

Asset Recovery

Contributing editors

Jeremy Garson, Daniel Hudson and Gareth Keillor
Herbert Smith Freehills LLP



2019

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Asset Recovery 2019

Contributing editors

Jeremy Garson, Daniel Hudson and Gareth Keillor
Herbert Smith Freehills LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in October 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law
Business
Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2012
Seventh edition
ISBN 978-1-912377-15-2

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between July and September 2018. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global overview	5	Jersey	74
Jeremy Garson, Daniel Hudson and Gareth Keillor Herbert Smith Freehills LLP		Simon Thomas and William Redgrave Baker & Partners	
Australia	7	Korea	80
Tobin Meagher, Andrew Moore and Sophia Giardini Clayton Utz		Michael S Kim, Robin J Baik and S Nathan Park Kobre & Kim	
Bermuda	14	John P Bang and Seokchun Yun Bae, Kim & Lee	
Kevin Taylor, Nicole Tovey and Kai Musson Taylors (in association with Walkers)		Liechtenstein	86
Canada	19	Thomas Nigg and Eva-Maria Rhomberg Gasser Partner Attorneys at Law	
Maureen Ward and Nathan Shaheen Bennett Jones LLP		Monaco	92
Cayman Islands	25	Donald Manasse Donald Manasse Law Offices	
Angela Barkhouse and Kenneth M Krys KRyS Global		Nigeria	98
Cyprus	31	Babajide O Ogundipe and Nneka I Ofili Sofunde, Osakwe, Ogundipe & Belgore	
Andreas Erotocritou, Antreas Koualis and Irena Markitani AG Erotocritou LLC		Serbia	103
England & Wales	38	Tomislav Šunjka ŠunjkaLaw	
Jeremy Garson, Daniel Hudson and Gareth Keillor Herbert Smith Freehills LLP		Switzerland	110
Greece	48	Marc Henzelin, Sandrine Giroud and Maria Vinogradova Lalive	
Ilias G Anagnostopoulos and Alexandros D Tsagkalidis Anagnostopoulos		Ukraine	118
Hong Kong	54	Vitaliy Kasko and Andrii Sliusar Vasil Kisil & Partners	
Nick Gall and Ashima Sood Gall		United Arab Emirates	124
Ireland	60	Ibtissem Lassoued Al Tamimi & Company	
Gavin Smith and William Greensmyth Walkers		United States	129
Italy	65	Carrie A Tendler, Jef Klazen and Clinton J Dockery Kobre & Kim	
Roberto Pisano, Valeria Acca and Chiara Cimino Studio Legale Pisano			

Preface

Asset Recovery 2019

Seventh edition

Getting the Deal Through is delighted to publish the seventh edition of *Asset Recovery*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Ukraine.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editors, Jeremy Garson, Daniel Hudson and Gareth Keillor of Herbert Smith Freehills LLP for his assistance with this volume. We also extend special thanks to Jonathan Tickner, Sarah Gabriel and Hannah Laming of Peters & Peters Solicitors LLP, who contributed the original format from which the current questionnaire has been derived, and who have helped to shape the publication to date.

GETTING THE 
DEAL THROUGH

London
September 2018

Global overview

Jeremy Garson, Daniel Hudson and Gareth Keillor

Herbert Smith Freehills LLP

We are delighted to be the contributing editors to this year's *Getting the Deal Through – Asset Recovery*. Given the international nature of fraud and asset recovery exercises, the ability to act swiftly across jurisdictions to locate and preserve assets, and pursue fraudsters, is fundamental. The hope is that this publication will help with the identification and management of cross-border legal strategies.

In this overview, we reflect upon some of the trends, highlights and developments in relation to fraud and asset tracing. However, overall, the key themes are that the jurisdictions continue to work to develop tools and techniques for combating international fraud, and that the trend for transparency shows no signs of stopping.

International developments

New rules on freezing and confiscation orders

In June 2018, the Council of the European Union agreed to new rules in the form of a regulation concerning the mutual recognition of freezing and confiscation orders in relation to criminal assets across the EU. The main features of the new rules include the following:

- a new regulation directly applicable in the EU, covering freezing and confiscation orders;
- a general principle of mutual recognition, ensuring judicial decisions in criminal matters are recognised and enforced by other member states;
- varied types of confiscation in criminal matters such as value-based confiscation and non-conviction based confiscation;
- standard certificates and procedures to allow for speedy and efficient freezing and confiscation actions;
- a deadline of 45 days for the recognition of a confiscation order, and in urgent cases a deadline of 48 hours for the recognition and a further 48 hours for the execution of freezing orders; and
- provisions to ensure that victims' right to compensation and restitution are respected in cross-border cases.

The Fifth Anti-Money Laundering Directive

Also in June 2018, the Council of the European Union agreed to a proposal for a directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. The main changes to Directive No. 2015/849 (the Fifth Anti-Money Laundering Directive) involve the following:

- broadening access to information on beneficial ownership – improving transparency in the ownership of companies and trusts;
- addressing risks linked to prepaid cards and virtual currencies;
- adding requirements in relation to cooperation between financial intelligence units; and
- improving checks on transactions involving high-risk third countries.

EU member states have 18 months to transpose the Fifth Anti-Money Laundering Directive into national law, though some member states have already done so.

Cryptocurrencies

Early 2018 saw a boom, and subsequent slide, in the price of cryptocurrencies, as well as the rapid growth of initial coin offerings (ICO). These very quickly led to allegations of fraudulent activity; for example, two ICOs Ifan and Pincoin – said to be cryptocurrency start-ups from

Singapore and Dubai respectively – were later alleged to be multilevel-marketing Ponzi schemes.

As cryptocurrencies (and the platforms and exchanges through which they are traded) are essentially unregulated, there is no method to recover money easily from fraudulent cryptocurrency activity. This has led to the authorities taking action to expand the scope of existing regulation.

For example, in Europe there have been amendments proposed to modernise the Fifth Anti-Money Laundering Directive in light of cryptocurrencies. Essentially, these updates would bring digital currency exchange platforms and wallet providers under the purview of existing legislation.

During April 2018, the Financial Conduct Authority announced that it is working with the Bank of England and the UK Treasury on a discussion paper for cryptocurrencies. It is hoped this paper will discuss the systemic problem of fraud currently present in the cryptocurrency markets.

In July 2018, the United States announced that digital currency fraud will form one of the areas of 'particular attention' for a new US anti-crime task force with participation from several government bodies. The Task Force on Market Integrity and Consumer Fraud, which will have the US deputy attorney general as its chair, and associate attorney general as vice chair, seeks to 'provide guidance for the investigation and prosecution of cases involving fraud on the government, the financial markets and consumers'.

Cryptocurrencies also raise a number of interesting legal questions for civil fraud practitioners (for example, in relation to tracing, and whether they constitute property), which will no doubt be tested by the courts in the near future.

Litigation and legal developments

Ahmad Hamad Algozaibi & Brothers Company v SAAD Investments Company

Ten years of litigation in relation to what has been described by the Cayman Islands' Chief Justice Anthony Smellie as 'one of the largest Ponzi schemes in history', said to have involved nearly US\$330 billion, reached a landmark point when the Grand Court of the Cayman Islands handed down a 1,348-page judgment following the trial in proceedings arising out of the *Algozaibi* fraud. In what was the longest trial in the Cayman Islands' history (lasting over a year), and said to be one of the largest fraud trials ever litigated, the court found that over 100 banks had been defrauded over two decades.

Freezing injunctions against unknown parties

A recent, novel development in the English courts was the creation of a freezing injunction against unknown persons who had allegedly committed a multimillion-pound fraud by infiltrating the email accounts of the senior management of an organisation, and had then sent payment instructions resulting in money being paid by the company to accounts controlled by the fraudsters.

Although the claimant discovered it had been the victim of fraud, it did not know the identity of the fraudsters. However, it did know the identity of at least some of the bank accounts they had used.

The court granted a freezing order and related disclosure order on the basis of a claim that identified the fraudsters through a description of a class of individuals (ie, the persons involved in the fraud and the

transfers) as well as the beneficial owners of accounts to which the payments had been made. It was reported that this was the first such freezing injunction made against 'persons unknown'.

Within nine months of the freezing injunction being made, a trial against the fraudsters (a number of whom had now been identified) took place and, in September 2018, judgment was handed down and damages of approximately £7 million were awarded.

UK administrative developments

In July 2018, the Ministry of Justice announced plans to build a cyber-crime, fraud and economic crime court in London, which is due to be completed in 2025. David Gauke, the Lord Chancellor, stated that the court would send 'a further message to the world that Britain both prizes business and stands ready to deal with the changing nature of 21st-century crime'. This demonstrates the UK's seriousness to addressing the challenges of fraud, especially in light of the General Data Protection Regulation and the growth in cyberthreats and crime.

The UK government appointed Lisa Osofsky, a former FBI lawyer, as the new director of the Serious Fraud Office (SFO) with effect from September 2018. Ms Osofsky is said to have prosecuted more than 100 cases for the US government during a 30-year career, as well as having a career in private practice, including at Goldman Sachs and Control Risks. It will be interesting to see whether this appointment results in a more 'US-style' approach by the SFO.

Transparency

Public registers in British overseas territories

The continued focus on transparency saw the UK Parliament include a provision in the Sanctions and Anti-Money Laundering Act 2018 to compel Britain's 14 overseas territories (including the British Virgin Islands (BVI), Bermuda and the Cayman Islands) to introduce public ownership registers by the end of 2020. If they have not introduced registers by then, the UK government can impose them. The BVI government has announced that it will be bringing a legal challenge to the Act.

Although crown dependencies (the Isle of Man and the Channel Islands) were not covered owing to their different constitutional position, they may well be put under pressure to introduce similar measures.

Panama Papers/Paradise Papers

The fallout from the Panama Papers data leak continues. The Panama Papers are the 11.5 million documents leaked to a German newspaper in 2016 from the Panama-based law firm Mossack Fonseca. The leak detailed the offshore private financial positions of wealthy individuals, multinational companies and government officials. It led to Nawaz Sharif, the former Pakistani Prime Minister, resigning and receiving a 10-year prison sentence; professional football player Lionel Messi being fined and given a suspended sentence; and investigations around the globe into the various individuals named in these papers.

In March 2018, Mossack Fonseca announced it was closing down and, in May 2018, Panamanian prosecutors charged 10 further Mossack Fonseca employees with money laundering.

In June 2018, a new batch of Panama Papers was leaked to the press showing that Mossack Fonseca was unable to identify thousands of owners of companies who were benefiting from its services, meaning that Mossack Fonseca had failed to comply with 'know your customer' rules and could be found civilly and criminally liable.

Additionally, legal proceedings for breach of confidence brought by the law firm Appleby against the *Guardian* and the BBC arising out of the Paradise Papers disclosure were settled in 2018.

Unexplained wealth orders

January 2018 saw the introduction in the UK of new and expansive investigative powers requiring both individuals and corporate bodies to provide information as to how they acquired property. Known as unexplained wealth orders (UWO), these new obligations to disclose information can apply to property anywhere in the world and can be served on persons outside the UK where certain criteria are satisfied. The thresholds are low and, broadly, UWOs can be sought in relation to assets with a value greater than £50,000, where there are reasonable grounds for suspecting that the known source of the person's lawfully obtained income would have been insufficient for the purposes of obtaining the property, and that the person is one of the following:

- a non-EEA politically exposed person (PEP);
- a family member or connected person of a PEP;
- involved in a serious crime (anywhere in the world) (based on reasonable grounds of suspicion); or
- connected with a suspected criminal.

Although these powers are potentially very wide, to date only a handful of UWOs have been issued. In October 2018, the High Court issued a judgment (*National Crime Agency v Zamira Hajiyeva*) in which it dismissed a challenge to the first UWO to have been made. However, it remains to be seen how much use will ultimately be made of this tool, but it is certainly a potentially powerful one in the fight against international fraud.

Newsworthy frauds

As always, there have been a number of frauds that have made the headlines in the past year, including:

- **Nirav Modi:** early in 2018, a number of Indian banks, including one of the largest national banks, Punjab National Bank, uncovered a fraud of approximately US\$2 billion alleged to have been carried out by the famous jeweller and billionaire Nirav Modi, using fraudulently obtained letters of undertaking. Although Punjab National Bank suffered the brunt of the losses, other banks were also affected including, but not limited to, Allahad Bank, Axis Bank and Union Bank of India. It is estimated that since 2012, bank fraud has cost Indian banks approximately US\$10 billion.
- **German Ponzi Scheme:** in July 2018, the founder of Infinus, a financial services firm, was convicted of fraud by a court in Dresden, which also sentenced four other managers and one employee of the firm for fraud and aiding and abetting fraud. They were accused of defrauding 22,000 investors of €320 million through a Ponzi scheme. The insolvency administrator is seeking to recover approximately €15 million in interest paid to investors.
- **Theranos Fraud:** in March 2018, Elizabeth Holmes, the chief executive of Silicon Valley biotech start-up Theranos, settled a claim for fraud after allegedly deceiving investors by claiming that the company had developed groundbreaking blood-testing technology. Around US\$700 million was raised from investors. As part of the settlement, Holmes returned millions of shares to the company and paid a financial penalty. She is also prohibited from being an officer or director of a public company.

Australia

Tobin Meagher, Andrew Moore and Sophia Giardini*

Clayton Utz

Civil asset recovery

1 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 is no automatic restriction. The question is considered under the court's general discretion.

A stay of the civil proceedings may be granted if the court considers that there is a real danger of injustice in the criminal proceedings if the civil proceedings continue. The overriding principle is one of balancing the interests of justice between the parties.

Although each case will be considered on its merits, the courts have become increasingly mindful of giving sufficient weight to the practical legal prejudice to an accused, in light of the privilege against self-incrimination, the cost of multiple legal proceedings and the accused's right in the accusatorial process of criminal proceedings not to disclose any aspect of his or her defence.

In an appropriate case, the court may make orders enabling the civil proceedings to progress to a certain point (eg, made ready for hearing), and then be stayed until the criminal proceedings have concluded.

2 Forum

In which court should proceedings be brought?

Each state or territory has a court system, and there is also a federal court system. There is a hierarchy of courts within each system, with the supreme court being the highest court in each state or territory. The High Court of Australia is the final court of appeal.

The court in which civil proceedings for the recovery of assets should be brought will depend on a variety of factors, including the amount claimed, the nature of the causes of action and relief sought, connecting factors to the forum and the location of the defendant's known assets. Most claims in fraud matters of any significant size or complexity are brought in the relevant state or territory supreme court, all of which hear monetary claims above certain thresholds, as well as claims for equitable relief.

3 Limitation

What are the time limits for starting civil court proceedings?

Limitation periods are generally governed by state and territory legislation.

In most jurisdictions, causes of action for breach of contract or in tort have a six-year limitation period from the date the cause of action accrued.

As far as equitable claims are concerned, in most jurisdictions the legislation only applies to a limited extent. However, where the legislation has no direct application to a cause of action founded in equity, the courts may nevertheless apply the statutory limitation periods by analogy.

In most jurisdictions, fraud postpones the running of the limitation period until after the claimant has discovered, or could with reasonable diligence have discovered, the fraud.

In limited circumstances, courts also have the discretion to extend the time to commence proceedings.

4 Jurisdiction

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

The jurisdiction of courts can be defined by reference to the common law and (partly) statute. The foundation of jurisdiction for actions in personam is service of originating process.

Service can be effected on any person who is physically present, no matter how briefly, within the geographic jurisdiction of the issuing court. Service outside Australia must be authorised under the rules of the issuing court. Those rules take into account the effect of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (Service Convention), to which Australia is a signatory.

A foreign defendant may apply to set aside service or stay the proceedings on various grounds, including that service was not authorised by the relevant court rules, the forum chosen by the claimant was inappropriate (forum non conveniens) or because the dispute falls within the scope of a foreign exclusive jurisdiction clause to which the claimant had agreed.

A defendant who has been sued in an inappropriate Australian superior court can apply for the proceedings to be transferred to another superior court under the Jurisdiction of Courts (Cross-Vesting) Acts.

