representation has been made knowingly (ie, without belief in its truth) or recklessly (as to whether or not it is true), with the intent that the other party will rely on that false representation. The party making the false representation will be liable for loss and damage caused to the other party in reliance on that false representation.

Claims based on misrepresentations that induce a contract can also be brought under the Contracts Act (1996 Revision) without the need to prove fraud, with the added advantage that the burden of proof is reversed in that party who made the representation must prove that they had reasonable grounds to believe that the facts represented were true.

Conspiracy

As fraud often involves people acting together either wrongfully or to achieve wrongful ends, a conspiracy claim may arise that gives rise to liability. Conspiracy is an economic tort. There are two different types of conspiracy: unlawful means conspiracy and lawful means conspiracy. These are addressed in **1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts**.

Misappropriation/Breach of Fiduciary Duty

Claims for breach of fiduciary duty are common in commercial fraud cases. Someone who is entrusted with looking after another person's property and with authority to make discretionary decisions on that person's behalf owes fiduciary duties in respect of that property. In 1998, the relationship was described by the English Court of Appeal in *Bristol and West Building Society v Mothew* as follows: "A fiduciary is someone who has undertaken to act for or on behalf of

another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty... A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal". The Cayman court agreed with this formulation in *Renova Resources Private Equity Ltd v Gilbertson* [2009] CILR 268.

Typical relationships in which a fiduciary duty is owed include a trustee (to the beneficiary), a company director (to the company), an attorney (to the client), a partner (to the other partner(s)) and an accountant (to the client). Fiduciary duties may also be owed by one joint venturer to another where one joint venturer has control of the assets of the joint venture. It should be noted that fiduciary duties may be found to exist in contexts other than these normally recognised relationships, though such cases will be exceptional and rare.

Unjust Enrichment

A claim in unjust enrichment arises where a defendant has been enriched at the expense of the claimant in circumstances where the enrichment was unjust, and where no defences arise. "Enrichment" entails receipt of something of value, such as money, shares or the discharge of an obligation. "At the expense of the claimant" means suffering a loss – namely, that the claimant has given up something of value. Factors that are recognised as unjust include mistake, failure of consideration, duress, and undue influence. Failure of consideration is not consideration in the contractual sense, but essentially the failure of a promise to do something in return. The remedy is restitution. Failure of consideration is not consideration in the contractual sense, but essentially the failure of a promise to do something in return. The remedy is restitution.

Fraudulent Disposition

Fraudulent dispositions of property can be set aside under the Fraudulent Dispositions Act, whereby a disposition of property made with intent to defraud and at an undervalue is voidable at the instance of a party to whom an obligation is owed who was thereby preju-

diced. The burden is on the transferee to prove that they did not act in bad faith in order to defend such a claim. These claims do not require an insolvency and are not part of the insolvency legislation (unlike in England and Wales, where the equivalent (although differently worded) provision is at Section 423 of the Insolvency Act 1986).

In the insolvency context, dispositions of a company's property made at an undervalue with intent to defraud creditors are voidable at the instance of the official liquidator of the company under Section 146 of the Companies Act. The official liquidator has the burden of establishing an intent to defraud. These claims may be brought within six years of the disposition.

Criminal Law

Fraud is a common-law criminal offence under Cayman Islands law. The main elements of the common law offence of fraud are acting dishonestly with an intent to gain or cause loss or to expose another to a risk of loss.

Under Section 235 (1) of the Penal Code, dishonestly appropriating property belonging to another with the intention of permanently depriving the other of it amounts to theft. Other offences relevant in fraud cases include false accounting, forgery, securities fraud and money laundering.

The courts have the power to order payment of compensation.

1.2 Causes of Action After Receipt of a Bribe

The causes of action available to a principal whose agent has been bribed arise under general principles and not under specific bribery legislation (which is applicable in respect of bribery of public officers). Those causes of action give rise to the following:

- a claim in the tort of bribery for recovery of the amount of the bribe without proof of loss or gain and, if the loss exceeds the amount of the bribe, the basis of the entitlement being a claim in restitution or unjust enrichment, a claim for compensation for the consequential loss suffered by the principal as a result of the bribe; an essential element of a claim in the tort of bribery is a fiduciary duty owed

by the party receiving the bribe – *Hopcraft v Close Brothers Ltd* [2025] UKSC 33;

- a claim for rescission;
- a claim for damages in fraud;
- a claim in constructive trust; or
- a claim for breach of fiduciary duty (as was found by the English court in *Suppipat v Narongdej* [2023] 7 WLUK 487).

1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts

Claims can be made against parties who assist or facilitate fraudulent acts in various ways, primarily conspiracy, knowing assistance, knowing receipt, and unjust enrichment.

Conspiracy

A civil claim in conspiracy enables a claimant to bring claims against a number of defendants who may not have committed any underlying wrongful act, and the claim can bring in parties who have become involved (although they might not be the main wrongdoer). A conspiracy involves two or more parties combining or agreeing to take concerted action that results in damage being caused to the victim of the conspiracy. As noted in 1.1 General Characteristics of Fraud Claims, there are two types of conspiracy (unlawful means conspiracy and lawful means conspiracy); however, in the context of commercial fraud, unlawful means conspiracy is the more common.

Unlawful means conspiracy

This involves two or more parties combining or agreeing with the intent of injuring another party, taking concerted action using unlawful means (carrying out unlawful acts), resulting in damage actually being caused to that party. As the name suggests, the use of unlawful means is an essential ingredient. Both crimes and civil wrongs can constitute unlawful means. Although what amounts to unlawful means is case-specific, examples of unlawful means include:

- inducing or procuring a breach of contract;
- transactions at an undervalue;
- preferences;
- transactions defrauding creditors; and
- contempt of court.

Although intent to injure the victim of the conspiracy is required, it is not necessary for this to be the sole or predominant intention.

Lawful means conspiracy

This involves two or more parties agreeing or combining to do lawful acts with the sole or predominant intent of injuring the victim, resulting in damage being suffered by the victim. The tort of lawful means conspiracy can make two parties liable for an act that would not have given rise to liability if it had only been carried out by one party. One of the difficulties is proving sole or predominant intent to injure; a common defence is for the defendant to claim that they were pursuing their own self-interest.

Dishonest Assistance

Liability for dishonest assistance involves liability on the part of a non-fiduciary for being an accessory to breach of trust by a fiduciary. The elements are:

- a breach of trust or fiduciary duty;
- the defendant procuring, inducing or assisting in the breach; and
- the defendant acting dishonestly in so doing.

The accessory must have not acted as an honest person would, in the circumstances, have acted. In applying this test, it is assumed that an honest person would not participate in a transaction if they know that it involved a misapplication of trust assets (*Royal Brunei Airlines Sdn Bh v Tan* [1995] 2 AC 378).

Knowing Receipt

Liability for knowing receipt involves a party receiving assets in breach of trust in circumstances where it would be unconscionable for that party to retain those assets. Liability for knowing receipt requires a disposal of assets in breach of a trust or custodial fiduciary duty, the beneficial receipt by the defendant of assets that are traceable as representing the claimant's assets, and the defendant's knowledge that the assets received are traceable to a breach of fiduciary duty (*El Ajou v Dollar Land Holdings PLC* (No 1) [1994] 2 All ER 685).

In a case involving a company that went into liquidation in the Cayman Islands (Saad Investments Com-

pany Limited), the UK Supreme Court has held that a claim for knowing receipt will fail where the claimant's proprietary equitable interest has been extinguished or overridden by the time of the defendant's knowing receipt of the property in question (*Byers v Saudi National Bank* [2023] UKSC 51). A claim in knowing receipt is a personal claim, not a proprietary claim.

1.4 Limitation Periods

For most claims by victims of fraud, the limitation period is six years from the date on which the cause of action accrues, which is usually the date when the damage was suffered. Where there has been fraud, deliberate concealment or mistake, the six-year period does not begin to run until the claimant has discovered, or could with reasonable diligence have discovered, the fraud, concealment or mistake. The Cayman court will treat the English authorities as relevant to construction if the Cayman provision is materially identical to the English provision (*Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2023] UKPC 40).

There is no limitation period for a claim by a beneficiary under a trust in respect of a trustee's fraud or a trustee's conversion of property.

1.5 Proprietary Claims Against Property

A claimant may assert an equitable proprietary claim in respect of any property that they were induced by fraud to transfer, as well as in respect of property representing the converted proceeds of the initially-transferred property (which is identified by the process of tracing). Such a claim may be asserted against the fraudulent party to whom the claimant's property was transferred. Such a claim may also be asserted against any person who subsequently receives the property (or its traceable proceeds) either:

- with notice of the fraud at the time of receipt; or
- for no consideration (ie, as a volunteer).

However, a proprietary claim will not be available against a party that acquires the property or its traceable proceeds as a purchaser in good faith without notice of the fraud at the time of receipt – such receipt will extinguish the proprietary claim, unless the property is re-acquired by a previous recipient of the property against whom a proprietary claim would have

been available. Subsequent acquisition of notice or receipt by an otherwise good-faith purchaser cannot “revive” a proprietary claim against them.

Funds that have been mixed with other funds may be the subject of an equitable proprietary claim – although the rules used to identify traceable proceeds from such mixed funds may vary from case to case (including first-in/first-out, rolling charge, and *pari passu* distribution bases). However, if property has non-fungible properties that allow it (by adducing appropriate evidence) to be identified with certainty from what would otherwise appear to be a “mixture”, such rules may have no application. This may be the case, for example, for certain types of crypto-assets.

1.6 Rules of Pre-Action Conduct

There are no pre-action protocols applicable to fraud claims. Often fraud claims are preceded by an application for a freezing injunction sought without notice to the other party in circumstances where giving such notice would have given that party the opportunity to dissipate assets that would render any order nugatory. However, in the absence of such an application, the overriding object requires parties to help the court to deal with cases in a just, expeditious and economic way and thus pre-action correspondence would be expected. The court has the power to penalise a party for failing to do so in costs.

1.7 Prevention of Defendants Dissipating or Secreting Assets

A victim of fraud can, in appropriate circumstances, obtain a freezing injunction from the Cayman Islands courts to restrain a defendant from disposing of or dealing with assets. This remedy – one of the “nuclear weapons” of civil litigation – provides an effective mechanism for the preservation of assets throughout the duration of the order until judgment can be obtained or enforced.

It is necessary to show a good arguable case that:

- the defendant has assets within or (in the case of a worldwide freezing order) outside the Cayman Islands (although the court will generally exercise greater caution in granting relief in respect of

assets overseas unless there is a clear connection with the Cayman Islands);

- a real risk of dissipation of assets that would otherwise be available to meet any judgment that the claimant might obtain; and
- it is just and convenient for the court to make the order.

Where the claimant asserts a proprietary claim to the assets sought to be frozen, there is no requirement to show a risk of dissipation.

A freezing injunction can be sought in support of foreign proceedings where there are no substantive proceedings in the Cayman Islands (Section 11A of the Grand Court Act, the equivalent power to that provided for in England and Wales by Section 25 of the Civil Jurisdiction and Judgments Act). The Cayman Islands court can also grant a worldwide freezing order. A freezing order operates in personam, but binds third parties, such as banks, who are given notice of the order.

Court fees are on a sliding scale where a claim for a debt or a liquidated sum is made, up to a maximum of KYD15,000 (USD18,000), but where the freezing injunction is sought in respect of foreign proceedings and no substantive claim is made in the Cayman Islands, the fee would be KYD5,000 (USD6,000).

Sanctions for non-compliance include contempt proceedings leading to a possible fine, sequestration of assets, or imprisonment, as well as the appointment of a receiver to police the freezing injunction.

The claimant is also required to give a cross-understanding in damages. As applications for freezing injunctions are almost always made without notice, the claimant is under a duty of full and frank disclosure or fair presentation, whereby the claimant must disclose all matters that are material to the court in deciding whether to grant the injunction and, if so, on what terms.

An order (a Chabra order) can be made against third parties where they hold assets that are beneficially owned by the main defendant.

The Cayman Islands courts also have the jurisdiction to grant a “notification injunction” as an alternative to a freezing injunction. Where a freezing injunction is intrusive to the extent that it is not just and convenient to grant one, a notification injunction may still be available, provided the grounds for a freezing injunction are established. Once a notification order is made, if the defendant wishes to dispose of an asset, they must first notify the claimant so as to give the claimant the opportunity to seek an order preventing the notified disposition (*Arcelormittal USA LLC v Essar Steel Limited and others* – 2 July 2019).

2. Procedures and Trials

2.1 Disclosure of Defendants’ Assets

Ancillary to the granting of a freezing injunction, an order is made for the defendant to disclose their assets so as to:

- ensure that the freezing injunction is effective in preserving assets;
- facilitate the policing of the freezing injunction by identifying the nature and extent of the respondent’s interest in assets; and
- allow the claimant to take further steps to prevent asset dissipation (*Perry v Lopag Trust and others* – FSB 205 of 2017).

The order will normally specify that this includes assets that are not in the defendant’s own name, jointly owned assets, and assets from which the defendant benefits. This is part of the freezing injunction for which a cross-undertaking in damages is required.

2.2 Preserving Evidence

The Cayman Islands courts have jurisdiction to make a search (Anton Piller) order (the other “nuclear weapon” in civil litigation). Search orders are a form of injunction that requires a respondent to allow the applicant’s solicitors to enter the respondent’s premises and search for and remove all items covered by the order. The purpose of a search order is usually to preserve evidence or property that is (or may be) the subject of an action or as to which a question arises in an action. These are very intrusive orders and the applicant must show:

- an extremely strong prima facie case;
- very serious actual or potential harm to the claimant;
- clear evidence of potentially incriminating evidence in the respondent’s possession; and
- a real prospect of destruction of such evidence.

2.3 Obtaining Disclosure of Documents and Evidence From Third Parties

Norwich Pharmacal Orders

Disclosure of documents and evidence to identify a proper defendant or obtain information to plead a claim may be obtained from third parties by way of a Norwich Pharmacal Order (NPO). The requirements for an NPO are that:

- a wrong must have been committed, or it is arguable that a wrong has been committed, by an ultimate wrongdoer;
- Norwich Pharmacal relief is necessary to enable a claimant to commence proceedings against the wrongdoer; and
- the third party has been “mixed up” in the wrongdoing.

Bankers Trust Orders

Furthermore, Bankers Trust Orders can be sought against third parties who may possess information on or evidence of financial activities that may aid in the identification, recovery or preservation of property. To obtain such relief, an applicant will need to demonstrate that there are:

- good grounds to argue that the property about which information is sought belonged to the applicant; and
- real prospects that the information sought will lead to the recovery or preservation of the property.

The interests of the applicant and the detriment to the respondents must be balanced in making such an order, which should be directed at identifying the whereabouts of the property.

Restrictions as to Use

In the cases of both Norwich Pharmacal and Bankers Trust relief, applicants will be subject to express and implied undertakings to use the information or

evidence for the purposes for which the leave was granted and not to use such information or evidence for any ulterior or collateral purpose. Applicants will be normally required by the court to provide express undertakings as to the use of any documents or information obtained (in addition to undertakings as to costs of compliance and cross-undertakings in damages).

2.4 Procedural Orders

As noted in 2.3 Obtaining Disclosure of Documents and Evidence From Third Parties, applications for freezing injunctions, search orders and NPOs/Bankers Trust Orders can be made without notice. In those circumstances, the applicant is under a duty of full and frank disclosure (as described in 2.3 Obtaining Disclosure of Documents and Evidence From Third Parties).

2.5 Criminal Redress

In the Cayman Islands, victims of fraud increasingly pursue dual-track approaches, seeking redress through both criminal and civil processes. The Financial Crime Investigation Unit of the Royal Cayman Islands Police Service handles fraud investigations, with prosecution conducted by the Office of the Director of Public Prosecutions under relevant legislation including the Penal Code (2014 Revision) and the Proceeds of Crime Act (2025 Revision).

The court has the discretion to stay civil proceedings when criminal matters are ongoing.

The benefits of pursuing criminal redress potentially include:

- compensation orders under Section 33 of the Penal Code;
- access to confiscation proceedings under the Proceeds of Crime Act; and
- lower effort required by the victim (as prosecution is conducted by the State).

However, victims have limited control over criminal proceedings, with decisions on prosecution and case management resting with authorities. Fraud victims who have the funds to do so often prioritise civil remedies.

2.6 Judgment Without Trial

Judgment in default can be awarded where a defendant does not participate in the proceedings, by not filing an acknowledgement of service or a defence within the prescribed time. Summary judgment can be awarded, without the need for a full trial, where the defendant has no defence to the claim or to the relevant part of the claim, in that the defendant has not shown a fair or reasonable probability that they have a real, or bona fide, defence (*Merren v Cayman National Bank* [2008] CILR 428).

2.7 Rules for Pleading Fraud

As a matter of professional conduct, an attorney must not make any allegation of fraud or dishonesty unless they have clear instructions to do so and have satisfied themselves that there is reasonably credible material supporting a prima facie case (Rule 8.04 of the Code of Conduct for Cayman Islands Attorneys-at-Law).

2.8 Claims Against “Unknown” Fraudsters

The Cayman Islands courts have recognised that it is permissible for claimants to issue proceedings, and for courts to award injunctive relief, against defendants identified other than by name (“persons unknown”) (*Ernst & Young Ltd v Department of Immigration* [2015] 1 CILR 151). Pleadings against such “persons unknown” must be made with sufficient particularity that any person to whom any court order (against “persons unknown”) is shown should be able to know whether or not it is descriptive of (and therefore directed to) that person.

Due to the difficulties relating to service of documents to “persons unknown”, claimants will generally need to apply for:

- dispensation of personal service; and
- authorisation of alternative or substituted service by means that could reasonably be expected to notify the persons likely to be affected by the terms of any order.

The Cayman Islands courts have broad powers and wide discretion to provide for substituted service (see 4.2 Service of Proceedings out of the Jurisdiction). Examples of such methods from more recent Eng-

lish authorities (which will have persuasive effect in the Cayman Islands) in the crypto-fraud context are likely to be illustrative for similar cases in the Cayman Islands. In 2022, in the case of *D'Aloia v Persons Unknown* [2022] EWHC 1723 (Ch), the English High Court authorised service on unknown crypto-fraudsters in the form of non-fungible tokens via Air-drop into the digital wallets into which the claimant had been fraudulently induced into transferring their crypto-assets.

2.9 Compelling Witnesses to Give Evidence

The Cayman Islands courts have the power to issue subpoenas to compel witnesses to give oral evidence in legal proceedings.

Further, where a person (whether or not a party to the proceedings) swears an affidavit in the litigation, the court has the power to order that person to attend the court for cross-examination in respect of their affidavit evidence. In fraud proceedings, it can be important to cross-examine a defendant on their asset disclosure affidavit – for example, where it is incomplete or inaccurate, as part of the policing of the freezing injunction. However, the court does not have power to compel a witness who is not within the Cayman Islands to attend for cross-examination (*In The Matter of a Company* [2025] CIGC (FSB) 13).

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters has been extended to the Cayman Islands by the UK. In respect of witnesses who are outside the Cayman Islands, the Cayman Islands courts will grant letters of request for information and testimony, and likewise will receive letters of request and make orders for a witness in the Cayman Islands to be examined in relation to proceedings in another convention state.

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on a Corporate Entity

In the Cayman Islands, the attribution of an individual's knowledge to a corporate entity follows English common law principles – primarily, the “identification

doctrine” articulated in *Meridian Global Funds Management Asia Ltd v Securities Commission* (1995) 2 AC 500 and *Bilta (UK) Ltd v Nazir* (2015) UKSC 23.

Under this approach, a corporate entity can be liable for fraud when:

- the fraudulent acts or knowledge are attributable to individuals who represent the company's “directing mind and will” – typically, directors, senior officers, or those with authority to bind the company;
- the individual was acting within the scope of their authority; and
- the acts were performed in the course of corporate business.

The Cayman Islands courts have confirmed this approach (*Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) Ltd* [2023] UKPC 40 and *HSBC Securities Services (Luxembourg) SA* [2017] 2 CILR 334). An important limitation applies through the “fraud on the company” exception recognised in *In re Hampshire Land Co* [1896] 2 Ch 743. Where a director or officer perpetrates fraud against the company itself, their knowledge is not attributed to the company.

For financial services companies operating in the Cayman Islands, the Anti-Money Laundering Regulations (2025 Revision) impose additional requirements designed to prevent fraud, with potential corporate liability for regulatory breaches even without direct board knowledge, if proper systems were not established.

3.2 Claims Against Ultimate Beneficial Owners

Direct claims against ultimate beneficial owners (UBOs) are possible in Cayman Islands courts by piercing or lifting the corporate veil in limited circumstances. Cayman Islands courts have confirmed in *Algosaibi v Saad* [2018] 3 CILR 1 that they will take the same approach as in *Prest v Petrodel Resources* in the UK Supreme Court – namely, where the corporate structure is a mere “façade” concealing true facts, the company is being used as a device to evade legal obligations or frustrate legal remedies, and there is evidence of impropriety beyond the fact that the company was used for wrongdoing.

The Cayman Islands Court of Appeal noted in *Walkers v Arnage Holdings Ltd* [2021] 1 CILR 347 that a decision to lift the corporate veil is one that involves an intense scrutiny of the facts and that the exceptional circumstances that permit disregard of the separate legal personality of a corporation are highly sensitive to the facts of the particular case.

Alternative ways of seeking remedies against UBOs include claims on the basis that:

- the UBO acted as a shadow director of the company – ie, was a person whose directions or instructions the directors of the company were accustomed to acting in accordance with (Section 89 of the Companies Act);
- the UBO was involved in an unlawful means conspiracy;
- the UBO was liable in knowing receipt or dishonest assistance or for restitution (as described in **1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts**).

3.3 Shareholders' Claims Against Fraudulent Directors

The Cayman Islands allows shareholders to bring derivative claims on behalf of companies against fraudulent directors, subject to obtaining permission from the court to continue the claim once a defendant has given notice of intention to defend.

The Cayman Islands court confirmed in *Renova Resources Private Equity Ltd v Gilbertson* (see **1.1 General Characteristics of Fraud Claims**) that shareholders may bring claims under the “fraud on the minority” exception to the rule in *Foss v Harbottle*. The court in *Renova* agreed with the principle stated in Gower’s Modern Company Law that where such an action is allowed, the shareholder is not really suing on their own behalf nor on behalf of the members generally, but on behalf of the company itself.

For shareholders pursuing such claims, the Cayman Islands court may order interim relief, including injunctions restraining directors’ actions or appointing receivers over company assets pending resolution.

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims

As a leading international financial centre, fraud proceedings in the Cayman Islands almost invariably involve seeking relief against parties from other jurisdictions, and the ability to join overseas parties is a long-established and vital part of Cayman Islands law and practice. The Cayman Islands courts may grant leave to serve proceedings on parties outside the Cayman Islands where the court is satisfied that:

- there is a serious issue to be tried against the relevant defendants;
- there is a good arguable case that the claim falls within at least one of the jurisdictional gateways set out in Order 11, rule 1 of the Grand Court Rules; and
- the Cayman Islands is clearly or distinctly the appropriate forum where the case can be tried in the interests of all parties and for the ends of justice and the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction (see, for example, the helpful summary of these principles in *MYF Maximus Limited v DNB Bank ASA and others* – 3 June 2024).

The jurisdictional gateways typically relevant to fraud cases include:

- a claim for an injunction ordering the defendant to do or not to do acts within the Cayman Islands;
- a claim to which the defendant is a necessary or proper party where another party has been or will be served within or outside the Cayman Islands; and
- a claim for tort, fraud or breach of duty where the damage was sustained or resulted from an act committed in the Cayman Islands.

The defendant against whom leave to serve out of the jurisdiction has been granted can challenge the granting of leave and may challenge the jurisdiction of the Cayman Islands courts on the grounds of forum non conveniens – namely, that the Cayman Islands is an inappropriate forum.

4.2 Service of Proceedings out of the Jurisdiction

The application is made supported by an affidavit setting out (among other things) the grounds of the application and the belief that the claimant has a good cause of action. The affidavit should also explain why the case is a proper one for service out of the jurisdiction. The application is usually made without notice to the defendants, and accordingly the applicant is under a duty of full and frank disclosure and fair presentation.

As service can be difficult, slow and cumbersome to serve in some jurisdictions, an order can be sought for substituted service where it is impracticable for any reason for personal service to be effected. Substituted service is service by other means – for example, by service on a lawyer or agent, by post, or by electronic means (see 2.8 Claims Against “Unknown” Fraudsters relating to service in the crypto context). However, the steps to effect service must not be contrary to the law of the country in which they are to be taken. Delay of itself is unlikely to be a sufficient reason for an order for substituted service. However, significant delay coupled with prejudice to the efficient progress of the litigation can be incompatible with the due administration and hence satisfy the impracticability test (*Maples FS Limited v B&B Protector Services, PJSC National Bank Trust and PJSC Oktritie Financial Corporation* [2022] 2 CILR 59).

5. Enforcement

5.1 Methods of Enforcement

If a defendant fails to comply with an order or judgment, then enforcement steps can be taken by the claimant. In fraud cases, methods of enforcement include the following.

- A charging order – this is an order where a charge is created over the debtor’s property, leading to a right to realise the charged property. A charging order over company shares is particularly effective in the Cayman Islands.
- Appointment of a receiver – the court may appoint a receiver over a debtor’s assets by way of equita-

ble execution where it appears to the court just and convenient to do so.

- A post-judgment freezing order – a freezing order can be made after judgment, preventing the defendant from dissipating assets pending enforcement.
- Contempt proceedings – depending on the nature of the order, contempt proceedings may be commenced against the defendant, which may result in the defendant being imprisoned, fined and/or having their assets sequestered.
- A garnishee order – this is an order requiring a party who owes money to the defendant to pay it to the claimant instead.
- Winding-up or bankruptcy proceedings – proceedings can be issued to wind up a corporate debtor or for the bankruptcy of an individual debtor.

5.2 Enforcement of Foreign Judgments

Foreign judgments are (save in the case of Australian judgments) enforced by way of common-law enforcement. This involves issuing proceedings in the Cayman Islands based on the foreign judgment. The foreign judgment must be final and conclusive. A foreign judgment that is subject to appeal in the foreign country may still be final and conclusive.

Traditionally, a foreign judgment could only be enforced if it was for a debt as described in 5.1 Methods of Enforcement; however, this area of law changed significantly following the case of *Bandone v Sol Properties* [2008] CILR 301, where the Cayman Islands court enforced a foreign court’s order for specific performance of a contract for the transfer of shares by ordering rectification of the company’s Register of Members. The court case confirmed that the direct enforcement of foreign judgments should no longer be confined to those for a debt or specific sum of money; non-money judgments may now be recognised and enforced by way of equitable remedies.

A defendant may seek to challenge the authority of or basis for the foreign judgment on the following limited grounds:

- the foreign judgment was obtained by fraud, either on the part of the court or the opposing party;

- the foreign court was not competent to pronounce the judgment, because it lacked jurisdiction over the person against whom it was pronounced;
- the foreign judgment was obtained in proceedings contrary to natural justice or where the defendant's rights were grossly violated;
- the foreign judgment is of a type that cannot be enforced in the Cayman Islands (eg, a tax or other similar charge or a fine or other penalty); or
- it would be contrary to public policy to recognise or enforce the foreign judgment – for example, where the foreign law is repugnant to Cayman Islands law.

Once service is effected, the defendant is required to file an acknowledgement of service and a defence within the prescribed time limits. In enforcement cases, the defence will generally be limited to the defences set out above. In the absence of filing such an acknowledgement of service or defence, the claimant may apply for default judgment. If the defendant does file a defence, the claimant may nevertheless apply for summary judgment on the grounds that the defence raised is spurious and that there is no real triable defence to the action. It would be very unusual for the matter to go to full trial in the absence of exceptional circumstances, as the merits of the underlying case will generally not be re-examined by the Cayman Islands court.

6. Privileges

6.1 Invoking the Privilege Against Self-Incrimination

Privilege against self-incrimination is a statutory right in the Cayman Islands (Section 55 of the Evidence Act) where answering a question or producing a document would tend to expose that person to a criminal offence. Thus, a defendant to a civil fraud claim may invoke the privilege against self-incrimination but only to that extent. Exposure to civil liability would not give rise to that right.

6.2 Undermining the Privilege Over Communications Exempt From Discovery

Legal professional privilege in the Cayman Islands comprises two types of privilege:

- legal advice privilege – covering confidential communications between lawyers and clients for the purpose of giving or receiving legal advice; and
- litigation privilege – covering communications created for the dominant purpose of litigation.

Both of these are subject to the “fraud exception” or “iniquity exception”, which prevents their application where communications are made in furtherance of fraud or other criminal purposes.

Practically, challenging privilege on fraud grounds typically involves an application for disclosure, with the court often conducting an *in camera* review of documents to determine if the exception applies. The threshold is high, requiring more than mere allegations, but once established, all related communications lose protection.

7. Special Rules and Laws

7.1 Rules for Claiming Punitive or Exemplary Damages

Damages in Cayman Islands law are compensatory – namely, to compensate the claimant for the losses they have suffered, rather than to punish the defendant. Punitive or exemplary damages will be “sparingly granted”, but may be available, for example, to confiscate profit where a party has deliberately committed a tort with guilty knowledge such that it would pay them to take a risk of the consequences (*Origami Partners III LLP v Pursuit Capital Partners (Cayman) Ltd* [2021] 2 CILR 191).

7.2 Laws to Protect “Banking Secrecy”

The Cayman Islands maintains a robust but evolving framework of financial confidentiality laws, balancing privacy protection with transparency requirements for legitimate investigations. The primary legislation governing banking secrecy is the Confidential Information Disclosure Act 2016 (CIDA).

Under the CIDA, the disclosure of confidential information without consent is prohibited, with criminal penalties for violations. However, the CIDA contains significant exceptions that facilitate evidence gathering in fraud claims, including that the court may order

disclosure of confidential banking information when relevant to proceedings, and explicitly permission for disclosure pursuant to statutory provisions, including the Mutual Legal Assistance (United States of America) Act and the Proceeds of Crime Act.

7.3 Crypto-Assets

The Cayman Islands courts are well practised at granting orders in respect of crypto-assets. Although the question as to whether crypto-assets amount to property has not yet been decided by the Cayman Islands courts, decisions of the English courts that crypto-assets may be treated as property are likely to be persuasive – see, for example, *AA v Persons Unknown* [2020] 4 WLR 35 and *D'Aloia v Persons Unknown* [2025] 1 WLR 821 (in which the English High Court accepted that Bitcoin and USD Tether, respectively, constituted property in English law).

The Cayman Islands courts grant NPOs in crypto-fraud claims – for example, against crypto-exchanges that are subject to Cayman Islands jurisdiction – to identify the owners of wallet addresses, to identify assets, and to provide KYC information, and also grant freezing injunctions.

Trends and Developments

Contributed by:

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Appleby is one of the world's leading full-service international law firms, with global teams of legal specialists advising public and private companies, financial institutions, and private individuals. Appleby has offices in ten highly regarded, well-regulated global locations, including the key international jurisdictions of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, the Isle of Man, Jersey, Mauritius, and the Seychelles, as well as the international financial centres of Hong Kong and Shanghai. Appleby's Cayman Islands dispute resolution team has six part-

ners and 12 other lawyers, and is a specialist team known for acting on the largest, most sensitive cases before the Cayman Islands courts. The team acts for clients from across the globe as well as for important clients in the Cayman Islands and regularly represents blue-chip firms and high net worth individuals in the highest-profile and highest-stakes litigation. This ranges across a number of practice areas, including fraud, insolvency, professional liability, funds, and cryptocurrency.

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The Cayman Islands continues to play a significant role in international fraud and asset tracing strategies, particularly in disputes involving cross-border corporate and investment structures. Over the past year, the types of contentious matters coming before the Cayman courts have reflected a combination of market volatility and ongoing regulatory developments. These factors have influenced both the nature of disputes and the procedural strategies adopted by plaintiffs and defendants.

Several themes have become more apparent in practice. These include the recurring use of interim remedies in fraud and asset recovery proceedings, heightened regulatory engagement in areas such as digital asset activity, and a greater willingness on the part of investors to scrutinise governance decisions in fund structures. In each of these areas, the commercial importance of Cayman proceedings often lies not only in the ultimate determination of rights but also in the speed with which protective relief can be obtained and the effectiveness with which cross-border litigation strategies can be co-ordinated.

These developments are particularly relevant to clients and investors because Cayman entities frequently form part of wider international holding or investment arrangements. Disputes involving Cayman companies therefore often arise alongside parallel proceedings, regulatory engagement or asset-recovery steps in other jurisdictions. In that context, the procedural flexibility of the Cayman courts and the experience in dealing with complex multi-jurisdictional disputes remain important features of the jurisdiction's dispute resolution framework.

Digital Assets and Fraud

The Cayman Islands as a digital asset hub

Digital asset activity remains an established feature of the Cayman Islands' financial services landscape, including in the structuring of investment vehicles, service-provider arrangements and governance frameworks connected with blockchain based ventures. The jurisdiction's established legal system and familiarity with complex cross-border finance mean that Cayman entities are frequently used within digital asset related structures. As a result, disputes with a digital asset dimension are increasingly encountered

in contentious proceedings involving Cayman companies or service providers.

Such disputes are often commercially significant because they combine technical complexity with a need for urgent procedural action. Matters arising before the Cayman courts have included issues relating to alleged misappropriation of digital assets, custody and control disputes, investment disagreements involving tokenised interests and claims connected with cyber incidents or platform failures. These disputes also raise practical tracing and enforcement challenges, reflecting the speed of digital transactions, price volatility and the pseudonymous nature of blockchain-based holdings.

Regulatory Framework and Supervisory Trends

From a regulatory perspective, the Cayman Islands has further developed its framework for virtual asset service providers. The Virtual Asset (Service Providers) (Amendment) Act, 2025 made targeted amendments to the statutory regime, including clarifying aspects of the definition of "virtual asset issuance" and addressing the treatment of certain tokenised investment interests and related issuance structures. These changes form part of the ongoing evolution of Cayman's regulatory approach to digital asset activity within its broader financial services framework.

In practical terms, regulatory compliance continues to be an important consideration for businesses operating digital asset-related structures involving Cayman entities. Market participants, including investors and service providers, are increasingly focused on governance arrangements, custody controls and the operational implementation of regulatory obligations. Where disputes arise, these issues may assume particular significance in assessing responsibility for asset management, disclosure and oversight.

Legislative proposals introduced in 2026 indicate a growing regulatory focus on the interaction between digital asset concepts and the investment funds framework. The Mutual Funds (Amendment) Bill, 2026 proposes provisions addressing tokenised mutual funds, including the introduction of defined concepts such as digital equity tokens and requirements relating to the maintenance of records evidencing the issu-

ance and transfer of tokenised interests. While the practical impact of these proposals will depend on their final form and implementation, they highlight the increasing relevance of digital record keeping and transfer mechanics in disputes involving tokenised fund interests.

A further proposal contained in the Virtual Asset (Service Providers) (Amendment) Bill, 2026 seeks to clarify that the issuance of tokenised equity or investment interests by regulated mutual funds and private funds does not constitute “virtual asset issuance” for the purposes of the core VASP regime. This clarification may affect the regulatory characterisation of certain transactions and structures. More broadly, the proposed amendments illustrate the ongoing effort to maintain consistency across Cayman’s financial services legislation as digital asset concepts become more closely integrated into mainstream investment structures.

Digital Asset Fraud and Asset Recovery

Digital asset fraud frequently arises in contentious matters involving Cayman structures. Although factual patterns vary, disputes have involved issues such as alleged unauthorised transfers of digital assets, investment-related claims concerning tokenised interests and losses said to arise from platform or custody failures.

Cayman proceedings may become relevant where the corporate structure, contractual arrangements or service-provider relationships involve a Cayman entity. In such circumstances, interim relief remains an available remedy. Freezing injunctions and disclosure orders may assist in preserving assets, tracing transaction pathways and identifying potentially relevant counterparties at an early stage in the dispute.

Disputes involving decentralised governance arrangements or automated transaction mechanisms can raise complex factual and legal questions, particularly where issues of control, authority or responsibility are contested. In many cases, such matters are likely to be analysed by reference to established legal principles, although the application of those principles will depend on the specific technological and contractual context in each case.

For businesses and investors operating in this area, the practical implication is that governance arrangements, documentation and allocation of operational responsibility may assume increased importance in both risk management and litigation strategy where digital asset-related disputes arise.

Beneficial Ownership Transparency and Enforcement Risk

Recent legislative amendments have furthered the development of the Cayman Islands’ beneficial ownership reporting framework. Changes introduced in 2025 refined aspects of the statutory regime and form part of the jurisdiction’s ongoing alignment with international standards relating to corporate transparency and anti-financial crime supervision.

In practical terms, beneficial ownership information is often significant in transactional due diligence and in contentious matters involving allegations of fraud, misappropriation or breach of fiduciary duty. Investors, lenders and service providers often seek greater clarity regarding the ultimate control of Cayman vehicles, particularly where structures form part of multi-jurisdictional investment arrangements.

From a disputes perspective, enhanced reporting requirements may affect the conduct of fraud and asset tracing claims. The availability of clearer ownership information can assist claimants in identifying potentially responsible parties, formulating disclosure applications and structuring recovery strategies at an early stage. Conversely, deficiencies in governance or reporting processes may give rise to regulatory engagement or become matters of evidential scrutiny in subsequent litigation.

Directors and corporate service providers therefore face practical expectations in relation to the maintenance of accurate ownership records and the implementation of appropriate internal controls. In contentious scenarios, the adequacy of those processes may assume relevance both in assessing liability and in determining the scope of available remedies.

Fraud, Interim Relief and Cross-Border Asset Tracing

Developing use of interim remedies

Interim relief plays an important procedural role in fraud and asset tracing proceedings involving Cayman structures. In cases where there is an alleged risk of dissipation or uncertainty as to the location of assets, applications for freezing injunctions and disclosure orders are commonly deployed at an early stage to preserve the status quo and facilitate investigation of the asset trail.

The Grand Court has significant experience dealing with urgent applications, including those made without notice where advance warning could prejudice the effectiveness of the relief sought. The availability of prompt interim protection is therefore often a material consideration where Cayman proceedings form part of a wider cross-border recovery strategy.

Relief against unknown defendants also arises in appropriate cases, particularly where alleged wrongdoing involves cyber-enabled transactions or the use of payment mechanisms that obscure the identity of the ultimate actor. Cayman procedural rules permit claims to be advanced against persons unknown and allow for alternative methods of service where justified by the circumstances.

Norwich Pharmacal relief also remains an established feature of the jurisdiction's asset-tracing toolkit. Orders directed at third parties who are not alleged to have committed wrongdoing can assist in identifying potential defendants, tracing asset movements and determining the appropriate forum for substantive proceedings. Such applications may form a material preliminary step in structuring a co-ordinated recovery claim.

The availability of interim remedies is one factor in the role played by Cayman proceedings within multi-jurisdictional fraud litigation. While the legal principles governing such relief are well established, their application frequently arises in increasingly complex factual settings involving digital assets, layered corporate structures and parallel regulatory engagement.

Fund Governance and Investor Disputes

Heightened scrutiny of governance

Recent amendments to the Companies Act, which came into force on 1 January 2026, introduced changes relevant to shareholder procedure and aspects of corporate governance practice in Cayman incorporated vehicles. These developments provide additional mechanisms through which investors may seek engagement with boards or pursue escalation of concerns in appropriate circumstances. Although the underlying fiduciary framework remains unchanged, compliance with constitutional processes and governance documentation continues to assume particular importance in contentious scenarios involving allegations of mismanagement or improper exercise of powers.

Legislative proposals concerning private investment vehicles also indicate an increased regulatory focus on governance arrangements in technologically enabled fund structures. The Private Funds (Amendment) Bill, 2026 proposes provisions addressing tokenised private funds, including requirements relating to record keeping, transfer controls and disclosure of technology specific risks. The practical implications of these proposals will depend on their final form and implementation, but disputes involving tokenised fund interests may require careful analysis of digital ownership records, disclosure materials and the contractual allocation of decision-making authority.

Governance disputes in the investment funds sector arise in a range of contexts, including issues relating to oversight, conflicts management, valuation methodology and the conduct of directors, general partners and investment managers. Such disputes frequently involve detailed examination of constitutional documents, offering materials and side letter arrangements, as well as the factual circumstances in which particular decisions were taken.

For fund managers and boards, the commercial environment is more demanding than it was in earlier periods of easy liquidity and strong valuations. Where performance comes under pressure, investors are more likely to scrutinise decision making, side letter arrangements, redemption treatment, valuation methodology and any apparent divergence between

disclosed policy and actual practice. Disputes arising from these issues can become highly contentious because they often combine legal, factual and reputational concerns.

In practice, Cayman courts address these disputes by applying established principles concerning fiduciary duties, proper purpose and contractual interpretation. While the specific outcome in any case will depend on its facts, the adequacy of governance processes and the maintenance of contemporaneous records may assume evidential significance where investor claims are pursued.

For both investors and fund operators, governance arrangements therefore remain a material consideration in managing litigation risk. Deficiencies in disclosure, decision making processes or internal controls may become matters of scrutiny in contentious proceedings, particularly where disputes arise in stressed market conditions or in the context of liquidity pressures or restructuring proposals.

Private funds and closed-ended structures form part of this broader landscape. As regulatory expectations have developed and supervisory frameworks have become more established, compliance with governance and reporting obligations may have implications not only from a regulatory perspective but also in the conduct of subsequent disputes.

Cross-Border Co-Ordination

Cayman's role in multi-jurisdictional disputes

Cross-border co-ordination remains a common feature of contentious matters involving Cayman entities. Disputes concerning fraud, insolvency, corporate governance or investment structures frequently arise alongside parallel proceedings, regulatory engagement or asset-recovery steps in other jurisdictions. Cayman proceedings are often commenced as one component of a broader litigation strategy addressing assets, counterparties and enforcement considerations across multiple forums.

The litigation framework of the Cayman courts allows for interaction with overseas proceedings in a number of ways. These may include applications for recognition or assistance, the granting of interim relief in

support of foreign claims, evidence gathering measures and practical co-ordination between officeholders, legal advisers and courts in different jurisdictions. The availability of such mechanisms can be relevant where the factual background to a dispute spans several legal systems.

In fraud and asset tracing matters, Cayman proceedings often form part of a wider recovery strategy directed at preserving assets, obtaining disclosure or establishing jurisdictional foundations for substantive claims. Similarly, disputes involving shareholder rights or fund governance may centre on Cayman incorporated holding structures even where operational activity takes place elsewhere.

The practical significance of this is that Cayman proceedings often operate as one part of a co-ordinated strategy rather than as a self-contained forum.

Conclusion

Disputes involving Cayman entities feature prominently in complex cross-border fraud, corporate and investment litigation. Recent developments have not involved fundamental changes to underlying legal principles. Rather, they reflect the evolving application of established court processes in a changing commercial and regulatory environment.

Over the past year, contentious matters have illustrated the ongoing importance of interim relief in asset-recovery strategies, the interaction between digital asset activity and existing legal frameworks, and the evidential significance of governance and disclosure processes in investor disputes. Legislative developments affecting digital asset regulation, beneficial ownership reporting and aspects of corporate governance have also formed part of the broader context in which such disputes arise.

For parties involved in international investment structures, Cayman proceedings may therefore remain one element of wider multi-jurisdictional litigation strategies. In practice, the relevance of the jurisdiction often derives from its available remedies, its experience in dealing with complex corporate structures and its role within co-ordinated cross-border recovery efforts.

Contributed by: Alan Bercow and Jae Shin, **Appleby**

More generally, the developments outlined in this article illustrate the continuing adaptation of dispute resolution processes to changing market conditions and technological developments. For businesses and investors operating through Cayman vehicles, careful attention to governance arrangements, regulatory compliance and litigation planning may remain important considerations in managing fraud risk and protecting asset value in contentious scenarios.

CHILE



Trends and Developments

Contributed by:

Jorge Cabrera, Jaime Winter and Felipe Berríos
Winter Etcheberry

Winter Etcheberry is a Santiago-based criminal law boutique focused on advising and representing clients in complex and high-profile matters. Established in 2023, the firm has developed a strong reputation for handling cases that require not only technical excellence in criminal law, but also careful strategic judgement in highly sensitive settings. The firm is led by partners who are also academics in criminal law and criminal procedure, and is particularly noted for its ability to manage matters involving white-collar crime, corporate fraud, corruption, internal investigations and disputes with significant reputational, regulatory and institutional implica-

tions. Its approach combines rigorous legal analysis with a broader understanding of crisis management, stakeholder mapping and long-term risk assessment. Winter Etcheberry regularly acts for companies, senior executives, public officials and private individuals in proceedings before criminal courts, prosecutors' offices and other authorities. The firm also advises on matters extending beyond judicial proceedings, including media-sensitive disputes, high-level negotiations and cases where legal strategy must be coordinated with political, institutional and communications considerations.

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The Forfeiture of Gains in Chile

With the entry into force of Laws 21,577 and 21,595 in 2023, the regulation of asset forfeiture in the Chilean legal order shifted from being a simple accessory penalty aimed at depriving offenders of the instruments and proceeds of crime to a system of enormous complexity and procedural heterogeneity. Forfeiture ceased to be exclusively a punitive sanction requiring a prior conviction as a necessary condition, admitting novel procedural mechanisms such as non-conviction-based forfeiture.

This legislative development forms part of a process of implementing the guidelines contained in various instruments of international law, including the Vienna Convention against Drug Trafficking, the Palermo Convention against Transnational Organised Crime and the United Nations Convention against Corruption (UNCAC), as well as the global standardisation promoted by the 40 Recommendations of the Financial Action Task Force (FATF).

As a result of these amendments, the landscape of forfeiture forms is heterogeneous and complex.

An analysis of the various provisions regulating this institution permits, first and foremost, a distinction to be drawn between the forfeiture of instruments, the forfeiture of proceeds and now, the forfeiture of gains.

The forfeiture of instruments applies to those things that served as a tool or means for the commission of the offence. The forfeiture of proceeds consists of the deprivation of ownership of material objects that result directly from the commission of the unlawful

act. The forfeiture of gains consists of the deprivation of ownership of assets up to the total value obtained as a consequence of the commission of the offence. The forfeiture of gains may be imposed on an equivalent basis where it is not possible to seize the direct material gain.

Following the systematic amendment of forfeiture, it may be imposed as an accessory penalty to a criminal conviction or, alternatively, without a prior conviction.

Regarding the forms of non-conviction-based forfeiture in the legal order, the forfeiture of instruments and proceeds that are particularly suited to the commission of offences, and the forfeiture of gains (and equivalent forfeiture of gains), is configured as a general action of public law whose primary function is the correction of illicit enrichment.

This latter form of forfeiture is the most significant innovation in the field of asset forfeiture in the Chilean legal system. It is regulated in general terms under Article 24 bis of the Chilean Criminal Code. This provision establishes that every criminal conviction necessarily entails the forfeiture of gains derived from the offence.

Regulation of the forfeiture of gains in the Chilean legal order

The gains that may be forfeited pursuant to the new Article 24 bis of the Chilean Criminal Code are not restricted to direct financial income but encompass a broad spectrum of increases in value. The legal order defines the causal basis using broad prepositions, ordering the deprivation of assets obtained “through

the offence” or “for or by committing it”. This legislative formulation captures not only tangible patrimonial advantages, fruits and profits derived from the investment of illicit funds, but also corporate cost savings.

The calculation of gains must be carried out in accordance with the so-called gross proceeds principle, under which the court is prohibited from deducting the expenses or costs incurred by the offender in the preparation and execution of the offence. Given the complexity of precisely reconstructing the amount of the gains, the law also authorises basing the forfeiture calculation on a simple comparison of the convicted person’s income level or on the unjustified increase in assets relative to their lawful sources of income.

Effects on third parties of the forfeiture of gains

To prevent the pursuit of criminal profitability from being easily evaded through corporate concealment manoeuvres or strategic transfers to family members, the legal order has had to extend the reach of forfeiture beyond the direct perpetrator of the offence, encompassing the assets of third parties.

Article 24 ter of the Chilean Criminal Code strictly regulates the manner in which this exception is constituted, with a view to safeguarding the position of the bona fide third-party acquirer. Accordingly, forfeiture against third parties shall only proceed in the following circumstances:

- gratuitous acquisition – where the third party acquired the gain on a gratuitous basis, as occurs in successions upon death or donations, given that the law affords no protection to the gratuitous receipt of assets tainted by unlawfulness;
- offence committed in the interest of the third party – where the underlying offence was committed directly in the interest or for the benefit of the third party, a situation that constitutes the cornerstone of criminal liability of legal persons;
- bad-faith acquirer – where the third party acquired the assets knowing, or having reasonable grounds to know, of their illicit origin at the time of the transaction; and
- capital contribution to a legal person – where a legal person has received the illicit gain materialised as a contribution to his or her share capital.

Conflict with civil claims

Forfeiture may come into conflict with civil patrimonial claims, particularly in insolvency scenarios. Patrimonial claims grounded in civil law may thus conflict with those arising from the forfeiture action. Chilean legislation resolves this complex concurrence of patrimonial claims radically, by means of a distributive rule contained in Article 48, first paragraph, of the Criminal Code, which grants the forfeiture of gains absolute payment priority, displacing fines, procedural costs and even the civil compensation of damages caused to victims.

With a view to mitigating the effects of state priority, the legislature created a special action under Articles 46 and 47 of Law 21,595 for victims who are unable to have their civil claim satisfied due to the offender’s insolvency. This action entitles them to proceed subsidiarily against the state itself, compelling it to pay their compensation using the very same assets that the Treasury succeeded in forfeiting in the criminal proceedings. In this way, the substantial mass of confiscated assets constitutes an authentic guarantee fund or special purpose estate, harmonising the demands of criminal policy with restorative justice.

The exercise of this restitution action is neither free nor automatic, being subject to strict cumulative conditions designed to protect the public purse and prevent abuse. For the action to succeed, the victim must hold, without exception, a monetary credit arising from the offence that has been judicially declared. The victim must likewise demonstrate conclusively the insufficiency of assets in the convicted person’s estate, confirming that it is materially impossible to meet the pecuniary liabilities without recourse to public funds. Of equal importance, the law requires an unavoidable “direct causal link” between the harm suffered by the victim and the specific gain that was forfeited. This action is subject to a limitation period of four years.

The state is not left without procedural recourse: the legislation grants it a catalogue of exceptions raised as preliminary and special procedural incidents. The state may invoke the “exception of availability of other assets”, a defence analogous to the civil benefit of excussion, whereby the Treasury obliges the victim to exhaust the search for and liquidation of the offender’s

or third parties' private assets in full before claiming the proceeds of forfeiture.

Equally, the Treasury may plead the "exception of negligent enforcement" if it can demonstrate that the impossibility of payment arose from the victim's own dilatoriness or procedural incompetence in seizing assets in a timely manner. Finally, the state may refuse payment by raising the "lack of a direct causal link", severing the normative causal nexus between the damage claimed and the state's gain obtained through forfeiture.

CHINA

Trends and Developments

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Secretariat is a global expert and advisory firm trusted in critical legal, risk and regulatory matters around the world. Renowned law firms, leading corporations and influential institutions turn to the firm's disputes, litigation, economic, investigations, engineering and data advisory services for high-stakes matters. With more than 700 professionals, Secretariat has offices

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Trends in Debt Recovery for China Parties

There are several useful debt recovery mechanisms within mainland China, including the following.

Determining whether a debtor has already been pursued by other creditors

Debtors placed on any of the following publicly available lists have already been pursued through the courts by creditors and do not have sufficient assets, or have been sanctioned for refusing, to repay unpaid debts.

- Restricted consumption list: Individuals who have insufficient assets to respond to a court-ordered enforcement, and must refrain from high-end expenditure on travel, property, financial products or school fees.
- Credit blacklist: Individuals or entities who have refused to comply with an enforcement order. Their accounts at banks, the housing authority, pension funds and payment platforms are frozen, they are not permitted to apply for government funding or tender for government projects and their personal expenditure is also curtailed.
- Dishonest debtor list: Individuals who have engaged in misconduct to avoid paying debts, including obstructing the courts, engaging in frivolous litigation, concealing or dissipating assets and violating restricted consumption or credit blacklist orders.

Determining whether the debtor has unencumbered assets in China

Within mainland China, publicly available records can help parties obtain pertinent (albeit limited) information about assets held domestically, such as:

- equity held in private companies via State Administration of Market Regulation records;
- substantial (more than 5%) equity held in companies listed on the Shenzhen or Shanghai stock exchanges; and
- patents, copyrights and trade marks via records maintained by the China National Intellectual Property Administration.

Information about property holdings and “vanity” assets is not publicly available, and (unsurprisingly) cash balances held in bank accounts and ownership of other financial products are confidential.

Obtaining support from the courts

Where creditors make successful application to the courts, judges are permitted to query provincial and nationwide databases linked to a wide range of asset-related personal data held by government authorities. For example, the Supreme People’s Court database grants access to the following.

- Financial information, including:
 - (a) record of accounts opened at the People’s Bank of China, and 3,900 other domestic banks and financial institutions;
 - (b) bank card transaction records kept by China

- UnionPay Co Ltd;
- (c) account balances at the WeChat Pay, Tenpay and Alipay platforms;
- (d) assets bought and sold through the JD Finance platform;
- (e) information about funds registered with the China Banking and Insurance Regulatory Commission;
- (f) securities holdings disclosed to the China Securities Regulatory Commission;
- (g) individual and company outbound investment registered with the State Administration for Market Regulation;
- (h) individuals who receive subsistence payments via the Ministry of Civil Affairs; and
- (i) tax registration, payment and recovery recorded by the State Taxation Administration.
- Property information, including:
 - (a) land use rights, housing and forestry ownership registered with the Ministry of Natural Resources;
 - (b) fishing vessel and other shipping information held by the Ministry of Agriculture and Rural Affairs and the Ministry of Transport; and
 - (c) vehicles listed in Ministry of Public Security records.
- Personal information, including:
 - (a) marriage registration and membership of non-profit or community organisations accessible through the Ministry of Civil Affairs;
 - (b) an individual's PRC ID number, held by the National Citizen Identity Information Center, and individual and entity social credit codes held by the National Organization Unified Social Credit Code Data Service Center; and
 - (c) travel document (likely passport) numbers held by the Ministry of Public Security.

Asset-tracing research outside of Mainland China

Where assets held locally are encumbered or unidentified, a multi-jurisdictional asset tracing investigation may be helpful.

Obtaining start-up identifiers from China-sourced information is still critical at this stage. Public records and media reports in most overseas jurisdictions render Chinese character names in pinyin or other romanised scripts. It can be challenging (or impossible),

therefore, to disaggregate false positives overseas, especially for names already very common in China.

It is important to conduct public record reviews and Chinese language media research to understand the background and profile of subject/s, and to obtain key identifiers such as corporate affiliations, types of business activities and operations, as well as personal information (in relation to individual subjects) about business associates, family members and potential proxies.

Outside of mainland China, the most common jurisdictions to examine for assets in cases involving Chinese debtors are:

- Hong Kong;
- Singapore;
- the United States;
- Canada;
- Australia; and
- the United Kingdom.

These jurisdictions have several advantages given:

- there is substantial cross-border trade and investment between China and these countries, so Chinese entrepreneurs and businesses often have a presence there;
- high net worth Chinese individuals show a preference for sending their children to study and set up their family in these jurisdictions, even while they are primarily engaged in China;
- asset-related publicly available information is relatively transparent and straightforward to retrieve; and
- all are common law jurisdictions that have previously recognised PRC legal judgments and are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations in 1958 ("the New York Convention").

Available asset-related information in the key jurisdictions

The following types of asset-related information can be identified from public databases maintained by

government regulated authorities in the key jurisdictions.

Real estate ownership

In each of the key jurisdictions, the current and historic owner/s of a property can be searched by address. In the United States, Canada and Australia, separate databases must be consulted depending on the country, province, state or territory of the location.

It is more difficult to identify real estate with only the name of an individual or entity. In the United States, British Columbia (only) in Canada, the United Kingdom, Australia and Hong Kong, it is possible to triangulate data points with the name of an individual or entity. For other parts of Canada and Singapore, databases are not sufficiently flexible to allow for this check. In Singapore, indications of holdings can be identified via property tax records, which show mortgages on properties, and can be searched by entity (but not by individual).

Vanity assets

Many high net worth individuals own “vanity” assets such as luxury vehicles and collections of value (art, jewellery, watches, etc).

A good place to search for indications of these holdings is the deep web, performing searches to identify the international social media accounts on platforms such as Facebook, Instagram, YouTube and TikTok associated with debtors, their family members and close business associates. Even where high net worth individuals themselves are inclined to maintain a low-profile, they quite frequently appear in the posts of friends and family. Glimpses of artwork in the backdrop of photos posted on social media, combined with review of auction house catalogues, can provide leads to collections of value, for example. It can be a surprise to a debtor to discover just how much a creditor knows about their personal lives for the purposes of settlement negotiations.

Arresting a luxury yacht or private jet can also be a useful tactic, even if the value of the asset is less than the sum owed. By definition, the process is likely to catch the debtor unawares and embroil them in administrative complications, and might directly inter-

rupt the business and travel plans of both an individual debtor and/or embarrass them in front of family members and friends.

It is possible to identify the owner of registered planes with a tail number, and superyachts and ships with an International Marine Organization number (or local equivalent). These numbers can often be identified via aviation enthusiast websites, which forensically photograph and record the movement of specific planes from airport to airport; and via advertisements in luxury travel magazines or paparazzi photographs published in celebrity news blogs and media. Satellite images and global shipping and flight tracking software also allow close examination of the location and movement of specific watercraft and planes.

In the United States, Canada, the UK and Australia, individuals can apply to mask their registration on privacy grounds, but most owners are listed in national (or state/provincial) registers. In Hong Kong and Singapore, shipping and aircraft registers are only accessible on application by legal counsel.

Many luxury craft owners choose to register their plane or yacht in offshore jurisdictions for tax purposes, or hold the asset via an offshore company such that they are not required to disclose ultimate ownership. Individuals who regularly travel through Europe often register in Malta or Cyprus, while Americans might choose the Cayman Islands or the Marshall Islands, among others. Open-source intelligence can usually help to identify the relevant “flag”, and naming patterns can sometimes help to indicate, if not confirm, ownership.

In the United States, vehicle ownership can usually be determined, but most other jurisdictions do not make this information publicly accessible.

Company equity

In Australia, Hong Kong and Singapore, the names and equity holding of shareholders of private companies is publicly disclosed. In the UK, companies are required to disclose their majority shareholder only. In Canada, only federally registered companies are obliged to disclose shareholders. US Secretaries of State records very rarely show shareholders.

In Australia, a reverse shareholder check across all states and territories can be conducted, and in Singapore, the same check can be conducted as long as an individual's ID number (either Singapore ID or foreign passport ID) can be supplied. In all other key jurisdictions, reverse shareholder checks are not possible, but deep web searches and public record aggregators can generate lists of corporate affiliations and likely equity holdings, which is helpful for planning next investigative steps or preparing court order applications.

As is the case in mainland China, listed companies in most of the key jurisdictions are required to disclose shareholders with more than 5% holding, except for the London Stock Exchange, which requires disclosure of more than 3% equity, and the Toronto Stock Exchange, which requires disclosure of more than 10% equity only.

Intellectual property

The key jurisdictions' intellectual property offices usually publish patent information about 18 months after filing, including the assignee (owner), inventors, title, technical specifications, legal scope, drawings and status (pending, granted or abandoned) of registered patents. Trade mark information is usually published one to three months after registration, depending on the jurisdiction, and includes applicant name (and address in most cases).

Checks for encumbrances and other creditors

It is possible to assess whether Chinese debtors are also indebted overseas, as well as to obtain information about other secured and unsecured creditors in each of the key jurisdictions, via:

- bankruptcy and insolvency registers;
- enforcement orders issued by courts at multiple levels; and
- property liens and mortgages, which usually include the name of the lender, amount owing, date issued and length of the loan.

In the United States, it is also possible to view Uniform Commercial Code filings, used by creditors to provide public notice of their security interest in a debtor's personal property – and which also establish the credi-

tor's priority by date of filing in the event of a default or bankruptcy.

Role of offshore checks

The 2016 release of the Panama Papers and subsequent tranches of information about offshore companies, followed by regulations since 2019 to increase the transparency of public records in offshore jurisdictions, help to provide a more complete understanding of Chinese asset portfolios.

For example, although lawyers must be engaged to compel disclosure of Cayman Islands company shareholders, a list of directors can now be retrieved directly from the Cayman Islands' corporate registry, allowing for better suppositions about a company's controllers. This has proved helpful as companies with operations in China often register their parent entity in the Cayman Islands.

Human intelligence

Human intelligence gathered from discreet interviews with well-placed local sources can provide leads to new research avenues that might otherwise remain undiscovered. For example, former employees may be able to provide insight on a corporate target's financial status, and associates of an individual creditor can often offer commentary on travel patterns, overseas interests (children studying, holiday homes, collections of value, etc) that allow for new leads to be pursued in the public record.

Potential for enforcement

Recent cases demonstrate that overseas courts are successfully navigating reciprocal recognition of judgments and arbitral awards:

- in December 2025, the Hong Kong Court of First Instance enforced a mainland judgment for RMB162 million (USD23.6 million) on behalf of a Chinese subsidiary of a South Korean heavy equipment and engine manufacturer against an individual fraudster;
- in November 2024, the Singapore High Court recognised and enforced a USD18 million civil monetary judgment from Guangdong against a Singapore citizen;

- in October 2024, the New South Wales Supreme Court enforced a 2019 Fujian High People's Court judgment against an Australian investor, awarding compensation of RMB10 million (USD1.5 million);
- in September 2024, the US District Court for the Southern District of California enforced a 2021 Beijing Arbitration Commission award of RMB153 million (USD21 million) following the failure of a Beijing communications company to repay a loan to a Shenzhen company; and
- in April 2019, a British Columbian court upheld a Tangshan Intermediate Court judgment and ordered two individuals residing in British Columbia to pay CAD16.3 million (USD12.2 million) to fulfil a debt owed to a Chinese coal trader.

Conclusion

It is challenging to conduct domestic research within mainland China to identify asset-related information, but where parties are able to successfully petition a domestic court to issue an enforcement order, judges then have access to a wide range of information collected by government authorities. Since 2013, lists that identify Chinese parties as either unable or unwilling to repay their debt have also been publicly available.

Where available avenues within China have been exhausted, creditors are increasingly harnessing open-source intelligence to assess the asset profile of debtors overseas. Transparent and comprehensive records in key jurisdictions such as the USA, Canada, UK and Australia, as well as Hong Kong and Singapore, make identification of asset-related information relatively straightforward. Recent cases suggest that courts in these jurisdictions are also becoming more familiar and comfortable with enforcing Chinese judgments and awards under reciprocal regimes.



Law and Practice

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George Z. Georgiou & Associates LLC is a leading full-service law firm in Cyprus that brings together 85 legal and non-legal professionals, including highly qualified lawyers, mediators, arbitrators, former judges and legal consultants. The firm is highly recommended by international legal directories, including Chambers & Partners, and is the sole Cypriot member of numerous associations including Ius Laboris, INTA and GALA – and the exclusive SIPAC member for Cyprus and Greece. The firm works closely with leading international law firms as a responsive and trusted partner, combining in-depth local insight with

strong international experience to provide strategic legal solutions on multi-jurisdictional projects. The firm serves a diverse client base spanning established financial institutions and corporations, HNWIs, investors, start-ups and innovative technology sector enterprises, while supporting Cyprus's development as a centre of excellence for international business. In co-operation with Velocity, the firm's associated high-end boutique advisory firm, the team advises on financial structuring, family offices, operational optimisation and project management, and a broad range of investment and commercial opportunities.

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1. Fraud Claims

1.1 General Characteristics of Fraud Claims

In Cyprus, there is no single, standalone cause of action for civil or commercial fraud. Instead, the legal framework has evolved in a flexible and pragmatic way, allowing courts to address fraudulent conduct through a combination of statutory provisions and common law principles.

At its core, fraud in Cyprus involves dishonest conduct that results in loss. Claims most commonly arise through actions for fraudulent misrepresentation, unlawful means conspiracy and breach of fiduciary duties. In practice, such claims are frequently supported by robust interim measures aimed at preserving assets and securing evidence pending the final resolution of the dispute.

Fraudulent Misrepresentation (Deceit)

Under Section 36 of the Civil Wrongs Law, Chapter 148, a claimant must establish that the defendant made a false representation of fact, knowing it was false, without believing it to be true or recklessly disregarding its truth. The representation must have been made with the intention that the claimant would rely on it. The claimant must then show that they were in fact misled, acted in reliance on the misrepresentation and suffered damage as a result.

Section 17 of the Contracts Law, Chapter 149 also recognises misrepresentation in the context of contract formation. Under said provision, the term “fraud” encompasses a range of deceptive conduct committed by a party to a contract (with their knowledge or through their agent) with the intention of deceiving the other party or inducing them to enter into the agreement. This includes making false statements of fact without belief in their truth, actively concealing material facts, making promises without any intention of fulfilling them, engaging in any conduct designed to deceive or committing any act or omission that the law expressly classifies as fraudulent.

A contract induced by fraud is voidable at the option of the innocent party. The primary remedy is rescission, which sets aside the contract and restores the parties to their pre-contractual position.

Unlawful means conspiracy

Unlawful means conspiracy is recognised in Cyprus as a distinct tort under common law. It arises where two or more people take action that is unlawful in itself, with the intention of causing damage to a third party who incurs the intended damage. It is not necessary to prove that damage was the main or predominant purpose of the conspirators. It is sufficient that harm to the claimant formed part of their intention. To establish a claim, the claimant must prove:

- a combination or co-ordinated action between two or more persons;
- the use of unlawful means;
- knowledge of the unlawfulness of those means;
- an intention to injure the claimant;
- an overt act carried out in furtherance of the agreement; and
- damage.

The agreement itself does not need to be formal or expressly stated. What is required is a shared understanding or deliberate co-ordination directed towards a common objective. Furthermore, the notion of “unlawful means” is interpreted broadly and is not confined to criminal conduct. It may include civil wrongs, such as inducing a breach of contract or committing another tort.

Breach of Fiduciary Duties

A claim for breach of fiduciary duty is available in Cyprus where a person in a position of trust and confidence fails to act in the best interests of the person to whom they owe such duties. Recognised categories of fiduciary relationships include those between trustee and beneficiary, agent and principal, director and company, solicitor and client, and partners. However, the categories are not closed, and fiduciary duties may arise in other commercial relationships, such as joint ventures, where the requisite attributes are present.

The core obligation of a fiduciary is one of loyalty. Fiduciaries must act solely in the interests of the person to whom they owe duties and must subordinate any personal interests they have. To establish a claim for breach of fiduciary duty, the claimant must prove:

- the existence of a fiduciary relationship;
- breach of the fiduciary duties owed within that relationship; and
- loss or damage suffered as a result of the breach (for claims seeking compensation) or profit made by the fiduciary (for claims seeking an account of profits).

Several remedies are available for breach of fiduciary duty including equitable compensation, an account of profits gained from the fiduciary's wrongdoing and proprietary remedies such as tracing any benefit received. In addition, the fiduciary may be liable to disciplinary proceedings from an appropriate regulator or may be disqualified.

1.2 Causes of Action After Receipt of a Bribe

The Republic of Cyprus has ratified the Council of Europe Criminal Law Convention on Corruption (Law 23 (III)/2000, as amended by Law 22 (III)/2012) and has implemented EU Council Framework Decision 2003/568/JHA on combating corruption in the private sector. Under Article 4 of the ratifying legislation, active bribery and passive bribery in the private sector constitute punishable criminal offences. The courts have recognised that bribery poses a serious threat to lawful society, distorts market competition and impedes healthy economic development.

Available Causes of Action

Where a principal discovers that their agent has received a bribe from a third party, several causes of action may be available under Cypriot law, including the following.

- **Fraud/deceit** (Article 36 Civil Wrongs Law, Chapter 149): A claimant may bring an action in fraud where the bribe was procured through false representations of fact made intentionally and with full knowledge that they were untrue, resulting in loss to the claimant.
- **Misrepresentation**: Claims may be brought for damages arising from false or negligent misrepresentations that induced the claimant to enter into a transaction or make payments in circumstances connected with the bribery scheme.
- **Conspiracy to defraud**: Where multiple parties co-operate in a scheme to defraud the claimant

through bribery, an action for conspiracy may lie. This was recognised in the Supreme Court decision in Civil Appeals No 14/2014 and 89/2014, where the Court examined allegations that multiple defendants participated in a co-ordinated fraudulent scheme.

- **Unjust enrichment**: A claim for the recovery of sums paid without legal basis may be pursued where the claimant can demonstrate that the recipient has been enriched at their expense without justification.
- **Breach of fiduciary duty**: An agent who accepts a bribe breaches their fiduciary obligations to their principal. The principal may seek remedies including disgorgement of the bribe, account of profits and damages for any losses suffered as a result of the breach.

A potentially decisive limitation on the availability of these causes of action arises from the common law doctrine of *ex turpi causa non oritur actio* – no action arises from a disgraceful cause. This principle was applied by the majority of the Supreme Court in Civil Appeals No 14/2014 and 89/2014. Where the claimant has participated knowingly in an illegal bribery scheme, the courts will likely apply the *ex turpi causa* doctrine to deny all relief, even where the claimant has suffered genuine loss through the dishonest conduct of others. Innocent claimants who were unaware of their agent's receipt of bribes retain full access to all available civil remedies.

Remedies Available

Cyprus law provides both personal and proprietary remedies to a principal whose agent has received a bribe. The agent is liable to account to the principal, as a constructive trustee, for all monies and benefits received in breach of fiduciary duties. The principal may also claim compensatory damages for any loss caused by the breach. Moreover, in terms of proprietary remedies, a fiduciary who obtains a benefit in breach of duty may be treated as holding that benefit on constructive trust for the principal. The constructive trust may arise automatically when the bribe is received, making the principal the beneficial owner with rights to trace and recover such benefits. The principal may also seek a declaration that the defendant holds the asset on constructive trust and an order

for its transfer. If the bribe has been used to acquire other property, the principal may trace into that property and claim it.

