# Asset Recovery

*Contributing editors*
**Jonathan Tickner, Sarah Gabriel and Hannah Laming**

2018

GETTING THE DEAL THROUGH

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**Jonathan Tickner, Sarah Gabriel and Hannah Laming**

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# Hong Kong

**Nick Gall and Ashima Sood**

Gall

## Civil asset recovery

### 1 Legislation

**What are the key pieces of legislation in your jurisdiction to consider in a private investigation?**

The key pieces of legislation in Hong Kong to consider in a private investigation include:

- Personal Data (Privacy) Ordinance;
- High Court Ordinance;
- Evidence Ordinance; and
- Rules of the High Court.

### 2 Parallel proceedings

**Is there any restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter?**

There are no restrictions on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter. However, a plaintiff in civil proceedings will need to consider carefully, and as a matter of strategy, whether to choose to wait until the criminal proceedings are concluded before commencing any civil proceedings. A conviction against the defendant in the criminal proceedings may be used to assist the plaintiff in proving liability in the civil proceedings. Alternatively, in circumstances where it is important for a plaintiff to take urgent action (such as to make an application for an injunction to freeze assets), normally the plaintiff will not wait for criminal proceedings to conclude.

### 3 Forum

**In which court should proceedings be brought?**

The Small Claims Tribunal can deal with civil claims for an amount up to HK$50,000.

The District Court has jurisdiction to hear and determine any action founded on contract, quasi-contract or tort where the amount of the plaintiff's claim does not exceed HK$1 million. However, where the proceedings relate to land, the District Court has power to deal with claims not exceeding HK$3 million.

All other claims exceeding HK$1 million or falling outside the District Court's jurisdiction will be heard before the Court of First Instance.

### 4 Limitation

**What are the time limits for starting civil court proceedings?**

There are different limitation periods for different causes of action.

The time limit for commencing an action for simple contract or tort, to enforce a recognisance (ie, a conditional obligation undertaken by a person before a court), to enforce an award, and to recover any sums recoverable under any Hong Kong Ordinance is six years from the date on which the cause of action accrued.

For claims in respect of contracts under seal (ie, a deed), the time limit is 12 years from the date of breach.

For personal injury or death claims, the time limit is three years from the accrual of the negligent act or omission or knowledge.

The six-year limitation period will not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could, with reasonable diligence, have discovered it in respect of the following cases:

- the action is based on fraud;
- any fact relevant to the plaintiff's right of action has been deliberately concealed from him or her by the defendant; or
- the action is for relief from the consequence of a mistake (ie, a misunderstanding of the facts, which causes one or more party to enter into a contract without understanding the responsibilities or outcomes).

However, the postponement of the limitation period in the case of fraud, concealment or a mistake does not apply in circumstances where the plaintiff seeks to recover any property or to enforce any charge against it or set aside the transaction affecting the property against an innocent third party who purchased the property with valuable consideration.

### 5 Jurisdiction

**In what circumstances does the civil court have jurisdiction? How can a defendant challenge jurisdiction?**

Subject to certain limitations (eg, over acts of state such as defence and foreign affairs), the civil courts in Hong Kong generally have jurisdiction over all cases in the region. However, the civil courts may not have the jurisdiction to hear and determine any action in circumstances where:

- there is insufficient connection between the parties and the Hong Kong jurisdiction (eg, neither of the parties is domiciled or ordinarily resides in Hong Kong, or the cause of action did not arise in Hong Kong);
- the parties have previously agreed that a particular court outside Hong Kong will have exclusive jurisdiction over any dispute between them or the matter should be arbitrated;
- considering the best interests and convenience of the parties to the proceedings and the witnesses in the proceedings, the proceedings should be conducted in another court; or
- there are other proceedings pending between the plaintiff and the defendant in another court outside Hong Kong.

A defendant who wishes to challenge the jurisdiction of the Hong Kong court must first complete an acknowledgement of service and give notice of intention to defend the proceedings. The defendant must, within the time limit for filing or serving his or her defence:

- issue a summons stating the grounds on which the jurisdiction of the Hong Kong court is disputed and the relief sought (eg, an order setting aside the writ or service of the writ on him or her or a declaration that the Hong Kong court has no jurisdiction over the defendant in respect of the subject matter of the claim); and
- file and serve a supporting affidavit verifying the facts on which the application is based.