5 Time frame

What is the usual time frame for a claim to reach trial?

The usual time frame for a claim to reach trial varies considerably depending on a number of factors, including the size, scale and complexity of the matter, and if there are concurrent criminal proceedings.

The Federal Court of Australia Act 1976 (Cth) aims to have disputes resolved 'as quickly, inexpensively and efficiently as possible' (section 37M). State and territory civil procedure acts also contain sections to similar effect.

It is rare for contested proceedings to reach trial in less than six months. Proceedings ordinarily reach trial in a period of six to 18 months. Of course, if civil proceedings have been stayed pending the outcome of concurrent criminal proceedings, then it might take far longer than usual for the claim to reach trial.

6 Admissibility of evidence

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

Applicable rules of evidence in federal, state and territory courts are established by legislation enacted in the relevant jurisdiction. In particular, each jurisdiction has its own Evidence Act. These acts are based largely upon the common law, but expand upon it in various ways.

Evidence is admissible where it is relevant to a fact in issue, and is not otherwise excluded. Areas of potential exclusion include hearsay evidence, opinion evidence, tendency evidence, credibility evidence and privilege. Courts also have a general discretion to exclude or limit evidence.

Generally, evidence is admitted primarily through documents and written statements, in the form of affidavits, witness statements or statutory declarations. The latter are usually 'read' onto the record in court

and serve as evidence in chief for that witness. The witness is then usually cross-examined and re-examined. In some matters, however, witnesses may be required to give the entirety of the evidence orally.

7 Witnesses

What powers are available to compel witnesses to give evidence?

At the request of a party to proceedings, the court may issue a subpoena compelling a person to attend court to give evidence.

Except as otherwise provided by the uniform Evidence Acts, every person is competent to give evidence, and persons who are competent are compellable to give evidence (section 12). There are certain limited exceptions to compellability in proceedings within the uniform Evidence Acts. These include, for example, the Sovereign, the Governor General, the governor of a state, the administrator of a territory, a foreign sovereign or head of state of a foreign country and, in limited circumstances, a member of a house of Parliament (section 15).

A person called to give evidence will, however, be entitled to refuse to answer specific questions if certain limited privileges apply (eg, privilege against self-incrimination or legal professional privilege).

8 Publicly available information

What sources of information about assets are publicly available?

Publicly available sources of information about assets include the following:

- the Australian Securities and Investments Commission, which maintains company and business name registers containing information relating to companies such as registration status, office-holders and, in some cases, shareholders and financial statements;
- the Personal Property Securities Register, which is a national online register where details of security interests in personal property can be registered and searched, at least by a creditor; and
- state or territory-based land and property information bodies, which maintain records of interests in real property.

9 Cooperation with law enforcement agencies

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

Information and evidence may be obtained through various means, as follows:

- making a request to the relevant agency for consideration in accordance with the agency's guidelines or statutory obligations;
- making an application for access to documents held by government agencies under freedom of information legislation, subject to various exemptions; and
- (most commonly) a party to civil proceedings causing the civil court to issue a subpoena requiring the production of specific documents. Production will be subject to any claims for public interest immunity or legal professional privilege.

If material is obtained from foreign jurisdictions via mutual assistance channels for the purposes of a criminal investigation or proceeding, it is inadmissible in any civil proceeding unless the Attorney General approves of its use for the purposes of that other proceeding (section 43B of the Mutual Assistance in Criminal Matters Act 1987 (Cth) (MAA)).

10 Third-party disclosure

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

A claimant can apply for a *Norwich* order (named after *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133) requiring a third party who has become relevantly involved in a transaction to disclose information that may be relevant to a potential claim, including the identity of the wrongdoer. It can be used for the purpose of tracing the disposition of monies obtained fraudulently (eg, by requiring a bank to disclose information).

In addition, court rules contain procedures for the obtaining of preliminary discovery to identify a prospective defendant or to decide whether to institute proceedings.

A party to proceedings may also cause subpoenas to be issued to third parties requiring them to attend court to give evidence or produce documents to the court, or both. A subpoena must be issued for a legitimate forensic purpose and, where documents are sought, identify those documents with reasonable particularity.

A party can also apply for an order for non-party discovery requiring a third party to disclose the existence of relevant documents.

11 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 key interim relief is a freezing order (*Mareva* injunction) and a search order (*Anton Piller* order). Both are exceptional remedies that are ordinarily sought on an ex parte basis.

To obtain a freezing order, the claimant must show that he or she has a good arguable case against the defendant and there exists a real danger that the defendant will deal with his or her assets in such a way as to wholly or partly deprive the claimant of the benefit of a final judgment. It will apply to the defendant's assets, typically whether located in or outside Australia, up to a specified sum. The operation of the freezing order must not be frustrated by any third party who has notice of it (eg, banks). In appropriate cases, the court may make a freezing order against a third party.

A freezing order will ordinarily be accompanied by an order compelling the defendant to file an affidavit disclosing the nature and value of his or her assets. Other, less common, ancillary orders may include an order requiring the delivery of designated assets not specifically in issue in the proceedings or an order restraining the defendant from leaving the jurisdiction.

A search order compels the defendant to permit persons specified in the order to enter premises and to search for, identify and remove specified things. The key matters of which the court must be satisfied are that the claimant has a strong prima facie case against the defendant and that there is a real possibility that the defendant might destroy, or otherwise cause to be unavailable, important evidentiary material that is in the defendant's possession.

A claimant can also seek other forms of interim relief. These include orders for the detention, custody or preservation of property that is the subject of the proceedings. The usual methods of preservation are an interlocutory injunction or appointment of a receiver.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

Courts have a wide discretion to impose sanctions for a failure to comply with the court's orders, including making adverse cost orders against the defaulting party or its solicitor, or both, striking out a pleading, rejecting evidence, staying or dismissing the proceedings, and giving judgment.

Breach of a court order can also give rise to a charge of contempt. Penalties for contempt include the imposition of a fine, the sequestration of assets or, in serious cases, imprisonment. It is usually left to the offended party to enforce contempt.

13 Obtaining evidence from other jurisdictions

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

Australian superior courts have the power to make an order for the issue of a letter of request to the judicial authorities of a foreign country requesting the taking of evidence from a person in that country.

These requests are usually made pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 (the Hague Convention) or a bilateral agreement with another country. If the foreign state is not a party to any such treaty, the request may still be made, but the receiving country is under no obligation to comply with the request.

An order for the sending of a letter of request is a discretionary one, and the party seeking the order must persuade the court that the discretion should be exercised because it ‘appears in the interests of justice to do so’. Legislation in most Australian jurisdictions requires the court to consider various matters in this regard.

A letter of request may also ask for the production of documents, at least where those documents are ancillary to the oral testimony of the witness. However, it remains unclear whether Australian courts have jurisdiction to issue a letter of request to a foreign country solely for the production of documents pursuant to the Hague Convention. In New South Wales (NSW), one judge has recommended that consideration be given to adopting a rule for the express conferral of the requisite power (*Gloucester (Sub-Holdings 1) Pty Ltd v Chief Commissioner of Stamp Duties* [2013] NSWSC 1419).

Court rules in all jurisdictions now allow subpoenas to be served overseas in accordance with the Service Convention; however, where leave is required to issue a subpoena abroad, an Australian court would be unlikely to grant leave if it would result in a clear breach of international law or comity.

14 Assisting courts in other jurisdictions

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

Australian courts will assist parties in enforcing foreign judgments. Such judgments may be enforced by either registering the judgment under the Foreign Judgments Act 1991 (Cth) or at common law.

The High Court of Australia has confirmed that Australian superior courts may make a freestanding freezing order in aid of foreign proceedings in certain circumstances, including where there is a danger of an actual or prospective foreign judgment remaining unsatisfied if assets are removed from Australia (see *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36).

State and territory supreme courts also have the power, following a request sent from a foreign court, to make orders requiring a person to give evidence or produce specified documents (but not give discovery) in aid of the foreign proceedings. If the foreign court is from a country that is not a signatory to the Hague Convention or a bilateral agreement with Australia, the request is to be sent via the diplomatic channel and will be considered and executed on the basis of comity.

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 the following:

- in equity: breach of fiduciary duty or breach of trust;
- in tort: claims for deceit, detinue, conversion, conspiracy or inducing breach of contract;
- a restitutionary claim for monies had and received; and
- certain statutory actions under the Corporations Act 2001 (Cth) and the Competition and Consumer Act 2010 (Cth) (CCA).

In equity, third parties may also be pursued for ‘knowing receipt’ of trust property or ‘knowing assistance’ in a breach of fiduciary duty. Certain equitable claims may be proprietary in nature, such as where a beneficiary claims against a defaulting trustee for the recovery of trust property (or its traceable proceeds). In addition, it is well accepted that where property is acquired from another by theft, proprietary relief by way of imposition of a constructive trust will be granted where appropriate.

16 Remedies

What remedies are available in a civil recovery action?

The main remedies available in a civil recovery action include the following:

- damages;
- equitable compensation;
- equitable lien or charge;
- account of profits;
- constructive trust;
- order for restitution;

- order for delivery of goods; and
- relief under the Corporations Act 2001 (Cth) or the CCA (eg, for declarations, damages or compensation orders), or both.

A successful claimant will also be entitled to claim interest (both pre- and post-judgment) and legal costs, although usually only a proportion of the total legal costs can be recovered.

17 Judgment without full trial

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

A victim can obtain a judgment without the need for a full trial, typically by obtaining either default or summary judgment.

A claimant may seek default judgment where the defendant fails to file a defence. Such a judgment will typically be given in the absence of the defendant. If the claim is for unliquidated damages, judgment may be given on liability only with damages to be assessed.

A claimant may obtain a summary judgment without proceeding to a contested final hearing, if it can satisfy the court that there is no real defence to the claim, or only a defence as to the amount of the claim. The court will not determine the proceedings summarily if there is a real question in dispute.

Under various statutory regimes, a victim (including a corporation) may also be able to make a claim for a victim’s compensation order against a convicted person for losses caused by the relevant criminal offence (see, for example, the Victims Rights and Support Act 2013 (NSW) (section 97)).

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

A freezing order may be available against a judgment debtor if the court is satisfied that there is a danger that a judgment will be wholly or partly unsatisfied because the judgment debtor absconds, or the assets of the judgment debtor are dissipated or removed from the jurisdiction, before the claimant can apply for one of the traditional forms of execution.

The court may also make ancillary orders, such as an assets disclosure order, an order appointing a receiver to the defendant’s assets or an order restraining a judgment debtor from departing the jurisdiction.

A judgment creditor may also obtain an order for examination of the judgment debtor requiring him or her to answer specific questions or produce documents to aid enforcement.

19 Enforcement

What methods of enforcement are available?

The principal means of enforcement are as follows:

- writ of execution, granting the sheriff’s office authority to seize and sell a judgment debtor’s real or personal property, or both, and pay the net proceeds to the judgment creditor;
- garnishee order, which directs third parties owing money to the judgment debtor (eg, wages) to pay the judgment creditor directly;
- charging order, which operates to charge certain property in favour of the judgment creditor; and
- insolvency orders, for example, winding up a company or making an individual bankrupt to effect a distribution of the judgment debtor’s assets among creditors.

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?

Various funding arrangements are available to parties contemplating or involved in litigation.

Generally, lawyers can offer ‘conditional’ billing where the lawyer’s ability to recover his or her fees depends on whether the legal action is successful. Typically, no fee is charged if the legal action is unsuccessful and an ‘uplift’ percentage is added to the lawyer’s fees if the action is successful.

All jurisdictions currently prohibit damages-based fee arrangements where the lawyer's fee is calculated by reference to a percentage of any amount recovered by the client. The Productivity Commission in its 2014 report 'Access to Justice Arrangements' recommended that this prohibition be removed for most civil matters, subject to comprehensive disclosure requirements and percentage limits on a sliding scale. However, this recommendation has proved to be contentious and it is uncertain whether reform will occur.

Third-party funding, whereby a party with no pre-existing interest in the proceedings funds the litigation in exchange for a share of the amount recovered, is permitted. The market for such funding is well established and active.

After-the-event insurance is available but rarely obtained.

Courts seek to manage the costs of litigation in various ways, including by exercising broad case management powers. Generally, these powers must be exercised to facilitate the just, quick and cheap resolution of the real issues in the proceedings. In addition, courts have a wide discretion in relation to costs and can make interim costs orders against a party, including against parties in default.

Criminal asset recovery

21 Interim measures

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

The following will focus on the operation of the Proceeds of Crime Act 2002 (Cth) (POCA), which is the principal federal legislation for confiscation. Each state and territory jurisdiction also has its own legislation that governs confiscation of the proceeds and instrumentalities of crime (collectively, the Confiscation Acts), including interim measures.

There are three main types of interim measures that can be obtained under POCA, all of which can be applied for on an ex parte basis from a court: restraining orders, freezing orders and the seizure of property under a search warrant.

The most important type of interim measure is a restraining order under Part 2-1, as it is necessary in most cases to obtain such an order over property before a forfeiture order can be obtained (see Parts 2-2 and 2-3). A restraining order prevents the disposal of or dealing with property, either absolutely or subject to conditions, pending the outcome of confiscation proceedings. It is usually made following an application to the court by the Australian Federal Police (AFP). The suspect need not have been convicted or even charged. The circumstances in which the order can be made include where there are reasonable grounds to suspect that the suspect committed a relevant offence, or that the property is the proceeds or an instrument of a relevant offence. The order can potentially cover all property of a suspect, including property owned by the suspect or subject to his or her effective control. The court may allow reasonable living and business expenses (excluding legal costs incurred in connection with POCA or criminal proceedings) to be met from the restrained property if certain conditions are met (section 24).

Second, a freezing order under Part 2-1A may be issued by a magistrate to a financial institution preventing the withdrawal of funds from a specified account. It may be issued where there are reasonable grounds to suspect that the account balance reflects the proceeds or an instrument of certain offences, and there is a risk of dissipation. A freezing order is usually obtained as a precursor to a restraining order. Unless extended, it ceases to have force after three working days (section 15N).

Finally, suspected tainted property may be seized under a search warrant issued by a magistrate pursuant to Part 3-5. Such property must be returned after 14 days unless an application for a restraining order or forfeiture order is made with respect to it (section 26O).

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?

Investigative bodies will consider, on a case-by-case basis, whether to take steps to identify, trace and freeze suspected proceeds of crime.

At the Commonwealth level, for example, the Criminal Assets Confiscation Taskforce (the Taskforce) – which is led by the AFP and includes the Australian Taxation Office (ATO) and the Australian

Criminal Intelligence Commission – works in partnership with other law enforcement and regulatory agencies in order to identify, investigate and litigate asset confiscation matters. The Taskforce describes its approach to investigation as 'proactive and intelligence-led'. It also takes referrals regarding potential confiscation matters from Commonwealth agencies, AFP criminal investigations and state, territory or foreign law enforcement agencies. The Taskforce will consider whether a particular matter is suitable for proceeds action or whether other remedies (eg, pursuit by the ATO of taxation remedies) are more appropriate.

23 Confiscation – legal framework

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

POCA covers confiscation in relation to indictable offences against Commonwealth laws, foreign indictable offences and state and territory offences with a federal aspect. The Confiscation Acts govern confiscation in relation to offences against the respective state and territory laws.

POCA's regime contains a comprehensive range of confiscation orders. A number of jurisdictions (South Australia, Queensland and, to a lesser extent, Victoria and the Australian Capital Territory) are modelled on the Commonwealth confiscation regime. All proceedings under POCA are civil proceedings and the burden of proof is on the balance of probabilities (sections 315 and 317).

The fundamental premise of these laws is that where a person has profited from criminal activity, those profits should be returned to society. Further, lawfully acquired property used in the commission of an offence should also be forfeited.