The principal may seek perpetual injunctions to restrain the agent from dissipating the bribe or assets acquired with it.

1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts

Claims against third parties who assist or facilitate the fraudulent acts of another in Cyprus are primarily based on common law and equitable principles, closely aligned with English law.

One of the main causes of action is dishonest assistance. This arises where a third party assists in a breach of trust or fiduciary duty in a dishonest manner. To succeed, the claimant must show the existence of a fiduciary relationship, a breach of that duty and that the defendant assisted in the breach while acting dishonestly. A person will be considered dishonest if, based on what they actually knew at the time, their conduct would be regarded as dishonest by ordinary standards.

It is not necessary to prove that the defendant knew all the details of the fraud. It is sufficient that they were aware that something improper was taking place. This includes situations where the defendant deliberately ignored obvious signs of wrongdoing or chose not to make enquiries, a behaviour commonly referred to as blind-eye knowledge.

Another key claim is knowing receipt, which arises where a third party knowingly receives assets or proceeds that have been misappropriated in breach of trust or fiduciary duty.

Liability may also be established through conspiracy. This encompasses both unlawful means conspiracy – which involves the use of unlawful acts as analysed previously – and lawful means conspiracy, a more exceptional basis for liability that requires a higher threshold to be met. Under lawful means conspiracy, liability may arise even where the constituent acts are themselves lawful, provided that two or more persons combine with the predominant purpose of causing

harm to the claimant. Crucially, the intention to injure must constitute the main or dominant purpose of the agreement, rather than being merely an incidental consequence.

While lawful means conspiracy is less commonly invoked than its unlawful counterpart, it remains potentially relevant in fraud cases where the evidence demonstrates a co-ordinated course of conduct directed primarily at injuring the claimant.

1.4 Limitation Periods

The limitation period for bringing a fraud claim in Cyprus is generally six years. However, where the claim involves fraud or where there is deliberate concealment of any fact related to the cause of action, time begins to run only from the date on which the claimant discovered the fraud or could reasonably have discovered it through the exercise of due diligence.

It should also be noted that a stricter limitation period applies in the context of international trusts. In particular, any action brought against a trustee of an international trust on the basis that the trust was established with intent to defraud creditors must be initiated within two years from the date of the transfer of the assets into the trust.

1.5 Proprietary Claims Against Property

Proprietary remedies are available in Cyprus where a fiduciary has acted in breach of their obligations, entitling the claimant to a declaration that the defendant holds the asset on constructive trust for their benefit, and for an order requesting the defendant to transfer the asset to the claimant.

The Cyprus legal system recognises these equitable principles as part of its common law tradition. A constructive trust is an ever-expanding concept, designed to keep the hands of the court free, to meet the demands of justice and good conscience. Cyprus courts have clarified the distinction between resulting and constructive trusts. In *Christoforou v Christoforou* (1998) 1 A.A.D. 1551, the court explained that both are created by operation of law, but resulting trusts arise primarily on the basis of intention presumed from the circumstances of each case, whereas construc-

tive trusts are imposed in view of the state of affairs that has developed, independent of express or implied intention.

Where a constructive trust is alleged, the claimant must prove not only the existence of the trust but also their standing to pursue the proprietary claim. This reinforces that proprietary remedies through tracing require both a proper equitable foundation and clear demonstration of the claimant's entitlement to pursue the specific assets.

When a claimant can establish a proprietary interest through a constructive trust or other equitable remedy, the claimed property is treated as never having belonged to the defendant's estate. This means the claimant can recover the specific property (or its traceable proceeds) ahead of unsecured creditors, as the asset is held on trust for the claimant's benefit rather than forming part of the insolvent's general assets available for distribution to creditors.

As Cyprus is a common law jurisdiction, and in instances where Cypriot case law is silent on an issue, guidance is typically sought from English case law and common law principles. This means Cyprus courts would likely apply established English tracing rules in relation to mixed funds, including:

- the ability to trace fraud proceeds that have been converted or exchanged for other assets;
- principles governing tracing into mixed bank accounts; and
- rules distinguishing between mixing with the wrongdoer's own funds versus mixing with funds of innocent third parties.

Where fraud proceeds have been successfully invested and have generated profits, a Cyprus court has the flexibility to:

- impose a constructive trust over the enhanced asset (including gains);
- order an accounting for profits; and
- award an equitable lien over specific property as security.

Cyprus provides robust procedural tools to support asset recovery, including:

- freezing orders (often issued when there is a real risk of alienation or dissipation of assets, both movable and/or immovable, situated in Cyprus or abroad);
- disclosure orders requiring respondents to reveal asset details;
- search orders to preserve evidence; and
- appointment of receivers where necessary.

1.6 Rules of Pre-Action Conduct

The new Civil Procedure Rules (in force since 2023) introduced mandatory pre-action protocols requiring parties to comply with certain steps before commencing proceedings.

Although there is no specific pre-action protocol tailored to fraud claims, prospective claimants are still generally required to send a letter before action. This letter should set out in detail the factual and legal basis of the claim, identify the relief sought and provide the prospective defendant with a reasonable opportunity to respond. In turn, the defendant is expected to engage meaningfully with the claim, whether by admitting, denying or seeking further clarifications.

The court retains wide case management and costs powers to address non-compliance, including the ability to impose sanctions on a party who fails to adhere to these pre-action steps.

However, in the context of fraud claims, strict compliance may not always be appropriate. Where there is urgency or a real risk of asset dissipation, a claimant may be justified in proceeding without prior notice and seeking ex parte interim relief, such as freezing orders or disclosure orders. In such circumstances, a departure from pre-action requirements will generally be accepted where giving notice would risk undermining the effectiveness of the relief sought.

In practice, such claims often begin with a without notice application before, or at the same time as, issuing the claim form. CPR Part 25 expressly allows the court to grant interim relief before proceedings are commenced where the matter is urgent, or it is

otherwise desirable in the interests of justice. In such cases, the grant of relief is typically conditional upon the claimant undertaking to issue proceedings if they have not already done so.

1.7 Prevention of Defendants Dissipating or Secreting Assets

A party may apply for an interim injunction to prevent a defendant from disposing of or otherwise dealing with their assets to ensure that the defendant does not hide, transfer or dissipate assets in a manner that would render them effectively judgment-proof.

A range of interim measures is available, depending on the circumstances of the case. The CPR have, to some extent, codified the court's power to grant several types of orders in CPR Part 25. These include:

- freezing orders (including worldwide freezing orders), which are commonly granted where there is a real risk of dissipation of assets, whether movable or immovable, located in Cyprus or abroad;
- disclosure orders, often granted ancillary to freezing orders, requiring the respondent to disclose details of their assets;
- appointment of a receiver, where the court considers it necessary to manage, preserve or realise assets; and
- an order for the detention, custody or preservation of relevant property.

Interim measures may apply to both tangible and intangible assets, wherever located, and extend to assets held directly or indirectly, including those beneficially owned.

Freezing orders operate in personam, intending to bind the individual rather than the asset itself, and may have worldwide effect. They typically include exceptions, such as for reasonable living expenses, legal costs and ordinary business activities.

Pursuant to Article 32 of the Courts Law 14/60, interim relief will be granted where:

- there is a serious question to be tried;
- there appears to be a probability that the plaintiff is entitled to relief; and

- unless the interim order is issued, it would be difficult or impossible to ensure complete justice at a later stage.

The claimant must further demonstrate that there is a real risk of dissipation of assets, such that any judgment obtained may go unsatisfied. This does not require proof that dissipation is likely, but rather that there is a genuine risk supported by objective evidence, and not merely by speculation.

The court will also consider whether the grant of such relief would be just and convenient under the circumstances of each case.

Where an application is made without notice, the applicant is subject to a duty of full and frank disclosure, requiring them to present all material facts, including those adverse to their case.

Furthermore, a cross-undertaking in damages is generally required. The applicant must undertake to compensate the respondent for any loss suffered if it is later determined that the order was wrongly granted, subject to the court's discretion in the circumstances. Such undertakings may be secured through a bank guarantee or payment into court.

Sanctions for non-compliance are also significant. All interim orders contain a penal notice warning that breach may result in contempt of court. If the court finds such contempt, it may order the payment of a fine, confiscation of assets or potentially imprisonment. In addition, any third party served with an order must not assist in its breach or deliberately frustrate its purpose, as they may also be held in contempt.

2. Procedures and Trials

2.1 Disclosure of Defendants' Assets

Ancillary disclosure orders are commonly granted in support of freezing orders to ensure their practical effectiveness. These require the respondent to disclose details of their assets and are usually defined broadly to extend beyond assets held in the respondent's own name, so as to include assets beneficially owned or otherwise directly or indirectly controlled

by the respondent. Accordingly, assets held through nominees, trustees or corporate structures fall within the ambit of disclosure.

The procedural requirements for obtaining such orders align with those applicable to freezing injunctions mentioned in **1.7 Prevention of Defendants Dissipating or Secreting Assets**. The same principles regarding sanctions for non-compliance and the requirement for a cross-undertaking in damages also apply.

2.2 Preserving Evidence

An applicant may seek a search order where there is a real risk that evidence may be destroyed, concealed or tampered with. Such an order allows the applicant's representatives, under the supervision of an independent lawyer appointed by the court, to enter specified premises and search for, inspect and secure relevant materials, including documents, computers and electronic data. The scope of a search order is typically narrowly defined, and only items expressly specified therein may be taken by the applicant's representatives.

To obtain such relief, the applicant must meet a particularly high threshold. In addition to satisfying the general requirements for interim relief under Article 32 of the Courts Law 14/60 (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**) the applicant must also demonstrate a strong prima facie case that:

- the potential damage, threatened or actual, is very serious;
- there is clear evidence that the defendant holds relevant incriminating material; and
- there is a real risk that such material may be destroyed or concealed if notice is given.

The court must also be satisfied, on the basis of clear and compelling evidence, that the interests of justice require the order to be granted without prior notice. A cross-undertaking in damages will also be required as a matter of course.

2.3 Obtaining Disclosure of Documents and Evidence From Third Parties

Disclosure from third parties is available both after and before proceedings are commenced.

Pursuant to CPR Rule 31.6, a wronged party may apply for specific disclosure against a non-party after proceedings have commenced. The application must be supported by evidence satisfying the requirements set out in CPR Rule 31.5 (2), including a sufficiently detailed description of the documents or categories sought, an explanation of their relevance and materiality to the issues in dispute and reasons for believing that the documents are within the possession, custody or control of the third party.

The court will grant such an order only if the previously delineated requirements are met, and none of the objections listed in CPR Rule 31.5 (7) apply, including lack of relevance to the matters in dispute, privilege, confidentiality concerns that the court considers compelling, particular difficulty or burden in producing the requested evidence and situations where the document has been lost or destroyed.

In addition, pre-action disclosure is available under CPR Rule 31.7, allowing a prospective claimant to obtain documents before proceedings are commenced. This may be particularly relevant in tracing claims. The application must be supported by evidence identifying the documents sought with sufficient specificity, explaining their relevance in the anticipated proceedings and confirming that these are not already within the applicant's possession or that it would be unduly burdensome for them to disclose them otherwise. The court may grant such an order only where both the applicant and the respondent are likely to be parties to subsequent proceedings, the evidential requirements described previously are satisfied and there is no valid objection under CPR Rule 31.5 (7).

Pre-action disclosure is further recognised as an interim remedy under CPR Rule 25 (1)(j) and may be sought by an application under Part 23 where substantive proceedings have not been commenced.

The court further retains jurisdiction to order disclosure against third parties such as Norwich Pharma-

cal orders, where a third party has become involved, even innocently, in wrongdoing and holds information necessary to identify the wrongdoer or trace assets. It should be noted that any material obtained pursuant to such an order may be used only for the purposes of the specific proceedings, or in accordance with the terms of the court's order, and cannot be used for any collateral or ulterior purpose without the court's permission.

The court may also grant injunctions against third parties in aid of enforcement or execution of a judgment. This might include an injunction granted directly against a third party with an ancillary disclosure order.

2.4 Procedural Orders

It is possible to seek interim injunctions such as those described in the previous sections, on a without notice (ex parte) basis in appropriate circumstances or when seeking urgent interim relief. CPR Rule 23.6 provides that an application may be made without serving an application notice:

- in cases of urgency or other exceptional circumstances;
- by consent of all parties;
- with the permission of the court;
- where the overriding objective is best furthered by doing so; and
- where this is permitted by law, rule or a court order.

In practice, without notice applications are most commonly sought where there is a real risk that if the defendant is notified in advance, they may take steps to frustrate the administration of justice, for example by dissipating assets, concealing information or otherwise interfering with evidence.

An application without notice must be supported by evidence explaining the reasons why the relief sought should be granted and the reasons why notice was not given. The applicant is subject to a strict duty of full and frank disclosure, requiring disclosure of all material facts, including those adverse to their case and those that would have been discovered through reasonable enquiries.

A cross-undertaking in damages is also required to compensate the respondent if it is subsequently determined that the applicant was not entitled to the relief granted by the court.

If the court considers that the application should not have been made without notice, it may either dismiss the application or adjourn it so that proper notice can be given to the other party.

Alternatively, where the requested order is granted, this would usually be for a limited period. A return date has to be set for an inter partes hearing, at which the respondent may challenge the order, and the court will decide whether to continue, vary or discharge it.

2.5 Criminal Redress

In Cyprus, fraud victims can pursue both criminal prosecution and civil claims simultaneously. The legal system generally permits criminal and civil proceedings to run in parallel, though courts retain discretion to intervene where they identify abuse of process, such as using parallel proceedings to oppress the opponent or gain improper tactical advantage. The criminal route is primarily state-driven, with investigative agencies like MOKAS (the financial intelligence unit) identifying assets, while civil proceedings place the burden of asset identification and tracing on the claimant themselves through disclosure orders, expert services and investigation of public records. A key advantage of the civil route is the lower burden of proof required, with claimants needing to establish their case only on the balance of probabilities rather than the criminal standard.

In practice, initiating criminal proceedings does not automatically delay civil claims. Evidence obtained during criminal investigations can generally be used in civil proceedings, subject to standard admissibility rules and constitutional requirements. However, strategic considerations arise: victims may choose to wait for criminal investigations to progress before advancing civil claims to benefit from state-gathered evidence, or courts may exercise discretion to stay civil proceedings if they appear motivated by improper tactical considerations. Civil claimants also have access to remedies including damages, restitutionary awards and freezing orders to prevent asset dissipa-

tion. The system therefore provides flexibility for fraud victims to pursue both routes, provided they do so in good faith.

2.6 Judgment Without Trial

A claimant may obtain a default judgment where the defendant fails to take the required procedural steps, such as failing to file a notice of appearance or a defence within the prescribed time limits.

In addition, a summary judgment is generally available in civil proceedings where the defendant has no real prospect of successfully defending the claim, and there is no other compelling reason for the case to proceed to trial. However, in practice, a summary judgment would rarely be granted in fraud cases, as such claims typically involve complex factual issues and issues of credibility that require cross-examination of witnesses and, often, evidence from experts.

2.7 Rules for Pleading Fraud

CPR Rule 16.13 provides that a party relying on allegations of fraud is required to expressly and specifically set out such allegations in their pleadings. This includes identifying the precise acts said to constitute fraud, providing full particulars of any misrepresentations and detailing any alleged breaches of fiduciary duty, notification or knowledge of relevant facts.

2.8 Claims Against “Unknown” Fraudsters

There is no express provision in the CPR in Cyprus permitting claims to be issued against persons unknown.

Cyprus courts have not yet directly addressed the specific issue of claims against unknown fraudsters, but given Cyprus’s established practice of following English common law principles – particularly in the area of injunctive relief and fraud litigation – it is possible that such claims would be permitted when the issue arises. The anticipated approach would require that unknown defendants be described with sufficient certainty to clearly identify who falls within and outside the scope of the claim, and that these persons, while currently unidentified, must be capable of being identified and served with proceedings.

The overarching principle is that courts may adopt innovative procedural tools to combat fraud and pre-

vent injustice, balancing the need to provide victims with effective remedies against the requirement that defendants receive fair notice of claims against them. This framework aligns with developments across common law jurisdictions where “persons unknown” injunctions and freezing orders have become established mechanisms for addressing modern fraud, particularly in cases involving cryptocurrency, online fraud or other sophisticated schemes where perpetrators intentionally obscure their identities.

2.9 Compelling Witnesses to Give Evidence

The court may compel a witness to give evidence and produce documents by issuing a witness summons. Once the summons has been properly served, the witness is under a legal obligation to comply and any failure to do so without lawful excuse may be treated as contempt of court.

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on a Corporate Entity

A company may be held responsible on the basis of vicarious liability for the acts or omissions of its employees or agents acting within the scope of their authority. In such cases, the conduct of the employee is treated as the conduct of the company.

In fraud cases, where establishing liability in many causes of action depends on proving a particular state of mind, the courts will apply the identification (or “directing mind and will”) doctrine. The court essentially examines the acts and state of mind of those individuals who represent the company’s directing mind, typically directors, senior officers or others exercising real decision-making authority and control over the company’s affairs. Where such individuals act within the scope of their authority and engage in fraudulent conduct, their knowledge and intent are attributed to the company itself, thereby rendering it liable.

3.2 Claims Against Ultimate Beneficial Owners

In exceptional circumstances, Cypriot courts may depart from the fundamental principle of separate legal personality of a company and pierce the corporate veil, so as to identify the company's rights, liabilities and assets as those of its shareholders or controllers.

The doctrine is particularly relevant in fraud cases, where individuals may seek to conceal their fraudulent acts or the proceeds of fraud behind corporate structures in an attempt to avoid personal liability or render themselves judgment-proof.

3.3 Shareholders' Claims Against Fraudulent Directors

Directors usually owe their fiduciary duties to the company. Therefore, the general rule is that the company itself is the proper claimant in respect of wrongs done to it. In practice, this means that any action against a fraudulent director would ordinarily be brought by the company acting through its board.

However, there are exceptions that allow shareholders to bring claims on behalf of the company. This is mainly through a derivative action, which enables a shareholder (typically a minority shareholder) to bring proceedings in the name of the company against directors or controlling shareholders who have engaged in wrongdoing, such as fraud, breach of fiduciary duty or misappropriation of assets. This is particularly significant where the alleged wrongdoers are themselves in control of the company and would prevent the company from pursuing the claim.

Under CPR Rule 20.13, a derivative action cannot proceed without the court's permission, although prior permission is not required when seeking urgent interim relief. The court will grant leave only if the claimant establishes a *prima facie* case, a threshold higher than a merely arguable case. In assessing this, the court will consider whether in the absence of a defence, the claimant would be entitled to judgment. At this stage, where facts are disputed, the claimant's evidence would generally prevail.

The claim must also fall within one of the exceptions to the rule in *Foss v Harbottle*, the most significant being where the wrongdoing amounts to fraud or that the directors either committed a deliberate or dishonest breach of duty or obtained an improper benefit, whether financial or otherwise.

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims

A claimant must obtain the court's leave to serve proceedings out of the jurisdiction, where the defendant is located abroad and in a non-EU country.

Such leave will be granted where one or more of the jurisdictional gateways under CPR Rule 6.8 are satisfied, such as where the claim relates to a civil wrong committed within the jurisdiction, damage has occurred or will occur in Cyprus or where the foreign defendant is considered a necessary or proper party to the proceedings. The application must be supported by an affidavit demonstrating a *prima facie* good cause of action, identifying the defendant's residence and explaining why service outside the jurisdiction is justified. The court must also be satisfied that the claim is suitable to be served abroad.

Furthermore, Cyprus courts are willing to exercise extraterritorial jurisdiction where there is a sufficient connecting link to Cyprus. This includes the ability to grant worldwide freezing orders. Nonetheless, these operate in personam and are enforceable only against parties within the court's jurisdiction, despite that assets may be located abroad.

4.2 Service of Proceedings out of the Jurisdiction

Please see 4.1 **Joining Overseas Parties to Fraud Claims** regarding obtaining permission to serve abroad. Once leave is granted, service must generally be effected in accordance with applicable international instruments, such as the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention) or any relevant bilateral agreement between Cyprus and the foreign

state. These typically involve transmission through designated central authorities.

Where it is not practicable to effect service in accordance with the prescribed international or bilateral procedures, for example due to delay or because the defendant is evading service, the court may permit substituted service through alternative means. The court has broad discretion to allow service by any method it considers appropriate in the circumstances, including service by email or other electronic means, provided it is satisfied that the suggested method is likely to bring the proceedings to the defendant's attention.

5. Enforcement

5.1 Methods of Enforcement

Once a party has obtained a judgment in Cyprus, or a foreign judgment has been recognised and registered, the successful party may proceed with enforcement measures to recover the judgment debt.

Nonetheless, in fraud cases, enforcement can be particularly challenging, especially where the judgment debtor has had the opportunity to conceal or dissipate assets before the wrongdoing is uncovered. In such circumstances, the courts retain the power to grant post-judgment relief, including freezing injunctions, to assist in the enforcement process.

The available enforcement methods include writs of execution for the sale of movable property, as well as writs for the sale of immovable property. In relation to immovable property, a creditor may also secure the debt by registering a charging order over the debtor's property.

Additional measures include garnishee orders (or third-party debt orders), which allow the creditor to seize funds or assets of the debtor held by third parties, such as bank accounts. The court may also order the judgment debtor to make periodic/monthly payments towards satisfaction of the debt following a cross-examination of the debtor regarding their assets, sources of income and overall expenses.

Furthermore, in appropriate cases, insolvency proceedings such as winding-up, may be initiated against the debtor. While such proceedings do not constitute enforcement methods in the strict sense, as they do not guarantee recovery of the full debt, they may be used as a means of exerting pressure or facilitating recovery where the debtor is a Cypriot company and the debt exceeds the statutory threshold of EUR5,000.

5.2 Enforcement of Foreign Judgments

There is no single unified system for the recognition and enforcement of foreign judgments in Cyprus. The applicable framework each time will depend on the country in which the judgment was issued and the legal framework governing that jurisdiction.

Judgments issued by courts of EU member states (with the exception of Denmark) are automatically recognised and enforceable in Cyprus pursuant to Recast Regulation (EU) No 1215/2012.

For judgments originating from the United Kingdom, British dominions, protectorates, mandated territories and other countries that afford reciprocal treatment to Cypriot judgments, recognition and enforcement are governed by the Foreign Judgments (Reciprocal Enforcement) Law of 1935 (Chapter 10), as amended.

In addition, Cyprus has entered into various bilateral treaties with countries such as Russia, Ukraine, Georgia and China, as well as multilateral conventions such as the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the "HCCH 2019 Judgments Convention"), which provide specific frameworks for recognition and enforcement. These instruments are generally based on the principle of reciprocity, meaning that recognition in Cyprus may depend on whether the foreign jurisdiction would recognise a corresponding Cypriot judgment.

Where a judgment originates from a country outside the EU and no applicable treaty exists, recognition and enforcement may still be pursued through a common law action. In such cases, the judgment creditor may initiate fresh proceedings before the Cypriot courts, seeking a judgment for the amount due under the foreign judgment, effectively treating it as a debt.

6. Privileges

6.1 Invoking the Privilege Against Self-Incrimination

Privilege against self-incrimination may be invoked by a respondent or defendant (and, in criminal proceedings, by an accused person) in respect of both oral and documentary evidence. The principle is grounded in common law principles and reflected in the Constitution, including the right to a fair trial and the right not to incriminate oneself. Accordingly, a defendant may refuse to answer specific questions or produce documents where doing so would expose them to a real risk of criminal liability.

Privilege against self-incrimination also arises in the context of civil proceedings, including fraud claims. For example, a defendant may rely on it where compliance with search orders or disclosure orders would create a real risk of criminal prosecution. The protection extends not only to the production of information or documents but also to obligations requiring entry to premises for inspection or copying of materials where there is a genuine risk of self-incrimination.

6.2 Undermining the Privilege Over Communications Exempt From Discovery

Legal professional privilege is recognised as a fundamental protection in legal proceedings. This is divided into two main categories: legal advice privilege and litigation privilege. Legal advice privilege applies to confidential communications between a lawyer and client for the purpose of giving or receiving legal advice, regardless of whether litigation is contemplated. Litigation privilege, on the other hand, applies to communications between a lawyer or client and third parties, but only where litigation is pending or reasonably anticipated and the communications are made for the dominant purpose of that litigation.

The protection afforded by the application of privilege does not apply in instances of fraud – better known as the iniquity exception. More importantly, privilege will not apply to communications or documents created for the purpose of furthering a fraud, crime or other form of dishonest or improper conduct. This applies equally to both legal advice privilege and litigation privilege. The exception may arise even where the

legal adviser is unaware of the fraudulent purpose; what is decisive is the intention of the client (or a third party using the client). Cypriot courts will require a strong prima facie case, which would still be assessed on the balance of probabilities, that the communication was part of or in furtherance of such wrongdoing. Where this threshold is met, the privilege is displaced, and the material becomes disclosable.

7. Special Rules and Laws

7.1 Rules for Claiming Punitive or Exemplary Damages

The general rule is that damages in civil proceedings are awarded to compensate the claimant for loss suffered, rather than to punish the defendant.

However, in limited and exceptional circumstances, the courts may award punitive (or exemplary) damages. Such damages may be awarded where the defendant has deliberately committed a tort with the intention of obtaining a benefit that they calculated would outweigh any compensation payable to the claimant. They may also be justified where the defendant's conduct is particularly egregious, oppressive or morally reprehensible, which warrants punishment by a civil court.

7.2 Laws to Protect “Banking Secrecy”

Cyprus has specific legal provisions protecting banking secrecy. Banking secrecy is regulated by Section 29 (1) of the Banking Law (66 (I)/97), which prohibits any member of the administrative and management body, the chief executive, directors, managers, officers and employees of a bank who have access to the records of the bank with regard to the account of any individual customer from giving, divulging, revealing or using for their benefit any information concerning the account of that client. This prohibition applies both during their employment or professional relationship with the bank and after the termination thereof.

Banking secrecy in Cyprus is not absolute and may be limited in fraud cases through certain mechanisms.

Statutory Exceptions

Section 29 (2) of the Banking Law provides that banking secrecy does not apply when:

- the information is provided to the police under the provisions of any law, or to any other duly authorised public officer or to the court during the investigation or prosecution of a criminal offence;
- the customer gives written consent;
- legal proceedings exist between the bank and customer;
- a garnishee order has been served; or
- disclosure is necessary for reasons of public interest or protection of the bank's interests.

Civil Fraud Proceedings – Norwich Pharmacal Orders

Fraud victims pursuing civil claims can apply for Norwich Pharmacal orders to compel disclosure. The court will grant such orders where three conditions are satisfied:

- first, a wrong has been committed or is arguably being committed;
- second, the order is necessary to enable proceedings against the wrongdoer; and
- third, the bank has been involved in facilitating the wrong and can provide information to identify or pursue the wrongdoer.

This mechanism has proven particularly effective in fraud cases, allowing claimants to trace misappropriated funds and identify perpetrators who might otherwise remain hidden behind banking confidentiality.

Public Interest Principle

Cypriot courts have consistently held that the public interest in combating fraud overrides banking confidentiality. When fraudulent conduct is alleged, whether in criminal or civil proceedings, the principle of public interest takes precedence over the confidential relationship between bank and customer.

Courts have made clear that individuals cannot shield themselves from legitimate fraud investigations by invoking banking secrecy. An accused fraudster cannot take refuge in the bank-customer relationship to prevent disclosure that would expose wrongdoing.

7.3 Crypto-Assets

Cyprus has not yet established a comprehensive legislative framework specifically for crypto-assets. At present, the primary domestic regulation in this area is the Prevention and Suppression of Money Laundering and Terrorist Financing Law of 2007, which includes provisions governing Crypto Asset Services Providers. In addition, as an EU member state, Cyprus is directly subject to the Markets in Crypto-Assets (MiCA) Regulation (EU) 2023/1114. While the Markets in Crypto-Assets Regulation (MiCA) introduces a broad classification of crypto-assets, it does not address questions concerning their proprietary status.

There is currently no Cypriot case law expressly confirming whether crypto-assets are treated as property. However, given that Cyprus courts apply English common law and equitable principles pursuant to Section 29 of the Courts of Justice Law 14/1960, it is highly likely that they would follow the approach adopted by English courts, which recognise crypto-assets as property (*Tulip v Van der Laan* [2023] EWCA Civ 83). On this basis, it should be possible to obtain interim relief such as disclosure orders to obtain information about relevant transactions against a cryptocurrency exchange, provided the usual legal thresholds are met.

GREECE

Law and Practice

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ANAGNOSTOPOULOS



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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 with 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, and the firm is distinguished by its track record in high-profile cases.

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A N A G N O S T O P O U L O S

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 (GCC) and the Greek Civil Code (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. The intent of the perpetrator to gain illicit financial benefit for themselves 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; and
- 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 a maximum of ten years and a monetary penalty.

It is noteworthy 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/receiving or promising/accepting, directly or through third parties/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; and
- bribery, active and passive, in the private sector (Article 396 GCC), which is an act of giving/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 20 years).

False statements and declarations

According to Article 176 of Law 4548/2018, the founder, member of the board of directors or 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 for further damages incurred (Article 147 et seq GCivC).

Tort claims

The injured party is entitled to compensation, including for material and moral damage caused by the

wrongful act, provided that deceit (as a criminal act) has taken place against their 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 also be sought on the basis of their 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 they 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 provides direct assistance to the perpetrator for the commission of the crime. In the latter case, the court may impose on the accomplice the same penalty as that on 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 give rise to criminal liability of the involved party (recipient), as follows.

- Acceptance and disposal of proceeds of crime (Article 394 GCC), which consists of 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 if simultaneous or consecutive actions of more persons have taken place to 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 they 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 20 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; and
- misdemeanours have a statute of limitations of five years, with a possible extension of another three years, similar to 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

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 offence, 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. However, in practice it is rather common for an extrajudicial declaration to be sent to the opposing litigant, with a request for restitution of damage, prior to filing a lawsuit.

Criminal Proceedings

From a criminal law perspective, Article 405 GCC provides that no criminal sanctions are imposed if the perpetrator, of their own will, fully compensates the injured party, before being examined as a suspect or defendant, and without causing unlawful harm to a third party.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Effect of Interim Measures

The Greek Code of Civil Procedure (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 cease 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 of up to EUR100,000 as well as their personal detention (Article 947 GCCivP).

Moreover, a person who tries to conceal, transfer, destroy, etc, their 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 their debt by damaging, destroying, transferring without value, concealing or appropriating without equivalent and marketable collateral any of their property, or who creates false debts of false contracts, shall be punishable 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 their 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 proving 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 the 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 for 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 should be 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

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 by issuing freezing orders, even before any charges are filed or involved persons are called for questioning. Preservation of evidence may also be 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.

New legislation was recently passed in Greece regarding the management of assets that have been frozen or seized as proceeds of criminal acts (Law 5042/2023). Such legislation, which mainly derives from relevant EU Directives, is aimed at preserving and utilising proceeds of criminal offences for public purposes, including redress for victims.

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 party 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 for which disclosure 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 may 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 Victim as a Party to Criminal Proceedings

The victim of a criminal offence (including a fraud victim) 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 pretrial 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 GCCP comprise the relevant legal framework.

Moreover, after issuing its judgment on the charges brought, the criminal court has the power 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 the 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) for the ruling of the civil court to be postponed until a final criminal judgment has been issued.

2.6 Judgment Without Trial

Occasionally, it is possible for the judgment of a civil or criminal court to be 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 who may, at any stage of the trial, reach a settlement provided under the applicable laws. The settlement is made 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 pretrial 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 sua sponte initiate 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 the absence of the plaintiff, the filed action is automatically rejected (Article 272 GCCivP).
- In the 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 GCivC).

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 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 also be 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 to not 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 the action is addressed; and
- 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 a Corporate Entity

Civil Liability

A civil lawsuit against both the individual perpetrator and 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 their 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, and sanctions 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 or hybrid criminal sanctions in bribery or breach-of-sanctions cases) usually depends on the type of profit or gain and on 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 Judgment No 2/2013 of the Supreme Court of Greece, Areios Pagos, sitting in plenary session), the corporate veil of legal entities can 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 where a legal entity is being used as a vehicle for the facilitation of criminal or other wrongful acts, and consequently where 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* are judicially pursued by the board of directors and not by shareholders themselves (Article 77 of Law 4548/2018). If 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 as follows:

- 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); and
- 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 exceeds 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.

For cases with cross-border elements, there are two sets of applicable rules:

- in relation to EU member states and EU-based litigants, relevant EU Regulations apply (eg, EU Regulation 1393/2007, as amended by EU Regulation 1784/2020, regarding the service of documents); and

- 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 in Greek civil or criminal proceedings are advised to (also) appoint a lawyer based within the jurisdiction of the competent domestic court.

Extraterritorial Effect of Greek Criminal Law

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 entities or other entities with their seat in Greece abroad, under the condition of dual criminality (Article 7 GCC – principle of passive personality); and
- 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).

4.2 Service of Proceedings out of the Jurisdiction

Depending on the involved jurisdictions (eg, EU member states or third countries), different sets of rules may apply for such proceedings. Please see also 4.1 **Joining Overseas Parties to Fraud Claims**.

5. Enforcement

5.1 Methods of Enforcement

Enforcement of Civil Judgments

Final judgments of 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 (Arti-

cles 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 of a felony or even a serious misdemeanour, the first-instance court may rule that its judgment be directly enforced, notwithstanding the submission of an appeal against it (Article 497 GCCP).

5.2 Enforcement of Foreign Judgments

The process for the enforcement of foreign civil and criminal judgments within the Greek jurisdiction is, as a rule, prescribed by relevant bilateral treaties and international conventions. Such proceedings are however significantly simplified among EU member states, whereby the principle of mutual recognition of judicial decisions applies.

In this case, the enforcement of judgments in civil and criminal matters entails the direct collaboration of the competent authorities in the involved jurisdictions, while the above process is facilitated by special EU legislation (eg, EU Directives Brussels I and II on the enforcement of civil judgments, the European Supervision Order on the enforcement of criminal judgments, etc). Please see also 4.2 **Service of Proceedings out of the Jurisdiction**.

6. Privileges

6.1 Invoking the Privilege Against Self-Incrimination

Criminal Proceedings

The right to silence and to not incriminate oneself is enshrined in Article 104 GCCP. In accordance with this 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 to not 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 latter's allegations will be accepted as true (Article 271 GCCivP).

6.2 Undermining the Privilege Over Communications Exempt From Discovery

The process of "discovery" or "disclosure" is not established under Greek civil law, though certain categories of privileged information, communications and documents are 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 is 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 GCC;
- the GCCP; and
- the 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).

Moreover, pursuant to Articles 263 and 264 GCCP, 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, a 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 Legislative Decree No 1059/1971 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 on the court at the trial stage.

7.3 Crypto-Assets

In accordance with EU 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 Law 4734/2020) 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, and that is not necessarily linked to legally circulating currency nor has the legal status of currency or money, yet 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 types of assets, though the pertinent field awaits further regulation.

HONG KONG

Law and Practice

Contributed by:

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Holman Fenwick Willan

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Holman Fenwick Willan is recognised internationally as an industry leader advising on all aspects of fraud in the aviation, commodities, construction, energy and resources, insurance and reinsurance, and shipping industries. The Hong Kong office has a stellar record in representing clients in all forms of disputes,

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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 has 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".

Fraudulent activity may include deception, though that 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 complex because it is analysed from both subjective and objective standards: *R v Ghosh* [1982] QB 1053. It is subjective in the sense that the question is asked whether the defendant realised at the time they were being dishonest, and objective in the sense that the question is asked whether they were acting dishonestly according to the ordinary standards of reasonable behaviour. However, in the civil jurisdiction, the test is largely objective – see *Royal Brunei Airlines v Tan* [1995] 2 AC 378.

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 that 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 repeatedly, 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. Victims fall foul of all sorts of deceptions, including email and phone scams, investment and wire frauds, and even impostor scams. There is also a constant stream of CEO frauds and frauds relating to investments in cryptocurrency.

General Characteristics of Fraud Claims

The individual heads of claim that apply depend on the underlying facts. Common causes of action that victims rely on include:

- fraudulent misrepresentation;
- deceit and fraudulent inducement;
- dishonest assistance (accessory liability);
- knowing receipt;
- constructive trust – arises when the recipient holds funds that they know have been paid to them by mistake or in breach of trust; and
- 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.

The first five claims all involve some manner of knowledge or dishonesty on the part of the defendant. The last claim 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, 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 position in reliance on receipt of the plaintiff's funds; and/or
- they are bona fide purchasers for value (ie, they paid fair value for an asset acquired with the funds) 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.

The most common relief sought for fraud is damages or restitution. Other remedies may also be sought, including injunctive or declaratory relief or an account of profits, which enables a plaintiff to recover any prof-

its made by a defendant who has utilised the proceeds of the fraud.

1.2 Causes of Action After Receipt of a Bribe Against the Corrupt Agent – Breach of Fiduciary Duty

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.

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 constructive trustees who hold the bribes on trust for the benefit of their principals. The principal can therefore 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, where the courts held 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 paid as a bribe for the benefit of the principal.

A principal or employer can also sue corrupt agents or employees for breach of their employment or service contracts.

Criminal Sanctions

The primary anti-corruption legislation in Hong Kong is the Prevention of Bribery Ordinance (Cap 201) (POBO), which is enforced by the Independent Commission Against Corruption (ICAC). The POBO prohibits the offer and acceptance of bribes in both the public and private sectors and establishes a series of criminal offences for corrupt conduct.

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.

Banks

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.

In *PT Asuransi Tugu Pratama Indonesia Tbk v Citibank NA* [2023] HKCFA 3 (in which Holman Fenwick Willan acted for the successful account holder), the Court of Final Appeal held that the defendant bank was liable for monies paid out of the plaintiff's bank account on the dishonest instructions of the plaintiff's authorised signatories. The Court held that the plaintiff's debt claim for the balance of the account before it was fraudulently emptied, and the account closed, was good in law, and that the fraudulent transfers were nullities, and the debt claim was not statute-barred. The Court held that the six-year limitation period started to run when the bank's customer demanded payment of the debt and not when the bank closed the account without the authority of its customer.

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 architects of frauds rarely hold the bank account into which victims mistakenly remit 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 in Mainland China, and

the account-opening documents will usually state low monthly salaries. Tracking the signatories 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, to recover any remaining funds.

Those who knowingly assist in money-laundering operations risk being charged with several criminal offences, such as conspiracy under Section 159A of the 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. In claims for dishonest assistance, the dishonesty must relate to the assistance of the breach of trust; the plaintiff does not need to establish that the defendant had knowledge of the relevant breach of trust (*China Medical Technologies Inc (in liquidation) v Wu Xiaodong and others* [2026] HKCFI 276).

The Organised and Serious Crimes Ordinance (Cap 455) (OSCO) empowers the police to charge individuals who deal with property that they know or have reasonable grounds to believe are the proceeds of an indictable offence.

The prosecution may also apply for a restraint 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 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 may be entitled to bring a proprietary claim in equity over the funds found in the hands of the second- or third-level recipients. Recipients often argue

that they received the funds pursuant to a legitimate business transaction or through an underground currency exchange. Recipients often seek to rely on the equitable defences mentioned previously (change of position or bona fide purchaser for value) to defeat a proprietary claim.

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 (*DBS Bank (Hong Kong) Ltd v Pan Jing* [2020] HKCFI 268 (in which Holman Fenwick Willan acted for the successful bank); *Taihei Dengyo Kaisha Ltd v Zhao Yizhe* [2024] HKDC 222).

However, some recent cases suggest that the use of underground banking does not automatically render the transaction unenforceable. Rather, the courts may consider the severity of the illegality on a case-by-case basis, having regard to a range of factors. The courts have held that the question of whether illegality bars the defences of bona fide purchase and ministerial receipt should not be summarily determined (*The Yerrid Law firm v Qianshaizi Trading Limited and Another* [2023] HKCA 788).

It is not uncommon for victims to encounter an evidential lacuna, which prevents them from directly linking payments received by first-level recipients to funds received by second- or third-level recipients. In appropriate circumstances, the courts may draw adverse inferences from the failure by defendants to produce documents and/or witnesses, which they can reasonably be expected to produce, in relation to the victim's tracing exercise (*ANZ Commodity Trading Pty Ltd v Excellence Raise Overseas Limited and Others* [2023] HKCFI 179 – in which Holman Fenwick Willan acted for the successful bank).

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 breach of professional standards. However, in identity fraud cases, the Court of Appeal has recently held that solicitors would not normally

guarantee the identity of the signer, or provide the lender with what would amount to an insurance policy against the risk of fraud (*Gain Global Corporation Ltd v Fongs (A Firm)* [2025] HKCA 586).

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 deliberate 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, it is still important to act quickly when fraud is discovered. Hong Kong law prevents a victim of fraud from recovering property, enforcing a charge or setting aside a transaction affecting such property where an innocent third party purchased the property for 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). However, the Court of Final Appeal has recently clarified that “constructive trustees” whose trusteeship arose solely as a result of their wrongful conduct (for example, making a secret and unauthorised profit) would fall outside of the scope of Section 20 (1) LO (*Hui Chun Ping v Hui Kau Mo* [2024] HKCFA 32). However, the equitable doctrine of laches (lack of diligence in making a legal claim) may apply and bar such claims.

1.5 Proprietary Claims Against Property

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 whether the victims can claim a proprietary interest in the property. Proprietary claims are powerful because they take priority over the claims of other creditors.

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. 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. 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.
- 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.
- More recently, equity allows backwards tracing. Backwards tracing allows victims 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 fraud even when mixed with other assets.

Trust Claims

Where a victim can establish that they are the beneficiary under a trust, they can trace the trust property into substitute assets.

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. Alternatively, the court can order an account of profits, which can then be claimed by the victim.

Vesting Orders

There are conflicting decisions on whether victims of fraud can obtain vesting orders under Section 52 (1) (e) of the Trustee Ordinance (Cap 29) (TO).

In the context of fraud cases, 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; and
- before making the application, the bank must be joined to the proceedings so that any vesting order binds the bank.

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.

1.6 Rules of Pre-Action Conduct

Damage Control: Preservation of Assets

As soon as fraud is discovered, victims should act quickly to stop the funds from being dissipated. Victims should follow these general guidelines:

- tell the bank – immediately inform the bank and ask the bank to reverse the transfer(s);
- tell the police – file a report with the Hong Kong Police and a Suspicious Transaction Report with the Joint Financial Intelligence Unit (JFIU);
- consider obtaining interim injunctive relief; and/or
- consider obtaining disclosure orders, particularly Norwich Pharmacal orders (NPOs).

Victims can apply for injunctive relief to freeze property over which the victim has a proprietary claim and restrict alleged wrongdoers from dealing with their assets. Injunctions can be granted in respect of assets within Hong Kong or worldwide and can restrain wrongdoers from removing or disposing of assets.

Pre-Action Disclosure

Pre-action disclosure against third parties (such as NPOs) can be sought to obtain information about potential defendants. Pre-action disclosure is also available against potential defendants. 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.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Mareva Injunctions (Sometimes Known as Freezing Orders)

Mareva injunctions restrain defendants from disposing of their assets with the intention of frustrating a judgment already or 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. 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.

Defendants who refuse or fail to comply with the terms of a Mareva injunction may be liable for contempt of court and ordered to pay a fine or sent to prison.

Court fees are inexpensive in Hong Kong. For High Court proceedings, the cost of issuing a writ or originating summons is only HKD1,045.

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.

As a condition of granting an injunction, the courts may ask that the plaintiff “fortify” the cross-undertaking (ie, provide a bank guarantee or make a payment into court).

Where there is a strong prima facie case of fraud, the courts do not always order the plaintiff to fortify its undertaking as to damages until after the defendant appears before the court and requests fortification.

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.

Prohibition Against Debtors Leaving Hong Kong

RHC Order 44A enables a plaintiff or a judgment creditor to apply to courts, ex parte, seeking an order prohibiting a debtor from leaving Hong Kong for a “judgment-proof” jurisdiction.

The applicant must show that there is reason to believe that the debtor is about to leave Hong Kong and the debtor's departure will likely obstruct or delay judgment or satisfaction thereof.

2. Procedures and Trials

2.1 Disclosure of Defendants' Assets

Mareva Injunctions

A Mareva injunction may also require defendants to disclose what has become of the plaintiff's property, and to 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 defendants to disclose the nature and value of their worldwide assets.

Ancillary Disclosure Orders

The court has inherent jurisdiction to order defendants 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 disclosure order would include assets held in the name of the defendant and assets held jointly with other person(s), as well as those held by nominees on the defendant's behalf.

If defendants fail to comply with a disclosure order, they and their directors may be liable for contempt of court.

2.2 Preserving Evidence

Anton Piller Orders

Where it is feared that important evidence may be destroyed or suppressed, a plaintiff may obtain 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.

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; and
- 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.

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.

The plaintiff will be required to give a cross-undertaking in damages as part of the Anton Piller order.

2.3 Obtaining Disclosure of Documents and Evidence From Third Parties

NPOs

NPOs are usually sought against banks that inadvertently handle stolen funds, and have visibility over when and where they went next, as well as the identity of the account holder. NPOs can also be sought against accountants, company secretaries and, potentially, law firms.

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. However, the decision in *A1 and A2 v R1, R2 and R3*

[2021] HKCFI 650, expanded the scope of NPOs in this area when the applicants successfully persuaded the Hong Kong court to grant disclosure orders over the Macau branches of two Hong Kong banks.

Under Hong Kong law, it is possible to seek an NPO in support of foreign proceedings.

The two-step process

In *Asiya Asset Management (Cayman) Ltd v Dipper Trading Co Ltd* [2019] HKCFI 1090, the court 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.

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.

This two-step approach should be followed in “all save the most exceptional of cases”. This is to be contrasted with the approach in England and Wales, where NPOs are often sought without notice and are accompanied by a gagging order (*Simon Bushell and Gary Milner-Moore on Disclosure of Information: Norwich Pharmacal and Related Principles, Second Edition*). This was the position in Hong Kong prior to the decision in *Asiya Asset Management*, and it is submitted that the prior approach is preferred because it is a process that is favoured by banks (because their general preference is to maintain a neutral stance) and by applicants (who in most cases are the victims of fraud who wish to keep costs to a minimum). Of course, if respondent banks desire an inter partes hearing, they are at liberty to apply.

When to apply

An NPO can be obtained before or after the commencement of proceedings.

Form of NPO application

The application is made pursuant to the inherent jurisdiction of the court by way of an originating summons and supported by affidavit evidence.

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 “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.

The application is made by an originating summons with supporting affidavit. The person against whom the order is sought must be made the defendant.

Discovery Against Third Parties

A party to an existing action may apply for an order for disclosure of documents held 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.

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; and
- Anton Piller orders.

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*). The plaintiff must therefore put the bank on notice.

It should be noted that orders given ex parte will generally operate for a limited time, and a substantive, inter partes hearing will be fixed to give the defendant an opportunity to set aside the injunction or amend the orders granted.

In all ex parte applications, there is a duty to give full and frank disclosure of all material matters.

2.5 Criminal Redress

Law enforcement and civil lawyers frequently work together to recover funds for victims of fraud. In cases of bank wire fraud, where a victim has been tricked into transferring funds into another bank account because of fraud, the victim should file a report with the Hong Kong police.

The police will then usually contact the recipient bank to see if the funds are still in that account. If the fraud is reported promptly, the fraudster may not have had the opportunity to move the funds elsewhere, and so the funds may still be in the account. If the funds have been transferred out of the account of the first-level recipient, the police will often obtain a warrant ordering the recipient bank to disclose to the police the relevant bank records to identify the second-level recipient.

A practice has evolved whereby the police recommend recipient banks to make a suspicious transaction report to the JFIU, following which the JFIU would issue a letter of no consent (LNC) to freeze the funds in the recipient's account. The Court of Final Appeal has upheld the legality and constitutionality of the LNC regime (*Tam Sze Leung & Ors v Commissioner of Police* [2024] HKCFA 8).

In the meantime, the efficient use of Mareva injunctions is paramount, and victims of fraud would be wise to obtain urgent Mareva relief.

Where a criminal prosecution is in progress, the defendant would usually seek to stay the civil proceedings pending the outcome of the criminal process. A certificate of conviction is admissible as evidence in a civil action, so a successful prosecution will assist the plaintiff in establishing liability 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 their 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 plaintiffs to abandon their proprietary claim and bring themselves within the scope of RHC Order 13 Rules 1–4.

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 courts retain 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 were denied. In cases concerning email frauds where the plaintiff asserts a proprietary claim, the courts have granted declaratory relief in default judgments to secure the plaintiff's proprietary claim.

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 granted without a trial on the grounds 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 for most actions begun by writ and, since 1 December 2021, claims alleging 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. 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. 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 courts to infer dishonesty from facts that have not been pleaded. The courts have inherent jurisdiction to strike out allegations of fraud made without proper evidence.

2.8 Claims Against “Unknown” Fraudsters

The Hong Kong courts have granted injunctive relief and judgments against persons unknown. In a number of cases, plaintiffs have obtained proprietary and Mareva injunctions against cryptocurrency wallets by identifying the defendants as “The Account Holders of Wallet Address [x]” (*Wang Weiqing v Zhuo Yihao and others* [2025] HKCFI 4941).

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).

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 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 a 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 a 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 context and, importantly in fraud cases, to the “fraud exception”.

The special rules of attribution will depend on the facts of the 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”; and
- 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:

- 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.

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 person may be found personally responsible for all or any of the debts or other liabilities of the company (Section 275, CWUMPO); and
- 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).

3.3 Shareholders' Claims Against Fraudulent Directors

General Principles

Where directors have breached 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.

Where both the company and a shareholder have a cause of action arising from the same conduct, but the shareholder's loss is not a separate and distinct loss and is reflective of the company's loss, the shareholder is not entitled to bring a personal action to recover that reflective loss (*Waddington Ltd v Chan Chu Hoo* (2008) 11 HKCFAR 370).

Common Law Derivative Action

Under common law, a shareholder can commence a derivative action in relation to a fraud on the company. The shareholder has to establish that:

- the wrongdoers have committed fraud on the company – “fraud” here is a broader concept than common law fraud, and generally covers conduct where power has been exercised for a purpose beyond the scope of or not justified by the instrument creating the power, such as breaches of fiduciary duties by directors; 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.

Common law derivative action can also be brought when the company has acted ultra vires and the company has not commenced an action.

Statutory Derivative Action (Part 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, which includes a non-Hong Kong company (Section 732, Companies Ordinance). The person bringing the statutory derivative action must be a shareholder of the company. “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 shall be granted. This essentially involves comparing what the company stands to gain in money or money's worth with the likely cost of the proceedings;
- 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 (unless the requirement has been dispensed with by the court).

A shareholder who wants to commence a statutory derivative action on behalf of a foreign company must first satisfy the requirements under the laws of the place of incorporation (if any). In the recent case of *Chen Pei Xiong v Convoy Global Holdings Ltd and Forthwise International Ltd* [2024] HKCFI 1568, the court ruled that the plaintiff did not have standing to bring a statutory derivative action in Hong Kong in relation to a British Virgin Islands (BVI) company, where he had failed to obtain leave from the BVI court before commencing the derivative action in Hong Kong.

Statutory Injunction (Part 14, Division 3, Companies Ordinance)

Sections 728–730 of the Companies Ordinance allow certain individuals, including shareholders and creditors, the right to seek an injunction to restrain breaches of the Companies Ordinance or breaches of fiduciary duties by directors.

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims Joinder of Parties

Under RHC Order 15 Rule 6, the courts 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 – by demonstrating that the defendant has, or is deemed to have, voluntarily submitted to the jurisdiction of the Hong Kong courts;

- service of process on the defendant within Hong Kong; and
- service of process on the defendant outside Hong Kong – in most cases, leave from the court must be obtained.

4.2 Service of Proceedings out of the Jurisdiction

If a foreign party is added as a defendant to a claim, the plaintiff must 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*. 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
- 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 to hear the claim.

Necessary Person Gateway

The gateway in RHC Order 11 Rule 1 (1)(c) is helpful in fraud claims and permits servicing out in actions begun by writ where:

- one of the defendants, the “anchor defendant”, has been duly served (whether within or out of the jurisdiction);
- the person out of the jurisdiction is a necessary or proper party to the claim;
- genuine, properly commenced proceedings are pending before the Hong Kong courts that involve a real issue, which the plaintiff may reasonably ask the court to try; and
- the Hong Kong court is the appropriate forum to hear the case – but bearing in mind the action already pending here.

Constructive Trust Gateway

Another important gateway 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”.

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 ICAC;
- the JFIU; and
- the Securities and Futures Commission (SFC), which deals with insider dealing offences and market abuse.

The burden of proving the commission of an 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 during the fraud), the defendant becomes a judgment debtor, and the plaintiff can apply 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.

Charging order

A charging order is a charge on an interest in land or over securities. If the judgment debtor does not satisfy the judgment following the making of a charging order, the judgment creditor can enforce the charging order by selling the charged land or 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.

Writ of execution

A writ of execution directs a bailiff to seize the judgment debtor's goods, chattels and other property to satisfy the judgment debt. The judgment creditor must issue a writ of execution of the type it requires; for example:

- a writ of fieri facias, to obtain a levy on the debtor's goods;
- a writ of possession, to obtain repossession of land; or
- a writ of delivery, for the delivery of goods.

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.

Winding-up petition/bankruptcy

If the judgment debtor can be shown to be insolvent, the judgment creditor can present a winding up petition against a debtor company or instigate bankruptcy proceedings against an individual debtor.

If the court grants the petition, a liquidator or trustee in bankruptcy will be appointed to gather in the judgment debtor's assets and pay their debts.

Winding up and bankruptcy are class remedies, which benefit the whole body of creditors. The judgment creditor who petitioned for appointment of the liquidator/trustee has no special priority (unlike, for instance, secured creditors) and will rank *pari passu* with all other creditors of the same class.

5.2 Enforcement of Foreign Judgments

As Hong Kong is not a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, foreign judgments can only be enforced in Hong Kong either through the:

- Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (FJREO);
- Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap 645) (MJREO); or

- common law.

FJREO

The FJREO applies to judgments from 15 jurisdictions, including Australia, Malaysia and Singapore.

A foreign judgment is registrable under FJREO if the judgment:

- is given in the superior court of the jurisdiction;
- is final and conclusive;
- is an order for a sum of money (other than taxes, fines or penalties);
- has not been wholly satisfied; and
- could be enforced by execution in the foreign country.

Section 6 (1) of the FJREO allows a judgment debtor to set aside registration of a foreign judgment in specific circumstances, such as lack of jurisdiction of the original court and public policy.

MJREO

The MJREO came into force on 29 January 2024, superseding the recognition and enforcement regime under the previous Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597).

The MJREO now includes most judgments from Mainland China on civil or commercial matters and covers both monetary and non-monetary reliefs. Certain types of judgments, such as judgments concerning matrimonial or family law, have been expressly excluded.

A Mainland judgment is registrable under the MJREO if the judgment:

- was handed down on or after 29 January 2024;
- is enforceable in the Mainland and given (i) by the Supreme People's Court, (ii) at second instance by a High People's Court or an Intermediate People's Court or (iii) at first instance by a High People's Court, an Intermediate People's Court or a Primary People's Court, and no appeal is allowed (or the time limit has expired) under the law of the Mainland; and

- is not an excluded judgment under Section 5 of the MJREO.

Common Law

Judgments of the courts of jurisdictions not listed in the FJREO or MJREO must be enforced at common law.

A foreign judgment may be enforced at common law if it is:

- final and conclusive upon the merits; and
- for a fixed or liquidated sum of money against a particular person (other than taxes, fines or penalties).

Injunctive relief will not be recognised by the Hong Kong courts under the common law regime. The Hong Kong courts may also refuse recognition of a foreign judgment under specific circumstances, such as lack of jurisdiction of the original court, public policy or natural justice concerns.

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 (Cap 383). When invoked, no adverse inference can be drawn from remaining silent. 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 during a POBO investigation. 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 issued by the SFC (being a preliminary notice for obtaining trading information), confirming that claiming privilege

against self-incrimination can be a reasonable excuse for non-compliance.

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.

6.2 Undermining the Privilege Over Communications Exempt From Discovery

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, then the disclosing party cannot assert legal professional privilege. To trigger the exception, there must be a definite charge of fraud or illegality. Fraud here is used in a relatively wide sense, encompassing general iniquity and civil fraud. Therefore, legal professional privilege does not extend where, for example, a solicitor is consulted on how to carry out an illegal act.

It is also worth noting that privilege is not lost if the purpose of the document was to ask, or warn against, the results of contemplated acts.

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:

- in cases of oppressive, arbitrary or unconstitutional actions by the servants of government;
- where the defendant's conduct was "calculated" to make a profit for themselves; and
- where expressly authorised by statute.

A case of fraud may fall within the second of these categories, 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 should be moderate and will only be awarded if the remedies available to the court are inadequate to punish and deter the defendant (*Allan v Ng & Co*).

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" 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 because of the relationship between banker and customer. The duty persists after the closure of the account.

However, the duty of confidence that a bank owes to its customer is not absolute and is qualified where:

- disclosure is required by law;
- there is a duty to the public to disclose;
- the interests of the bank require disclosure; and
- disclosure is made further to express or implied customer consent.

Statutory Duty of Secrecy

Section 120 of the Banking Ordinance (Cap 155) sets out banks' statutory duty to preserve the secrecy of customer affairs and circumstances where banks may share customer information with regulators.

Section 120 (5) provides that the duty of secrecy does not apply in certain circumstances, such as:

- disclosure of information during 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 sets out certain requirements in relation to 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) (PDPO)

Additionally, a bank is required to keep certain customer information private under the PDPO.

Obtaining Evidence in Fraud Claims

Banker's record – Evidence Ordinance (Cap 8) (EO)

If the bank is not a party to the proceedings, a court order is required to compel production of a banker's record as evidence in court (Section 20 (2), EO).

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, EO).

Bankers Trust Orders

A Bankers Trust Order directs a bank to disclose certain information. The information disclosed is 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.

Bankers Trust Orders can be sought 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.

As a condition of a Bankers Trust Order being granted, the applicant may be required to:

- give an undertaking in damages;
- pay the bank's expenses; and
- agree to use the documents disclosed for the purpose of tracing only.

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 an offence or apprehending the offender.

OSCO (Cap 455), anti-money laundering and anti-terrorism

A bank can also be compelled to disclose customer information under the 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 obligations on financial institutions, including banks.

7.3 Crypto-Assets

Hong Kong law treats crypto-assets as property: *Re Gatecoin* [2023] HKCFI 914. The position is the same under English law.

Injunctions

It is possible to obtain both proprietary and Mareva injunction relief in Hong Kong in relation to crypto-assets (*Yan Yu Ying v Leung Wing Hei* [2021] HKCFI 3160 and *Nico Constantijn Antonius Samara v Stive Jean-Paul Dan* [2019] HKCFI 2718).

However, injunctive relief should usually be sought against the fraudster's crypto account rather than against the "omnibus" wallet of the crypto exchange (*Wang Weiqing v Zhuo Yihao & Others*).

NPOs

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 cryptocurrencies, and customer information and the wallet operators' IP addresses. This information will assist a plaintiff to bring both personal and proprietary claims. The authors have obtained Bankers Trust orders and NPOs against cryptocurrency exchanges operating in Hong Kong which were registered abroad.

Recently, the Hong Kong court ordered the disclosure of financial records and books of a decentralised autonomous organisation finance platform in the cryptocurrency industry (*Mantra Dao Inc. and Another v John Patrick Mullin and Others* [2024] HKCFI 2099).

INDIA



Law and Practice

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AZB & Partners was founded in 2004 as a collaboration between the founding partners, Mr Ajay Bahl, Ms Zia Mody and Mr Bahram Vakil. With a clear purpose to provide reliable, practical and full-service advice to clients across all sectors, and having grown steadily since inception, AZB & Partners now has offices across Mumbai, Delhi, Bangalore and Pune, with an accomplished and driven team of over 500 lawyers who are 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. This strength allows the firm to provide bespoke counsel to its diverse clientele and assist them in negotiating dynamic and volatile business environments. The firm has been ranked in Chambers and Partners' global ranking 2023 as a leading firm.

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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
- injure their interests.

Generally, a dishonest concealment of facts amounts to fraud as much as overt actions or the making of false statements. Specifically, under the Companies Act, an abuse of position with intent to deceive is also covered under fraud. The Companies Act also does not require the occurrence of loss to set up a case of fraud.

In 2023, the Indian Parliament enacted a new penal statute – Bharatiya Nyaya Sanhita 2023 (BNS) – and repealed the existing pre-colonial Indian Penal Code 1860 (IPC). Similarly, the erstwhile Code of Criminal Procedure 1973 has also been repealed and replaced by a new statute – Bharatiya Nagarik Suraksha Sanhita 2023 (BNSS). Both the BNS and BNSS came into effect from 1 July 2024.

The BNS, like its predecessor statute the IPC, does not define fraud as a distinct offence. It only provides for fraudulent intention as an ingredient of various specific offences. The BNS defines “fraudulently” to mean with an intent to defraud.

Dishonest misappropriation of property, or dishonest conversion of property for one’s own use, is also a penal offence. This offence takes the form of “cheating” where someone, by deceitful or fraudulent means, induces a person to deliver a property to themselves. On the other hand, where a person has been entrusted with this property and dishonestly or illegally misappropriates or converts it for their own use or benefit, this comprises the offence of “criminal breach of trust”.

However, the BNS, under Section 111 (1) (Explanation ii), has for the first time introduced the offence of “economic offence” as a part of a definition of a larger offence – namely, “organised crime”. Here “economic offence” has been expansively defined to include offences such as criminal breach of trust, forgery, counterfeiting of currency and valuable securities, financial scams, Ponzi schemes, mass-marketing fraud or multi-level marketing schemes to defraud the public for monetary gain, large-scale organised betting in any form, offences of money laundering and hawala transactions.

Notably, not only the commission of a fraudulent act per se but also any agreement or conspiracy to enter into a fraudulent act, entered into by two or more persons, is penalised under the BNS, regardless of whether actual fraud is committed.

There is a more nuanced definition of fraud in 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 their agent to deal in securities, whether or not there is any wrongful gain or avoidance of any loss.

1.2 Causes of Action After Receipt of a Bribe The Prevention of Corruption Act, 1988 (the “PC Act”)

Paying illegal gratification (bribes) to a public or a government official is punishable under a special statute – the Prevention of Corruption Act (the “PC Act”). The PC Act penalises a government servant as well as any person or organisation (including its officers) who gives any illegal gratification to a public official to obtain a benefit. The term “gratification” is used 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 minimis standard for the quantum that would qualify as a bribe. In order to prove the offence of bribery, the prosecution has to prove:

- the demand of a bribe by the public servant or the offer to pay a bribe by a person; and
- the acceptance or obtainment of the illegal gratification, either through direct or circumstantial evidence.

Claims relating to bribery in India can be brought against public servants and can also lie against 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 bribe has been received to induce a public servant to perform their public duty improperly or dishonestly.

The Companies Act

Under the Companies Act, it is the directors’ responsibility to create adequate internal financial controls

to prevent and detect fraud and other irregularities within a company. Such internal controls include the setting-up of channels for reporting the receipt of a bribe by an agent. In the event of a failure to do so, the stakeholders may avail of various recourses under the Companies Act, including:

- prosecution for fraud;
- an action for disgorgement pursuant to a class action (in the case of egregious default); or
- an action for oppression and mismanagement.

A statutory auditor of the company is obligated to report fraud to the audit committee or the board of directors. Where the suspected fraud exceeds INR1 crore, the auditor must also report such to the central government, after giving the audit committee or the board of directors (as the case may be) an opportunity to respond. Failure to do so exposes the auditor 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 may inform the Registrar of Companies (ROC) or the Serious Fraud Investigation Office (SFIO) – ie, the statutory corporate fraud-investigating agency constituted under the Companies Act.

1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts The BNS

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. The definition of abetment also includes engaging with one or more person(s) in a conspiracy for committing a fraudulent act, if any act or omission occurs in pursuance of that conspiracy.

Where no specific punishment is prescribed for abetment, persons who conspire towards, assist in, or facilitate such fraudulent acts are punished with the same punishment as though they had committed the intended offence. Claims of abetment also extend to situations where a party assists in the commission of a

crime by receiving or harbouring fraudulently obtained assets, provided that the party had knowledge that the assets were fraudulently obtained. Further, under Section 48 of the BNS, India has expanded extraterritorial application of abetment by making abetment outside India an offence where a crime is committed inside India.

The Companies Act

Where the statutory auditor fails to perform their duties or does not detect fraud despite it being brought to their notice, the auditor may face various actions, such as:

- a class action for disgorgement;
- regulatory action, including disbarment; and
- criminal prosecution for fraud or abetment of fraud.

In addition to other actions, they may also be removed from their position through a government action and debarred for up to five years if found guilty of having directly or indirectly acted in a fraudulent manner or colluding in a fraud by the company, its officers or its directors. In a landmark ruling in 2023 – *Union of India v Deloitte Haskins and Sells LLP*, reported in (2023) 8 SCC 56 – the Supreme Court of India held that an action seeking removal and debarment under Section 140 (5) of the Companies Act is maintainable even against statutory auditors who had resigned prior to such action being instituted.

The Prevention of Money Laundering Act, 2002 (PMLA)

The PMLA penalises the offence of money laundering per se, when such offence involves proceeds of crime in relation to a specified or scheduled offence – ie, offences listed in the Schedule to the PMLA. The existence of such predicate offence is a sine qua non for initiation of proceedings under the PMLA. Notably, offences such as cheating, forgery of valuable security and wills, etc, are scheduled offences under the PMLA.

Under the PMLA, “money laundering” is defined very widely to include any of the following activities pertaining to proceeds of crime:

- acquisition;

- possession;
- use;
- concealment; and
- projection or claiming proceeds of crime as untainted property.

These activities are independent of each other and are to be read disjunctively.

Further, the definition covers not only persons directly involved in any of the aforesaid activities but also those who indirectly or directly attempt to indulge in, or assist in, such activities. In other words, the PMLA criminalises not only an overt act of money laundering but also any attempt to commit it.

The PC Act

Under the PC Act, abetment of an offence under the Act by either a private person or a government official is punishable, whether or not the offence was committed as a consequence of that abetment.

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. However, where the fraud is continuing, a fresh period of limitation begins to run at every moment of the time during which the fraud continues.

Criminal Proceedings

In general, the limitation period for an offence is dependent on the period of imprisonment prescribed for that offence. For example, where an offence is punishable with imprisonment for up to three years, a complaint must be filed within three years from the commission of the offence. In cases involving fraudulent acts, the limitation period would depend on the specific offence. Criminal courts also have inherent powers to condone delay where it is properly explained or where doing so serves the interests of justice.

Additionally, no limitation period is prescribed for offences punishable with imprisonment exceeding three years. Accordingly, complaints for offences such

as cheating and dishonestly inducing delivery of property (punishable with up to seven years' imprisonment) or forgery of a valuable security or a will (punishable with up to ten years' imprisonment) may be filed at any time.

Civil Proceedings

For civil claims, the limitation period is prescribed under the Schedule to the Limitation Act and varies depending on the causes of action. However, as stated above, the cause of action commences when the fraud is discovered or could reasonably have been discovered. The Supreme Court in *Daliben Valjibai and Others v Prajapati Kodarbhai Kachrabhai and Another*, 2024 INSC 1049, decided on 11 December 2024, reiterated that in cases pertaining to fraud a limitation period of three years begins from the date of knowledge of the fraud.

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 agreement is bound to restore it. However, where restoration is not possible due to conversion of the proceeds of fraud, the claimant is still entitled to compensation for the loss suffered. In such cases, the principles under Section 65 of the Contract Act may apply, which provide that any person who has received any advantage under such agreement or contract is bound to restore it or make compensation to the person from whom it was received. The term "received any advantage" ensures restitution of an innocent party to such position as though they had not entered into the contract.

Further, the Specific Relief Act, 1963 provides that a person entitled to possession of specific movable property may recover it as per the procedure prescribed under the Code of Civil Procedure, 1908 (CPC). Accordingly, once the contract is declared void, a party may institute a civil suit seeking declaratory relief regarding the title to the property, along with possession thereof.

The Insolvency and Bankruptcy Code, 2016 (IBC)

The IBC provides for various mechanisms 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 or corporate insolvency resolution process, where any resolution professional (RP) or liquidator finds that the corporate debtor conducted their business with intent to defraud creditors or for any fraudulent purpose, the adjudicating authority may direct any persons (including directors or partners) knowingly involved in it to contribute to the assets of the corporate debtor.

The RP is also obligated 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 filing an application under Section 44 or 45 of the IBC, respectively. These processes restore the transactions to the corporate debtor rather than to an individual claimant. Any person seeking such reversal will be entitled to proceeds from such transactions only in accordance with the resolution plan or the distribution scheme under Section 53 of the IBC. It has recently been held that such avoidance applications by the RP will be unaffected by the approval of the resolution plan or conclusion of the corporate insolvency resolution process (CIRP).

The Insolvency and Bankruptcy Board of India (IBBI) is also empowered to direct "any person" who has made an unlawful gain or averted losses by contravening the IBC to disgorge an amount equivalent to such unlawful gain. The IBBI may also take steps to reconstitute losses suffered by identifiable persons where such loss is directly attributable to the contravention.

Pertinently, under Section 32A of the IBC, a new right has been conferred on the successful resolution applicant, whereby any prior attachment, seizure, retention or confiscation of property of the corporate debtor, in relation to offences committed before the commencement of the CIRP, shall stand released and made available free from encumbrances to the resolution applicant if such property is covered under the approved resolution plan.

The BNSS

Under the BNSS, the police are also empowered to seize any movable property or evidence suspected to be involved in any fraudulent act. Additionally, under Section 497 of the BNSS (Section 451 of the Code of Criminal Procedure (CrPC)), the court may pass such orders as it thinks fit for proper custody of any property during the pendency of the criminal trial.