## 6 Admissibility of evidence

**What rules apply to the admissibility of evidence in civil proceedings?**

The law relating to the admissibility of evidence (found within, among others, the Evidence Ordinance, Rules of the High Court and the common law) is complex and beyond the scope of this chapter. However, in general, evidence is admissible in civil proceedings in Hong Kong if it is relevant to an issue in the proceedings. Evidence is relevant if it renders the existence of a fact in issue in the proceedings more or less probable. That said, there are a number of exclusionary rules of evidence, which may render relevant evidence inadmissible. The exclusionary rules of evidence generally fall into two categories:

- owing to public policy, the evidence is inadmissible (eg, the evidence is covered by legal professional privilege or litigation privilege); and
- in cases where a specific rule forbids the admission of certain evidence (eg, the hearsay rule).

## 7 Publicly available information

**What sources of information about assets are publicly available?**

The following sources of information about assets are publicly available:

- land registration;
- companies' registration;
- business registration;
- trademark registration; and
- vehicle registration.

## 8 Cooperation with law enforcement agencies

**Can information and evidence be obtained from law enforcement and regulatory agencies for use in civil proceedings?**

It is possible to obtain information (eg, the identity of the accused) from law enforcement and regulatory agencies for use in civil proceedings by making a request in writing.

In general, information obtained from law enforcement and regulatory agencies is protected by the Personal Data (Privacy) Ordinance. However, the privacy regime provides for specific exemptions whereby access to data for the purpose of prevention or detection of crime or for the purpose of legal proceedings within Hong Kong are permissible. In case the information is required for foreign proceedings, the cross-border transfer provisions apply and are more stringent.

The courts have commented that failure to provide the requisite information by the authorities is seen as an obstruction to the administration of justice. If the authorities are unwilling to cooperate, the relevant party can seek recourse from the courts by taking out a summons for discovery.

## 9 Third-party disclosure

**How can information be obtained from third parties not suspected of wrongdoing?**

**Pre-action discovery**

In Hong Kong, proposed plaintiffs (both local and foreign) are able to take advantage of a pre-action process known as *Norwich Pharmacal* applications. Such an application allows the proposed plaintiff to seek an order from the court that innocent third parties, who may have been caught up in a wrongdoing perpetrated against the proposed plaintiff, provide discovery in relation to such wrongdoing.

*Norwich Pharmacal* orders are often employed by the proposed plaintiff to identify wrongdoers, obtain evidence in support of proposed proceedings against wrongdoers, identify assets belonging to the wrongdoers or trace assets or funds dissipated by the wrongdoers.

A Bankers Trust order is a form of *Norwich Pharmacal* order that requires a bank to provide information and discovery ordinarily protected by the bank's duty of confidentiality, for the purpose of enabling the tracing of funds through bank accounts.

**Post-action discovery**

At any stage of the proceedings, a party may apply to the court for an order that a third party, who appears to be likely to have or to have had in his or her possession, custody or power any documents that are relevant to an issue arising out of that claim, disclose and produce such documents.

The Evidence Ordinance provides a similar provision in respect of banks, in that any party to any proceedings may apply to the court for an order to inspect and take copies of any entries in a banker's record for the purposes of such proceedings. The court may make such an order with or without summoning the bank.

Alternatively, if a witness is unwilling to attend an examination or to produce documents voluntarily, such witness can be compelled to do so by serving a writ of subpoena on that witness.

## 10 Interim relief

**What interim relief is available pre-judgment to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud?**

The main interim relief available pre-judgment to prevent the dissipation of assets and to obtain information from those suspected of involvement in fraud include:

- a *Mareva* injunction (ie, an injunction restraining a defendant from dealing with his or her assets and removing them from the jurisdiction). The Mareva injunction will also require the defendant to make disclosure, by affidavit, to the plaintiff of all assets owned by the defendant;
- an *Anton Piller* order (ie, an injunction requiring the defendant to permit the plaintiff to enter the defendant's premises to enable him or her to inspect the documents relating to the subject matter of a cause and to seize and remove such documents and place them into safe custody);
- a prohibition order to prevent a debtor from leaving Hong Kong;
- the interim attachment of property of a defendant (whereby property belonging to the defendant becomes a form of security before judgment until the defendant furnishes the required security);
- the appointment of a receiver: a receiver may be appointed to recover and protect funds and other assets that the defendants have obtained in connection with the fraud; and
- the appointment of a provisional liquidator: in circumstances where fraud was perpetrated by or through a company (which may be insolvent or has become insolvent as a result of the fraud), a provisional liquidator may be appointed by the court to preserve that company's assets pending the determination of a winding-up petition against that company. The provisional liquidators (and any subsequent liquidators appointed) will have the power to investigate the affairs of the company and any fraud perpetrated by or through the company.

## 11 Right to silence

**Do defendants in civil proceedings have a right to silence?**

In civil proceedings in Hong Kong, a defendant can refuse to produce any document or answer any questions that would tend to expose himself or herself, or his or her spouse, to proceedings for a criminal offence or for the recovery of a penalty.

The test to determine whether a person is entitled to claim privilege against self-incrimination is not limited to whether there is an increased risk of prosecution. Rather, a witness is entitled to claim privilege in relation to any piece of information or evidence on which the prosecution might wish to rely in establishing guilt and also on which they might wish to rely when deciding whether or not to prosecute.

There are various exceptions to the privilege against self-incrimination. For example, one cannot claim privilege against self-incrimination where the criminal offence involved is theft.

Corporate defendants are also entitled to claim privilege against self-incrimination. However, directors or agents of a principal are not entitled to resist discovery or refuse to answer a question on the ground that it will incriminate the company or his or her principal.

## 12 Non-compliance with court orders

**How do courts punish failure to comply with court orders?**

Courts can order severe sanctions such as striking out a party's claim or entering judgment against a party unless the courts' orders are complied

with within the prescribed time. This is the most common sanction in Hong Kong to ensure a party's compliance with court orders.

A person who fails to comply with a court order or an undertaking may also be in contempt of court. While the primary punishment for contempt is imprisonment, committal orders are usually a remedy of last resort. The court will usually fine the contemnor or require a bond for his or her good behaviour instead.

### 13 Obtaining evidence from other jurisdictions

**How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?**

In Hong Kong, there is a mechanism for the examination of a person out of the jurisdiction who is unwilling or unable to be present at trial. An application may be made to the court for an order for the issue of a letter of request to the judicial authorities of the country in which the evidence of that person is to be taken abroad. Such evidence may be taken either orally or by means of written questions. However, the Hong Kong courts will not readily allow such an application as a consequence of the great expense and delay involved. An order for the issue of letters of requests is usually granted in cases where the evidence is directly material to an issue in the case and is necessary in the interest of justice.

### 14 Assisting courts in other jurisdictions

**What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?**

Section 21M of the High Court Ordinance provides foreign plaintiffs with a tool to identify, protect and realise assets in Hong Kong even if the substantive proceedings are conducted elsewhere, provided that the foreign proceedings are capable of giving rise to a judgment that may be enforced in Hong Kong (as a general rule, it must be a final and conclusive monetary judgment).

If so, then provided that proceedings have been or are to be commenced against a party in a jurisdiction outside Hong Kong, a foreign plaintiff may use section 21M of the High Court Ordinance to seek interim relief in Hong Kong, such as appointing a receiver, or obtaining a *Mareva* injunction, over the foreign defendant's assets. The rules that apply to a local plaintiff seeking such relief will also apply to foreign plaintiffs seeking to obtain similar relief under section 21M of the High Court Ordinance.

The foreign plaintiff can then continue pursuing the foreign proceedings, without the need to run concurrent proceedings in Hong Kong, knowing that assets have been secured in Hong Kong.

If the foreign plaintiff subsequently obtains a judgment in the foreign proceedings, the judgment can be registered in Hong Kong and enforcement proceedings can be commenced against the assets frozen (for enforcement proceedings, see question 19).

### 15 Causes of action

**What are the main causes of action in civil asset recovery cases, and do they include proprietary claims?**

The main causes of action in civil asset recovery cases include:

- fraud;
- fraudulent conveyance;
- fraudulent trading;
- fraudulent misrepresentation;
- unjust enrichment;
- money had and received;
- misfeasance;
- breach of contract;
- repayment of loan;
- infringement of intellectual property rights; and
- money laundering.