All jurisdictions provide for both conviction and non-conviction based confiscation. In most jurisdictions, there are four types of confiscation orders that can be sought from a court by the relevant state agency:

- orders for the forfeiture of assets (see questions 24 and 33);
- pecuniary penalty orders (see question 29);
- literary proceeds orders (requiring that a person who has committed an offence disgorge literary proceeds derived in relation to that offence); and
- unexplained wealth orders (see question 24).

However, there are a number of significant differences between each jurisdiction regarding how confiscation orders are obtained and the operation of certain orders.

The manner in which the benefit figure is calculated will vary according to the nature of the order sought (see questions 24, 29 and 33).

24 Confiscation procedure

Describe how confiscation works in practice.

Overview

Confiscating the proceeds of crime is a complex process that usually involves the following steps:

- investigating by the relevant state agency, in order to substantiate unlawful conduct and identify property;
- obtaining a court order restraining property;
- obtaining a subsequent court order confiscating property; and
- disposing of confiscated property.

Law enforcement agencies are given significant information-gathering powers to assist them with their investigations. Under POCA, these include oral examinations, production orders, notices to financial institutions, monitoring orders and search and seizure powers.

The section below sets out the process for obtaining two specific types of confiscation order: forfeiture orders and unexplained wealth orders.

Forfeiture orders

Forfeiture orders may be either conviction or non-conviction based. Non-conviction based forfeiture orders are discussed in question 33.

There are two types of conviction-based forfeiture orders under POCA:

- forfeiture upon application by the Commissioner of the AFP or Commonwealth Director of Public Prosecutions (CDPP) (no restraining order required) (section 48). The application for forfeiture must be made within six months of the conviction of an indictable offence, and the court must be satisfied that the property is either the proceeds or instrument of the offence; and
- automatic forfeiture, six months after conviction of a 'serious offence', of all property (unless otherwise excluded) that is subject to a restraining order relating to the offence (section 92). A serious offence is defined under POCA to be an indictable offence punishable by imprisonment for three or more years of a certain nature, including money laundering offences.

Property may be excluded from forfeiture if, among other things, the court is satisfied that a person has an interest in a property that is neither the proceeds nor an instrument of unlawful activity (section 94).

Once forfeited, the property vests in the Commonwealth.

Unexplained wealth orders

Most Australian jurisdictions now have unexplained wealth laws. The laws are controversial because they reverse the onus of proof and the long-standing legal tradition of the presumption of innocence. In essence, individuals who cannot lawfully account for the wealth they hold may be liable to pay that wealth to the state. However, there are differences between each jurisdiction, especially regarding whether some connection to criminal conduct is required.

Under POCA, where there are reasonable grounds to suspect that a person's wealth exceeds the value of his or her lawfully acquired wealth, the court may make an order requiring the person to attend court and prove, on the balance of probabilities, that his or her excess wealth was not derived from a relevant offence. If the court is not satisfied that part of the person's wealth was not derived from such offences, the court may make an unexplained wealth order requiring them to pay that part of his or her wealth to the Commonwealth (sections 179B and 179E).

25 Agencies

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

Federally, since 2012, the AFP has had the responsibility over the majority of confiscation proceedings, both conviction and non-conviction based. The CDPP only retains responsibility for conviction-based confiscation where no restraining order is necessary to preserve the property.

Generally, for most states and territories, the police force is responsible for investigating assets, and the CDPP is responsible for confiscation proceedings. However, the NSW Crime Commission and the Queensland Crime and Corruption Commission are responsible for non-conviction based confiscation in those states.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Yes. Under POCA and in most other jurisdictions, the definition of the proceeds of crime explicitly includes property that is wholly or partly derived or realised from a disposal or other dealing with the proceeds of crime.

27 Third-party ownership

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

Yes. Under POCA and in various other jurisdictions, confiscation of property that is the proceeds or instrumentality of crime and that is acquired by a third party is generally permitted, unless it has been acquired as follows:

- for sufficient consideration (for money, goods or services that reflect its commercial value); and
- without knowledge of any circumstances that would arouse reasonable suspicion that the property was the proceeds or instrumentality of crime.

Further, under POCA and in various other jurisdictions, if an innocent third party has an interest in property that is the subject of a forfeiture order, the court may direct that such interest be excluded from the operation of the relevant forfeiture order. Alternatively, a compensation order can be made in favour of that person following the disposal of the property.

28 Expenses

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

Confiscation proceedings under POCA and most state and territory jurisdictions are civil, not criminal, in nature. In most jurisdictions, therefore, subject to any specific legislative provisions, the ordinary rules regarding civil cost recovery apply to the costs of confiscation proceedings (ie, costs follow the event) (*Commissioner of the AFP v Fysh (No. 2)* [2013] NSWSC 105 and *Bow Ye Investments Pty Ltd v DPP (No. 2)* [2009] VSCA 278).

29 Value-based confiscation

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

In most jurisdictions, value-based confiscation is allowed. The mechanics for obtaining such an order differ significantly across jurisdictions.

Under POCA, the Commissioner of the AFP or the CDPP can apply to a court for a pecuniary penalty order. This is an order that requires a person to pay an amount of money to the Commonwealth. The basis for a pecuniary penalty order is that a person has been convicted of an indictable offence, or has committed a serious offence (see question 24).

The court must quantify a pecuniary penalty order in accordance with Part 2-4, Division 2. Broadly, this involves a value determination of the benefits derived from the commission of the offence. In assessing the value of those benefits, the court should pay close attention to the evidence before concerning itself with certain specified matters, but must not subtract expenses or outgoings incurred in relation to the illegal activity (section 126).

These (or analogous) provisions have been applied to achieve different results in different contexts. For example, in a number of cases concerning illicit drugs, the gross proceeds of the offence have been regarded as the value of the offender's benefit, with no account taken of the acquisition costs of the illegal drugs. However, in a 2015 insider trading case, it was held that determining the value of the benefit derived from the unlawful sale of shares purchased lawfully must involve bringing into account the cost price of the shares against the gross proceeds of their sale (see *Director of Public Prosecutions (Cth) v Gay* [2015] TASSC 15).

A pecuniary penalty order may be sought and made even if another confiscation order has been made in relation to the offence. However, the amount of the pecuniary penalty must be reduced by an amount equal to the value of any forfeited property (section 130).

The amount payable under a pecuniary penalty order is a civil debt due to the Commonwealth (section 140). However, it can be enforced by the creation of a charge over any restrained property (section 142).

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?

Generally, under POCA and the Confiscation Acts, the state agency that is seeking a restraining or confiscation order from the court bears the onus of proof.

However, in those jurisdictions where an application can be made for an unexplained wealth order, the onus of proving that a person's wealth is not derived from an offence lies on that person (see question 24).

In addition, on an application to exclude property from a restraining or forfeiture order (or from automatic forfeiture) under POCA or relevant Confiscation Acts, the party seeking the exclusion order bears the burden of proving that it has an interest in the property, which is neither the proceeds nor instrument of crime.

Update and trends

The AFP and relevant state agencies continue to actively litigate proceeds of crime matters. In 2016–2017, the Taskforce restrained A\$93.3 million in assets, which was A\$3.2 million less than in the 2015–2016 financial year. The AFP's 2016–2017 annual report states that the complexity of investigations pursued, as well as the far higher amounts restrained in previous years, meant that more resources were committed to matters already before the court, rather than undertaking new restraint action.

Under the 2017–2018 federal budget, the AFP will receive an additional A\$321.4 million over the following four years to increase investigative resources. These funds are earmarked for 'high priority AFP operations', which include combating organised drug importation and serious financial crimes.

On 20 June 2018, the Unexplained Wealth Legislation Amendment Bill 2018 was introduced to the House of Representatives. This is a significant development because the Bill seeks to amend POCA in order to create a national approach to target unexplained wealth. Owing to constitutional limitations, this will require one or more states to refer their power to the Commonwealth. The Bill is a result of consultations between the Commonwealth, state and territory governments. The Bill aims to improve asset recovery by negating the current inconsistencies between state and territory frameworks. Among other things, it will allow unexplained wealth restraining orders and unexplained wealth orders under POCA to be made in respect of relevant offences of participating states. As a result, in cases where a criminal syndicate has derived funds from a mix of participating state, territory, foreign and Commonwealth offences, this Bill allows a single federal unexplained wealth regime to be used to restrain and confiscate the illicit funds of syndicate members (regardless of whether the funds were derived from a Commonwealth-, foreign-, state- or territory-based offence), rather than relying on a patchwork of orders brought by Commonwealth, state and territory authorities.

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 most cases, confiscated property cannot be used to satisfy such claims (assuming the claimant does not have an interest in the property; see question 27). However, in a number of jurisdictions, the court may reduce the amount otherwise payable under a pecuniary penalty order by the amount payable by the person by way of restitution, compensation or damages in relation to an offence to which the order relates.

Further, in Victoria, a restraining order may be made to preserve property in order that it be available to satisfy an order for restitution or compensation under the Sentencing Act 1991 (Vic). Property that is forfeited must also be used to satisfy any such order.

32 Confiscation of profits

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

In short, yes. Profits obtained through commission of criminal offences can be confiscated in all Australian jurisdictions.

By way of example, in *Commissioner of the AFP v Fysh* [2013] NSWSC 81, a pecuniary penalty order was made under POCA requiring the defendant to pay to the Commonwealth the amount of the profit he made on the purchase and sale of shares for which he had been found guilty of insider trading offences under the Corporations Act 2001 (Cth). On those facts, the court held that the amount of the benefit derived by the defendant was the net gain received (excluding brokerage fees) as a result of the transaction.

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.

Non-conviction based forfeiture is allowed in all jurisdictions except Tasmania.

Under POCA, there are two types of non-conviction based forfeiture order:

- person-directed forfeiture order: forfeiture of property where the court is satisfied that a person is engaged in conduct constituting one or more serious offences (section 47); or
- asset-directed forfeiture order: forfeiture of property where the court is satisfied that the property is the proceeds or instrument of certain offences, or no claim has been made in respect to the property (section 49).

In both cases, the property must first be subject to a restraining order for at least six months before the forfeiture order can be made.

Similarly to conviction-based forfeiture, property may be excluded from forfeiture if, among other things, the court is satisfied that a person has an interest in the property that is neither the proceeds of unlawful activity or the instrument of any serious offence (section 73).

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?

The regime for managing restrained and confiscated property is broadly consistent across all jurisdictions.

The Public Trustee (the Trustee) (or an equivalent body) will take custody and control of the property, often once a restraining order has been made.

The Trustee is usually empowered to obtain information about the property, manage and otherwise deal with it. Once a forfeiture or other confiscation order has been made, the Trustee must dispose of the property (to the extent the property is not money). The Trustee is entitled to recover costs incurred in connection with the exercise of its duties, including managing the property, as well an amount of remuneration for the Trustee.

The balance of the proceeds must be credited to a dedicated fund. This fund is primarily used in each jurisdiction to support programmes for crime prevention, intervention or diversionary measures, other law enforcement initiatives, and victims' compensation.

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.

Mutual assistance to and from Australia is governed by the MAA.

Requests under the MAA are made by the Attorney General, usually on behalf of the AFP or the CDP, but also on behalf of state and territory investigative and prosecution agencies. Under the MAA, Australia can request assistance from foreign countries for, among other things, the issue of orders similar in nature to restraining orders, search warrants, monitoring orders and production orders under POCA, in aid of a criminal proceeding or criminal investigation commenced in Australia regarding a serious offence.

The process under the MAA is assisted by a number of bilateral mutual assistance treaties to which Australia is a party.

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.

Australia can assist foreign countries to recover assets pursuant to the MAA or, in limited circumstances, via domestic proceeds of crime action. Requests under the MAA must be made to the Attorney General.

There is a range of provisional measures available under the MAA to identify, locate and trace the proceeds of crime located in Australia. These include production orders, monitoring orders, search warrants and time-limited domestic restraining orders pending receipt of a foreign restraining order.

Australian authorities can also take action under the MAA to register a foreign restraining order, including a non-conviction based order,

made in respect of a foreign serious offence. A 'foreign serious offence' is an offence against the law of a foreign country, the maximum penalty for which is death, imprisonment for a period exceeding 12 months or a fine exceeding A\$54,000.

In limited circumstances, Australia may also consider taking domestic action on behalf of a foreign country under POCA, including obtaining a freezing or restraining order. This action can take place without a foreign proceeds of crime order, and a mutual assistance request may not be required.

37 Treaties

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

Australia is a signatory to a number of international conventions with provisions on asset recovery, including the following:

- the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- the United Nations Convention against Transnational Organized Crime 2000;
- the United Nations Convention against Corruption 2003;

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997;
- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990; and
- the Terrorist Financing Convention 1999.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

In no jurisdiction can a private prosecutor bring a confiscation application. Only the state agencies as set out in POCA and the Confiscation Acts can apply for confiscation orders under those respective Acts. Under POCA, for example, such applications must be brought by either the Commissioner of the AFP or the CDPP.

* *The authors wish to thank Sid Wang and Alice Zheng for their contribution to earlier editions. We also thank Laura Peck, Geoffrey Sykes, Olympia Gayleard and Alice Rein for their assistance in preparing this chapter.*



Tobin Meagher
Andrew Moore
Sophia Giardini

tmeagher@claytonutz.com
amoore@claytonutz.com
sgiardini@claytonutz.com

Level 15
1 Bligh Street
Sydney
New South Wales 2000
Australia

Tel: +61 2 9353 4000
Fax: +61 2 8220 6700
www.claytonutz.com

Bermuda

Kevin Taylor, Nicole Tovey and Kai Musson
Taylors (in association with Walkers)

Civil asset recovery

1 Parallel proceedings

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

The court has discretion to stay civil proceedings where there is an overlapping criminal complaint that is triable on indictment still pending and a clear case of prejudice can be made should the civil proceedings continue. In *Capital G Bank v Eve Simmons* [2008] Bda LR 60, the court found that there is no distinction between this modern approach and the rule in *Smith v Selwyn* (1914–1915) All ER 230, which suspends the claimant's right to maintain a civil action against a defendant where the claim is based upon a felonious act, until such time as the defendant has been prosecuted. This rule was applied in *Todd v Smith* [1993] Bda LR 14.

Section 25(3) of the Criminal Code Act 1907 states that, except when expressly provided, the prosecution or conviction of a person for an offence does not affect any civil remedy that any person aggrieved by the offence may have against the offender. Section 26, however, provides that where civil proceedings have been taken for a summary offence against property, the defendant cannot later be prosecuted for the same cause.

2 Forum

In which court should proceedings be brought?

Claims are most likely to be brought in the Supreme Court.

3 Limitation

What are the time limits for starting civil court proceedings?

The Limitation Act 1984 prescribes the limitation periods for various types of action including the following:

- tort: six years from the date on which the cause of action accrued;
- contract: six years from the date on which the cause of action accrued;
- enforcement of arbitration award: 20 years from the date on which the cause of action accrued;
- recovery of land: 20 years from the date on which the right accrued;
- breach of trust (other than fraudulent): six years from the date on which the cause of action accrued; and
- fraudulent breach of trust: no limitation.

The commencement date of a limitation period can be extended in certain circumstances for certain causes of action. For example, the Limitation Act 1984 provides a discretion to the court to extend time limits in the case of personal injury. In *Snowden v Emery, Dyer and Bermuda Hospitals Board* [2014] Bda LR 92, the court confirmed that 'in the exercise of the discretion, the basic question to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet this claim on the merits, notwithstanding the delay in commencement'.

4 Jurisdiction

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

Where the rules of court have been satisfied in relation to the service of process within or outside the jurisdiction, the court shall have jurisdiction to entertain an action. Jurisdiction will also be invoked where a defendant has submitted to the court's jurisdiction, or where the action relates to property situated within the jurisdiction. A defendant may challenge jurisdiction on grounds that he or she is not subject to the personal jurisdiction of the court, that there is another more appropriate forum or that there is a valid jurisdiction agreement between the parties, provided the defendant has not already submitted to the jurisdiction.

5 Time frame

What is the usual time frame for a claim to reach trial?

With respect to actions commenced by summons, the usual time frame for a claim to reach trial is approximately five months from commencement.