Section 497 of the BNSS also introduces procedural requirements for handling property produced before the court or magistrate, including disposal, destruction, confiscation or delivery.

Where a claimant seeks to establish their proprietary rights in a criminal proceeding to recover property, they may make a claim before the court. The court may then order the release/restoration of the seized property, either during the pendency of the investigation/trial or after its conclusion. Such release/restoration may be granted with or without conditions including execution of a bond, with or without securities, to the satisfaction of the court.

New Provisions of Attachment and Forfeiture of Property Under the BNSS

The powers for attachment and forfeiture of property available under the CrPC have been retained under Chapter VII (Sections 111–124) of the BNSS.

However, in addition thereto, the newly introduced Section 107 of the BNSS also empowers the magistrate to attach property identified as “proceeds of crime” upon an application by an investigating officer giving reasons for believing that the property is derived or obtained from a criminal activity or commission of an offence. This is subject to the magistrate hearing the affected party. However, under Section 107 (5), the magistrate may also pass an ex parte interim order of attachment. If the magistrate ultimately finds the property to be proceeds of crime, it can direct pro rata distribution of such proceeds of crime to the victims of such crime. Where no claimants exist, the property stands forfeited to the government.

The Kerala High Court recently distinguished the powers of seizure under Section 106 BNSS from attachment under Section 107 BNSS, and held that seizure

under Section 106 may be carried out by the police with an ex post facto report to the magistrate, whereas attachment under Section 107 can be effected only pursuant to orders of the magistrate. The Bombay High Court, approving the Kerala High Court’s reasoning, has held that investigating agencies cannot freeze bank accounts under Section 106 and that such freezing can only be ordered under Section 107.

In light of the rise in digital arrest scams in India, the Supreme Court of India has taken suo motu cognisance of the issue, which is presently pending adjudication along with a plea seeking uniform guidelines for freezing and de-freezing of bank accounts during cybercrime investigations.

Notably, the power of attachment under the BNSS comes with even fewer procedural safeguards than those provided under the PMLA. The constitutional validity of Section 107 has been challenged before the Supreme Court of India and is presently pending adjudication.

The PMLA

As stated in **1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts**, the PMLA defines “proceeds of crime” broadly to include property directly or indirectly obtained through fraudulent activities, as well as its equivalent value held in India where such property is taken or held outside India. Notably, where the proceeds of crime generated from fraud as recognised in a scheduled offence are mixed with other funds, their value may still be identified and subjected to seizure or attachment, recognising that the tainted property may no longer be available.

The Directorate of Enforcement (ED) may attach or, where necessary, freeze properties derived directly or indirectly from the proceeds of crime. However, the Supreme Court of India recently clarified that mere use of a property in the commission of the predicate offence will not render said property a proceed of crime.

Recently, in *Davy Varghese and Another v Directorate of Enforcement* [WP (CrI) No 1354 of 2025, decided on 16 December 2024], the Kerala High Court set aside the attachment of properties, observing that such

properties could only be attached under the narrow third limb exception under Section 2 (1)(u) and that “value of such property” refers to the monetary worth of property derived from the offence, not to assets acquired bona fide. The Court further warned against retroactive application of attachment powers, holding that this would offend the constitutional principle against ex post facto penal consequences under Article 20 of the Constitution.

If, upon completion of trial, the offence of money laundering is proved, such property forms part of the proceeds of crime and stands confiscated by the central government, 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 has suffered loss due to the offence of money laundering, at any point during or after the trial.

The Foreign Exchange Management Act, 1999

In 2015, Section 37A of the Foreign Exchange Management Act (FEMA) was introduced authorising the ED to seize equivalent assets within India where a resident holds foreign exchange, foreign securities or immovable property outside India in contravention of Section 4 of FEMA. The ED has recently invoked these powers in multiple cases to seize equivalent assets in India in cases where assets are allegedly held outside India in contravention of FEMA. Notably, the Karnataka High Court has recently held that this provision introduced in 2015 is not retrospectively applicable.

1.6 Rules of Pre-Action Conduct

Criminal Proceedings

In the case of a criminal complaint relating 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

Where a claimant files a civil claim relating to a fraud under a contract, they should issue a legal notice (usually a demand notice) or comply with any pre-action

steps as prescribed under the dispute resolution clause of the contract.

Moreover, specific legislation or provisions may have their own particular rules of pre-conduct action. For example, under the Commercial Courts Act, 2015 (the “CC Act”), parties must undergo pre-institution mediation where no urgent interim relief is sought. Similarly, a civil action against the government or a public official may be instituted after serving a written notice two months in advance, unless waived by the court. Failure to comply with such pre-conduct action may be fatal to the claim where the statute so provides.

1.7 Prevention of Defendants Dissipating or Secreting Assets

A victim of fraud pursuing civil claims may apply for a temporary injunction to prevent a party from alienating assets during adjudication. The application must satisfy the common law requirements for grant of an injunction:

- 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.

Such injunction is in personam, but may also extend to third parties, where they interfere with or obstruct the course of justice.

Where a suit is instituted for seeking damages/permanent injunction, the court fees payable are computed as per the Court Fees Act, 1870 and 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 for seeking an ad interim injunction are typically nominal and vary across courts.

A similar remedy is available under Section 9 of the Arbitration and Conciliation Act, 1996 (the “A&C Act”), which permits parties to seek an ad interim injunction for preservation of assets or the substratum of an arbitration, before, during or after the constitution of an arbitral tribunal but before execution of an arbitral award.

Further, as noted in **1.5 Proprietary Claims Against Property**, the BNSS empowers police officers to seize property involved in a fraudulent offence. The magistrate may also issue attachment orders (including ex parte interim attachment orders), where property is believed to constitute proceeds of crime. These powers can be exercised at a pretrial stage and even before the accused has an opportunity to plead and establish their innocence in a trial. Criminal courts also have wide powers to secure the custody of any property produced before them during the pendency of trial and may order its release/restoration to the claimant either during the pendency of investigation/trial or after conclusion of the trial.

Civil Law Remedies for Violation of an Injunction

Violation of an interim injunction constitutes a contempt of court and is punishable with civil imprisonment and/or a fine. The court may also attach the property of the violating party and declare any transaction in violation of such injunction null and void.

Criminal Law Remedies for Violation of an Injunction

Under the BNS, fraudulent removal or dissipation of assets to prevent forfeiture for the satisfaction of an order or a decree, whether passed or likely to be passed, is punishable with imprisonment of up to two years or a fine, or both.

Cross-Undertakings

There is generally no statutory requirement for a claimant to furnish a cross-undertaking in damages, except in patent suits filed in New Delhi. However, courts or arbitral tribunals may require such an undertaking to indemnify losses suffered by the opposite party if the injunction is later found unwarranted. Courts may also impose conditions, including deposit of an amount, while granting interim relief.

Further, Under Section 144 of the CPC, where any order is subsequently varied, reversed or modified, a party may seek restitution of its position 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

Under Section 94 of the BNSS (Section 91 of the CrPC), a court or a police officer may compel a person, through a written notice, to produce any "document or other thing" necessary or desirable in respect of the fraudulent act, during the stage of investigation, inquiry or trial. Notably, Section 94 has been amended to vest power with a law enforcement agency to seek production of communication devices containing digital evidence. A person may be compelled to disclose documents relating to assets held by themselves or through nominees. Failure to produce documents or electronic records before a public servant may attract simple imprisonment of up to one month and a fine of up to INR5,000. If such failure is before a court, it may be punishable with simple imprisonment of up to six months and a fine of up to INR10,000.

Civil Proceedings

In civil proceedings, a claimant may seek discovery, inspection and admission of certain documents in the control of the opposite party. Where assets are, in the usual course of business, held by a third party, the court may direct such third party to disclose them. The opposite party may also be required to answer specific questions (termed "interrogatories") served by the claimant. Failure to answer such interrogatories or comply with an order of discovery may lead to dismissal of the defendant's defence under Order XI Rule 21 of the CPC. Additionally, in the case of false information, the defendant may also be proceeded against for perjury. At the same time, courts may impose costs where interrogatories are unreasonable, vexatious or exceedingly lengthy.

Cross-Undertakings

As explained in **1.7 Prevention of Defendants Dissipating or Secreting Assets**, a party can be put to terms and be directed by the court to deposit a certain amount. Further, under Section 144 of the CPC, a court may order restitution where an order is subsequently vacated or modified. This power includes the power of the court to award consequential costs to the party.

2.2 Preserving Evidence Criminal Proceedings

Law enforcement agencies often have their own internal manuals governing the preservation and storage of evidence. For example, the Central Bureau of Investigation (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, with details recorded in the submodule of crimes or relevant register. Such items can be issued to the investigating officer as and when required for the purpose of investigation upon proper receipt and must be returned thereafter. 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, the ED under the PMLA may attach any property that it reasonably suspects to be “proceeds of crime”. Attachment preserves such property for use as evidence at trial. The Prevention of Money Laundering (Receipt and Management of Confiscated Properties) Rules, 2005 further regulate identification, maintenance and custody of confiscated properties. Where an attached asset is depreciating in nature, courts may permit its sale in order to realise its maximum value, even during the pendency of the trial.

Following concerns raised by Financial Action Task Force (FATF) regarding use of cryptocurrencies in money-laundering activities, Indian enforcement agencies have also begun attaching cryptocurrencies and assets of such exchanges as proceeds of crime. As a measure of statutory recognition, in March 2023 the government of India (for the first time) formally brought “cryptocurrency” and “virtual digital assets” under the regulatory ambit of the PMLA, thereby making compliance with reporting requirements mandatory.

Moreover, the police and the courts are given the power to seize and attach any property that is governed by the procedure provided in the BNSS. Under these criminal statutes, “property” is defined very broadly to

include movable or immovable property, corporeal or incorporeal property, and the instruments relating to such assets (and includes bank accounts).

Further, the BNS criminalises secreting or destroying documents to prevent their production in legal proceedings, punishable with imprisonment of up to three years or a fine of INR5,000, or both, thereby deterring destruction of evidence.

Civil Proceedings

Under the CPC, courts regulate and control the evidence placed before them. High Courts in India have their own specific rules in relation to maintenance of evidence. For example, the Delhi High Court Rules require old and delicate documents to be safeguarded, such as by using a protective covering or by using photocopies while sealing the original. The CPC also permits appointment of a receiver under Order XL to preserve property that 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. Additionally, under Order XXXIX Rule 7 of the CPC, a party may seek court orders for inspection, detention or preservation of property forming the subject matter of the suit. Similarly, under the A&C Act, the court or the arbitral tribunal may issue interim directions for preservation of evidence which is in the exclusive possession of a party, and which is necessary for protection of the subject matter of the arbitration.

Physical Search of Documents

The Bharatiya Sakshya Adhiniyam, 2023 (BSA) that replaced the Indian Evidence Act, 1872 from 1 July 2024 empowers courts to require production of any document at any time, as the court may deem fit (unless this falls under a recognised privileged communication). However, under 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. However, it may be noted that the provisions relating to privileged communications have been retained under the BSA.

In civil proceedings, a claimant may seek discovery and inspection of the evidence through application to the court. Inspection usually takes place at the office

of the defendant's pleader, or at the usual place of custody of such evidence. The application must be made on oath affirming relevance of the documents, but no undertaking is required. Such inspection is limited to documents referred to and/or relied on by the defendant in its pleadings, or to specific documents that the claimant affirms the defendant has, and does not amount to a general search of the defendant's premises.

The CPC also allows appointment of commissioners under Order XXVI for local investigation/inspection or for ascertaining mesne profits or damages, or annual net profits. The commissioner records the evidence, prepares a report and submits it to the court, and may also examine witnesses on interrogatories or otherwise.

2.3 Obtaining Disclosure of Documents and Evidence From Third Parties

Criminal Proceedings

As stated in 2.1 Disclosure of Defendants' Assets, Section 94 BNSS empowers a court or the police to summon any person to produce any document, communication device containing digital evidence or thing necessary for investigation or trial. The provision is not limited to the accused and may be invoked to seek a document or thing relevant for investigation from any person in whose possession or power such document or thing is believed to be.

Civil Proceedings

Under the CPC, courts have 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. One notable change regarding production of documents is that under the newly enacted BSA the definition of the word "document" has been expanded to include:

- electronic or digital records stored in emails;
- server logs;
- documents on a computer;
- messages;
- websites;
- the cloud;
- location evidence; and
- voicemail messages stored on digital devices.

Similarly, the definition of the word "evidence" has also been expanded to include any information given electronically, marking a significant statutory development.

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. However, the claimant will be required to inform the opposite party of this and to send all documents forthwith. Such an injunction may be vacated upon an application filed by the opposite party if the claimant has knowingly made false or misleading statements. Further, once 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.

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 on the speed at which they are disposed. However, criminal proceedings can be initiated only when criminal offences are sufficiently made out in the cause of action, as courts have repeatedly cautioned against giving a criminal colour to purely civil/contractual disputes.

In practice, the route chosen by victims depends on the relief sought. Indian criminal law provides limited scope for victim compensation, which is usually 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 are more appropriate.

The standard of proof required to hold against the perpetrator is different in both cases. 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 do not 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 whether the conviction precedes the civil determination.

2.6 Judgment Without Trial

Criminal Proceedings

The BNSS does not provide for the obtaining of judgments without a full trial being conducted. However, if an accused is absconding and there is no immediate prospect of arrest, the court may record evidence in their absence, which may later be used against the accused when the trial can take place. The court may also dispense with the presence of the accused if it is satisfied that their 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 needed to be amended to allow for “trial in absentia”.

In view of such suggestions, the BNSS has (for the first time) introduced provisions relating to conducting a trial of an accused person in absentia. Under Section 356 of the BNSS, trial in absentia may be conducted if three conditions are satisfied, namely:

- the accused person is declared as a proclaimed offender under Section 84 of the BNSS;
- they have absconded to evade trial; and
- there is no immediate prospect of arresting them.

Thus, the BNSS provides for pronouncement of judgment in such trials, with the further stipulation that an appeal therefrom can only be preferred if the pro-

claimed offender presents themselves before the Court of Appeal.

Civil Proceedings

The courts can also issue an ex parte decree in a defendant's absence, provided that sufficient opportunity has been provided to the defendant and despite which the defendant failed to appear before such court or has failed to file a written statement. However, in such cases also, a plaintiff is still required to prove their case to obtain an ex parte decree.

For civil cases, the CPC also allows filing an application seeking a summary judgment in certain commercial disputes. Under Order XIII-A of the CPC, read with the CC Act, the court may give a summary judgment where the defendant has no real prospect of successfully defending the claim and there is no other compelling reason for why the claim should not be disposed of without proceeding to trial. 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. In such suits, the defendant may defend the claim only with the court's leave; if leave is refused, the suit is decreed in favour of the plaintiff.

2.7 Rules for Pleading Fraud

Courts in India have adopted an expansive and inclusive definition of fraud. The primary component that must be alleged and proved in such claims is establishing 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 fraud must be pleaded with specific particulars and that the case can only be decided on the basis of those particulars. Mere bald allegations or pleadings of fraud are not sufficient. Order VI Rule 4 of the CPC similarly requires that pleadings relying on any misrepresentation, fraud, breach of trust, wilful default

or undue influence must state detailed particulars, including dates and times where necessary.

2.8 Claims Against “Unknown” Fraudsters

Claims may also be brought against unknown fraudsters, especially when a claimant seeks ex parte interim injunction to protect its interests, where there is an imminent threat to such interests, and where the identity of the fraudster is unknown. India courts have frequently granted such “John Doe” orders (referred to as “Ashok Kumar” orders in India), especially in cases involving fraudulent misrepresentations or frauds in relation to intellectual property.

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 94 of the BNSS empowers the police or a court to direct a person to produce certain specified documents in their possession as evidence. Courts in India also have broad powers to summon witnesses, either on their own motion or upon application by a claimant, and to compel production of any evidence or document.

Civil Proceedings

Arbitral tribunals can also seek court assistance in taking evidence under Section 27 of the A&C Act by exercising the stipulated powers. These powers have also been recognised under the BSA. Additionally, under Order XXVI of the CPC, courts may appoint a commission for deposing a witness or pursuing interrogatories in cases where:

- the witness is within local limits and cannot be compelled to appear before a court;
- there is apprehension of evading jurisdiction before such witness can be compelled to appear before a court; or
- such witness is incapable of attending evidentiary proceedings.

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on a Corporate Entity

Indian courts have held 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, the offence would also be imputed to the entity. Such imputation will be dependent on 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. Where the relevant statute prescribes a fine or penalty, the corporate entity may also be subjected to such punishment upon conviction.

3.2 Claims Against Ultimate Beneficial Owners

When a corporate entity is used as a vehicle for fraud, and its separate identity has been misused to commit such frauds, courts use the well-established common law doctrine of piercing the corporate veil to identify the individuals who are the ultimate beneficial owners of the entity. In such circumstances, the courts disregard the company’s separate legal identity in order to punish the actual perpetrators of the fraudulent conduct. The courts have frequently lifted the corporate veil where they suspect that the company itself is a sham entity created for an unlawful purpose or through unlawful means.

Notably, in order to aid identification and regulation of such individuals, in 2018 the Ministry of Corporate Affairs in India introduced the Significant Beneficial Ownership Rules (the “SBO Rules”), which define the criteria for constituting a significant beneficial owner (SBO) in a company. The SBO Rules require the reporting company to submit specified information pertaining to SBOs to the Registrar of Companies (ROC), 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 for identifying ultimate beneficial ownership among 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 shareholders' interests.

The 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. For 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.

The Delhi High Court has clarified 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 disgorgement, are civil actions in the nature of equitable relief.

The Companies Act also permits institution of class actions before the National Company Law Tribunal to 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. For a company that has 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 members 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. For a company without a share capital, a "class" has been defined as not less than one fifth of the total members of such a company.

Recently, the National Company Law Tribunal (NCLT) admitted India's first corporate class action suit under Section 245 of the Companies Act instituted by minority shareholders. The order of admission was challenged before the National Company Law Appellate Tribunal (NCLAT), which dismissed the appeal and upheld the maintainability of the class action.

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims Under the Contract Act

A suit for declaration of contract rendered void on account of fraud, or for claiming damages on account of such fraud committed by a private party, may require the joinder of an overseas party. Such joinder is governed by the CPC, which does not distinguish between joinders of an overseas party and a domestic party. 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). Courts may issue a notice/summons to an overseas party, and, if they fail to appear or defend, 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. Where a decree is sought to be enforced in 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

Indian law 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, allegations involving criminal aspects of fraud, forgery or fabrication, and which hit at the very formation of the contract, fall within the domain of public law and must be adjudicated by the courts.

Indian law has evolved to permit joinder of non-signatories to an arbitration, be it domestic parties or overseas parties. Courts have also applied the “group of companies” doctrine for the joinder of parties to an arbitration. This doctrine was authoritatively recognised by the five-judge Constitution Bench of the Supreme Court of India in *Cox & Kings Ltd v SAP India (P) Ltd*, 2023 INSC 1051. In doing so, the Supreme Court has held that consent may be implied in some situations to include a non-signatory to an agreement as party to an arbitration if the circumstances show that the mutual intention of all the parties was to bind both the signatory and the non-signatory affiliate.

Fraud Under the Companies Act

While the Companies Act provides punishment for fraud under Section 447, its application to overseas entities is limited. A foreign company, under Section 2 (42), refers to 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 an electronic mode; and
- conducts any business activity in India in any other manner.

Under Section 379 of the Companies Act, 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 by one or more companies or bodies corporate incorporated in India, whether singly or in aggregate, such company must comply with specified provisions of the Companies Act for its business in India as if it were incorporated in India.

Further, Section 380 of the Companies Act provides for service of any process, notice or other document required to be served on a foreign companies, while Section 228 permits inspection, inquiry or investigation into their affairs.

Criminal Proceedings

Indian courts may exercise jurisdiction over criminal acts committed with a fraudulent intent under the BNS when the act has been committed by:

- any citizen of India residing beyond India;

- any person on a ship or aircraft registered in India, wherever it may be; and
- any person who commits an offence involving a computer source in India.

Where such jurisdiction exists, the BNSS provides for an elaborate process for the valid service of summons or warrants, etc, in any contracting “state”, through an authority for transmission. India has entered into mutual legal assistance treaties/arrangements (MLATs) with various countries that 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 where an MLAT is involved 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 for enabling 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 in cases where properties forming proceeds of crime are taken or held outside India.

4.2 Service of Proceedings out of the Jurisdiction

The BNSS governs criminal procedure in India, including the issuance of summons by a court (or a police officer through the court) for the production of any document or material necessary for the purposes of any investigation, inquiry or trial. Such summons may be issued to any person believed to be in possession of relevant information.

The BNSS also prescribes procedures for service of summons or warrants in a contracting “state”, through an authority for transmission. As stated in 4.1 **Joining Overseas Parties to Fraud Claims**, India has entered into MLATs with various countries/contracting states to facilitate such co-operation. India also participates in multilateral frameworks such as the FATF and Inter-

national Criminal Police Organization (Interpol), which enable member states to share and access data on crimes and criminals as well as offer a range of technical and operational support. Additionally, India has bilateral treaties providing for mutual legal assistance, information sharing and extradition.

The requests for service of such judicial documents outside India are processed by the Ministry of Home Affairs (MHA), which examines the request upon receipt to ensure that it is compliant with the provisions of any bilateral or multilateral treaty or any other international convention to which both India and the receiving country are signatories. It also examines the summons request to verify compliance with Indian law and the laws of the foreign recipient country. The request is then sent through the Ministry of External Affairs to the “Central Authority” of the reciprocating country. Service of summons is ultimately carried out in accordance with the laws and procedures of the requested country.

5. Enforcement

5.1 Methods of Enforcement

Civil Proceedings

A decree obtained by a petitioner based on a claim of fraud in contractual disputes 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 prescribes the procedure for executing decrees in India. Courts have held that all execution petitions must be disposed of within six months of their filing, failing which an executing court must record the reasons for delay.

Foreign decrees may also be enforced in India provided they satisfy the test of finality under Section 13 of the CPC. Under Section 44A of the CPC, decrees of superior courts of a reciprocating territory are executable in India as decrees passed by an Indian district court. If the decree is passed by a non-reciprocating territory, the procedure under Indian law is to institute a civil suit seeking recognition and, thereafter, enforcement of the foreign decree.

Similarly, a domestic arbitral award under the A&C Act is enforceable as a court decree under Section

36, subject to challenges under Section 34. A foreign award may be enforced in India where the court is satisfied that it fulfils the conditions provided for in Sections 44, 48 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, investigations may be conducted by agencies exercising powers under the BNSS, including 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.

In a significant ruling, the Delhi High Court in *RK Gupta v Union of India* (2023:DHC:9243) held that the SFIO, an investigating agency under the Companies Act, has the power to investigate offences under the Indian Penal Code (now BNS) in addition to the power to investigate offences under the Companies Act. However, on appeal, even though the Supreme Court of India refused to entertain a challenge against the High Court judgment, it did observe that, since the issue as to whether SFIO inspectors are “police officers” under the CrPC (now BNSS) did not directly arise for consideration in said case, the High Court judgment cannot be treated as a precedent in this regard.

In a recent decision, the Karnataka High Court has held that two parallel investigations by the SFIO and CBI arising out of the same set of facts is permissible. This has been challenged before the Supreme Court, where the issue is presently pending adjudication.

Additionally, to secure the presence of an accused, a criminal court may issue bailable or non-bailable warrants. In serious cases of fraud, where accused persons may be evading arrest, the executive can issue Look-Out Circulars (LOCs) to alert immigration authorities to inform law enforcement agencies if such an accused person is found to be leaving India or even travelling into India. Issuance of LOCs, however, does not automatically lead to arrest; it only results

in accused persons being prevented from travelling out of India.

5.2 Enforcement of Foreign Judgments

Under Section 44A, a “reciprocating territory” refers to any country or territory outside India that has been declared by the central government as such, and “superior courts” refers to those courts specified in the relevant notification. India has designated 13 reciprocating territories under Section 44A – namely, the United Kingdom, Singapore, Bangladesh, Malaysia, Trinidad and Tobago, New Zealand, the Cook Islands (including Niue), Western Samoa, Hong Kong, Papua New Guinea, Fiji, Aden and, more recently, the United Arab Emirates.

A foreign judgment rendered by a superior court in a reciprocating territory may be enforced in India by filing an execution application before a competent Indian court, accompanied with a certified copy of the decree and a certificate from the relevant superior court of the foreign jurisdiction, indicating any amounts that have been satisfied under the decree. It is important to note that a foreign judgment is not subject to a review on the merits; rather, it must only satisfy the conditions outlined in Sections 13 and 44A of the CPC.

Upon the filing of the application, the court issues notice to the judgment debtor directing them to show cause as to why the decree should not be executed. If the judgment debtor fails to appear or provide an adequate explanation, the court will recognise and enforce the foreign decree as though it were an Indian judgment. The court will then permit the decree holder to execute the judgment against the assets of the judgment debtor. The decree holder may also apply to the court for directions requiring the judgment debtor to disclose any assets. If such assets are disclosed, the court will proceed with the attachment and sale of those assets.

The limitation period for enforcing a foreign judgment is governed by the limitation period of the “cause country” – the reciprocating territory from which the judgment originates. Therefore, the decree holder loses the right to enforce the judgment in India if they fail to initiate enforcement proceedings within the limi-

tation period prescribed by the cause country. Additionally, if the decree holder has initiated enforcement proceedings within the prescribed limitation period in the cause country but the judgment is not fully satisfied, the right to apply under Section 44A will arise only after the execution proceedings in the cause country are concluded. The application may be filed within three years of the finalisation of the execution proceedings in the cause country.

In contrast, judgments from non-reciprocating territories cannot be directly enforced in India. Instead, the plaintiff must file a fresh suit in India. This suit may be filed in the court of first instance that has territorial and pecuniary jurisdiction to pass a decree based on the foreign judgment. Such an action is treated as any other suit filed before an Indian court, where the parties have the right to present evidence and make arguments on the merits of the case. The limitation for filing such a suit under the Limitation Act is three years.

6. Privileges

6.1 Invoking the Privilege Against Self-Incrimination

Criminal Proceedings

A right against self-incrimination is innate in Indian jurisprudence; it has been guaranteed as a fundamental right by Article 20 (3) of the Constitution of India, and is reflected in various other statutes, including the BNSS and the BSA. This protection applies to all forms of testimonial evidence, including oral testimony and production of documents, and is available both at the pretrial stage and during the trial. A witness may refrain from giving evidence that may result in self-incrimination, and, since the burden of proof is on the investigation agencies and the prosecution, adverse inference cannot be drawn from exercising this fundamental right.

However, certain special statutes apply where the burden of proof is on an accused to prove that punitive actions should not be exercised against them. For example, the Supreme Court recently held that protection of the right against self-incrimination guaranteed under Article 20 (3) is not available to a person

whose statement is recorded under the PMLA, since the nature of proceedings conducted by the ED under the Act is that of “inquiry” and not investigation per se. However, such right will be available once a person is arrested for the offence of money laundering under the PMLA.

Civil Proceedings

In civil proceedings, the right against self-incrimination does not apply in the same manner. Consequently, courts may draw adverse inferences where a party fails to produce evidence or refuses to testify in defence of their case, consistent with Section 119 of the BSA.

6.2 Undermining the Privilege Over Communications Exempt From Discovery

In India, privilege from disclosing communications between a lawyer and their client is statutorily recognised under Sections 132 (1), 132 (3) and 133 of the BSA, respectively, and under Section 227 of the Companies Act, protecting communication between a client and lawyer even after the relationship ends. However, privilege does not apply where:

- communication is made in furtherance of any illegal purpose; or
- any fact observed by any lawyer, in the course of their employment as such, shows that any crime or fraud has been committed since the commencement of their employment.

Privilege may also be waived where a client expressly waives their privilege or adduces evidence and offers themselves as a witness, in which case they may be compelled to disclose any communication, which, in the opinion of the court, is necessary in order to explain any evidence they have led, and no other. This has to be read in the context of Section 133 of the BSA wherein, by merely volunteering to give evidence, such a privilege is not waived. The Section also contemplates that, if a party calls in their lawyer as a witness, they may be deemed to have consented to such disclosure only if they question their lawyer on fact, which otherwise would have been protected from disclosure under Section 132 (1) of the BSA.

Although Section 132 (1) of the BSA refers to “bar-rister, 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. While the Advocates Act 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 in Section 134 of the BSA uses an even wider connotation of “legal professional adviser”, which has not been defined in the Advocates Act.

However, it is to be noted that, under the Bar Council of India Rules (the “BCI Rules”), when a lawyer joins a company under full-time employment, they are under an obligation by such rules to surrender their registration as an advocate. This conundrum creates a complexity in recognising privilege of 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, some High Courts have taken the view 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 (now BSA) would not be available to such lawyers.

In a recent significant ruling, the Supreme Court of India has held that compelling lawyers to disclose client communications undermines constitutional protections, including the right to legal representation and the right against self-incrimination under Article 20 (3). The Court observed that summoning an advocate without proper basis reflects investigative overreach.

The Court therefore laid down a two-fold test for the rare circumstances in which an advocate may be summoned:

- explicit reasons must be stated in the summons explaining why the statutory exception applies, subject to judicial review; and

- prior written approval must be obtained from an officer not below the rank of Superintendent of Police, who must record prima facie satisfaction that the exception applies.

7. Special Rules and Laws

7.1 Rules for Claiming Punitive or Exemplary Damages

In Indian law, punitive or exemplary damages may only be granted in certain cases, such as tortious claims, IPR matters or where the relevant statute so allows such damages to be imposed. Such damages are often awarded in cases where the party in breach of an agreement has behaved in an outrageous, reprehensible or objectionable manner. In contractual disputes, damages are primarily governed by Sections 73 and 74 of the Contract Act, which generally do not permit punitive or exemplary damages.

Section 73 of the Contract Act provides for compensation for breach of contract which results in actual damage 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 them which “naturally arose in the usual course of things”. Compensation cannot be given for any remote and indirect loss or damage sustained by reason of the breach. The aim is to allow for a party to be placed, as far as money can allow, in as good a situation as though 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 them. 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 the 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.

However, Indian courts have consistently limited this to reasonable compensation where the stipulated sum represents “genuine pre-estimate of damages” agreed by the parties. Courts have clarified that the phrase “whether or not actual damage or loss is proved to have been caused thereby” does not dispense with proof where such loss can be proved. Only where damage or loss is difficult or impossible to prove may the liquidated amount named in the contract be awarded without proof of actual loss. Amounts stipulated in terrorem cannot be granted under Indian law. This principle therefore limits the scope of exemplary or punitive damages under the Contract Act.

These principles may not strictly apply in cases involving fraud, as fraud unravels all, and any contract obtained by fraud would make it voidable. In such cases, Section 65 of the Contract Act applies, which provides that any person who has received any advantage under such an agreement or contract is bound to restore it, or to make compensation to the affected party, thereby placing the innocent party in the position they would have occupied had the contract not been entered into. This principle has been further diluted by Indian courts to the effect that the primary aim of awarding compensation is restitution rather than punishment. 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 incorporated under the SEBI Act and Section 212 (14A) of the Companies Act. As stated in **3.3 Shareholders’ Claims Against Fraudulent Directors**, the Companies Act already allows for seeking freezing of 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 for directing disgorgement under the SEBI Act. It was noted that a repayment of ill-gotten gains imposed on wrongdoers is a monetary equitable remedy designed to prevent a

wrongdoer from unjustly enriching themselves as a result of their 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 imposes a statutory 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 applies to:

- 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
- intermediaries processing payments under the Payment and Settlement Systems Act, 2007.

Breach of these obligations is 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 from being compelled to produce bankers’ books or testify regarding their contents unless specifically directed by a court for special cause.

The Indian Information Technology Act, 2000 also recognises financial information (such as a bank account, credit card, debit card or other payment instrument detail) to be sensitive personal data and prohibits any disclosure thereof unless personally consented to by the entity/person to whom it belongs, or without con-

sent when sought by investigating agencies in accordance with the law. These obligations have been further bolstered under the newly enacted Digital Personal Data Protection Act, 2023 (“DPDP Act”).

On 13 November 2025, the government notified the Digital Personal Data Protection Rules, 2025 (“DPDP Rules”). This notification forms part of a series of measures issued by the central government to operationalise the DPDP Act, including staggered commencement of its provisions and the establishment and constitution of the Data Protection Board of India (DPB). The substantive compliance obligations under this framework are to take effect after a transition period of 18 months, allowing entities time to strengthen data governance practices, technological systems and compliance processes.

The Companies Act also safeguards against disclosure of third-party sensitive financial information, where such information is sought by bankers of any company under investigation (other than the information of the company itself).

However, banking secrecy is not absolute. Banks may be compelled, through summons and processes issued in accordance with the law, to disclose such information. 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 their books of accounts or face a penalty for non-compliance as specified under various statutes. Such statutes include:

- the Income Tax Act, 1961;
- the Foreign Exchange Management Act, 1999;
- the Customs Act, 1962; and
- the BNSS.

Additionally, 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 investigation. Banks and intermediaries are also subject to limited disclosure under the Right to

Information Act, 2005 where information held by them qualifies as public information.

7.3 Crypto-Assets

India presently has no dedicated legislation governing crypto-assets. Although the government of India introduced the Cryptocurrency and Regulation of Official Digital Currency Bill, 2021 to prohibit private crypto-assets and create a framework for a digital currency issued by the Reserve Bank of India (RBI), this has not materialised into substantive legislation. The government of India has stated that any regulation on crypto-assets will be finalised only after international consultation.

The Finance Act, 2022 (the “Finance Act”) recognised, for the first time, taxation of certain virtual digital assets (VDAs) as a basis for recognising the income generated from such VDAs. While this does not expressly legitimise VDAs, it taxes income from VDAs at 30% and every transaction involving such VDAs at 1% tax deducted at source.

Notably, the Finance Act introduced a new clause (47A) in Section 2 of the Income Tax Act defining a VDA as “any information, code, 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 [which] functions as a store of value or a unit of account and [this] includes its use in any financial transaction or investment but [is] not limited to investment schemes, and [which] can be transferred, stored or traded electronically”. Non-fungible tokens and any other token of a similar nature are included in this definition.

The Finance Act recognised 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 presently recognised as legal tender under Indian law.

The RBI has repeatedly cautioned parties from dealing with cryptocurrencies, and through a circular dated 6 April 2018 has asked banks and entities regulated by the RBI to not allow use of the banking system for trade in crypto-assets. However, in *Internet and Mobile Association of India v RBI*, the Supreme Court of India struck down this circular, allowing banks to serve entities/persons dealing in crypto-assets. Nevertheless, through its circular dated 31 May 2021, the RBI has also advised its regulated entities to continue to carry out customer due-diligence processes for transactions in VDAs, in line with regulations governing standards for know-your-customer, anti-money laundering, and the combating of financing of terrorism obligations under the PMLA.

In March 2023, the government of India formally brought “cryptocurrency” and VDAs under the regulatory ambit of the PMLA. It is now mandatory for any person dealing with cryptocurrencies and/or virtual digital assets to comply with reporting requirements. There are increasing incidents of law enforcement authorities freezing crypto-assets where they are suspected of being involved in the commission of crime.

This nuanced area is becoming a topic of debate, as by their very nature “asset tracing” of crypto-assets presents 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 in light of the potential impact of attachment or confiscation of such property (given that a public ledger does not allow change of ownership in a traditional way).

Trends and Developments

Contributed by:

Vijayendra Pratap Singh, Priyank Ladoia, Arjun Narang and Puneet Dhanoa
AZB & Partners

AZB & Partners was founded in 2004 as a collaboration between the founding partners, Mr Ajay Bahl, Ms Zia Mody and Mr Bahram Vakil. With a clear purpose to provide reliable, practical and full-service advice to clients across all sectors, and having grown steadily since inception, AZB & Partners now has offices across Mumbai, Delhi, Bangalore and Pune, with an accomplished and driven team of over 500 lawyers who are 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. This strength allows the firm to provide bespoke counsel to its diverse clientele and assist them in negotiating dynamic and volatile business environments. The firm has been ranked in Chambers and Partners' global ranking 2023 as a leading firm.

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Introduction

The relationship between the Insolvency and Bankruptcy Code, 2016 (IBC) and the Prevention of Money Laundering Act, 2002 (PMLA) has become one of the most significant areas of contemporary financial jurisprudence in India. Both statutes pursue important but distinct public objectives. The main purpose of the IBC is to ensure that the company undergoing insolvency proceedings is revived or liquidated expeditiously within a stipulated timeframe, whereas the objective of PMLA is to identify, attach and confiscate the proceeds of crime arising out of a criminal activity and to prosecute economic offenders.

When these two statutory regimes intersect, particularly in cases involving large corporate frauds, the resulting legal tensions can be complex. In recent years, the challenge has been to ensure that enforcement actions under the PMLA do not unnecessarily frustrate legitimate insolvency resolution processes, while simultaneously preserving the ability of the State to pursue money-laundering investigations and prevent offenders from benefiting from illicit gains.

This article examines the recent developments signalling a policy shift towards a more harmonised approach that recognises that effective insolvency resolution and anti-money laundering enforcement are not mutually exclusive.

The Statutory Framework: the IBC and PMLA *Objectives of the IBC*

The IBC was enacted to consolidate India's fragmented insolvency regime and to introduce a time-bound, creditor-driven process with the goal of maximising the value of assets while balancing the interests of all stakeholders. The preamble of the IBC emphasises the reorganisation and insolvency resolution of corporates in a manner that maximises asset value, promotes entrepreneurship, ensures credit availability and balances stakeholder interests.

At the heart of the IBC is the corporate insolvency resolution process (CIRP), which culminates in either the approval of a resolution plan or the liquidation of the corporate debtor. The resolution plan, once approved by the adjudicating authority under Section 31 of the IBC, becomes binding on the corporate debtor and all stakeholders, including creditors, employees, guarantors and government authorities. This statutory finality is critical since resolution applicants commit substantial financial resources based on the certainty that the approved plan will provide a clean slate and a predictable liability landscape.

The courts in India have, in a plethora of cases, repeatedly reaffirmed this position, holding that the success of the IBC framework depends on said certainty. If resolution applicants remain exposed to unforeseen liabilities or enforcement actions affecting core assets, the incentive to participate in resolution processes would be significantly reduced. Thus, the IBC places

considerable emphasis on finality, predictability and value maximisation.

Objectives and enforcement mechanism under the PMLA

The PMLA operates in a fundamentally different domain, being a penal statute aimed at combating money laundering and depriving offenders of the proceeds of crime. The Directorate of Enforcement (ED) is the investigating agency under the PMLA, and is empowered under Section 5 of the PMLA to provisionally attach property believed to constitute proceeds of crime, subject to confirmation by the adjudicating authority.

The attachment mechanism under the PMLA serves a dual purpose – ie, it ensures that:

- suspected tainted assets are preserved pending investigation and adjudication, thereby preventing their dissipation; and
- the attached property remains secured and traceable as material evidence of the alleged money-laundering offence, enabling the ED to establish the trail of proceeds of crime.

The PMLA also provides for eventual confiscation by the central government following prosecution and conviction by the special court under the PMLA.

However, the attachment under the PMLA creates friction when the assets of a corporate debtor undergoing CIRP – which are essential for preserving the going-concern value of the corporate debtor – are simultaneously subject to PMLA proceedings.

Under the PMLA, the adjudicating authority may release the property where a person satisfies the adjudicating authority that their acquisition is bona fide, legitimate and for fair market value paid therefor. A bona fide third party is one who can demonstrate by cogent evidence that they acquired a lawful interest in the property for adequate consideration, or in the case of a financial creditor that it acquired the interest prior to commission of the predicate offence or had no complicity in the money-laundering offence and exercised strict due diligence.

The Statutory Mechanism for Asset Restoration: Deconstructing Sections 8 (7) and 8 (8) of the PMLA

The PMLA contains an important but underutilised mechanism for the restoration of attached property, provided under Sections 8 (7) and 8 (8). In situations where the money-laundering trial cannot proceed or be completed – such as in cases of the accused's death, the accused absconding or other reasons – the special court is empowered to pass appropriate orders for confiscation or release of the property.

Further, the special court is empowered to order restoration of property (in whole or in part) to a claimant with a legitimate interest who has suffered a quantifiable loss due to the offence of money laundering. The special court must be satisfied that the claimant acted in good faith, took reasonable precautions and was not involved in the money-laundering offence. The provision thus protects bona fide third parties including financial creditors by allowing restitution of tainted assets, and it may be invoked even during the pendency of the trial.

In the insolvency context, the aforesaid provisions have acquired renewed significance as they provide a statutory pathway through which assets attached under the PMLA may be made available for the benefit of creditors/resolution applicants.

However, a likely hurdle to restitution of assets under Section 8 (8) of the PMLA can arise on account of Rule 3A of the Prevention of Money-Laundering (Restoration of Confiscated Property) Rules, 2016. Rule 3A states that, for the special court to exercise power of restoration of property and entertain an application under the second proviso to Section 8 (8) of the PMLA, it is mandatory for the charges under Section 4 of the PMLA to have already been framed. Only after the framing of charges is done can an application for restitution be filed – this requirement was recently reaffirmed by the Supreme Court in *Nav Nirman Builders & Developers Pvt Ltd v Union of India*, 2026 INSC 130.

Considering that trials under the PMLA are often lengthy and a considerable period of time is typically required before the stage for framing of charges is reached, the requirement imposed by the Supreme

Court and the PMLA rules mandating the framing of charges as a precondition operates as a significant impediment to the smooth and timely restitution/restoration process envisaged under the PMLA.

Statutory Immunity Under Section 32A of the IBC

Section 32A of the IBC was introduced through the IBC (Amendment) Act, 2020, which came into force on 28 December 2019. As per Section 32A, liability for offences of the corporate debtor committed prior to the CIRP ceases if:

- a National Company Law Tribunal (NCLT)-approved resolution plan is in place; or
- there is a change in management or control to an eligible person.

The immunity under Section 32A only applies if the new person in control is not:

- a promoter or part of the erstwhile management;
- a related party to the former management; or
- suspected by investigators of abetting or conspiring in the offence.

No action can be taken against the corporate debtor's property for prior offences once the control changes to an eligible person as per Section 32A(2) of the IBC. Such action includes attachment, seizure, retention or confiscation of property under such law applicable to the corporate debtor.

The provision represents a legislative attempt to strike a balance – ie, while the corporate debtor and its assets receive protection post-resolution, individual wrongdoers (including promoters and officers responsible for the misconduct) remain fully liable to investigation and prosecution.

From Collision to Coexistence: the BPSL Landscape

The pre-existing uncertainty

It is crucial to understand how the courts and tribunals historically grappled with the IBC-PMLA conflict. Both statutes contain non-obstante clauses, in Section 238 in the IBC and Section 71 in the PMLA, leading to a complex tug-of-war situation.

The early consensus heavily favoured the supremacy of the PMLA in matters involving tainted assets. Various courts in India observed that the moratorium under the IBC does not apply to criminal proceedings or penal actions under the PMLA. The National Company Law Appellate Tribunal (NCLAT), in *Rotomac Global Private Limited v Deputy Director, Company Appeal (AT) (Insolvency) No 140 of 2019*, held that the PMLA can be invoked simultaneously with the IBC, with neither having an overriding effect over the penal actions of the other. Later, the NCLAT in *Kiran Shah, RP of KSL and Industries Ltd v Enforcement Directorate, Company Appeal (AT) (Insolvency) No 817 of 2021* held that the NCLT fundamentally lacks the jurisdiction to handle issues falling under the purview of the PMLA.

The Delhi High Court in *Rajiv Chakraborty RP of EIEL v Directorate of Enforcement WP(C) 9531/2020* held that Section 32A acts as the terminal point, since authorities under the PMLA would cease to have power to attach or confiscate when a resolution plan has been approved or where a measure towards liquidation has been adopted. The constitutional validity of Section 32A was upheld by the Supreme Court in *Manish Kumar v Union of India*, (2021) 5 SCC 1, while noting that protecting the corporate debtor's assets post-resolution is critical to economic revival and ensuring that new investors are not haunted by the sins of the erstwhile management.

Despite these clarifications, the physical release of assets remained a significant procedural bottleneck. This was exemplified in *Anil Kohli v Directorate of Enforcement, Company Appeal (AT) (Insolvency) No 389 of 2018* when the NCLAT reiterated that PMLA attachments validly made prior to the CIRP could not be undone merely because the insolvency process was ongoing. This persistent friction set the stage for the pivotal BPSL litigation, which ultimately necessitated a shift towards the current model of structured co-operation.

The pivotal point

The Supreme Court's decision in *Kalyani Transco v Bhushan Power and Steel Ltd*, 2025 INSC 1165 and *Kalyani Transco v Bhushan Power and Steel Ltd*, 2025 INSC 621 (BPSL) serves as the definitive pivot point

as it exposed the ongoing friction between the anti-money laundering mechanisms and CIRP efforts.

BPSL was one of the “dirty dozen” – ie, the 12 major corporate defaulters identified by the Reserve Bank of India (RBI) for immediate resolution. The CIRP commenced in July 2017. After extensive bidding and negotiations, JSW Steel Limited (JSW) emerged as the successful resolution applicant (SRA) with a resolution plan of INR19,350 crores, which the NCLT approved on 5 September 2019.

However, in parallel with this, in April 2019 the Central Bureau of Investigation (CBI) filed a First Information Report (FIR) alleging large-scale siphoning and diversion of funds by BPSL’s erstwhile promoters. Thereafter, the ED registered an Enforcement Case Information Report (ECIR) and started proceedings under the PMLA. The ED issued a provisional attachment order under Section 5 of the PMLA on 14 October 2019, attaching BPSL’s assets worth over INR4,000 crores. The issue arose when the assets that JSW was attempting to acquire and revive were suddenly frozen and completely inaccessible, stalling a recovery for the financial creditors. Faced with the prospect of the entire resolution collapsing, JSW challenged the ED’s attachment before the NCLAT, which stayed the attachment in October 2019.

In the meantime, a major legislative shift occurred. The government introduced the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, inserting Section 32A into the IBC, which acts as a “clean slate” mechanism and grants immunity to the corporate debtor and its property from prior offences once a resolution plan is approved.

Relying heavily on this new Section 32A, the NCLAT delivered its judgment in February 2020. The NCLAT declared that the ED lacked the power to attach the assets once the resolution plan was approved, ruling the ED’s attachment to be illegal and without jurisdiction.

This was also challenged before the Supreme Court, and the core issue was whether the NCLAT had the authority to quash an order passed by the ED. In its May 2025 judgment, the Supreme Court drew a firm

line in the sand. It clarified that the NCLT and NCLAT are products of company law, whose jurisdictions are strictly circumscribed by the IBC. They do not possess the power of judicial review over decisions made by statutory authorities operating in the realm of public law such as the ED under the PMLA. The Court held that the NCLAT’s decision to declare the ED’s attachment illegal was beyond its authority.

While the Supreme Court protected the jurisdictional integrity of the PMLA, it acknowledged the financial reality. If the attached assets were not released, JSW could not implement the resolution plan, and the recovery of INR19,350 crores of public money would fail. Furthermore, the newly enacted Section 32A could not be applied retrospectively to automatically make the ED’s 2019 attachment void.

To bridge this deadlock, the ED filed an affidavit suggesting that, under the peculiar circumstances of the case, JSW be permitted to take control of the attached properties by treating the handover as restitution under Section 8 (8) of the PMLA, read with Rule 3A of the Prevention of Money Laundering (Restoration of Property) Rules. The Supreme Court accepted this mechanism, directing the ED to immediately hand over control of the unencumbered assets to JSW, thereby unlocking the stalled resolution plan.

However, subsequently in May 2025, the Supreme Court set aside the resolution plan, taking into consideration certain technical aspects. Being aggrieved by the May 2025 judgment, review petitions were filed before the Supreme Court by JSW (being the successful resolution applicant) and others.

The Supreme Court took into consideration that the corporate debtor was running into substantial losses which had become profitable, and thousands of employees had been earning their livelihood on account of the corporate debtor running as an ongoing concern due to the resolution plan. Therefore, the Supreme Court ultimately allowed the resolution plan to continue while upholding the objectives of the IBC.

The trajectory of the BPSL litigation is crucial for asset-tracing as it maps the evolution of the legal framework. The Supreme Court confirmed that, while

insolvency tribunals cannot strong-arm the ED into releasing assets, the PMLA's own internal mechanism can be actively used to bring proceeds of crime back into the corporate rescue ecosystem. This specific breakthrough in the *BPSL* case served as the direct catalyst and legal foundation for the recent Insolvency and Bankruptcy Board of India (IBBI) and ED circulars, which have now institutionalised this restitution process as a standard operating procedure for all future insolvency cases.

Institutional Harmonisation: a Standardised Protocol for Restitution

A major policy development occurred with the release of the IBBI Circular dated 4 November 2025, and the press release dated 5 November 2025 by the ED. Both of these steps collectively established a standardised mechanism through which insolvency professionals may seek restitution of assets attached under the PMLA during CIRP or liquidation.

The solution achieved in the *BPSL* case highlighted the need for a systemic, standardised approach. Recognising this, the IBBI and the ED issued said co-ordinated directives in November 2025.

The IBBI issued a circular advising insolvency professionals that, in cases where assets of a corporate debtor are attached by the ED, insolvency professionals should formally file an application before the special court under Sections 8 (7) or 8 (8) of the PMLA for the restitution of those assets. Simultaneously, the ED released a press release affirming its proactive support for IBC resolutions, declaring that strict enforcement under the PMLA and value maximisation under the IBC are not conflicting objectives.

To expedite these applications, the IBBI formulated a mandatory standard undertaking to be filed by insolvency professionals before the special court. This undertaking imposes strict compliance safeguards, including:

- usage of restituted assets – the insolvency professionals must guarantee that the restituted assets are not sold or transferred to anyone ineligible under Section 29A of the IBC, nor can they benefit any person accused in the ED's proceedings;

- periodic reporting – the insolvency professional is required to submit quarterly status reports to the special court, detailing the usage, monetisation and distribution of the assets;
- co-operation and disclosures – the insolvency professional must extend full co-operation to the ED, proactively reporting preferential, undervalued, fraudulent or extortionate (PUFE) transactions, and sharing detailed information regarding the Committee of Creditors and the SRA; and
- document production – while non-commercially sensitive documents must be provided immediately, commercially sensitive data (such as valuation reports) are protected and only shared once the ED acknowledges their sensitivity in writing.

By institutionalising this process, the circular and press release respect the Supreme Court's boundary set in *BPSL* as they keep the jurisdiction to release assets firmly within the special PMLA courts, avoiding overreach by the insolvency professionals and providing a clear, lawful pathway to access frozen assets.

Conclusion

The co-ordinated response by the IBBI and ED reflects a broader policy recognition. It recognises the prolonged conflict between insolvency and PMLA proceedings and that this ultimately harms the public interest. In large corporate frauds, the principal financial creditors are often public sector banks. Therefore, delays in resolution or uncertainty can significantly erode asset value and undermine creditor recoveries, which ultimately affects banks and the public exchequer.

However, as highlighted above, such restitution may be permissible under the PMLA Restitution Rules, which allows for consideration of applications under Section 8 (8) PMLA only after framing of charges in the trial initiated by the ED. Practically speaking, in some cases the stage of framing of charges may take years, in which case the introduction of this co-ordinated protocol may fall victim to the substantive delays in investigation and criminal trials. While the new framework directly addresses uncertainty surrounding attached assets as one of the major sources of delay, further consideration may be required to resolve the issues that could arise in its implementation.



Law and Practice

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Chen, Yaari, Vaki & Co. is a boutique firm located in the heart of the business and legal hub of Tel-Aviv. The firm specialises in civil-commercial litigation and representation in white-collar cases. The civil department, headed by advocate Yitzhak Yaari, handles civil-commercial litigation of every kind, including shareholder disputes, defrauding investors, international arbitrations, asset recovery and class actions. The

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1. Fraud Claims

1.1 General Characteristics of Fraud Claims

There are many judgments in Israeli case law relating to acts of fraud, including serious fraud, bribery, forgery and theft, and less extreme cases such as misrepresentations or breaches of fiduciary duties (of corporate officers, custodians, trustees, etc). Someone who is injured by an act of fraud is entitled to relief under Israeli law, according to the general approach of Israeli law that “where there is a right, there is also a remedy” (*ubi ius ibi remedium*). The specific cause of action can be found in various statutes, whether general ones such as the Torts Ordinance, the Contracts Law or the Unjust Enrichment Law, or specific legislative frameworks such as the Companies Law, the Securities Law, the Agency Law, the Trust Law, the Mutual Trust Law, etc.

These lawsuits, in which the plaintiff alleges fraud, misrepresentation, malice or undue influence, require a particularly high standard of proof that exceeds the one required in an ordinary civil claim (although not the standard of proof of beyond all reasonable doubt, which is required in criminal proceedings). Therefore, these claims are often filed after the defendant has already been convicted in a criminal proceeding: under Section 42A of the Evidence Ordinance, the findings and conclusions of a final criminal judgment convicting a defendant will be admissible in a civil trial as *prima facie* evidence of the matters determined. This eliminates the need to re-establish the defendant’s liability. As a rule, and wherever possible, it is recommended that clients who have fallen victim to fraud file civil proceedings before criminal proceedings are commenced in order to secure access to the fraudster’s assets and recover from them before they are seized by law enforcement authorities.

1.2 Causes of Action After Receipt of a Bribe

The crime of bribery is regarded as one of the most serious economic crimes and has been described by the Supreme Court as “the worst crime that corrupts the integrity of the civil service.” There are many civil causes of action that are available to a company when one of its officers accepts a bribe: the torts stated in the Torts Ordinance, namely fraud, theft and negligence; breaches of fiduciary duties and statutory

duties, and unjust enrichment. According to the case law of the Supreme Court, “It is self-evident that the court will not be sympathetic to someone who takes a bribe, not for personal reasons but for reasons in the public interest and public ethics... It is therefore natural that the courts will also treat someone who gave a bribe severely in a civil proceeding filed against him and make it as easy as possible for the plaintiff to prove his damage” (CA 711/72 *Naftali Meyer v Jewish Agency for Israel* [1974] IsrSC 28 (1) 393, 402).

Moreover, someone who has been injured by a bribe is entitled to sue the person who received a bribe for the amount that they received, even without proving that the plaintiff suffered damage, based on the principle that “no wrongdoer should be allowed to profit from his own wrongdoing.” Thus, for example, in one case, the State filed a civil lawsuit against a person who was convicted of taking bribes in return for information that came into his possession in the course of carrying out his duties (advance information about the making of surprise inspections). In that case, the Supreme Court held that the defendant enriched himself at the State’s expense and therefore could be held liable under unjust enrichment law. However, it was also held that even if the defendant had not enriched himself at the State’s expense, he could be held liable under the principle that no wrongdoer should profit from their own wrongdoing.

Another basis for holding someone who took a bribe liable is the law of fiduciary duties. The law recognises that in certain cases a person has a fiduciary duty towards others. This is the case in the relationship between an agent and their principal, between a manager and the corporation, between a trustee and a beneficiary, and other situations in which the interests of one person have been entrusted to another. When someone breaches a fiduciary duty, they may be deprived of the profit they made by breaching the duty, and the profit may be transferred to the person to whom they owed a fiduciary duty.

1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts

Since there are causes of action in tort against the fraudster, there is nothing to prevent suing anyone who aided them in the act of fraud. The liability of

the aider is stated in Section 12 of the Torts Ordinance [New Version], according to which “someone who participates in, aids, advises or induces an act or omission that was done or is about to be done by another, or commands, permits or ratifies them, will be liable for them.” The aider’s liability does not derogate from the fraudster’s liability, and they are jointly and severally liable to the injured party. The condition for imposing liability on an aider is that they contributed to the commission of the tort, that they are aware of (or even merely turned a blind eye to) the wrongful conduct, and the aider materially contributed to the commission of the tort.

Anyone who bought or received an asset from someone who obtained the asset fraudulently will be liable to return the property to its lawful owner, since it is a basic principle that no one can pass on to another more rights than they have (*nemo dat quod non habet*). The exception to this is the “market overt” doctrine, which is stated in various statutes of which the best known is the Sale Law, according to which if anyone buys a tangible asset (but not a right) for consideration from someone who is in the business of selling assets of that type, in the ordinary course of business, received it and acted in good faith, their right will prevail over the right of the person from whom the asset was taken unlawfully (such as by fraud or theft).

1.4 Limitation Periods

The usual limitation period in civil claims is seven years. However, Section 7 of the Prescription Law provides that “the running of limitations for a claim will be suspended as long as the plaintiff does not file a claim because the defendant, or someone acting on his behalf, knowingly misleads the plaintiff, exerts force on him, threatens him or takes advantage of his distress.” This Section was amended in 2015 and expanded the old section that only dealt with a claim based on fraud. The courts tend to construe the law so that claims of fraud are not dismissed because of limitations. Therefore, it was held that in order for the limitation period to start, actual and subjective knowledge of the fraud is required, rather than the objective knowledge of a reasonable person. Only knowledge that can be established by evidence in court will be regarded as actual knowledge, whereas suspicions are insufficient to fulfil the requirement of subjective

knowledge. It was further held that “the court should not go out of its way to dismiss a case against a fraudster because of limitations, and any doubt should work against the fraudster” (CA 4683/16 *Israel Electric Corporation Ltd v Estate of the late Asher Cohen* (23 January 2019)).

Another relevant section is Section 8 of the Prescription Law, which provides that if the facts constituting the cause of action were unknown to the plaintiff, for reasons beyond their control and which could not have been prevented even with reasonable care, the limitations period will begin to run on the date on which the facts became known to the plaintiff. Therefore, as long as the plaintiff does not know the facts that constitute a cause of action of fraud, the limitations period does not begin to run.

1.5 Proprietary Claims Against Property

The right of tracing is recognised in Israel. As part of the tracing process, a new asset is identified as a potential subject of a lawsuit based on its being a substitute for an original asset that was itself the subject of the lawsuit. The new asset replaces the old one and may therefore be exposed to the same lawsuits. A distinction should be made between “tracing” and “following”: in the “following” process, the goal is physically to locate a specific tangible object that has passed from hand to hand. In such a case, the plaintiff’s goal is to realise their right in relation to the original object. Their right in such a case is based on their property right in the object. On the other hand, in the “tracing” process, the focus is on the substitute asset that came into the hands of the original holder instead of the previous asset, and the plaintiff’s right is based on the laws of unjust enrichment.

One way or another, an order may be obtained to return the asset to the plaintiff whose property was stolen, provided that the original property or the substitute asset is identifiable. Funds can be traced even if they have mixed with other money.

The right of tracing is overridden by someone who bought the asset in market overt, provided the conditions for the acquisition are met, especially the purchase of the asset for consideration and in good faith. Moreover, according to the Unjust Enrichment Law,

the court has discretion not to order restitution when the restitution is unjust, but only when the claim is not a proprietary claim. Thus, for example, if A stole an asset from B and sold it to C in conditions that do not constitute market overt, A can sue for the asset, and the court cannot exempt C from restitution. However, if A stole an asset from B, sold it and gave the sale proceeds to C, here too A can sue C for the money, but the court can exempt C from restitution if it is found to be unjust.

Unlike in tort law, which focuses on the damage suffered by the plaintiff, unjust enrichment law focuses on the benefit received by the defendant and provides that it should be returned to the plaintiff. Therefore, in so far as profits accrued from the stolen property before it was returned to the plaintiff, the plaintiff will also be entitled to those profits.

1.6 Rules of Pre-Action Conduct

There is no obligation in Israel to conduct preliminary proceedings before filing a fraud claim.

1.7 Prevention of Defendants Dissipating or Secreting Assets

In a fraud claim filed in court, as in any other civil lawsuit, the plaintiff may petition the court for temporary orders that will preserve the status quo. As a rule, a motion for a temporary order should be filed after a statement of claim has been filed (or at the same time that it is filed), but in urgent cases, this can be done even before the lawsuit is filed, provided that the lawsuit is filed within seven days of the date on which the order is given or within any other period ordered by the court.

The customary order for seizing assets is an order for a temporary lien on the defendant's assets held by them or by a third party. Beyond that, it is possible to obtain:

- a temporary injunction (including a Mareva order);
- a temporary receivership order (in which it is possible to obtain powers to enter premises, seize assets, search computers, etc);
- an order to seize evidence in the defendant's possession or control; and

- an order preventing the defendant from leaving the country.

Most of these orders do not require the defendant's co-operation, but if a defendant violates an order made against them, contempt of court proceedings can be filed against them, which allows the imposition of sanctions including a fine or imprisonment.

The application of interim orders is territorial. However, a Mareva order effectively also allows for the seizure of assets outside the jurisdiction, because it is a personal order that prohibits the debtor, who is within the jurisdiction, from disposing of their assets, irrespective of their location.

No fee is payable for filing a motion for a temporary order, but a fee is payable for filing a lawsuit in court. In the case of a pecuniary claim, a fee of 2.5% of the amount claimed (up to approximately NIS28.5 million, and 1% of the amount claimed above that) is payable; half the fee is payable upon filing the claim, and the other half is payable before the trial hearings begin.

A motion for temporary relief filed in court should be accompanied by the applicant's undertaking to compensate the person against whom the temporary order is made for any damage caused by the granting of the temporary relief if the relief will expire or will be limited in scope, as well as surety at the court's discretion.

Interim orders can also be obtained in arbitration proceedings, but in this regard, a distinction should be made between ordinary arbitrations and international commercial arbitrations. In ordinary arbitrations, which are litigated under the Arbitration Law, 5728-1968, the court must be petitioned under Section 16 of the Arbitration Law to obtain interim relief. By contrast, international commercial arbitrations are not governed by the general Arbitration Law, but by the International Commercial Arbitration Law, 5784-2024, which authorises the panel of arbitrators to grant interim relief without requiring a petition to the court. This law adopted the model law formulated by the United Nations Commission on International Trade Law (UNCITRAL).

2. Procedures and Trials

2.1 Disclosure of Defendants' Assets

There is no recognised proceeding in Israel in which the defendant is required to declare their assets so that they can be seized to ensure the enforcement of the judgment. Instead, the plaintiff must locate the defendant's assets and apply for their freezing to ensure the enforcement of the judgment. In most cases, locating the assets is done before the filing of the statement of claim through investigation firms. When the plaintiff knows of the existence of certain assets owned by the defendant, but does not know where they are located, they can request the appointment of a temporary receiver, who will be authorised, *inter alia*, to search for and locate the assets, to enter premises to locate and seize them, protect them, manage them, and, where appropriate, improve their value.

2.2 Preserving Evidence

Section 123 of the Civil Procedure Regulations, 5779-2018, authorises the court to grant an Anton Piller order to appoint someone to seize evidence for the purpose of conducting a search, copying or seizing evidence in the respondent's possession or control. Evidence is defined as "a document, including information stored on digital or electronic media, and objects, where there is a reasonable likelihood that they will be used as evidence in a lawsuit or they are necessary for adjudicating it." The condition for granting the order is that the court is persuaded that there is a real concern that the respondent or someone else acting on their behalf may conceal the evidence, alter it or destroy it, and this will seriously impede the litigation of the proceeding or the discovery of the truth.

Like a temporary receiver, the person appointed to seize the evidence can also receive extensive powers, such as:

- the power to search for and locate the evidence;
- enter premises to locate and seize evidence;
- search computer material, copy documents stored on electronic media; and
- exercise any authority, power or right given to the owner or holder of the assets.

Naturally, the hearing of the motion to grant an order to seize evidence is generally *ex parte*, and the hearing in the presence of both parties is only held after the seizure of the evidence. Because of this, and because of the violation of privacy that such an order may cause, the courts are cautious in granting the order.

As stated, among the powers that can be given to the person appointed to seize evidence is the power to enter premises. The Regulations establish rules for entering premises, such as giving suitable notice to the person against whom the order was made and informing them of their right to consult a lawyer by telephone. At the request of the person responsible for the premises, the appointee should explain to them in clear language the meaning of the order and that refusing to allow it to be carried out constitutes contempt of court and may be used as evidence in the legal proceedings. Entering the premises should be done in the presence of the person responsible for the premises, as well as two witnesses who do not have a personal or professional relationship with any of the parties (unless the person responsible for the premises does not wish the presence of witnesses or the court orders otherwise for special reasons).

The conditions for conducting a search and the seizure of a computer and computer material are:

- explicit authorisation to perform the search and seizure;
- appointment by the court of an experienced office-holder to perform the search (unless the person responsible for the premises agreed to perform the search themselves); and
- ensuring that, during the search, no access is permitted to information from communications between computers (unless the person responsible for the premises is the one who performs the search).

2.3 Obtaining Disclosure of Documents and Evidence From Third Parties

As a rule, a court in Israel will not issue an order against a third party who is not a party to the legal proceedings ordering them to disclose documents and evidence. The usual way of obtaining documents in the possession of a third party is by summoning them

to testify through the court, while specifying that they are required to bring the requested documents with them. The court has the power to order a third party to disclose and produce documents and evidence, but it will only use this in special and exceptional cases, and only after it has carefully and meticulously examined the facts of the case and ascertained that the requested disclosure is indeed related to the issues in dispute. The exceptional cases that have been recognised as allowing the use of this power include:

- when a claim is made of a conspiracy between the party to the proceeding and the third party;
- when the third party is owned or controlled by the party to the proceeding;
- when bank documents are requested, and prima facie evidence is presented that the bank account is in fact an account of the party to the proceeding, even though it is not registered in their name, or that the party transferred money to the third party's account in bad faith and with the aim of concealing this fact, in co-operation with the account holder.

2.4 Procedural Orders

Israel's Civil Procedure Regulations provide that motions for temporary relief are heard in the presence of both parties, but a court "may, for special reasons, grant temporary relief ex parte, if it is persuaded, based on sufficient evidence, that there is a reasonable concern that the delay caused by holding the hearing in the presence of the parties or serving the motion on the respondent will frustrate the purpose of the temporary relief or cause the applicant serious harm." This rule, according to which the motion will be heard in the presence of both parties, does not apply to a motion for a temporary lien and a motion for seizing evidence, which will generally be heard ex parte.

In the decision granting provisional temporary relief (ie, relief granted ex parte, before the hearing in the presence of both parties), the court needs to schedule a hearing in the presence of all the parties as soon as possible and no later than 14 days after the provisional order was granted (unless it finds special reasons for ordering a later date). Notwithstanding, when a temporary lien order or seizure order is issued ex parte, the court will not schedule a hearing in the presence of both parties unless the respondent (or the holder)

requests the cancellation of the order. A provisional order that is granted ex parte must be served on the other party without delay and no later than three days after the order was granted.

Someone who applies to the court ex parte has a greater duty of good faith, is required to disclose all the relevant details to the court, and if they are in doubt as to whether they should disclose any particular detail, they are required to disclose it. A lack of good faith or a failure to disclose a detail that should have been disclosed may result in the order being set aside.

2.5 Criminal Redress

Naturally, victims of fraud often file a complaint with the police. If an investigation is indeed opened, it often leads to a delay – sometimes for years – of the hearing of civil proceedings (usually at the request of the State Attorney's Office), for fear of disrupting the investigation and the criminal proceedings. As part of criminal proceedings, the police often seize the suspect's property. For these reasons, it is often recommended to file civil proceedings and not initiate criminal proceedings, which may delay the civil proceedings and harm the victim's chances of recovering assets from the fraudster.

2.6 Judgment Without Trial

When the statement of claim has been properly served on the defendant, and they do not file a statement of defence on time, the court may be petitioned to grant judgment based on the statement of claim. In such a case, the court may require the plaintiff to provide sufficient proof of the claim, in whole or in part, or give judgment based on the statement of claim alone.

The defendant may petition the court to cancel a judgment given in the absence of a defence. Such a motion will be granted if the defendant proves that the statement of claim was not properly served on them. Even if the service was duly effected, the court has discretion to set aside the judgment, especially if the likelihood of success of the defence is high. The courts in Israel "do not like" judgments given in the absence of a defence, and they tend to grant motions to cancel such judgments, while compensating the

plaintiff for the damage caused to them by the defendant's procedural failure by awarding costs.

Moreover, when a statement of defence is filed, and the court finds that the statement of defence does not show any defence, it has the power at a pre-trial hearing to grant judgment accepting the claim. Exercising this power is exceptional and will be done only when there is no doubt that the defence has no chance of success.

2.7 Rules for Pleading Fraud

As stated in **1.1 General Characteristics of Fraud Claims**, lawsuits in which the plaintiff claims fraud, misrepresentation, malice or undue influence require a particularly high standard of proof, which exceeds the standard of proof required in an ordinary civil claim. Such claims – as well as pleadings of conspiracy, deliberate deception, breach of fiduciary duties, illegal withdrawal of money, etc – also require greater factual details in the plaintiff's written pleadings, including the full details and their dates. The logic of this is that such claims tarnish a person's reputation, and in some cases, the commission of the alleged act also constitutes a criminal offence. Such claims should not be raised in vague terms, and the party against whom the claim is made should be given the information that will enable them to understand the case against them. Without details, the court may refuse to hear the claim, which means that the claim may be dismissed.

2.8 Claims Against "Unknown" Fraudsters

The question of whether it is possible to file a lawsuit in Israel against an anonymous person whose identity is unknown was addressed by the Supreme Court in one case, where anonymous messages defaming someone were published on the internet, and they sought to file a lawsuit under the Prohibition of Defamation Law (LCA 4447/07 *Rami Mor v Barak ITC* [1995] *International Telecommunication Services Ltd.* (25 March 2010)). It was held (by a majority) that a lawsuit cannot be filed in Israel against a person whose identity is unknown. Israeli law does not allow this, and even explicitly provides that the plaintiff must state the defendant's name, as well as their identity number, address and telephone number, if they can be ascertained.