Proprietary claims are possible as well.

### 16 Remedies

**What remedies are available in a civil recovery action?**

The common remedies available in civil asset recovery actions include:

- restitution (ie, restoring the benefit conferred to the non-breaching party);
- damages;
- seizure of goods or property;
- final injunction (ie, a court order that requires a party to do or refrain from doing specified acts);
- constructive trust; and
- account of profits.

### 17 Judgment without full trial

**Can a victim obtain a judgment without the need for a full trial?**

**Default judgment**

If a defendant fails to file an acknowledgement of service (ie, a notice that states whether or not the defendant intends to contest the proceedings) within 14 days from the date of service of a writ of summons, or a defence within 28 days after being served with the statement of claim or an acknowledgement of service, the plaintiff may enter:

(i) final judgment if the writ is indorsed for:
  - a liquidated sum (ie, an amount which is certain, fixed and or agreed); or
  - the recovery of land only;

(ii) interlocutory judgment if the writ is indorsed for:
  - unliquidated damages (ie, damages that are yet to be ascertained or assessed);
  - the detention of goods only; or
  - the detention of goods and damages; and

(iii) final and interlocutory judgment if the writ is indorsed with mixed claims under (i) and (ii).

**Summary judgment**

If a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, a plaintiff may apply to the court for judgment on the ground that the defendant has no defence to a claim included in the writ.

An application for summary judgment applies to all actions except for, among others, a claim based on an allegation of fraud, defamation and malicious prosecution.

### 18 Post-judgment relief

What post-judgment relief is available to successful claimants?

The main post-judgment relief available to successful claimants includes:

- a *Mareva* injunction in aid of enforcement;
- the appointment of a receiver;
- the examination of judgment debtors in identifying the whereabouts of the assets of the judgment debtors; or
- the discovery or disclosure of documents against third parties.

### 19 Enforcement

**What methods of enforcement are available?**

The methods of enforcement available include:

- a writ of fieri facias (ie, the mode of enforcement of a money judgment by the seizure and sale of the judgment debtor's goods and chattels, usually by auction, sufficient to satisfy the judgment debt and costs of execution);
- garnishee proceedings (ie, a process of enforcing a money judgment by seizing or attaching a debt due to the judgment debtor, to be paid directly to the judgment creditor. The most common example is garnisheeing a judgment debtor's bank account);
- charging orders (ie, an order for any property of the judgment debtor such as land or shares in a company to be frozen for securing the payment of the payment debt);
- the appointment of a receiver;
- an order for committal (ie, an order committing a person to prison);
- a writ of sequestration (ie, a process of contempt by proceedings against the property of the contemnor. It is available if the person is in contempt of court as a result of disobedience to a court order, or in breach of an injunction);
- bankruptcy proceedings; or
- winding-up proceedings.

There are also ways to aid the execution of judgment. These include the examination of judgment debtors or a prohibition order.

**20 Funding and costs**

**What funding arrangements are available to parties contemplating or involved in litigation and do the courts have any powers to manage the overall cost of that litigation?**

Under the Legal Practitioners Ordinance and the Solicitors' Guide to Professional Conduct, a solicitor may not enter into a contingency fee arrangement for acting in any contentious proceedings. A 'contingency fee arrangement' means any arrangement whereby a solicitor is to be rewarded only in the event of success in litigation by the payment of any sum (whether fixed, or calculated either as a percentage of the proceeds or otherwise). Such contingency fee arrangements are unlawful and unenforceable in contentious proceedings.

In Hong Kong, the prohibition against champerty and maintenance still applies. 'Maintenance' is defined as 'the giving of assistance or encouragement or support to litigation by a person who has no legitimate interest in the litigation, nor any motive recognised by the court as justifying the interference', while 'champerty' is defined as 'an aggravated form of maintenance, in which the maintainer supports the litigation in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action'. However, the Hong Kong courts have taken a more relaxed approach in relation to maintenance following a Court of Final Appeal case in 2007, and have made the following exceptions:

- if a person assisting or supporting the litigation has a legitimate common interest; and
- if the assistance or encouragement or support to litigation would advance a person's access to justice, without which he or she would not be able to pursue his or her claim.