With respect to actions commenced by writ, the usual time frame for a claim to reach trial is approximately 18 months from commencement.

6 Admissibility of evidence

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

The Evidence Act 1905 governs admissibility of evidence in civil proceedings, together with Order 38 of the Rules of the Supreme Court (RSC). In particular, Part IIA of the Act addresses admissibility of hearsay evidence.

7 Witnesses

What powers are available to compel witnesses to give evidence?

The RSC provide that, if the Registrar of the Supreme Court so authorises, a writ of subpoena ad testificandum (summoning a witness to give oral evidence) or a writ of subpoena duces tecum (instructing the witness to produce documentary evidence) may be issued out of the Supreme Court Registry to compel the attendance of a witness for proceedings in chambers. An application must be made for any such writ and the Registrar may direct that the application be made to the judge before whom the proceedings are to be heard rather than to directly to the Registrar.

In terms of compelling a witness to give evidence for use in foreign proceedings, the issuance of letters rogatory is an available tool and involves the filing of an ex parte application with the Supreme Court.

The Court must be satisfied that the following three requirements have been met after receiving an application for the taking of evidence in Bermuda:

- the application is made following a request issued by or on behalf of the foreign court that exercises jurisdiction similar to that of the Bermudian court;
- the evidence to which the application relates is to be obtained for the purposes of foreign proceedings that have been instituted in the foreign court; and
- there is an intention that the proceedings before the foreign court should proceed to trial.

Assuming the application is successful, the witness will be ordered to appear at a particular time and place before an examiner in order to be examined under oath. Such an order is typically accompanied by another order that compels the witness to produce certain documents, if such relief is required.

8 Publicly available information

What sources of information about assets are publicly available?

Companies

Public records available from the Registrar of Companies include the following:

- company name;
- registration number;
- incorporation dates;
- certificate of incorporation;
- memorandum of association;
- notice of registered office;
- registered charges (registration is voluntary and there is no requirement for a company to maintain an internal register of charges);
- winding-up notices;
- share capital increase or reduction notice; and
- prospectus registrations.

Information relating to shareholders and directors may be obtained by request made directly to the company's registered office.

Registry General

In relation to real property, registered charges over land can be searched for a fee.

Shipping and aviation

A transcript of the register may be obtained for a fee and will include details of the registered owner and any registered mortgages.

Court records

With effect from 1 December 2015, the public may, on payment of the associated fee, obtain copies of the originating process for civil and commercial cases, save for winding-up proceedings, applications relating to trusts or arbitrations, cases relating to the administration of the deceased's estates and divorce proceedings, or any proceeding involving children. Request for access to documents not otherwise automatically available can be made to the Registrar.

9 Cooperation with law enforcement agencies

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

The Bermuda Monetary Authority receives and processes requests for information from foreign regulatory authorities in relation to Bermudian financial institutions, companies or individuals.

The Proceeds of Crime Act 1997 allows an enforcement authority to disclose information obtained by it in the course of its functions for civil recovery investigations and proceedings, whether in Bermuda or elsewhere.

The Public Access to Information Act 2010 provides a right of access to information held by government bodies, subject to the exclusion of exempted records under Part 4 of the Act.

10 Third-party disclosure

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

Norwich Pharmacal orders

Under the principles of *Norwich Pharmacal*, an applicant may obtain information from third parties where there has been a wrong committed, where an order is needed (usually to identify the wrongdoer) and where the person or entity against whom the order is sought has been involved in the wrongdoing (innocently) so as to have facilitated it and is able to provide the necessary information for the wrongdoer to be

sued. Orders will not be granted for fishing expeditions, and remain a matter of discretion for the court.

Bankers Trust orders

Banks may be ordered to provide discovery in order to enable funds to be traced where there are good grounds for believing the funds held by the bank are the claimant's, in accordance with the principles in *Bankers Trust v Shapira* (1980) 1 WLR 1274. The court in *Crowley Maritime Corporation v International Marine Assurance Group Ltd* [1988] Bda LR 42 extended the reach of such orders beyond banks holding the proceeds of fraud, to a defendant against whom the fraud has been alleged.

11 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?

Order 29 of the RSC provides a range of interim remedies such as an injunction, preservation of property, sale of perishable property and recovery of property subject to a lien.

Mareva (freezing) injunctions will be granted where there is a good arguable case, a real risk of dissipation of assets and where the court considers in all circumstances of the case that it is just and convenient.

Section 110 of the Companies Act 1981 provides for the Minister of Finance, either of his or her own accord or on the application of members of a company, to appoint an investigator of the affairs of the company and report thereon.

In insolvency proceedings a provisional liquidator may be appointed to preserve assets and prevent dissipation pending the hearing of a petition.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

In the first instance, the court may make an 'unless' order providing, for example, that unless a party complies with the order it will not be permitted to further prosecute or defend an action. Failure to comply with an unless order may result in the action being dismissed, or if non-compliance persists, contempt of court proceedings and committal.

13 Obtaining evidence from other jurisdictions

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

An application may be made to the court, under Rule 39 of the RSC, for the issue of a letter of request to the judicial authorities of the country in which a person is located, for the examination of that person on oath.

14 Assisting courts in other jurisdictions

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

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters is extended to Bermuda via the United Kingdom. Accordingly, Bermuda will assist in the service of foreign process on local defendants.

Evidence may be taken in Bermuda for use in foreign proceedings pursuant to Part IIC of the Evidence Act 1905 and Rule 70 of the RSC.

The current common law position is that interim injunctive relief will be granted in support of foreign proceedings (stand-alone freezing orders) where the court has personal or territorial jurisdiction over the defendant and a good arguable case may be made for the relief under local law. In considering whether it is 'just and convenient' to grant an injunction, the court will consider whether the relief would properly assist the foreign court (*ERG Resources LLC v Nabors Global Holdings II Limited* [2012] Bda LR 30).

Bermuda has reciprocal enforcement regimes with a number of jurisdictions under the Judgments (Reciprocal Enforcement) Act 1958, pursuant to which foreign money judgments may be registered and enforced in Bermuda. Those jurisdictions falling outside the Act, or where the judgment is non-monetary, may still enforce foreign

judgments under common law principles by commencing proceedings in Bermuda and applying for summary judgment.

15 Causes of action

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

The most common civil causes of action include breach of contract, tort, fraud-based claims, tracing or other proprietary claims. A broad range of equitable, common law and statutory relief is available.

16 Remedies

What remedies are available in a civil recovery action?

The most common range of remedies to be ordered at trial are as follows:

- damages – compensatory (and punitive in appropriate cases);
- declaration as to rights;
- interim or permanent injunctions;
- specific performance;
- account of profits; and
- orders permitting tracing of assets and recovery.

17 Judgment without full trial

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

Yes. Default judgment is available where proceedings have been validly served but the defendant fails to respond within the time prescribed by the RSC.

Summary judgment is available where, although the defendant has responded to a service of proceedings, the claimant can establish that the defendant has no defence to the claim or any part of it.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

Freezing orders are available to preserve rights and assets and, in certain circumstances, stand-alone freezing orders will be ordered against a defendant in foreign proceedings where there are no local proceedings in progress.

Rule 48 of the RSC provides for the production of documents by, and the examination of, a judgment debtor as to the means of satisfying the judgment debt.

Rule 50 of the RSC provides for the appointment of a receiver by way of equitable execution.

19 Enforcement

What methods of enforcement are available?

Rule 45 of the RSC provides various methods of enforcement of a money judgment including:

- seizure and sale of assets;
- appointment of a receiver;
- garnishee orders;
- writ of sequestration; and
- order for committal.

A money judgment will automatically create a lien over real property situated in Bermuda that is registered in the judgment debtor's name.

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?

The general rule in Bermuda is that 'costs follow the event'; namely, the loser will pay the other party's costs for the action, although costs awards fall within the discretion of the court. Although litigants are usually self-funded, third-party funding is permitted. Contingency fees are not permitted in Bermuda.

The RSC prescribe an overriding objective for the court to deal with cases justly, which includes saving expense, dealing with cases proportionately to the amount of money involved and the financial position of each party, and ensuring cases are dealt with expeditiously and fairly. However, the court has no specific statutory cost management powers.

Criminal asset recovery

21 Interim measures

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

The Proceeds of Crime Act 1997 (PCA) makes provision for powers of the court to order confiscation of assets of offenders that are derived from criminal conduct. The PCA grants enhanced powers to the court and the police in relation to issuing confiscation orders, investigations into the assets of offenders and the enforcement of such orders.

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?

When a serious crime is recognised, investigations to identify and trace assets are initiated by enforcement authorities.

Powers of the court under the PCA for the production of information to assist in certain criminal and civil recovery investigations are not automatic, but may be initiated on application by the relevant investigating authority.

23 Confiscation – legal framework

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

Confiscation of the proceeds of crime is governed by the PCA. A confiscation order may be considered by the court on the application of the Director of Public Prosecutions (DPP) or of its own motion where it considers it appropriate to do so.

The court must first determine whether the defendant has benefited from criminal conduct. If benefit is found, the court shall, before sentencing or otherwise dealing with him or her in respect of the offence, issue a confiscation order and determine the amount to be recovered. The court shall then do the following, in respect of the offences concerned:

- order the defendant to pay the amount of the confiscation order within such period as it may specify; and
- take into account the confiscation order prior to imposing any fine on the defendant or making any order involving payment by the defendant or under section 37 of the Misuse of Drugs Act 1972; or
- subject to (ii) leave the confiscation order out of account when determining the appropriate sentence or other manner of dealing with the defendant.

The court can order confiscation of the aggregate value of the defendant's proceeds of criminal conduct or a lesser value.

24 Confiscation procedure

Describe how confiscation works in practice.

Where a defendant appears before the court to be sentenced, the court may consider whether or not to make a confiscation order. The court may postpone determining whether the defendant has benefited from the wrongdoing or the amount to be recovered under a confiscation order if it considers that more information is required, for the purpose of enabling that information to be obtained. Except in exceptional circumstances, the postponement shall not exceed six months from the date of conviction or three months after an appeal is determined or otherwise disposed of.

The procedural stages are as follows:

- Where the DPP applies to the court for a confiscation order, the DPP must give the court a prosecutor's statement of matters that are considered relevant to the determination of whether the defendant has benefited from criminal conduct, or an assessment

of the value of the proceeds of criminal conduct. The court may require the DPP to produce a prosecutor's statement where the court considers a confiscation order on its own motion.

- The defendant may then be ordered to indicate the extent to which he or she accepts the allegations in the prosecutor's statement and, so far as any allegation is not accepted, give particulars of any matters on which it is proposed to rely.
- The court decides on the balance of probabilities whether to make a confiscation order based upon the material in the parties' respective statements and upon evidence it has heard.
- Once a confiscation order is made, enforcement agencies such as the DPP, the police and customs officers may proceed to enforce the confiscation order by way of their respective statutory powers of enforcement.
- Confiscation orders can be applied to third-party holders of the property (*DPP v Roberts* [2006] Bda LR 22 and *Re Aldo Nelson Kirby Pace* [2005] Bda LR 34) provided there is no mingling of the property of the defendant and the third party and that the defendant's property can be clearly identified.
- Enforcement agencies can also apply to a magistrate for the freezing of funds in the course of a confiscation investigation.

25 Agencies

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

The following agencies are responsible for tracing and confiscating proceeds of crime:

- the police and customs officers together with the DPP;
- the Financial Intelligence Agency; and
- the Bermuda Monetary Authority.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

According to section 4(1) of the PCA, 'property' includes money and all other property, movable or immovable, including things in action and other intangible or incorporeal property. 'Realisable property' is any property held by the defendant and any property held by a person to whom the defendant has made a gift caught by the PCA. There is no distinction between primary proceeds and secondary proceeds.

27 Third-party ownership

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

Yes. Where property held by a person to whom the defendant has directly or indirectly given a gift falls within section 6 of the PCA, the property may be subject to confiscation.

28 Expenses

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

The court has the power to issue other orders involving payment by a defendant where a confiscation order has been made. However, it must take the confiscation order into account, before doing so.

29 Value-based confiscation

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

Yes. Confiscation under the PCA is value-based. Any payments or rewards received at any time as a result of, or in connection with, criminal conduct carried out by the defendant or another person are the defendant's proceeds of criminal conduct, and the value of these proceeds is the aggregate of the values of payments, or other rewards, property and pecuniary advantage. In determining whether the defendant has benefited from criminal conduct and, if so, the value of the proceeds of the criminal conduct, the court shall make certain assumptions pursuant to section 12(2)-(3) of the PCA. In *R v Beach* [2002] Bda LR 28, the court held that at the stage of assessing the value of the defendant's proceeds from criminal conduct, the court should state, by

reference to section 2(3) of the PCA, what assumptions if any have been made, the payments or other rewards that (after taking account of any such assumptions) the court finds have been received by the defendant and the aggregate of the values of those payments or other rewards.

Section 4(4) of the PCA states as follows:

For the purposes of this Act, the amount that might be realised at the time a confiscation order is made against the defendant shall be:

- the total of the values at that time of all the realisable property held by the defendant; less*
- where there are obligations having priority at that time, the total amounts payable in pursuance of such obligations, together with the total of the values at that time of all gifts caught by this Act.*

The value of property is determined in accordance with section 5 of the PCA. Gifts caught by the PCA are determined in accordance with section 6 of the same.

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?

Assumptions that the court must make under section 12 of the PCA have the effect that the burden is on the defendant to prove that the property he or she acquired in the six years prior to the commencement of proceedings was not obtained through criminal conduct, nor any expenditure in that period met out of payments received in connection with criminal conduct.

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?

Under the PCA, there is a separate procedure for making compensation orders within criminal proceedings to compensate a victim. However, there is no express general power for the court to make a compensation order or to order that a civil claim be satisfied from moneys recovered via confiscation.

32 Confiscation of profits

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

There is no express reference in the PCA to confiscation of such types of benefit. However, financial advantage or profit would be caught within the statutory framework of the PCA as financial advantage and profit comprise a benefit received from criminal conduct.

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.

The confiscation procedure under the PCA may be considered when a defendant appears before the court to be sentenced. Pending conclusion of confiscation proceedings, the DPP may make an application to restrain assets. Prior to the enactment of the PCA in *R v Burchall* [1991] Bda LR 71, with consideration of section 37 of the Misuse of Drugs Act, the court held that no such conviction is necessary for in rem confiscation.

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?

Where a restraint order has been made, the court may appoint a receiver to take possession of and manage property. Further, the DPP

may apply for the appointment of a receiver in respect of any realisable property and in respect of any realisable property over which a charging order has been made. Remuneration and expenses of the receiver are generally paid from the confiscated assets fund. However, a receiver appointed in connection with property freezing orders shall be entitled to remuneration and expenses out of the proceeds of the property realised, even if the services are provided under arrangements made by the enforcement authority, but not if the receiver is a member of staff of the enforcement authority.

Once any payments as directed by the court have been made from proceeds of the realisation of property, the receiver shall apply the proceeds to the confiscation order. Where there are excess funds the receiver shall distribute them among those who held property that has been realised under the PCA, and in such proportions as the court may direct after giving a reasonable opportunity for those persons to make representations to the court.

There is no express provision in the PCA that grants the managing authority or a government authority the ability to utilise the assets as their own.

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.

Depending on which jurisdiction Bermuda is seeking assistance from, there are various procedural methods for requesting international assistance. Key procedures include registration of foreign judgments, freezing orders and letters rogatory for requests for evidence.

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.

The Criminal Justice (International Co-operation) (Bermuda) Act 1994 (CJICBA) provides for mutual legal assistance if requested by other countries in criminal proceedings and investigations in the context of all serious offences under Bermudian law and for implementing the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Pursuant to the CJICBA, the central authority

for all requests made is the Attorney General. Counsel in the Attorney General's Chambers will be responsible for executing such requests.

The PCA and the Proceeds of Crime (Designated Countries and Territories) Order 1998 (PCO) govern the registration or enforcement of external confiscation orders or external recovery orders. Requests for the enforcement of such orders may only be made by countries listed in Schedule 1 to the PCO. Pursuant to the PCO, the central authority for all requests made by designated countries is the Attorney General.