Following this ruling, the Copyright Law was amended by adding a specific arrangement that allows the District Court to order the disclosure of the identity of a person who performs actions that constitute copyright infringement through an electronic communications network. This procedure allows the applicant, who claims a copyright infringement, to petition the court to order a third party (such as an internet service provider) to provide information that will help to identify the infringer, subject to certain conditions such as a real concern of infringement and the likelihood that the claim will be decided in the applicant's favour.

2.9 Compelling Witnesses to Give Evidence

A witness who is lawfully summoned and fails to appear to testify may be subject to various sanctions. The first of these is a subpoena, which orders the witness to be brought before the court. The order is carried out by the police, who may arrest the witness and bring them before the court. Moreover, the court may fine a recalcitrant witness and even make an imprisonment order against them. If the court has a reason to believe that a person summoned to testify or produce a document will not appear or produce the document, it may order the witness to provide surety or make any order it thinks fit to ensure that they appear, including the deposit of a passport and an order prohibiting them from leaving the country. Failure to appear to testify is also a criminal offence.

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on a Corporate Entity

Section 47 of the Israeli Companies Law provides that "The actions and intentions of an organ are the actions and intentions of the company." This adopts the doctrine known as the "doctrine of organs," according to which human qualities of thought and action may be attributed to a corporation, even though it is not a human being. Therefore, according to the case law of the Supreme Court, when an officer of a company commits an act of fraud, the company can also be found liable (in addition to finding the officer liable), provided that the officer's act was done in the course of performing their duties and was done for the benefit

of the corporation (or at least was not directed against it). The test of whether the act was done in the course of the officer performing their duties is a broad one: whether they acted in their capacity as a “corporate individual” rather than as a private individual.

In addition to liability by virtue of the doctrine of organs, vicarious liability can sometimes be attributed to a company because of the acts of persons who acted on its behalf. Thus, for example, a company may be liable under the Torts Ordinance for a tort that was committed by one of its employees (even if they are not an organ) or by an agent.

3.2 Claims Against Ultimate Beneficial Owners

A finding that a company is liable does not mean that its organs have no liability for their actions, nor does it grant them immunity in torts. If an officer, in their position in the company, deceives, misleads, misrepresents, conducts negotiations in bad faith, performs a contract in bad faith, etc, they will be personally liable, whether the company is also liable or not. Moreover, Section 6 of the Israeli Companies Law provides the doctrine of raising the veil, according to which a court may attribute a debt of a company to a shareholder if it finds that it is just and right to do so in the circumstances of the case, in the exceptional case where the company’s separate legal personality is used, *inter alia*, to defraud someone. This section is intended to prevent shareholders from hiding behind the corporate veil in order to avoid being sued by victims of fraud.

3.3 Shareholders’ Claims Against Fraudulent Directors

By means of a derivative action, a shareholder or director can compel the company to sue its officers when they caused damage to the company. This tool is intended to solve the representative problem, which arises when the directors themselves caused damage to the company. A shareholder (or director) who wishes to file a derivative action is usually required to write first to the company and demand that it enforces its rights by filing a lawsuit. If this demand is refused (or ignored), the court can be petitioned to allow the filing of a derivative action. The court will certify the motion if it is persuaded that the claim and its litigation

are in the company’s best interest and the plaintiff is not acting in bad faith.

Usually, even before the motion for a derivative claim is filed, a motion for discovery relating to the process of approving the derivative claim is filed in court. This motion will be approved if the court is persuaded that there is a preliminary basis in evidence regarding the conditions for certifying the derivative claim.

Upon certification of the motion to file a derivative action, the applicant files the claim and litigates it on behalf of the company. At the end of the lawsuit, the court awards attorney’s fees, which are usually paid by the company, as well as remuneration for the plaintiff who took the trouble to file and litigate the derivative claim. These amounts are usually determined as a percentage of the benefit derived by the company from the claim.

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims

Naturally, there is nothing to prevent suing a foreign individual or corporation in Israel, or to join a foreign individual or corporation as a defendant together with Israeli defendants. The jurisdiction over the foreign party is acquired by serving the statement of claim on that party. If the defendant has a representative in Israel, it can simply be served on the representative. If not, the documents must be served outside the jurisdiction. According to the 2018 Regulations, it is no longer necessary to obtain the court’s approval in advance for serving a party outside Israel, but there is a long list of cases where a party may serve a statement of claim outside the jurisdiction. What these cases have in common is the existence of a certain connection to Israel, whether a personal connection of the defendant or a substantive connection relating to the cause of action.

However, it is still necessary to apply to the court to order the way in which service will be performed, and the court has the authority to prevent service of the documents. The court will not prevent service outside the jurisdiction if it finds that the claim satisfies one of the grounds stated in the Regulations as allowing

service outside the country, and it is not a frivolous or vexatious claim.

In addition, the court needs to be persuaded that the State of Israel is the proper forum for litigating the proceeding. This last condition gives the court discretion not to assume jurisdiction over the case, if the natural forum for hearing the case is not Israel. The decisive criteria in this context is “the most connections test,” in which the facts indicating a connection between the parties or the subject-matter of the claim and the competing forums are examined. The considerations taken into account include the place where the events occurred, the domicile and business of the parties, access to evidence and witnesses, the law governing the case and the efficiency of the hearing.

4.2 Service of Proceedings out of the Jurisdiction

Israel, like dozens of other countries, is a signatory to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which was concluded in The Hague in November 1965. The Convention was ratified and incorporated into Israeli law by means of the Regulations for the Implementation of the Convention, which allow for the service of documents in member states of the Convention (including the United States and all European Union member states). One of the ways listed in the Convention is service by mail. Courts in Israel also recognise service through an international courier company, by personal delivery with confirmation of service, as an alternative to service by mail.

There are several countries that are signatories to the Convention (such as Germany, the Czech Republic, Greece, Lithuania, Poland and Slovakia) that have had reservations about the clause that allows service by mail. In order to serve a statement of claim on a defendant who is in any of these countries, the approval of the Courts Administrator in Israel should be obtained, according to which the service request complies with the provisions of the Convention and the Regulations, and the document should be served through the Courts Administration in Israel to the central authority in the destination country.

5. Enforcement

5.1 Methods of Enforcement

Enforcement of a judgment in Israel is done through the Enforcement Office. Usually, 30 days after judgment is given, an enforcement file can be opened against the defendant, and if the defendant does not comply with the judgment within 20 days, enforcement proceedings can be filed against them, such as:

- imposing liens on movable property, real estate, and money held by a third party;
- imposing various restrictions (such as restrictions on passports, leaving Israel and the use of debit cards);
- appointing a receiver; and
- eviction proceedings, and other similar measures.

To enforce an arbitration award, the award must first be approved by the court. This is a simple procedure, which may be lengthened if the defendant files a motion to cancel the arbitration award. In a motion to cancel an arbitration award, the court does not act as an appellate court with respect to the arbitrator, and it only needs to consider whether there were defects, such as that there was no valid arbitration agreement at all, that the arbitrator exceeded his authority, that the content of the award is contrary to public policy, etc. When an arbitration award is approved, it can be enforced at the Enforcement Office.

When the court granted a temporary lien order or a temporary injunction (including a Mareva order), and the plaintiff wins the case, the orders become final and will continue to remain in effect until the judgment is performed (or until a further order of the court), in order to bridge the period of time between the giving of the judgment and the opening of the enforcement file and prevent the concealment of assets at this stage.

Even if temporary orders were not requested or granted, the court may grant relief to ensure the performance of the judgment, when giving the judgment or immediately thereafter. Such a motion, for relief when the judgment is given or shortly thereafter, does not require the deposit of any surety or undertaking by the

applicant (unlike in the case of a motion for temporary relief).

5.2 Enforcement of Foreign Judgments

A foreign judgment is enforced by filing a lawsuit petitioning the court to declare the foreign judgment enforceable. The conditions for enforcing a foreign judgment are:

- the judgment was given in a country whose laws authorise the courts to give it;
- the judgment cannot be appealed;
- the obligation in the ruling is enforceable according to the laws of Israel and its content is not contrary to public policy; and
- the judgment is enforceable in the country where it was given.

When a judgment is declared enforceable, it can be enforced at the Enforcement Office like any Israeli judgment.

A foreign arbitration award is enforced in Israel according to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), to which Israel is a party. According to this Convention, the award is submitted to the court, which will approve the award unless the respondent proves any of the conditions stated in Article 5 of the Convention, which are:

- the arbitration agreement is invalid or the parties to it were under some incapacity;
- a party was unable to present their case in the arbitration proceeding;
- the award does not fall within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;
- the award is not in accordance with the arbitration arrangements agreed by the parties, or failing such agreement, is not in accordance with the law of the country where the arbitration took place;
- the award is not valid because it has been set aside or it is not final according to the law in the country where it was given;
- the subject matter of the dispute cannot be decided by arbitration; or

- the recognition or enforcement of the award is contrary to public policy.

6. Privileges

6.1 Invoking the Privilege Against Self-Incrimination

The right to remain silent is limited to criminal proceedings – to a suspect in a police investigation and a defendant in an indictment – but not to a party or witness in a civil trial. By contrast, everyone has a right to immunity against self-incrimination, which is enshrined in Section 47 of the Evidence Ordinance, which provides that “a person is not obligated to give evidence if it involves an admission of a fact that it is one of the elements of a criminal offence of which he has been or may be indicted.”

According to the case law of the Supreme Court, immunity from self-incrimination allows a litigant in a civil proceeding to refuse to answer a question asked in interrogatories or to disclose a document that they claim is protected by privilege. In such a case, the other party may object to this by filing a motion petitioning the court to determine whether the privilege does indeed apply, and for this purpose, the court may review the document. If the court orders the question to be answered or the document to be disclosed, it may not be used in a criminal proceeding unless the accused consents.

Even if the right to insist on privilege against self-incrimination is given to a party in a civil proceeding, it is not necessarily advisable for them to insist on this right, since a party’s refusal to answer questions or disclose documents can be taken into account when assessing the credibility and weight of their testimony, because in a civil proceeding, the parties need to “show their cards” (and for the same reason, they need to disclose all the relevant documents to the other party).

6.2 Undermining the Privilege Over Communications Exempt From Discovery

Section 48 of the Evidence Ordinance provides the well-known privilege of “statements and documents exchanged between a lawyer and his client or another

er person on behalf of the client and which have an objective connection to the professional service provided by the lawyer to the client.” This is an absolute privilege, which cannot be set aside even by a court order, but it does not extend to a lawyer’s advice to their client on how to commit a future offence. Such advice has no objective connection to the professional service provided by a lawyer to the client and is not included at all in the scope of the privilege (in the words of the Supreme Court in *CrimA 670/80 Baruch Abuhatzeira v State of Israel*: “This is a purely criminal and illegal matter, which is very far from what the legislature intended to protect by means of the privilege between a client and a lawyer and his employees”). Certainly, an agreement between a lawyer and their client for the two of them to commit a criminal offence is unrelated to professional services and is not privileged. Information that a client gives to their lawyer about their intentions and plans to commit an offence in the future is also not privileged information. Moreover, if a client tells a lawyer of their intention to commit a felony, and the lawyer does not prevent the commission of the offence, they commit a criminal offence.

7. Special Rules and Laws

7.1 Rules for Claiming Punitive or Exemplary Damages

The rule is that a person is only liable to pay compensation for the damage they caused. However, there are some specific laws in Israel that give explicit authority to award punitive (or exemplary) damages, ie, compensation that does not have a “remedial” or “corrective” basis but punishes the tortfeasor by requiring them to pay compensation that exceeds the amount of the damage. Thus, for example, the Patent Law entitles the patent owner to punitive damages if the patent was infringed after the infringer was warned of the infringement. The Compensation for Victims of Terrorism (Punitive Damages) Law entitles the heirs of a victim of terrorism to compensation in a sum of NIS10 million, in addition to any other damages awarded, from someone who transferred money to the perpetrator of the terrorist act. The Consumer Protection Law entitles the consumer to punitive damages in a sum of NIS10,000 if the dealer breaches certain consumer obligations.

Moreover, as early as the 1950s, the courts in Israel recognised the possibility of ordering a tortfeasor to pay punitive damages, even without an express provision of statute to this effect. This power is exercised in rare cases involving a particularly severe injury, accompanied by a high degree of fault, when the tortfeasor’s behaviour is abhorrent and reprehensible. Fraud or forgery are obvious cases that satisfy these conditions and in which courts have awarded punitive damages.

7.2 Laws to Protect “Banking Secrecy”

A bank owes its customers a duty of confidentiality, according to which it is prohibited from disclosing information about customers to third parties. A distinction should be made between bank confidentiality, which applies outside legal proceedings, and banking privilege, which relates to legal proceedings. This privilege is not determined by statute, but is the product of case law, and it is therefore a relative privilege, ie, it can be removed in certain conditions. The privilege, which also applies after the death of the account holder, derives from the contractual duty of confidentiality that a bank owes its customer, together with the general statutory confidentiality provision determined in the Protection of Privacy Law.

When it determines whether the privilege should be removed, the court will strike a balance between the following considerations:

- the importance of the information to deciding the dispute;
- the existence of evidence that justifies the disclosure;
- the lack of alternative that will not invade privacy; and
- the scope of the disclosure needed to do justice.

When the confidential banking information relates to a party (to the legal proceeding), the starting point is that the interest of disclosure, which is required to hold a proper judicial proceeding, outweighs the privacy interest of the party. This is certainly the case when there are claims of fraud.

By contrast, when the protected information belongs to a third party who is not a party to the proceed-

ing, a disclosure order will only be made in rare and exceptional circumstances. Usually, there is no reason to order the disclosure of bank accounts of someone who is not a party to the proceeding, except in the case of a concern of collusion between the party and the account holder, such as a concern that the account is in the name of a straw man but actually belongs to the party, or that the party is the person depositing the money into the account. Where the party acts in the account of a third party as if it were their own by means of a power of attorney, or in a case where the third party is a company owned or controlled by the party to the proceeding, the court will also tend to order the disclosure of the account. As a rule, a third party who is likely to be harmed by the disclosure order should be allowed to present their case regarding the disclosure.

7.3 Crypto-Assets

Crypto-assets, such as wallets and digital currencies, are assets like any other and can be seized, attached and used to recover by a judicial order. The police and prosecuting authorities routinely seize wallets containing digital currencies as part of investigations and criminal proceedings, and there is also no impediment to doing this by means of temporary orders in civil proceedings, and naturally to realising these assets in enforcement proceedings.



Law and Practice

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LAWP Studio legale e tributario is a law and tax firm with more than 20 years of providing assistance in corporate and commercial transactions (including M&A, financing, and joint ventures), as well as in tax matters, to private and corporate clients alike. It successfully operates in civil, commercial and tax law by pooling the expertise of lawyers and chartered accountants. LAWP professionals are particularly appreciated for their 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. They also advise on a wide range of complex commercial litigation and arbitration matters in the commercial, corporate, sports and financial sectors, with a focus on contractual claims, directors' liabilities, and tax litigation, as well as on international fraud and asset tracing. The team also assists in obtaining provisional measures and civil compensation, in enforcing foreign judicial decisions or measures, and in out-of-court undertakings.

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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 as an offence whereby the offender – using trickery or deception – misleads the damaged party, with the aim of procuring an unfair advantage to themselves or others and causing detriment to the damaged party.

Fraud requires the offender to misrepresent reality by giving the appearance of non-existing circumstances. Typically, the fraudster re-enforces their actions through astute schemes and manoeuvres – often with accompanying documents that have been either counterfeited or created to simulate or conceal this reality – in order to first gain the trust of the victim before misleading them into making a mistake. For the fraud to be criminally relevant, it has to cause a reduction in the assets of the victim or cause other damage to them.

Victims of fraud can also include the government (or government entities) and fraud may also target the obtainment of public funds. In such cases, the conduct of the fraudsters is sanctioned more severely and claims may be brought directly by public prosecutors.

If the victims of fraud are individuals, they must bring a claim filing a specific complaint, without which the

criminal proceeding cannot be initiated. This requirement has been strengthened by a recent major reform impacting criminal and civil proceedings, adopted through Legislative Decree No 149/2022 (“Decree 149/2022”), which extended the range of cases requiring a private complaint as a condition for the initiation of a criminal proceeding. By way of example, prior to Decree 149/2022, fraud causing huge damage to victims could be prosecuted directly by public authorities; now, owing to the introduction of said provision, the victim would need to file a formal complaint to public authorities. Following Decree 149/2022, fraud can be prosecuted directly by public authorities only if:

- it is committed against the State or another public authority or the EU;
- it is committed by generating fear of an imaginary danger in the victim or convincing the victim of a false need to follow an order by a public authority; and
- it is committed by taking advantage of circumstances to decrease the victim’s capacity for defence.

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 they 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

Misappropriation (Article 646 of the Italian Criminal Code) is distinct from fraud in that it is considered to take place when the offender is not using deception or schemes to defraud the victim but, rather, already has lawful access to the victim's money (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 – given that the statutory provisions are intended to protect both the assets of the victim and the interests of the public administration.

Making 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 whereby money or another benefit is sought to perform statutory duties or to omit/delay their execution (Articles 318 and 319 of the Italian Criminal Code), where the public function is systematically leaning towards private interests;
- corruption whereby the main objective of the corruptor is to illegitimately facilitate or penalise a party in a civil, criminal or administrative proceeding (Article 319-ter of the Italian Criminal Code); or
- abuse of power by public servants and officials forcing (Article 317 of the Italian Criminal Code) or inducing (Article 319-quater of the Italian Criminal Code) someone to unlawfully give or promise money or any other advantage (in this last case, sanctions are provided not only against the public servants and official, but also against the private subjects who unlawfully give or promise money or any other advantage).

Corruption within companies' management

Although the above-mentioned provisions govern corruption of public servants and officials, other statu-

tory provisions (Article 2635 of the Italian Civil Code (ICC)) punish corruption practices within companies' management. These provisions mainly target directors, general managers, statutory auditors and other management agents.

These agents 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 (Article 2635 bis of the ICC). In this last case, sanctions are reduced by one third.

Conspiracy and criminal association

When criminal actions are committed by two (or more) persons, all of them are sanctioned for the same offence (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 of the Italian Criminal Code).

In addition, Article 416 of the Italian Criminal Code 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 against 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 contractual undertakings between parties at many stages, from negotiation to performance of an agreement.

Articles 1137, 1175 and 1176 of the ICC 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 – for example, 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 ICC, the agreement may be cancelled (in cases where 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; however, the other party may seek damages to restore the contractual balance.

Other provisions protect from misrepresentation in other areas in corporate laws – for example, misrepresentation in financial statements, corporate communications and/or accounting documents – where offences are sanctioned under criminal law.

Additional consequences derive from misappropriation, misrepresentation, disguise 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, the offender who has received a bribe and the party paying, giving or promising the bribe are both 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 investigative 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 that have been involved in the bribery.

A claimant may also have the right to initiate a civil claim against 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 causing undue damages to others (Article 2043 of the ICC). 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**).

If the offender is an agent of a company, the company may also bring actions for mismanagement and breach of fiduciary duties, forcing the removal of the offender from the company's management 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 Italian Criminal Code, when several persons take part in the same offence, all of them may be sanctioned for the relevant offence without distinguishing between the author, co-author, instigator, facilitator, etc. Thus, each co-operator is not only liable for their own actions, but also for those actions committed by the other parties, if intended 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 Italian Criminal Code, which punishes (with imprisonment of up to eight years) anyone who – in order to secure a profit

for themselves or others – acquires, receives or conceals money or assets resulting from any offence. This provision punishes conduct that is not criminal in itself, but which may have criminal relevance if the offender is aware (or has reason to be aware) that money or goods they have acquired, received or concealed derive from a crime.

Similarly, money laundering provisions (Article 648-bis of the Italian Criminal Code) are intended to prevent co-operation that may help the author of the crime to hide and disguise the unlawful origin of said money, goods and profits.

Moreover, in 2015, the crime of self-money laundering was introduced (Article 648-ter¹ of the Italian Criminal Code) to prevent the author of the crime from reinvesting money, goods and profit from their previous offence.

In the event that 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 of the ICC).

1.4 Limitation Periods

For criminal actions, in accordance with Article 157 of the Italian Criminal Code, 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. By way of example, in the case of generic fraud under Article 640 of the Italian Criminal Code (for which offenders are subject to imprisonment for up to five years), the limitation period is six years.

For civil actions, Article 2946 of the ICC establishes a general limitation period of ten years, which starts from the moment when the relevant right may be exercised. Special limitation periods are established, for instance, for:

- indemnification claims deriving from a tort (five years);
- claims concerning corporate matters (five years); and

- revocatory actions for fraud 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 from them or that they were 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 that 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 of the Italian Criminal Code), 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 – for example, when targeting property that represents the converted proceeds of the fraud and/or the telematics and electronic devices used to commit a fraud. In the case of certain offences (eg, fraud against the State, to obtain public funds, abuse of a weak position of the defrauded, computer fraud, corruption, or within companies' management), 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 fraudulently induced, the contract is cancellable (Article 1439 of the ICC), as described in **1.1 General Characteristics of Fraud Claims**. 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 of the ICC).

Similarly, whenever assets are subject to misappropriation, the claimant has the chance to claw back their property from the defendant through an action for recovery (Article 948 of the ICC), intended 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 the 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 they have not received any indirect advantage from it, the damaged party may neither recover the assets from the bona fide third party nor 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’s office or with any other criminal police authority. A complaint must be made within three months following the date the offended party received notice of the relevant criminal act.

Certain fraud claims of higher importance can be initiated by the public prosecutor’s office on its own motion – for instance, fraudulent acts against the government, fraudulent acts implying considerable damage to the claimant’s property, fraudulent acts

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 ADR methods to facilitate out-of-court agreements. The two main ADR methods available are:

- mediation before a third-party mediator; and
- 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; and
- *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 the 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 of the Italian Code of Criminal Procedure) – 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. The Decree 149/2022 has excluded the possibility of ordering a conservative seizure solely to guarantee the paying of sanctions and court fees. Following investigations and indictment, it may be ordered by the competent court on money and assets belonging to the defendant and to other parties that fraudulently received ownership of said assets, as the transfer may be subject to claw-back actions.

- Preventative seizure (*sequestro preventivo*) (Article 321 of the Italian Code of Criminal Procedure) – this aims to prevent the offender (or other third party) maintaining access to assets related to the offence and 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 of the Italian Code of Criminal Procedure) – this is ordered in relation to the assets involved in the offence (including its proceeds) to avoid their concealment or destruction and ensure their availability as evidence in court.

Civil Proceedings

Civil proceedings also provide different types of remedies to freeze assets involved in fraud claims, which are detailed as follows:

- Conservative seizure (*sequestro conservativo*) (Article 2905 of the ICC and Article 671 of the Italian Code of Civil Proceedings (ICCP)) – this is requested on movable or immovable assets owned by the debtor, where there is a risk that the latter will dissipate said assets, affecting the creditors' rights. It may also target assets owned by third parties acquired fraudulently or in bad faith, or assets held by third parties subject to claw-back remedies.
- Judicial seizure (*sequestro giudiziario*) (Article 760 No 2 of the ICCP) – this is requested on books, records, documents and other means from which evidence is purported to be derived, so as 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, through publicity in the relevant public registries (in the case of immovable assets, vehicles and other registered assets) or through foreclosure and delivery of notices to third parties having possession

of other 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 constitutes a crime sanctioned with imprisonment up to one year and a monetary fine (Article 388 of the Italian Criminal Code).

Cross-Undertaking in Damages

Pursuant to Article 669-undecies of the ICCP, 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. Failing to comply with said order may result in a financial penalty. Disclosure orders cannot force the recipient to violate professional or state secrets (Article 118 of the ICCP). Furthermore, a defendant may be required by the judicial officer to disclose their assets during enforcement proceedings and forced expropriation (see **5. Enforcement**).

In the event that the debtor does not fulfil the order of further disclosure of assets imposed by the judicial authority, or makes a false statement, they 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,

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and records of social security institutions in order to acquire all information pertaining to the discovery of assets and claims to be enforced (Article 492-bis of the ICCP).

Criminal Proceedings

Criminal law provides the option to acquire documentary evidence in order to disclose relevant information regarding the defendant (Article 234 of the Italian Code of Criminal Procedure), including digital documents and data stored abroad (Article 234-bis of the Italian Code of Criminal Procedure). Documents representing the terms and the means of the offence may be acquired regardless of the person/entity who owns them (Article 235 of the Italian Code of Criminal Procedure).

Evidence may be obtained by several means (ie, inspection, search, seizure, order to disclose secret documents, wire-tapping) and can be searched for 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 evidence linked to the offence is found as a result of searching, it may be seized. Seizure may be carried out at third parties' premises, including banks, IT providers, and telecommunications companies (Articles 254-bis and 255 of the Italian Code of Criminal Procedure). By way of example, the judicial authority may proceed with the seizure of documents, values, sums deposited in current accounts and anything else from banks – even where contained in safety deposit boxes – when it has justified reasons to believe that they are pertinent to the offence, even if they are 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 – in particular, probatory seizure (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**) – when

it is necessary to preserve evidence in circumstances where there is a serious and actual fear that it may be destroyed or suppressed (Article 274a of the Italian Code of Criminal Procedure).

Generally, investigations are conducted by public prosecutors' offices and police officials (see **2.4 Procedural Orders**). However, the defendant may also carry out parallel and additional investigations through an attorney in order to adequately protect the defendant's right to defence (Article 327-bis of the Italian Code of Criminal Procedure) – for example, 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. These 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 the merits.

In such cases, the claimant may resort to one or more of the following remedies:

- prior examination of witnesses (Article 692 of the Italian Code of Criminal Procedure), 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; and/or
- prior technical assessment and judicial inspection (Article 696 of the Italian Code of Criminal Procedure), 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. 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 described in **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 the courts.

Criminal Proceedings

In addition to general measures to disclose evidence (see **2.2 Preserving Evidence**), additional remedies are granted to secure obtainment of evidence held by professionally qualified parties (eg, attorneys, notaries and investigators). 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 of the ICCP). 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 of the ICCP 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 (see **2.1 Disclosure of Defendants' Assets**) – namely, orders must be essential for the discovery of relevant facts and must be carried out without causing serious prejudice to the involved party or third person, and the involved parties cannot be forced to violate professional or state secrets. In the event of non-compliance, the court may order the payment of monetary fines.

When disclosure orders involve a third party, the court may require its direct participation in the trial. The third party 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 necessary to be acquired within the proceeding (Article 213 of the ICCP). The public authority must answer the request within 60 days, justifying any refusal.

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 this principle in some cases (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 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.

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, which must be held as soon as possible. At the hearing, the court may confirm, reform or revoke the urgent order.

The Decree 149/2022 introduced the option to have a civil proceeding with simplified investigation, which allows a faster decision on the merits (albeit with full participation of the defendant), when the facts of the case are not controversial, when the request is based on documentary evidence, or when the request requires a non-complex investigation activity (Article 281-decies of the ICCP). The possibility of resorting to this simplified procedure has been extended by Decree 164/2024 to the oppositions provided for by Articles 615 (first paragraph), 617 (first paragraph) and 645 of the ICCP and, on an optional basis, to all cases

in which the court adjudicates in a single-judge composition, even in the absence of the aforementioned prerequisites.

The same Decree 149/2022 also provided for the option for the court – during the course of the civil proceeding and upon request by a party – to issue an immediately enforceable order approving or rejecting the claimant's requests when the facts are already proven and the counterparty's claims appear manifestly ungrounded (Article 183-ter and 183-quater of the ICCP). The approving order under Article 183-ter of the ICCP is modified by Decree 164/2024 providing that the relevant provision, not further appealable, constitutes a title for the registration of a judicial mortgage.

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, whereas 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 their possession and proposes either the indictment of the suspect or the dismissal of the investigation to the judge for preliminary investigation.

Preliminary investigations need to be carried out without any risk of interference by the suspect or third parties, which may be detrimental to investigative 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, and seizures), the public prosecutor's office must send the defendant a notice of investigation indicating the alleged charges, together with an invitation to exercise the right to appoint a lawyer (Article 369 of the Italian Code of Criminal Procedure).

Furthermore, if a provisional measure is ordered (see 1.7 Prevention of Defendants Dissipating or Secreting Assets), its issuance is carried out ex parte – although 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 of the Italian Code of Criminal Procedure), or in a civil case that is then transferred to the criminal trial. This right, enforced by Decree 149/2022, must be exercised within the preliminary hearing.

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 may continue 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 is 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 despite being subject to a less rigid burden of proof – could in certain 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. However, in a criminal trial, the burden of proof regarding 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 they may be prevented from pursuing their civil claims.

2.6 Judgment Without Trial

The parties 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 they have actual knowledge of the proceedings against them. Once actual knowledge has been ascertained, the relevant trial continues even without the presence of the defendant, but they 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 they have been properly notified of the existence of the proceeding), the latter can continue without the defendant's participation. The defendant is kept informed about the main events of the proceeding (such as acts containing new claims, counterclaims, and court orders), and they will have the right to join it at any time until the hearing for closing arguments is held. If the defendant proves that the claimant's request or its servicing is void and that the defendant was not aware of the existence of the trial as a result (Article 294 of the ICCP), the court may restore all the defendant's reliefs and deadlines that 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 their pleadings against the defendant. In the event that 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 of the ICCP). Following Decree 149/2022, in some cases, the court may now also impose monetary fines on the party bringing a manifestly ungrounded claim (Article 96, paragraph 4 of the ICCP).

In the case of criminal proceedings related to fraud, the damaged party must make a complaint providing the public prosecutor and pertinent authorities with any relevant detail, evidence and information in their possession, so that the public prosecutor and pertinent authorities can promptly run investigations and support the indictment. Anyone who makes a claim intentionally accusing someone they know to be innocent, or who fabricates evidence against them, may be prosecuted for slander (Article 368 of the Italian Criminal Code). 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 yet been identified), indicating to competent authorities any useful circumstances that may help their identification. Following the report, however, the public prosecutor may ask the court to dismiss the case or authorise the investigations to continue if investigations have not led to a solution within six months. 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, being a witness 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 a witness's 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 fail to appear at the hearing without any justified reason, the court may order their forced appear-

ance 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 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 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 – given that 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 sub-

ject to a particular kind of liability for offences carried out by persons with 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 formally administrative in nature but acts mostly like criminal liability. It is autonomous and additional to the personal criminal liability of directors and officers.

To validly claim the existence of corporate criminal liability, the offence must be committed “in the interest or to the advantage of the organisation”. If the offender acts solely and exclusively in the interests or for the advantage of themselves or third parties, the organisation is not deemed liable.

The offences triggering liability of a company may include offences against public administration (ie, corruption and bribery), misrepresentation of financial information, tax fraud, money laundering, cyber-crimes, and environmental crimes. 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:

- a so-called Organisation, Management and Control Model (“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; and
- 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 in the case of limited liability companies.

However, members of partnership-like entities remain subject to joint and unlimited liability.

Claims targeting individuals behind the “corporate veil” usually take a two-tier approach, as follows.

- First, actions are brought against the individuals who formally hold roles and functions within the company, such as the actual directors and managing body.
- Second, remedies may be sought against shadow directors and ultimate beneficial owners, to the extent that 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 to the extent that they fall within the category of shadow directors.

Article 2086 of the ICC, as recently amended, also imposes upon owners and founders the duty to implement an organisational and management system adequate for the nature and size of the business in order to detect the onset of an insolvency situation and avoid harm to creditors and other third parties.

If a company subject to direction and co-ordination is used as a vehicle for fraud, the company’s shareholder and the company’s creditor, as the sole parties that have the right – pursuant to Article 2497 of the ICC – to bring action in this specific case, may take direct action against those responsible, namely:

- the controlling company; and
- jointly and severally, anyone who participated in the harmful act or knowingly benefited from it, within the limits of the advantage gained.

This provision protects company shareholders from damages in terms of profitability and the value of their shareholding, and company’s creditors from harm to the financial integrity of the controlled company.

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 for bringing 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 of the ICC), actions brought by the company against directors must 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 of the ICC), whereby 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 option 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 (that is 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 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, by way of example, Italian courts have jurisdiction over international information frauds if the offence – committed abroad by a foreigner – has produced effects in Italy. In addition, to a certain extent, special provisions regulate the 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 EU legal provisions on criminal judicial co-operation and introduced new instruments, principles and regulations concerning:

- mutual assistance in criminal matters between EU member states;
- conventions on extradition between EU 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; and
- 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 of Law 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 of Law 218/1995).

From an EU perspective, Regulation 1215/2012 (Brussels I-bis) establishes jurisdiction between EU member states and also provides for mutual recognition and enforcement of judgments on civil and commercial matters. This regulation is fully applicable in Italy.

Regulation 1215/2012, while confirming the jurisdiction of the country where the defendant is domiciled, is capable of stretching Italian jurisdiction to certain matters related to international fraud claims, including the following:

- for matters relating to a contract, if the relevant obligation had to be performed in Italy (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; and
- the enforcement in Italy of decisions taken by courts in other EU member states or the seeking of relevant provisional and protective measures in Italy.

4.2 Service of Proceedings out of the Jurisdiction

No response has been provided in this jurisdiction.

5. Enforcement

5.1 Methods of Enforcement

Enforcement of Criminal Sanctions (Articles 656 et seq of the Italian Code of Criminal Procedure)

Criminal enforcement may occur only after a judgment becomes final (Article 650 of the Italian Code of Criminal Procedure). Prior to the final decision on the merits, preventative measures may still be requested and authorised in order 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 through a detention order issued by a 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 as an alternative to custodial measures, enforcement may also involve the payment of monetary fines proportionate to the committed offence. Any failure to pay will result in an automatic conversion into detention.
- Ancillary sanctions: courts may also impose ancillary sanctions, which may have a serious impact on the convicted party from a personal, professional and reputational point of view (ie, a travel ban and disqualification from holding public office, or the executive offices of legal entities). Sanctions will also remain on the criminal record 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 most sought-after enforcement procedure in fraud claims – and, more generally, in monetary claims – is the expropriation of assets.

Expropriation is initiated with a foreclosure (see **2.1 Disclosure of Defendants' Assets**), which takes the following different forms (that can also be accumulated) depending on the targeted assets:

- movable assets or money in the possession of the debtor;
- movable assets or money of the debtor in the possession of third parties; and
- 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 the debtor's movable assets or money 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 of and/or return any of those assets. They 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 by any third party.

Once assets have been frozen through foreclosure, the final steps of the enforcement process are aimed at ensuring that the assets are sold or assigned. The sale of assets may take place by auction or without auction, as well as 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.

5.2 Enforcement of Foreign Judgments

No response has been provided in this jurisdiction.

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 they can refuse to provide information to investigators, to public prosecutors and to the courts. The defendant is also not obliged to tell the truth. 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 themselves, whereas in the event of a trial the defendant is examined and cross-examined only if they so request or express consent.

Unlike criminal proceedings, in civil proceedings, parties cannot take advantage of the right to silence or take the role of witness, as they are 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 relevant 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 the judge refers. 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

Lawyers must maintain the utmost confidentiality when it comes to professional activity carried out in favour of their client, as well as concerning information they become aware of in connection with their office. Only limited exemptions are provided to this principle – for example, 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, wire-tapping 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 of the Italian Code of Criminal Procedure).

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 finally acknowledged the applicability of punitive damages in some cases, 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 – namely, 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 – for example, infringement of patents and trade marks, environmental damage, or compensation for damages – even ex officio, for procedural liability where it appears that a party has acted or resisted recklessly in court with bad faith or gross negligence (Article 96, paragraph 3 of the ICCP).

7.2 Laws to Protect “Banking Secrecy”

The Italian legal system lacks an explicit legislative provision on banking secrecy. However, there are rules that – although not directly aimed at guaranteeing this secrecy – expand the protection of customers against 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 relation to 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 (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 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 EU legislators are trying to fill the regulatory gap by defining crypto-assets and imposing relevant limits. By way of example, in 2017 the Italian Ministry of Economics and Finance (MEF) included service providers related to virtual currency among the recipients of AML obligations, while in 2022 the Cryptocurrency Registry was established – through 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).

Legislative Decree No 129/2024, which transposes into Italian law Regulation 1114/2023 on crypto-assets markets, has assigned supervisory authorities, such as Consob and the Banca d'Italia, the responsibility to oversee and regulate operations related to crypto-assets. It has also introduced transparency and fairness obligations for operators, with the aim of protecting investors and ensuring market stability. Furthermore, administrative sanctions are foreseen for those who fail to comply with the regulations, in order to strengthen investor security and the stability of the crypto-assets market.

Prevailing jurisprudence admits:

- probatory seizure, performed by digitally extracting evidence of relevant transactions; and
- preventative seizure, performed either by seizing the agent's hardware or 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 – thanks to their anonymity – they are used to hide the illegal origin of funds.

Trends and Developments

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Fornari e Associati Studio Legale is a professional firm specialised in corporate criminal law and compliance, with 15 professionals at its offices in Milan, Rome and Bari. The firm's clients include banks, financial intermediaries, insurance companies, companies (also listed on regulated markets), national and multinational groups, public and private entities, and natural persons. The firm recently provided assistance in the criminal proceedings concerning the largest bribe contested in Italy to oil and gas companies, which ended with the full acquittal of all the

defendants. The firm also assists foreign clients who carry out their professional or business activities at a national level and provides its services to Italian clients with economic interests abroad. Among its main areas of activity are financial, banking, environmental, corporate and bankruptcy matters, tax and public administration criminal law, cybercrimes, corporate criminal liability, anti-corruption matters, internal investigations, privacy, ESG, whistle-blowing, market abuse, international sanctions, extradition and European arrest warrants.

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Overview

The technological revolution that the world has experienced over the past 50 years has had a disruptive impact on all areas of society, particularly since these new technologies are not necessarily always used for legitimate purposes. Indeed, it is an established fact that crimes are increasingly committed using IT tools. Cybernetic devices can very easily make an individual both the victim and perpetrator of an unlawful act, with a whole series of consequences in terms of prevention, detection and prosecution of crimes.

Considering that the Italian Criminal Code was published in 1930, for instance, it is easy to understand how important it is for the legislature and the interpreters of the law to make a continuous effort to keep legal matters up to date. The advent of cyberspace as a place of immediate interaction, even between people thousands of kilometres away from each other, has made it necessary to question both what innovative types of crime could come to characterise criminal law and which “classic” crimes can find new forms of commission through the use of the latest generation of technological means.

Today, more than ever, companies find themselves engaged in the dual task of protecting themselves from the risk of cyber-attacks and preventing the commission of criminal offences made possible by the use of these tools. On the one hand, companies could see their internal security undermined, while, on the other, they could face administrative liability arising from a crime (pursuant to Legislative Decree No 231/2001). Both scenarios could have serious impacts on business.

In 2024, the average cost of data breach reached an all-time high of USD4.88 million, marking 10% increase compared to USD4.45 million in 2023, and reflecting a broader upward trend of 15.3% growth between 2020 and 2023. In Italy, according to the Clusit Report 2024, 30% of large companies estimate that the financial damage caused by cyber-threats amounts to at least USD50,000. However, more recent findings point to a reduction in the average cost of data breaches in the country, highlighting a positive shift largely driven by the increasing maturity of internal breach detection and response practices.

Still, even if the use of AI-powered security tools provided significant cost reduction for entities that adopted them, recent research published by Accenture in the “State of Cybersecurity Resilience 2025” shows that only a minority of organisations have developed a truly mature cybersecurity framework (34%), and an even smaller group is equipped to address AI-powered threats effectively (13%). Although many organisations acknowledge AI’s growing impact on cyber-risk, far fewer have introduced structured processes to assess the security of AI tools before deployment.

Cybercrime

When talking about cybercrimes, a distinction needs to be made. Cybercrimes in the strict sense are characterised, in terms of the specificity of the law, by the presence of elements of data or information automation, which constitute the essential core of the criminal offence. However, cybercrimes in the broader sense are nothing more than common crimes committed using computer tools.

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The first includes: computer fraud (Section 640-ter of the Italian Criminal Code), unauthorised access to computer or telematics systems (Section 615-ter of the Italian Criminal Code), or the new offence of cyber-extortion (Section 629 (3) of the Italian Criminal Code).

The second category, as already mentioned, represents common crimes committed through the use of new technologies. The use of technology not only affects the way in which the crime is carried out but also makes the work of investigative bodies even more complex, as they find themselves having to investigate criminal phenomena that are difficult to decipher.

By way of example, the offences of money laundering and self-laundering (Sections 648-bis and 648-ter.1 of the Italian Criminal Code, respectively) become so-called cyber-laundering if committed in the context of cyberspace. This is the case, for instance, in the transfer of money to current accounts opened at credit institutions based in offshore states or the use of so-called smart cards (ie, cards that can be reloaded and therefore used without a specific current account being opened).

Another relevant phenomenon that increasingly intersects with money-laundering cases concerns the use of virtual currencies (or cryptocurrencies). The essential characteristics of the cryptocurrency system are as follows:

- decentralisation of negotiations – decisions are entrusted not to a bank or other regulatory body but to individual users, whose actions are implemented through the so-called blockchain;
- rapid circulation on the internet; and
- anonymity of market operators – the blockchain system actually makes it possible to trace transactions carried out on the network, but does not reveal the identity of those involved.

The anonymity of virtual currencies, which can facilitate criminal activities, continues to raise concerns, as emphasised in the EU's Fifth Anti-Money Laundering Directive. To address these risks, national Financial Intelligence Units (FIUs) should be granted the ability to access information on cryptocurrency addresses.

National Cybersecurity Perimeter

The legislative cybersecurity perimeter has been reinforced in Italy and Europe in recent years. Two main laws have been introduced to that end.

Law No 90/2024, focused specifically on cybercrimes, strengthened the national framework on cybersecurity, introducing a set of provisions aimed at ensuring enhanced protection against cyber-attacks and facilitating an efficient response to these emergencies. Section 16 of the Law specifically intervened on the Italian Criminal Code and Section 17 of the Law specifically intervened on the Italian Code of Criminal Procedure, introducing new crimes (such as cyber-extortion) and changes to procedural rules that help prosecutors in the investigations phase.

Legislative Decree No 138/2024 transposed the NIS2 Directive (EU 2022/2555) into the Italian legal system, by embodying its principles and rules in the following ways.

- National cybersecurity strategy: member states are required to adopt a national cybersecurity strategy and maintain an updated list of essential service operators, ensuring that these entities comply with the Directive's requirements.
- Scope of application: in addition to the sectors already covered by the NIS1 Directive (such as energy, transport, healthcare, finance, water resource management and digital infrastructure), the NIS2 Directive introduces –
 - (a) new sectors subject to cybersecurity obligations, classified as either “highly critical” or “critical”;
 - (b) new categories of entities, classified as “essential” or “important”, based on their significance within the sector or the type of services they provide; and
 - (c) the need for medium and large entities in critical sectors to adopt adequate cybersecurity risk management measures and report significant incidents to national competent authorities (ie, incidents that may cause major disruptions or damage).
- Supervisory measures: the NIS2 Directive introduces stricter oversight mechanisms and a more severe sanctioning regime, aiming to strengthen

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mutual trust and cybersecurity capabilities across the EU.

- Liability of senior management: the Directive establishes senior management liability for non-compliance with cybersecurity risk management measures, thereby encouraging corporate governance bodies to actively and continuously engage in cybersecurity-related decision-making.
- Cybersecurity response networks: the Directive establishes a network of computer security incident response teams (CSIRTs), tasked with sharing information on cyber-threats and managing cyber-incidents. Furthermore, it creates the European Cyber Crisis Liaison Organisation Network (EU-CyCLONe) to facilitate the exchange of information among member states and EU institutions in the event of large-scale cyber-incidents and crises.

Alongside national laws, the EU DORA Regulation (EU 2022/2554) became applicable in Italy on 17 January 2025, forcing financial institutions and critical ICT providers to manage cyber-risk, reporting and testing in accordance with stricter standards than those provided by NIS2.

Corporate Vicarious Liability (Legislative Decree No 231/2001)

Law No 90/2024 has added a new crime to the list of offences triggering company liability: “cyber-extortion” (Section 629 (3) of the Italian Criminal Code).

The crime of cyber-extortion punishes “anyone who, through the conduct described in Sections 615-ter (“Unauthorized access to a computer or telematic system”), 617-quater (“Unlawful interception, obstruction or disruption of computer or telematic communications”), 617-sexies (“Forgery, alteration, or suppression of the content of computer or telematic communications”), 635-bis (“Damage to information, data and computer programs”), 635-quater (“Damage to computer or telematic systems”) and 635-quinquies (“Damage to computer or telematic systems of public interest”), or through the threat of committing such acts, forces another person to act or refrain from acting, obtaining an unjust profit for themselves or others to the detriment of the victim”.

The legislature, through the introduction of the crime of cyber-extortion among the offences triggering the liability of a company, aims to counter the concerning phenomenon of ransomware, a type of virus that blocks user access to files and demands a sum of money, usually in cryptocurrencies, to make them accessible again.

Entities convicted of cyber-extortion are subject to disqualifying sanctions, including the possibility of being banned from conducting business for a period of no less than two years. This provision underscores the legislature’s focus on preventing these crimes, which pose an increasing threat to businesses, particularly those operating in the critical digital infrastructure sector. Indeed, according to data from the latest National Cybercrime Centre for the Protection of Critical Infrastructure (*Centro Nazionale Anticrimine Informatico per la Protezione delle Infrastrutture Critiche* or CNAIPIC), these attacks accounted for 34% of “serious attacks”.

Decree Law No 92/2024 (as amended and converted by Law No 112/2024) has added a new crime to the list of offences triggering corporate liability: “misappropriation of money or movable property” in cases involving damage to the financial interests of the EU (Section 314-bis (2) of the Italian Criminal Code).

The crime of “misappropriation of money or movable property” punishes “a public official or a person in charge of a public service who, by virtue of their office or service, has possession or availability of money or other movable property belonging to others and allocates it to a use different from that prescribed by specific legal provisions or acts having the force of law, leaving no margin for discretion, and who intentionally obtains an unfair financial advantage for themselves or others or causes unjust damage to others” (paragraph 1).

The penalty is increased “when the act affects the financial interests of the European Union and the unfair financial advantage or unjust damages exceed EUR100,000” (paragraph 2).

The crime of “misappropriation of money or movable property” falls under offences triggering corporate lia-

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bility only if the act affects the financial interests of the EU and causes damage exceeding EUR100,000. By setting this threshold, the legislature appears to have wanted to criminally punish the entity only when the harm to the EU is significant, leaving the enforcement of less severe offences to the administrative system.

The scope of this provision within the offences triggering corporate liability is further limited, considering that it only punishes a public official or a person in charge of a public service. This means that corporate liability may only arise if the entity is a public economic body, is partially owned by a public administration or is under public control. Alternatively, liability may also be established if a private individual within the entity has contributed to the commission of the crime by the public official.

Beneficial Owner

Legislative Decree No 90/2017 was issued to implement EU Directive No 2015/849 (the so-called Fourth AML Directive). As required by Legislative Decree No 90/2017, Decree No 55/2022 of the Ministry of Economy and Finance (MEF) was then published in the Official Gazette on 25 May 2022. It contained “provisions relating to communication, access and consultation of data and information relating to beneficial ownership of businesses with legal personality, of private legal persons, of trusts producing legal effects relevant for tax purposes and legal institutions similar to trusts”.

With the aim of tackling the use of the economic and financial system for the purpose of money-laundering and terrorism-financing, this Decree introduced new measures regarding the collection of data relating to company owners through the register of beneficial owners (the “Register”).

Section 1, paragraph 2, letter pp) of Legislative Decree No 231/2007 defines the beneficial owner as “the natural person or natural persons, other than the customer, in whose interest or of which, ultimately, the continuous performance of an established professional relationship is rendered or the operation is executed”. The entities that must disclose the actual data controller in the company register are:

- companies with legal personality – ie, all LLCs (ordinary, simplified, and innovative start-ups, among others), joint stock companies and other corporations;
- private legal entities (ie, foundations and recognised associations); and
- trusts and similar legal institutions.

The information must be confirmed every 12 months and any changes that may have occurred must be reported within 30 days. The persons responsible for making the specific disclosure are, respectively:

- for corporations, the directors;
- for private legal persons, the founders, representatives, or directors; and
- for trusts, the trustees.

The data that must be communicated concerns entitlement to ownership of the company or the specific body. For example, in the case of companies, shares, methods of exercising control, powers of legal representation, administration and management data must be communicated. In this way, the Register will contain all the information on beneficial ownership of businesses, with the aim of countering illicit activities carried out related to money-laundering in the business space.

The right of access to the Register, according to Sections 5–7 of Ministerial Decree No 55/2022, will be granted by the authorities, to persons pursuant to Section 3 of Legislative Decree No 231/2007 and to the public in different ways. With reference to public access, in particular, on 22 November 2022 the Grand Chamber of the ECJ held, in joined cases C-37/20 and C-601/20, that the provision according to which the information relating to the beneficial owners included in the Register must be accessible to the public (Section 30 (5) of the EU’s Fifth Anti-Money Laundering Directive) violated the fundamental rights to respect for private life and the protection of citizens’ personal data, which are protected by Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.

This principle was incorporated in the preamble to the Ministerial Decree of 12 April 2023 (by which the Ministry of Enterprises and Made in Italy (MIMIT) approved

the “technical specifications of the electronic format of the single corporate communication”, necessary for the transmission of the data of the beneficial owners to the business register (according to the provisions of Section 3 (5) of Ministerial Decree No 55/2022). The preamble points out that, in agreement with the MEF, Section 7 (1) of Ministerial Decree No 55/2022 must be disapplied. Section 7 (1) of Ministerial Decree No 55/2022 provides that the first name, surname, month and year of birth, and country of residence and citizenship of the beneficial owners are accessible to the public without any kind of limitation.

In the course of 2023, two additional implementing decrees were published:

- the MIMT Decree of 16 March 2023 (published in the Official Gazette on 28 June 2023) and related annex, which define the models for the release of certificates and copies (including digital ones) relating to beneficial ownership information; and
- the MIMIT Decree, in agreement with the MEF, of 20 April 2023 (published in the Official Gazette on 28 June 2023) which defines the amounts of secretarial fees to be paid for practices and outputs on beneficial ownership.

On 15 October 2024, the Council of State suspended the operation of the Register with Order No 8248/2024. The Council of State found that the provisions of the implementing decrees could potentially violate Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, which protect the right to privacy and personal data. For this reason, the Council of State referred six preliminary questions to the Court of Justice of the European Union, concerning the interpretation and the validity of EU Directive No 2015/849.

A further significant legislative development occurred with Legislative Decree No 210 of 31 December 2025, effective from 9 January 2026, which supplemented Legislative Decree No 231/2007. This Decree implements Section 74 of EU Directive 2024/1649 and introduces stricter rules governing access to the Register, which is no longer granted to the general public without distinction. Instead, subjects other than competent authorities and obliged entities must dem-

onstrate the existence of a “qualified interest” in order to obtain access.

These amendments shift from full to selective transparency, tiering access to beneficial ownership data by subject and interest. While aligned with EU law and CJEU jurisprudence, the system may prove operationally complex for practitioners.

Furthermore, the Decree provides that a subsequent measure of the Ministry of Economy and Finance, adopted in agreement with the Ministry of Enterprises and in consultation with the Data Protection Authority, will define the procedural rules governing access to the Register, including the verification of the “qualified interest” requirement, legal remedies available in case of refusal by the competent administrative authority, and the criteria for assessing exclusion grounds.

As such, although the Decree represents an important step towards the Register’s effective implementation, further intervention from both the EU and national lawmakers is needed.

Whistle-Blowing

On 10 March 2023, the Italian government issued Legislative Decree No 24/2023 (“the Decree”), which comprehensively regulates “the protection of persons who report breaches of Union law” and “breaches of national legislation”.

The new legislation raised, and still raises, both interpretative and operational issues not yet fully resolved despite concerted efforts. As such, companies are called upon to make a complex adjustment to the new whistle-blowing legislation, in order to avoid the imposition of administrative fines, the extent of which (unlike many other issues regulated by the Decree) has been very clear from the outset.

In this scenario, of particular importance and support for companies are the guidelines adopted by the Italian National Anti-Corruption Authority (*Autorità Nazionale AntiCorruzione* or ANAC) with Resolution No 311/2023 of 12 July 2023 and the Operational Guide for Private Entities issued by Confindustria in October 2023. These sources of soft law have been designed to provide guidance to companies which are subject

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to whistle-blowing regulations, and are constantly updated.

The Resolution 311/2023 was updated by Resolution No 479 on 26 November 2025. On the same day, with Resolution No 478, ANAC approved new guidelines on internal whistle-blowing channels. The aim is to ensure a uniform and effective application of whistle-blowing rules, and to provide further guidance to the entities required to implement them.

In addition to public sector bodies, the whistle-blowing legislation is applicable to:

- entities that have employed an average of at least 50 employees in the past year (with fixed-term or open-ended contracts);
- entities operating in specific sectors (banking, credit, investment, insurance and reinsurance, professional pensions or individual pension products, securities, investment funds, payment services), even with an average number of fewer than 50 employees in the past year; and
- entities that have adopted organisational and management models pursuant to Legislative Decree No 231/2001 (“231 Models”), even with an average of fewer than 50 employees in the past year.

The requirements that the entities identified by the Decree must fulfil can be summarised as follows:

- identification of the reporting manager (internal or external, monocratic, or collegial);
- identification of the internal reporting channel;
- adoption of a whistle-blowing policy;
- updating 231 Models, the Code of Ethics and any internal documentation mentioning the reporting channels;
- privacy obligations;
- information provided to persons inside and outside the organisation; and
- training of employees and the manager (if internal).

First of all, each entity must ensure the adoption of a policy that fully regulates whistle-blowing within the organisation itself. It is advisable for this activity to be entrusted to a lawyer or to a qualified person with specific expertise in the field (possibly outside the organisation). Specifically, the policy must:

- define the role and tasks of the individuals responsible for managing the reports;
- identify the methods and terms of data retention;
- provide and regulate different reporting methods (in written and oral form);
- provide for procedures that guarantee the confidentiality of the person making the report, of the other persons indicated by the Decree, and of the content of the report; and
- provide for staff awareness-raising and training initiatives to disseminate the purposes of the whistle-blowing policy and the procedure for its use.

At the same time, private sector entities that have adopted 231 Models will have to update them. The Decree has provided that the latter regulate the internal reporting channels, the prohibition of retaliation and the disciplinary system. Alternatively, 231 Models must contain an explicit reference to the policy.

European Public Prosecutor’s Office (EPPO)

As for the latest EPPO annual report there were:

- 3,602 investigations underway, allegedly causing approximately EUR45.01 billion in financial damage to the EU;
- 275 indictments (34% more than in 2024); and
- freezing orders for assets worth EUR1.13 billion requested and granted by judges.

In specific relation to Italy, 635 investigations were opened, 791 people were indicted in total and EUR59.74 million in frozen assets was accumulated. Finally, details of judicial activity showed 279 ongoing proceedings, 41 first instance judgments, 29 convictions and eight acquittals. Of these proceedings, 99 were for money-laundering, 24 for corruption, 16 for embezzlement and 310 for VAT fraud.

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Donald Manasse Law Offices 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

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1. Fraud Claims

1.1 General Characteristics of Fraud Claims

Monaco's civil law system provides for 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 may 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 of fraud and consists of mis-

appropriating 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 – eg, 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, which 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, and 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), whereas active corruption is committed by the corrupter. Both are sanctioned in 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 civil 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 file a criminal complaint during the trial, 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, which 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, on the basis of breach of contract or on the general basis of civil responsibility (Article 1229 of the Civil Code), which is the basis for an action in the equivalent of tort. Article 1229 states that any act that causes harm to another obliges 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 such 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 are also captured under Articles 218, 218-1, 218-2 and 218-3, and 219 of the Penal Code. The burden of proof is now on those suspected of money-laundering to demonstrate the lawful origin of funds. Monaco's financial intelligence unit, the *Autorité Monégasque de Sécurité Financière* (AMSF), has powers to initiate, together with the Prosecutor, the blocking any suspect funds or transactions, without the obligation of informing the owner in advance. The owner will only be informed once the order, or the decision of the *judge des libertés* confirming the blockage, has been served, which is generally several weeks later.

A relatively new provision criminalising the organisation of insolvency to avoid the enforcement of a judgment is provided for in Article 368-1 of the Penal Code and applies even before a judgment has become final. The criminal infraction extends to those who assist in creating the insolvency, including accomplices. The Penal Code specifically provides that accomplices will be jointly liable.

Article 1022 of the Civil Code provides for the Paulian action, which allows creditors to challenge all acts performed by a debtor to defraud the creditors of their rights. The effect of the Paulian action is to render the transfer to a third party void, and therefore unenforceable against 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, paragraph 2, of the Civil Code 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 doing so is considered necessary for the manifestation of the truth. However, confiscation of the proceeds of a crime is also provided for, in Articles 12 and 32 of the Penal Code; these provisions have been further developed under Law 1.535 of 9 December 2022 (“Law 1.535”).

Law 1.535 transposes into Monaco law certain provisions of the EU Directive (2014/42/EU) on the freezing and confiscation of the proceeds of crime and the FATF Recommendations. The Law provides, among other things, for a special service (*Service de Gestion des Avoirs Saisis ou Confisqués* or SGA) to manage seized or confiscated assets, and to facilitate the payment of damages awards to victims from the assets.

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 a judicial mortgage will have precedence (unless the judicial administrator claims a preferential transfer). The suspect period in Monaco during which assets not transferred for value can be “clawed back” is

three years from the date the entity is declared to have become insolvent.

1.6 Rules of Pre-Action Conduct

There are no particular or specific rules requiring, for example, a letter before taking 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 the 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

A victim of fraud can request a freezing order over assets belonging to a defendant and held by third parties as a pre-judgment attachment, by filing an ex parte application with the president of the Court of First Instance (Articles 490 and 491 of the CPC). The claimant must demonstrate the existence of a “certain principle of a claim with a sufficiency of evidence”. This is a standard established by case law. There is no requirement for 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, but it is not necessary to name specific account numbers. 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, other than where the assets are pledged to the bank, for example. It is not necessary to explain why it is thought a third party or bank holds assets, nor is it necessary to specify, for example, the bank account numbers to be seized. Nor is it necessary to demonstrate a risk of asset dissipation to justify the seizure order.

Under Article 487 of the CPC, it is possible to unilaterally and without a court order make assets, including bank funds, temporarily unavailable to the defendant by filing an application with the court, which will

be served to the third parties or the defendant. The presiding judge will then respond within a very short time with a decision on whether or not to allow the temporary unavailability to continue. While the initial application is *ex parte*, the third party and the debtor will be informed. If the application is unsuccessful, the debtor will already 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 of the CPC), it is necessary to demonstrate a risk of dissipation.

Third parties holding assets, particularly banks, will be served with a seizure order and must respond immediately as to whether such order can be satisfied (whether funds exist and, if so, the amount to be frozen under the order). They must make a supplementary declaration at the date of the first hearing of the amount seized, after any 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. The 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”.

Court Fees

While no court fees or bonds are payable, Monaco *avocat-défenseurs* (ie, members of the Monaco Bar, which currently comprises 35 lawyers, who are either *avocat-défenseurs*, *avocats*, or *avocat-stagiaires*) are statutorily entitled to 0.4% of the amount in controversy as statutory fees if a claim or procedure is successful, in addition to their honoraria, even if their participation is limited to the 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 to 0.3% if they have been involved in negotiations. There are additional calculations for appellate procedures. The statutory fees are not always applicable or enforced.

2. Procedures and Trials

2.1 Disclosure of Defendants’ Assets

Attempts to enforce deposition and discovery orders from foreign courts on Monaco residents in civil cases have not been successful. It is possible to obtain a deposition through the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the “Hague Evidence Convention”), to which Monaco is a signatory; however, no coercive measures may be taken in the requesting country against the person refusing to submit to the deposition. In local civil cases, there are no provisions for pre-trial deposition and limited provisions for pre-trial discovery.

It is possible to request and obtain, through an *ex parte* proceeding, a civil order compelling a third party, or even a potential party, to disclose information. The request must be specific as to the information requested. There are no sanctions similar to contempt orders for refusing to comply, and the party making the request may then sue in an accelerated proceeding known as a *référé* to seek an order to comply, with an *astreinte*, or civil fine for refusing to do so.

2.2 Preserving Evidence

The CPC has been revised by Law 1.511 of 2 December 2021, at Article 300-1, to provide for the possibility of seeking a court order 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 from 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 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 (*astreinte*) can be imposed for failure to do so. The extent to which courts will order such disclosure is being tested in the courts. In a recent case, the court refused to order a general disclosure of “all communications between the bank and the client” relating to an investment because it was not precise enough, even though it would be impossible for the plaintiff/client to plead with greater precision without first reviewing the documents.

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 in related civil proceedings, unless authorised by the investigating magistrate or a prosecutor, as the information is covered by the “secrecy of the instruction” until the investigation is concluded and the matter is tried.

2.4 Procedural Orders

As indicated in 1.7 **Prevention of Defendants Dissipating or Secreting Assets**, the seizure orders are filed *ex parte* and seeking such measure prior to trial is always an appropriate step. Because the orders are *ex parte*, the presiding judge will be particularly attentive to the good faith of the party requesting them. The presiding judge will refuse any such *ex parte* request once litigation has begun, as an *ex parte* request in that event is considered disloyal if the other party is not informed. The defending party may file a criminal complaint if they consider that the judge was misled into granting the order – this is considered to be an *escroquerie au jugement*, ie, obtaining a judgment by fraud.

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 set by the investigating magistrate in accord-

ance with the victims’ financial situation and is usually not 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 the defendant being committed for a criminal trial, the limitation period may be considered not to have interrupted and there is a risk that any subsequent civil procedure will be time-barred.

2.6 Judgment Without Trial

A civil trial will only consist of oral argument by respective counsel (and this will often be reduced to filing the written pleadings and supporting documentation without oral argument; this was particularly the case during the pandemic). There is no live testimony by the parties or witnesses in a civil trial. Nor is there any possibility for a directed verdict where the defence is unmeritorious (or for a motion to dismiss a case where the complaint is unmeritorious or frivolous). The court may restrict the time available for oral argument if it considers the pleadings to 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 the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the “Hague Service Convention”), or where the defendant does not continue in their defence once they have designated counsel. In this case, the judgment 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 (Article 14 of Law 1.0476 of 28 July 1982). Foreign lawyers pleading before the Monaco courts are expected to maintain the same standards in addition to the standards set 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 often occurs. One reason that this tactic is used is that it prevents the defendant from filing criminal 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, Article 326 et seq of the CPC provide for the possibility of demanding an investigation and testimony, but this has not been known to have been put into practice. In any event, spouses, ex-spouses and children may 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 is a signatory to the Hague Evidence Convention.

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on 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 a company and its 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 the seizure of the corporate asset on the basis that the corporate vehicle is a sham. In a recent case, the Court of Appeals refused to make a New York judgment rendered against a Panamanian company’s alleged beneficial owner enforceable against that company. However, in the separate action to validate the seizure order, the same Court of Appeals rendered a judgment against the Panamanian company for the same amounts (including punitive damages, which it is not possible to award in Monaco courts) awarded by the New York judgment.

Where civil companies (companies that hold assets and do not trade) hold property, there has been a growing tendency of judges to allow pre-judgment liens on property, to secure the claims against the shareholders. This is particularly the case where civil companies have low capitalisation (for example EUR1,500) and purchase properties worth many millions of euros.

3.3 Shareholders' Claims Against Fraudulent Directors

The shareholders of a company cannot act on behalf of that 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 generally 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 if one party is a Monaco resident, even where the other defendants are not. However, there is a caveat: there will be no jurisdiction if the application is made only to bring a party who has their habitual residence or domicile outside Monaco before the Monaco courts. Since the CDIP is relatively recent (2017), no case law applying this exception has yet been published.

Where there is a seizure action, it must be validated before the Monaco courts by an 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, of the CDIP).

To enforce against seized assets, it will often be necessary to seek recognition of a foreign judgment. In that event, "any interested party" may bring the action for recognition (Article 15 of the CDIP) and the defendant may be the overseas or foreign party.

4.2 Service of Proceedings out of the Jurisdiction

Parties outside of the jurisdiction can be served by instructing a bailiff to file the summons or decision with the prosecutor general's office, under the provisions of the Hague Service Convention. No leave of the court is required for service abroad.

5. Enforcement

5.1 Methods of Enforcement

Monaco judgments are enforced by bailiffs (*huissiers*). There are three bailiffs in Monaco. It is an office held by appointment of the Prince. Only bailiffs may serve process in Monaco, and only bailiffs may execute judgments against the assets of a defendant pursuant to a money judgment issued by the Monaco courts. Enforcement can be effected through the seizure of the bank accounts belonging to the debtor.

The procedural requirements for a judgment to be enforceable in Monaco are set out at Articles 470 et seq of the Monaco Code of Civil Procedure. The judgment must first be formally notified (by a bailiff or through the prosecutor's office if the party is not in Monaco). Unless the judgment states that it can be provisionally executed, an appeal suspends the execution.

For real and personal property, including furniture and automobiles, a sale at public auction is required.

For real property, conventional mortgages will grant the lender the right, in the event of default, to initiate judicial sale proceedings, without having to obtain a judgment on the debt. The judicial sale begins with a "commandment to pay" served on the debtor and published in the registry of deeds. Once published, the "commandment" makes it impossible for the debtor to otherwise dispose of the property.

Judicial sales of real property take place in court, in the presence of a bailiff, and following public notice of the sale to attract as many bidders as possible. The timelines and procedures are very strictly followed. There is a right to overbid the first auction within eight working days, after which a second auction may be held.

Contractual clauses that allow creditors to take ownership of real or personal property in loan documents in the event of default are null and have no effect in Monaco.

5.2 Enforcement of Foreign Judgments

The process for enforcement of a foreign judgment begins with the filing of an adversarial lawsuit against the adverse party in the court of first instance of Monaco.

In this way, a final judgment (or a judgment with provisional execution, regardless of appeal) is obtained from the Monaco court. A bailiff may then execute the judgment. 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 at Articles 13 to 20 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.

Jurisdiction of the foreign court will be a factor considered by the Monaco court to determine recognition. The foreign court will be considered not to have had jurisdiction when:

- the Monaco courts had exclusive jurisdiction; or
- the litigation did not have a sufficient nexus with the foreign state, notably when the foreign jurisdiction is only based on:
 - (a) the temporary presence of the defendant in the foreign country; or
 - (b) the existence of assets belonging to the defendant that are not connected with the litigation; or

- (c) the exercise by the defendant of a commercial or professional activity unrelated to the litigation.

These provisions do not apply if the defendant has accepted jurisdiction.

It is possible for a party to bring an action in Monaco seeking “non-recognition” of a foreign judgment (Article 13, paragraph 2 of the CDIP), to prevent the enforcement, and even where the foreign plaintiff is not resident in Monaco.

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-co-operation, during both the investigation and the trial.

6.2 Undermining the Privilege Over Communications Exempt From Discovery

The new CPC provisions allowing for discovery orders have not yet produced published case law. As they may be accompanied by a fine, or an *astreinte*, they 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, but in a recent case, where the debtor’s personal account had been shown to be nearly empty, the court issued such an order, and the bank complied. The debtor subsequently brought proceedings to quash the order, although the information had allowed the seizure of funds. If a Monaco lawyer or a foreign practitioner were served with an disclosure order (*compulsoire*), the lawyer could refuse to comply citing the rules of professional secrecy and the Article 308 of the Penal Code, making it a criminal offence to breach confidentiality.

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 phone of a foreign lawyer practising in Monaco. Monaco was sanctioned by the European Court of Human Rights

for allowing the use of the privileged information in a criminal investigation, and the criminal cases that were based on the information obtained were ultimately quashed by the Court of Appeals. The exception to this principle is similar to the common fraud exemption. In a recent money-laundering prosecution, the fact that evidence was obtained, and quashed in a foreign jurisdiction, by violating client-attorney privilege, did not prevent the Monaco court from entering a conviction.

7. Special Rules and Laws

7.1 Rules for Claiming Punitive or Exemplary Damages

There are no punitive or exemplary damages in Monaco.

7.2 Laws to Protect “Banking Secrecy”

Banking secrecy rules apply in civil cases. As mentioned at 6.2 **Undermining the Privilege Over Communications Exempt From Discovery**, 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 invoked to resist a criminal investigation, but has been raised by a third-party bank served with a civil court order to produce information.

7.3 Crypto-Assets

Crypto-assets are generally treated the same way as any other assets, but obtaining a seizure order for them can be particularly difficult. Legislation enacted in 2022 has clarified the legal framework applicable to crypto-assets, including the provision of services relating to them.

POLAND



Law and Practice

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KW Kruk and Partners Law Firm is an independent law firm that has been providing legal services to Polish and foreign corporate clients and financial institutions for more than 20 years. The boutique firm has headquarters in Warsaw and specialises in dispute resolution, asset recovery and asset tracing, in both civil and criminal proceedings. It also specialises in international trade and customs, including providing

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1. Fraud Claims

1.1 General Characteristics of Fraud Claims

Practice shows that frauds are usually crimes aimed at the unlawful seizure or extortion of funds accumulated in bank accounts, most often with the use of electronic banking. The most common type of fraud in Poland is phishing. This term is understood as an adopted method in which a criminal impersonates another person, company or institution in order to extort confidential information, persuade the victim to take specific actions, or extort funds. Another type of fraud is the misappropriation of company property by its employees or members of its management board. There has also been a significant increase in investment fraud, which involves attempts to extort money. Fraudsters are constantly improving the techniques they use to persuade potential victims to make investments, usually offering very high profits with a supposedly low risk of losing money.

In the Polish legal system, both criminal law and civil law provisions are used to combat fraud. In order to effectively pursue claims for fraud, it is entirely justified to conduct both proceedings (ie, civil and criminal) in principle in parallel, with the mutual use of evidence collected in these proceedings. Criminal proceedings play an important role in this regard, as they provide the opportunity to quickly examine the case and obtain security. In criminal proceedings, it is important that the victim of a crime promptly files a notice of suspected crime with the Public Prosecutor's Office. It is worth noting that some evidence can only be obtained in criminal proceedings – this applies in particular to evidence covered by banking, tax or telecommunications secrecy, which is of particular importance in pursuing the above-mentioned claims. However, one should not forget the importance of civil proceedings, which give the victim of a crime the opportunity to claim damages.