Further, the High Court held that Hong Kong liquidators and similar overseas appointment takers are able to enter into litigation funding arrangements in respect of certain causes of action vested in the company over which they are appointed. This is commonly known as the insolvency exception to maintenance and champerty. As a result of these decisions, liquidators are commonly relying on litigation funding to pursue claims and Hong Kong is seeing the emergence of third-party funders and after-the-event insurance in respect of such claims.

## Criminal asset recovery

**21 Interim measures**

**Describe the legal framework in relation to interim measures in your jurisdiction.**

The Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance provide for the restraint of assets or property or charge of property to preserve it for the purpose of satisfying a confiscation order.

A restraint order prohibits any person from dealing with any realisable property. An item of property under restraint may also be seized by an authorised officer for the purpose of preventing any realisable property from being removed from Hong Kong.

A charging order imposes a charge on the property (eg, land or securities) for securing the payment to the Hong Kong government of:

- an amount equal to the value of that property; and
- an amount not exceeding the amount payable under the confiscation order.

Applications for a restraint order and charging order may only be made by the prosecution. Such orders can be made by the Court of First Instance after proceedings have been instituted in Hong Kong against the defendant for a 'specified offence' or a 'drug trafficking offence' and the judge is satisfied that there is reasonable cause to believe that the defendant has benefited from that specified offence or drug trafficking offence.

Once a restraint order is made, the court can appoint a receiver to take possession of any realisable property and manage and deal with the property.

**22 Proceeds of serious crime**

**Is an investigation to identify, trace and freeze proceeds automatically initiated when certain serious crimes are detected? If not, what triggers an investigation?**

In Hong Kong, law enforcement powers such as the power to identify, trace and freeze proceeds are not automatically initiated when serious crimes are detected. Such powers, which mainly vest in law enforcement and regulatory agencies, are discretionary and may be exercised depending on the circumstances surrounding the case.

**23 Confiscation – legal framework**

**Describe the legal framework in relation to confiscation of the proceeds of crime, including how the benefit figure is calculated.**

The Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance provide for the tracing, freezing, confiscation and recovery of the proceeds of drug trafficking and other indictable offences. The former ordinance applies when a person is convicted for, among other things, trafficking, supplying to an unauthorised person, manufacturing, cultivating, or importing or exporting a dangerous drug. The latter ordinance applies when a person is convicted of a 'specified offence', which is listed in schedules 1 and 2 therein. These include possession of arms or ammunition without licence, import or export of goods bearing a forged trademark, and possession of forged documents.

Although many offences are not listed in the two ordinances, it is still possible to capture the proceeds of such offences through the vehicle of money laundering. This effectively means that if a person 'deals' with the proceeds of any indictable offence, such as tax evasion, he or she may be committing the offence of money laundering, and such proceeds can come within the scope of the confiscation provisions in the Organized and Serious Crimes Ordinance.

The two ordinances also have a wide reach in terms of place and time. Both ordinances apply to property situated outside Hong Kong and to offences committed prior to these ordinances coming into force.

The courts calculate the 'benefit figure' by assessing the value of the accused's proceeds of crime.

**24 Confiscation procedure**

**Describe how confiscation works in practice.**

After conviction, the prosecution may apply to the court for a confiscation order against the offender as part of sentencing. The prosecution will then need to prove the following preconditions to confiscation on a balance of probabilities (ie, more probable than not):

- whether a person has benefited from a specified offence;
- whether a person has benefited from an organised crime; and
- the amount to be recovered in this case in pursuance of a confiscation order.

The prosecution will then file a statement setting out the facts to support an application for confiscation. The statement of facts is treated as conclusive except for those facts that the accused expressly does not accept.

The defendant may also be directed by the court to submit a statement that is relevant to determining the amount that might be realised at the time the confiscation order is made. If the prosecution accepts any of the allegations in the defendant's statement, such facts may be treated as conclusive.

Any disputed facts between the prosecution and the defendant will be subsequently resolved at a hearing before the court.