The Evidence Act 1905 allows the court to provide assistance to foreign courts seeking evidence in criminal and civil cases. Any country may make requests through letters rogatory. The central authority for all requests is the Supreme Court. Letters rogatory are exclusively handled by the Registrar of the Court. In the event that the Registrar of the Court grants a request, then the evidence will be transmitted to the requesting court by the Clerk of the Court.

37 Treaties

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

Bermuda is a signatory to the following conventions:

- the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;
- the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; and
- the United Nations Convention against Transnational Organized Crime.

The Attorney General has recently stated in the House of Assembly that the cabinet is committed to taking steps to seek the extension of the United Nations Convention against Corruption to Bermuda.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

No. Only the DPP is entitled to bring criminal asset recovery proceedings. However, a private prosecutor may seek the DPP's consent to act on the private prosecutor's behalf in such proceedings. In such circumstances, any recovered criminal assets will likely be treated by the DPP in accordance with the PCO, and the PCO makes no express provision for a private prosecutor to realise such property.



In association with Walkers

Kevin Taylor
Nicole Tovey
Kai Musson

kevin.taylor@walkersglobal.com
nicole.tovey@walkersglobal.com
kai.musson@walkersglobal.com

Park Place
Third Floor, 55 Par La Ville Road
Hamilton HM11
Bermuda

Tel: +1 441 242 150
www.walkersglobal.com

Canada

Maureen Ward and Nathan Shaheen

Bennett Jones LLP

Civil asset recovery

1 Parallel proceedings

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

No. Nothing precludes a civil proceeding from progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter. In fact, section 11 of the Criminal Code, RSC 1986, Chapter C 46, explicitly permits such parallel proceedings.

2 Forum

In which court should proceedings be brought?

Before commencing a claim, a decision should be made about which province the claim should proceed in. Claimants are presumptively entitled to pursue their claims in any province, but normally do so in the place in which the subject matter of the dispute arose (which is also generally where the relevant parties are located). The presumption may be negated if the defendant demonstrates there is no 'real and substantial' connection between the claim and the claimant's chosen province, or demonstrates that the chosen forum is not the most convenient for the parties under the principle of *forum non conveniens* (*Van Breda v Village Resorts*, 2012 SCC 17).

Notably, faced with a *forum non conveniens* argument, courts will consider, among other things, the law that will govern the dispute. The fact that the law of another province (or international jurisdiction) will govern the dispute is not dispositive, but is one factor that may impact whether the court declines to exercise jurisdiction. However, under Canadian conflict of laws principles, even if a claim proceeds before the courts of a particular province, the courts may apply the law of another province (or international jurisdiction) in appropriate circumstances (eg, if a contract mandates application of a particular jurisdiction's laws). As a result, choosing a particular Canadian province in which to bring a claim may not result in the laws of that province being applied and may therefore limit the substantive advantages to be gained.

Regardless of the province, claims generally proceed in the provincial superior courts, which have court offices in most notable municipalities across each province. The provincial superior courts are also divided by certain subject matters, such as bankruptcy, and commercial and small claims (in Ontario, for example, under C\$25,000). The judges of those subject matter divisions are specialists in those areas, and unique procedures often exist to streamline the court process. Certain claims meeting enumerated criteria may also be heard in the Federal Court. While headquartered in Ottawa, the Federal Court also has locations across Canada.

3 Limitation

What are the time limits for starting civil court proceedings?

The time limits for commencing civil actions are prescribed by provincial legislation. Each province has legislation addressing limitations periods generally (eg, general tort or contract actions). The general limitation periods range from two to six years, depending on the province. In recent years, amendments in various provinces have seen the shortening of general limitation periods, with two years increasingly

emerging as the chosen time period. In some general limitation legislation, other more specific causes of action are also addressed. For instance, the province of Manitoba's Limitation of Actions Act, CCSM, Chapter L 150, provides a six-year limitation period in respect of any fraudulent misrepresentation action. In addition, each province has subject-matter specific legislation that, in some instances, provides different limitation periods. For example, Ontario's Securities Act provides a three-year limitation period in respect of certain securities-based claims.

Common law provides that, unless specifically altered by legislation, the clock will not begin to run on any limitation period until such time as the claim is 'discovered'. Discovery occurs when the person with the claim actually learned of the facts giving rise to the claim, or when a 'reasonable person' with the abilities of and in the circumstances of the claimant would have had such knowledge. Some provinces, including Ontario, have codified the common law discovery principle. There remain, however, certain exceptions to the principle, including, most notably, in cases involving those lacking the capacity to commence claims such as minors or persons with certain disabilities.

4 Jurisdiction

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

The provincial superior courts will generally have jurisdiction simpliciter over civil asset recovery matters. Although the courts maintain the inherent jurisdiction to control their own procedure, a presumption in favour of jurisdiction is generally applied. As discussed in question 2, a defendant, however, may challenge the court's jurisdiction, either by advancing the position that there is no 'real and substantial' connection between the dispute and the province, or that the chosen jurisdiction is a *forum non conveniens* because there is 'clearly a more appropriate' jurisdiction in which the claim should proceed. In such a case, the defendant would typically request that the court direct the action to proceed, if at all, in another jurisdiction or simply permanently stay the action. The leading Canadian case on issues of jurisdiction is *Van Breda v Village Resorts*, 2012 SCC 17.

5 Time frame

What is the usual time frame for a claim to reach trial?

The time frame for a claim to reach trial varies significantly, often based on the nature of the claim, the province in which the claim is being advanced and the particular court in which the claim is commenced. For instance, in Ontario, the Superior Court of Justice has a Commercial List Division that specialises in complex financial disputes, and often hears claims involving asset tracing and recovery. A claim on the Commercial List is likely to be advanced more quickly than in a regular division of the same court. Still, litigation is a long process and claims can often take multiple years to reach trial, particularly if the parties engage in multiple interlocutory motions. For this reason, pre-judgment asset tracing and preservation mechanisms such as *Mareva* injunctions can be critical.

6 Admissibility of evidence

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

Admissibility of evidence is either governed by provincial or federal legislation, depending on the subject matter of the dispute. In asset recovery matters, provincial legislation will most often apply. In Ontario, the relevant legislation is the Evidence Act and Ontario's Rules of Civil Procedure. For federal matters, the most relevant legislation is the Canada Evidence Act.

In an effort to increase efficiency and decrease wait times, courts have rules available for summary judgment motions, which can avoid the need for full trials. In Ontario, although the court retains discretion to order *viva voce* (oral) evidence, evidence on any motion is typically advanced by way of written affidavit. Affiants are cross-examined outside of court and the judge hearing the motion is provided copies of the examination transcripts. Further, on a motion, hearsay evidence is generally permissible, although the court is permitted to consider the weight to be given to such evidence. At a civil trial, the opposite is true. The presumptive trial process includes *viva voce* evidence and a prohibition on hearsay, both features that can lengthen and complicate trials by way of motions.

7 Witnesses

What powers are available to compel witnesses to give evidence?

There are various powers available to compel witnesses to give evidence at different stages of a proceeding. Each province has procedural rules governing how and when a witness may be compelled to give evidence. For instance, Ontario's Rules of Civil Procedure provide a mechanism to compel an examination for discovery of 'any person who there is reason to believe has information relevant to a material issue in the action' (Rule 31.10), and to summons a witness to trial (Rule 53.04). In addition, in common law, a party may obtain a *Norwich Pharmacal* or 'disclosure order' requiring a third party to provide evidence relevant to tracing assets and discovery claims, including testimony. Courts can also issue 'letters rogatory' requesting a foreign court to compel the evidence of a witness in a foreign jurisdiction.

8 Publicly available information

What sources of information about assets are publicly available?

Common sources of publicly available information include personal property security searches (to find registered security interests on assets such as vehicles), litigation searches (to find ongoing court proceedings and previously rendered judgments) and land registry searches (to find information about real property ownership, including any encumbrances on title). Generally, most information beyond these sources is not publicly available.

9 Cooperation with law enforcement agencies

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

There are various means to seek information and evidence from law enforcement and regulatory agencies. These include applications for information disclosure under the municipal, provincial or federal freedom of information acts, and applications for production of information obtained by police in the course of a criminal investigation. In the latter case, applications are made to the court pursuant to the common law test originally articulated by the Ontario Court of Appeal in *P (D) v Wagg*. Under the *Wagg* test, the court will consider factors such as privilege, public interest immunity and whether there exists a prevailing public interest in non-disclosure that overrides the promotion of the administration of justice through full access of litigants to relevant information.

10 Third-party disclosure

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

The provincial superior courts may, upon request, order production for inspection of documents in the control of a third party provided the documents are not privileged and the court is satisfied that the documents are relevant to a material issue in the action and it would be unfair to require the requesting party to proceed without having access to the documents (eg, under Rule 30.10 of Ontario's Rules of Civil Procedure).

A party may also move before the court on an *ex parte* basis for a *Norwich Pharmacal* or 'disclosure' order. Such orders are most commonly granted to allow for disclosure of confidential information such as bank statements or other financial information. In considering whether to order disclosure, the court will consider whether the requesting party has demonstrated the following:

- a reasonable claim on the merits;
- a relationship between the third party (with the confidential information) and the claim;
- that the third party is the only practicable source of information;
- that the third party can be indemnified for the costs of the disclosure; and
- that the interests of justice favour the obtaining of the disclosure (*GEA Group AG v Ventra Group*, Ontario Court of Appeal).

11 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?

In order to prevent the dissipation of assets, a party may move before the court for a *Mareva* injunction, also often called a 'freezing order'. As the name suggests, such an injunction aims to freeze the assets of an alleged wrongdoer pending the resolution of a claim on its merits. In order to obtain a *Mareva* injunction, a requesting party must demonstrate, among other things, a strong *prima facie* case of fraud and a real risk of dissipation. *Mareva* injunctions are almost always obtained *ex parte* and, in such cases, the moving party is required to provide full and fair disclosure of all material facts, including those facts that may favour the defendant. In addition, an undertaking as to any damages caused by the injunction is required.

In order to obtain information from those suspected of involvement in the fraud (as opposed to innocent third parties, in which case a *Norwich* order is appropriate), a party may request that the court issue an *Anton Piller* order. Such an order is obtained without notice and effectively serves as a private search warrant, requiring a defendant to allow the claimant to search premises and seize evidence in order to avoid destruction of such evidence. An independent supervising solicitor is commonly required to ensure the order is fairly understood and its limits are respected. As with a *Mareva* injunction, the moving party is required to make full disclosure of all material facts and provide an undertaking as to damages.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

Where parties to a court order fail to comply, a contempt of court order may be issued. The purpose of a contempt order is to compel compliance with the civil order. As a sanction for contempt, the court may render further orders against the non-compliant party, including fines or even imprisonment.

In Ontario, for instance, contempt orders may be issued under Rule 60.11 of the Rules of Civil Procedure. The Rule requires a three-part test to be met:

- the order that was breached must clearly and unequivocally state what was to be done;
- the party that breached the order must have done so deliberately and wilfully; and
- the evidence must establish contempt beyond a reasonable doubt (*Children's Aid Society of Ottawa-Carleton v C (T)*, Ontario Superior Court of Justice).

13 Obtaining evidence from other jurisdictions

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

In appropriate circumstances, Canadian courts will issue written requests to foreign courts. Such 'letters of request' are the same as the better-known letters rogatory process and consist of a request to a foreign court to compel the attendance of a person in the foreign jurisdiction to be examined under oath. Many provinces have codified their rules regarding letters of request, including Rule 34.07 of Ontario's Rules of Civil Procedure.

14 Assisting courts in other jurisdictions

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

Following the Supreme Court decisions in *Morguard Investments v De Savoye* and *Beals v Saldanha*, Canadian courts are generally expected to recognise and enforce the judgments of the courts of other provinces and foreign jurisdictions anywhere in the world.

Canadian courts will recognise and enforce judgments of foreign (non-Canadian) courts absent a demonstration of the following:

- the foreign court lacked jurisdiction over the dispute based on the Canadian 'real and substantial' connection test for assuming jurisdiction;
- the foreign judgment was obtained by fraud unknown by the defendant at the time of the judgment;
- an issue with the foreign procedure or due process gives rise to questions about natural justice; or
- the foreign judgment is contrary to Canadian concepts of basic morality.

15 Causes of action

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

The following are the main causes of action for civil asset recovery:

- tort claims, including fraud, fraudulent misrepresentation, knowing assistance, conspiracy and conversion;
- breach of contract claims;
- equitable claims such as unjust enrichment; and
- proprietary claims such as breach of trust.

16 Remedies

What remedies are available in a civil recovery action?

There are multiple remedies available in a civil recovery action. As noted question 11, there are preliminary remedies focused on preservation of assets and disclosure of information. Remedies at the conclusion of an action on the merits are as follows:

- a monetary award as compensation for damage;
- tracing and accounting of misappropriated funds;
- disgorgement of any profits;
- seizure of assets;
- interest on the amount of any damages award (pre-judgment and post-judgment); and
- costs and disbursements of the opposing party.

17 Judgment without full trial

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

Yes. For instance, a victim can obtain default judgment if the defendant fails to comply with the proper timelines and procedures in an action. In Ontario, Rule 19 provides that, in such circumstances, a claimant may have the defendant noted in default and thereafter move for judgment without notice or the need for a full trial.

In a defended action, a victim can also move for summary judgment, which, in Ontario, is governed by Rule 20 of the Rules of Civil Procedure. To obtain summary judgment, the claimant must demonstrate that there is no genuine issue requiring a trial. Following the recent Supreme Court of Canada decision of *Hryniak v Mauldin*, summary judgment is available when the court is able to make the

necessary findings of fact, apply the law to the facts and provide a proportionate, more expeditious and less expensive means to achieve a just result (relative to a trial). Summary judgment rules can be utilised to resolve all or part of a claim.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

The post-judgment relief available primarily includes the relief set out in question 19.

19 Enforcement

What methods of enforcement are available?

The primary methods utilised to execute a judgment against judgment debtors who do not voluntarily comply with judgments include the following:

- garnishment of bank accounts or wages, with the assistance of a sheriff;
- obtaining a writ of seizure and sale allowing the judgment creditor, with the assistance of a sheriff, to seize certain of the judgment debtor's assets and sell them at public auction;
- injunctions to freeze and prevent the dissipation of assets;
- examinations under oath regarding assets in aid of execution (in Ontario, under Rule 60.18 of the Rules of Civil Procedure); and
- applications to the court for the appointment of a receiver, to either supervise the judgment debtor's affairs or take control of the debtor's assets.

In addition, a claimant or judgment creditor can bring a fraudulent conveyance claim in either the underlying action or in an effort to enforce a judgment. The limitation periods governing fraudulent conveyance claims must be carefully considered as they typically start to run from the time of the transfer itself (and, therefore, potentially prior to obtaining judgment). As such, it is often prudent to include such claims in the underlying action.

Legislation relevant to the process of enforcing judgments includes, in Ontario, the Bailiffs Act, RSO 1990, Chapter B 2, and the Execution Act, RSO 1990, Chapter E 24. In addition, as noted in question 12, if a judgment debtor fails to comply with a judgment, the claimant may seek a contempt of court 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?

Historically, strict adherence to the doctrine of champerty and maintenance meant that courts insisted that litigants maintain fully autonomous control over their claims regardless of financial realities. This approach led to a prohibition on litigation funding arrangements based on public policy rationales such as protecting vulnerable litigants from abuses, including high interest rates, ensuring lawyers' duties of loyalty and confidentiality were not compromised, and otherwise maintaining lawyers' professional judgement and efficacy.

More recently, however, courts loosened the restrictions on litigation funding. In 2015, building on the precedents seen in the Canadian class action realm, the Ontario Superior Court of Justice confirmed that funding arrangements are available in commercial litigation, holding there is 'no reason why such funding would be inappropriate in the field of commercial litigation', a sentiment clearly encompassing fraud and asset recovery actions (*Schenk v Valiant Pharmaceuticals International*). Such an approach has been motivated by the courts' acknowledgement that litigation funding arrangements can promote access to justice. Courts, however, retain discretion to disallow such third-party arrangements that deprive the litigant of too much control over, or benefit from, the claim.