1.2 Causes of Action After Receipt of a Bribe Grounds for Prosecuting the Crime of Bribery

In the Polish legal system, bribery is sanctioned by criminal law. The applicable provisions depend on whether the conduct concerns the public sector or the private sector. The bases for punishment for this type of crime are:

- passive bribery: accepting a financial or personal benefit, or a promise thereof, in connection with the performance of a public function;
- active bribery: granting or promising to provide a financial or personal benefit to a person performing a public function in connection with the performance of this function;
- paid passive protection: undertaking intermediation in settling a case with reference to influence (eg, in a state or local government institution, national or international organisation), causing another person to believe in the existence of influence, using such a belief or confirming their belief of the existence of influence, in exchange for a financial or personal benefit or a promise of such influence; and
- paid active influence: granting or promising to provide a financial or personal benefit in exchange for intermediation in settling a case, consisting in unlawful influence on the decision, act or omission of a person performing a public function, in connection with the performance of this function.

The above acts are punishable by imprisonment, and in less serious cases also a fine or restriction of liberty.

Acceptance of a Bribe by an Agent

It is also worth adding that accepting a bribe may cause damage, in which case the employer is liable for damage caused by the employee accepting the bribe. However, such an employer is entitled to a recourse claim against the employee. An employee accepting a bribe may also be subject to disciplinary liability, including termination of the employment contract without notice.

1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts

Aiding and Abetting in Criminal Procedure

Pursuant to the applicable provisions of Polish criminal law, anyone who facilitates the commission of an offence through their behaviour – in particular by providing a tool or means of transport or by giving advice or information, with the intention of causing another person to commit a prohibited act – is liable for aiding and abetting. Moreover, anyone who facilitates the commission of such an offence through their omission, contrary to a specific legal duty to prevent the commission of a prohibited act, is also liable for aiding

and abetting. Polish criminal law treats incitement and aiding and abetting on a par with perpetration, so the instigator or aider is punished within the limits of the threat intended for the perpetrators.

Accepting Funds From Fraud – Money Laundering

The acceptance of fraudulent assets may be qualified as a crime of money laundering. Liability on this basis may be borne by the person who:

- receives, possesses, uses, transfers or exports abroad, hides, transfers or converts funds derived from crime;
- assists in the transfer of ownership or possession; or
- undertakes other activities that may frustrate or significantly hinder the determination of assets' criminal origin or place of placement, detection, seizure or forfeiture.

Civil Procedure

The Civil Code provides a basis for filing a claim for redress of damage against a person who persuaded or helped another person to cause damage, as well as against a person who knowingly benefitted from the damage caused to another person. Civil law also provides for the possibility of filing an *Actio Pauliana*, which is used in a situation where a third party obtains a financial benefit as a result of a legal act performed by the debtor to the detriment of creditors; the creditor may then request that this act be recognised as ineffective in relation to said creditor. It is necessary, however, that the debtor acted with awareness of harming the creditors and that the third party also knew about it.

1.4 Limitation Periods

Limitation Period in Criminal Law

In criminal proceedings, the limitation period depends on how the act is classified and what penalty is imposed for a given crime. As a rule, in the case of fraud and money laundering (which are the most common legal qualifications in this type of act), the perpetrator cannot be punished if 15 years have elapsed since the offence was committed, so the statute of limitations for punishing these types of offences is 15 years.

Limitation Period for Claims for Compensation

The limitation periods for claims for damages pursued in civil proceedings are as follows:

- three years from the date on which the injured party learnt about the damage and the person obliged to compensate for it, although this period may not be longer than ten years from the date on which the event causing the damage occurred; and
- 20 years from the date on which the crime was committed if the damage resulted from a crime or a misdemeanour (in which case it is irrelevant whether criminal proceedings have previously been instituted and penalties imposed).

1.5 Proprietary Claims Against Property Rules Regarding the Procedure for the Recovery of Funds

A basic principle that is of vital importance when a victim claims restitution is the need to prove ownership of the funds that were lost as a result of the fraud. It is therefore necessary to submit to the Public Prosecutor's Office any evidence and documents in one's possession that will prove ownership of these funds. If the fraudulent funds are commingled with other funds in the offender's accounts, recovery will be difficult but not impossible.

As a matter of principle, Polish law does not use proprietary tracing concepts in the same way as some common law jurisdictions. In practice, the victim's position will usually depend on whether the asset can still be identified with sufficient precision and whether ownership-based arguments remain available. This distinction may be particularly important in insolvency, because an ownership-based position is generally stronger than a purely personal claim for payment.

Where there is only one victim and said victim proves ownership of the lost funds, recovery will be possible. However, the situation becomes more complicated when there are many victims in the case and the funds blocked in the offender's accounts are not sufficient to satisfy all the victims. In such cases, prosecutors sometimes apply a proportional division of the blocked funds depending on the amount of funds lost by each victim, but more often, due to the complicated nature of the case, the case is taken to court for

further proceedings. In such a case, recovery requires lengthy negotiations first with the prosecutor and then with the court.

When the funds obtained from the crime are further invested, the crime involves money laundering, as indicated in **1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts**. Indeed, money laundering is considered to be any activity that aims to introduce into the legal marketplace assets that come from illegal sources.

Lost Funds as Material Evidence

It is beneficial for the victim of the crime of fraud if the prosecutor's office considers the funds lost by said victim as a result of fraud as material evidence. When the prosecutor's office finds that this evidence is unnecessary for further proceedings, it may release it, which will enable the victim to recover the funds.

1.6 Rules of Pre-Action Conduct

Out-of-Court Resolution

Civil procedure

Before bringing an action for damages as a result of a fraudulent act, the party who intends to bring the action should attempt to resolve the dispute out of court. An example of such an action is to issue a demand for payment to the entity that will be the defendant in the event of the claim, indicating a deadline by which it must respond to the demand in question.

Criminal procedure

The criminal procedure does not provide for amicable proceedings before a case is filed. Before filing a report of a suspected crime, all actions are undertaken already within the framework of the ongoing proceedings; only within the scope of this procedure is it possible to make any attempt at negotiation.

Summons

It is advisable to start by issuing a summons, as a summoned party may make an effort to reach a settlement in the case, thus avoiding litigation and reducing the costs of proceedings.

1.7 Prevention of Defendants Dissipating or Secreting Assets

One of the basic methods in criminal proceedings of preventing the perpetrator of fraud from dispersing or hiding assets is to file a motion to block the account that was used to commit the crime and, if the perpetrators can be identified, also other accounts belonging to them. Such a blockade is associated with a ban on making withdrawals, outgoing transfers and other operations involving a reduction in the balance on the above-mentioned accounts.

It is best to submit the application immediately – ie, at the very beginning of the proceedings, in the notification of a suspected crime. This means that the account may already be blocked when the proceedings are in the *in rem* phase – ie, despite the fact that the perpetrator has not yet been identified. Criminal proceedings also provide for property security, which is a measure aimed at securing a future judgment on the accused's property if there is a risk that the execution of the judgment will not be possible without security. Both real estate and movable property may be subject to such seizure.

As a rule, no fees are paid for activities in criminal proceedings, so the application for blocking accounts is not subject to a fee.

Securing Claims in Civil Proceedings

In civil proceedings, it is possible to obtain appropriate security through the court imposing certain restrictions on the defendant or on a participant in the proceedings related to the management of property and the possibility of its disposal. As indicated in **1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts**, in a situation where the debtor disposes of their assets, the creditor may, after meeting the conditions specified in the regulations, also file an action for declaring the debtor's legal transaction to the detriment of the creditor ineffective; this institution is called the *Actio Pauliana*. Furthermore, concealing, selling or deleting assets by the debtor is a crime punishable by imprisonment.

2. Procedures and Trials

2.1 Disclosure of Defendants' Assets

Disclosure Procedures

Under Polish law, claimants may apply for interim asset preservation orders, which can include disclosure obligations. Although there is no standalone statutory “asset disclosure order”, courts may require the defendant to identify assets in support of enforcement or preservation, as follows.

- In Polish civil law, formal asset disclosure from a defendant is typically available after a judgment is issued. Before judgment, claimants may apply for interim freezing orders or evidence preservation, although broad pre-action disclosure of assets is not permitted.
- In criminal cases, prosecutors and courts have wide powers to obtain information about a suspect's assets at any stage of proceedings. This includes compelling third parties to disclose information, seizing assets and tracing funds held by nominees.
- In bankruptcy and restructuring cases, court-appointed administrators can demand comprehensive asset disclosures from the debtor and third parties. There are also mechanisms to reverse fraudulent transfers and secure hidden assets.

Failure to comply with disclosure obligations in civil or insolvency proceedings may result in fines, coercive detention or criminal liability for providing false information. In criminal cases, refusal to disclose assets can lead to additional charges or sanctions.

Assets Held by Nominees

Nominee arrangements typically involve one party holding assets or exercising rights on behalf of another, often based on a private agreement. While such arrangements are commonly recognised in certain jurisdictions, it should be noted that Polish law does not formally recognise the concept of a nominee as a distinct legal institution. In criminal proceedings, however, it is possible to prosecute the actual beneficial owners if it can be demonstrated that such a relationship existed and that they exercised effective control over the assets or rights in question.

Cross-Undertaking in Damages

Unlike in common law systems, under Polish civil procedure (Articles 730–757 of the Code of Civil Procedure) Polish courts typically do not require a formal cross-undertaking in damages from claimants when granting interim injunctions, although courts may sometimes request the claimant to provide a security deposit to cover potential wrongful loss. This approach simplifies asset freezing applications and lowers the financial risk for claimants.

2.2 Preserving Evidence

Legal Measures to Secure Evidence

Under Polish law, when there is a credible risk that crucial evidence might be destroyed or suppressed, a party may request the court to issue a preservation order. These orders are designed to secure relevant documents and other evidence pending the outcome of the proceedings. This mechanism is particularly useful in cases involving economic or corporate crimes where the alteration or destruction of evidence is a genuine threat.

Key measures include:

- interim injunctions – the court may grant orders aimed specifically at preserving evidence, ensuring that documents or electronic data remain intact; and
- asset and evidence freezing orders – although primarily used to secure assets, these orders can also protect evidence by freezing accounts or records that may contain vital information.

Physical Searches of Premises

Under Polish law, parties to civil or commercial disputes have no right to physically search a defendant's premises or business. Only state authorities (court, prosecutors or police) may conduct physical searches upon court warrant or prosecutor's order.

Requirements and Cross-Undertaking in Damages

To obtain these remedies, the claimant must show:

- credible evidence of urgency – proof that evidence is at risk; and
- strict proportionality – the search must be narrowly tailored to the dispute.

Although Polish law does not generally mandate a cross-undertaking in damages as in common law systems, courts may sometimes require a security deposit to safeguard against potential wrongful search claims.

2.3 Obtaining Disclosure of Documents and Evidence From Third Parties

Obtaining Third-Party Disclosure

Polish civil and criminal procedures allow for the disclosure of documents or evidence from third parties through court or prosecutor intervention. This is especially useful in complex fraud, corruption or asset recovery cases involving banks, accountants or business associates.

Key tools include:

- court orders – the claimant may request the court to compel a third party to produce specific documents; and
- expert appointments – courts may appoint experts to access and analyse third-party data, particularly in financial or digital matters.

Pre-Action Disclosure

Unlike some common law jurisdictions, Polish civil law does not generally allow pre-action disclosure. However, evidence preservation motions can be filed prior to trial if there is a real risk that evidence may be lost or its use impeded. At the same time, courts may order a third party to disclose specific documents if they are essential for the claim and cannot be obtained otherwise. Such motions require demonstration of the relevance and urgency of the requested material.

In criminal investigations, prosecutors and law enforcement authorities have broad powers to obtain disclosure from third parties even before formal charges are filed. This includes seizing documents, financial records or digital data, and summoning third parties to produce evidence.

Pre-action disclosure is an integral part of the investigative phase in criminal fraud matters.

Restrictions on Use of Disclosed Material

Material disclosed through court orders or evidence preservation in civil proceedings is restricted to use within the specific case for which it was obtained. Polish courts strictly prohibit secondary use or public dissemination of such materials unless authorised by a separate ruling.

In criminal cases, evidence obtained from third parties is part of the criminal case file and is subject to procedural confidentiality until trial. Disclosure to victims, civil claimants or other parties is limited and controlled by the prosecutor or court. Use of such material outside the criminal proceedings requires express permission and may be restricted to prevent prejudice to the investigation. This restriction shall not apply to the use of disclosed material in other civil or criminal proceedings, including foreign proceedings. This issue should therefore be assessed on a case-by-case basis.

2.4 Procedural Orders

Use of Without Notice Applications in Poland

Under Polish law, ex parte (without notice) applications are permitted, but they are used cautiously. Courts will consider such measures if notifying the defendant in advance would likely frustrate the intended protection, especially in cases involving fraud, imminent asset dissipation or the destruction of evidence.

Relief may take the form of freezing injunctions, orders for preserving evidence, or search and seizure requests in both criminal and urgent civil contexts. These measures are carefully scrutinised and typically granted only when absolutely necessary to prevent irreversible harm.

When Ex Parte Relief is Justified

Ex parte orders are appropriate in urgent situations where delay could result in the loss or concealment of critical rights or property. The element of surprise plays a key role in preserving the effectiveness of such relief. However, courts treat these applications as strictly temporary and subject to swift judicial review.

Duties and Protections

To balance the absence of the defendant, the claimant is held to a high standard of candour and must present

all relevant information, including any facts that may not support their position. Courts may also require a security deposit or other form of financial assurance to mitigate the risk of harm if the order proves to be unjustified. In addition, a follow-up hearing is usually scheduled shortly after the order is granted to allow the defendant to respond and challenge the measure using the remedies available under Polish procedure.

2.5 Criminal Redress

Criminal Proceedings as a Recovery Tool

In Poland, fraud victims often turn to the criminal process not only to pursue justice but also to seek financial redress. Criminal proceedings are particularly effective when the defendant has hidden assets or when civil enforcement may be difficult. Victims can join the case as injured parties or civil claimants, enabling them to pursue compensation directly during the trial.

Interaction Between Criminal and Civil Proceedings

Civil and criminal cases can proceed in parallel. However, where the outcome of the criminal case is decisive for the civil matter, especially in establishing liability, a civil court may decide to suspend its proceedings. While this can cause delay, it often strengthens the civil claim by grounding it in a criminal conviction.

Importantly, evidence collected in criminal proceedings may be used in related civil cases, increasing procedural efficiency and evidentiary strength.

2.6 Judgment Without Trial

Civil Claims: Fast-Track Judgments

In Polish civil proceedings, certain procedural mechanisms allow claimants to secure the following judgments without a need for a full trial:

- default judgment – issued when the defendant fails to file a response or appear at the hearing, based solely on the claimant's filings;
- payment order – granted in straightforward monetary disputes, where documentary evidence clearly confirms the claim; and
- summary dismissal of meritless defence – if the defence is evidently unfounded or abusive, the

court can reject it without extensive proceedings in accordance with the general procedural rules.

Criminal Cases: No Conviction Without an Identified Offender

In criminal proceedings, Polish law prohibits the conviction of an unknown or absent perpetrator; a verdict can only be issued against an identified, formally charged individual.

However, during the investigative phase, prosecutors and courts can:

- secure, preserve and freeze assets believed to be linked to the crime; and
- obtain court orders declaring seized property (such as funds in the bank account) as evidence, enabling its retention for potential restitution or confiscation, even before the suspect is identified.

This mechanism allows victims to indirectly protect their financial interests while the investigation continues.

2.7 Rules for Pleading Fraud

Higher Standard for Alleging Fraud

While there is no separate standard of proof in Poland for fraud allegations, professional conduct rules and judicial expectations impose a higher threshold of responsibility on parties and their counsel when fraud is pleaded. Legal representatives must avoid making unfounded or speculative allegations, particularly when they concern criminal acts or moral wrongdoing.

Lawyers are bound by the Code of Ethics for Advocates and Attorneys-at-Law, which prohibits the initiation of proceedings without legal or adequate factual justification. Making false or unverified accusations of fraud may result in professional disciplinary action or procedural sanctions, including adverse cost orders or dismissal of the claim.

Requirement for Cogent Evidence

In civil cases, the claimant must prove their claim on the basis of the preponderance of evidence. However, courts expect the claimant to provide clear, specific and credible evidence when allegations involve dishonesty or criminality, even though the formal evi-

dentiary threshold remains civil. Courts may refuse to admit vague or broadly framed fraud claims lacking factual substantiation, as the court assesses the evidence in accordance with the principle of free evaluation of evidence.

In criminal matters, fraud must be proven beyond a reasonable doubt. Prosecutors bear the burden of presenting comprehensive, credible and consistent evidence that is sufficient to eliminate reasonable doubts as to the defendant's guilt. The court will carefully examine the reliability of witnesses, the authenticity of documents and the overall coherence of the case before issuing a conviction.

2.8 Claims Against “Unknown” Fraudsters

Under Polish civil procedure, it is generally not possible to initiate legal proceedings against unidentified fraudsters. The statement of claim must indicate at least minimal identifying details of the defendant (eg, name, business name, registered address). However, in civil cases where the perpetrator's identity is initially unknown, a claimant can:

- initiate pre-trial evidence preservation measures (eg, securing documents); or
- where permitted by law, apply for disclosure orders against third parties to identify the perpetrator.

A claimant may file a claim against a person described only by certain characteristics (eg, “the person responsible for the unauthorised transfer from account X”) if the factual basis is strong and specific.

Once the identity is established, the claim can proceed against the named defendant. Unlike in some common law systems, Polish courts do not formally allow proceedings against “unknown person” in civil matters.

Investigative and Interim Measures

In contrast, under Polish criminal law it is fully permissible to initiate and conduct a criminal investigation against an unknown perpetrator. The prosecution service or police can open an investigation without knowing the suspect's identity and issue asset freezing or evidence preservation measures in accordance with criminal procedure. In such cases, the prosecu-

tion must demonstrate that a criminal offence has been committed and that there is a reasonable basis to believe that the offence was committed by an as-yet-unidentified person.

To support such criminal cases, claimants may seek:

- disclosure orders against banks or telecom providers;
- the preservation of digital evidence; or
- criminal complaints that trigger prosecutorial investigative powers.

These tools can help to identify the unknown party and later amend the claim once the identity is revealed.

2.9 Compelling Witnesses to Give Evidence Court Powers to Compel Witnesses

In Polish civil proceedings, the court and the prosecutor have the authority to compel witnesses to appear and give testimony. Upon request by a party, the court issues a summons requiring the witness to attend a hearing and, after being instructed as to their rights and obligations, testify under oath. Refusal to appear without valid reason may result in fines, and persistent refusal can lead to compulsory escort by court bailiffs.

Obligations and Protections

Witnesses are legally obliged to testify truthfully. However, they may refuse to answer questions if doing so would expose them or close family members to criminal liability. In some cases, witnesses may also request that their identity or location remain confidential, especially in sensitive fraud or corruption cases.

Use in Civil and Criminal Matters

These powers apply equally in civil and criminal proceedings, although the procedural framework and the authorities competent to apply those measures are not identical. In criminal cases, prosecutors can compel testimony even at the investigation stage. In civil cases, the court's role is reactive – it will compel a witness only upon formal application by a party and if the evidence is deemed relevant.

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on a Corporate Entity

Criminal Liability

In addition to the personal liability of directors, officers or other individuals, Polish law also provides for the liability of collective entities under the separate statute governing the liability of collective entities for prohibited acts committed under penalty. Accordingly, liability may arise both on the side of the natural persons involved and on the side of the corporate entity itself. In a situation where the actions of members of the company's management board result in a crime being committed, such members may be held criminally liable. The offences for which a member of the company's management board may be held liable include:

- fraud;
- causing damage to business transactions;
- bribery;
- loan fraud;
- extortion of compensation;
- money laundering;
- frustrating or reducing the satisfaction of the creditor;
- favouring creditors;
- keeping unreliable documentation;
- causing the company's insolvency; or
- tax crimes, such as non-payment of taxes.

Committing the above-mentioned offences may be punishable by imprisonment, fines or the restriction of liberty, depending on the nature and classification of the act.

Liability Under the Commercial Companies Code

Pursuant to the provisions of the applicable Commercial Companies Code, if enforcement against the limited liability company proves ineffective, the members of the management board are jointly and severally liable for the company's obligations.

Civil Liability

The provisions of the Civil Code also provide for liability for damages of legal persons, including capital companies.

3.2 Claims Against Ultimate Beneficial Owners

The beneficial owner may be liable under general rules if they are at fault for fraudulent conduct – ie, if they were personally involved in the fraudulent conduct, exercised relevant control over it, knowingly benefited from it or otherwise satisfy the conditions for civil or criminal liability. Ex delicto liability is borne by anyone who, through their own fault, has caused damage to another. Such a beneficial owner may also be held liable under the provisions of the Penal Code for committing the crime of fraud, because on this account anyone who, in order to obtain a financial benefit, leads another person to dispose of their own or someone else's property in an unfavourable way by misleading them or by taking advantage of an error or inability to properly understand the action taken is liable.

3.3 Shareholders' Claims Against Fraudulent Directors

Principles of Claiming Against Directors

The directors of a company may be held liable for activities causing damage to that company, by the company itself. This is because any act undertaken by the members of the management board that results in damage to the company gives rise to certain claims by the company. In such cases, the liability of the board members is joint and several. If the company itself does not bring an action for compensation for the damage caused to it within a year from the date of disclosure of the act causing the damage, any member of the management board may bring an action for compensation for the damage caused to the company. Moreover, shareholders may file a claim for redress of damages, under general principles, against members of the management board who caused the damage.

Limitation Periods

Claims against members of the management board for damage caused to the company are subject to the limitation rules laid down in the Commercial Companies Code. A claim for redress of damage expires

after three years from the date on which the company became aware of the damage and the person obliged to repair it. However, in any case, the claim expires ten years after the date on which the event causing the damage occurred.

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims

Polish civil procedure permits the joinder of foreign defendants in fraud claims where there is a sufficient connection between the foreign party and the subject matter of the dispute. This may include cases where:

- the fraudulent act had effects in Poland;
- the assets in question are located in Poland; or
- the foreign party acted in concert with domestic defendants.

The joinder must comply with the rules on international jurisdiction, primarily under the EU Brussels I bis Regulation (for EU-based parties), or under bilateral or multilateral treaties for third countries. If no treaty applies, jurisdiction is assessed under the Polish Code of Civil Procedure, typically based on domicile, place of performance or where damage occurred.

In criminal cases, Polish courts may exercise jurisdiction over and prosecute foreign individuals and entities involved in fraud if:

- the offence was committed in whole or in part within territory of Poland;
- the offence produced effects on Polish territory; or
- the victim is a Polish citizen or entity and the offence is punishable in both jurisdictions, so the jurisdictional bases provided by the Penal Code apply.

This follows from provisions of the Polish Penal Code (Articles 110–114) governing territorial, personal and protective jurisdiction. Cross-border co-operation is facilitated through mutual legal assistance treaties, EU legal frameworks (eg, the European Arrest Warrant) and Interpol red notices.

Extraterritorial Reach of Polish Courts

Polish courts may exercise extraterritorial jurisdiction in civil fraud matters where there is a strong Polish nexus. This includes economic loss suffered in Poland or where key evidence or victims are located in Poland. However, courts are cautious in doing so and will examine whether there is a sufficient connecting factor to Poland under the relevant EU instrument, treaty or the Code of Civil Procedure.

4.2 Service of Proceedings out of the Jurisdiction

Standard Procedure for Foreign Service

Service of documents in civil and commercial matters on parties located outside Poland depends on the destination country, as follows:

- within the EU, service is governed by the EU Service Regulation (2020/1784), enabling transmission through designated authorities;
- for non-EU states, Poland relies on the Hague Service Convention or relevant bilateral treaties; and
- if no treaty exists, service is conducted via diplomatic channels, which may be significantly slower.

In criminal cases, international service follows:

- the 1959 European Convention on Mutual Assistance in Criminal Matters and its additional Protocols;
- bilateral treaties on legal assistance in criminal matters; and
- diplomatic channels via the Ministry of Justice and Ministry of Foreign Affairs.

EU Regulation 2020/1784 does not apply to criminal matters in the EU, but certain procedural acts can be executed under the European Investigation Order (EIO).

Alternative and Expedited Options

To speed up service, courts may authorise:

- service by electronic means, where accepted by the foreign state;
- service through foreign counsel or process servers; or

- publication or substitute service, in rare cases where the defendant cannot be located despite diligent efforts being made to do so.

Polish law also permits preliminary permission from the court to serve abroad, provided the claim is well grounded and contains sufficient details to identify the defendant's location. The court will then proceed under the applicable EU instrument, international convention, treaty or domestic procedural rules.

5. Enforcement

5.1 Methods of Enforcement Enforcement Proceedings

The basic method of law enforcement in Poland is judicial enforcement, carried out with the participation of a court bailiff. To commence enforcement proceedings, it is necessary to have an enforceable title, which is most often a court judgment with an enforcement clause or a notarial deed of voluntary submission to execution. The initiation of enforcement proceedings requires the submission of an appropriate application to the competent bailiff.

Execution Methods

Enforcement most commonly concerns the following categories of assets or rights:

- bank accounts;
- movable property;
- remuneration for work;
- retirement or disability benefits;
- immovable property;
- other property rights of the debtor (ie, copyright); and
- maritime assets such as seagoing vessels.

Administrative Enforcement

This type of enforcement is used in particular to enforce taxes, fines imposed by administrative authorities or social security contributions.

5.2 Enforcement of Foreign Judgments Recognition and Declaration of Enforceability of a Judgment

The process for enforcing a foreign judgment in Poland depends primarily on the state of origin of the judgment and on whether an applicable EU instrument or international treaty governs recognition and enforcement. For judgments issued in EU member states, enforcement is generally governed by the Brussels I bis Regulation. Such judgments are recognised in Poland without separate proceedings and, for enforcement purposes, no exequatur is required. In practice, the creditor will usually need to present a copy of the judgment together with the relevant certificate issued under the Regulation and, where necessary, a certified Polish translation. Enforcement is then carried out through the ordinary Polish enforcement system.

For judgments issued in non-EU states, the position is more formal. If an applicable international convention or bilateral treaty exists, that instrument will govern the process. If no such instrument applies, the matter is governed by the Polish Code of Civil Procedure. As a rule, a third-country judgment that is to be enforced in Poland must first be recognised or declared enforceable in Poland, depending on the relief sought. Once the judgment produces the required effect in Poland and the necessary enforcement formalities are completed, enforcement may proceed against assets located in Poland.

6. Privileges

6.1 Invoking the Privilege Against Self-Incrimination Right to Silence and Refusal to Disclose Information

Under Polish law, the constitutional guarantee most closely linked to protection against self-incrimination is the right of defence in criminal proceedings. A defendant in civil or criminal proceedings may invoke the constitutional right not to self-incriminate (Article 42 (2) of the Constitution of Poland). This means a party cannot be compelled to provide information or documents that could expose them to criminal liability.

In civil cases, this privilege is more limited than in criminal proceedings. A party must clearly justify their refusal to comply with a court order on the basis that disclosure would directly risk criminal exposure. The court evaluates whether the refusal is proportionate and substantiated.

Consequences and Inferences

Unlike in criminal trials, civil courts may draw negative inferences from a party's refusal to answer or provide information. This could influence the court's assessment of credibility or be considered when evaluating circumstantial evidence. However, the court cannot treat the silence as direct proof of liability.

6.2 Undermining the Privilege Over Communications Exempt From Discovery Scope of Legal Privilege in Poland

In Poland, communications between a lawyer and their client are protected by professional secrecy. This covers all correspondence and documents exchanged for the purpose of legal advice or representation. Lawyers cannot be compelled to disclose such information, and breach of this duty is both unethical and criminally punishable.

This privilege applies fully in both civil and criminal matters and is generally exempt from disclosure obligations, including in the discovery-like procedures available under Polish law.

The Fraud Exception

However, this protection does not extend to communications made for the purpose of committing or concealing a crime, including fraud. If it can be shown that legal advice was used to further a fraudulent scheme, courts may disregard the privilege and admit such materials as evidence.

This principle – known as the “crime-fraud exception” – is recognised in Polish jurisprudence, particularly in high-stakes financial crime cases. Prosecutors or civil courts may challenge the scope of privilege where there is credible evidence that legal services were misused to facilitate illegal conduct.

7. Special Rules and Laws

7.1 Rules for Claiming Punitive or Exemplary Damages

Damages, Redress and Exemplary Compensation

Under Polish criminal law, it is possible to seek damages and redress for harm. In accordance with the applicable provisions of the Penal Code, in the event of a conviction, the court may adjudicate, and at the request of the victim or other entitled person shall order a mandatory (applying the provisions of civil law) obligation to redress, in whole or in part, the damage caused by the crime or provide compensation for the harm suffered. If the adjudication of the above obligations is significantly difficult, the court may instead order compensation for the benefit of the victim and, in the event of the victim's death, also for the benefit of his or her next of kin. Therefore, the rules applicable to civil procedure apply to pursuing this type of claim in criminal proceedings.

Furthermore, the ruling on the above-mentioned damages or remedies does not block the possibility of pursuing the unsatisfied part of the claim in civil proceedings. It should be remembered, however, that adjudicating on damages or redress is additional in criminal procedures, as the basic role of criminal proceedings is to determine guilt and impose a penalty.

7.2 Laws to Protect “Banking Secrecy”

Polish banking law protects banking secrecy. The bank, its employees and persons through whom the bank performs banking activities are obliged to maintain banking secrecy. Banking secrecy covers all information concerning a banking activity that is obtained during negotiations and during the conclusion and performance of the agreement on the basis of which the bank performs this activity.

In criminal proceedings, banking secrecy may be lifted or displaced in the cases expressly provided by law, and the bank is required to disclose protected information upon a lawful request from the court or prosecutor in the circumstances specified in the Banking Law. The bank is obliged to provide information constituting banking secrecy at the request of a court or prosecutor in connection with pending proceedings

for a crime or fiscal offence, or in connection with the execution of a request for legal assistance.

7.3 Crypto-Assets

Fraud involving crypto-assets has become increasingly relevant in Poland. While crypto-assets are not legal tender, the regulatory environment is no longer as undeveloped as it once was, with the EU MiCA framework now applying across the Union. At the same time, the Polish domestic supervisory framework remains in a transitional phase. In February 2026, the Polish Financial Supervision Authority indicated that, during the transitional period under MiCA, certain entities may continue to operate under previously applicable national rules until 1 July 2026 or until they obtain or are refused authorisation, whichever occurs first.

From an asset recovery perspective, cases involving crypto-assets remain factually and evidentially difficult, especially where assets have been transferred across multiple wallets, platforms or jurisdictions. The main challenge is therefore the practical difficulty of tracing, identifying and securing the relevant assets and counterparties in time.

Trends and Developments

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Poland – Fraud, Asset Recovery and Business Risk in 2026

Fraud disputes in Poland are becoming more complex, more international and more technology-driven. The market is no longer dominated by traditional diversion-of-funds cases alone: clients are increasingly facing phishing, fake investment schemes, business email compromise, payment fraud, misuse of corporate structures and crypto-related asset dissipation. That is the reason why fraud and asset recovery work in Poland has become much more immediate and much more operational than it used to be. The legal framework remains important, but the cases that tend to go well are usually the ones where the client reacts quickly, secures the facts early and understands that civil, criminal and regulatory steps often need to be considered together rather than one after another.

For clients doing business in Poland, that shift is important because it changes what legal advisers are expected to do. In many cases, the issue is not simply whether there is a claim. The real question is whether anything crucial can still be done before the funds disappear, before evidence is lost and before the matter becomes more expensive and harder to control. The Polish legal framework offers a number of effective remedies, but the commercial environment in which those remedies are used has changed significantly. As a result, the market trend in 2026 is clear, because successful fraud work in Poland is increasingly based on co-ordinated response rather than single-track litigation.

Intermediaries play a large role in fraud disputes

The role of intermediaries is becoming increasingly important in the Polish fraud market. Not every case will lead to a claim against a bank, payment provider, technology provider or other service intermediary. Even so, these bodies are often central to tracing, information gathering, mitigation and leverage.

This reflects the modern structure of fraud. A payment may pass through several entities before reaching its destination. A scam may rely on messaging infrastructure, spoofed identifiers, hosted websites or account onboarding processes operated by different service providers. The fraudster may be difficult to identify directly, but the surrounding transaction chain often reveals institutions that handled key parts of the event.

For that reason, clients are increasingly advised to examine not only the conduct of the primary wrongdoer, but also the ecosystem through which the fraud was executed. Sometimes this analysis supports direct claims, and sometimes it strengthens the factual basis for regulatory engagement or disclosure efforts; in other cases, it simply improves tracing and positions the client better for settlement or enforcement.

This trend also cuts the other way. Businesses themselves are under greater scrutiny when they become victims of fraud. Opponents, insurers and other stakeholders are more likely to ask whether the company had adequate controls, whether approval processes were properly followed and whether obvious warning signs were missed. In practice, recovery disputes

increasingly involve both wrongdoing by external actors and close examination of the victim's own governance environment.

Cyber-enabled fraud is now the market baseline

One of the clearest developments in the Polish market is that cyber-enabled fraud is no longer a specialist subset of fraud work: it has become the baseline. Public reporting in Poland continues to show that phishing, impersonation scams and other forms of computer-enabled fraud remain dominant, and that investment scams are also evolving in sophistication. That matters because many disputes now begin not with an obvious theft, but with a compromised communication channel, a manipulated instruction or a false online narrative that initially appears credible.

For clients, the practical significance is obvious. The first question is often no longer whether the facts amount to fraud in legal terms, but whether the payment path can still be identified and interrupted before the funds are layered through multiple accounts or channels. In that sense, many fraud matters in Poland now begin as incident-response exercises before they become court cases. The legal analysis remains critical, but timing and information capture increasingly determine whether any legal remedy will be effective in practice.

The broader regulatory environment also reflects that shift. Poland's Act on Combating Abuse in Electronic Communications, in force since September 2023, was specifically designed to respond to threats such as smishing and CLI spoofing. This is relevant for fraud disputes because it shows that the surrounding legal and operational environment is adapting to the same risks that are now driving contentious work. Even where a dispute ultimately turns on civil liability or asset recovery, the factual background increasingly includes channels and behaviours that have already become a focus of public anti-abuse policy.

Prevention and readiness are part of dispute strategy

One of the clearest market developments is that clients are beginning to treat fraud readiness as part of dispute preparedness. This is a practical response to the way fraud cases now unfold. Businesses cannot

assume that they will have time to build a response once a loss is discovered – by then, the most valuable opportunities may already be disappearing.

As a result, more companies are reviewing approval procedures, payment controls, escalation rules, internal investigation protocols and relations with external advisers before any incident occurs. This is particularly important for businesses with high-value transactions, complex supply chains, decentralised finance functions or extensive dealings through remote channels. In those environments, speed and structure matter more than ever.

This trend is also changing client expectations of outside counsel. Businesses increasingly look for advisers who can bridge the gap between litigation, asset recovery, internal investigations and crisis response. In serious fraud matters, the distinction between advisory work and contentious work has become less rigid. A firm's value often lies in its ability to move seamlessly from urgent containment to longer-term recovery.

Internal fraud – a major source of contentious work

Although digital scams and external fraud attract the most attention, internal fraud remains a major part of contentious work in Poland. Some of the most difficult cases are not the ones involving anonymous fraudsters, but the ones involving senior employees, shareholders or long-standing business partners.

These matters are often more complicated than they first appear. They may involve side arrangements, undisclosed conflicts, procurement manipulation, hidden commissions, transfer of business opportunities, misuse of corporate assets or payments that were formally authorised but substantively improper. In many cases, the documents appear regular but the problem lies in the purpose behind them or in the relationships between the people involved.

That creates a different type of challenge for clients, as the company may have to investigate while still operating the business. It may need to deal with employment, governance and shareholder issues at the same time. It may also need to re-evaluate how

far to escalate matters and at what stage, particularly where criminal allegations could affect ongoing decision-making or the market perception of the business.

Governance failures are increasingly part of the dispute itself

One of the more noticeable developments in Poland is that fraud disputes are no longer analysed solely through the conduct of the wrongdoer. In many cases, the dispute also turns on the quality of the victim company's own governance arrangements. Questions about approval chains, segregation of duties, internal reporting, supervision of finance teams and escalation procedures are now often central to the factual and legal analysis.

This is particularly visible in cases involving payment diversion, insider misconduct and procurement irregularities. Opponents, insurers and sometimes even business partners increasingly examine whether warning signs were missed, whether internal controls were followed and whether the company reacted appropriately once concerns arose. As a result, governance weaknesses are no longer treated only as an internal management issue: They can become part of the dispute itself.

For clients, the practical lesson is that a fraud response strategy should not begin only after an incident has crystallised. Businesses that review decision-making structures, approval frameworks and reporting lines in advance are usually in a much stronger position later, not only to prevent fraud but also to explain their conduct persuasively if a dispute arises. In that sense, corporate governance is becoming part of recovery strategy as much as part of compliance.

Cross-border features are increasingly common

Another clear market trend is the growing international dimension of fraud work in Poland. Even where the victim, the payment and the initial event are domestic, the case often develops a cross-border aspect very quickly. Funds are moved abroad, service providers are located elsewhere, beneficial control sits in another jurisdiction or relevant digital infrastructure is outside Poland.

For clients, this makes early case management even more important. Cross-border matters tend to punish delay. If the initial factual record is weak, if the transaction chain is not mapped properly or if the wrong steps are taken first, the client may later find that foreign options are harder to pursue than expected.

This is also where expectations sometimes need to be managed. Poland has effective legal tools, but it does not offer the same type of broad disclosure culture that clients may know from some common law jurisdictions. As a result, success often depends less on sweeping document production and more on building a targeted, coherent case from the information that can realistically be obtained early.

In practice, that usually means two things. First, the Polish phase of the matter needs to be handled with foreign enforcement in mind. Second, clients should not wait until the case is "clearly international" before thinking across borders – by then, some of the most useful opportunities may have passed.

Parallel civil and criminal proceedings are becoming the default model

A further feature of the Polish market in 2026 is that serious fraud cases are increasingly run on more than one track at the same time. This is not entirely new, but it has become much more central in practice. Civil proceedings remain essential where the client wants damages, targeted recovery action or commercial control over the case. Criminal proceedings, however, may be equally important where the claimant needs rapid access to information, pressure on wrongdoers or practical support in tracing assets. The question is therefore often not whether a matter is civil or criminal, but how the two should be co-ordinated.

This is particularly relevant in Poland because the system does not offer the same broad disclosure culture known from some common law jurisdictions. Claimants therefore often need to think more strategically about where useful information is likely to sit and which route is most likely to unlock it. In practice, a well-run fraud matter may involve a combination of internal investigation, civil preparation, criminal filings, engagement with intermediaries and, where relevant, regulatory reporting. That multi-track model is becoming

ing the norm in more serious cases rather than the exception.

The legal environment is no longer as undeveloped as it was a few years ago, because MiCA now frames the EU market. In February 2026, the Polish Financial Supervision Authority confirmed that the MiCA transitional period continues only until 1 July 2026 or until authorisation is obtained or refused, whichever comes first. For clients, that does not mean crypto recovery is impossible. It means that crypto-related fraud analysis now needs to be treated as a mainstream part of fraud strategy, combining tracing, regulatory analysis and cross-border practicalities from an early stage.

Looking ahead

The Polish fraud and asset recovery market in 2026 is defined less by dramatic changes in black-letter law than by changes in how fraud happens and how quickly clients must respond. The legal tools remain important, but the market is increasingly shaped by operational realities: digital evidence, fast-moving assets, intermediary involvement and international fund flows.

For clients doing business in Poland, the key takeaway is that recovery is now closely linked to preparedness. The strongest cases are often those in which the client acts early, secures evidence quickly, co-ordinates legal avenues intelligently and understands that fraud response is both a legal and commercial exercise.

That trend is unlikely to reverse. Fraud schemes will continue to evolve, particularly in digital and cross-border settings. At the same time, clients will continue to expect advisers to deliver not only legal analysis, but practical recovery strategy. In that environment, Poland's fraud market is becoming faster, more sophisticated and more integrated with wider business risk management than ever before.



Law and Practice

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Rogério Alves & Associados Sociedade de Advogados, SP, RL

Rogério Alves & Associados Sociedade de Advogados, SP, RL is a full-service law firm with national and international reach. It was established in Lisbon, Portugal, in 2013. With more than 30 legal professionals, the firm keeps growing in line with its successful track record. Rogério Alves & Associados (RA) is a recognised, experienced and well-known player in the field of criminal law. All lawyers on this team have amassed a great deal of experience, covering a

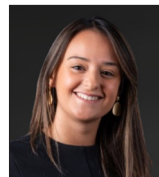
wide range of proceedings commonly found in criminal law. The firm represents clients in the sphere of so-called economic and financial crimes (white-collar crimes), crimes against honour and property, and litigation related to regulatory offences – the scope, importance and intensity of which continue to grow. RA's practice operates under the belief that the connection between the lawyer and the court is historical and traditional.

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1. Fraud Claims

1.1 General Characteristics of Fraud Claims

In Portugal, the crime of fraud is set out in Article 217 of the Penal Code and punishes anyone who, with the intention of obtaining illegitimate enrichment for themselves or for a third party, by means of error or deception about facts that they have cunningly caused, or who causes another to perform acts that cause them, or another person, patrimonial damage, will be punished with imprisonment for up to three years or a fine. Attempt, alone, is punishable. Criminal proceedings are contingent upon the lodging of a complaint. However, where the alleged offender is in a legally recognised family relationship with the victim, criminal proceedings further depend on an indictment brought by the victim pursuant to Article 207.

Restitution or reparation shall result in the termination of the criminal proceedings pursuant to Article 206.

In addition, Article 103 of the General Regime of Tax Offences punishes tax fraud (which covers conducts such as concealing facts or figures in accounts or tax returns, or simulating business deals) and the penalty will be different depending on the value of the financial advantage. If the advantage is equal to or greater than EUR15,000, the crime is punishable by a prison sentence of up to three years or a fine. If the amount is lower, the behaviour is punishable and only qualified as a misdemeanour, as stated in Article 118 of the

General Regime of Tax Infractions. Tax fraud can be qualified under the terms of Article 104 of the General Regime of Tax Infractions.

The crime of false declarations is set out in Article 348-A of the Penal Code and punishes those who intentionally lie about their identity, marital status or other relevant characteristics before a public authority or official in the exercise of their duties. The applicable penalty is imprisonment for up to one year or a fine. This punishment will apply if there is no specific law providing for a more severe penalty for the falsehood committed.

In Portugal, multiple corruption-related offences are typified under Article 372 et seq of the Portuguese Penal Code.

The undue receipt of an advantage consists of a situation in which a public official, in the exercise of their duties, requests or accepts a pecuniary (or non-pecuniary) advantage when it is not due to them. This behaviour is punishable by up to five years in prison or a fine. The same crime is committed by anyone who promises a public official a financial or non-financial advantage, in which case they will be punished with up to three years in prison or a fine.

Active corruption, which consists of offering (or suing) a civil servant, directly or through an intermediary, a financial or non-financial advantage for the perfor-

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mance of any act or omission contrary to the duties of the position held or to be held, is punishable by imprisonment of one to five years (Article 374 of the Penal Code).

Regarding passive corruption, see **1.2 Causes of Action After Receipt of a Bribe**.

Corruption in the private sector is also punishable, under the terms of Article 9 of Law No 20/2008, of 21 April, with a prison sentence of up to three years or a fine. If the conduct is aimed at distorting competition or damaging the property of third parties, the perpetrator is punished with imprisonment of up to five years or a fine of up to 600 days, and attempts are punishable.

Portugal's Penal Code does not provide for the crime of conspiracy. Similar concepts include criminal association (Article 299 of the Criminal Code) and agreement to commit certain crimes when defined (eg, terrorism), but there is no general criminalisation of "conspiracy" similar to that found in Anglo-Saxon legal systems. Extradition is permitted, within the limits and under the terms of Article 3 of the Assembly of the Republic Resolution 40/98.

Illegitimate appropriation, provided for in Article 234 of the Penal Code, consists of someone having power over public or co-operative sector assets (either by administering them, managing them or simply using them) and illegally appropriating those assets, or intentionally allowing someone else to do so. The penalty will be the one provided for the crime, with the aggravating factor of one third at its maximum and minimum limits. In this case, the attempt is punishable.

1.2 Causes of Action After Receipt of a Bribe

Article 373 (1) of the Penal Code punishes the crime of passive corruption in the following terms: if the official requests or accepts, for themselves or for a third party, a pecuniary or non-pecuniary advantage, or the promise thereof, for the performance of any act or omission contrary to the duties of the office, he/she shall be punished with imprisonment of one to eight years. If this act or omission is not contrary to the duties of the office and the advantage is not due to

them, the official will be punished with imprisonment of one to five years.

If the act or omission is not contrary to the duties of the office and the advantage is not due, the official shall be punished with imprisonment of one to five years.

1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts

In Portugal, both the perpetrator and the accomplice of a crime are punished (Articles 26 and 27 of the Penal Code).

The perpetrator of a crime is anyone who carries out the criminal act themselves or through another person, anyone who takes a direct part in the execution by agreement with one or more other agents, and anyone who intentionally directs another person to carry out the illegal act.

On the other hand, anyone who in any way assists someone in the commission of a crime is punished as an accomplice. In these cases, the penalty is especially mitigated under the terms of Article 73 of the Penal Code.

Anyone who contributes to the dissipation or concealment of benefits derived from a criminal offence is liable for the offence of money laundering under the terms of Article 368-A of the Penal Code. This offence is likewise committed by any person who, even if not the perpetrator of the predicate offence, acquires, possesses or uses such assets, provided they are aware of their illicit origin.

1.4 Limitation Periods

The limitation periods in the Portuguese legal system depend on the penal framework of each crime (Article 118 of the Penal Code).

- If the maximum custodial sentence is more than ten years in prison, the statute of limitation period is fifteen years.
- If the maximum custodial sentence is more than five years in prison but less than ten years, the statute of limitation period is ten years.

- If the maximum custodial sentence is one year or more, the statute of limitation period is five years.
- When the penalty is less than one year in prison or when the crime is punishable only by a fine, the statute of limitation period is two years.
- For corruption-related offences, a special rule in Article 118 (1)(a) of the Penal Code provides a 15-year limitation period. This applies to:
 - (a) influence peddling;
 - (b) undue receipt of an advantage by public officials and political office holders;
 - (c) passive corruption by public officials, political office holders, and in the context of sports competitions;
 - (d) active corruption by public officials and political office holders;
 - (e) embezzlement;
 - (f) economic participation in business;
 - (g) concussion;
 - (h) abuse of office;
 - (i) breach of official secrecy;
 - (j) breach of the secrecy of correspondence and telecommunications;
 - (k) influence peddling in the context of sports competitions;
 - (l) corruption in international trade and in the private sector;
 - (m) offences provided for in the Code of Military Justice concerning corruption, embezzlement and other military officials' offences;
 - (n) fraud in obtaining a subsidy or subvention; and
 - (o) the offence of criminal association, provided that the purpose or activity of the group, organisation or association is directed to the commission of certain of the above-mentioned crimes of corruption.

1.5 Proprietary Claims Against Property

Claims for civil damages arising from the commission of a criminal offence are, as a rule, brought within the corresponding criminal proceedings, subject to statutory exceptions. Accordingly, in certain circumstances – particularly where the criminal proceedings are protracted – the injured party may, if they wish, bring the claim before the civil courts.

Under Portuguese law – specifically the Civil Code and the Insolvency and Corporate Restructuring

Code (CIRE) – a victim's claim arising from a crime-based civil liability may take precedence over other unsecured creditors in insolvency, in defined circumstances.

1.6 Rules of Pre-Action Conduct

Strictly speaking, Portuguese law has no counterpart to the Anglo-Saxon “Rules of Pre-Action Conduct” – that is, no general, cross-cutting set of specific, structured duties that parties must satisfy before commencing civil proceedings, on pain of stand-alone procedural sanctions. That said, the relatively recent legislative framework on combating corruption and related offences is noteworthy in this context, as it incorporates a strong preventive dimension that merits particular attention.

Decree-Law No 109-E/2021, of 9 December, establishes a general regime for the prevention of corruption in Portugal, whereby entities with 50 or more employees are obliged to implement a set of documents in their organisation (Code of Ethics and Conduct, Plan for the Prevention of Risks of Corruption and Related Offences, Training Policy and Whistleblowing Channel), designed to ensure knowledge of and compliance with the rules related to this issue.

This legal framework means that companies and public entities that fail to adopt or implement their compliance programmes in an incomplete or flawed manner will face penalties, including administrative offences. It is also mandatory for these entities to create internal control mechanisms to ensure that their compliance programmes work and that their decisions are made in a transparent and fair manner. For entities to adjust, the application of these new rules requires a progressive attitude.

Finally, there is the National Anti-Corruption Mechanism (MENAC), Portugal's independent administrative authority for corruption prevention. In essence, it:

- sets, promotes and oversees anti-corruption compliance programmes in public bodies and certain private entities;
- issues guidance and standards on risk-prevention plans, whistle-blowing channels, conflicts of interest and training;

- supervises preventive duties and can impose administrative sanctions for non-compliance;
- co-ordinates with other authorities (eg, Public Prosecutor's Office, Judiciary Police, Inspectorate-General of Finance, CMVM, ASF) where offences are suspected; and
- collects data and publishes reports on corruption prevention.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Article 228 of the Portuguese Code of Criminal Procedure establishes the preventive seizure of assets, which is a patrimonial guarantee measure designed to ensure the payment of the amount corresponding to the benefits of the crime. This measure allows the judge, at the request of the Public Prosecutor's Office or the injured party, to order the seizure of the defendant's assets to ensure future execution. Under Portuguese law, freezing injunctions operate in personam, but they have in rem effects once applied to specific assets (eg, bank accounts and property). The injunction is directed at the defendant but can bind identified assets.

Also, Article 227 of the Portuguese Code of Criminal Procedure provides for economic bail. This is a measure aimed at securing assets to ensure the payment of the pecuniary penalty, procedural costs or any debt, compensation or civil obligation arising from the crime. To obtain this measure, the applicant must demonstrate a well-founded fear that the guarantees of payment will be lacking or substantially diminished.

Court fees (*custas judiciais*) are due and are generally proportional to the value of the claim or the assets targeted, following the Portuguese Regulation on Procedural Costs (*Regulamento das Custas Processuais*).

Non-compliance can result in civil fines, seizure of assets, or, in serious cases, criminal liability for disobedience under Article 348 of the Penal Code. Also, third parties (eg, banks or custodians) must comply once notified. If they assist in breaching the order, they may be held liable or sanctioned for obstruction or facilitating dissipation.

2. Procedures and Trials

2.1 Disclosure of Defendants' Assets

In Portugal there are no procedures available to require a defendant to give disclosure of their assets to assist in preserving assets pending a judgment. However, the court may issue official requests to public entities where a person's assets are registered, or to banks (including the Bank of Portugal), to provide information about the assets held by that individual.

Under Law No 72/2025, published on 23 December 2025, violations of freezing or asset-related restrictions imposed by the court or by EU restrictive measures may now carry specific criminal sanctions, which reinforces the legal framework for asset preservation in fraud or money laundering cases.

2.2 Preserving Evidence

In Portugal, seizures are a crucial instrument for preventing the concealment and dissipation of assets. They are regulated under Article 178 et seq of the Portuguese Code of Criminal Procedure.

Physical searches (*busca e apreensão*) at a defendant's premises are permitted only with prior judicial authorisation, usually in criminal proceedings or exceptional civil cases involving strong evidence of fraud.

As a means of securing evidence, seizures serve the procedural objective of uncovering the truth and act as a safeguard against the loss of unlawful gains, ultimately contributing to the fair administration of justice. Under Article 178 (1) of the Portuguese Code of Criminal Procedure, instruments, proceeds, or advantages linked to the commission of a criminal offence may be seized, along with any animals, objects, or items left by the perpetrator at the crime scene or any other object that may potentially serve evidentiary purposes.

The lawfulness of a seizure depends on the existence of sufficient evidence connecting the good to the offence. It must be determined whether the measure concerns assets used or intended for criminal activity, rather than the lawful possessions of the accused which, having no connection to the crime under inves-

tigation, may only be subject to preventive seizure under Article 228 of the Portuguese Code of Criminal Procedure.

Given the impact of seizures on constitutionally protected rights and guarantees, their execution is subject to authorisation or validation by the competent authority (either the judge or the prosecutor), as outlined in numbers 3 to 6 of Articles 178, 267, 268 and Article 1 (b) of the Portuguese Code of Criminal Procedure.

Exceptionally, searches can be carried out by criminal police bodies but in these urgent cases such acts must be validated within 72 hours (Article 178 (4)(6) of the Portuguese Code of Criminal Procedure).

According to Article 177 of the Portuguese Code of Criminal Procedure, house searches can only be ordered or authorised by a judge and must be carried out between 7am and 9pm (outside these hours, that is, during the night between 9pm and 7am, they can only be carried out in exceptional cases, as provided for in the same article).

2.3 Obtaining Disclosure of Documents and Evidence From Third Parties

If a party seeks to include documents that are deemed relevant to the case but are held by a third party in the proceedings, they must request the competent judicial authority to take the necessary measures to obtain them.

2.4 Procedural Orders

It follows from Article 61 (1)(a) of the Portuguese Code of Criminal Procedure that the defendant has the right to be present at procedural acts that directly concern them.

However, there are exceptions to this rule, in particular regarding the seizure of assets without hearing the opposing party. The seizure of assets without hearing the opposing party (*arresto sem audiência do réu/arguido*) is an urgent protective measure provided for in Article 228 of the Portuguese Code of Criminal Procedure and Articles 391 to 396 of the Portuguese Code of Civil Procedure. It is intended to prevent the dissipation or concealment of assets before a court

judgment is delivered. The court may order the provisional seizure of assets *ex parte* (without prior notice or hearing of the defendant) where there is a serious risk of irreparable harm or of asset dissipation. After the seizure, the defendant must be notified promptly and given an opportunity to be heard or to challenge the order.

2.5 Criminal Redress

Under Portuguese law, victims of fraud often seek redress through the criminal justice system by filing a civil compensation claim (*pedido de indemnização civil*) within the criminal proceedings. This allows the court to rule on both criminal responsibility and civil liability in a single process, which is generally more efficient and cost-effective. Victims may also participate as private prosecutor (*assistente*) to help influence the proceedings. This mechanism is widely used in fraud cases where financial harm is central to offence.

When civil and criminal proceedings run in parallel, Portuguese courts may suspend the civil action until the criminal case concludes, especially when the criminal outcome is relevant to determining civil liability. Criminal conviction can have binding effects on civil proceedings regarding factual findings, but an acquittal does not necessarily prevent a separate civil claim. However, delays in the criminal process can slow down victims' access to compensation, prompting some to pursue standalone civil actions for faster results.

2.6 Judgment Without Trial

Under Portuguese criminal law, a judgment cannot be obtained purely by default or without a trial, even if the defendant does not participate or the defence appears unmeritorious. That said, if the defendant is absent without justification, the trial may proceed in their absence (*julgamento à revelia*) under Article 333 of the Portuguese Code of Criminal Procedure, provided the court confirms the defendant was properly notified and their rights are safeguarded. Even in such cases, the court must hear the prosecution's evidence, examine witnesses, and deliberate as in any other trial. Thus, while proceedings may continue without the defendant, a full trial is still required before a criminal judgment can be rendered.

2.7 Rules for Pleading Fraud

With the enactment of Law No 83/2017, 18 August, which partially transposed Directive 2015/849/EU, “legal advice should remain subject to the obligation of professional secrecy, except where the legal professional is taking part in money laundering or terrorist financing, the legal advice is provided for the purposes of money laundering or terrorist financing, or the legal professional knows that the client is seeking legal advice for the purposes of money laundering or terrorist financing.”

This legislation has been incorporated into the Portuguese Bar Association’s Regulation on the prevention and combating of money laundering and terrorist financing (*Regulamento da Ordem dos Advogados sobre a prevenção e combate ao branqueamento de capitais e financiamento do terrorismo*).

Consequently, lawyers, whether as a law firm or in individual practice, are subject to the provisions of the law and this Regulation whenever they intervene or assist, on behalf of a client or in other circumstances, in the following activities:

- barter transactions and the purchase or sale of immovable property, commercial establishments, or shareholdings;
- management of funds, securities, or other assets belonging to clients;
- opening and management of bank, savings, or securities;
- creation, incorporation, operation, or management of companies, societies, other legal entities, or collective interest centres without legal personality;
- the sale or acquisition of rights over professional athletes; and
- other financial or real estate operations, on behalf of or in support of the client.

Lawyers who have suspicions that a certain operation is likely to involve money laundering or terrorist financing must strengthen their means of analysing the situation to the best of their ability, taking into account the possibility of obtaining further clarification, by reporting suspicious operations to the Bar Association, duly documenting that certain funds or other assets,

regardless of the amount or value involved, come from criminal activities or are related to terrorist financing.

In addition, lawyers have a duty to co-operate with the authorities and to keep communications and suspicious documentation confidential.

2.8 Claims Against “Unknown” Fraudsters

Article 113 et seq of the Portuguese Penal Code foresees the rules of the complaint and does not require the suspect of the crime to be identified. It is therefore possible to file a complaint against unidentified persons, and it will be up to the Public Prosecutor’s Office to find the perpetrator. Article 262 of the Portuguese Code of Criminal Procedure thus tells us that the investigation phase consists of carrying out the necessary actions to investigate whether a crime has in fact occurred, to identify who committed it and who is responsible for it, and to gather the necessary evidence to decide whether there are grounds for an indictment. Although the participant has, in this case, some elements to identify themselves, what is certain is that there is nothing to prevent a criminal report from being filed even against unknown or uncertain persons and that the identification will then result from the investigative activity of the Public Prosecutor’s Office.

2.9 Compelling Witnesses to Give Evidence

In Portuguese criminal proceedings, witnesses are legally required to appear and testify when duly notified (Article 132 of the Portuguese Code of Criminal Procedure). If a witness fails to appear without justification, the court may order their compulsory appearance by police (*condução coerciva*) and impose a fine (Article 116 number 2 of the Portuguese Code of Criminal Procedure). Once present, witnesses must take an oath and testify truthfully. False declarations may lead to criminal liability under Article 360 of the Criminal Code, which penalises unjustified refusal to testify.

Certain individuals have the right to refuse testimony due to privileged relationships, including spouses, direct relatives, and persons bound by professional secrecy (Articles 134 and 135 of the Portuguese Code of Criminal Procedure). Even in such cases, they must appear and formally state their reason for refusal. In

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cases involving serious crime or threats to the witness, courts may apply protective measures such as anonymity, closed-door hearings, or video testimony, ensuring both witness safety and the integrity of the proceedings (Law No 93/99).

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on a Corporate Entity

Corporate entities, such as companies and other types of legal person, are liable for the unlawful conduct of their employees, owners, and individuals in leadership positions, as well as anyone acting in the company's name or on its behalf, whether directly or indirectly in its interest.

Not all illegal actions by these individuals result in criminal liability for the corporate entity. However, the company may be criminally liable for offences including:

- criminal association;
- influence peddling;
- corruption;
- crimes against the administration of justice, such as false statements, bribery, and money laundering;
- crimes against property, assets in general, and property rights (including theft, breach of trust, fraud, extortion, and usury); and
- receiving stolen goods, forgery of documents, money or securities, and forgery of dies, weights, and similar objects.

A corporate entity may also be liable for the actions of those who, in its name and on its behalf or in its interest, commit crimes such as:

- trafficking in human organs;
- medical negligence;
- ill-treatment;
- violation of labour safety rules;
- slavery;
- human trafficking;

- crimes against sexual freedom or self-determination;
- crimes against cultural identity and personal integrity;
- crimes of common danger, such as arson, the spread of disease, and other particularly dangerous conduct;
- disobedience to public authority; and
- violation of prohibitions or bans determined by judgment.

The liability of a legal person is excluded when an employee or representative has acted against the direct orders or instructions of those in leadership positions within the legal person (ie, legal entity).

3.2 Claims Against Ultimate Beneficial Owners

Those who stand behind companies may be held liable, particularly if they participate – directly or indirectly – in criminal conduct, such as the acts referred to in **3.1 Imposing Liability for Fraud on a Corporate Entity**.

Using a company as a vehicle for money laundering, criminal association, influence peddling or corruption, for example, is considered a criminal offence.

The liability of an ultimate beneficiary of a criminal activity involving illicit proceeds may arise whether the beneficiary committed the offence directly or through intermediaries (either individuals or corporate entities).

Anyone who assists the principal offender, thereby acting as an accomplice, may also be held criminally liable.

3.3 Shareholders' Claims Against Fraudulent Directors

The liability of board members towards the company is legally established.

Managers or directors are liable for damages caused to the company by acts or omissions carried out in breach of legal or contractual duties, unless they prove that they acted without fault and/or according to rational business criteria.

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Managers or directors are also liable, under general terms, to shareholders and third parties for any damage directly caused to them in the performance of their duties.

Compensation for damages resulting from the commission of a crime is governed by civil law. However, under criminal procedural rules, the principle of adhesion applies, whereby civil proceedings are conducted within criminal proceedings.

For example, if there is an ongoing criminal proceeding against a manager or director who intentionally caused significant patrimonial damage to the company through a serious violation of their duties, civil compensation must, in principle, be petitioned within the criminal proceedings (after the Prosecutor produces an indictment).

However, the principle of adhesion may be set aside in certain circumstances, such as when the criminal proceedings have not led to an indictment within eight months from the complaint.

To lodge a complaint on behalf of the commercial company, it is necessary for the company to resolve this at a general meeting, awarding power to a special representative.

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims

Under Portuguese law, foreign parties may be joined to fraud claims if there is a close factual or legal connection between the claims and the Portuguese courts have jurisdiction over all parties. When such claims involve overseas individuals or entities, Portuguese courts may request international judicial co-operation, including for the service of documents and the collection of evidence. These procedures are governed by the Law on International Judicial Cooperation in Criminal Matters (Law No 144/99), as amended.

Within the European Union, co-operation is further supported by the Convention on Mutual Assistance in Criminal Matters (2000) and its Protocol to the Convention on Mutual Assistance in Criminal Matters

between the member states of the European Union (2001), which apply exclusively to EU member states that have ratified them. These instruments streamline co-operation in criminal matters among EU countries.

Portuguese criminal law also allows courts to exercise extraterritorial jurisdiction in specific cases. This includes situations where the offender or victim is Portuguese, where the crime impacts national interests or security, or where a law explicitly grants such jurisdiction. In fraud cases, if the offence causes harm in Portugal or targets Portuguese interests, courts may assert jurisdiction over foreign defendants. However, such jurisdiction is used cautiously and requires a strong and demonstrable connection to the Portuguese legal system.

Recently, Law No 72/2025 of 23 December was adopted, transposing Directive (EU) 2024/1226, which strengthens the duties of international co-operation for restrictive measures and requires judicial authorisation under the Law on International Judicial Cooperation in Criminal Matters when data are to be used in criminal proceedings.

4.2 Service of Proceedings out of the Jurisdiction

Under Portuguese criminal law, serving parties located abroad generally requires formal international co-operation, governed by international conventions, bilateral agreements, and national legislation. The most common method is through letters rogatory, which are formal requests from a Portuguese court to a foreign court seeking assistance with judicial acts such as serving documents, gathering evidence, or carrying out arrests. These are crucial tools in criminal investigations and proceedings involving cross-border elements.

Letters rogatory are usually transmitted via diplomatic channels, the Ministry of Justice, or directly between courts, depending on the applicable legal framework. Although effective, the process can be slow due to procedural formalities and the need to respect the sovereignty of the requested state. Still, it ensures legal certainty and safeguards fundamental rights, such as due process and the right to a defence.

To expedite service, Portuguese authorities may resort to alternative methods when permitted by the foreign country and authorised by the Portuguese court. These may include electronic service, registered mail, or use of consular channels. In urgent situations, courts may approve substituted service methods. Regardless of the method used, all procedures must comply with the laws of the receiving country and uphold due process guarantees to ensure the validity and fairness of the proceedings.

5. Enforcement

5.1 Methods of Enforcement

Portuguese criminal law provides judicial authorities seizure and confiscation measures of any material or instruments used to commit offences (kept for evidence) and proceeds obtained from offences.

These measures are, in general, established in the Portuguese Code of Criminal Procedure, in Article 178 (1), and more thoroughly in a complementary law, Law No 5/2002 of 11/01. This law reinforces and facilitates seizure and confiscation measures (such as breach of financial secrecy and record of sound and images) regarding specific crimes such as humans, drugs, cars and arms trafficking, influence peddling, all kinds of terrorist organisations crimes, corruption, money laundering, criminal association, child pornography and prostitution, prostitution, sports coercion and fraudulent sports practices, money and credit card counterfeiting and smuggling.

5.2 Enforcement of Foreign Judgments

Portugal is adherent of European and international conventions and co-operates with other states in accordance with the principle of reciprocity.

In Portugal, the enforcement of foreign judgments requires review and confirmation (*reconhecimento*) by the Portuguese courts under the Civil Procedure Code and Private International Law rules. The process involves filing a request with the Court of Appeal (*Tribunal da Relação*), which assesses conditions such as jurisdiction, due process, finality, and non-contradiction with Portuguese public order. Once recognised,

the judgment can be enforced as if it were a Portuguese decision.

Also, foreign criminal judgments that have become final may be enforced in Portugal under the conditions predicted in Law No 144/99 (Article 96). The procedure is conducted by the public prosecutor that admits it or not in accordance with the law and then submits it to the Minister of Justice. If the Minister of Justice considers the request admissible, the file is forwarded, through the General Prosecutor, to the Public Prosecutor at the competent Court of Appeal, pursuant to Article 235 of the Portuguese Code of Criminal Procedure, to initiate the procedure for review and confirmation of the judgment.

6. Privileges

6.1 Invoking the Privilege Against Self-Incrimination

The Portuguese legal system strongly protects the guarantee against self-incrimination (*nemo tenetur*). One of the main corollaries is the right to silence, which is grounded in the constitutional guarantees of defence and fair trial and is implemented in criminal procedure.

With specific regard to criminal proceedings, this right is laid down in Article 61 (1)(d) of the Criminal Procedure Code. This provision lists the procedural rights and duties of the defendant and paragraph (d) foresees the right of the defendant not to answer questions from any person about the offences charged or the content of any statements made concerning them. Thus, this right is one of the most important guarantees of the accused in criminal proceedings and is a manifestation of the principle of the right not to be incriminated.

However, while the right to silence cannot harm the defendant, it does not automatically operate to the defendant's advantage. By remaining silent – thereby foregoing the opportunity to present their version of the facts or to clarify points about which they have personal knowledge – the defendant cannot later claim that they have been harmed by the exercise of that right.

It should be noted that this right does not extend to matters of identity (and, where the law so requires, criminal record) and does not cover evidence obtained independently of the defendant's will in accordance with the law. In civil proceedings, the criminal-law right to silence does not transpose wholesale; nevertheless, party testimony is inadmissible on criminal facts for which the witness is a defendant, and targeted refusals to answer potentially incriminating questions are permitted.

6.2 Undermining the Privilege Over Communications Exempt From Discovery

In Portugal, the lawyer-client relationship is safeguarded by professional secrecy. However, this protection is not absolute and may be lifted in exceptional circumstances and pursuant to defined procedures.

Legal professional privilege is protected, but it does not apply to communications made for the purpose of committing or furthering a crime or fraud. If documents or advice are created with the intent to facilitate fraudulent conduct, the privilege may be lifted by judicial decision, allowing their disclosure in civil or criminal proceedings.

Authorisation to disclose information covered by professional secrecy is only permitted when it is unequivocally necessary to defend the dignity, rights, and legitimate interests of the lawyer, client, or their representatives. Such disclosure requires prior approval from the president of the respective regional council of the Bar Association, as stipulated in Article 92 (4) of the Statute of the Portuguese Bar Association (Law No 145/2015, of 9 September) and Article 4 of the Regulation on the Waiver of Professional Secrecy (Regulation No 94/2006, of 12 June).

However, should the Bar Association refuse to waive legal professional privilege, an appeal may be lodged with the higher courts (the "Court of Appeal" or the "Supreme Court of Justice", as the case may be).

In practice, two pathways must be distinguished: (i) Bar authorisation for waiver when disclosure is absolutely necessary to protect the dignity, rights and legitimate interests of the lawyer of the client; and (ii) judicial "secrecy-breaking" incidents, in which the higher

court, after consulting the Bar, may order disclosure based on the prevalence of a superior interest.

7. Special Rules and Laws

7.1 Rules for Claiming Punitive or Exemplary Damages

In Portugal, punitive damages are not awarded, unlike in common law jurisdictions such as the United States. Rooted in a civil law tradition, the Portuguese legal system adheres to compensatory damages aimed at restoring the victim to the pre-harm position, whether the damage is pecuniary (eg, financial loss) or non-pecuniary (eg, pain and suffering).

Victims of crime may file a civil compensation claim (*pedido de indemnização civil*) within criminal proceedings under the adhesion regime set out in Article 71 of the Portuguese Code of Criminal Procedure. However, such claims are strictly limited to actual losses. Damages intended to punish or deter the wrongdoer are not recognised, as they would conflict with the principles of proportionality and the reparative function of civil liability.

Contractual penalty clauses may coexist with compensation for additional loss, operating as coercive/pre-liquidated remedies rather than punitive awards, and are reducible if manifestly excessive.

A separate civil action may only be brought in exceptional cases, as set out in Article 72 of the Portuguese Code of Criminal Procedure, with the compensatory nature of damages unchanged.