**25 Agencies**

**What agencies are responsible for tracing and confiscating the proceeds of crime in your jurisdiction?**

The Hong Kong Police Force has various divisions that are responsible for tracing and confiscating the proceeds of crime in Hong Kong. These include:

- the Commercial Crime Bureau;
- the Organised Crime and Triad Bureau; and

**Update and trends**

Section 25 of the Organized and Serious Crimes Ordinance states that a person commits an offence if 'knowing or having reasonable grounds to believe that any property in whole in part, directly or indirectly, represents any person's proceeds of an indictable offence, he deals with that property'. It further provides that 'references to an indictable offence include a reference to conduct which would constitute an indictable offence if it had occurred in Hong Kong'.

The Court of Final Appeal has recently upheld that on a charge under section 25, it is not necessary for the prosecution to show that the proceeds being dealt with are in fact the proceeds of a crime. It only needs to be shown that when the accused dealt with the property, he or she knew, or had reasonable grounds to believe that such property represented the proceeds of a crime.

In another judgment, the Court of Final Appeal has confirmed that where it is shown that the relevant property came from some identifiable act committed overseas, it will be caught by section 25 if such conduct constituted an indictable offence in Hong Kong, irrespective of the legal position in the jurisdiction where such conduct took place. The Appellant in this case sought to argue that in cases where the relevant property originated overseas, the prosecution was required to identify the underlying conduct and then prove that the accused was aware of the conduct and the criminal nature of that conduct, and it had also to be further shown that such conduct amounted to an indictable offence in Hong Kong if it had occurred here. Dismissing the Appellant's argument, the Court ruled that the focus of the provision is on the position under Hong Kong law, and the legality of such conduct under any foreign law will not be taken into account.

Separately, amendments are being proposed to the Hong Kong money laundering legislation to prescribe statutory customer due diligence and record-keeping requirements for designated non-financial businesses and professions in order to ensure that the regulatory framework of Hong Kong is in line with the relevant global standards set by the Financial Action Task Force. The Administration is currently considering the way forward in consultation with the relevant sectors.

- the Joint Financial Intelligence Unit, which is jointly run with the Hong Kong Customs and Excise Department.

In addition, the Independent Commission Against Corruption was established to combat, among others, corruption and bribery and also has powers to trace and confiscate the proceeds of crime.

### 26 Secondary proceeds

**Is confiscation of secondary proceeds possible?**

In Hong Kong, confiscations of secondary proceeds are possible. The Mutual Legal Assistance in Criminal Matters Ordinance provides that proceeds can include 'property derived or realised, directly or indirectly, from direct proceeds'.

### 27 Third-party ownership

**Is it possible to confiscate property acquired by a third party or close relatives?**

Third-party interests are not normally considered at the confiscation stage. It is therefore possible to confiscate property acquired by a third party or close relatives.

If the convicted person does not pay after a confiscation order is imposed, there will be a second proceeding to recover the property from the offender to satisfy the confiscation order. In this proceeding, third parties may have their interests heard and recognised before the court.

If proceedings to recover property have been wrongfully initiated, property holders may apply to the Court of First Instance under the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance for compensation.

### 28 Expenses

**Can the costs of tracing and confiscating assets be recovered by a relevant state agency?**

The Mutual Legal Assistance in Criminal Matters Ordinance allows the Secretary for Justice to liquidate property that has been confiscated. This Ordinance also provides that reasonable expenses incurred during the asset recovery process may be deducted from the liquidated property.

### 29 Value-based confiscation

**Is value-based confiscation allowed? If yes, how is the value assessment made?**

Value-based confiscation is permitted in Hong Kong. The courts calculate the 'benefit' to the convicted offender. Having determined the accrued benefit, the court will then assess the offender's ability to pay (ie, the value of the amount that might be realisable from the offender's assets or the value of the accused's proceeds of any specified offence).

If the amount that might be realised at the time the confiscation order is made is less than the value of the accused's proceeds, then the recoverable amount is only the amount that might be realised.

The court may then make a confiscation order in the amount of the benefit or the realisable assets, whichever is lower.

### 30 Burden of proof

**On whom is the burden of proof in a procedure to confiscate the proceeds of crime? Can the burden be reversed?**

The prosecution division of the Department of Justice has the burden of proof in a procedure to confiscate the proceeds of crime (for preconditions to a confiscation order, see question 24).