In addition, in instances where a receiver or trustee has been appointed (for example, in cases of investment fraud or a bankruptcy), courts retain discretion over the payment from the estate to the receiver or trustee, and to their counsel and other advisers.

Criminal asset recovery

21 Interim measures

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

Section 462.32 of the Criminal Code allows the judge to grant a warrant to search, seize and detain property if the judge is satisfied that there are reasonable grounds that the property could be subject to a criminal forfeiture order.

Section 462.33 allows the judge to grant a restraining order prohibiting any person from disposing of or dealing with the property except as authorised by the order. The judge must also be satisfied that there are reasonable grounds that the property could be subject to a criminal forfeiture order.

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?

All police forces may initiate investigations on their own accord. Victims or other parties with information may also trigger investigations by making a complaint to the Royal Canadian Mounted Police (RCMP), or the provincial or municipal police.

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) can also trigger investigations. The Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, Chapter 17, obligates designated financial institutions to report suspicious transactions to FINTRAC. It analyses these reported transactions, then shares information with the appropriate police force, which may then commence an investigation.

23 Confiscation – legal framework

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

If the offender is convicted of a designated offence and the Attorney General can prove on a balance of probabilities that the property is the proceeds of crime and that the offender committed the designated offence in relation to that property, the court must order the forfeiture of the property to the Crown (see section 462.37(1) of the Criminal Code).

Even if the offender is convicted of a designated offence, but the court is not convinced that the offender committed the designated offence in relation to the specific property, the court retains discretion to make a forfeiture order if it is convinced beyond a reasonable doubt that the property is nonetheless the proceeds of some crime (see section 462.37(2)).

When imposing a sentence on or discharging an offender, the court may order the offender to make restitution to the victims of the crime (see section 738). The value of the restitution imposed shall not exceed the harm suffered by the victim because of the offence. The court can issue a restitution order to compensate victims for property damage, bodily or psychological harm, the threat of bodily harm in the cases of close family members, and identity theft.

24 Confiscation procedure

Describe how confiscation works in practice.

See question 23.

25 Agencies

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

Depending on the nature of the offence and the location of the misconduct, one of the RCMP or the provincial and municipal police (or some combination) may be involved in investigating proceeds of crime. To the extent court assistance is required is as follows:

- the Attorney General of Canada is responsible if the designated offence in question is a contravention of a federal statute or regulation other than the Criminal Code (see section 462.3(3)); and

- the provincial attorneys general are responsible if the designated offence in question is a contravention of the Criminal Code (see section 462.3(4)).

FINTRAC may also be involved in cases involving money laundering or terrorism financing. In such cases, FINTRAC may also collaborate with other Canadian agencies including the Canadian Security Intelligence Service, the Canada Revenue Agency, Citizenship and Immigration Canada, and the Communications Security Establishment Canada.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Yes. The Criminal Code's broad definition of the proceeds of crime captures secondary proceeds. Section 462.3(1) provides the following definition:

any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of (a) the commission in Canada of a designated offence, or (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

The Criminal Code's broad definition of property reinforces this conclusion. Section 2 of the Code provides the following definition:

property includes [. . .] property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by the conversion or exchange.

27 Third-party ownership

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

Yes. The Criminal Code's definition of property includes property controlled by any person and converted property. In *R v Rosenblum*, the British Columbia Court of Appeal ruled that transferring property to a third party or close relatives does not prevent the court from ordering a forfeiture. The court can order the forfeiture if it is satisfied that the property is the proceeds of crime. Section 462.4 of the Criminal Code also gives the court the power to render any transfers of the property following its seizure or the service of a restraint order void, unless the recipient of the property paid valuable consideration and acted in good faith.

The court also has a discretionary power to order the return of property that would otherwise be forfeited to its lawful owner or a person lawfully entitled to possess it (see section 462.41(3)). A person must meet several conditions to be eligible for the return of property. The person must not have been charged with or convicted of a designated offence, must have acquired rights in the property in good faith, and must appear innocent of any complicity or collusion in a designated offence.

28 Expenses

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

Yes. Section 10 of the Seized Property Management Act, SC 1993, Chapter 37, directs the federal Minister of Public Services and Procurement and Accessibility to share the proceeds of disposition of a forfeited property with any Canadian law enforcement agency that participated in the investigation. Law enforcement agencies can thus recoup their costs from the forfeited proceeds.

29 Value-based confiscation

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

Section 462.37(3) of the Criminal Code allows the court to impose a fine instead of a forfeiture order if the property cannot be subject to forfeiture. The value of the fine must be equal to the value of the property. The court must also impose a term of imprisonment in case the

Update and trends

Over the past year, courts have clarified and strengthened the tools available to fraud victims for tracing and securing assets. For instance, in *2092280 Ontario Inc v Voralto Group Inc*, the Ontario Divisional Court confirmed that the risk of asset dissipation – a requirement for a *Mareva* injunction or ‘freezing order’ – may be inferred from evidence of fraud in the circumstances of the case. The ability to satisfy the asset dissipation requirement on the basis of such an inference eases the historical requirement of positively demonstrating that an alleged fraudster’s assets were being lost or removed, which was a difficult standard to meet in light of the often concealed nature of a fraudster’s private affairs.

In *SFC Litigation Trust v Chan*, the Divisional Court confirmed that an Ontario court can issue a worldwide *Mareva* injunction to freeze assets of an alleged fraudster abroad, even where there are no such assets held in the province. The Divisional Court held that an Ontario court’s in personam jurisdiction over the alleged fraudster (and satisfaction of the other *Mareva* injunction criteria) provided the basis to freeze assets abroad. This approach is likely to be adopted by courts across Canada, and expands the circumstances in which Canadian courts can freeze assets.

In addition, the Supreme Court of Canada recently considered

and addressed the proper approach to *ex turpi causa*, the legal doctrine that provides that ‘no cause of action may be founded on an immoral or illegal act’. Most often, consideration of the *ex turpi causa* doctrine has arisen where a company brings a claim that arises from, or is connected to, some wrongdoing by an insider of the company. Although the doctrine has at times been strictly interpreted (and therefore precluded companies’ claims somehow connected to wrongdoing), in *Livent Inc v Deloitte & Touche*, the Supreme Court confirmed a more modern, liberal approach. This approach emphasises that the *ex turpi causa* doctrine is designed to protect the integrity of the justice system and should be used sparingly, namely only when the individual wrongdoer would personally profit from the company’s claim. In doing so, the Supreme Court appears to have opened the door to further claims seeking to trace and recover misappropriated assets and hold responsible parties to account.

Finally, in October 2017, Parliament passed the Justice for Victims of Corrupt Foreign Officials Act, more commonly known as Canada’s ‘Magnitsky Act’. Following the lead of the US Magnitsky Act, the Act provides the Canadian government the authority to target and freeze the assets of foreign nationals determined to be responsible for, or complicit in, significant corruption or gross violations of internationally recognised human rights.

offender defaults on the fine. The fine is a discretionary power. Courts will consider the offender’s ability to pay and will generally not impose fines on offenders who lack property or assets (see *R v Savard*, Quebec Court of Appeal and *R v Neves*, Manitoba Court of Appeal).

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?

See question 23. In addition, for offences concerning criminal organisations and certain offences under the Controlled Drugs and Substances Act, SC 1996, Chapter 19, it is the offender who bears the burden of proof. The Attorney General need only demonstrate on a balance of probabilities that the offender engaged in a pattern of criminal activity for the purpose of receiving a material benefit, or that the offender’s legitimate sources of income cannot reasonably account for the value of all the offender’s property for the court to order forfeiture (see section 462.37(2.01–2.02) of the Criminal Code). If the Attorney General can prove either of these things, the offender must prove on a balance of probabilities that the property is not the proceeds of crime.

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?

Yes. See question 23 regarding restitution orders.

32 Confiscation of profits

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

Yes. Section 462.39 of the Criminal Code allows the court to infer that property was obtained or derived from the commission of a designated offence for the purposes of forfeiture, if the following requirements are met:

- the value of all the property of the alleged offender after the commission of the offence exceeds the value of that person’s property before its commission; and
- the legitimate sources of income of the alleged offender cannot reasonably account for this increase in value.

The Criminal Code’s broad definition of the proceeds of crime also includes any benefit or advantage that is derived from the commission of a designated offence, whether indirectly or directly (see section 462.3(1)).

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.

Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec and Saskatchewan have all passed legislation that allow for non-conviction based forfeiture. In non-conviction based forfeiture proceedings, the provincial Attorney General must demonstrate on a balance of probabilities that the property in question is a proceed or an instrument of unlawful activity. It is not necessary for the owner of the property to have been convicted, and even an acquittal does not protect the accused against forfeiture. Still, all provincial legislation has proportionality provisions. For instance, in British Columbia and Ontario, these prevent the judge from ordering forfeiture when it is ‘clearly not in the interests of justice’.

Provincial non-conviction based forfeiture legislation has survived a federalism-based legal challenge. In *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19, the Supreme Court of Canada ruled that Ontario’s forfeiture legislation did not encroach on the federal power over criminal law. However, challenges to the provincial regime based on the Canadian Charter of Rights and Freedoms are currently pending.

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?

Section 462.331 of the Criminal Code provides that, on the application of the Attorney General or a person the Attorney General authorises, the court may appoint a person to take control and manage seized property. When the Attorney General so requests, the court will appoint the Minister of Public Services and Procurement and Accessibility. The Seized Property Management Act authorises the Minister to manage and dispose of seized and forfeited property, including disposal through interlocutory sale or destruction. The Minister is responsible for property maintenance.

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.

The Department of Justice has an International Assistance Group (IAG). The IAG reviews and coordinates all mutual legal assistance requests made by (or to) Canada. Canadian prosecutors and law

enforcement authorities are encouraged to contact the IAG to discuss the procedural and legal requirements for making requests for mutual legal assistance to Canada. Generally, where assistance is sought from a country that is a party to a mutual legal assistance agreement with Canada, the agreement will set out the types of assistance available to Canada. Most agreements provide for wide measures of cooperation, including the following:

- search and seizure;
- compelling the production of documentary or physical evidence;
- compelling witness statements or testimony, including by video or audio link;
- transferring sentenced persons to give evidence or to assist in a Canadian investigation;
- lending court exhibits;
- enforcing restraint, seizure and forfeiture orders; and
- enforcing criminal fines.

Where there is a mutual legal assistance agreement with Canada, the IAG provides Canadian police and prosecutors with a standard treaty request template to assist them in drafting their request. Where there is no mutual legal assistance agreement with Canada, the IAG will provide a standard non-treaty request template.

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.

Requests for assistance regarding criminal matters should be submitted to the IAG.

A step-by-step guide entitled 'Requesting Mutual Legal Assistance in Criminal Matters from G8 Countries' was published as a result of the 2011 G8 conference and is readily available online (the G8 Guide). The G8 Guide has a section addressing Canada, which outlines that the following steps should be taken when requesting mutual legal assistance from Canada. The key steps are as follows:

- consult with the IAG before submitting the request;
- ensure the request is proportionate to the alleged crime;
- indicate the mechanism used to seek assistance. The request should identify the treaty, convention or other avenue of cooperation being used to seek assistance from Canada;
- identify the authority conducting the investigation or prosecution (in the requesting country);
- summarise the case;
- set out the applicable legal provisions. Include verbatim text of the relevant provisions, including applicable penalties; and
- identify the assistance being sought.

If the requesting state has a mutual legal assistance agreement with Canada, section 9.3 of the Mutual Legal Assistance in Criminal Matters Act allows the federal government to authorise federal or provincial attorneys general to enforce orders from a criminal court of the requesting state to seize or restrain property. In order to file such an order, the Attorney General of Canada must be satisfied that the person has been charged with an offence in the requesting state that would be an indictable offence in Canada.

If the requesting state lacks a mutual legal assistance agreement with Canada, the federal government can refer the request to the RCMP to commence a Canadian investigation and forfeiture proceedings under the Criminal Code. Section 11 of the Seized Property Management Act allows the federal government to enter into agreements with foreign states to share the proceeds of the disposition of the forfeited property if foreign law enforcement agencies participated in the investigation. The Freezing Assets of Corrupt Foreign Officials Act, SC 2011, Chapter 10, also allows the foreign government to freeze the assets or restrain property of a foreign state's foreign leaders and senior officials provided that certain preconditions are met.

37 Treaties

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

Canada is a signatory to the following international conventions that contain mutual legal assistance provisions covering asset recovery:

- the United Nations Convention against Corruption, UN General Assembly, A/58/422, 2003;
- the Inter-American Convention Against Terrorism, Organization of American States, AG/RES. 1840, 3 June 2002;
- the Convention on Cybercrime, Council of Europe Treaty No. 185, Budapest, 23 November 2001;
- the United Nations Convention against Transnational Crime, UN General Assembly resolution 55/25, 15 November 2000;
- the Terrorist Financing Convention, UN General Assembly, 9 December 1999;
- the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD, 17 December 1997;
- the Inter-American Convention Against Corruption Organization of American States, 29 March 1996; and
- the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

No. Only the Attorney General can apply for forfeiture orders, warrants and restraint orders.



Bennett Jones

**Maureen Ward
Nathan Shaheen**

**wardm@bennettjones.com
shaheenn@bennettjones.com**

3400 One First Canadian Place
PO Box 130, Toronto
Ontario M5X 1A4
Canada

Tel: +1 416 863 1200
Fax: +1 416 863 1716
www.bennettjones.com

Cayman Islands

Angela Barkhouse and Kenneth M KryS

KRyS Global

Civil asset recovery

1 Parallel proceedings

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

Parallel proceedings in civil and criminal matters that are based on the same set of facts are permissible.

However, a court may stay a civil proceeding if a defendant would be unjustly prejudiced by providing information in said proceeding that may incriminate him or her in future or current criminal proceedings.

Of persuasive authority is the case of *Panton v Financial Institutions Services Limited* [2003] UKPC 8, in which the Privy Council concluded that in order to obtain a stay of parallel civil proceedings, the defendant would have to show that he or she would suffer unjust prejudice in the ongoing criminal proceedings if they were to continue, taking into account competing considerations between the parties.

In particular, the burden of proof (should there be a stay in proceedings) will lie with the defendant, who must point to a real and non-notional risk of injustice: 'A stay would not be granted if it was deemed to be simply to obtain a tactical advantage by a defendant in criminal proceedings.'

2 Forum

In which court should proceedings be brought?

The structure of the court system is hierarchical, with appeals lying to the court above at each stage. The Summary Court is the first in the hierarchy, dealing with matters up to CI\$20,000, followed by the Grand Court, the Court of Appeal and, finally, Her Majesty's Judicial Committee of the Privy Council.

The Grand Court tries most types of civil disputes. In particular, the Financial Services Division hears complex commercial and trust disputes, which often arise in respect of corporate or trust entities, including the following:

- Cayman Islands-registered investment funds and exempted insurers;
- proceedings under the Companies Law;
- local and foreign bankruptcy proceedings; and
- proceedings for enforcing foreign judgments and arbitral awards.

3 Limitation

What are the time limits for starting civil court proceedings?

Limitation periods are imposed by the Limitation Law (1996 Revision). There are different limitation periods for different types of claims as follows:

- torts: six years from the date of the damage (three years for personal injury or if a motor vehicle caused the damage);
- contracts: six years from the date of the breach;
- claims by a beneficiary against a trustee for fraudulent breach of trust: no limitation period; and
- claims for the recovery of land: 12 years from the date when the right accrued (30 years if the claim is against the Crown).

Part III of the Law contains exclusions and extensions to ordinary time limits (eg, in cases of fraud, concealment or mistake as to when the wrongdoing becomes known).