7.2 Laws to Protect "Banking Secrecy"

In Portugal, banking secrecy is a legal safeguard that protects the confidentiality of citizens' financial information, as stipulated in banking and tax legislation. This procedure ensures that public or private entities cannot freely access bank data without the account holder's consent or legal authorisation expressly provided by law.

However, banking secrecy is not absolute and may be lifted in exceptional circumstances, particularly within criminal proceedings where access to bank

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information is deemed essential to uncover the truth and ensure justice. Portuguese law provides statutory exceptions that allow disclosure to judicial authorities in criminal cases, to supervisory authorities such as the Bank of Portugal (“Banco de Portugal”), Portuguese Securities Market Commission (CMVM) and Insurance and Pension Funds Supervisory Authority (ASF).

The lifting of banking secrecy in criminal cases follows the procedure outlined in Article 135 of the Code of Criminal Procedure. In light of said procedure, where a witness considers that the duty of professional secrecy prevents the answering of certain questions, this circumstance must be declared before the judicial authority seised of the specific case.

Where there are well-founded doubts as to the legitimacy of the refusal, the judicial authority (judge or prosecutor, depending on the stage of the criminal procedure) shall hear the professional body representing the profession to which the relevant duty of professional secrecy relates – for example, the Bar Association in the case of lawyers, or the Portuguese Medical Association in the case of medical doctors.

Ultimately, the lifting of professional secrecy may be ordered by the higher court, where it recognises that the facts are indeed covered by such secrecy but nonetheless considers that the giving of evidence is justified, on the basis that other interests – for example, the ascertainment of the material truth – prevail over the interest underlying professional secrecy.

7.3 Crypto-Assets

Portuguese legislation no longer relies on a purely fragmented, anti-money laundering and counter-terrorist financing (AML/CTF) centric approach to crypto-assets. Since the entry into force of Regulation (EU) 2023/1114 (also known as MiCA) and the adoption of a dedicated national implementing statute, Portugal now benefits from a more comprehensive, sector-specific regulatory framework. This framework designates Banco de Portugal and CMVM as the competent authorities for supervision, sanctioning powers, and interim measures in the crypto-asset market, without prejudice to the continued robust focus on AML/CTF.

Within this limited regulatory landscape, Law No 83/2017, of 18 August, remains central. It has now been updated to include specific measures concerning crypto-asset transfers and self-hosted addresses, and to subject crypto-asset service providers to the supervision of Banco de Portugal. Although the term “virtual asset” was historically used for compliance purposes, the legal framework now expressly refers to the definition of crypto-assets by reference to MiCA and places the corresponding services under sectoral supervision, while preserving the AML/CTF focus.

Although drafted in functional terms, this AML/CTF framework – together with the MiCA implementing regime – recognises the economic and proprietary nature of crypto-assets for supervisory and enforcement purposes, subjecting them to regulatory controls, registration requirements, and interim measures within the remit of the Banco de Portugal and the CMVM.

As referenced in **5.1 Methods of Enforcement**, Portuguese criminal procedure and mutual recognition instruments allow for the seizure of objects connected with the commission of a criminal offence, as well as the instruments, proceeds, and benefits derived from it, under Article 178 of the Portuguese Code of Criminal Procedure.

This normative framework, combined with the principle that any property liable to be confiscated must be subject to seizure, has enabled judicial authorities and criminal police bodies to seize physical crypto wallets (ie, hardware wallets), where such assets are linked to offences such as fraud, aggravated swindling, corruption, money laundering, or tax evasion.

In the case of custodial wallets – particularly those managed by centralised exchanges based within the European Union or operating in co-operation with judicial authorities – it is possible, via international judicial co-operation mechanisms, to order the freezing or transfer of the respective assets, in accordance with applicable mutual assistance instruments.

The main challenge – common across all legal systems and particularly acute in the crypto-asset context – lies in the identification, tracing, seizure, and

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recovery of the specific economic advantage obtained through the commission of a crime. This difficulty stems largely from the intangible, decentralised, and technologically complex nature of blockchain-based assets, which allows offenders to rapidly dissipate, fragment, or conceal illicit proceeds using global platforms, encryption systems, anonymous digital wallets, and obfuscation techniques such as mixers or tumblers.

Trends and Developments

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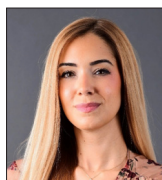
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wide range of proceedings commonly found in criminal law. The firm represents clients in the sphere of so-called economic and financial crimes (white-collar crimes), crimes against honour and property, and litigation related to regulatory offences – the scope, importance and intensity of which continue to grow. RA's practice operates under the belief that the connection between the lawyer and the court is historical and traditional.

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Strengthening Fraud Detection and Asset Recovery in Portugal: Law, Policy and Innovation

Introduction

As cross-border fraud schemes become more intricate and financial transactions move seamlessly across jurisdictions, traditional enforcement tools are increasingly put under strain. Over the past ten years, Portugal has significantly modernised its legislative and judicial responses to fraud and asset recovery, aligning itself with evolving European standards. Reinforced regulatory scrutiny, enhanced transparency mechanisms for asset management, and a stronger network of international partnerships are gradually reshaping Portugal into a jurisdiction that is better equipped to detect, restrain and recover assets in complex, multi-jurisdictional cases.

The evolving legal definition of fraud in Portugal

Portugal's legal definition of fraud, under Article 217 of the Penal Code, has been traditionally centred around deception for unlawful gain. In response to the growing sophistication of digital fraud, Portuguese authorities – while not yet having enacted specific legislation directly addressing AI-driven fraud – have increasingly interpreted existing criminal and civil fraud provisions to include conduct involving synthetic identities, phishing, deepfakes, and manipulation of AI-generated content. These interpretations are reinforced by the broader framework of the Cybercrime Law (Law No 109/2009), as well as Law No 83/2017 (AML Law), both of which have been periodically updated and complemented by sectoral regulations to address emerging threats.

In recent years, a significant prosecutorial focus has been on fraud involving digital platforms and virtual-asset services, marking a shift from conventional schemes to tech-facilitated economic crimes (such as Operation Samurai, Operation Admiral and Operation Ambrosia). Courts have increasingly recognised these schemes under the existing fraud statute, supported by sophisticated digital forensic evidence.

The current Criminal Policy Law, Law No 51/2023, sets out the main objectives, priorities and guidelines for criminal policy in Portugal for the 2023–2025 biennium. Among the priority areas to be prevented and investigated are bank fraud, misuse of payment

instruments and devices or data, and fraud committed through computerised means or communications, reflecting an explicit policy focus on economic and cyber-enabled crime.

In accordance with the Criminal Policy Law, the identification, location and seizure of assets or products related to crimes are also a priority, to be carried out by the Asset Recovery Office (GRA – *Gabinete de Recuperação de Ativos*) under the terms of Law No 45/2011 of 24 June, which operates under the Judicial Police.

Also, civil fraud claims, based on Articles 483–487 of the Civil Code, remain a parallel path for victims to recover damages. Increasingly, these are supported by real-time digital evidence, including blockchain transactions, server logs, and geolocation metadata. These forms of proof, while still novel, are gaining acceptance as courts adapt to a digital reality in fraud litigation.

Trends in asset tracing and enforcement

Mechanisms for asset recovery

Asset tracing in Portugal is primarily governed by Article 228 of the Code of Criminal Procedure and, also, Article 391 of the Code of Civil Procedure. These provisions establish mechanisms for interim relief, including preventive seizure (*arresto preventivo*) of movable property or money, whether held in bank accounts or in cash.

These measures can be granted *ex parte* where urgency and risk of asset dissipation are demonstrated. Courts require a strong *prima facie* case and a detailed list of assets to be traced or frozen, supported by credible evidence.

The legislative framework for extended confiscation remains centred on Law No 5/2002, of 11 January, which provides for a special regime of loss of assets in cases of organised and economic financial crime. Under Article 7, where a defendant is convicted for certain catalogue offences and there is a discrepancy between their lawful income and their patrimony, that “incongruent” portion of the assets is presumed to derive from criminal activity, unless the defendant proves their lawful origin.

In practice, courts have consolidated the distinction between “classic” confiscation (loss of specific instruments, products and advantages of the crime under the Penal Code) and extended confiscation, which covers assets not directly linked to a proven individual offence but deemed to result from criminal activity based on this presumption. The Court of Appeal case law between 2023 and 2025 has repeatedly confirmed that, in the extended regime, the prosecution must prove:

- conviction for a catalogue offence;
- the existence of patrimony; and
- its incongruence with lawful income, while the defence bears the burden of rebutting the presumption as to the lawful origin of the incongruent assets.

At the policy level, the government’s multi-annual programme of *Grandes Opções 2025–2029* expressly calls for the strengthening of instruments on deprivation of criminal proceeds, “namely through a new mechanism of extended confiscation of assets”, and for further strengthening of the Asset Recovery and Asset Management Offices. As of early 2026, however, this remains at the level of legislative intent: no comprehensive new statute overhauling the regime of Law No 5/2002 has yet entered into force, and extended confiscation continues to be governed by that law as interpreted and applied by the courts.

Draft proposals under discussion envisage, in particular:

- easing the requirement to show a direct link between specific crimes and the benefits obtained, by focusing confiscation on the nature of the asset rather than its value – even in cases where underlying offences have not been fully established;
- enabling confiscation where criminal proceedings have become time-barred, the defendant has died or has been amnestied, through an autonomous procedure determining the disposition of the asset; and
- introducing a new procedural party – the “affected person” – who may be impacted by decisions on seizure, freezing or confiscation and who would be granted participatory rights in the proceedings.

Regulatory trends: AML, ESG and whistle-blowing Tensions between strengthening AML and the defendant’s fundamental rights

Portugal’s anti-money laundering regime, governed by Law No 83/2017 (as altered and republished by Law No 58/2020), has significantly broadened its scope. The statute is now complemented by detailed sectoral regulations issued by the Bank of Portugal, the CMVM (the Portuguese Securities Market Commission), the ASF (the Insurance and Pension Funds Supervisory Authority) and the ASAE (the Economic and Food Safety Authority), including dedicated rules for entities operating with virtual assets and for non-financial obliged entities.

The legislation and its implementing regulations now impose enhanced obligations on:

- cryptocurrency exchanges and digital-wallet providers;
- non-financial professionals, including estate agents, art dealers and other high-risk sectors; and
- foreign-owned entities holding assets located in Portugal.

The Central Department for Investigation and Penal Action (DCIAP), which holds nationwide jurisdiction, and the Department for Investigation and Penal Action (DIAP) in Lisbon, are the principal bodies responsible for directing investigations into fraud and other forms of economic and financial crime. Under the AML framework, the DCIAP is authorised to access all relevant financial, tax, administrative, judicial, and police data necessary for the preventive investigation of money laundering and terrorist financing.

The Asset Recovery Office (*Gabinete de Recuperação de Ativos* – GRA) plays a pivotal role in identifying and seizing assets or proceeds linked to criminal activity, both within Portugal and internationally. It also facilitates co-operation with counterpart agencies in other jurisdictions. The Public Prosecutor’s Office may apply for the extended confiscation of assets in favour of the state, targeting individuals under investigation for serious offences, as defined in Law No 5/2002 and Law No 45/2011.

However, the mechanism of extended asset forfeiture continues to spark legal debate. Under the current system, any asset or monetary value held by a defendant that appears inconsistent with their lawful income may be subject to confiscation – unless the defendant can prove its legitimate origin. This presumption is enshrined in Article 7 (1) of Law No 5/2002, which states that the “difference between the value of the defendant’s assets and those consistent with their lawful income” is presumed to derive from criminal activity. The GRA is tasked with determining the so-called “congruent assets”. If the defendant does not challenge this assessment, the GRA’s valuation – regardless of its accuracy – becomes final, resulting in the forfeiture of the assets to the state.

Critics argue that this framework effectively reverses the burden of proof and risks undermining the presumption of innocence. The Constitutional Court, however, has repeatedly upheld the constitutionality of the presumption, emphasising that extended confiscation is not a purely penal sanction but a patrimonial reaction to an incongruent wealth situation, intended to restore a lawful economic order rather than to punish culpability in the classic sense. This doctrinal and jurisprudential tension will likely remain central to litigation in this area.

Whistle-blower protections driving disclosure

Law No 93/2021 established the general regime for the protection of whistle-blowers, transposing into Portuguese law Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law. The primary purpose of the Portuguese law is to encourage the reporting of infringements by ensuring that whistle-blowers are not penalised for acting in the public interest and in compliance with the law.

As a result, protected whistle-blowers are a growing source of evidence in both public and private fraud claims, with access to anonymised disclosure channels improving asset tracing intelligence.

From a subjective perspective, the regime covers any natural person who, acting in good faith and based on reasonable grounds, reports an infringement committed in the context of their professional activity. This includes current or former employees, service provid-

ers, trainees, job applicants, shareholders and members of corporate bodies, among others.

The law establishes three possible channels for reporting:

- entities with 50 or more employees, whether public or private, are required to implement secure and confidential mechanisms for receiving and following up on reports;
- an external channel directed to competent public authorities, such as the Bank of Portugal; and
- public disclosure, particularly when adequate responses are not provided through the other channels or when there is an imminent risk to the public interest.

The core of the regime lies in protection against acts of retaliation, which include suspension or dismissal, demotion, reassignment of duties, moral harassment, changes to contractual conditions, and threats or any form of intimidation. Another important measure is the presumption of retaliation by the contracting entity; that is, if a whistle-blower who has made a valid report subsequently suffers an adverse measure, it is presumed that this was motivated by the report, thereby placing the burden of proof on the accused entity to demonstrate otherwise.

Whistle-blowers who do not act “in good faith” do not enjoy the protection afforded by the law. The debate over what constitutes a legitimate complaint made in good faith will certainly animate the courts, which will have to settle this new area of litigation between companies and their employees.

From 2024 onwards, the EU’s new corporate sustainability due diligence framework – Directive (EU) 2024/1760 – has further increased the strategic importance of internal and external whistle-blowing channels, particularly in ESG sensitive sectors and complex value chains. Risk-based due diligence obligations, combined with protection against retaliation under the whistle-blowing regime, mean that internal reports are increasingly feeding into supervisory actions and civil litigation concerning supply chain and sustainability risks.

Emerging ESG fraud risks

Portugal's Climate Framework Law (Law No 98/2021) introduces a comprehensive set of economic and financial instruments aimed at achieving climate neutrality. Among these instruments, taxation plays an important role in facilitating the transition. The law mandates the government, mainly, to:

- strengthen the application of the carbon tax;
- promote more active taxation on the use of natural resources; and
- introduce tax incentives for individuals and entities that purchase, consume, or utilise environmentally sustainable goods and services.

These measures are designed to encourage environmentally responsible behaviour and reduce the ecological footprint. However, they also increase the risk of fraud, particularly in the context of grants and incentives linked to such tax benefits.

In parallel, Decree Law No 57/2008 – recently amended by Law No 10/2023 – establishes the legal framework for addressing unfair commercial practices in business to consumer relations. This includes the penalisation of misleading or deceptive conduct. At EU level, Directive (EU) 2024/825 further amends the Unfair Commercial Practices Directive (2005/29/EC) to directly target greenwashing by:

- prohibiting generic environmental claims such as “green”, “environmentally friendly” or “climate neutral” unless they are backed by excellent, recognised environmental performance; and
- banning claims that a product is climate neutral, climate positive or has a reduced climate impact when such claims rely solely on offsetting greenhouse gas emissions outside the product's value chain.

For instance, falsely advertising a company's commitment to decarbonisation may constitute an unfair commercial practice, as it can significantly distort consumer decision-making. Under the new EU rules, unsubstantiated assertions of decarbonisation, environmental neutrality or ethical sourcing are increasingly likely to be viewed not merely as unfair commercial

practices, but also as potential fraudulent misrepresentation in both civil and criminal contexts.

At the same time, the Corporate Sustainability Reporting Directive (CSRD) and its subsequent amendments have introduced detailed and phased-in obligations for large undertakings and listed SMEs to disclose verifiable ESG data, with some reporting deadlines deferred by two years to ease compliance burdens while preserving the core transparency objectives.

Therefore, companies making unsubstantiated claims about environmental sustainability or ethical sourcing are subject to heightened scrutiny. Portuguese companies that publish aggressive sustainability claims without robust, auditable support face increased exposure not only to regulatory enforcement and consumer protection actions, but also to fraud, market abuse and director liability claims where ESG disclosures prove materially misleading.

This reflects a broader shift within the European Union, particularly under the CSRD, the EU sustainable finance framework and the new consumer protection rules on green claims. These frameworks require Portuguese companies to provide verifiable environmental, social and governance (ESG) data. Failure to do so – especially where data is falsified – may expose companies to liability for fraud and reputational damage.

2026 and beyond – legislative modernisation

Artificial intelligence and legal automation

As of 2026, Portugal still lacks a comprehensive national statute exclusively regulating the use of AI. However, the legal landscape has changed significantly with the adoption of the EU Artificial Intelligence Act – Regulation (EU) 2024/1689, which establishes harmonised rules for AI systems across the Union. The AI Act will apply in stages, with prohibitions on certain unacceptable uses and obligations for high-risk AI systems and general-purpose AI models progressively taking effect between 2025 and 2027.

For Portugal, this means that, even in the absence of a standalone national AI Act, courts, regulators and market participants will need to comply directly with the AI Act, particularly in sectors where AI systems

qualify as high risk (such as credit scoring, employment, essential services and certain justice-related tools). The national debate around accountability, transparency and fundamental rights – especially when AI tools are embedded in judicial or quasi-judicial decision-making – therefore now unfolds within a clear EU-level regulatory framework.

The regulatory silence at the national level has raised pressing questions regarding accountability, transparency, and the protection of fundamental rights, particularly when AI tools are integrated into processes involving the administration of justice. A recent and controversial development underscored this regulatory vacuum: in late 2024, a Portuguese Court of Appeal judgment (*Tribunal da Relação*) was reportedly drafted with the aid of generative AI. The matter garnered public attention and prompted concerns over the degree of human involvement, the absence of disclosure, and the potential violation of procedural guarantees. As a result, the High Council for the Judiciary (*Conselho Superior da Magistratura*, CSM) opened a formal inquiry into the judge's conduct, signalling a growing need for clear rules governing the judicial use of AI.

Institutional responses have since accelerated. In the justice sector, the government's Digital Strategy Action Plan 2026–2027 foresees the approval of a dedicated Strategy for Digital and AI in Justice, as well as the adoption of a code of conduct on the use of AI by justice sector entities, to be completed by the end of 2026.

More broadly, the newly adopted National Artificial Intelligence Agenda (*Agenda Nacional de Inteligência Artificial* – ANIA), approved in early 2026, sets a comprehensive policy framework for 2026–2030, covering infrastructure, adoption, talent and responsible use. Among other measures, ANIA provides for:

- the designation and co-ordination of national competent authorities for AI and a model for implementing the AI Act at national level;
- the introduction of regulatory sandboxes, including in sectors such as justice and public administration; and

- the development of a practical implementation guide, standards and risk-assessment tools to help organisations comply with the AI Act, with initial implementation planned for 2026.

While full judicial decision-making through AI remains legally and ethically contentious, legal automation has been gaining ground in Portugal in more practical, operational areas. Several digital tools have already transformed how justice is administered, particularly in routine or administrative tasks. Due to the delay in implementing a detailed national regulatory framework for the use of artificial intelligence, the public justice system has been outpaced by the private legal sector, which has progressively adopted AI-driven tools to enhance both efficiency and accuracy in legal practice. Measures such as the adoption of more intelligent document repositories, automated transcription of courtroom testimony, and advanced case management systems would still significantly benefit the public justice system.

The combination of the AI Act, ANIA and the forthcoming Digital Strategy for Justice is likely to drive a more structured, transparent and rights-sensitive integration of AI into Portuguese legal practice and court administration over the coming years.

Conclusion

Portugal's legal and regulatory landscape concerning international fraud and asset tracing has evolved considerably, underpinned by recent legislative developments, the adoption of advanced technologies, and a stronger alignment with both EU and global enforcement standards.

Historically, Portuguese legislation has closely followed European directives and regulations, incorporating the principles established by the European Parliament and Council – particularly in areas such as the prevention of money laundering and terrorist financing, the protection of whistle-blowers, sustainability reporting and, more recently, the regulation of artificial intelligence.

The current government has expressed a clear commitment to enhancing mechanisms for the recovery of assets derived from economic and financial crimes.

Policy documents for 2025–2029 explicitly prioritise the reinforcement of asset recovery mechanisms and extended confiscation, alongside the modernisation of investigative tools and cross-border co-operation. For international litigators, asset-recovery specialists, and victims of fraud, Portugal now presents a legal environment that is increasingly transparent, efficient, and responsive.

Nonetheless, a degree of tension persists between fundamental principles of criminal defence – such as the presumption of innocence and the burden of proof resting with the prosecution – and the expansion of more intrusive asset confiscation and preventive seizure measures. Courts and the Constitutional Court have, to date, upheld the core of the extended confiscation regime, but debates over proportionality, due process and the proper allocation of evidential burdens continue to shape litigation.

Environmental protection and broader ESG concerns also feature prominently on the national and European agendas. Portugal has introduced “green taxation” policies and incentives, which require robust oversight to ensure that tax and regulatory benefits are granted exclusively to companies genuinely committed to decarbonisation and responsible business conduct. New EU instruments on sustainability reporting and greenwashing significantly increase both transparency and litigation risk for misleading ESG claims.

At present, Portugal still lacks a comprehensive national legal framework governing the use of artificial intelligence. However, there is justified optimism that ongoing public discourse, the EU AI Act and the emerging domestic implementation framework (including the National AI Agenda and the Digital Strategy for Justice) will pave the way for effective and responsible AI regulation. The central challenge for 2026 and beyond will be to harness these tools to enhance fraud detection and asset tracing, without eroding due process and fundamental rights.

SAUDI ARABIA

Law and Practice

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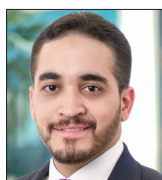
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1. Fraud Claims

1.1 General Characteristics of Fraud Claims An Overview

Fraud-related conduct in Saudi Arabia is addressed through several laws, each targeting a specific type of dishonest behaviour, and a victim may need to engage more than one of them.

Deception

On the civil side, the Civil Transactions Law (CTL) is the starting point. Under Article 61 of the CTL, deception (يُرْغَت) means using fraudulent means – including deliberate silence – to induce someone into a contract they would not otherwise have entered. Under Article 62 of the CTL, the deceived party may seek nullification of the contract where the deception relates to a material matter.

False Statements and Forgery

Where documents are involved, the Penal Code for Forgery Offences (the “Forgery Penal Code”) applies. Forgery requires bad faith and causing harm, and extends beyond physical alteration to include inserting false facts into a document or deliberately omitting facts that should have been recorded, under Article 3 of the Forgery Penal Code. Penalties vary depending on the type of document. For example, forging a non-official document carries up to three years’ imprisonment and/or a fine of up to SAR300,000 under Article 9 of the Forgery Penal Code; and forging a Commer-

cial Paper (negotiable instrument) or security, bank instrument or insurance policy carries one to five years and a fine of up to SAR400,000 under Article 13 of the Forgery Penal Code.

In a company setting, Article 260 of the Companies Law 1443-2022 (the “Companies Law”) makes it a criminal offence for directors, board members, officers, auditors or liquidators to deliberately include false or misleading information in financial statements or reports, or to intentionally omit material facts in order to misrepresent the company’s financial position. The penalty is up to three years’ imprisonment or a fine of up to SAR5 million, or both.

Misappropriation

Misappropriation is addressed across two provisions of the Anti-Financial Fraud and Breach of Trust Law (the “Anti-Financial Fraud Law”). Under Article 1 of the Anti-Financial Fraud Law, unlawfully obtaining another’s money through lying, deception or false impressions carries up to seven years’ imprisonment and a fine of up to SAR5 million. Article 2 of the Anti-Financial Fraud Law separately targets those entrusted with money – whether through employment, partnership, deposit, loan, lease, mortgage or agency – and who either unlawfully appropriate it, deal with it in bad faith or intentionally cause damage to it. This carries up to five years’ imprisonment and a fine of up to SAR3 million.

Corrupt Payments

The Anti-Bribery Law applies to both the public and private sectors. The Anti-Bribery Law criminalises offering, promising, giving, soliciting, accepting or receiving a bribe, and treats the giver and the recipient as equally liable. Under Article 8 of the Anti-Bribery Law, the definition of “public official” is broad, covering banking sector employees and employees of companies with government shareholding. Public official bribery carries up to ten years’ imprisonment and/or a fine of up to SAR1 million under Articles 1 and 2 of the Anti-Bribery Law. Private employees bribery – involving employees of private companies, sole proprietorships or professional bodies – carries up to five years’ imprisonment or a fine of up to a SAR500,000, or both, under Articles 9 bis 1 and 9 bis 2 of the Anti-Bribery Law.

Conspiracy and Participation

Both the Anti-Financial Fraud Law and the Anti-Bribery Law extend liability to those who conspire, incite or assist in the commission of fraud or bribery. Under Article 3 of the Anti-Financial Fraud Law and Article 10 of the Anti-Bribery Law, facilitators face the same maximum penalty as the principal offender where the offence is carried out.

Civil and Criminal Proceedings

Civil and criminal proceedings are not mutually exclusive. Under Article 69 of the Criminal Procedure Law, a victim may assert a private right claim before the public prosecution during the criminal investigation itself. Under Article 22 of the Criminal Procedure Law, the end of a criminal action does not extinguish a civil claim, and Article 143 (2) of the CTL confirms that a compensation claim arising from a crime remains alive for as long as the criminal case does. The interaction between these two tracks is explored further in **2.5 Criminal Redress**.

1.2 Causes of Action After Receipt of a Bribe Civil Remedies

An agent owes duties of care and loyalty to their principal under the CTL. Accepting a bribe breaches both duties and gives the principal a direct compensation claim for any resulting loss. More specifically, where the bribe influenced a transaction – whether an agent purchases at an unconscionable or above-specified

price (Article 492) or sells below the specified or market price (Article 494) – the principal may refuse to ratify the transaction. In either case, the transaction is deemed concluded for the agent’s own account, and the principal may separately claim compensation for any loss suffered. Article 491 (2) of the CTL prohibits an agent from purchasing from any person from whom the agent stands to gain or avoid a loss, and Article 495 of the CTL imposes the same prohibition in the context of selling – both provisions capture the bribery arrangement.

Criminal Remedies

The principal may file a criminal complaint under the Anti-Bribery Law against both the agent and the bribing party. The Anti-Bribery Law applies to bribe recipients acting in a relevant capacity – where the agent is employed in the private sector (whether by a private company, sole proprietorship or professional body) – such that the receipt of a bribe in connection with the performance or refrainment of their duties is an offence under Article 9 bis 2, and the bribing party faces equal criminal exposure under Article 9 bis 1. Where the agent falls within the definition of “public official” under Article 8 – which extends to employees of joint-stock companies, companies managing public facilities and banking sector employees, among others – the heavier penalties apply under Articles 1 to 6.

Bribery is classified as a corruption crime under Article 2 of the Oversight and Anti-Corruption Authority Law (the “Nazaha Law”). Under Article 4 of the Nazaha Law, the Oversight and Anti-Corruption Authority (“Nazaha”) acts with the full powers of public prosecution for corruption crimes and is therefore the competent authority to receive the complaint, investigate and try the case before the designated criminal court.

1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts

Civil Claims

Where a third party assisted in or facilitated a fraud that induced a contract, the victim’s first step is to seek nullification of that contract, under Article 63 of the CTL, as explained in **1.1 General Characteristics of Fraud Claims**. Once nullified, payments made under the contract become recoverable as undue payments under Articles 145 to 147 of the CTL.

Where the facilitating third party was enriched as a result of the fraud, Article 144 of the CTL provides a separate claim against any person enriched without legitimate cause at another's expense. In all cases, Article 127 of the CTL imposes joint and several liability on all persons responsible for the same harmful act.

Saudi courts generally limit compensation to actually suffered losses and lost profits that are a natural result of the harmful act. This flows directly from Articles 136 and 137 of the CTL.

Criminal Claims

A facilitating third party may face criminal exposure under three separate laws, which may apply concurrently. Under Article 3 of the Anti-Financial Fraud Law, anyone who incites, conspires with or assists in the commission of any offence under that law faces the same maximum penalty as the principal offender if the offence is carried out, and up to half that maximum if it is not.

Under Article 10 of the Anti-Bribery Law, anyone who knowingly incites, conspires with or assists in the commission of a bribery offence is treated as an accomplice and faces the same penalties as the principal.

Under the Anti-Money Laundering Law, a facilitating party faces independent criminal exposure. Article 2 criminalises acquiring, possessing or using funds known to be proceeds of crime, concealing or disguising their nature or source, and participating in, facilitating or colluding in any such acts. Article 4 clarifies that a money laundering conviction is independent from a conviction for the underlying predicate offence – meaning a facilitator can be prosecuted under the Anti-Money Laundering Law even if the primary fraud case has not yet concluded. The complaint is filed with the public prosecution or the police. The Public Prosecution is the competent authority to investigate and prosecute money laundering crimes under Article 48 of the Anti-Money Laundering Law.

1.4 Limitation Periods

Saudi law does not have a single limitation period for fraud claims. Different periods apply depending on the type of claim.

Civil Claims

For nullification of a contract on grounds of deception, Article 79 of the CTL provides that a claim must be brought within one year from the date the victim becomes aware of the deception. In all cases, nullification claims cannot be heard after ten years from the date the contract was concluded.

For civil compensation claims arising from harmful acts, Article 143 (1) of the CTL sets a three-year period from the date the victim becomes aware of both the harm and the identity of the person responsible, with an absolute cap of ten years from the date the harm occurred. However, where the compensation claim arises from a criminal act, Article 143 (2) of the CTL provides that the civil claim remains alive for as long as the criminal case can be heard – a provision that significantly extends the effective limitation period in fraud cases that are also the subject of criminal proceedings.

For unjust enrichment claims, Article 159 of the CTL sets a three-year period from the date the creditor becomes aware of their right, with an absolute cap of ten years from the date the right arose.

Criminal Claims

Saudi criminal laws do not provide a uniform limitation period for fraud offences. Under Article 27 of the Forgery Penal Code, criminal suits for most forgery offences lapse after ten years from the date of commission. For offences under the Anti-Financial Fraud Law and Anti-Bribery Law, no limitation period is prescribed in the texts of those laws.

1.5 Proprietary Claims Against Property Identifiable Property

Where misappropriated movable property remains identifiable and in the possession of another, a fraud victim can assert a proprietary claim to recover it. Article 26 of the Enforcement Law allows a claimant of ownership of a movable property to request provisional attachment of that property while in the possession of others, where there is compelling evidence supporting the claim.

Where the recipient acted in bad faith, Article 676 of the CTL further requires that person to account for

all fruits received or negligently not received from the date bad faith began, meaning gains generated from invested fraud proceeds are also recoverable.

Mixed Funds

Once fraud proceeds are mixed with legitimate funds, the position becomes more difficult. Saudi civil law does not provide a tracing mechanism for mixed assets. However, under Article 33 of the Anti-Money Laundering Law, upon conviction for a money laundering or predicate offence, the court must order confiscation of proceeds of crime, including proceeds intermingled with funds from legitimate sources, up to the value of the intermingled proceeds – providing a practical criminal law alternative where criminal proceedings are underway.

1.6 Rules of Pre-Action Conduct

Saudi law does not prescribe formal pre-action conduct rules specific to fraud claims. A fraud victim may file a civil claim before the competent court or a criminal complaint before Nazaha, the public prosecution or the police, as the case may be, without any prior notice to the defendant.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Criminal Route

A fraud victim may file a criminal complaint with the public prosecution or the police, which triggers broad investigative and asset preservation powers that the victim cannot access directly through civil proceedings. Once a complaint is filed, the public prosecution may, under Article 80 of the Criminal Procedure Law, search premises and seize items used in or resulting from the commission of a crime pursuant to a search warrant. Under Article 57 of the Criminal Procedure Law, the head of the public prosecution may order the seizure of correspondence, publications and packages, and authorise the monitoring and recording of telephone conversations if useful for solving the crime. Under Article 85 of the Criminal Procedure Law, where the investigator has evidence that a person holds items relevant to the investigation, they may seek an order for delivery of those items. Under Article 58 of the Implementing Regulations of the Criminal Procedure Law, the public prosecution may freeze bank accounts and balances.

In cases where fraud proceeds are involved, the Anti-Money Laundering Law provides additional powers. Under Article 44, the public prosecution may order provisional seizure of funds that may become subject to confiscation for up to 60 days, ex parte and without prior notice. Under Article 45, the public prosecution may issue search warrants to seize funds, properties and documents relating to a predicate offence or money laundering crime, also ex parte. These powers represent the most powerful asset preservation tools in the fraud context.

Civil Route – Summary Proceedings

Except where the dispute falls within the jurisdiction of the commercial courts, a claimant may seek asset preservation through summary proceedings under Articles 205 and 206 of the Civil Procedure Law, which provide for urgent provisional measures – including provisional seizure and injunctions against interference with possession – where the lapse of time may affect the outcome.

Where the dispute falls within the jurisdiction of the commercial courts, Article 36 of the Law of Commercial Courts provides for summary relief, including provisional seizure, seizure of certain documents, prevention or permission of disposition, travel ban and receivership. Under Article 37 of the Law of Commercial Courts, the court may require the claimant to provide a security to indemnify the defendant if the claim is found to have no merit.

Provisional Attachment

The primary pre-judgment asset preservation mechanism available to a civil claimant is provisional attachment under the Enforcement Law. Under Article 23 of the Enforcement Law, provisional attachment is conducted as summary proceedings by the competent authority adjudicating the dispute. Where a substantive claim is already filed, that authority has jurisdiction to issue the attachment order under Article 30. Where no substantive claim exists yet, the claimant may file the attachment petition and must then institute a substantive claim within ten days under Article 31 – failing which the attachment is void.

Under Article 24 of the Enforcement Law, the grounds for provisional attachment are that the debtor has

no established residence in the Kingdom or that the creditor justifiably fears assets may disappear or be smuggled. Article 24.3 of the Enforcement Law Implementing Regulations (the “Enforcement Law Regulations”) confirms that all of the debtor’s assets – movable and real property – are provisionally attachable. Under Article 28 of the Enforcement Law, provisional attachment requires the debt to be evident and due. Under Article 27 of the Enforcement Law, the attachment can also reach funds and assets held by third parties, including banks, with the garnishee required to disclose and deposit into the enforcement court’s account within ten days of notification.

In Rem or In Personam

Under Article 20 of the Enforcement Law, all of a debtor’s assets are liable to satisfy their debts. Once attachment is ordered, any disposition by the debtor of the attached assets is invalidated. Under Article 20.2 of the Enforcement Law Regulations, this effect runs from the date and time the debtor or garnishee is notified of the attachment order – or from the date of publication where notification is not possible. Under Article 20.3, assets registered in the debtor’s name remain subject to attachment even where a third party claims ownership, and the attachment will not be lifted until that third party establishes their ownership.

Receivership

Separately, under Article 211 of the Civil Procedure Law, where the right to disputed property is not yet established and an imminent danger is feared if the property remains in the hands of the possessor, the court may place that property under receivership – providing an additional protective tool in fraud cases involving specific assets at risk.

Guarantee

Under Article 32 of the Enforcement Law, the claimant must provide a guarantee, such as bank guarantee, or a notarised written guarantee from a solvent guarantor covering all rights of the defendant and any damage sustained if the claim is proved invalid. The solvency of the guarantor is assessed at the court’s discretion under Article 32.1 of the Enforcement Law Regulations.

Court Fees

The provisional attachment petition attracts a fee of SAR1,000. The substantive claim fee is calculated as a percentage of the claim value under the Judicial Fees Law and its Implementing Regulations: 5% for claims below SAR100,000, 4% for claims between SAR100,000 and SAR499,999, 3% for claims between SAR500,000 and SAR999,999 and 2% for claims of SAR1 million and above, capped at SAR1 million, as per Article 3 of the Judicial Fees Law and Article 2 of the Judicial Fees Law Implementing Regulations. Under Article 13 of the Judicial Fees Law, the losing party bears the court fees and petitions.

Sanctions for Non-Compliance

Under Article 88 of the Enforcement Law, a defendant who conceals or smuggles property, refuses to disclose assets or provides false statements faces up to seven years’ imprisonment. This applies equally to legal representatives and employees of private legal persons who obstruct or impede enforcement under Article 88.1 of the Enforcement Law Regulations. Under Article 46 of the Enforcement Law, where a debtor fails to comply with an enforcement order, the enforcement judge may impose, including but not limited to, a travel ban, mandatory asset disclosure and a bar on financial institutions dealing with the debtor. A debtor proven to have dissipated significant assets faces up to 15 years’ imprisonment under Article 90 of the Enforcement Law, which is classified as a serious crime mandating detention.

Effect on Third Parties

Under Article 20.3 of the Enforcement Law Regulations, assets registered in the name of the debtor are subject to attachment even if claimed by a third party, and will not be released until that third party establishes ownership. A garnishee who provides a false declaration or refuses to declare assets faces enforcement against their own property and a damages claim under Article 27.4 of the Enforcement Law Regulations.

2. Procedures and Trials

2.1 Disclosure of Defendants' Assets

Asset disclosure in Saudi Arabia operates differently depending on whether a claimant holds an enforceable instrument. Under Article 9 of the Enforcement Law, compulsory enforcement may only be carried out pursuant to an enforceable instrument for a due and specified right – which includes court judgments, arbitral awards and documents the defendant acknowledges as containing a due right.

Once such an instrument exists, the enforcement judge may order the debtor to disclose assets sufficient to satisfy the debt under Article 16 of the Enforcement Law. Under Article 17 of the Enforcement Law, all competent authorities, asset registration bodies and the debtor's own debtors, accountants and employees must comply within ten days. The judge may extend this to any person believed to have knowledge of the debtor's assets under Article 17.1 of the Enforcement Law Regulations. Under Article 47 of the Enforcement Law, the enforcement judge may also personally question the debtor, their accountants, employees and persons suspected of being favoured by the debtor, and may appoint an expert to trace assets. The regime is not limited to assets in the defendant's own name – under Article 46 of the Enforcement Law, it extends to the debtor's spouse, children and any person to whom circumstantial evidence suggests assets may have been transferred.

Before judgment, the disclosure mechanisms available are more limited. For the tools available at that stage – including provisional attachment, garnishment of third parties and the consequences of non-compliance – **1.7 Prevention of Defendants Dissipating or Secreting Assets.**

2.2 Preserving Evidence

Civil Proceedings

On the civil side, a party who fears that evidence may be lost or destroyed may file an urgent inspection case under Article 206 of the Civil Procedure Law, read together with Articles 108 and 109 of the Evidence Law. Article 109 of the Evidence Law specifically allows a party who fears the loss of evidence relating to a fact that may be disputed before the

court to request its inspection and establishment by way of a summary case. Where the dispute falls within the jurisdiction of the commercial courts, the equivalent procedure is available under Article 36 (1) of the Law of Commercial Courts, which expressly includes inspection to verify an existing state among the summary petitions that may be filed. In all cases, Saudi courts have established that such applications must satisfy two requirements: seriousness (meaning the claim appears valid on the face of the papers) and urgency (meaning there is an imminent harm that cannot be remedied or that is feared to occur imminently). This procedure may be invoked before substantive proceedings are commenced. Where the court grants the application, it is the court itself – or an expert appointed by it – that conducts the inspection, including at the defendant's residence or place of business. Whether the claimant may attend is subject to the court's discretion. No cross-undertaking in damages is explicitly required.

Criminal Proceedings

On the criminal side, filing a fraud complaint with the public prosecution or the police triggers investigative powers – including search warrants, seizure of documents and interception of communications under Articles 79, 80 and 57 of the Criminal Procedure Law – that are far broader than what is available in civil proceedings.

2.3 Obtaining Disclosure of Documents and Evidence From Third Parties

During Proceedings

The primary mechanism for obtaining documents from third parties is Article 37 of the Evidence Law, under which the court may, on its own motion or at a party's request and at any stage of the case, order the joinder of a third party to produce a document in their possession. The court may also request from a public entity a certified copy of any document the litigant is unable to produce, and may request the public entity to provide information relevant to the case, verbally or in writing. Under Article 45 of the Procedural Manuals for the Law of Evidence, third-party joinder for document production follows the general joinder procedures under the relevant laws.

Before Commencement of Proceedings

The document production mechanism under Article 37 of the Evidence Law requires proceedings to be on foot. However, the urgent inspection procedure under Articles 108 and 109 of the Evidence Law, mentioned in 2.2 Preserving Evidence, may be invoked before proceedings are commenced where the requirements of seriousness and urgency are met.

Restrictions

Documents may not be compelled where they are protected by a special legal provision or where production would reveal trade secrets. Legal professional privilege is discussed in 6.2 Undermining the Privilege Over Communications Exempt From Discovery.

2.4 Procedural Orders

The General Rule

Saudi procedural law generally requires that the defendant be notified before orders are made against them. Under Article 207 of the Civil Procedure Law, the minimum notification period in summary cases is 24 hours, which may be reduced by court order in compelling circumstances. This reflects a default position that even urgent proceedings involve some form of notice.

When Without-Notice Orders Are Available

Without-notice orders are available in specific circumstances. Under Article 16 of the Enforcement Law, the enforcement judge may order asset disclosure and attachment without prior notice to the debtor where there is circumstantial evidence of persistent default or concealment. In the context of provisional attachment under Articles 23–32 of the Enforcement Law, the order may be issued by the court before the defendant is formally notified, provided notification follows within ten days of the order under Article 31 of the Enforcement Law, failing which the attachment is void. On the criminal side, Articles 44–46 of the Anti-Money Laundering Law expressly provide that provisional seizure, search warrants and interception orders may be issued ex parte and without prior notice.

Additional Burden on the Claimant

Under Article 32 of the Enforcement Law, the claimant seeking provisional attachment must provide a guar-

antee to cover any damage sustained by the defendant if the claim is proved invalid.

2.5 Criminal Redress

Why Victims Use the Criminal Route

In Saudi Arabia, fraud victims frequently turn to the criminal process – not only to punish the perpetrator, but because the criminal investigation unlocks powerful tools that civil proceedings alone cannot provide: search warrants, asset seizure and the investigative resources of the public prosecution. Filing a criminal complaint is therefore often a practical first step, even where the victim's primary goal is financial recovery.

How the Two Tracks Interact

Under Article 17 of the Criminal Procedure Law, crimes that affect private rights require a complaint from the victim to initiate proceedings. Once filed, the victim may assert their private right claim during the criminal investigation itself under Article 69 of the Criminal Procedure Law. The two tracks run in parallel – under Article 22 of the Criminal Procedure Law, the lapse of the public criminal action does not extinguish the private right claim, and under Article 143 (2) of the CTL, the civil compensation claim remains alive for as long as the criminal case can be heard.

Does Criminal Prosecution Delay Civil Claims?

The civil and criminal tracks are independent and may proceed simultaneously. Under Article 87 of the Evidence Law, a civil court is not bound by a criminal acquittal unless it is based on a finding that the act itself did not occur. However, a criminal conviction carries *res judicata* effect as to the facts found by the criminal court – meaning the civil court is bound by those factual findings and cannot reach a contrary conclusion on the same facts. This makes a criminal conviction a powerful foundation for a subsequent or parallel civil compensation claim.

2.6 Judgment Without Trial

Absent Defendant

Under Article 57 of the Law of Civil Procedure, where a defendant has been notified in person and fails to appear, the court proceeds to rule on the merits, and the judgment is not deemed in absentia. Where the defendant was not notified in person, the case is postponed, and the defendant is re-notified; if the

defendant again fails to appear without an acceptable excuse, the court rules on the merits, and the judgment is deemed in absentia.

In practice, court notifications in Saudi Arabia are now issued electronically to the mobile number registered with the Ministry of Interior linked to the defendant's national ID, which is treated as personal notification. This means that where the defendant is identifiable, notification is largely automatic – and a defendant's failure to appear will typically result in the court proceeding to judgment on the merits without the in absentia classification.

Unmeritorious Defence

Saudi procedural law does not have a mechanism equivalent to summary judgment for a wholly unmeritorious defence. The court considers the merits of all cases brought before it.

2.7 Rules for Pleading Fraud

Saudi law does not prescribe special rules for pleading fraud. The general evidential framework under the Evidence Law applies – a claimant bears the burden of proof and facts must be relevant, material and admissible. There is no heightened pleading standard specific to fraud allegations and no professional conduct rules requiring a threshold of evidence before asserting fraud.

2.8 Claims Against “Unknown” Fraudsters

Saudi civil procedural law requires the defendant to be identified in the statement of claim under Article 41 of the Civil Procedure Law. Bringing a civil claim against a truly unknown defendant is therefore not straightforward under the civil framework.

The more practical route is the criminal process. The public prosecution has broad investigative powers to identify perpetrators. Once the fraudster is identified, the victim may assert their private right claim within the criminal proceedings under Article 69 of the Criminal Procedure Law.

2.9 Compelling Witnesses to Give Evidence Civil Proceedings

Under Article 72 (3) of the Evidence Law, the court may on its own motion or at the request of a litigant

summon any person whose testimony it deems necessary. Under Article 81 of the Evidence Law, a party who fears losing the opportunity to bring a witness may request a summary case to hear that testimony before substantive proceedings commence.

Criminal Proceedings

Under Article 165 of the Criminal Procedure Law, any person summoned to testify pursuant to a judge's order must appear at the designated time and place. Under Article 116 of the Implementing Regulations of the Criminal Procedure Law, if a witness fails to appear without an acceptable excuse, the court may summon them by any means it deems fit.

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on a Corporate Entity

Civil Liability

Under Article 28 of the Companies Law, which applies across all company types, managers and board members are jointly and severally liable for any damage caused to the company, its partners, shareholders or third parties arising from wrongful acts, negligence or omission in the performance of their duties. A company is bound by the acts of its managers and board members carried out within the scope of their authority and the company's purposes. Additionally, under Article 129 (2) of the CTL, a corporate employer is liable for harm caused by a subordinate during the course of their work.

Criminal Liability of Individuals

Several criminal laws directly target individuals acting within or on behalf of a company. Under Article 260 of the Companies Law, managers, officers, board members, auditors and liquidators who intentionally falsify financial statements or misuse company funds face up to three years' imprisonment and/or a fine of up to SAR5 million.

Criminal Liability of the Company Itself

Multiple laws extend criminal liability to the corporate entity. Under Article 31 of the Anti-Money Laundering Law, a legal person that commits a money laundering

offence faces a fine of up to SAR50 million and may be prohibited from certain activities, closed down or liquidated. Under Article 23 of the Forgery Penal Code, a private entity whose manager or employee commits forgery offences in its favour and with its knowledge faces a fine of up to SAR10 million and a ban on contracting with public entities for two to five years. Under Article 19 of the Anti-Bribery Law, a company faces fines and a government contracting ban where a manager or employee commits bribery for its benefit. In all cases, the criminal liability of the company does not exclude the personal criminal liability of the individuals who acted on its behalf.

3.2 Claims Against Ultimate Beneficial Owners

Saudi company law establishes clear separation between a company and its partners or shareholders, who are not liable for company debts beyond their capital contributions under the Companies Law.

Where a person standing behind the company acts as a manager or board member, Article 28 of the Companies Law exposes them to personal liability directly. Where such a person has directed, incited or assisted in the commission of fraud through the company, Article 3 of the Anti-Financial Fraud Law extends criminal liability to them.

Where the company has been used as a vehicle for money laundering, Article 3 of the Anti-Money Laundering Law provides that the criminal liability of the legal person does not exclude the personal criminal liability of those who participated in the money laundering – including owners, board members and employees.

On the enforcement side, Article 46 of the Enforcement Law empowers the enforcement judge to order disclosure of assets belonging to any person to whom circumstantial evidence suggests assets may have been transferred, providing a practical route to reach assets placed in structures designed to conceal the identity of those who stand behind the company.

3.3 Shareholders' Claims Against Fraudulent Directors

Company Action

Under Article 29 (1) of the Companies Law, the company may bring a derivative action against its managers or board members for any damage resulting from a violation of the law, the company's constitutional documents or a wrongful act, negligence or omission in the performance of their duties. The decision to bring such action is made by the partners, general assembly or shareholders, as the case may be.

Minority Shareholder Action

Where the company fails to act, Article 29 (2) of the Companies Law allows partners or shareholders representing at least 5% of the capital – or a lower threshold if provided in the constitutional documents – to bring a derivative action on behalf of the company. Under Article 30 (1) of the Companies Law, a prior shareholder resolution relieving managers from liability does not bar the action.

Personal Claims

Under Article 29 (4) of the Companies Law, a partner or shareholder may also bring a personal action against managers or board members where the wrongful act causes damage personally to them rather than to the company as a whole.

Limitation Period

Derivative actions generally lapse five years from the end of the fiscal year in which the act occurred, or three years from the end of the manager's term, whichever is later. Crucially, this limitation period does not apply to cases of forgery and fraud under Article 30 (2) of the Companies Law.

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims Civil Jurisdiction

Joining an overseas party to Saudi civil proceedings requires first establishing a jurisdictional basis. Saudi courts have jurisdiction over cases filed against Saudi citizens regardless of their place of residence under Article 24 of the Civil Procedure Law, and against non-Saudis resident in the Kingdom under Article 25 of

the same law. Under Article 26 of the Civil Procedure Law, jurisdiction extends to non-Saudis without Kingdom residence where the obligation originated in or the place of performance is in the Kingdom, or where one of multiple defendants has a place of residence in the Kingdom. Article 26 of the Implementing Regulations of the Civil Procedure Law clarifies that the Kingdom is deemed the place where an obligation originated if the contract was concluded inside the Kingdom, and the place of performance if the contract provides for performance wholly or partly within the Kingdom. Under Article 28 of the Civil Procedure Law, parties may also submit to Saudi court jurisdiction by agreement. Under Article 29 of the Civil Procedure Law, Saudi courts have jurisdiction over precautionary and provisional measures enforced in the Kingdom regardless of whether they have jurisdiction over the underlying claim.

Once jurisdiction is established, the claimant proceeds to serve the overseas defendant – the procedure for which is discussed in **4.2 Service of Proceedings out of the Jurisdiction**. Under Article 23 of the Civil Procedure Law and its Implementing Regulation, all documents coming from outside the Kingdom must be attested by the Ministries of Foreign Affairs and Justice and translated into Arabic. Under Article 21 of the Civil Procedure Law, a 60-day extension applies to both appearance deadlines and challenge periods for persons residing outside the Kingdom, which the court may extend for a further similar period.

Mutual Legal Assistance Under the Anti-Money Laundering Law

Where fraud involves money laundering or predicate offences, the Anti-Money Laundering Law provides a separate mutual legal assistance framework applicable to countries with which the Kingdom has concluded agreements or on the basis of reciprocity. Under Article 38, competent authorities may exchange information and conduct inquiries on behalf of foreign counterparts. Under Article 39, mutual legal assistance may be provided in respect of money laundering and predicate offence investigations, including tracing, seizure, recovery and confiscation of funds and proceeds of crime. Under Article 40, a final confiscation order issued by a competent foreign court may be recognised and enforced in the Kingdom. Under

Article 41, accused or convicted persons may be extradited to or from the Kingdom in money laundering cases. Mutual legal assistance requests are handled by the Permanent Committee for Mutual Legal Assistance under Article 42.

The Riyadh Arab Agreement for Judicial Cooperation (1983)

Saudi Arabia is a party to the Riyadh Arab Agreement for Judicial Cooperation of 1983 (the “Riyadh Convention”), together with over 20 Arab states. The Riyadh Convention provides the primary framework for obtaining judicial assistance from other Arab states in both civil and criminal matters. In criminal matters it covers:

- service of criminal documents through the Ministries of Justice under Article 6;
- letters rogatory for the examination of witnesses, collection of evidence and other judicial procedures under Articles 14–20;
- exchange of criminal records under Article 5; and
- extradition of persons charged or convicted of offences carrying a liberty-depriving penalty of at least one year under Articles 38–45.

Where a contracting state declines to extradite its own nationals, it undertakes to prosecute them domestically under Article 39.

Interpol

Saudi Arabia is a member of Interpol. Where a fraud suspect has fled the jurisdiction and the applicable requirements under Interpol’s Rules on the Processing of Data are fulfilled – including the existence of an arrest warrant and satisfaction of the minimum penalty threshold under Article 83 – the public prosecution may request its National Central Bureau to publish a Red Notice under Article 82 of the Rules, seeking the location and detention, arrest or restriction of movement of the wanted person for the purpose of extradition or similar lawful action. Red Notices may be complemented by Diffusions under Article 97 – a more flexible mechanism for circulating co-operation requests directly to selected member countries.

Bilateral Agreements

Beyond the multilateral frameworks mentioned previously, Saudi Arabia has concluded bilateral agreements and memoranda of understanding with a number of countries relating to judicial co-operation, financial investigation and extradition. The scope and terms of available assistance will therefore vary depending on the country involved, and the applicable bilateral framework should be verified at the outset of any cross-border fraud matter.

4.2 Service of Proceedings out of the Jurisdiction

Method of Service

Under Article 19 of the Civil Procedure Law, where the person to be served resides outside the Kingdom, a copy of the notice is sent to the Ministry of Foreign Affairs for delivery through diplomatic channels. A statement from the Ministry confirming delivery to the person to be served is deemed sufficient. This applies to both Saudi defendants outside the Kingdom and non-Saudi defendants, as confirmed by the Implementing Regulations of the Civil Procedure Law. International treaties and conventions applicable between the Kingdom and the relevant country are taken into account.

Foreign Companies With a Kingdom Presence

Where a foreign company has a branch or agent in the Kingdom, service is effected on the branch manager or agent, or their designee, under Article 17 of the Civil Procedure Law. In such cases, overseas service through diplomatic channels is not required.

Alternative Service in Practice

In practice, a claimant may serve the defendant abroad by courier and submit proof of personal receipt to the court as an alternative to the Article 19 diplomatic channel process. Although this does not strictly follow the Article 19 procedure, courts may accept it as valid service on the basis of Article 5 of the Civil Procedure Law, which provides that procedural requirements are satisfied when their underlying purpose has been fulfilled – and the purpose of service is to ensure the defendant has actual notice of the proceedings. However, the Implementing Regulations of the Civil Procedure Law provides the court has discretion if the underlying purpose of a procedure has been fulfilled.

5. Enforcement

5.1 Methods of Enforcement

The Enforcement Process

Enforcement is conducted through enforcement courts. A claimant holding an enforceable instrument, under Article 9 of the Enforcement Law, files a request, and the judge issues an order to the debtor to fulfil what has been ordered. If the debtor fails to comply within five days, the judge issues an order under Article 46 of the Enforcement Law, mandating disclosure and enforcement against the debtor's present and future assets. In standard practice, this results in bank accounts being identified – sufficient funds are transferred directly to the court's account. The judge may also impose a travel ban and other measures.

Attachment and Forced Sale

The enforcement judge may also attach and sell the debtor's movable and real property under Articles 35–55 of the Enforcement Law. Attachment invalidates any subsequent disposition of the attached assets.

Garnishment of Financial Assets

The Enforcement Law provides specific garnishment mechanisms for financial assets. Under Article 60, bank accounts – including current accounts, investment accounts, term deposits and safe deposit boxes – are garnished through the financial institution's supervisory authority, which bars the debtor from withdrawing funds. Under Article 61, company equity shares are garnished through the Ministry of Commerce, and securities through the Capital Market Authority. Under Article 62, commercial papers (negotiable instruments) including cheques and promissory notes may be garnished. Under Article 63, future funds owed to the debtor may also be captured.

Asset Disclosure

Under Articles 16 and 17 of the Enforcement Law, the enforcement judge may order mandatory disclosure of the debtor's assets from all competent authorities, registration bodies, accountants and employees. Under Article 46 of the Enforcement Law, asset disclosure may extend to assets of the debtor's spouse, children and nominees.

Personal Sanctions Against the Debtor

Where the debtor fails to comply within five days, the judge, under Article 46 of the Enforcement Law, may order a travel ban, forced asset disclosure and bars on financial institutions dealing with the debtor. Where enforcement requires a personal act and the debtor refuses, the judge may impose daily fines up to SAR10,000 under Article 69. Concealment, false statements or refusal to disclose assets carries up to seven years' imprisonment under Article 88.

5.2 Enforcement of Foreign Judgments Conditions

Under Article 11 of the Enforcement Law, without prejudice to treaties and agreements, a foreign judgment may only be enforced on the basis of reciprocity and subject to all of the following conditions being met:

- Saudi courts have no jurisdiction over the dispute and the foreign court had jurisdiction under applicable rules;
- the parties were properly summoned and afforded the right to defend themselves;
- the judgment is final under the law of the issuing court;
- the judgment does not conflict with any Saudi court judgment on the same matter; and
- the judgment does not conflict with public order in the Kingdom – which means the provisions of Sharia under Article 11.3 of the Enforcement Law Regulations.

The same conditions apply to foreign arbitral awards under Article 12 of the Enforcement Law.

Procedure

Under Article 14 of the Enforcement Law, the foreign judgment is presented to the Enforcement Court, which ascertains that the conditions are fulfilled and affixes the enforcement seal. The applicant must submit an official copy of the judgment and service of process documents, an attestation that it is final and enforceable, and – in the case of a default judgment – proof that the defendant was duly notified under Article 11.1 of the Enforcement Law Regulations. Foreign official documents must be attested by the Ministries of Foreign Affairs and Justice and translated into Arabic. The burden of proving reciprocity lies with the

applicant under Article 11.6 of the Enforcement Law Regulations.

6. Privileges

6.1 Invoking the Privilege Against Self-Incrimination

Saudi law does not expressly provide for a privilege against self-incrimination as understood in common law jurisdictions. However, under Articles 101 and 102 of the Criminal Procedure Law, the accused may refuse to answer questions during the investigation, and the investigator records the refusal and continues proceedings. The accused may not be subjected to duress or asked to take an oath.

6.2 Undermining the Privilege Over Communications Exempt From Discovery

Under Rule 21 of the Professional Conduct Rules for Lawyers, a lawyer's duty of confidentiality over client information and documents yields in five circumstances:

- to prevent a crime;
- where there is suspicion of money laundering or terrorism financing;
- to defend the lawyer against a claim or complaint;
- with the client's written consent; or
- where required by a specific statutory provision or court order.

The most significant exception in the fraud context is the first – where the lawyer becomes aware that client information relates to a crime being committed or planned, the duty of confidentiality does not apply. The money laundering exception is equally important given that fraud frequently generates laundered proceeds.

In criminal proceedings, while Article 84 of the Criminal Procedure Law protects lawyer-client documents from seizure during an investigation, the Anti-Money Laundering Law provides a route to overcome this: under Articles 44 and 45 of the Anti-Money Laundering Law, the public prosecution may issue ex parte search warrants and seizure orders in money laun-

dering investigations, which can extend to lawyers' offices and documents.

7. Special Rules and Laws

7.1 Rules for Claiming Punitive or Exemplary Damages

Saudi law does not provide for punitive or exemplary damages. Compensation is governed by Articles 136 and 137 of the CTL, which establish that compensation shall fully restore the aggrieved party to their original position – covering actual loss and lost profits that are a natural result of the harmful act.

Where contractually agreed compensation exists, Article 179 (3) of the CTL permits the court to increase the agreed amount if the claimant establishes that fraud or gross negligence by the other party caused the harm to exceed what was agreed.

7.2 Laws to Protect “Banking Secrecy”

In Saudi Arabia, banks owe a general duty of confidentiality to their customers in respect of account information and financial data. However, this duty yields in a number of circumstances. In the context of fraud and asset recovery, three are particularly relevant.

Under Article 43 of the Anti-Money Laundering Law, the public prosecution may order any financial institution – through the supervisory authority – to provide records, documents or information in connection with a criminal investigation, and the institution must comply promptly and accurately.

Under Articles 44 and 45 of the Anti-Money Laundering Law, the Public Prosecution may issue ex parte provisional seizure orders and search warrants extending to financial records in money laundering and predicate offence investigations.

As discussed previously, under the enforcement framework of the Enforcement Law, the enforcement judge may order garnishment of bank accounts and mandatory disclosure of financial information through the supervisory authority once an enforceable instrument exists.

In all three cases, banking confidentiality does not operate as a bar to disclosure.

7.3 Crypto-Assets

Saudi Arabia does not have a dedicated statutory framework governing crypto-assets. The most relevant framework from the perspective of fraud and asset recovery is the Anti-Money Laundering Law. The Anti-Money Laundering Law's definition of “funds” is broad – encompassing assets of any value or type, whether tangible or intangible, including electronic or digital systems. Crypto-assets used as proceeds of fraud or as instruments of money laundering therefore fall within the Anti-Money Laundering Law's reach, and the public prosecution's investigative and seizure powers under Articles 43–45 of the Anti-Money Laundering Law apply to them.

Trends and Developments

Contributed by:

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Mohammed AIDhabaan & Partners Eversheds Sutherland (MDAPES) is a Saudi practice with more than 40 lawyers on the ground in the Kingdom, operating as part of the Eversheds Sutherland global network of over 3,000 lawyers across 70+ offices in 30+ jurisdictions. MDAPES also has access to a network of more than 200 related law firms, including formal-

ised alliances in Latin America, Asia Pacific and Africa. The firm advises major domestic and international corporations, financial institutions and government entities on a wide range of matters in the Kingdom. Recent work includes successfully representing a client in proceedings to void promissory notes of significant value issued through fraud.

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Introduction

This article examines four developments that have materially changed how fraud is detected and prosecuted, and assets recovered, in Saudi Arabia. The first is the growing enforcement record of Nazaha – Saudi Arabia’s Oversight and Anti-Corruption Authority – and the Capital Market Authority (CMA), both of which are producing concrete prosecution outcomes in financial fraud cases. The second is the comprehensive digitisation of the Ministry of Justice’s enforcement infrastructure, which has reduced the time and procedural steps required to freeze assets following a court order and has integrated enforcement courts directly with banks and payment service providers. The third is the Companies Law 2022, which consolidates criminal and civil liability for corporate insiders who commit fraud. The fourth is the Whistleblower Law, enacted in 2024, which addresses the detection gap in fraud cases by protecting and financially incentivising individuals who report wrongdoing. These developments are connected: stronger enforcement outcomes depend on faster detection, faster detection depends on people being willing to report and faster recovery of assets depends on the enforcement infrastructure being able to act quickly once a case is filed.

Enforcement Activity: Nazaha and Capital Market Fraud

Nazaha is the primary body responsible for investigating and prosecuting corruption-related financial offences in Saudi Arabia. In 2025, Nazaha conducted more than 21,200 inspection rounds, investigated over 3,100 suspects across ministries, agencies and

state-linked entities, and ordered the arrest of approximately 950 individuals on charges including bribery, abuse of authority and related financial offences. Nazaha’s criminal investigation and prosecution unit operates through 26 branches nationwide, staffed by seconded public prosecutors exercising full prosecutorial powers.

The Nazaha Law was enacted on 29 July 2024 and came into effect on 7 November 2024. Under Article 19 of the Nazaha Law, where a public employee’s wealth increases disproportionately after taking office and investigations uncover evidence of corruption, the individual must justify the source of that wealth or face escalation to Nazaha’s investigative unit and potential asset confiscation. Article 20 provides that where the accused absconds or dies before prosecution, Nazaha continues to gather evidence and pursue recovery of misappropriated funds, co-ordinating with the Ministry of Justice to enforce rulings both domestically and internationally. In June 2024 alone, Nazaha conducted 924 facility inspections and arrested 155 public officials. Since the Nazaha Criminal Investigation Unit’s inception in September 2024, 280 investigations have been opened with 130 people subject to arrest.

Bribery and corruption offences are predicate offences under the Anti-Money Laundering Law. This means that when Nazaha investigates a corruption case, the asset recovery and confiscation powers of the Anti-Money Laundering Law are simultaneously available – including the power to freeze assets and compel

financial disclosure. Nazaha's enforcement activity therefore directly feeds the fraud and asset recovery process.

In capital markets, the CMA has established a pattern of referring fraud cases to the public prosecution. In early 2024, the CMA referred a group of investors to the public prosecution for allegedly rigging stock prices across 52 listed companies on Tadawul. In May 2025, the CMA referred further suspects for manipulating a share offering and engaging in fraudulent trading. In 2023, the CMA secured SAR4.2 million in fines against two firms for unlicensed trading and advertising securities on social media, describing the outcome as the result of co-ordination between the CMA, the public prosecution and the relevant security authorities. Referral to the public prosecution activates the Anti-Money Laundering Law's investigative and seizure powers – including ex parte provisional asset freezing orders – in addition to the regulatory track. Convicted violators are publicly named, and victims retain access to civil compensation through the CMA's dispute resolution committee.

The Digital Transformation of Enforcement Infrastructure

The Ministry of Justice has digitised its enforcement and judicial services in a way that has directly changed the practical speed of asset recovery.

The primary platform is Najiz.sa, through which all judicial services – including enforcement – are now accessed. In the first half of 2024, Najiz delivered more than 43 million services without requiring physical visits to judicial facilities. In Q1 2024 alone, the platform recorded 23 million visits from more than 90 countries. The platform provides more than 160 judicial services through four portals serving individuals, businesses, lawyers and government agencies. By 2023, the automation rate for judicial services had reached 86.94%, surpassing the Ministry's own targets by 8.4%, and client satisfaction with judicial services reached 97%. In the 2024 Government Electronic and Mobile Services Maturity Index, Saudi Arabia was named the leading country in e-government services across the Middle East and North Africa for the third consecutive year, and ranks second among G20 nations for the quality and reach of its online services.

In 2024, 98% of more than 2.3 million court sessions were conducted remotely via the electronic litigation service. The average number of sessions required to close a case reached two – 33% more efficient than 2023.

Nafith is the Ministry of Justice's platform for promissory notes, launched in April 2020. It allows individuals, banks and financial institutions to issue, register and manage promissory notes electronically, with direct linkage to the enforcement courts. The Saudi Central Bank (Saudi Arabian Monetary Authority – SAMA) has informed all banks that they can connect directly to Nafith and integrate it with their own systems. When a promissory note is properly registered on Nafith, the enforcement authority can order asset freezes, salary deductions or travel bans without additional evidentiary hearings. For Nafith-registered promissory notes, the Ministry of Justice has reduced enforcement to two automatic procedural steps. A Virtual Enforcement Court, accessible through Najiz, operates around the clock with automatic review of applications, referral to the judicial panel and completion of enforcement – with no requirement for in-person appearances.

The integration between the enforcement system and the financial sector is equally important for fraud recovery. SAMA has issued binding instructions requiring payment service companies to immediately suspend a customer's electronic wallet upon receiving a ban order from an enforcement court, and to prevent any new relationships with that customer. The digital linking between the Committees for Banking and Financial Disputes and the public prosecution was completed in May 2021, enabling full electronic exchange of data between the two bodies. Electronic retail payments reached 70% of all retail transactions in 2023, up from 62% in 2022, covering 10.8 billion transactions through national payment systems. As the volume of digital financial activity increases, the speed of this court-to-financial-institution enforcement chain becomes increasingly important.

Corporate Fraud: The Companies Law 2022

The Companies Law 1433-2022 (the "Companies Law"), which was enacted on 30 June 2022, came into force on 18 January 2023 and sets out a detailed

framework of criminal and civil liability for corporate insiders who commit fraud.

Under Article 260 of the Companies Law, managers, officers, board members, auditors and liquidators who intentionally falsify financial statements or misuse company funds or authority for personal gain face up to three years' imprisonment and/or fines of up to SAR5 million. The same provision applies to liquidators who improperly favour particular creditors. Under Article 261, an auditor who discovers suspected criminal violations during their work and fails to notify management faces up to one year's imprisonment and/or a fine of up to SAR1 million. Article 263 doubles all penalties under Articles 260 and 261 for repeat offenders, defined as any person who commits the same offence within three years of a final judgment for a prior offence. Under Article 264, the court may additionally ban a convicted person from membership of the board of directors of a joint-stock company listed in the capital market. Article 265 designates the public prosecution as the authority with jurisdiction to investigate and prosecute offences under Articles 260 and 261. Article 269 confirms that criminal penalties under the Companies Law do not affect the right of any person to seek civil compensation for the same conduct.

On the civil side, Article 28 makes managers and board members jointly and severally liable for damage caused by wrongful acts or omissions, without requiring a criminal conviction. Article 102 gives minority shareholders in joint-stock companies a direct route to trigger judicial oversight: a shareholder representing at least 5% of a company's capital may petition the competent judicial authority to inspect the company where the conduct of board members or the auditor raises suspicion; the judicial authority may, where it finds the complaint valid, remove board members and appoint qualified supervisors.

Criminal and civil claims against the same individuals can be pursued simultaneously under the Companies Law, and the criminal track does not extinguish or displace the civil compensation claim.

Whistleblower and Witness Protection

The Protection of Whistleblowers, Witnesses, Experts, and Victims Law (the "Whistleblower Law") was enacted on 18 February 2024 and came into effect on 29 June 2024.

The Whistleblower Law establishes a dedicated protection programme within the public prosecution. The programme provides identity concealment, workplace relocation, secure transportation and escorts, psychological and legal assistance, and the ability to give testimony remotely with voice and image alteration.

The Whistleblower Law creates a tiered set of criminal penalties for those who retaliate or interfere. Under Article 24, disclosing the identity of a protected person carries up to one year's imprisonment and/or a fine of up to SAR200,000. Under Article 25, using force or violence against a protected person to prevent them from telling the truth carries up to three years' imprisonment and/or a fine of up to SAR500,000. Under Article 26, threatening, blackmailing or offering a benefit to a protected person to prevent them from telling the truth carries up to two years' imprisonment and/or a fine of up to SAR300,000; obstructing or refusing to provide protection when required by law carries up to one year's imprisonment and/or a fine of up to SAR200,000. Where such acts are committed by public officials, they are classified as corruption crimes under the law.

Article 17 of the Anti-Bribery Law separately provides a financial reward to informants. Any person – who is not a briber, accomplice or intermediary – whose information leads to a bribery offence being proved receives a reward of not less than SAR5,000 and not more than half the value of confiscated funds.