The burden of proof then shifts to the accused if he or she wishes to claim that he or she is unable to pay the amount under the confiscation order on the basis that the amount exceeds the value of the realisable property. The standard of proof required is also a balance of probabilities.

### 31 Using confiscated property to settle claims

**May confiscated property be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction?**

In Hong Kong, confiscated property cannot be used to satisfy civil claims for damages or compensation from a claim arising from the conviction.

### 32 Confiscation of profits

**Is it possible to recover the financial advantage or profit obtained though the commission of criminal offences?**

It is possible to recover the financial advantage or profit obtained through the commission of a criminal offence.

Under the Interpretation and General Clauses Ordinance, the definition of 'property' includes:

- money, goods, choses in action and land; and
- obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property described above.

### 33 Non-conviction based forfeiture

**Can the proceeds of crime be confiscated without a conviction? Describe how the system works and any legal challenges to in rem confiscation.**

While local confiscation is generally conviction-based, some powers of forfeiture exist without a conviction. For example, where an offender has absconded and the court is satisfied that reasonable steps have been taken to ascertain the person's whereabouts or to obtain the return of that person to Hong Kong, a confiscation order may be made against his or her criminal assets.

**34 Management of assets**

**After the seizure of the assets, how are they managed, and by whom? How does the managing authority deal with the hidden cost of management of the assets? Can the assets be utilised by the managing authority or a government agency as their own?**

Once a confiscation order is made, the court may, on an application by the prosecutor, appoint a receiver to realise the seized property. The proceeds of the realisation of the property will usually be paid to the court and applied to paying any expenses incurred by a person acting as an insolvency officer and the receiver's remuneration and expenses. If there is any money remaining after the court has made all payments it will be paid into the general revenue.

**35 Making requests for foreign legal assistance**

**Describe your jurisdiction's legal framework and procedure to request international legal assistance concerning provisional measures in relation to the recovery of assets.**

A request by Hong Kong to an appropriate authority of a place outside Hong Kong for assistance in a criminal matter may be made by the Secretary for Justice under the Mutual Legal Assistance in Criminal Matters Ordinance. Such a request may be made for assistance in relation to the taking of evidence, production of materials, or search and seizure (see question 13 for the procedure in respect of the taking of evidence and production of materials by Hong Kong courts).

**36 Complying with requests for foreign legal assistance**

**Describe your jurisdiction's legal framework and procedure to meet foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets.**

Under the Mutual Legal Assistance in Criminal Matters Ordinance, a request by an appropriate authority of foreign jurisdiction to Hong Kong for assistance in a criminal matter may be made to the Secretary for Justice. Such request may be made for assistance in relation to the taking of evidence, the production of materials, search and seizure, and the transfer of persons.

The request must be accompanied by:

- the name of the authority concerned with the criminal matter;
- a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;
- a description of the purpose of the request and the nature of the assistance being sought;
- details of the procedure that the foreign jurisdiction concerned wishes to be followed by Hong Kong;
- a statement setting out the wishes of the place concerning the confidentiality of the request and the reason for those wishes;
- details of the time within which the foreign jurisdiction wishes the request be complied with;
- details of allowances to which the person will be entitled and the arrangements for accommodation for that person while the person is in the foreign jurisdiction, if the request involves a person travelling there from Hong Kong; and
- a statement setting out the maximum penalty for the external offence.

**37 Treaties**

**To which international conventions with provisions on asset recovery is your state a signatory?**

The international conventions or treaties to which Hong Kong is a party include:

- the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;
- the United Nations Convention against Transnational Organized Crime;
- the United Nations Convention against Corruption; and
- the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

On the domestic front, Hong Kong has enacted legislation to implement the new international arrangements for cooperation in criminal matters, including the Mutual Legal Assistance in Criminal Matters Ordinance.

Further, Hong Kong also participates as a member of certain international organisations and conferences using its own name, such as the Financial Action Task Force against Money Laundering.

**38 Private prosecutions**

**Can criminal asset recovery powers be used by private prosecutors?**

In Hong Kong, criminal asset recovery powers can only be used by the law enforcement and regulatory agencies and cannot, therefore, be used by private prosecutors.

GALL

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