As in other common law countries, it may be possible for a claimant and a defendant to mutually agree to a 'standstill', which would extend the statute of limitations. This may provide the defendant advance notice that the claimant will file a claim and therefore allow both parties an opportunity to resolve their differences without the limitations period becoming an issue.

4 Jurisdiction

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

Under section 11 of the Grand Court Law 2008, the Grand Court is a superior court of record of first instance, having unlimited jurisdiction in both criminal and civil matters; it exercises similar jurisdiction as is vested in and capable of being exercised in England and Wales by the High Court and its divisional courts.

The courts of the Cayman Islands have jurisdiction in the following circumstances:

- where a person resides in the Cayman Islands;
- where a company is incorporated in the Cayman Islands;
- where the dispute is about land in the Cayman Islands;
- where a trust is governed by laws of the Cayman Islands; and
- where a breach of contract or a tort has occurred in the Cayman Islands.

Personal service of a claim is required, or delivery to a registered office for corporate entities.

In addition, the court can permit service outside the jurisdiction if the defendant is not present in the Cayman Islands, subject to certain procedural practice. The court will not grant leave to such service unless the claimant provides a supporting affidavit setting out the cause of action demonstrating the following:

- it has a good chance of success;
- there is a real issue that the court should try;
- where the defendant is or is likely to be; and
- the method of service.

The method of service need not be in person, so long as it is in accordance with the law of the country in which service is to be effected.

A defendant can challenge jurisdiction, or argue that the court is the improper forum.

5 Time frame

What is the usual time frame for a claim to reach trial?

The time frame depends on the urgency of the application, the complexity of the matter and the availability of counsel, but the Grand Court has a good reputation for expediting matters when possible. Trials can occur within six months of the claim being filed, although a year is more likely.

6 Admissibility of evidence

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

Part IV of the Evidence Law (2011 Revision) provides statutory guidance on what is admissible. However, the rules may also be influenced by English pre-1999 case law as the approach taken to admissibility is generally very similar. If required, the courts may also seek guidance from the Supreme Court Practice (1999 edition) (White Book).

7 Witnesses

What powers are available to compel witnesses to give evidence?

Most parties to litigation are from outside the jurisdiction, so the court has limited power or authority to compel witnesses to give evidence. The court can make an order upon individuals, entities and third parties for the following:

- examination of witnesses either orally or in writing;
- production of documents; and
- inspection, photographing, preservation, custody or detention of any property.

However, the court uses its authority to compel witnesses with caution, and will only do so when it is necessary and justified.

8 Publicly available information

What sources of information about assets are publicly available?

Generally, there is limited information about assets that is publicly available. Cayman Islands-exempt entities are not required to file audited accounts.

Entities licensed or registered with the Cayman Islands Monetary Authority (CIMA) are required to file audited accounts, but that information is not public.

Vehicle registration is not available to the public.

The following information can be made available for a fee or by physical attendance:

- status of standing;
- registered agent and office details;
- annual registration fee payment history;
- real estate property ownership; and
- legal records (those held in other archives, eg, court records).

The following information about an entity may be obtained through a court order:

- company registrar filings;
- articles of incorporation and memorandum of association;
- directors' and officers' register;
- members' register;
- details of the beneficial owner; and
- registered encumbrances.

9 Cooperation with law enforcement agencies

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

The court can order the Financial Reporting Authority to provide information, documents or evidence to third parties pursuant to the Proceeds of Crime Law (2017 Revision).

Further, the Freedom of Information Law (2015 Revision) provides a right of access to information held by public bodies, except when disclosure of those records is exempt under Part III of the Law (ie, for reasons of national security, legal privilege and personal information).

10 Third-party disclosure

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

Two types of discovery actions available to a claimant are *Norwich Pharmacal* and *Bankers Trust* orders.

Norwich Pharmacal orders

A *Norwich Pharmacal* order is typically pre-action and is granted against a third party that has been innocently mixed up in wrongdoing, to force the disclosure of documents or information, which may identify another person (for example a wrongdoer or a potential beneficiary), or to identify the nature of the wrongdoing, both of which may be the subject of subsequent legal proceedings.

To the extent the disclosure identifies additional wrongdoing by the third party, it may be possible to use those documents but that cannot be the purpose for which they were sought. Moreover, one can, where appropriate, apply for a 'gag order' when seeking disclosure, which directs the party not to disclose that they have been ordered to provide information to a third party. This is particularly helpful where the respondent is a bank or a professional who may have duties to give notice to their clients of such matters.

In order to obtain a *Norwich Pharmacal* order, applicants will need to show the following:

- that there is a 'good arguable case' that a wrongdoing has occurred;
- that the person against whom the disclosure request is sought is involved, albeit possibly innocently, in the wrongdoing as more than a mere witness;
- that the respondent is likely to have the information sought (ie, it is not a fishing expedition); and
- that the order must be necessary and proportionate, and in the overall interests of justice.

Bankers Trust orders

As the name implies, *Bankers Trust* orders are used to obtain information from banks. Following *Bankers Trust v Shapira* (1980) 1 WLR 1274, the court can order discovery as follows:

- when there is good reason to believe (eg, as a result of tracing) that property held by the bank is, in fact, the property of the claimant;
- when documents produced by the bank will be used solely for the purpose of tracing money and not for any other purpose;
- when the claimant gives an undertaking in damages; and
- when the claimant undertakes to pay any and all expenses resulting from the bank giving discovery.

However, the following types of documents may be prevented from being disclosed:

- documents protected by legal professional privilege;
- documents tending to incriminate, or expose to forfeiture, the party who would disclose them;
- documents privileged on the grounds of public policy; and
- documents whose disclosure would breach the law (eg, confidentiality laws).

11 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?

Interim relief is available in the following forms:

- *Mareva* injunctions (freezing orders) to prevent dissipation of assets;
- *Anton Piller* orders requiring access to a defendant's property to search for and remove, or take copies of, documents or property, or both; and
- in the case of insolvency proceedings, an order appointing a provisional liquidator in company winding-up proceedings to prevent dissipation of the company's assets, or misconduct by the company's directors.

Mareva injunctions freeze the assets of a party pending further order or a final resolution of the court. To the extent the respondent is in a common law jurisdiction and he or she seeks to move or transfer assets without approval of the court, he or she can be found in contempt and, in some extreme cases, be denied the ability to provide a defence until he or she complies.

In addition, a *Mareva* injunction will normally compel an accounting from the respondent of his or her assets. However, the court can require that the party applying for the order provide security or a bond, also known as a cross-undertaking. The rationale for this is that

because it is such a draconian remedy, if the claim is not successful then the respondent may be entitled to damages for financial or reputational loss caused by having the injunction placed upon him or her.

An *Anton Piller* order can be obtained providing the right to search premises and seize evidence that is the subject matter of the dispute without warning the defendant. Applications for *Anton Piller* orders are made ex parte.

In order to obtain an *Anton Piller* order, the following must be demonstrated:

- that there is prima facie evidence of the wrongdoing;
- that the potential or actual damage is be very serious;
- that there is clear evidence that the respondent has incriminating evidence in his or her possession; and
- that there is a real possibility the respondent may destroy this material if he or she were to become aware of the application.

An *Anton Piller* order can prevent destruction of relevant evidence, and is particularly useful in ensuring electronic evidence on computers or mobile devices is preserved.

Insolvency mechanisms can also be used when a claimant seeks an order to appoint a provisional liquidator to secure the remaining assets for the benefit of creditors, particularly in cases where fraud or misconduct is alleged. Often, an application for a provisional liquidation can be made ex parte to avoid any 'tip-off' and dissipation or misuse of the company's assets.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

An individual or entity can also be found in contempt of court, which could result in a fine or imprisonment for up to two years, or both.

Ultimately, a court may rule in favour of the claimant if the defendant does not comply with disclosure orders or another order of the court.

13 Obtaining evidence from other jurisdictions

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

Information can be obtained through courts in other jurisdictions under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 subject to their being a contracting state party.

It is important to consider with local counsel what additional tools are available to foreign litigants seeking evidence in other jurisdictions and therefore available to claimants from the Cayman Islands. For example, a 'section 1782 discovery' is a tool available to a foreign litigant in legal proceedings being held outside the United States, seeking sanctions from an American court to obtain evidence for use in the non-US proceeding.

14 Assisting courts in other jurisdictions

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

The Grand Court Rules permit service of foreign proceedings under the Hague Conventions noted in question 13.

If seeking evidence from a witness who is present in the Cayman Islands, the foreign court must usually issue a letter of request seeking the assistance of the Grand Court, after which the witness may be examined before a judge of the Court and a transcript of the evidence is provided to the requesting court.

As set out in questions 10 and 11, the Grand Court can order the disclosure of documents for use in proceedings in another jurisdiction using *Norwich Pharmacal* and *Bankers Trust* orders, *Mareva* injunctions and *Anton Piller* orders to assist with asset preservation and evidence gathering.

However, a person cannot be compelled to give any evidence under an order that they would not have been compelled to give in civil proceedings in the Cayman Islands or in the country where the requesting court exercises its jurisdiction.

In addition, the Cayman Islands adopted the Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters, which provide a framework for strengthening court-to-court cooperation in cross-border insolvency cases. For example, a court may receive communications from a foreign court for the purpose of taking a matter under submission and rendering decisions, and may respond directly to them.

The Grand Court may make orders to do the following:

- recognise the right of a foreign representative to act in the Cayman Islands on behalf of a debtor;
- stay proceedings against a debtor;
- examine witnesses;
- have documents produced to it; and
- transfer property of a debtor to the representative.

15 Causes of action

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

As a common law jurisdiction, the main causes of action include the following:

- breach of contract;
- fraud;
- tort; and
- suit in equity (eg, unjust enrichment).

Within insolvency mechanisms a cause of action available to a liquidator, under statute and with the authority of the court, is the ability to challenge transactions that have not benefited the company, such as unfair preference claims (eg, gifts or transactions to related parties), wrongful or fraudulent trading and transactions at undervalue. These remedies are only available within the context of a liquidation.

Proprietary claims (tracing at law and in equity) are available; however, in the case of *Ahmad Hamad Algosaibi & Brothers (AHAB) v Saad Investment Finance Corporation Ltd and Others*, 2018, the Grand Court held that although the law may infer necessary transactional links to give rise to a tracing claim where there is a scheme 'specifically designed' to subvert the ability of creditors to recover misappropriated funds, the general rule remains that it is necessary to establish a chain of transactions in order to trace funds.

The Court then went on to make a number of other important observations for the law of tracing, in particular with regard to jurisdiction where it held that given the alleged misappropriations took place in Saudi Arabia, the proper law governing AHAB's equitable claims was Saudi law. As Saudi law does not recognise a proprietary remedy in these circumstances, it was not possible for AHAB to establish a proprietary base on which to establish its tracing claim.

16 Remedies

What remedies are available in a civil recovery action?

The court may grant the following available remedies:

- damages;
- compensation in equity;
- interim and permanent injunctions;
- restitution of property where a party has been unjustly enriched;
- declarations that property or assets are held in constructive trust;
- account of profits improperly made from a breach of trust or fiduciary duty;
- specific performance;
- order rescinding a contract (for example, owing to misrepresentation, mistake, duress or undue influence);
- rectification of a written contract;
- declarations as to the parties' rights relating to the matter in issue; and
- orders allowing the claimant to follow, trace and recover from trustees or a third party property that has been applied or transferred in breach of trust.

Although damages are generally intended to be compensatory, the court has the jurisdiction in limited circumstances to award aggravated damages if the defendant is shown to have acted deliberately or out of malice towards the claimant, and exemplary or punitive damages

where there are cases of oppressive, arbitrary or unconstitutional conduct by government agents, the defendant's actions were calculated to make a profit or where permitted by statute.

17 Judgment without full trial

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

Both claimants and defendants can apply for a summary judgment, which is an expedited hearing of the dispute based on affidavit evidence only.

The defendant opposing the application must file an affidavit addressing the merits of the claim.

The Grand Court will grant a summary judgment after the claimant has served the defendant – who has also given notice of intention to defend – but will only do so if it is satisfied that upon the evidence placed before it the claim or the defence has no realistic prospect of success.

Where there are disputes between the parties in relation to matters of law or fact that merit investigations at trial, the court will not grant a summary judgment.

A default judgment can be obtained when the proceedings have been properly served on the defendant but the defendant fails to respond to them.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

The post-judgment relief available is the same as that of interim remedies, including the following:

- restitution of property;
- order to provide an account of profits;
- declaration of assets held in constructive trust;
- declaration as to the parties' rights;
- order allowing the claimant to follow, trace and recover from trustees or a third party property that has been applied or transferred in breach of trust;
- freezing orders;
- appointment of a receiver over a trust's or company's assets; and
- appointment of a liquidator to enable the orderly winding up of a company and disposal of its assets.

19 Enforcement

What methods of enforcement are available?

The following enforcement options are available once a judgment has been obtained:

- seizure and sale of the judgment debtor's goods to satisfy the debt and costs of the execution;
- garnishee proceedings (where a person indebted to the judgment debtor is required to pay moneys owed directly to the judgment creditor);
- charging orders (providing security to the judgment creditor over the judgment debtor's assets);
- attachment of earnings orders; and
- appointment of receivers to aid enforcement of a debt.

Alternatively, a judgment creditor may be able to petition to wind up a company based on a foreign judgment debt on the basis that it is 'unable to pay its debts' (*Lhasa Ins Ltd* [1996] CILR N-3).

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?

Contingency fee agreements are currently not permissible except where the court has sanctioned liquidators to enter into contingency agreements with foreign lawyers (and that they are enforceable in the jurisdiction). Lawyers in the Cayman Islands are currently not permitted to enter into contingency fee arrangements.

With regard to third-party funding agreements, traditionally, the Grand Court has restricted funding for insolvent liquidation estates. Liquidators have a statutory power to sell the 'fruits of an action' to a third-party funder, subject to the approval of the Court. The Court will consider in particular, whether the funder has the ability to control or interfere with the litigation, in which case the agreement will be void on the basis of maintenance and champerty.

Although the doctrines of maintenance and champerty have yet to be formally abolished in the Cayman Islands, the court in *A Company v A Funder* (November 2017), being mindful of the law of maintenance and champerty in other common law jurisdictions, concluded that overall, a proposed funding agreement was legitimate on the basis that 'it did not corrupt public justice, undermine the integrity of the litigation process and give rise to a risk of abuse' (J Segal). The relevant factors in the court's decision were based around the relationship between the funder and the claimant, and the ability of the funder to affect litigation strategy.

Criminal asset recovery

21 Interim measures

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

The legal framework for interim measures in criminal asset recovery lies within the Proceeds of Crime Law (2018 Revision) (PCL). Interim and confiscation measures relating to proceeds of drug trafficking are dealt with according to the Misuse of Drugs Law (2017 Revision).

Pursuant to the PCL, the court can order the restraint of property as an interim measure if sufficient evidence is presented. Such orders prevent a person from dealing with realisable property held by him or her. The court may vary, set aside or make exclusions to the order.

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?

Investigations to identify and trace assets by law enforcement authorities are initiated by the Customs Department and the Royal Cayman Islands Police Service (RCIPS).

The CIMA has powers to investigate entities regulated by them under the Monetary Authority Law (2018 Revision). It can initiate investigative procedures and bring enforcement action against an entity or an individual that is in contravention of the regulatory regime.

In addition, under the Anti-Corruption Law (2018 Revision), the Anti-Corruption Commission can receive, consider and investigate reports of any corruption offences as set out in the Anti-Corruption Law, as well as detect and investigate suspected corruption offences, attempts to commit an offence or conspiracies to commit an offence.

23 Confiscation – legal framework

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

Pursuant to the PCL, courts shall have the power to make an order to pay such sum as the court thinks fit, if:

- a defendant is convicted of an offence or offences in proceedings before the court;
- the Director of Public Prosecutions (DPP) asks the court to proceed under the PCL; or
- the court believes it is appropriate for it to do so.

To calculate the benefit figure, the following shall be decided by the court or summary court:

- whether the defendant has a criminal lifestyle;
- whether the defendant has benefited from his or her general criminal conduct; or
- where it decides that the defendant does not have a criminal lifestyle, whether he or she has benefited from a particular criminal conduct.