The two mechanisms operate together: the Whistleblower Law addresses the personal risk of reporting, while Article 17 of the Anti-Bribery Law provides a direct financial reason to do so. In corporate fraud cases, the person most likely to be aware of misconduct is an employee, auditor or business partner who previously had no protection and no financial incentive to report. Both factors have now been addressed.

International Integration: FATF Membership and Cross-Border Recovery

The Financial Action Task Force (FATF) is an intergovernmental body of 40 members that sets international standards for combating money laundering, terrorist financing and related threats to the integrity of the financial system. Member countries are subject to periodic peer review, with results published publicly. In June 2019, Saudi Arabia joined FATF as the first Arab country and the 37th member globally. As of 2024, Saudi Arabia is fully compliant with 17 of FATF's 40 Recommendations and largely compliant with 21 others, with only two areas rated partially compliant.

The cross-border asset recovery framework is set out in Articles 38 to 42 of the Anti-Money Laundering Law. Under Article 38, Saudi competent authorities may exchange information with foreign counterparts on a treaty or reciprocity basis. Under Article 39, Saudi authorities may provide mutual legal assistance in tracing, seizing, and confiscating fraud proceeds upon request from a foreign court or authority in a treaty or reciprocity country. Article 40 provides for recognition and enforcement of foreign confiscation orders, subject to the condition that the assets can be confiscated under Saudi law. Article 41 permits the extradition of money laundering suspects on a treaty or reciprocity basis; where extradition is refused, Saudi courts may try the matter themselves using investigations provided by the requesting country. Article 42 designates the Permanent Committee for Mutual Legal Assistance as the body responsible for receiving and handling all international requests.

FATF membership means that Saudi Arabia's co-operation commitments are assessed and rated publicly by an independent peer body. For a foreign fraud victim tracing proceeds to Saudi Arabia, that membership provides a more reliable basis for co-operation than a purely bilateral or ad hoc arrangement.

Conclusion

Saudi Arabia's fraud and asset tracing landscape has changed across four distinct dimensions in recent years. Enforcement is active at volume – Nazaha's 2025 statistics, the revised Nazaha Law's strengthened asset recovery powers and the CMA's multi-year referral record all demonstrate a system in operation. The digital enforcement infrastructure has shortened the time from court order to asset freeze, connected enforcement courts directly to banks and payment providers, and made 98% of judicial proceedings remote. The Companies Law 2022 provides a statutory framework for criminal prosecution and civil compensation against corporate insiders, with the public prosecution designated as the authority for investigation and prosecution. The Whistleblower Law has addressed the detection gap by pairing legal protection for those who report with a financial incentive to do so. And Saudi Arabia's FATF membership and cross-border recovery framework, with full or largely compliant ratings across 38 of 40 Recommendations as of 2024, provide the international infrastructure needed when fraud proceeds leave the Kingdom.

SINGAPORE



Law and Practice

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Rajah & Tann Singapore has a dedicated fraud, asset recovery and investigations team that includes former prosecutors and legal advisers to the Commercial Affairs Department of the Singapore Police Force. The team builds upon the wealth of experience gathered by its lawyers in dealing with complex cross-border commercial fraud and asset recovery, white-collar crime, regulatory and compliance advice and insolvency, as well as through its 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 Keppel Corporation's global settlement with authorities in the USA, Brazil and Singapore; investigations into fraud allegations involving Lehman Brothers, MF Global and Wirecard; the collapse of OW Bunker; and the Malaysian 1MDB scandal. **Rajah & Tann Singapore LLP** is a member firm of **Rajah & Tann Asia**, a network of over 1,000 fee earners across ten jurisdictions, delivering excellent service to clients.

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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 to trace its proceeds.

A principal's right at common law to recover the bribe or the monetary value of the bribe received by its agent is also statutorily recognised. Section 14 of the Prevention of Corruption Act 1960 provides that a principal may recover, as a civil debt, the amount or 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 paid fines equal to or exceeding the value of the bribe received is not a bar to the principal's recovery. 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 a 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 1959).

There are, however, specific provisions that deal with claims based on fraud. For instance:

- under Section 22 of the Limitation Act 1959, 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 their use; and
- under Section 29 of the Limitation Act 1959, the six-year limitation period shall not begin to run in certain cases of fraud or mistake until the claimant 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 fraud may bring a proprietary claim for misappropriated funds or property and seek a constructive trust over them. The constructive trust will give the claimant priority over other unsecured creditors in an insolvency situation. It also enables the claimant to trace and follow the proceeds of the fraud. 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 those of other inno-

cent 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 particular rules of pre-action conduct for fraud claims. Pursuant to the terms of the Rules of Court 2021, a party to any court proceeding is under an express duty to consider an amicable resolution of the dispute before the commencement and during the course of the proceedings (Order 5 Rule 1 (1)). In addition, prospective claimants are required to make an offer of amicable resolution (which shall be open for acceptance within a reasonable period of time, or for at least 14 days, unless parties agree otherwise) before commencing action unless the claimant has reasonable grounds not to do so (Order 5 Rule 1 (2)).

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 claimant asserts a proprietary interest. Such injunctions are typically sought on an urgent and without notice (ex parte) basis. Freezing injunctions can be sought 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 on to the defendant's assets as a 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 2016, with a fine of up to SGD100,000, imprisonment for a term not exceeding three years or both. Additionally, the court may refuse to hear the defendant until:

- the contempt is purged;
- the defendant submits to the order or direction of the court; or
- an apology is made to the court's satisfaction.

Third parties (such as banks) in Singapore are also bound by the freezing order upon receiving notice of the injunction; failure to comply may render them liable for contempt of court.

A claimant seeking a freezing or proprietary injunction will need to pay the filing fees for the application, which may range from 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 the defendant may incur. 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 a bank guarantee.

2. Procedures and Trials

2.1 Disclosure of Defendants' Assets

Generally, a claimant can seek a disclosure order as an ancillary order to support the freezing injunction. The defendant will be required to file an affidavit identifying their assets, whether held in their own name or not and whether owned solely or jointly.

If there are reasonable grounds 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 order, 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 by way of a summons without notice (ie, on an ex parte basis). The requirements that must be satisfied 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 is clear evidence that the defendant possesses the incriminating evidence and there is 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.

As with 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 the court grants it.

2.3 Obtaining Disclosure of Documents and Evidence From Third Parties

In a court application, the applicant may 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 a Bankers 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 contempt of court. The Riddick principle, however, is not absolute and the 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 by way of a summons without notice (ie, ex parte). However, the courts' practice

directions require that, except in cases of extreme urgency or with the court's permission, the applicant must provide at least two hours' notice to the other party before the hearing.

In an *ex parte* application, the applicant must make full and frank disclosure to the court of all facts within their knowledge which are material to the exercise of the court's discretion whether to grant the relief, 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. Criminal prosecution and civil proceedings may proceed in parallel. In less serious fraud cases, however, criminal prosecution may take place only after the conclusion of the civil claim.

Singapore has various statutory provisions that would capture different fraudulent acts. For example, the Penal Code 1871 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 1967 also sets out the following conduct which, if a person is found guilty thereof, may amount to an offence:

- breach of directors' duties (Section 157);
- false and misleading statement (Section 401);
- false statements or reports (Section 402); and
- fraud by officers (Section 406).

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 fails to file a defence within the stipulated timelines.

In cases where it is clear that the defence is wholly unmeritorious, the claimant may seek summary judgment without trial. Generally, summary judgment is argued on affidavit evidence and granted where there are no triable issues.

2.7 Rules for Pleading Fraud

The Legal Profession (Professional Conduct) Rules 2015 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 (Rule 9 (2)(h)(iii)).

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 (as in a fraud claim), the stronger or more cogent the evidence required for the claimant to discharge their burden.

2.8 Claims Against “Unknown” Fraudsters

The Singapore courts have taken a pragmatic approach and have allowed claims to be brought against unknown fraudsters. In a recent Singapore High Court decision, *CLM v CLN* [2022] 5 SLR 273; [2022] SGHC 46, it was held for the first time in Singapore that the Singapore court has 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 an 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 to produce documents must be served personally within the 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 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.

Firstly, there are primary rules of attribution found in the company's constitution or implied by company law, which deem certain acts of certain natural persons to be the acts of the company. For instance, if the board of directors of a company is aware of acts committed by its employees or agents, knowledge of those 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 under which, although the primary and general rules of attribution are not applicable, the courts find that a substantive rule of law applies to the company. This would depend on the interpretation or construction of the relevant rule by 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 may be bound by the improper acts of its 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 duty.

3.2 Claims Against Ultimate Beneficial Owners

In certain exceptional circumstances, courts can look beyond a company's separate legal personality and to those who stand behind it, ie, shareholders. This is typically referred to as "lifting the corporate veil".

One scenario in which the corporate veil can be lifted is when the relevant person uses the company as an instrument of fraud. A person who commits a wrongdoing through a company they control cannot evade responsibility by claiming that only the company and not themselves, should be held liable for the misconduct.

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 claimant 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 shareholders' resolution and then have the company bring claims against them.

However, where the wrongdoers are themselves in control of the company and do not allow 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 under either common law or statute.

Specifically, under Section 216A of the Companies Act 1967, the shareholder may apply to the court for

leave to bring an action in the company's name. The court would need to be satisfied that:

- the complainant has given 14 days' notice to the directors of the company of the complainant's intention to apply to the court for leave to commence action if the directors of the company do not bring, diligently prosecute, defend or discontinue the action or arbitration;
- 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 in which a director misappropriates the company's funds or opportunities, or receives bribes or benefits at the company's expense.

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims

Bringing a claim against overseas parties requires establishing that the Singapore court:

- has jurisdiction over the overseas parties; or
- Is the appropriate court to hear the action?

Whether the Singapore courts assume extraterritorial jurisdiction will depend on the nature of the 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 Singapore. In a separate case, it was held that the Singapore courts can order a foreign individual to be subject to examination in judgment-debtor proceedings if the foreign individual is so closely connected to the substantive claim that the Singapore court is justified in exercising jurisdiction over them.

4.2 Service of Proceedings out of the Jurisdiction

Pursuant to the Rules of Court 2021, to establish that the Singapore court has jurisdiction over the overseas parties or is the appropriate court to hear the action, the claimant needs to show that (Order 8 Rule 1 (2)):

- there is a good arguable case that there is sufficient nexus to Singapore;
- Singapore is the forum conveniens (proper forum); and
- there is a serious question to be tried on the merits of the claim.

Specifically, under paragraph 63 (3) of the Supreme Court Practice Directions 2021, the claimant should refer to any of the non-exhaustive list of factors to show that there is a good arguable case that there is sufficient nexus to Singapore.

As for the forum conveniens requirement, the claimant may refer to a non-exhaustive list of common law factors (the Spiliada factors) to show that Singapore is the proper forum for the trial of the claim. Some of the factors include:

- the governing law of the contract;
- where parties were incorporated; and
- the location of witnesses.

The court's approval is not required if service outside Singapore is permitted under the parties' contract (Order 8 Rule 1 (3)).

In the event that the court's approval is granted and the claimant is faced with a difficult defendant, the claimant may apply for substituted service (paragraph 65 of the Supreme Court Practice Directions 2021). To do so, two reasonable attempts must first be made at personal service (paragraph 65 (2)). Modes of substi-

tuted service include AR registered post or electronic means such as email or internet transmission (paragraph 65 (3)).

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 take steps to make enforcement of the judgment difficult. For instance, the fraudster may seek to conceal or dissipate their assets or 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 claimant may apply under Order 22 Rule 11 of the Rules of Court 2021 for an order for the examination of the 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 will 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 in **1.7 Prevention of Defendants Dissipating or Secreting Assets**, are also available as remedies to preserve the fraudster's assets 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 the sale will then be paid to the company to satisfy the judgment debt.

Where it is known that the fraudster owes debts to other persons, an enforcement order may also be issued to the other person to pay the debt amount to the claimant, 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.

5.2 Enforcement of Foreign Judgments

After the repeal of the Reciprocal Enforcement of Commonwealth Judgments Act 1921 on 1 March 2023, there are generally three processes by which foreign judgments may be enforced in Singapore.

Common Law Regime

First, a party that has obtained a foreign judgment may seek to enforce it under the common law. There are several requirements to be satisfied before foreign judgments may be enforced in Singapore. For instance, the foreign judgment must be a fresh money judgment. This means that the foreign judgment to be enforced must be for a definite sum of money; it cannot be a judgment requiring a defendant to perform a specific act.

Another requirement is that the foreign judgment must be final and conclusive. This means that the foreign judgment to be enforced must be one that cannot be varied, reopened or set aside by the foreign court that delivered it. To commence enforcement under the common law regime, a claimant must commence a fresh civil claim in the Singapore courts to enforce the foreign money judgment as a debt against a defendant. A defendant may resist enforcement by arguing, amongst other things, that the foreign judgment was procured by fraud, obtained contrary to natural justice or that enforcement would be contrary to public policy.

Choice of Court Agreements Act 2016

Second, a foreign judgment may be enforced under the regime of the Choice of Court Agreements Act 2016 (CCAA), which gives effect to the Hague Convention on Choice of Court Agreements (the “Hague Convention”). Under the CCAA regime, a foreign judgment from a court of a state party to the Hague Convention may be enforced in Singapore, subject to the requirements and exceptions set out in the CCAA. The broad stages are as follows.

- A judgment creditor seeking to enforce a foreign judgment in Singapore must first commence an originating application without notice, supported by an affidavit. The judgment creditor would have to exhibit in the supporting affidavit, amongst other things, the foreign judgment seeking to be enforced (Order 37 Rule 2 of the Rules of Court 2021).
 - (a) At this stage, a Singapore court would enforce the foreign judgment only if it is enforceable in the state where it originates. In deciding whether to enforce a foreign judgment, the Singapore court cannot review its merits, except as permitted under the CCAA. Additionally, the Singapore court is bound by any findings of fact made by the foreign court that issued the foreign judgment, unless it was a default judgment (Section 13 of the CCAA).
 - (b) A Singapore court must refuse to enforce a foreign judgment if it is obtained without giving the defendant notice of the foreign proceedings or by fraud, or if enforcement of the foreign judgment would be contrary to Singapore’s public policy (Section 14 of the CCAA).
 - (c) A Singapore court may refuse to enforce the foreign judgment under Section 15 of the CCAA. For instance, a Singapore court may refuse to enforce a foreign judgment that is inconsistent with a judgment given by a Singapore court in a dispute between the same parties.
- The judgment creditor has to effect service of the court order together with a copy of the foreign judgment on every party to the case or proceedings in which the foreign judgment was obtained within 28 days after the date on which the court order is made. The judgment creditor must, within

14 days after the date on which the court order and the copy of the foreign judgment are served on a party, file an affidavit of service on that party (Order 37 Rule 6 of the Rules of Court 2021).

- A judgment debtor may file for an application to set aside the court order relating to the foreign judgment (Order 37 Rule 7 of the Rules of Court 2021). This application must be made within 28 days after the date on which the court order and a copy of the foreign judgment were served on the judgment debtor or such longer period as the court may allow. A judgment debtor may rely on the grounds provided under Sections 14 and 15 of the CCAA to set aside the court order.
- If the court order is not set aside, a judgment creditor who wishes to apply for an enforcement order to enforce the foreign judgment must produce to the court: the court order, a copy of the foreign judgment and an affidavit of service on the party against whom the enforcement is sought (see Order 37 Rule 10 of the Rules of Court 2021).

Reciprocal Enforcement of Foreign Judgments Act 1959

Third, foreign judgments may be enforced pursuant to the Reciprocal Enforcement of Foreign Judgments Act 1959 (REFJA). Currently, only judgments from Hong Kong, Brunei Darussalam, Australia, India, Malaysia, New Zealand, Pakistan, Papua New Guinea, Sri Lanka and the UK could be registered under the REFJA. The broad stages of registering a foreign judgment under the REFJA regime are as follows.

- A judgment creditor must apply for registration by way of an originating application without notice (Order 60 Rule 2 of the Rules of Court 2021). This application for registration must be supported by an affidavit exhibiting, amongst other things, the foreign judgment that is to be registered (Order 60 Rule 3 of the Rules of Court 2021). A judgment creditor may apply for registration of the foreign judgment at any time within six years after the date of the judgment, or if there is any appeal against the judgment, the date of the last judgment given in those proceedings. However, a foreign judgment cannot be registered if, at the date of the application, it has been wholly satisfied, discharged, or it

could not be enforced in the state that it originates from (Section 4 of the REFJA).

- A court order giving permission to register a foreign judgment must then be drawn up by, or on behalf of, the judgment creditor. The court order must state that an application may be made to set aside the registration of the foreign judgment and must contain a notification that an enforcement order to enforce the judgment will not be issued until after the expiration of that period. This court order must then be served on the judgment debtor in question (Order 60 Rule 5 of the Rules of Court 2021). A notice of registration must be served on the judgment debtor personally unless the court otherwise orders (Order 60 Rule 7 of the Rules of Court 2021).
- Within three days after the service of the notice of registration (or any longer period as the court may permit), the notice or a copy of the notice must be endorsed by the person who served it with the day of the week and date on which it was served. If the notice is not so endorsed within this period, the judgment creditor may not apply for an enforcement order to enforce the foreign judgment to which the notice relates without the permission of the court (Order 60 Rule 8 of the Rules of Court 2021).
- A judgment creditor may apply to set aside the registration of a judgment by way of a summons supported by an affidavit (Order 60 Rule 9 of the Rules of Court 2021).
 - (a) In this regard, Section 5 (1)(a) of the REFJA provides for certain grounds where the Singapore court shall set aside the registration of a foreign judgment. These grounds include: the foreign judgment was obtained by fraud; if enforcement of the foreign judgment would be contrary to public policy of Singapore; or the judgment debtor, being a defendant in the proceedings in the foreign court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the foreign country) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear.
 - (b) Section 5 (2)(b) of the REFJA provides that the registration may be set aside if the Singapore court is satisfied that the matter in dispute in

the proceedings in the foreign court had before the date of the judgment in the foreign court been the final and conclusive judgment by a court having jurisdiction in the matter.

- (c) Section 5 (2)(c) of the REFJA provides that the registration may be set aside if the Singapore court is satisfied that the notice of registration had not been served on the judgment debtor or that the notice of registration was defective.
- If the registration has not been set aside, the judgment creditor who wishes to apply for an enforcement order to enforce a foreign judgment that is registered with the REFJA must produce to the court an affidavit of service of the notice of registration of the judgment and any order made by the court in relation to the judgment (Order 60 Rule 10 of the Rules of Court 2021).

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 may 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 committed a crime.

At the same time, the court has the power under Section 116 (g) of the Evidence Act 1893 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 inferences against a party who fails to produce documents or call crucial witnesses to testify at trial, both in civil and criminal proceedings.

For the court to draw an adverse inference, there are two main requirements that need to be satisfied:

- there needs to be a substratum of evidence that 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; and
- 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 2010 expressly provides the Singapore courts with the power to draw an adverse inference from the silence of the accused for failing to mention any fact that they subsequently rely on in their defence which the accused could reasonably have been expected to mention when questioned, charged or informed of their offence.

6.2 Undermining the Privilege Over Communications Exempt From Discovery

While communications between a lawyer and a client attract legal advice privilege or litigation privilege, such communications can be stripped of their privileged status on the basis of a “fraud exception”.

In particular, Section 128 (2) of the Evidence Act 1893 expressly provides that legal advice privilege will not apply to “any communication made in furtherance of any illegal purpose” or to “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 claimant for their loss, rather than to punish the wrongdoer. Even where 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 impose a punitive award when no such award is necessary.

7.2 Laws to Protect “Banking Secrecy”

Under Section 47 (1) of the Banking Act 1970, the bank is not allowed to disclose customer information to any other persons. However, the Banking Act 1970 also provides exceptions where disclosure is allowed – for instance, where 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 world-wide freezing injunction against defendants who allegedly stole cryptocurrencies, even though their identities were unknown and disclosure orders against the relevant cryptocurrency exchanges to assist in tracing the stolen assets.

This decision should have implications for 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.

Crypto-assets have also been held to be capable of being held on trust and can constitute debt in some winding-up applications. The Court has also clarified that the situs of crypto assets is the location where they are controlled, as in where the person who controls the private key resides.

Trends and Developments

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Rajah & Tann Singapore has a dedicated fraud, asset recovery and investigations team that includes former prosecutors and legal advisers to the Commercial Affairs Department of the Singapore Police Force. The team builds upon the wealth of experience gathered by its lawyers in dealing with complex cross-border commercial fraud and asset recovery, white-collar crime, regulatory and compliance advice and insolvency, as well as through its 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 Keppel Corporation's global settlement with authorities in the USA, Brazil and Singapore; investigations into fraud allegations involving Lehman Brothers, MF Global and Wirecard; the collapse of OW Bunker; and the Malaysian 1MDB scandal. Rajah & Tann Singapore LLP is a member firm of Rajah & Tann Asia, a network of over 1,000 fee earners across ten jurisdictions, delivering excellent service to clients.

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Jansen Chow co-heads the Rajah & Tann's fraud, asset recovery and investigations practice. An experienced litigator and a leading practitioner in cryptocurrency and digital data disputes, Jansen

successfully obtained Singapore's first worldwide Mareva injunction against "persons unknown" and third-party disclosure orders against cryptocurrency exchanges in CLM v CLN. He regularly advises global blue-chip clients on complex internal investigations, including acting for a Singapore conglomerate in a high-profile corruption investigation in Brazil, which was awarded "Boutique or Regional Practice of the Year" and nominated for "Most Important Development of the Year" at the Global Investigations Review Awards. Reflecting his capabilities, Jansen is consistently recognised as a leading lawyer in this field.



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Introduction

Singapore continues to cement its position as a leading centre for cross-border fraud and asset recovery litigation. As a major financial hub with robust rule-of-law institutions, its courts regularly address complex multi-jurisdictional disputes involving asset misappropriation and the increasingly prominent role of digital assets in fraudulent schemes. This write-up surveys the most significant recent judicial developments from 2025 to 2026.

The Mareva Injunction

The Mareva injunction remains the primary tool for preserving assets pending judgment. The requirements for a Mareva injunction are well established:

- a good arguable case on the merits; and
- a real risk that the defendant will dissipate assets.

The precise contours of the “real risk of dissipation” have been significantly refined in recent years.

Continental Shipping Line Pte Ltd v Jonathan John Shipping Ltd [2025] 1 SLR 1191; [2025] SGCA 36 (“Continental Shipping”)

The Court of Appeal’s decision in *Continental Shipping* is one of the most important recent authorities on Mareva injunctions in Singapore. The case arose from a time charterparty dispute in which the respondent shipowner obtained a worldwide Mareva injunction against the appellant charterer under section 12A of the International Arbitration Act 1994. The appellant applied to set aside the injunction and the Court of Appeal allowed the appeal, holding that no real risk of dissipation had been established.

The Court distinguished between “unjustified” dealings with assets and those for “legitimate commercial reasons” or “in the ordinary course of business,” concluding that the former carried a dissipation risk. The touchstone is the defendant’s “dishonesty or propensity to be untruthful”, demonstrated by “solid evidence” rather than mere speculation. Probative factors include a “pattern of unusual or unexplained movement of funds” and conduct such as “misappropriation of assets or market manipulation”.

The Court identified several indicia of insufficient dissipation risk, namely:

- cessation of primary business operations, where a plausible commercial explanation exists;
- liquidity of the defendant’s assets, which reflects the business nature rather than the intent;
- the foreign nationality of directors or shareholders; and
- withdrawals from enjoined accounts made under the ordinary business expenses exception and promptly reported.

The decision is a reminder that a Mareva injunction is not intended to provide a claimant with security for its claim or to guard against the risk of a defendant’s insolvency. Rather, it is a corrective measure intended to prevent the defendant from abusing the court’s process by deliberately frustrating the enforcement of a prospective judgment or award.

Ser Kang Wei v Salas Porras [2025] SGHC 257 (“*Ser Kang Wei*”)

The principles in *Continental Shipping* were considered by the High Court in *Ser Kang Wei*, a complex cross-border fraud involving an intricate web of transnational entities across multiple jurisdictions, including the UAE, Singapore and Zimbabwe. The claimants alleged that the defendants had perpetrated a fraudulent gold investment scheme, inducing them to transfer USDT to cryptocurrency wallets controlled by the defendants. The scheme involved elaborate representations of lucrative gold-trading opportunities, underpinned by South African and Zimbabwean entities. Upon investigation, these entities turned out to have had no dealings with the defendants’ fund.

The defendants relied on *Continental Shipping* to argue that the mere ability to move assets does not equate to a real risk of dissipation. However, the Court distinguished the case on its facts, noting that the Court of Appeal had itself observed that the ability to move assets, “when coupled with findings of dishonest conduct on the part of the defendant, can lead to a finding of a real risk of dissipation”. Considering the evidence before it, such as a pattern of companies being “incorporated, restructured and dissolved within a short period of time” for no discernible commercial purpose and the non-disclosure of certain bank accounts and shares, the Court found a real risk of dissipation and maintained the worldwide Mareva injunction, including over cryptocurrency assets.

The case illustrates both the continued willingness of Singapore courts to extend freezing relief to digital assets and the practical reality that cryptocurrency is increasingly the medium through which fraud proceeds are transferred and concealed.

Crypto-Assets

The treatment of cryptocurrency is one of the most dynamic areas of Singapore’s fraud and asset recovery jurisprudence. Given the pseudonymous nature of blockchain transactions and ease of cross-border movement, the ability to assert proprietary rights over cryptocurrency is critical for fraud victims.

The foundations were laid in earlier decisions: in *CLM v CLN* [2022] 5 SLR 273; [2022] SGHC 46, the High

Court granted Singapore’s first worldwide Mareva injunction against “persons unknown” in a cryptocurrency theft case, in *ByBit Fintech Ltd v Ho Kai Xin* [2023] 5 SLR 1748; [2023] SGHC 199, the Court definitively held that cryptocurrency constitutes a chose in action capable of being held on trust and in *Cheong Jun Yoong v Three Arrows Capital* [2024] 4 SLR 907; [2024] SGHC 21, the Court established that the situs of a crypto asset is determined by the residence of the person controlling the private key. Building on this framework, the Singapore Courts have, in 2025 and 2026, addressed more granular questions, including the valuation of cryptocurrency for damages assessment and the treatment of digital assets in insolvency.

Kalen, Alexandru v World Exchange Services [2026] SGHC 31 (“*Kalen Alexandru*”)

The case concerned a representative claim brought on behalf of 85 individuals who held digital tokens and fiat monies on the defendant’s online trading platform. The claimants had previously succeeded in establishing that the defendant breached the applicable user agreement by failing to allow them access to their stored digital tokens and funds. The claimants also succeeded in their claim that the defendant breached the buyback agreement, as it failed to purchase the digital tokens from them.

At the assessment of damages stage, among other issues, the Court was required to determine the appropriate valuation date for the claimants’ losses. The claimants argued that the valuation date should be the trial date, while the defendant contended that it should be the date of breach. The Court held that the correct approach is to assess the valuation date by reference to the time when a claimant is reasonably expected to mitigate their losses. Whether the claimant is reasonably expected to mitigate depends on, among other factors, when the claimant has knowledge of the breach and whether it is possible and reasonable to mitigate. Conceptually, the valuation date may coincide with the date of breach itself if the claimant has knowledge of the breach and it is possible and reasonable to mitigate at that point. On the facts, the Court found that the appropriate valuation date was a reasonable time after the claimants first discovered their inability to control, transfer, or withdraw their digital tokens and funds.

Importantly, the Court rejected the approach adopted in the English authority of *Southgate v Graham* [2024] EWHC 1692, which suggested that the court was free to fix the valuation date on a date other than the date of breach if the breach-date valuation fails to adequately compensate the claimant. The Court reasoned that such an approach gives the claimant the benefit of perfect hindsight and risks unfairly conferring a wind-fall. Instead, the formulation adopted in Singapore directly ties the valuation date inquiry to the possibility and reasonableness of the claimant's mitigation and assumes reasonable rather than best mitigation. As for the valuation method, the Court accepted that the value of cryptocurrency assets could be determined based on real-time prices from established cryptocurrency data websites, which have also been referred to by a number of foreign and Singapore authorities.

These developments demonstrate that Singapore courts will reason from established contractual principles when assessing cryptocurrency damages, rather than treating digital assets as requiring an entirely novel framework.

Re Taylor, Joshua James and another (Official Receiver, non-party) [2025] 4 SLR 1207; [2025] SGHC 104 (“*Re Taylor*”)

In *Re Taylor*, the application concerned the distribution of cryptocurrency in the liquidation of Egonex Capital Ltd, a company that operated a digital asset exchange platform. The central question was whether the cryptocurrencies held by Egonex Capital were held on trust for its customers.

In analysing the platform's terms and conditions, the Court concluded that no express, resulting or Quistclose trust had been created over the digital assets. In relation to an express trust, the Court reasoned that although certain clauses referred to digital assets as “custodial assets” held for customers' benefit, this language did not go so far as to indicate that the assets were held on trust. Rather, the assets could have been held on a pledge or with a level of control less than a proprietary interest. Critically, the terms suggested that legal title to the digital assets was held by the customer, not merely beneficial title and an express exclusion of fiduciary and equitable duties further negated any intention to create a trust.

The Court similarly found no basis for a resulting trust as there was no express trust that had arisen and failed, or a Quistclose trust, as there was no intention for the unclaimed cryptocurrencies to be repaid to customers after the platform's closure and Egonex was free to close the account and empty the accompanying digital wallets.

The practical consequence was that the cryptocurrencies were not vested in Egonex Capital as the legal and beneficial title had remained with the customers. Egonex Capital was not entitled to the cryptocurrencies, which meant they fell outside the general pool of assets available to the company's creditors in liquidation.

This decision is of considerable importance for the growing number of fraud and asset recovery cases that intersect with the insolvency of cryptocurrency exchanges. It underscores the need to pay attention to the terms and conditions governing the custody of digital assets on exchange platforms, as the trust language is crucial in determining whether customers' cryptocurrency assets are protected from creditor claims. Practitioners advising fraud victims who have lost assets through a now-insolvent exchange will need to examine the relevant platform's terms closely to assess whether a proprietary claim or tracing remedy remains available.

Regulatory Developments: Expanded Licensing Under the Financial Services and Markets Act (FSMA)

Alongside the judicial developments surveyed above, Singapore has also expanded its regulatory framework for digital assets. From June 2025, the Monetary Authority of Singapore (MAS) will require digital token service providers to be licensed under Part 9 of the FSMA. The new provisions apply to individuals and partnerships that carry on a business of providing any type of digital token service outside Singapore or from a place of business in Singapore and to Singapore corporations that carry on a business of providing any type of digital token service outside Singapore, whether from Singapore or elsewhere (Section 138 of the FSMA)

MAS has signalled that it will set a high bar for licensing and will generally not issue licences to digital token service providers whose substantive regulated activities are outside Singapore. The stated rationale is that the money laundering risks associated with such business models are higher and MAS is unable to effectively supervise persons whose operations are substantially conducted abroad.

The introduction of these licensing requirements has two practical implications for fraud and asset recovery. First, the forced wind-down of operations by digital token service providers who are unable to obtain a licence may generate a new wave of litigation regarding breach of contract and the return of customer assets, similar to the issues that arose in the liquidation of Eqonex Capital in *Re Taylor*. Second, as licensed providers, digital token service providers will be subject to MAS regulatory oversight, which may extend to additional disclosure obligations that could facilitate pre-action discovery applications and other investigative steps by fraud victims in the future.

Conclusion

The recent developments reveal several clear trends.

First, courts are refining the “real risk of dissipation” requirement for obtaining Mareva injunctions, insisting on specific evidence of unjustified dealings rather than generic, speculative factors that may not point to a dissipation risk.

Second, digital asset law has matured rapidly. Cryptocurrency is definitely recognised as a chose in action capable of being held on trust, while situs is determined by the residence of the person controlling the private key. However, the Court still applies established legal principles, even in the face of novel issues relating to cryptocurrency that are on the rise, as seen in:

- cases involving cryptocurrency; and
- cases where cryptocurrency is an asset concerned in liquidation.

Regulatory-wise, FSMA licensing will create new compliance challenges and litigation avenues.

These developments confirm Singapore’s continued evolution as a sophisticated jurisdiction for international fraud and asset recovery. When confronted with the novel features of cryptocurrency disputes, however, the courts have reasoned from first principles, applying established doctrines in a principled yet pragmatic manner. Practitioners will need to stay abreast of these rapidly developing principles as traditional fraud remedies, digital asset innovation and expanding regulation continue to generate novel questions of law.

SOUTH KOREA

Law and Practice

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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. D&A is well recognised for its distinguished practice in the area of cross-border dispute resolutions including asset recovery, restructuring/insolvency, maritime, projects and energy sectors.

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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 with the wrongful intention to obtain property gains. According to Article 347 of the Criminal Act, the crime of fraud is stipulated as follows: 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.

A deceptive act may arise not only from an affirmative misrepresentation, but also from an omission or failure to act where there is a legal or regulatory duty to disclose. In this sense, fraud-related claims may encompass a wide range of situations and commercial transactions. For instance, excessive exaggeration and false advertising may, under Korean law, fall within conduct capable of supporting a fraud allegation.

That said, certain levels of promotional exaggeration in product marketing are generally not regarded as deceptive, provided they can be understood within the bounds of good faith and accepted commercial practice. However, where a false representation is made in a manner that is considered reprehensible in light of good faith, it exceeds the permissible limits of exaggeration and advertising puffery and may amount to a deceptive act constituting fraud (Supreme Court Decision 97Do1561). This decision is regarded as the first case in Korea to recognise fraud liability in relation to excessive exaggeration in product advertising.

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 Foreign Corrupt Practices Act in the USA.

From the Perspective of Civil Claims

In the context of civil claims, fraud generally serves as a basis for a tort claim. A declaration of intent induced by the other party's fraudulent act or omission, where there is an intention to defraud, may be rescinded, or may constitute grounds for the cancellation of a prior declaration. Alternatively, a party deceived by fraudulent conduct may bring a civil claim seeking compensation for damages instead of pursuing rescission or cancellation of the underlying transaction. Fraud may therefore give rise not only to claims for damages based on tort, but also to claims for damages arising from breach of contract. In practice, where fraud is alleged, claimants commonly pursue both criminal proceedings and civil remedies in parallel.

The Korean Supreme Court held that "in cases where damages are caused to others by fixing stock prices through the trading of listed securities, then the stock price manipulator shall be liable for damages resulting from the illegal act to the extent that there is reasonable causal relationship, and this legal principle applies likewise to cases where damage is caused to others by fixing the market price of securities that are the underlying assets of financial investment products" (Supreme Court Decision 2013Da2740).

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. This 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 their duties, or if they provide such to a third party, they can be punished pursuant to the Act on the Aggravated Punishment of Specific Economic Crimes, etc. An example of 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 of an equivalent standard to public officials.

However, there has been some controversy over whether it is correct to regard the duties of employees of financial institutions as the same as those of public officials, and whether it is reasonable to treat employees of financial institutions differently from employees of other private companies.

Other Causes of Action

From a civil law perspective, bribery may constitute a tort and give rise to liability against the individual who provides or receives the bribe, whether directly or through an intermediary acting as their agent. From an administrative law standpoint, the giving and receiving of bribes may also amount to a breach of public procurement legislation, potentially leading to sanctions such as exclusion from participation in future government tendering processes. Under the relevant government procurement framework, a person who has engaged in fraudulent conduct may be disqualified from bidding for a period of up to two years, or, in lieu of such exclusion, a penalty surcharge may be imposed.

In recent years, there has also been a growing number of cases in which entities have been sanctioned by multilateral development banks for fraudulent conduct in procurement processes. This development is a particular concern for Korean companies, as the sanction regimes of such institutions are notably stringent both in terms of the duration of exclusion and the limited scope for obtaining relief.

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 degree of assistance or facilitation. There is not yet a clear line dividing 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. In the context of the offence of acquiring stolen property, "acquisition" refers to obtaining control and the ability to dispose of the stolen property, effectively by taking possession of it.

The Korean Supreme Court held that "in order to impose liability for damages on the account holder who transferred the access medium for aiding and abetting through negligence, a causal relationship should be recognised based on the specific circumstances at the time of the transfer, by ensuring that the account holder could have foreseen that the individual transaction conducted through the access medium constitutes a tortious act and that using the access medium facilitates such tortious act" (Supreme Court Decision 2012Da84707).

Bank Account Transfer and Withdrawal Cases

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 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 Decision 2010Do6256). It can be concluded that, in order to be a separate crime differentiated from the main crime, there should be another violation in terms of acquiring stolen property.

Degree of the Recognition of Stolen Goods

Recognition that goods are stolen does not require definitive knowledge; it is sufficient if there is conscious negligence to the extent that the person suspects the item may be stolen. In the context of an ordinary transaction, where there are grounds for suspicion as to whether an item is stolen – for example, where an expensive luxury item is offered without a certificate of authenticity, or where it is priced significantly below the market rate – the acquisition of such an item may give rise to criminal liability for handling stolen goods.

From a civil law perspective, acts that assist or facilitate another person's fraudulent conduct may constitute a tort. A person who provides such assistance or facilitation may be held jointly and severally liable for damages arising from the fraud.

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, beginning 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. It is therefore important to ensure that the minimum three-year limitation period is not overlooked when preparing to bring a tort claim.

1.5 Proprietary Claims Against Property

Cancellation of a Contract due to Fraud Generally

The misrepresentation of material facts in a transaction, carried out in a manner that is contrary to the principle of good faith, may be regarded as unlaw-

ful deception. Furthermore, a causal link between the deceptive conduct and the formation of the contract is deemed to exist where, but for the deception, the contract would either not have been concluded at all or would not have been concluded on the same terms. In such circumstances, the contract may be rescinded on the basis of fraudulent inducement.

Pursuant to Article 110 (2) of the Civil Act, a declaration of intention concerning the transfer of interests, which is induced by fraud or by a fraudulent omission on the part of the other party, may be cancelled or revoked. However, this right may be limited where there is a bona fide third-party beneficiary who has acquired a legitimate interest in the property concerned. Where a contract is rescinded on the ground of fraud, it is treated as void ab initio, with the result that any benefits received by the parties must be restored as unjust enrichment in accordance with 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 purchased the property from the vendor who had no knowledge of the fraudulent acts. In such circumstances, the claimant is generally unable to recover the misappropriated property directly from the current title holder. Instead, the claimant may seek restitution from the perpetrator of the fraud, typically in the form of recovery of the proceeds of sale, reflecting principles analogous to unjust enrichment recognised in common law systems.

Even if the proceeds of fraud are invested successfully, the claimant can only request the return of the sale 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

In Korea, there is no formal pre-action conduct requirement in relation to fraud claims. In practice, victims of fraud commonly first file a criminal complaint. Once the case has been investigated and, where appropriate, indicted by the prosecutor following various investigative measures, the claimant may then decide whether to pursue a civil action in court or to seek resolution through alternative dispute resolution mechanisms, such as mediation.

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.

If the creditor does not have a monetary claim but has a specific right arising from a fraudulent act (which, for example, may be the right to transfer title to real estate), the creditor can file an application for a preliminary injunction order preventing the debtor from transferring the assets. In addition to an injunction prohibiting disposition as described above, it is also possible to seek a provisional injunction establishing

a temporary status pending the outcome of the main proceedings.

The Relevant Court Fees

The relevant court fees consist of a stamp duty and a service fee, both of which are relatively modest compared with the costs of initiating full proceedings and are not calculated by reference to the value of the claim. However, the creditor is required to provide a security deposit in accordance with the court's order, and this amount is generally linked to the value of the claim. The level of the deposit varies depending on both the claim amount and the nature of the assets to be attached or subject to injunctive relief.

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. Where an application is made to attach a debtor's bank account, the court commonly sets the deposit at around 40% of the claim amount, with approximately half payable in cash and the remaining half provided in the form of a payment guarantee. There is no fixed statutory rule or uniform standard governing the precise amount of security required; rather, it is determined on a case-by-case basis at the discretion of the presiding judge.

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, they can enforce against 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 2004da13601 Decision). In Korea, this is called the relative effect of preliminary injunction, because the debtor cannot argue against the effectiveness of the 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 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, by a specified date. Unless the debtor files an objection to the court order within one week after the service date, the court order will be finalised, and the court will appoint a hearing date, requiring the defendant to attend the hearing and submit the asset lists.

In the asset lists, the defendant must submit information on:

- paid transfer of real estate within one year;
- paid transfer of property other than real estate to their relatives within one year; and
- 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.

2.2 Preserving Evidence

"Preservation of evidence" is a method of investigating evidence to be used to prove 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 pretrial evidence collection system under Korean law, which does not recognise a pretrial discovery system.

A party who 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, 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 a necessity for preserving important evidence.

Recently, in cases filed abroad, when relevant evidence exists in Korea, there are instances where domestic courts are requested to co-operate in the investigation of evidence in accordance with the Hague Evidence Convention.

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 injunc-

tion order made without a hearing, and can apply for re-examination by a hearing procedure.

For a preliminary injunction that determines a temporary status, a hearing date is generally designated because it has a huge impact on the person concerned.

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.

Facts and evidence admitted in the relevant criminal cases are admissible in civil cases unless there are special circumstances to rule them out.

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 where the default judgment date is appointed, if the defendant files an answer before the designated judgment date, 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 applying 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 requesting additional evi-

dence. The debtor has the option to accept the payment order served, or to 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, the payment order will be final and enforceable; therefore, the creditor can enforce against the debtor's assets. However, if the debtor files an objection, 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 many 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

As a general rule, it is not possible to bring a civil claim against unidentified fraudsters, primarily because the court must be able to serve the statement of claim on the defendant at the address specified in the pleadings. It is, however, permissible to add a further defendant or to amend the name of a defendant during the course of the proceedings, provided it is clear that the claimant has misidentified the defendant or made an error when preparing the claim.

By contrast, it is possible to initiate criminal proceedings against unknown fraudsters. Unlike civil claims, the investigation of criminal matters falls within the responsibility of the relevant investigative authorities, rather than the complainant.

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 they have the right to refuse to testify even where they have been served the summons, the court can impose a fine of up to KRW5 million. Additionally, if the witness repeatedly does not attend, then the court can order detention of 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 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, the director's act may not be attributed to the company. It can serve in the company's defence that it does not wish the director's personal act to be attributed to it.

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

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 the following:

- there must be unity of interest and ownership between the two entities;
- fraudulent acts by the shareholders wholly governing the corporate entity; and
- this therefore creates inequitable damage 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 applica-

tion 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 improperly 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 Decision 2019Da293449).

In another case, the Korean Supreme Court held that, 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, this is against the rule of equity and any background owner shall be liable for corporate liability (Supreme Court Decision 2008Da82490).

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 if the existing company establishes a new company with substantially the same form and contents as the company for the purpose of avoiding debt, the establishment of the new company is an abuse of the company system to achieve the illegal purpose of avoiding debt of the existing company (Supreme Court Decision 93Da44531; Supreme Court Decision 97Da21604; Supreme Court Decision 2002Da66892).

Additionally, the Korean Supreme Court held that arguing that the above two companies have separate corporate personalities is not permissible in good

faith; therefore, the creditors of the existing company will be able to claim the performance of their debts from either of the above two companies (Supreme Court Decision 2002Da66892).

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.

Adoption of Multiple Derivative Lawsuits

Additionally, according to Article 406-2 of the Commercial Act, enacted on 29 December 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 the business sector.

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims

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 being notice of a pending fraud claim given to plausibly affected parties and providing them with the option of joining the pending litigation. In both cases, the parties who want to join the pending claims or who 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.

4.2 Service of Proceedings out of the Jurisdiction

The service process for overseas parties is based on the Hague Convention or a bilateral treaty, and it generally takes around six to 12 months in processing. There is no specific option or alternative in Korea to speed up the service process out of the jurisdiction.

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, 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.

5.2 Enforcement of Foreign Judgments

In accordance with Article 217 (1) of the Civil Procedure Act, for a foreign judgment to be recognised in Korea, the following requirements must be met:

- The foreign court must have had proper international jurisdiction.
- The defendant must have been duly served with process.
- The final judgment must not contravene public policy.
- Reciprocity must exist.

Article 26 (1) of the Civil Enforcement Act stipulates that enforcement of the final foreign judgment or a

judgment recognised as having the same effect may be authorised by a Korean court through an enforcement procedure.

In accordance with the above provision, during a procedure to obtain enforcement of foreign judgment, the Korean court reviews the requirements for domestic recognition of a foreign judgment under Article 217 (1) of the Civil Procedure Act.

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 their 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

Pursuant to Article 26 of the Lawyers Act, a lawyer shall not disclose confidential information and has a right to refuse to provide such confidential information. Until recently, the Korean legal system did not 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 tried to amend the Lawyers Act in order to adopt the attorney-client privilege, which is an indispensable concept in terms of preserving legal professionalism. As a result of these efforts, the Lawyers Act has recently been amended, and under Article 26-2 attorney-client privilege has been adopted; this provision is scheduled to come into force on 20 February 2027.

Article 26-2 (1) of the Lawyers Act stipulates that “an attorney and a client or a person intending to become a client may not disclose the contents of the confidential communications made between them for the purpose of providing or receiving assistance regarding legal cases or legal affairs”.

And Article 26-2 (2) of the Lawyers Act stipulates that “an attorney and a client may not disclose documents or materials prepared for litigation, investigation, or inquiry in connection with a case accepted by the attorney including those prepared and managed in electronic form”.

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 Some 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 areas have adopted punitive damages clauses, including the following:

- Act on the Protection of Fixed-Term and Part-Time Workers;
- Act on the Protection, etc of Dispatched Workers;
- Act on Fairness of Agency Transactions;
- Act on Fairness of Franchise Transactions;
- Product Liability Act; and
- Antitrust and Fair Trade Act, etc.

Although there is no general provision on punitive damages in fraud claims, special acts where fairness of transactions is thought to be needed, 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 Decision 2018Da231550). 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”.

The Korean Supreme Court also held that even if the foreign law applied to a foreign judgment determines a certain multiple of the actual damage amount as the final damage amount, it is not possible to deny approval of the foreign judgment based on that alone.

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 with another without the written request or consent of the title holder” unless there is a court 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, provided that the judge issues an order in this regard. Through the above procedure, 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 Decision 2018Do3619). 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.

There are increasing numbers of cases in which people apply for provisional seizure by compulsory execution of virtual assets such as Bitcoin. However, as there is no statute related to civil enforcement on virtual assets, confusion is expected when a forced enforcement application is requested. Therefore, a study by an incumbent judge proposed that guidelines should be presented in the Korean Supreme Court rules until relevant legislation is implemented.

In Korea, there is growing momentum to introduce KRW-pegged stablecoins into the institutional framework. Much of the recent discussion has focused on the scope of eligible issuers and on issues of user protection, including, in particular, the scope and management of reserve assets.

SWITZERLAND



Law and Practice

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Monfrini Bitton Klein was founded in Geneva by Enrico Monfrini in 1978, and focused on international business law and complex litigation. The firm's asset recovery practice started in the 1990s, representing foreign governments, companies, individuals and liquidators of bankruptcies, and victims of fraud and Ponzi schemes. In 2017, the firm changed its name to Monfrini Bitton Klein (MBK) and became a litigation-only practice to offer conflict-free services to its clients, focusing on asset recovery, white-collar crime, and cross-border litigation, in particular the enforcement of foreign judgments, bankruptcy decisions or arbitral awards, and the obtaining of evidence and interim measures in support of foreign proceedings. MBK is the representative for Switzerland of ICC FraudNet, the leading global network of fraud and asset recovery lawyers, and has access around the world to hundreds of specialised correspondent lawyers, private investigators, forensic accountants, insolvency practitioners and litigation funders.

Ardenter Law advises on the implementation of global strategies aimed at the efficient resolution of complex disputes, in particular in the fields of asset tracing and recovery and international crime. Its asset recovery activity stands on the three pillars of (i) economic and financial crime; (ii) cross-border insolvency; and (iii) enforcement of foreign judgments and arbitral awards. Its expertise on ESG norms and standards also makes it an active stakeholder in the fight against the most heinous international crimes. With an international network of lawyers and experts, as well as a deep understanding of international organisations and NGOs, Ardenter implements, co-ordinates and monitors the legal teams involved in multi-jurisdictional proceedings. As a law firm based in Geneva, Ardenter represents the interests of its clients before Swiss courts and authorities.

Monfrini Bitton Klein and Ardenter Law have worked together on this chapter.

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1. Fraud Claims

1.1 General Characteristics of Fraud Claims

Switzerland being a civil law jurisdiction, civil remedies often need to be supported by criminal remedies. The institution of criminal proceedings enables the victims of fraud participating as plaintiffs to request that the law enforcement authorities issue broad freezing and disclosure orders from defendants and third parties holding assets or information (see **2.5 Criminal Redress**).

“Fraud” has a narrower meaning under Swiss law than the general term “civil fraud” of common law and refers to notions of criminal law rather than of private law. For the purpose of this article, the term “fraud” is defined broadly to include, in particular but not limited to, the following felonies of Swiss criminal law: embezzlement, fraud, criminal mismanagement, money laundering, felonies committed in bankruptcy, forgery, conspiracy, corruption and bribery.

The main civil remedy available for fraud claims is the liability in torts provided for by Article 41 of the Swiss Code of Obligations (SCO). Tort liability is given when the claimant proves that the defendant committed an

unlawful act. In addition to deceit (Article 28, SCO) and infringement of absolute rights such as property, tort liability will be given in cases of criminal offences when the goal of these offences is to protect assets or interests that were harmed.

Liability in torts may also concur with liability for breach of contract (Article 97, SCO) or unjust enrichment (Article 62, SCO), in particular where they are combined with motives of impossibility (Article 20, SCO), unfair advantage (Article 21, SCO), misrepresentation (Article 23, SCO) or duress (Article 29, SCO).

1.2 Causes of Action After Receipt of a Bribe

There are no specific causes of action available in Switzerland to a claimant whose agent has received a bribe and general rules on liability for damages will apply subject to the agent’s narrower duty to surrender anything received in consequence of the agency, including bribes received ([BGE 143 III 348](#), consid. 5.1.2).

It is also worth mentioning that an agreement entered into through the payment of a bribe is not, by that very fact, illegal or immoral. A contract obtained by bribing a civil servant is void only if the reprehensible

nature of the conduct extends to the content of the agreement. The agreement may, however, be voided on the ground of misrepresentation.

1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts

Article 50, paragraph 1, SCO provides that where two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly liable to the person suffering damage. The court determines at its discretion whether and to what extent they have a right of recourse against each other (Article 50, paragraph 2, SCO). Where the participants of the criminal offence caused the same damage together, the claimant may bring claims against any of the participants.

The recipient of fraudulently obtained assets shall be liable in torts if they handled (knowingly or in bad faith) stolen “goods” (excluding claims), by taking possession of, accepting as a gift or as the subject of a pledge, concealing, or assisting in the disposal of goods which they know or must assume have been acquired by way of an offence against property only to the extent that they received a share in the gains or caused damage due to their involvement (Article 50, paragraph 3, SCO).

The recipient of other fraudulently obtained assets (such as claims), including the person who participated in the concealment of stolen assets and of the proceeds of felonies, shall also be jointly liable with the main perpetrators. The most recent case law specifies that in cases where the assets subject to confiscation derive from crimes against property, the crime of money laundering protects not only the interest of the state in confiscation but also the protection of the person harmed by the predicate offence. Therefore, the liability of the money launderer also extends to the damage caused by the predicate offence to the extent of the assets whose confiscation was impeded by the money laundering.

1.4 Limitation Periods

As mentioned in **1.1 General Characteristics of Fraud Claims**, the main cause of action in cases of fraud is the liability for damages in torts. The right to claim damages or satisfaction prescribes three years

from the date on which the person suffering damage became aware of the loss, damage or injury and of the identity of the person liable for it but in any event ten years after the date on which the harmful conduct took place or ceased (Article 60, paragraph 1, SCO).

If the person liable has committed a criminal offence through their harmful conduct, then the right to damages or satisfaction prescribes at the earliest when the right to prosecute the offence becomes time-barred. If the right to prosecute is no longer liable to become time-barred because a first-instance criminal judgment has been issued, the right to claim damages or satisfaction prescribes at the earliest three years after notice of the criminal judgment is given (Article 60, paragraph 2, SCO).

In cases of fraud, as described in **1.1 General Characteristics of Fraud Claims**, the offences carry custodial sentences of three years and more, excluding sentences of life. Therefore, the right to prosecute is subject to a time limit of:

- 15 years if the offence carries a custodial sentence of more than three years; and
- ten years if the offence carries a custodial sentence of three years (Article 97, paragraph 1, SPC).

If a judgment is issued by a court of first instance before expiry of the limitation period, the time limit no longer applies (Article 97, paragraph 3, SPC).

The criminal statute of limitation starts:

- the day on which the offender committed the offence;
- the day on which the final act was carried out if the offence consists of a series of acts carried out at different times; or
- the day on which the criminal conduct ceases if the criminal conduct continues over a period of time (Article 98, SPC).

It should be noted that this extended civil statute of limitation does not permit the application of foreign criminal law, and it is not necessary for criminal proceedings to have been instituted.

1.5 Proprietary Claims Against Property

The legal remedies mentioned in **1.1 General Characteristics of Fraud Claims** do not enable persons harmed by fraud to bring property claims over the misappropriated assets.

Constructive trusts do not exist under Swiss law.

The insolvency office holder and the creditors may open claw-back actions pursuant to Articles 286 to 288 of the Debt Collection and Bankruptcy Act (DCBA), in particular in cases of gifts and disposal of assets made without consideration or where the acts were performed with the intention, recognisable by the other party, of prejudicing its creditors or favouring certain creditors to the detriment of others (deceit pursuant to Article 288, DCBA). Plaintiffs will bring restitution claims in these legal actions.

In fraud-related cases, criminal redress will be more efficient in this regard (see **2.5 Criminal Redress**). The forfeiture of assets that have been acquired through the commission of an offence or that are intended to be used in the commission of an offence or as payment therefor shall be ordered, unless the assets are passed on to the person harmed for the purpose of restoring the prior lawful position (Article 70, paragraph 1, SPC). Restitution in favour of the person directly harmed takes precedence over forfeiture in favour of the state. If illicit and licit assets held in a bank account were mingled, restitution is still possible if a connection can be established between the offence and the bank account concerned. If the paper trail is interrupted due to mingling, the assets must be forfeited and a replacement claim ordered, which will eventually be allocated to the plaintiffs up to the amount of their damage.

1.6 Rules of Pre-Action Conduct

There are no specific rules of pre-action conduct in relation to fraud claims.

General principles of law apply. In particular, the injured party must not allow the damage to increase inappropriately and must do whatever is required in good faith to prevent and reduce the damage (Article 44, SCO).

The legal provisions on the legal profession and the rules of professional conduct also provide that attorneys-at-law have the professional duty to endeavour to settle disputes amicably, in the best interests of their clients. They shall refrain from any behaviour likely to jeopardise the confidence placed in them.

1.7 Prevention of Defendants Dissipating or Secreting Assets

There are three ways of securing assets:

- civil attachment orders;
- insolvency freezing orders; and
- criminal freezing orders.

Civil Attachment Orders

If the claimant has sufficient evidence to demonstrate a likelihood of the presence of assets in Switzerland, a civil attachment may be obtained ex parte, in particular in the case of the post-trial enforcement of judgments (including foreign interim reliefs) and arbitral awards, as well as in the event the defendant is not domiciled in Switzerland and the claim has sufficient ties with Switzerland. The mere presence of assets in Switzerland is not sufficient to meet the requirement of “sufficient ties”. This requirement will be met if the claimant shows likelihood of the commission of money laundering in Switzerland as this entails liability in torts. Civil attachment orders are in rem orders and only affect the assets held at the moment when the order is notified. The court will not order the disclosure of assets and banking secrecy will apply until the end of the inter partes proceedings. The amount of the banking assets actually attached will be disclosed to the claimant only if the inter partes attachment proceedings are successful.

One should note that documents and information obtained abroad via gag and/or without notice disclosure orders, such as NPOs or discovery pursuant to Section 1782 of Title 28 of the United States Code, are admitted as evidence in Swiss proceedings.

Security for damages caused by unjustified attachment may be ordered ex officio or upon request of the respondent.

Insolvency Freezing Orders

In the case of foreign insolvency proceedings, recognition of the foreign insolvency decree (Articles 166ff of the Private International Law Act (PILA)) will be granted *ex parte*, without further *inter partes* hearings. Third parties concerned may, however, appeal against the recognition. The publication of the decision of recognition in the federal and cantonal gazettes puts on notice all debtors on Swiss territory of the bankrupt debtor that they can no longer make payments to the latter under penalty of having to pay twice, and that the holders of the assets of the bankrupt, in any capacity whatsoever, are required to place them immediately at the disposal of the bankruptcy office. Subject to the extraordinary application of the principle of transparency (see 3.2 **Claims Against Ultimate Beneficial Owners**), assets of third parties cannot be frozen. Banking secrecy does not apply to the assets of the debtor.

Advances for costs may be requested to secure the costs of the liquidation proceedings – mainly court and administrative costs. Security for damages cannot be ordered against the foreign liquidators or creditors, as the duty to manage the assets of the estate relies on the state (or the appointed ancillary insolvency office holder).

Criminal Freezing Orders

Where criminal proceedings are instituted (see 2.5 **Criminal Redress**), broad freezing of assets may be ordered by the public prosecutor in order to secure restitution to the plaintiffs, procedural costs, fines and penalties, forfeiture (Article 263, paragraph 1, *litterae b-d*, Swiss Code of Penal Procedure (SCPP)) and replacement claims (Article 71, paragraphs 1-2, SPC). These freezing orders can be drafted in a generic form, without identification of specific Swiss assets. Banking secrecy does not apply.

Security for damages cannot be ordered against the plaintiff who requires the issuance of criminal freezing orders.

Where ordered under Article 263, paragraph 1, *litterae b-d*, SCPP, the criminal freeze takes precedence over any civil order obtained by plaintiffs. Where ordered under Article 71, paragraphs 1-2, SPC, the state has

no preferable rights over the assets otherwise seized by the plaintiffs.

2. Procedures and Trials

2.1 Disclosure of Defendants' Assets Civil Proceedings

In civil proceedings, except in matters where the parties have a legal duty of mutual information on common assets, such as heirs or spouses, a claimant has no means to obtain disclosure of the assets of the defendant. Contrary to World Freezing Orders issued *ad personam*, pre-trial civil attachment of assets are orders *in rem* on identified Swiss assets and can only be granted if the claimant demonstrates a likelihood that there exist assets in Switzerland. Outside of the assets identified in the attachment order, the defendant cannot be compelled to disclose its Swiss or worldwide assets. Assets held with Swiss banks cannot be disclosed before the end of the *inter partes* proceedings of attachment.

Criminal Proceedings

In criminal proceedings, holders of assets of the accused or of third parties have the duty to hand over items and assets that may be seized pursuant to Articles 263, paragraph 1 and 265, paragraph 1, SCPP (1.7 **Prevention of Defendants Dissipating or Secreting Assets**). If and only if they refuse to comply with the invitation of handing over, the public prosecutor will issue disclosure orders pursuant to Article 263, SCPP.

The accused is not subject to the duty to hand over (Article 365, paragraph 2, SCPP) but may be subject to criminal disclosure orders and to searches, where they may request the sealing of items and assets protected under Article 264, SCPP. Suspicion of detention in bad faith is enough to obtain the disclosure of assets formally held by third parties.

Subject to restrictions justified by legally protected interests such as privacy of third parties, banking secrecy does not apply.

Insolvency Proceedings

The scope of the duty to disclose assets in insolvency proceedings (Article 222, paragraph 1, DCBA) – should they be domestic or ancillary proceedings, is narrower than in criminal proceedings, since the duty to disclose assets and information only applies to the debtor, usually excluding nominees or ultimate beneficial owners of the debtor. The debtor cannot invoke banking secrecy to resist an insolvency disclosure order.

The piercing of the corporate veil may be obtained but under the strict requirements of corporate law (see **3.2 Claims Against Ultimate Beneficial Owners**).

The debtor who refuses to comply with a disclosure order, and so conceals assets, may be prosecuted for fraudulent bankruptcy and fraud against seizure and sentenced to a custodial sentence not exceeding five years (Article 163, paragraph 1, SPC). It is also liable to a fine pursuant to Article 323, paragraph 4, SPC.

In any type of judicial proceedings, Article 292, SPC provides that any person who fails to comply with an official order that has been issued by a competent authority or public official, under the threat of criminal sanctions for non-compliance, shall be liable to a fine.

2.2 Preserving Evidence

Civil Proceedings

Article 158 of the Swiss Code of Civil Procedure (SCCP) provides for the possibility of taking evidence located in Switzerland at any time if the applicant can demonstrate a likelihood that the evidence is at risk or that it has a legitimate interest in obtaining the requested evidence. The precautionary taking of evidence may also be granted if the trial will take place outside of Switzerland. In practice, however, this Article has a very narrow scope.

Conservatory measures may also be requested before or during proceedings if the applicant can demonstrate a likelihood that a right to which it is entitled has been violated or a violation is anticipated and that the violation threatens to cause not easily reparable harm to the applicant. They can also be requested in support of foreign proceedings pursuant to Article 10, PILA.

Criminal Proceedings

Items and assets belonging to the accused or to a third party may be frozen if it is expected that they will be used as evidence (Article 263, paragraph 1, littera a, SCPP; see **1.7 Prevention of Defendants Dissipating or Secreting Assets** and **2.1 Disclosure of Defendants' Assets**). If the holder of these items and assets refuses to comply, searches can be ordered at their domicile, seat or premises. These searches are conducted under warrant of the prosecutor and with the support of the police.

Private parties cannot conduct searches or take any coercive measures against any other parties.

2.3 Obtaining Disclosure of Documents and Evidence From Third Parties

There are several alternative ways of obtaining evidence from third parties:

- civil precautionary taking of evidence and civil production orders;
- criminal disclosure and search orders; and
- orders of disclosure of information by the bankruptcy authorities.

Civil Disclosure Orders

In principle, pre-trial collection of evidence is not available in Switzerland, subject to very narrow exceptions. For example, as mentioned in **2.2 Preserving Evidence**, Article 158, SCCP provides for the precautionary taking of evidence.

During the civil trial, the claimant has to assert its damage by quantified prayers of relief and to allege all the facts necessary to prove the damage immediately in its first submissions. Therefore, requesting the production of evidence during a civil trial is an inefficient strategy in fraud-related cases.

Criminal Disclosure Orders

As mentioned in **1.7 Prevention of Defendants Dissipating or Secreting Assets**, **2.1 Disclosure of Defendants' Assets** and **2.2 Preserving Evidence**, items and assets belonging to an accused or to a third party may be seized if it is expected that the items or assets:

- will be used as evidence;

- will be used as security for procedural costs, monetary penalties, fines or compensation;
- will have to be returned to the persons suffering harm;
- will have to be forfeited; or
- will be used to cover compensation claims made by the state in accordance with Article 71, SPC.

As also mentioned in **2.1 Disclosure of Defendants' Assets**, holders of assets of the accused or of third parties have the duty to hand over items and assets that may be seized pursuant to Article 263, paragraph 1, SPCP.

Where the assets are held with Swiss banks, the types of documents that may be obtained include banking statements, SWIFT messages, KYC documents, visit reports and compliance reports.

In principle, evidence obtained in criminal proceedings can be used in any other parallel proceedings, in Switzerland or abroad (see **2.5 Criminal Redress**).

Pre-Trial Collection of Evidence in Insolvency Proceedings

In insolvency proceedings, the debtor is obliged, under threat of penal law sanctions, to divulge all assets to the bankruptcy office and to hold themselves at the office's disposal (Article 222, DCBA). The debtor must open premises and cupboards at a bankruptcy official's request. If necessary, the official may use police assistance. Third parties who have custody of assets belonging to the debtor or against whom the debtor has claims have the same duty to divulge and deliver up as the debtor. Creditors and other interested parties have a right to consult the bankruptcy file and to use the evidence that it contains.

The Swiss Federal Court ruled that in the specific context of insolvency, there is also a public interest in the disclosure of internal information of Swiss banks that may enable Swiss and foreign insolvency trustees to identify claims, to assess their amounts and to collect all supporting evidence for the purpose of bringing a legal action against the bank itself. In other words, the scope of the duty of banks and any other service provider to inform insolvency trustees is much broader than their contractual duty of accountability.

2.4 Procedural Orders

If the claimant has sufficient evidence to demonstrate a likelihood of the presence of assets in Switzerland, a civil attachment may be obtained ex parte and without notice, in particular in the case of post-trial enforcement of judgments and arbitral awards, as well as in case the defendant is not domiciled in Switzerland and the claim has sufficient ties with Switzerland (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**).

In the case of foreign insolvency proceedings, recognition of the foreign insolvency decree (Articles 166ff, PILA) will be granted ex parte, without further inter partes hearings. Third parties concerned may, however, appeal against the recognition (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**).

Subject to the limits provided for in the SPCP and SPC protecting the administration of justice, there is no duty of full and frank disclosure in ex parte proceedings.

Where criminal proceedings are opened against unknown persons, disclosure of assets and evidence, as well as the freezing of assets, may also be ordered by the public prosecutor against third parties, with the compelling order to be bound by secrecy. In principle, access to the file is not granted to the plaintiffs at this stage.

2.5 Criminal Redress

As mentioned in **1.1 General Characteristics of Fraud Claims**, Switzerland is a civil law jurisdiction. Due to the lack of a discovery process under the SPCP, civil proceedings in fraud-related matters are in most cases preceded or supported by criminal proceedings so as to obtain evidence and secure assets in support of civil claims.

Rather than impeding the civil action, the instigation of criminal proceedings supplements it, and criminal proceedings do not suspend the civil action. In principle, there is no secret in the investigations in criminal proceedings. The plaintiffs to criminal proceedings have the right to consult the file and to levy copy, with the right to use such in other proceedings of any kind (including arbitration), both in Switzerland and abroad.

Before or in parallel to civil proceedings, a person aggrieved by fraud may file a criminal complaint before the law enforcement authorities. Any individual or legal entity whose rights, as legally protected by the applicable provision of the SPC, have been directly harmed by a crime is deemed to be an aggrieved person and may be admitted as plaintiffs.

Persons who are indirectly aggrieved by a crime, such as the shareholders, the directors, the employees, the creditors or the assignees of the direct victim of the crime are not considered to be aggrieved persons (exceptions apply, in particular in corruption and bribery cases, as well as for felonies committed in bankruptcy).

During a criminal investigation, the plaintiff has essentially the same party rights as the suspect, as set out below:

- the right to access the file, with the right to take a copy and to use criminal evidence in any other proceedings (with the notable exception of states acting as plaintiffs where mutual legal assistance requests from those states are pending execution) – in principle, there is no secrecy in the investigations;
- the right to request the award of damages against the accused person when the plaintiff made an additional civil plaintiff declaration within the criminal proceedings – the award part of the criminal judgment has the same effect as a judgment issued by a civil court (it qualifies as such, in particular pursuant to Article 1 of the Lugano Convention on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the “Lugano Convention”));
- the right to be restituted with their property and assets; and
- the right to be allocated with a monetary penalty or fine, objects and assets that have been forfeited, or the proceeds of their sale, compensatory claims and the amount of the good behaviour bond.

2.6 Judgment Without Trial

Civil Default Judgments

In civil proceedings, a party is in default if they fail to accomplish a procedural act within the set limi-

tation period or do not appear when summoned to appear. The proceedings shall continue without the act defaulted on unless the law provides otherwise (Article 147, paragraphs 1-2, SCCP). The court may on application grant a period of grace or summon the parties again for a new appearance provided the defaulting party shows credibly that they were not responsible for the default or were responsible only to a minor extent. The application must be submitted within ten days of the day on which the cause of default has ceased to apply. If notice of a decision has been given to the parties, restitution may be requested only within six months after the decision has come into force (Article 148, SCCP). In the event that a party fails to attend the main hearing, the court shall consider the submissions made by the parties and may rely on the representations of the party present and on the information on file (Article 234, paragraph 1, SCCP). In other words, the court cannot dismiss the party in default for this reason alone and still needs to appraise the evidence on file.

The party in default must have been properly served with the summons to appear to be found in default (see 4.2 Service of Proceedings out of the Jurisdiction).

Criminal Judgment in Absentia

In criminal proceedings, a trial can be conducted in absentia pursuant to Articles 366ff, SCPP. If an accused who has been duly summoned fails to appear before the court of first instance, the court shall fix a new hearing and summon the person again or arrange for them to be brought before the court. If the accused fails to appear for the re-arranged trial or if it is not possible to bring them before the court, the trial may be held in the absence of the accused. Proceedings in absentia may only be held if the accused has previously had adequate opportunity in the proceedings to comment on the offences of which they are accused and sufficient evidence is available to reach a judgment without the presence of the accused.

If it is possible to serve the judgment in absentia personally, the person convicted shall be notified that they have ten days to make a written or oral application to the court that issued the judgment for it to reassess the case in a new trial. The court shall reject

the application if the person convicted was duly summoned, but failed to appear at the trial without excuse. If the convicted person again fails to appear for the trial, the judgment in absentia shall remain valid. The court shall issue a new judgment, which is subject to the customary rights of appeal.

2.7 Rules for Pleading Fraud

There is no specific rule for pleading fraud.

General criminal sanctions for crimes against the administration of justice (such as false accusations or misleading the judicial authorities) and crimes against honour (such as defamation) apply to any parties to criminal and civil proceedings.

The legal provisions on the legal profession and the rules of professional conduct described in **1.6 Rules of Pre-Action Conduct** also apply.

2.8 Claims Against “Unknown” Fraudsters

It is not possible to institute civil proceedings against unknown defendants.

Criminal investigations can and are routinely initiated against persons unknown.

Articles 376ff, SCPP provide for the possibility to proceed to independent forfeiture of assets or replacement claims where requirements of forfeiture are met, namely that the assets are demonstrated to be the proceeds of crime, and the third party who received such proceeds is not in good faith or did not provide adequate consideration for such assets (Articles 69ff, SPC).

2.9 Compelling Witnesses to Give Evidence

In civil proceedings, if a third party refuses to co-operate without justification (eg, protection against self-incrimination), the court may impose a disciplinary fine of up to CHF1,000, threaten fines under Article 292, SPC, order the use of compulsory measures and charge the third party the costs caused by the refusal (Article 167, paragraph 1, SCCP).

In criminal proceedings, any person who refuses to testify without having the right to do so may be liable to a fixed penalty fine and may be required to pay the

costs and compensation incurred as a result of such refusal. If a person who is obliged to testify insists on refusing to do so, they will again be requested to testify and cautioned as to a fine under Article 292, SPC. In the event of continued refusal, criminal proceedings for a breach of Article 292, SPC will be initiated (Article 176, SCPP), which may only result in a conviction leading to a fine.

Notwithstanding the relatively lenient sanctions for witnesses who refuse to testify, in any judicial proceedings, false testimony related to the facts of the case is a felony punished by Article 307, paragraphs 1-2, SPC. Persons providing information (in particular, plaintiffs and persons who cannot be excluded as the perpetrator of or as a participant in the offence under investigation or another related offence) may be subject to criminal prosecution for false accusation, for misleading judicial authorities and for assisting offenders (Articles 178ff, SCPP).

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on a Corporate Entity

Corporate Civil Liability

A legal entity may be liable in torts for the acts of individuals. Under Article 55 (2) of the Swiss Civil Code (SCC), the governing officers bind the legal entity by concluding transactions and by their other actions. Under Article 55, paragraph 1, SCCO, the employer is liable for the damage caused by its employees in the performance of their work unless it proves that it took all due care to avoid damage of this type or that the loss or damage would have occurred even if all due care had been taken.

Corporate Criminal Liability

On the criminal side, Swiss law provides for two types of criminal corporate liability for Swiss or foreign legal entities:

- subsidiary criminal liability if it is not possible to attribute to a specific person a felony or misdemeanour committed within a company due to its

inadequate organisation (Article 102, paragraph 1, SPC); and

- primary liability with regard to money laundering, organised crime and bribery independently of the criminal liability of individuals if a company did not take all the reasonable and necessary organisational measures to prevent such offences (Article 102, paragraph 2, SPC).

3.2 Claims Against Ultimate Beneficial Owners

Swiss private law applies the principle of separateness of legal entities and good faith is presumed. Only the manifest abuse of a right is sanctioned by law (Article 2, paragraph 2, SCC).

Criminal findings of fraud may enable courts to motivate findings of bad faith but do not suffice to obtain the piercing of the corporate veil.

The presence of anti-money laundering forms in banking documentation identifying a legal or natural person as the ultimate beneficial owner of a bank account is not sufficient to demonstrate a manifest abuse of rights.

However, according to the principle of transparency, the formal existence of two legally distinct persons cannot be accepted without reservation when all or almost all of the assets of a company belong either directly or through intermediaries to the same person, whether natural or legal. The claimant must demonstrate that despite the legal duality of persons, there are not two independent entities, the company being a mere instrument in the hand of its author, who together form a single economical unit. In accordance with economic reality, there is an identity of persons whenever the fact of invoking the diversity of subjects constitutes an abuse of rights or has the effect of manifestly prejudicing legitimate interests.

In criminal proceedings, forfeiture of assets (that may then be allocated to the plaintiff) is not permitted if a third party has acquired the assets in ignorance of the grounds for forfeiture, provided they have paid adequate consideration therefor or forfeiture would cause them to endure disproportionate hardship (Article 70, paragraph 2, SPC).

3.3 Shareholders' Claims Against Fraudulent Directors

Article 754, paragraph 1, SCO provides that the members of the board of directors and all persons engaged in the business management or liquidation of the company are liable both to the company and to the individual shareholders and creditors for any losses or damage arising from any intentional or negligent breach of their duties.

Outside of bankruptcy (namely as long as the company is solvent), in addition to the company, the individual shareholders are also entitled to sue for any losses caused to the company. The shareholder's claim is for performance to the company (Article 756, paragraph 1, SCO).

In the event of the bankruptcy of the damaged company, its creditors are also entitled to request that the company be compensated for the losses suffered. However, in the first instance, the insolvency office holder may assert the claims of the shareholders and the company's creditors (Article 757, paragraph 1, SCO). Subject to any assignment of claims to creditors (Article 757, paragraph 3, SCO), where the insolvency office holder waives their right to assert such claims, any shareholder or creditor shall be entitled to bring them. The proceeds shall first be used to satisfy the claims of the litigant creditors. Any surplus shall be divided among the litigant shareholders in proportion to their equity participation in the company; the remainder shall be added to the insolvent's estate (Article 757, paragraph 2, SCO).

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims

The joining of parties in civil or criminal proceedings depends on their legal standing as provided for by Swiss law.

Outside of mutual legal assistance in criminal and civil matters, Swiss courts and authorities do not exercise extraterritorial jurisdiction.

In criminal proceedings, as mentioned in **2.5 Criminal Redress**, only individuals or legal entities whose

rights, as legally protected by the applicable provision of the SPC, have been directly harmed by a crime may be admitted as plaintiffs.

In civil proceedings, legal standing is usually given to the person who has a substantive claim. There exist few exceptions, such as the derivative action of the shareholder on behalf of the company provided for at Articles 754ff, SCO (see 3.3 **Shareholders' Claims Against Fraudulent Directors**).

Third parties may join civil proceedings by:

- principal intervention (Article 73, paragraph 1, SCCP), where the intervenor claims to have a better right in the object of a dispute, to the total or partial exclusion of both parties;
- accessory intervention (Article 74, SCCP), where the intervenor shows a credible legal interest in having a pending dispute decided in favour of one of the parties;
- third-party notice (Article 78, paragraph 1, SCCP), where a party notifies a third party of the dispute if, in the event of being unsuccessful, they might take recourse against or be subject to recourse by a third party; and
- third-party action (Article 81, paragraph 1, SCCP), where a party notifies a third party, asserting the rights that they believe they will have against the notified third party in the event that they are unsuccessful in the court that is dealing with the main action.

4.2 Service of Proceedings out of the Jurisdiction

Courts and authorities' orders and decisions are served on parties by official channels. Notice by the parties is not considered proper service. Improper service of documents instituting proceedings will entail the nullity of the proceedings and of the final decision. Therefore, it is not advisable to circumvent the process of service provided for in international treaties (notably the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters) and Swiss domestic law as this would eventually jeopardise the chances of recovery in Switzerland.

The [Federal Office of Justice \(FOJ\) publishes an online guide on mutual assistance in civil and criminal matters, with a country index](#), which is frequently updated. All information on requirements for service in each specific jurisdiction is accessible there. The FOJ guide is published for guidance purposes only.

For proper civil service, Article 141, paragraph 1, SCCP provides for alternative service by publication in specific circumstances. Service shall be effected by notice in the official gazette of the canton or in the Swiss Official Gazette of Commerce where:

- the whereabouts of the addressee are unknown and cannot be ascertained despite making reasonable enquiries;
- service is impossible or would lead to exceptional inconvenience; and
- a party with domicile or registered office abroad has not provided a domicile for service in Switzerland despite being instructed to do so by the court.

In this respect, the FOJ guide mentions the foreseeable duration of service in the requested state, from a few months to impossibility of service. Where the FOJ guide mentions that service in a country is impossible, Swiss case law and practice of courts impose a duty of effective attempt of service through official channels, which can take several months.

5. Enforcement

5.1 Methods of Enforcement

Money judgments are enforced under the DCBA and are executed by local debt collection offices. Non-money judgments are enforced under the SCCP, with assistance from the civil courts.

Enforcement follows the domestic procedures applicable to money and non-money judgments.

If the debtor is domiciled in Switzerland, enforcement proceedings will usually be instituted by a simple request to issue an order to pay sent to the local debt collection office. The claim does not need to be documented at this stage. If the debtor opposes to the order to pay, the creditor may file a request to set

aside the opposition before the courts, where enforcement of the foreign decision will be requested. If the creditor succeeds, seizure of the Swiss assets of the debtor may be requested to and executed by the debt collection office over all the Swiss assets of the debtor up to the amount of the claims, subject to debt collection proceedings.

Debt collection proceedings can be preceded by a request for post-trial attachment of Swiss assets if the debtor is domiciled in Switzerland. If the debtor is not domiciled in Switzerland, a request for attachment of Swiss assets must precede the debt collection proceedings in order to create a forum for enforcement at the place of the assets (except in situations where the creditor can show a legitimate interest in seeking recognition outside of enforcement proceedings). The creditor will have to demonstrate a likelihood of the presence of Swiss assets in the request for attachment and cannot be granted an order for disclosure of assets by the court. The proceedings of attachment are conducted first *ex parte*, then *inter partes* in case the debtor opposes. The attachment proceedings will be conducted in parallel with the debt enforcement proceedings. If the creditor succeeds, the debt collection office will seize the attached assets and will release them in favour of the creditor.

5.2 Enforcement of Foreign Judgments

In the case of foreign decisions, the recognition of foreign judgments is decided incidentally pursuant to the rules of the PILA and, where applicable, bilateral or multilateral treaties. Switzerland is a party to the Lugano Convention and to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which applies *erga omnes*.

6. Privileges

6.1 Invoking the Privilege Against Self-Incrimination

In civil proceedings, a party (claimant or defendant) may refuse to collaborate if the taking of evidence could expose a close relative within the meaning of Article 165 to criminal prosecution or civil liability (Article 163, paragraph 1, *littera a*, SCCP). The party does

not benefit from the protection against self-incrimination.

The court may not infer from a party's or third party's legitimate refusal to co-operate that the alleged fact is proven (Article 162, SCCP). If a party refuses to co-operate without motives, the court will take this into account when assessing the evidence (Article 164, SCCP).

In criminal proceedings, the accused is not obliged to testify against themselves. In particular, they have the right to refuse to give evidence and to refuse to co-operate with the proceedings. They are, however, obliged to submit to the coercive measures provided for by law (Article 113, paragraph 1, S CPP). Proceedings shall continue even if the accused refuses to co-operate (Article 113, paragraph 2, S CPP).

Switzerland being a state party to the European Convention on Human Rights (ECHR), the case law of the European Court of Human Rights (ECtHR) applies. In principle, and in the absence of any other decisive evidence collected by the law enforcement authorities, the use of the right to remain silent cannot be used against the accused or construed as a confession. However, in cases where there is sufficient evidence for a conviction, the silence of the accused may be used against them. An aggravation of the sentence can be justified only if one can infer a lack of remorse or awareness of wrongdoing from the silence.

In insolvency proceedings, which are of administrative nature, the principle is reversed as the debtor has a duty to collaborate with the authorities. There is no statutory rule on the right to remain silent. However, in cases where parallel criminal proceedings are pending, one can infer from ECtHR case law regarding proceedings for tax fraud that a debtor who is also an accused in parallel criminal proceedings may refuse to testify before the insolvency authorities or office holders where there is a risk that their declarations may very well be produced in the criminal proceedings.

6.2 Undermining the Privilege Over Communications Exempt From Discovery

Client-attorney privilege is protected in both civil and criminal proceedings, and extends to communications

between lawyers and their clients, as well as documents collected or created within the performance of their mandate and within the scope of the typical activity of lawyers (representation before courts and advisory in legal matters). A lawyer may always refuse to collaborate even if they are released from client-attorney privilege, provided that it serves the mere interests of the client.

A lawyer cannot invoke client-attorney privilege to protect their own interests. The creation of documents for the purpose of committing, or assisting in the commission of, a criminal offence is, obviously, not a typical activity.

In civil proceedings, parties and/or third parties will therefore have the right to refuse to collaborate, including the right to refuse to provide communications with their lawyers (Article 160, paragraph 1, *littera b*, SCCP) and the right of lawyers to invoke their professional secrecy (Articles 163, paragraph 1, *littera b* and 166, paragraph 1, *littera b*, SCCP).

In criminal proceedings, pursuant to Article 264, paragraph 1, *litterae a* and *d*, SCPP, the following items may not be seized irrespective of their location and when they were created:

- documents used in communications between the accused and their defence lawyer; and
- items and documents used in communications between another person and their lawyer provided the lawyer is entitled to represent clients before Swiss courts in accordance with the Lawyers Federal Act and is not accused of an offence relating to the same case.

This does not apply to items and assets that must be seized with a view to their return to the person suffering harm or their forfeiture (Article 164, paragraph 2, SCPP).

In a landmark decision (BGE 147 V 385), the Swiss Federal Court ruled that prosecutors can seize communications between a third party to the criminal proceedings and their US attorney-at-law, since the legal privilege given to communications between a lawyer

and third parties only extends, in summary, to Swiss and EU or EFTA lawyers.

7. Special Rules and Laws

7.1 Rules for Claiming Punitive or Exemplary Damages

Switzerland being a civil law country, punitive damages are, in principle, contrary to substantive public policy and punitive damages cannot be claimed under Swiss law. However, damages based on a penalty clause agreed by the defendant can be claimed, as long as they remain proportionate.

It is debated whether punitive damages adjudicated by foreign courts or arbitral tribunals can be enforced. The mere fact that a foreign decision grants punitive damages does not suffice to conclude that it is contrary to procedural public policy. Where the amount of the claim appears disproportionate, partial enforcement remains possible.

7.2 Laws to Protect “Banking Secrecy”

Swiss banking secrecy is provided for in Article 47 of the Federal Banking Act. It is conceived as a criminal offence that punishes the breach of secrecy by the bank or one of its employees towards its client. The client of the bank is the beneficiary of the secret, which can be opposed to the bank as their counterparty. In turn, the bank cannot reveal to third parties the existence of the contractual relationship with their client.

Banking secrecy cannot be opposed in criminal and insolvency proceedings. In civil proceedings (including in mutual assistance), banking secrecy qualifies as “other legally protected secrets”, far behind the professional secrecy of lawyers, priests or doctors.

Banking secrecy does not grant any privileged right to refuse to collaborate before courts and authorities. It is only an exception to the duty to collaborate of third parties holding information. Swiss banks may still resist a request for collection of banking information by arguing that the interest in keeping the secret outweighs the interest in finding the truth in the trial.

7.3 Crypto-Assets

There is no definition of the terms crypto-assets or cryptocurrencies in Swiss law and the legal treatment of these assets will depend on each area of law. In general terms, crypto-assets are treated as property but, like for any other types of assets, the way they can be frozen, seized or forfeited will depend on the type of holding over them.

In criminal proceedings in particular, the Swiss Federal Court has ruled that the immediate liquidation of seized crypto-assets and their conversion into Swiss francs in view of forfeiture infringed the legal provisions of the SCP. In spite of the high volatility of this type of asset, law enforcement authorities must seek the advice of experts to proceed to the appropriate liquidation of crypto-assets, as they have a duty of care over the managed seized assets.

In February 2021, the Federal Act on Adaptation of Federal Law to Developments in Distributed Ledger Technology (DLT) entered into force. Among others, bankruptcy, anti-money laundering and financial market laws were amended to take into consideration the increase of the development of blockchain and DLT technologies.

Article 242a, DCBA has been included in bankruptcy law under a new section “Restitution of crypto-assets”. It provides that the bankruptcy office holder decides on the restitution of crypto-assets, of which the debtor had the power to dispose at the opening of the bankruptcy and that are claimed by a third party. The claim is justified if the debtor has undertaken to keep the crypto-assets at the disposal of the third party at all times and if the crypto-assets are individually attributed to the third party or are attributed to a community and the third party’s share is clearly determined. This legal provision only targets the bankruptcy of a custodian company and aims at the restitution of their assets to the clients. Subject to these legal requirements, these clients therefore have a property claim that benefits from a priority over the ordinary creditors, who only dispose of a claim against the bankrupt estate.

With respect to the financial markets laws, platforms based on DLT have been included in the definition of financial market infrastructures (Article 2, littera a, 5a of the Financial Market Infrastructures Act, FinMIA). As a consequence, financial crimes can now also be committed on these types of platforms.

The federal Act on Money Laundering (ML Act) was also amended to include DLT-based platforms in the definition of financial intermediaries (Article 2, paragraph 2, ML Act). Initial coin offerings and services provided in a permanent business relationship in connection with the transfer of cryptocurrencies are now considered as financial intermediation and are subject to the ML Act’s obligations of diligence.

Trends and Developments

Contributed by:

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Canonica Valticos Carnicé & Associés was founded in 2009 and is a Geneva-based law firm composed of 12 lawyers, including eight partners. Renowned for its strong focus on litigation, the firm advises and represents clients across a broad range of practice areas, including criminal law, commercial and civil litigation, arbitration, employment, real estate and construction. It is particularly recognised for its white-collar crime and international assistance practice. The team provides strategic guidance and representation in all aspects of business crime, such as money laundering, corruption, fraud, and disloyal management, as

well as compliance with Swiss anti-money laundering regulations. In these areas, the firm regularly acts before both cantonal and federal authorities and assists clients in complex, often cross-border, criminal proceedings. Recent mandates include representing clients in ongoing criminal cases of corruption, private bribery, banking fraud and money laundering.

The author acknowledges, with thanks, the valuable contribution made to the article by Me Chiara Ardin, junior associate at Canonica Valticos Carnicé & Associés.

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Mutual Legal Assistance in Financial Criminal Matters and the Egmont Group: Tensions and Challenges

Introduction

International mutual legal assistance in criminal matters is widely recognised as the formal and structured framework through which states co-operate to gather evidence for use in legal proceedings. It is a well-established and essential tool in the fight against transnational crime, based on binding legal rules and procedural safeguards. However, beyond this established mechanism, there exists another dimension of international co-operation that is less visible yet equally crucial: the Egmont Group.

The Egmont Group is an informal network of financial intelligence units, hereinafter referred to as FIUs, designed to facilitate the rapid exchange of information relating to suspicious financial activities. Unlike mutual legal assistance, which is strictly regulated, this mechanism allows for more flexible and immediate co-operation. This flexibility is particularly valuable for the early detection and analysis of illicit financial flows.

Together, these two approaches illustrate the dual nature of international co-operation in criminal matters: one formal and judicial, the other informal and operational.

The aim of this article is, therefore, to examine the relationship between these two complementary instruments. It begins with an overview of international mutual legal assistance in criminal matters, with a focus on the Swiss system. It then defines and analyses the Egmont Group, before addressing the issues arising from the interaction between international mutual legal assistance and the Egmont Group. The article concludes with final observations.

International mutual legal assistance in criminal matters and the Swiss system

Principles and functions

International mutual legal assistance is a formal mechanism of co-operation between states that enables the collection and transmission of evidence. It is founded on respect for procedural safeguards, state sovereignty and fundamental rights, thereby ensuring

that the evidence obtained is admissible and usable in criminal courts.

In this sense, mutual legal assistance plays a key role in the judicialisation of international financial cases. It enables the collection and transmission of evidence connected to criminal offences that can be directly relied upon in court.

In Switzerland

Legal basis

At national level, international mutual legal assistance in criminal matters is governed by the Federal Act on International Mutual Assistance in Criminal Matters (Mutual Assistance Act, IMAC) and the Ordinance on International Mutual Assistance in Criminal Matters.

Pursuant to Article 1, paragraph 1, IMAC, the Act governs all procedures of international co-operation in criminal matters, in particular assistance intended to support criminal proceedings abroad.

Mutual assistance therefore encompasses the transmission of information, procedural acts and other official acts permitted under Swiss law, provided that such acts appear necessary for criminal proceedings conducted abroad or serve to recover the proceeds of an offence (Article 63, paragraph 1, IMAC). Mutual assistance measures include, in particular, the obtaining of evidence, notably the production of documents and papers (Article 63, paragraph 2, letter c, IMAC).

Competent authority

Under Article 17, paragraph 2, IMAC, the Federal Office of Justice is responsible for receiving requests from abroad. The execution of requests for mutual legal assistance in criminal matters may then be delegated by the Federal Office of Justice to the Mutual Legal Assistance division.

In 2025, the Federal Office of Justice received 1,333 requests for the taking of evidence in criminal matters, 25 requests for the surrender of property and 1,565 requests for surveillance measures. These figures are steadily increasing, leading to a growing workload and a corresponding desire on the part of authorities to obtain information more efficiently.

Procedure

When a request for mutual legal assistance is submitted to the Swiss authorities, a number of procedural steps must be followed, some of which may require a considerable amount of time.

Following an initial summary review, the Federal Office of Justice delegates the matter to the competent cantonal or federal authority. That authority then decides whether the request may be executed and orders any interim measures, such as the seizure of assets or documents, house searches and the summoning of persons.

Once these measures have been executed, documents are sorted and prepared for investigative purposes. If the seizure of documents has been ordered, the persons concerned may request that they be sealed, with the court subsequently ruling on the request, provided the documents contain protected professional secrets. After the persons concerned have been heard, and as soon as the foreign proceedings allow, a final ruling is issued.

Once the final ruling becomes legally enforceable, the requesting authority is informed of the results of the investigation.

International mutual assistance with the United States is subject to a specific procedure.

As this overview shows, the process is lengthy and heavily regulated.

This is particularly significant as, upon receipt of a foreign request for the exchange of information, compliance with the principles of speciality, reciprocity and respect for professional secrecy must be verified.

The Swiss authorities also examine whether the requirement of dual criminality is satisfied. Procedural measures, including house searches, seizure of evidence, summonses subject to coercive measures in the event of non-compliance, witness examinations, telephone surveillance and the lifting of duties of confidentiality, may only be ordered if the act described in the request also constitutes a criminal offence under Swiss law. In other words, the conduct must be pun-

ishable under Swiss law as if it had been committed in Switzerland.

There are, however, two exceptions to this principle. Even if the act prosecuted in the requesting state does not constitute an offence in Switzerland, enforcement measures may be ordered where they serve to exonerate the accused or to prosecute offences consisting of sexual acts against minors.

The principle of proportionality must also be respected in mutual legal assistance proceedings. Assistance may be granted only to the extent strictly necessary for the criminal authorities of the requesting state to establish the facts.

Appeals may subsequently be lodged against the final ruling. The final decision issued by the enforcement authority, as well as certain interim decisions, may be appealed to the Federal Criminal Court within 30 days of written notification. Interim decisions may be challenged within ten days if they concern the seizure of property or valuables or the appearance of persons involved in the foreign proceedings and cause immediate and irreparable prejudice. The permissible grounds of appeal are set out in Article 80i, IMAC.

Appeal proceedings may take several months, and sometimes more than a year, and are frequently dismissed. In limited circumstances, a further appeal may be lodged with the Federal Supreme Court.

Financial intelligence by the Egmont Group Overview

The Egmont Group was established in 1995 as an informal network of 24 national FIUs, taking its name from the Egmont Palace in Brussels, where the founding meeting was held. It remains the only global body facilitating the direct exchange of operational and strategic financial intelligence between FIUs.

The Egmont Group now comprises more than 175 operationally independent FIUs, including Switzerland, represented by the Money Laundering Reporting Office since 1 April 1998. Other members include France, Spain, Italy, the United States and the United Kingdom. Russia, which joined in 2002, is currently suspended.

The Egmont Group also admits governmental or inter-governmental organisations as non-member observers whose roles relate to the prevention of money laundering and terrorist financing. Such observers include, among others, the European Commission, Europol, the International Monetary Fund and the World Bank.

The Egmont Group defines itself as a facilitator of information exchange between FIUs, both bilaterally and multilaterally, in order to support the global fight against money laundering and terrorist financing. It also aims to enhance co-operation between FIUs so as to strengthen their individual capabilities and overall effectiveness.

To achieve these objectives, the Egmont Group provides FIUs with a secure platform for sharing expertise and financial intelligence. However, it does not conduct financial investigations itself, as these are carried out by national law enforcement and investigative authorities.

As an example of its activities, the Egmont Group regularly publishes anonymised financial analysis cases, which facilitate the sharing of knowledge among FIUs and raise awareness among key stakeholders.

Functioning

Under the Egmont Group Charter, members are required to promote the widest possible co-operation and exchange of information with other FIUs, based on reciprocity or mutual agreement and in accordance with fundamental principles. These principles include the free exchange of information for analytical purposes at FIU level, the prohibition on disclosure or use of information for other purposes without prior consent, and the obligation to protect confidentiality.

Members are also encouraged to actively support the work of the Egmont Group, including participation in projects, subject to their resources and competencies.

In line with these principles, FIUs must have a sufficient legal basis to co-operate on matters relating to money laundering, associated predicate offences and terrorist financing, and must be capable of provid-

ing international co-operation in a rapid and effective manner.

Tensions and challenges relating to international mutual legal assistance in Switzerland and the Egmont Group

Legal considerations

Fishing expeditions

FIUs are encouraged to engage in spontaneous disclosures of information to their foreign counterparts. They may exchange information to which they have direct or indirect access, or which they are authorised to obtain at national level, subject to the principle of reciprocity.

At national level, however, requests from foreign counterparts must comply with Article 31 of the Anti-Money Laundering Act (AMLA). Consequently, the Money Laundering Reporting Office cannot act on requests that have no clear connection with Switzerland. This provision ensures that it does not engage in fishing expeditions.

Overriding procedural guarantees

Article 30, AMLA authorises law enforcement authorities to transmit confidential information gathered through reports made by financial intermediaries to foreign authorities. Such intermediaries are able to observe and report facts in real time which judicial authorities would struggle to obtain, as the legal requirements for coercive measures are often not yet met.

Provided that the requesting authority undertakes to use the information exclusively for analytical purposes in the fight against money laundering, reciprocity is ensured and the exceptions in Article 31, AMLA do not apply, the procedure of international mutual legal assistance is displaced.

Admissibility of evidence

The exchange of information between the Money Laundering Reporting Office and its foreign counterparts is of critical importance, as most predicate offences underlying reported cases are committed abroad. Obtaining information from counterpart FIUs is therefore essential for assembling a case file that can be referred to prosecutorial authorities.

A key principle of international co-operation is that information exchanged must be used solely for the purpose for which it was provided. This applies equally when information received from a foreign counterpart is transmitted to another national authority with the counterpart's consent. In practice, the Money Laundering Reporting Office is often authorised to forward such information to prosecutors, provided it is not used as evidence.

As a result, information obtained through this channel must not be included in the criminal case file. This restriction may conflict with a broad interpretation of the principle of respect for the rights of the defence under the Swiss Criminal Procedure Code, which requires all information received to be included in the file.

To avoid breaching the conditions imposed by foreign counterparts, the Money Laundering Reporting Office may choose not to transmit certain information to prosecutorial authorities. While legally prudent, this outcome is unsatisfactory, as even non-evidentiary information may be crucial to the investigation. Prosecutors may then seek the same information through mutual legal assistance, enabling its lawful use as evidence.

Information forwarded by the Money Laundering Reporting Office to prosecutors is therefore subject to a specific regime under AMLA, allowing it to be reviewed in accordance with strict conditions without necessarily being included in the case file.

Issues relating to the rights of the defence

The tensions described above may conflict with the rights of the defence, an issue that has been addressed by the courts. In a judgment of 11 April 2023, the Federal Criminal Court considered defendants' access to information provided to the Money Laundering Reporting Office by foreign counterparts. In that case, the counterpart FIU had expressly restricted the use of certain information in line with Egmont Group principles.

The Federal Criminal Court acknowledged that these principles constitute international standards that may take precedence over the Swiss Criminal Procedure Code. Nevertheless, it ultimately held that the right of access to the case file extends to all documents, regardless of their evidentiary value, leaving it to the parties to assess their relevance.

This judgment highlights the tension between defendants' rights of access and the confidentiality obligations arising from the Egmont Group framework. For practitioners, the difficulty lies in challenging a refusal of access to such information, particularly where they are not aware that the Egmont Group communication system has been used.

Conclusion

The relationship between international mutual legal assistance in criminal matters and the Egmont Group demonstrates the essential complementarity between formal judicial mechanisms and informal operational co-operation.

At the same time, this co-operation raises significant challenges, including the risk of circumventing procedural guarantees and uncertainties surrounding the admissibility of information obtained through informal channels. While the co-ordination of these mechanisms enhances the effectiveness of efforts against financial crime, it must remain consistent with fundamental rights and the rights of the defence.

Although progress has been made in reconciling these objectives, important issues remain unresolved.



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Seladore Legal is a specialist disputes firm, focusing exclusively on litigation, arbitration, and white-collar crime. With 25 practising lawyers based in London and Milan, the firm is recognised for handling high-value, multi-party, and cross-border disputes, particularly those involving fraud, asset tracing, and enforcement issues. Its team, drawn from leading UK, US, and international firms, acts for corporates, financial institutions, and high-net-worth individu-

als across finance, energy, technology, and professional services. By concentrating solely on disputes, Seladore avoids transactional conflicts and provides independent representation in contentious matters. Recent work includes defending Antoine Massad in a fraud claim brought by Kuwait's Public Institution for Social Security (PIFSS) and acting for President Filipe Nyusi of Mozambique in the high-profile "Tuna Bonds" litigation.

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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, and 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, 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, for example, 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 conspiracy 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 for a specific claim available to liquidators of “wrongful trading”, which occurs 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 or 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 that:

- 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 English courts will not apply a foreign law where doing so conflicts with the principles of domestic public policy.

In bribery cases, English courts have historically been ready and 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 (assuming 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 the claimant may not have a direct cause of action against all of them. There are two forms of conspiracy, as follows.

- The first is “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 elsewhere, 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 on the instructions of a customer's agent (eg, a company's director), 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). This duty prevents a bank from carrying out instructions, where the bank has reasonable grounds to believe that the agent is attempting to defraud the customer.

The bank may breach its duty:

- where it executes the instructions knowing (or shutting its eyes to the fact) that they were made dishonestly;
- where it acts recklessly in failing to make reasonable enquiries; or
- where there were reasonable grounds for believing that the instructions were an attempt to misappropriate funds.

There are limits to this duty. First, it is possible for banks to expressly exclude the duty in their contractual terms. Second, the duty does not extend to situations where the instructions are valid and clear.

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 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:

- any fraudulent breach of trust; or
- 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 instead to “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 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; and
- 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. As noted in **2.7 Rules for Pleading Fraud**, there are professional obligations not to allege fraud unless there is credible material which establishes an arguable case of fraud. 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 affi-

davit). 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 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 and physical property, as well as things such as 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 and 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. However, in making such an application the claimant will typically need to provide:

- an undertaking to commence a claim shortly after the injunction hearing is determined; and
- a “cross-undertaking in damages”, meaning that 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 the undertaking through a bank guarantee or payment into court.

Remedies Assisting With International Claims

For preventing the dissipation of overseas assets, English courts have developed two remedies that assist with international claims.

Worldwide freezing injunctions

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:

- any assets the defendant has in England and Wales are insufficient to satisfy the claim; and
- 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 and Wales 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 (CPR)

Rule 31.17 of the CPR allows for disclosure from a non-party when the disclosure sought is:

- likely to support the claimant's case or adversely affect the case of the other party/parties; and
- necessary for dealing with the claim fairly and/or for saving 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;
- trace assets;
- assist in pleading a case; and/or
- 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

There is no applicable information in this jurisdiction.

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 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 very extreme cases), a defendant who fails to comply with orders and instructions issued by the court may be “debarred” 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 CPR 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 to not 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

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 will likely apply to any person who assisted or participated in the fraud, as well as to any person who received misappropriated funds. A freezing order will often be paired with orders against third parties such as 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 CPR 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 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 extremely 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**).

The more common approach for 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 Claimant

Importantly, directors' 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 claimant 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, 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 (broadly) show 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 and Wales;
- the harmful act or the harm suffered occurred in England and Wales; and/or
- an international co-defendant is a “necessary and proper party” to proceedings in England and Wales 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 and Wales is not the appropriate venue for a particular claim, and that a more appropriate forum exists elsewhere).

4.2 Service of Proceedings out of the Jurisdiction

The procedure for serving parties out of the jurisdiction is discussed in 4.1 Joining Overseas Parties to

Fraud Claims. In summary, the claimant will need to show 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.

Having established that they are permitted to serve on a party out of the jurisdiction, the claimant must provide service using one of the following methods:

- under an international multilateral service convention, such as the Hague Service Convention, or a bilateral service agreement between the UK and another state;
- if permitted under the relevant foreign law, through the government or judicial authority of a foreign state or through a UK consular authority located in that jurisdiction;
- by any method permitted by the law of the relevant foreign state; and
- on a foreign state through the UK's Foreign Ministry (FCDO).

The claimant may also apply to the English court for permission to serve a party out of the jurisdiction via alternative means. This can be a useful tool when the prescribed method of service is problematic (for example, because an address cannot be found or because service is being evaded). When determining whether to grant alternative service on a foreign-located party, the court will consider:

- whether there is a good reason to do so, taking into account all the circumstances;
- whether the alternative means will ensure that the document is brought to the other party's attention;
- how quickly the application has been made; and
- whether the party is located in a state to which a multilateral or bilateral service convention applies.

If the claimant is seeking alternative service on a party out of the jurisdiction, and that method of service would be within the jurisdiction, the claimant must still obtain permission to serve out of the jurisdiction.

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:

- the value of any assets owned by the defendant; and
- 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, they may be subject to proceedings for contempt of court.

5.2 Enforcement of Foreign Judgments

Whether the English courts will recognise and enforce a foreign judgment depends on the jurisdiction the judgment originates from. This factor will also dictate the framework for enforcement spanning treaties, common law and statutory regimes. For some countries, depending on the seniority of the court, when the judgment was handed down or its subject matter, etc, those looking to enforce a judgment may be able to utilise multiple regimes. Each has slightly different requirements and procedures, and vary in complexity. Consideration should therefore be given to which will be the most effective and efficient process. First, the most broadly adopted treaty is the Hague Convention on Choice of Court Agreements of 2005. This applies as between the UK and the EU, Mexico, Singapore, Switzerland, as well as some additional signatories. It is often the most straightforward process, but is not without its limitations. For example, it only applies to exclusive choice of court agreements, and a country must have formally ratified the treaty for it to apply.

Second, judgments from specified jurisdictions, including other United Kingdom and most Commonwealth jurisdictions, have the benefit of express English statutory schemes for enforcement. Each piece of legislation has its own requirements and processes.

Finally, the common law regime is somewhat of a catch-all for those jurisdictions (or discrete judgments) for which no other method is available. For example, it is the only option for enforcing judgments from US or Chinese courts. However, there are a number of requirements for a judgment to be within the scope of the common law regime. This includes that the foreign court must have had jurisdiction on a territorial or consensual basis, and the judgment must be on the merits for a debt or definite sum of money and be final and conclusive. Notably, the common law process does not actually make the foreign judgment enforceable in England; rather it is regarded as creating a debt, and the English court will then give an English judgment on that debt which can be executed.

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 otherwise 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

A party to English legal proceedings can withhold “privileged” documents. In broad terms (and specific advice should be sought in respect of both 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. For this exception to apply, the court must determine that, on the balance of probabilities, there is 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 and where the conduct was motivated by the pursuit of profit (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 princi-

pled”. 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

Although there had been a legal debate for a number of years as to whether cryptocurrency assets were property (rather than information), which had significant impact on the potential legal remedies for the loss of crypto-assets, the position is now settled. In December 2025, the Property (Digital Assets etc) Act 2025 came into force which establishes that digital assets are a third type of property (in addition to chose in action and chose in possession) and are recognised as legal property.

The law on the location of a crypto-asset (relevant for determining whether a court has jurisdiction over the dispute) is, however, in its infancy, although case law appears to be reaching a consensus that the relevant location is the place where the person or company that owns the coin or token is domiciled.

The English courts have also demonstrated willingness to be responsive in cases of crypto-asset fraud, which are 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 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**).

Trends and Developments

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Penningtons Manches Cooper LLP is a 900-person firm with offices in major centres of international commerce, including London, Paris, Madrid, and Singapore, providing a strong global platform for complex fraud and asset tracing work. Its heavyweight litigation team is recognised for acting with speed and precision in high-stakes situations, securing urgent injunctions, freezing orders, and asset disclosure relief to protect assets at risk. The team routinely handles multi-jurisdictional mandates, working seamlessly with overseas advisers, forensic specialists, and enforcement bodies to trace and recover assets

across borders. What distinguishes the firm is its disciplined, evidence-driven approach. The team focuses on timing, strategy, and practical outcomes, giving clients a realistic route to recovery in cases involving corporate fraud, cyber-enabled wrongdoing, and opaque offshore structures. With a proven track record advising on complex disputes for financial institutions, multinational businesses, family enterprises, entrepreneurs, and investors, Penningtons Manches Cooper delivers the expertise, control and results essential for tackling serious financial misconduct.

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Introduction

Fraudsters will always find new ways to trick people out of their funds. While trends change over time, the fundamentals remain the same: deception, diversion, dissipation. Staying one step ahead of fraudsters, and anticipating and adapting to new problems, is crucial in fighting fraud. In this analysis of recent trends, we consider key legal developments in fraud litigation and look to the horizon to predict the future.

With an eye to 2026 and beyond, the current trends troubling the courts and set to dominate international fraud litigation and asset recovery include:

- how the courts manage crypto-assets and digital property;
- the impact of AI-enabled fraud;
- bank liability for failing to prevent fraud or retrieve funds; and
- the scope of worldwide freezing orders.

As fraud threats grow ever more interconnected and sophisticated – driven by significant advances in technology – it is critical to understand the emerging risks and take swift legal action to remedy the consequences.

Crypto-Assets: New Digital Property, New Rules?

The English courts confirmed that digital assets and cryptocurrencies can constitute “property” back in 2019. Responding to new crypto-frauds by anonymous wrongdoers, the courts granted worldwide freezing orders and enforced property rights, often against “persons unknown”. In granting those remedies, judges found that cryptocurrencies such as Bitcoin, digital assets and non-fungible tokens (NFTs) could be treated as property for the purposes of those remedies.

Cementing that approach, on 2 December 2025, the Property (Digital Assets etc) Act 2025 came into force. This legislation formally confirms that digital or electronic assets can be recognisable as a third category of personal property. While the Act does not expressly define crypto-assets as “property”, it permits the courts to develop their status through case law, which will delineate its boundaries and associated rights.

This forward-thinking and flexible approach through the common law and statute has allowed the English courts to respond to the rapidly evolving world of digital fraud. Legal remedies for fraud and theft are now fully available in respect of digital currencies and other crypto-assets. It also allows for the inclusion of such property in bankruptcy and insolvency proceedings.

Recently, we have seen the first guidance from the courts on its implementation and the scope of its application. In *Ping Fai Yuen v Fun Yung Li & Anor* [2026] EWHC 532 (KB), Mr Yuen sought to recover Bitcoin valued at approximately GBP180 million, which he alleged was stolen by his ex-wife. The private key to the Bitcoin was contained in a “cold wallet” (ie, not connected to the internet) on a physical device. However, anyone with access to his passwords could recreate the wallet on a separate device. Mr Yuen claimed he was covertly filmed on newly installed CCTV while entering the passwords by his wife, who then allegedly entered his accounts and stole GBP180 million worth of Bitcoin.

But what claims could he bring for this crypto fraud and how did the court respond? Interestingly, Mr Yuen attempted to bring his claim for recovery in various ways, including damages for conversion (the tort of intentionally interfering with someone else’s personal property), conspiracy to commit conversion and trespass to goods, as well as a freezing order over the Bitcoin and a declaration of ownership. The judgment neatly explains how English law currently applies to crypto-assets. The court confirmed that while Bitcoin can constitute property under English law, it is not the kind of property which can be subject to a claim in conversion (because it is not (yet) a “tangible” asset that can be “interfered with”). The claimant’s claim in conversion was therefore struck out, with the court confirming conversion is presently limited only to tangible assets, not intangible or “third category” assets such as Bitcoin.

The claimant’s claim in trespass, while not immediately struck out, faced similar difficulties. Like the tort of conversion, trespass is defined by direct interference with tangible property. In this case, the court gave Mr Yuen time to amend his claim to argue that there had

been direct physical interference with the cold wallet in which Bitcoin was held.

It remains to be seen whether a tort of wrongful interference with digital property will develop, or whether a cause of action in conversion will apply to intangible assets. This case, coming just months after the Digital Assets Act came into force, has already stretched the boundaries of the law as it applies to digital assets. It seems likely that further pressure will be placed on traditional property torts as the fight against fraud evolves.

Artificial Intelligence

For banks, PSPs and fintechs, AI is reshaping the fraud landscape in causing significant financial, operational and reputational harm. From hyper-realistic deepfakes to phishing emails generated instantaneously and tailored precisely to a company's structure and tone, AI is industrialising deception on a grand scale, enabling fraudsters to sharpen their targeting in real time and scale attacks on the financial industry.

In August 2025, Anthropic reported in its "Detecting and countering misuse of AI" announcement several examples of Claude being misused by fraudsters, including a large-scale extortion operation using Claude Code. Key findings included the following:

- Agentic AI has been weaponised. AI models are now being used to perform sophisticated cyberattacks rather than just advising on how to carry them out.
- AI has lowered the barriers to sophisticated cybercrime. Fraudsters with few technical skills are using AI to conduct complex operations, such as developing ransomware, that previously would have required significant training.
- Cybercriminals and fraudsters have embedded AI throughout all stages of their operations – including profiling victims, analysing stolen data, stealing credit card information and creating false identities, allowing the expansion of the reach of their fraud operations to more potential victims.

Following its initial announcement, in November 2025, Anthropic shared in its report titled "Disrupting the first reported AI-orchestrated cyber espionage campaign"

the steps it had taken to build stronger safeguards, offering suggestions for detecting, disrupting and preparing for future versions of this type of attack. Similar reports were produced by Google ("Adversarial misuse of generative AI") and Open AI ("Disrupting malicious uses of AI").

From a legal perspective, financial institutions need to be prepared not only to combat AI cybercrime but also to meet the legal and regulatory requirements in all jurisdictions in which they operate. Companies need to understand and monitor their obligations (and liabilities) in a range of regulatory regimes. This includes cyber insurance, internal AI governance and misuse detection, as well as dealing with data and privacy obligations at scale and speed. Key issues include the following:

- In England and Wales, failure to take appropriate measures to guard against AI-enabled fraud may lead to large organisations facing liability under the Failure to Prevent Fraud offence, introduced by the Economic Crime and Corporate Transparency Act 2023.
- In the EU, under the EU AI Act (Regulation (EU) 2024/1689), organisations are obliged to ensure that AI systems are designed and monitored to prevent unlawful outcomes, including, for example, risk assessments (also a requirement for compliance under the UK Failure to Prevent Fraud obligation).
- Within the EU again, under new rules building on the EU Digital Services Act, social media companies operating in the EU will be required to compensate banks by covering their customers' losses if it is clear that a user has been defrauded as a result of the platform's failure to remove a reported scam. While banks must also refund customers for certain unauthorised transactions, the two-pronged approach to liability is intended to avoid consumer claims falling between the cracks.

In terms of future obligation, there are calls from some financial institutions for the net to be spread more widely for consumer compensation where, for instance, the fraud itself has originated from – and was arguably enabled by – a social media platform. Data produced by UK Finance suggests that 72% of APP

scams originate online. It remains to be seen whether the approach adopted in the EU will be implemented in the UK. For now, financial institutions need to remain vigilant not only for agentic AI attacks but also to remain compliant (increasingly through the appropriate use of AI) with their own suspicious activity reporting.

Banks' Liability: APP Fraud, Mandatory Reimbursement and the "Retrieval Duty"

The Supreme Court's decision in *Philipp v Barclays Bank UK PLC* [2023] UKSC 25 that banks are not liable when their customer personally authorises a payment to a fraudster (known as authorised push payment, or APP fraud), significantly reduced the scope of consumer claims against banks. In its place, since October 2024, banks and payment service providers have been required to reimburse victims, subject to certain parameters, under mandatory reimbursement rules. While this represents a significant step forward for some consumers, it does not extend to cases where the money is diverted internationally (a frequent occurrence) or for losses over GBP85,000.

As a result, claimants have tested the scope for pursuing claims against banks based on a "retrieval duty". This refers to the possible duty owed by banks to seek their customers' instructions to recover monies paid out pursuant to APP fraud once they know that the payment was induced by fraud. It requires the bank to exercise reasonable skill and care in carrying out its contractual obligations to its customers. While the court confirmed in *Santander UK plc v CCP Graduate School Ltd* [2025] EWHC 667 (KB) that a "receiving bank" does not owe a "retrieval duty", it is possible that a retrieval duty may be owed by the "sending bank".

In *Dawn Barclay-Ross v Starling Bank Limited* [2025] EWHC 2158 (KB), the court refused to strike out a claim against a sending bank for the "loss of chance" of recovering the monies. This case opened the door to the potential for such a duty to exist. Unfortunately, as the claimant discontinued their claim it remains to be seen whether that door will remain open.

Liability in Misrepresentation – No Need For Conscious Awareness

A key requirement for bringing a claim in misrepresentation or deceit was, until recently, that a conscious, contemporaneous awareness and understanding of the representation must be proven. This meant, in simple terms, that the person being deceived or defrauded had to have been aware of the deception at the relevant time. They could not simply "assume", for example, that a bank was acting honestly when setting interest rates.

Historically, for this reason, group claimants have struggled to successfully bring securities claims against UK issuers where the claimants were "passive investors" or tracker funds. Typically, such claimants are unable to show that they had actively relied upon statements made in published information before investing. Instead, claims are often framed around collective or institutional decisions, or where the claim is based on the typical behaviour of the market or standard market practices.

However, in November 2025, the Privy Council in *Credit Suisse Life (Bermuda) Ltd v Bidzina Ivanishvili & Ors* [2025] UKPC 53 ruled that no such conscious awareness or understanding is required. This is likely to have a significant impact on claims for deceit, making it easier for claimants to establish liability. Although not strictly binding precedent in England and Wales, this Privy Council decision is likely to be persuasive authority.

While the impact of this decision will be felt particularly in securities and structured finance disputes, we anticipate seeing commercial claimants advancing more claims formulated in the tort of deceit, particularly in group mis-selling claims, where claimants often rely on implied representations or assumptions.

Worldwide Freezing Orders – How Far Do They Travel?

As fraudsters move ever faster, funds are dissipated across the world and into offshore entities or crypto exchanges at pace. In response, lawyers have deployed interim remedies such as worldwide freezing orders and proprietary injunctions, claims against "persons unknown", as well as targeted disclosure

(including Norwich Pharmacal and Bankers Trust orders) against exchanges and other third-party intermediaries increasingly creatively.

Worldwide freezing orders are a crucial element in a fraud lawyer's weaponry, but recent decisions show it is crucial to understand the basis and scope of any relief against respondents outside the jurisdiction.

The jurisdictional gateways

In *Gilbert v Broadoak Private Finance Ltd* [2026] EWHC 153 (KB), the court discharged a worldwide freezing order against respondents in Spain on the basis that it did not have jurisdiction over them. While the claim had a reasonable prospect of success, it did not fit within any of the clearly (and tightly) defined procedural "gateways" for serving the claim out of the jurisdiction. Here, the court was asked to grant an order against a third party on the basis that assets held in the name of a third party would be available to satisfy judgment against the defendant (known as the "Chabra" jurisdiction).

Where those "Chabra" respondents are based outside the court's jurisdiction, the court needs to be satisfied that the application can pass through one of the jurisdictional gateways. Here, despite the claim having reasonable prospects, none of the gateways applied.

The court recognised that the outcome here was "harsh" on the claimants (who otherwise had a good claim for relief) but held that there is presently no "general power" to serve proceedings outside the jurisdiction to assist enforcement of an English judgment debt. As fraudsters move money ever further and faster across borderless cryptocurrency platforms, it may be that the English courts revise the civil procedure rules to address this issue.

Jurisdictional scope of conspiracy to facilitate breach of freezing orders

On the other hand, the English courts have recently highlighted the reach of their powers by confirming that claims for unlawful means conspiracy against individuals who facilitate breaches of freezing orders can be brought against individuals resident outside the jurisdiction.

In *Lakatamia Shipping Co Ltd v Su* [2025] EWCA Civ 1389, the Court of Appeal held that a lawyer who carried out his client's instructions to transfer funds in breach of an English worldwide freezing order, outside of the jurisdiction in Monaco, was liable for unlawful means conspiracy. English worldwide freezing orders typically contain a provision that "the terms of this order do not affect or concern anyone outside the jurisdiction of this court" apart from the respondent and other specified exceptions. However, the Court of Appeal held this does not mean that individuals outside the territorial jurisdiction of the English court have a defence to liability for unlawful means conspiracy.

This is a significant ruling, increasing the power and scope of English freezing orders. Anyone who assists in the breach of such an order, wherever they are located, may potentially be liable in damages in the English courts.

Scope of freezing orders in support of foreign proceedings

The recent case of *Hughes v Bellamy* [2026] EWHC 237 (Ch) showed the court's willingness to grant injunctive relief (including freezing orders) in support of foreign proceedings (under Section 25 Civil Jurisdiction and Judgments Act 1982 – CJJA). In this case, the parties were equal shareholders in, and directors of, an Isle of Man company. Following evidenced concerns of a risk of dissipation, an injunction was granted to freeze assets of two English companies in support of parallel unfair prejudice proceedings in the Isle of Man.

This significant ruling highlights the pragmatic approach favoured by the English courts. Where appropriate evidence and urgency can be shown, s.25 CJJA can be a useful tool to preserve English assets pending determination of foreign proceedings. The judgment also provides helpful guidance for legal practitioners in cross-border shareholder disputes to consider such an application at the earliest stage where there is a meaningful risk of assets being moved before the foreign court can act.

Asset Recovery – Substantial Gains

The English courts have all the tools to help freeze and trace assets, and, at the conclusion of proceedings, there is a clear pro-enforcement stance in this jurisdic-

tion evidenced by a number of significant recent decisions limiting the scope of challenges to enforcement. In one such recent decision from March this year – *Hulley Enterprises v The Russian Federation* [2026] EWHC 456 (Comm) – the Commercial Court granted the enforcement of three arbitration awards against Russia (at c.USD66 billion, including interest, reportedly the largest ever granted by the court). Russia had resisted enforcement under the public policy exception in s.103 (3) of the English Arbitration Act 1996. Despite this, however, the Court's decision reaffirmed that English law strongly favours the enforcement of New York Convention awards, and that there is a very high bar for a public policy objection to succeed. It also highlights the English courts' reluctance to allow parties to expand upon, or recast, arguments already put before a tribunal.

Conclusion

English courts have met the realities of modern fraud with equal measures of flexibility and discipline. For fraud litigators, the practical message remains the same: speed is necessary to secure relief. However, it must be accompanied by a skilled application of the law, including on service out of the jurisdiction and ensuring that interim remedies are tailored to fit new ways of holding digital property. Recent guidance from the courts on worldwide freezing orders and the requirements for fraud claims suggests that the English courts will continue to be an agile, claimant-friendly forum for cross-border asset recovery.



Law and Practice

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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 abid-

ing 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 US Supreme Court. It also represents clients in regulatory and criminal investigations, and conducts internal investigations.

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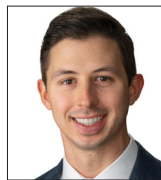
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1. Fraud Claims

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, in some circumstances, 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 offence 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 Sections 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 triple the government's actual loss plus a penalty for each false claim. While the FCA allows the US 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 Sections 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 have historically co-operated 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 2025, the DOJ temporarily paused FCPA enforcement, voluntarily dismissed certain ongoing cases, and issued new guidelines for future prosecutions. The revised guidance focuses FCPA enforcement on foreign bribery that relates to cartels or transnational criminal organisations, impedes US corporate interests, or impacts US national security interests. The guidance also instructs prosecutors to “prioritize serious misconduct” and avoid focusing on conduct involving generally accepted “business courtesies”. While the guidance narrows the historically broad focus of FCPA enforcement, the DOJ has continued to enforce the statute under the new guidelines.

Unlike the DOJ, the SEC did not announce an official “pause” in enforcement or issue any revised guidelines in 2025. However, SEC officials indicated that the SEC will “follow the DOJ’s lead” with respect to FCPA enforcement. To that end, the SEC dismissed numerous FCPA actions in 2025, including where parallel proceedings were dismissed by the DOJ. In a departure from its historically robust enforcement, the SEC also initiated no new FCPA actions throughout 2025. It is uncertain whether that marks a permanent shift or merely a temporary adjustment to the SEC’s enforcement.

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 situations 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 Section 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 Section 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 Sections 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 govern-

ment 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 question 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 specifically 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 nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case". 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 defence, a defendant 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 "per-

petuate 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 sequestration 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 continuing 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 dis-

pute 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 them 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, they can be held in contempt.

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on 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 corporations, 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 generally 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.

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.

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. More flexible standards may apply to certain federal claims asserted in federal court.

4.2 Service of Proceedings out of the Jurisdiction

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; or
 - (b) mail sent by the court clerk, return receipt; or
- 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.

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, US 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.

5.2 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 exe-

cute it. Recognition of foreign judgments is ordinarily 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, where:

- the foreign court lacked jurisdiction;
- the defendant did not have proper notice of the proceedings; or
- enforcing the judgment would violate public policy.

New York state courts are often a good forum for seeking recognition of foreign judgments. New York has narrow grounds for non-enforcement, and 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 a 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 to 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 their silence cannot be used against them in a criminal matter. An employee may invoke the Fifth Amendment in response to a subpoena for oral testimony, even in their 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

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 they 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 their 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 a 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, wilful 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. The Right to Financial Privacy Act similarly limits the government’s ability to access customers’ financial records without the customer’s consent or through a subpoena, search warrant or other formal written government request. Organisations such as the Federal

Trade Commission and the Financial Industry Regulatory Authority also regulate the disclosure of financial information in certain situations, require financial institutions to implement privacy policies, and fine banks for violating privacy laws.

7.3 Crypto-Assets

Crypto-assets, commonly known as digital assets, cryptocurrency, virtual currency or digital currency, are digital representations of value that serve, at least theoretically, as a substitute for traditional, fiat currency. Crypto-assets can generally be traded for fiat currencies or other digital assets. Like other assets, they are subject to taxation, freezing and regulation.

A comprehensive regulatory regime for crypto-assets is still emerging in the United States. At the federal level, Congress passed legislation in 2025 establishing requirements for US stablecoins, including reserve and audit requirements aimed at protecting consumers and ensuring financial stability in the stablecoin market. While Congress has also taken up other, more comprehensive, legislation, those efforts remain stalled.

Until recently, federal regulators exercised extensive authority over digital assets and aggressively pursued enforcement. Typically relying on existing statutory frameworks, the SEC, Commodity Futures Trading Commission (CFTC), Internal Revenue Service (IRS), Financial Crimes Enforcement Network (FinCEN) and DOJ issued overlapping regulations and guidance, often taking the position that issuers, owners, and traders of digital assets were subject to numerous regulatory requirements. For example, the SEC took a broad view of whether cryptocurrencies constitute “securities” subject to the disclosure and anti-fraud requirements of the federal securities laws. The CFTC similarly adopted the position that many digital assets constitute “commodities” subject to its regulatory authority. Relying on those broad interpretations, federal prosecutors and regulators instituted many enforcement actions against digital asset companies for registration and recordkeeping violations as well as fraud and market manipulation.

In 2025, the new presidential administration took a different approach. President Donald J. Trump promised

to make the United States the “crypto capital of the world”. Within days of taking office, President Trump signed an Executive Order calling for the promotion of digital assets and blockchain technology, signalling a more lenient regulatory environment.

Consistent with that policy announcement, the DOJ, SEC and CFTC have adopted more permissive policy positions and issued revised crypto enforcement guidelines. The DOJ, for example, directed prosecutors to focus on cases involving terrorism financing, sanctions evasion, consumer fraud, or cartels and transnational criminal organisations in an attempt to focus on the worst illicit uses of cryptocurrency. The DOJ instructs prosecutors to avoid “regulatory” cases focused on registration requirements, whether a particular entity qualifies as a money transmitter business under federal statutes, or whether a particular digital asset qualifies as a “security” or “commodity”. The SEC and CFTC have likewise stated that they intend to avoid “regulation by enforcement”, and the SEC recently dismissed several landmark registration and classification cases it brought against major cryptocurrency companies under the prior administration. However, like the DOJ, both the SEC and CFTC have expressed commitment to pursuing fraud and market manipulation cases, and each has announced significant fraud-related cryptocurrency enforcement actions since President Trump’s inauguration.

Individual states also have their own laws and regulations applicable to crypto-assets, but these provisions differ greatly from state to state. Many states regulate cryptocurrency under the existing rules applicable to money transmitter businesses, requiring companies dealing with digital assets to apply for a money transmitter licence. Some states also apply state-specific securities laws, often called Blue Sky laws, to digital asset companies. Still other states have developed crypto-specific regimes that overlay additional requirements, such as anti-money laundering requirements, on top of existing laws. In New York, for example, digital asset companies must obtain a crypto-specific “BitLicense” before conducting certain digital asset activities within the state.

Recovery of Digital Assets

Digital assets provide a new means of perpetrating fraud schemes. The recovery of funds involved in such schemes, however, is more difficult than in ordinary frauds, and many victims never recover their losses. For instance, although enforcement officials have obtained court orders to restrain or freeze digital assets, successfully freezing such assets can prove challenging in practice. Digital assets are often difficult to locate because they are typically held in encrypted digital wallets rather than in bank or brokerage accounts. In addition, digital assets may be put through several layers of “mixing” or other treatment designed to anonymise the assets’ source and ownership. Assets may also be held overseas or instantly transferred offshore, complicating recovery efforts.

To address these difficulties, regulators have attempted to freeze virtual assets as they are transferred through digital “exchanges” or online platforms. However, this approach often relies on co-operation from non-regulated exchanges, which may be lacking or inconsistent, and is generally unable to recover assets that have already passed into overseas accounts. While regulators and law enforcement continue to develop new means to trace, isolate and recover crypto-assets, further technological developments may impede these efforts.

There have been some notable recoveries in cryptocurrency actions, however, including the Bitfinex matter where law enforcement recovered approximately 80% of the stolen Bitcoin – worth approximately USD10 billion. President Trump also issued an executive order to create a Strategic Bitcoin Reserve that will be capitalised with bitcoin forfeited as part of criminal or civil asset forfeiture proceedings. Many cases, however, still see recoveries that pale in comparison to the amount of overall losses.

Although prosecutors and regulators have had limited success in recovering crypto-assets, their efforts are ongoing. The shift in focus to pursuing fraud-related actions and protecting retail customers may yield additional recoveries in the future.

USA – ILLINOIS



Trends and Developments

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Hilco Global Professional Services

Hilco Global Professional Services has an Investigations and Dispute Resolution practice which advises boards of directors, special and audit committees, private equity sponsors, lenders, investors, management teams and legal counsel on complex, high-stakes matters involving fraud, misconduct, regulatory scrutiny, financial reporting issues and business disputes. The practice is led by Kristofer Swanson, with Andrew Bayer and Jordan Kraner serving as senior members of the team. Its work spans investigations, forensic accounting, asset tracing, digital evidence, data analytics, compliance and dispute

support, including matters involving alleged financial statement manipulation, corruption, money laundering, False Claims Act violations, sanctions concerns, asset diversion, whistle-blower allegations, regulatory inquiries and contentious post-transaction disputes. Drawing on Hilco Global's broader platform, the practice is able to leverage deep industry expertise and adjacent technical restructuring, valuation, transaction advisory and capital solutions competencies, where matters require co-ordinated analysis, cross-border fact development and practical judgment.

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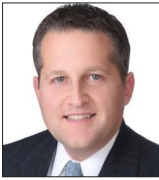
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Fraud Risk and Strategic Response Opportunities in Illinois: A Private-Sector Perspective

Illinois as a concentration point for fraud risk

For companies that do business in Illinois, fraud risk is not theoretical or hypothetical – it is downright pernicious.

Anchored by Chicago's role as a global financial, commercial and logistics hub, Illinois sits at the intersection of capital flows, supply chains and complex service delivery. Financial institutions, insurers, healthcare systems, manufacturers, transportation networks and multinational headquarters operate in close proximity, often through layered vendor ecosystems and high-volume transaction environments. These systems are efficient, but they are also inherently complex – and complexity is often where fraud risk concentrates.

Many of these industries share characteristics that elevate exposure:

- high transaction volumes across multiple systems;
- reliance on third-party vendors, subcontractors and intermediaries;
- distributed operations with uneven control environments; and
- frequent use of exceptions, adjustments, and manual overrides

Within these environments, misconduct rarely presents as a discrete event. It more often emerges as a pattern embedded within legitimate activity – incremental overbilling, fictitious vendors, diversion of inventory, reimbursement manipulation, payroll schemes, or cyber-enabled misdirection of funds.

Empirical data reinforces the scale and relevance of enterprise-facing fraud risk.

According to the Association of Certified Fraud Examiners, organisations lose an estimated 5% of annual revenue to occupational fraud, with significantly higher losses in complex schemes involving management or collusion. Critically, the ACFE consistently finds that fraud schemes last a median of 12 months before detection, underscoring how long misconduct can remain embedded within normal operations.

From a cyber-enabled fraud perspective, the Federal Bureau of Investigation's Internet Crime Complaint Center (IC3) reports that business email compromise (BEC) and related schemes targeting companies continue to generate billions of dollars in annual losses, with these attacks often exploiting routine payment processes and trusted vendor relationships rather than technical vulnerabilities alone.

Other Illinois-specific exposure has also been substantial. A performance audit by the Illinois Auditor General found that unemployment insurance overpayments between 2020 and 2022 totaled approximately USD5.24 billion, including fraud, identity theft and other improper payments – illustrating both the scale of potential loss and the challenges of detecting fraud within high-volume payment systems.

Taken together, these data points highlight a consistent theme: fraud affecting companies is not only widespread, but often prolonged, operationally embedded, and financially material, with corresponding implications to historical financial reporting and the availability of voluntary self-disclosure programmes.

For corporate leadership, the implication is direct: fraud must be treated not as a remote legal contingency, but as an operational risk requiring preparedness, speed and disciplined response capability: in other words, investigative readiness.

The modern fraud environment: speed, fragmentation and asymmetry

The environment in which fraud occurs has evolved in ways that materially affect how companies experience – and respond to – risk.

Real-time movement of value

Funds now move across banks, fintech platforms, payment applications and, increasingly, digital asset ecosystems with minimal friction. Transactions that once required days can occur in seconds. Fraud schemes exploit this speed, often layering transfers across multiple intermediaries to obscure origin, control and ownership.

The consequence is practical: time directly affects recoverability. By the time a transaction is flagged,

funds may already have moved far beyond immediate reach.

Jurisdictional structuring and investigative friction

Modern fraud frequently exploits geographic and legal boundaries to create frictions in the discovery, investigation and recovery efforts.

A representative pattern illustrates the challenge:

- a fraudulent insurance claim or payment request is initiated from Illinois, using legitimate credentials or a compromised internal process;
- the claim is tied to activity in a second jurisdiction – for example, a fictitious vendor, repair facility or service provider that appears credible on paper; and
- proceeds are directed to accounts, payment platforms or intermediaries located in a third jurisdiction, sometimes with additional layering through fintech channels or digital assets.

Whether deliberately engineered or opportunistic, this structure creates immediate friction:

- identifying the relevant actors requires co-ordination across jurisdictions;
- obtaining records may involve multiple institutions with different legal requirements;
- preserving assets becomes more difficult as funds move through successive layers; and
- early missteps can allow value to dissipate before a coherent response is in place.

For companies, the lesson is not theoretical. Even relatively modest schemes can quickly become multi-jurisdictional problems, requiring co-ordinated investigative and legal strategies from the outset.

Fragmented and expanding evidence sources

The evidentiary landscape has also expanded significantly. Relevant information may now reside across:

- personal devices and text messaging;
- encrypted or ephemeral messaging platforms;
- cloud-based collaboration tools and shadow IT environments;
- enterprise systems and transactional databases;

- access-control logs and physical security systems;
- video surveillance; and
- AI and LLM-based platforms, including chat histories, prompts, outputs and associated metadata.

The emergence of LLMs introduces a new category of potential evidence. In some organisations, employees rely on AI tools to draft communications, analyse data or generate work product. These interactions may create records reflecting intent, knowledge, timing and decision-making context, depending on system architecture and retention settings.

In certain matters, LLM artifacts can corroborate or challenge other evidence, or provide insight into how particular actions were conceived or executed. At the same time, these records may be transient or subject to platform-specific retention limits, making early identification and preservation critical.

Taken together, these dynamics create asymmetry: organisations that respond quickly can preserve both evidence and value, while those that delay often lose both.

Investigative opportunities: from inquiry to strategic leverage

When fraud is suspected, companies are not limited to reactive investigation. The early stages of a matter present affirmative opportunities to preserve value, generate leverage and shape outcomes.

These opportunities are most effectively pursued by integrated teams of white-collar attorneys and forensic experts operating under privilege, ensuring that legal strategy, fact development and evidentiary considerations advance in parallel.

Key opportunities include the following.

Early asset visibility and constraint

Rapid analysis of payment flows, account activity and counterparties can determine whether funds remain within identifiable channels. Early engagement with financial institutions, payment processors, or intermediaries may allow companies to:

- interrupt or reverse transactions;

- obtain critical transactional data; and
- identify downstream accounts or recipients

Even where immediate recovery is not possible, early visibility can materially influence strategy.

Strategic evidence preservation

Preservation is not merely procedural – it is strategic. Effective preservation requires identifying where critical evidence is most likely to reside and where it is most vulnerable to loss.

This includes not only traditional systems, but also:

- off-channel communications and personal devices;
- ephemeral messaging platforms;
- system logs and access records;
- surveillance data; and
- LLM and AI-generated artifacts.

Sequencing is critical, particularly where senior personnel or potential insiders are involved, and since the underlying misconduct may have been going on for an extended period of time before discovery, it is critical to thoughtfully and intentionally assess that business-as-usual retention periods for potentially relevant logs and data repositories.

Parallel development of fact and recovery theories

Sophisticated responses begin evaluating recovery pathways – contractual, tort-based, insurance-related or statutory – while fact development is ongoing. This allows for timely, targeted action when opportunities arise.

Leveraging commercial relationships

Vendor and counterparty relationships often include contractual rights – such as audit provisions, indemnities or termination rights – that can be leveraged early to obtain information or co-operation.

Narrative formation and documentation

Early, disciplined documentation of findings and actions supports credibility with stakeholders, including auditors, insurers, counterparties, employees and, where applicable, regulators. Narrative formation is a strategic component of response.

Illinois as a platform for private-sector action

Illinois offers a combination of legal tools and commercial infrastructure that can materially influence outcomes when deployed early.

Courts in Illinois – particularly in Cook County and the Northern District – are experienced in complex commercial disputes and emergency applications. Available mechanisms include:

- temporary restraining orders and preliminary injunctions under Rule 65;
- asset discovery and constraint through citation proceedings under 735 ILCS 5/2-1402 and Illinois Supreme Court Rule 277; and
- remedies under the Illinois Uniform Fraudulent Transfer Act (740 ILCS 160/8)

Case law reinforces the availability and scope of these tools. In *Mohanty v St. John Heart Clinic, S.C.*, the Illinois Supreme Court reaffirmed the standards for injunctive relief. In *Bank of America, NA v Freed*, the First District addressed citation proceedings in asset discovery. In *Bremel v Quedas, Inc*, the court confirmed the potential availability of punitive damages under the Fraudulent Transfer Act.

These tools are well established. Their effectiveness depends on timely, co-ordinated deployment.

Chicago's financial ecosystem further supports early action, enabling rapid engagement with banks, insurers and intermediaries. In many matters, Illinois serves as an initial control point from which broader, multi-jurisdictional efforts can proceed.

The first 72 hours: a strategic control phase

Across a wide range of matters, the first 72 hours after suspicion arises are disproportionately important. This period is best understood as a control phase, in which integrated teams establish structure, preserve evidence and begin shaping outcomes.

0–24 hours: stabilise and establish control

- establish a privileged, counsel-led response structure;
- define communication protocols and decision rights;

- sequence preservation, particularly for senior personnel;
- issue targeted preservation efforts across traditional and non-traditional systems, including AI/LLM environments; and
- conduct rapid financial and operational triage

24–48 hours: develop a defensible strategy

- identify key custodians, systems and counterparties;
- map preliminary fund flows and transaction patterns;
- assess recovery pathways and legal leverage points;
- align investigative, legal and operational workstreams; and
- evaluate cross-border considerations

48–72 hours: execute for leverage

- engage financial institutions and intermediaries;
- evaluate targeted legal or commercial interventions;
- initiate focused witness or document development; and
- refine documentation and narrative positioning

The objective is not completeness. It is control, optionality and momentum.

Implications for companies and privileged response teams

For companies operating in Illinois, several principles consistently apply:

- effective responses to allegations of fraud and misconduct require predefined response capability, not ad hoc reaction;
- early action should focus on value preservation and leverage;
- investigative and recovery strategies should be integrated from inception;
- emerging evidence sources, including AI systems, should be anticipated and addressed proactively; and
- decision-making should be structured, privileged and well-documented.

For integrated teams of white-collar attorneys and forensic experts, the role is correspondingly expanded to co-ordinate complex, time-sensitive responses that directly affect economic outcomes.

Conclusion

Fraud risk in Illinois reflects the state's strengths: dense commercial activity, interconnected systems and global reach. Those same characteristics create conditions in which misconduct can emerge, propagate, and become difficult to unwind.

The three-jurisdiction model described above is no longer exceptional – it is increasingly typical. It illustrates why early co-ordination, speed and technical capability are essential.

When issues arise, outcomes are often determined not by the thoroughness of investigation over time, but by the effectiveness of the initial response.

Companies that act quickly – with the assistance of co-ordinated teams, working under attorney-client privilege – can preserve evidence, identify value recovery options, and better shape and manage the trajectory of a matter. Those that delay may find that both assets and information have moved beyond reach.

In this environment, investigative readiness becomes a strategic asset that, when deployed early and effectively, can materially influence recovery success, exposure mitigation and timely resolution.

Preparation, speed and integration are therefore not differentiators. They are prerequisites.

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