24 Confiscation procedure**Describe how confiscation works in practice.**

The court will hear evidence put before it regarding whether the defendant has a criminal lifestyle, or has received benefit from a specific criminal act or conduct.

The defendant has the right to respond and defend accordingly. If the court decides against the defendant, it has the power to make a confiscation order enabling law enforcement agencies to seize property belonging to the defendant. The confiscation value will be calculated as per question 23.

Orders can also be applied to third-party holders of the property (ie, banks or funds) if the defendant's property can be sufficiently identified and is not mingled with that of third parties.

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

The RCIPS and customs officers are the main agencies active in the confiscation of criminal proceeds, in conjunction with the Attorney General or DPP. The CIMA and the Financial Reporting Authority can initiate investigations, including asset tracing.

26 Secondary proceeds**Is confiscation of secondary proceeds possible?**

There is no distinction under the law between primary and secondary proceeds; confiscation is possible across all realisable property.

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

Property that is considered a 'tainted gift' is realisable against a third party in the same way as it would be against the defendant.

Section 70 of the PCL sets out whether property acquired by third parties is considered a tainted gift based on whether the gift was connected with the defendant's criminal lifestyle, or made by the defendant at any time after the date on which the offence concerned was committed.

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

There are no provisions in the PCL regarding the recovery of costs by agencies; as such, it is not clear whether they would be recovered by a relevant state agency.

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

Where the court is satisfied the defendant has a criminal lifestyle, it shall decide the recoverable amount and make a confiscation order requiring him or her to pay the amount. The confiscation order is normally value-based.

Part 18(1) of the PCL specifies the available recoverable amount as the aggregate of the following:

- the total value (at the time the confiscation order is made) of all the free property held by the defendant minus the total amount payable in pursuance of obligations, which have priority; and
- the total value (at the time) of all tainted gifts.

If the available amount is less than the benefit, the court can order a lesser amount.

The court may also take into account any civil proceedings by a victim of an offence to which the criminal proceedings relate that have been, or will be, instituted.

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?**

In criminal matters, the burden of proof generally lies with the prosecution.

However, once the court has determined that the defendant has a criminal lifestyle or has benefited from criminal conduct, then property acquired or disposed of in the six years before the proceedings by the defendant will be considered for confiscation.

It will then be for the defendant to prove that the property was not acquired through a criminal lifestyle or from a criminal act in order to exclude it from any calculation.

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?**

Where the court grants compensation orders within criminal proceedings for victims of a crime, such orders may be satisfied from assets recovered through the confiscation process.

Though the court may take into account any information showing that a victim of an offence in criminal proceedings has instituted, or intends to institute, civil proceedings against the defendant, the court does not have express power to order that confiscated funds be used to satisfy civil claims.

32 Confiscation of profits**Is it possible to recover the financial advantage or profit obtained through the commission of criminal offences?**

The purpose of confiscation is to remove the value or benefit received from a criminal lifestyle or specific gain from criminal behaviour, therefore, any financial advantage or profit obtained is automatically caught within the available amount for confiscation.

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.**

The court can, in certain circumstances, enforce a judgment in rem against funds or assets to be recovered in matters involving proceeds of serious crime.

For the court to enforce in rem confiscation from overseas, it will, via formal request, seek a full description of the circumstances of the crime, the laws under which it is indicted (to allow for an assessment of whether the conduct would be criminal if committed within the Cayman Islands) and the reasons for believing that there is a connection with the Cayman Islands (eg, that there is relevant information to be obtained, or assets to be restrained and ultimately confiscated).

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?**

The court may make a receivership order, which places assets in the custody of a receiver to preserve their status, or enforcement receivership in which a receiver enforces against assets held in respect of any realisable property to which a restraint order applies. Once relevant expenses have been paid, any amount remaining in excess of the order is usually returned to the defendant or other owners of the property.

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.

Under the Criminal Justice (International Cooperation) Law (2015 Revision) (CJICL), the DPP is responsible for requesting mutual legal assistance from another country.

The Chief Justice is the designated central authority that can request mutual legal assistance based on the bilateral mutual legal assistance treaty with the United States under the Mutual Legal Assistance (United States of America) Law (2015 Revision).

The Cayman Islands can also implement legal tools provided within any of the United Nations conventions or other international treaties to which it is party. Although dual criminality is generally a requirement in all cases, technical differences in the categorisation of offences should not pose an impediment to mutual legal assistance.

The Cayman Islands is also party to the Asset Recovery Inter-Agency Network for the Caribbean (ARIN-CARIB), launched in 2017 to establish a network of contact points in the region and focus on all aspects of asset recovery activities and assistance. The network is an informal cooperative group based on the Camden Asset Recovery Inter-Agency Network, which is an effective law enforcement tool used among member countries for the expedient sharing of information, and use of multiple tools to trace, freeze or seize assets of an international criminal organisation. This can be useful for the process of asset recovery in providing information that can be used in a formal mutual legal assistance or letter rogatory process.

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.

Legal framework

The main avenue for provision of assistance by the Cayman Islands is the CJICL, which enables mutual legal assistance to be provided at the investigative stage of a matter where the conduct would constitute an offence in the Cayman Islands. Designated countries for legal assistance are listed in the Annex to the CJICL.

The PCL governs the registration or enforcement of confiscation orders made by courts of other jurisdictions. Requests for the enforcement of such orders may be made only by countries listed in the Annex.

The Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (EPOJ) enables the Grand Court to provide assistance to foreign courts in obtaining evidence in criminal and civil cases.

Requests are made through letters rogatory and can be requested by any country.

The Cayman Islands is party to certain United Nations conventions and other multilateral treaties (see question 37), which can form the basis of foreign legal assistance requests. It can also assist informally in accordance with the ARIN-CARIB network (see question 35).

Procedure

The DPP is charged with the responsibility for receiving and acting upon requests for assistance pursuant to the CIJCL (for those countries listed in the Schedule to the CIJCL) or the PCL.

The Attorney General will consider applications made under the EPOJ and the Misuse of Drugs Law.

The requesting court or tribunal must forward the letter of request to the Grand Court through the central authority as defined in the Hague Convention, although in practice the request is sent through diplomatic channels to the Governor of the Cayman Islands.

In preparing the letter of request the requesting court should ensure that the nature of the proceedings commenced against a person or entity is described in detail, and in the case of criminal proceedings the precise criminal charge brought against the accused person should be particularised. If granted, the evidence will be transmitted to the requesting court by the clerk of the Grand Court.

37 Treaties

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

As a British overseas territory, the Cayman Islands does not directly ratify treaties, instead where the United Kingdom considers it appropriate it extends treaties to which it is a party to the Cayman Islands by the mechanism of Orders in Council. These currently include the following:

- 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 Organisation for Economic Co-operation and Development’s Anti-Bribery Convention.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

The DPP is the only person formally entitled to bring criminal asset recovery proceedings.



Angela Barkhouse
Kenneth M Krys

angela.barkhouse@krys-global.com
kenneth.krys@krys-global.com

PO Box 31237
Governors Square, Building 6, 2nd Floor
23 Lime Tree Bay Avenue
Grand Cayman, KY-1205
Cayman Islands

Tel: +1 345 947 4700
Fax: +1 345 946 6728
www.krys-global.com

Cyprus

Andreas Erotocritou, Antreas Koualis and Irena Markitani

AG Erotocritou LLC

Civil asset recovery

1 Parallel proceedings

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

In general, there is no restriction in furthering civil proceedings in parallel with, or in advance of, criminal proceedings in relation to the same subject matter. Civil proceedings are normally furthered by the victim for restitution purposes, whereas criminal proceedings are primarily aimed at punishing the wrongdoer.

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

2 Forum

In which court should proceedings be brought?

Civil actions, such as claims for the recovery of assets (irrespective of their value), are brought in district courts, which have jurisdiction to hear at first instance any civil action unless the subject matter of the action falls within the exclusive jurisdiction of a special court, such as the Family Court or the Admiralty Court.

3 Limitation

What are the time limits for starting civil court proceedings?

Limitation periods for civil proceedings are mainly provided by the Limitation of Actions Law of 2012 (Law No. 66(I)/12) and are as follows:

- tort: six-year limitation period from the date of accrual of the cause of action, except for cases of negligence, nuisance or breach of statutory duty where there is a three-year limitation period from the date the injured person became aware of the cause of action;
- contract: six-year limitation period from the date of accrual of the cause of action;
- mortgage or pledge: 12-year limitation period from the date of accrual of the cause of action;
- bill of exchange, etc: six-year limitation period from the date of accrual of the cause of action; and
- cause of action for which no particular provision is made: 10-year limitation period from the date of accrual of the cause of action.

In the case of civil proceedings for fraud or where the defendant has intentionally concealed any fact relevant to the cause of action, the limitation period only commences when the claimant discovers or could, with reasonable diligence, have discovered the fraud or concealment.

4 Jurisdiction

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

In general, district courts have civil jurisdiction to hear and decide any action on a first-instance level as follows:

- when the subject matter of the action has wholly or partly arisen within the district of the court;
- when the defendant, at the time of filing the action, resides or works within the district of the court;
- when the subject matter of the action relates to immovable property within the district of the court; and
- where there is a binding jurisdiction agreement between the parties.

Additionally, district courts may acquire civil jurisdiction from specific legislation, international treaties and conventions, including EU Regulation 1215/2012 and the Brussels and Lugano Conventions, which supersede local laws.

The defendant can dispute a court's jurisdiction by filing a conditional appearance followed by an application to dismiss and set aside the proceedings, before taking any further steps in the proceedings.

If the defendant fails to act as provided above, then he or she may be deemed to have submitted himself or herself to the jurisdiction of the court, thereby waiving his or her right to dispute the jurisdiction of the court.

5 Time frame

What is the usual time frame for a claim to reach trial?

A claim in a district court usually reaches trial within two to four years from the filing of the relevant action.

This depends on, inter alia, any interim proceedings, such as applications for interim orders, which may be pursued within the time frame of the main proceedings, and the procedural behaviour of the parties during the period leading up to trial.

6 Admissibility of evidence

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

As a general rule, any oral, real or documentary evidence is admissible at court, provided it is relevant or connected to the matters in issue in the case.

Evidence that has been obtained by means contrary to the provisions of the Constitution of Cyprus, and evidence covered by privilege is inadmissible. Evidence obtained by illegal means, but not in contravention of the Constitution, may be admissible.

Opinion evidence is inadmissible; however, expert evidence and expert opinions are admissible where such evidence is required to determine an issue of scientific or technical nature.

7 Witnesses

What powers are available to compel witnesses to give evidence?

Any person within the jurisdiction of Cyprus may be compelled to appear in court to give oral evidence or furnish the court with documents, upon being served with a witness summons, namely a written direction by the court to appear at a specified time and date to give evidence. The court may issue a witness summons on its own motion, or further to an application by any of the parties, at any stage of the proceedings.

Additionally, the court may order any person who is present in the courtroom to give evidence, irrespective of whether said person has any connection with the proceedings, and that person will thereafter be regarded as having been summoned before the court by means of a witness summons.

The above are applicable to compellable witnesses; the classes of persons who are not compellable are very few.

If a person who has been summoned to give evidence and has been given reasonable notice of the time and place where he or she should appear for this purpose, fails to appear before the court and does not give sufficient reason for his or her failure, he or she may be compelled to appear before the court by means of an arrest warrant. Additionally, said person will be liable to imprisonment or a fine, and may be ordered to pay any expenses incurred as a result of his or her failure to appear in court.

If a person who appears before the court to give evidence, further to a witness summons or an arrest warrant, refuses to give evidence as requested and does not give sufficient reason for his or her refusal, he or she will be liable to imprisonment and a fine.

8 Publicly available information

What sources of information about assets are publicly available?

The primary sources of publicly available information about assets are the following:

- the Registrar of Companies, which maintains registers of officers, registered offices, registered shareholders and registered charges of limited liability companies and other legal entities. The identity of the ultimate beneficial owners of companies is not recorded and is not publicly available;
- the Intellectual and Industrial Property branch of the Registrar of Companies, which registers Cypriot trademarks, patents and industrial designs;
- the Land Registry, which maintains records of the holders of the legal title of real property, as well as records of all registrable interests on real property including mortgages and charges;
- the Department of Merchant Shipping, which maintains the Register of Cyprus Ships: where details of vessels registered under the Cyprus flag are recorded. The register includes the registered owner, details of the vessel and any mortgages registered on the vessel;
- the Department of Civil Aviation, which maintains the Cyprus Aircraft Register where aircraft with Cypriot nationality are registered. The publicly available information includes the owner and operator of the aircraft, and details of the aircraft; and
- the Road Transport Department, which holds details of the registered holders of licensed vehicles in Cyprus.

9 Cooperation with law enforcement agencies

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

There are no special rules or procedures for obtaining information and evidence from law enforcement and regulatory agencies for use in civil proceedings.

However, such evidence may be obtained via the normal routes of obtaining evidence in civil proceedings, such as by compelling witnesses to produce evidence at trial, or by pretrial disclosure orders.

10 Third-party disclosure

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

Third-party disclosure orders against innocent parties are available on the basis of the principle set out in the *Norwich Pharmacal* case.

A third-party disclosure order may be issued by a court when the following conditions are met:

- a wrongdoing was carried out, or arguably carried out, by an ultimate wrongdoer;
- the disclosure order is necessary to enable an action to be brought against the ultimate wrongdoer; and
- the person against whom the order is sought must, as follows:
 - be involved so as to have facilitated the wrongdoing; and
 - be able, or likely to be able, to provide the information necessary to allow the ultimate wrongdoer to be sued.

Pre-action disclosure orders are unavailable, however, the Supreme Court has recognised a litigant's right to raise proceedings against an innocent party solely for the purpose of pursuing the issuance of a disclosure order. Disclosure orders are normally sought together with gagging orders preventing the third party from notifying the ultimate wrongdoer of the disclosure proceedings and the prospective proceedings that may be brought against the ultimate wrongdoer.

Innocent third parties may also be compelled to give evidence as witnesses at trial.

11 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?

Owing to section 32 of the Courts of Justice Law No. 14/1960, in exercising their civil jurisdiction, district courts have a wide discretion to issue any interim order or appoint a receiver when it is just and convenient to do so, provided that the following conditions are satisfied by the applicant or claimant:

- there is a serious question to be tried at the hearing of the main proceedings;
- it is probable that the applicant will obtain a favourable judgment in the main proceedings;
- there is a great risk that, if the order is not issued, it will be difficult or impossible to do justice at a later stage; and
- the balance of convenience is in favour of the applicant.

The unfettered discretion of the district court to issue any order it deems necessary has been acknowledged by the Supreme Court, although the law does not codify the particular types of orders that are available.

The following types of interim orders preventing the dissipation of assets, pending the final hearing of the case, have been recognised and are frequently issued by courts:

- worldwide freezing injunctions prohibiting the defendant from disposing of, dealing with or otherwise reducing the value of his or her assets, up to the value of the claim;
- *Chabra* orders prohibiting third parties who hold property belonging to the defendant, but against whom there is no cause of action, from disposing of, dealing with or otherwise diminishing the value of the assets of the defendant that are in their control or custody; and
- receivership orders for the appointment of a receiver to hold, protect and preserve the assets of the defendant where there is cogent evidence to suggest that this is necessary under the circumstances.

As regards obtaining information from those suspected of involvement in fraud, the following types of orders have been recognised and are frequently issued by courts:

- ancillary disclosure orders for the disclosure of assets covered by freezing injunctions;
- *Norwich Pharmacal* orders for the disclosure of information that is necessary for instituting further proceedings; and
- *Anton Piller* orders ordering a person to allow the applicant's lawyers, a supervising lawyer, experts (if necessary) and other assisting personnel to enter premises, under his or her control, for the purpose of conducting a search in order to locate, collect and preserve evidence.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

Failure to comply with a court order constitutes contempt of court. The court, following a finding of contempt of court, may order the imprisonment of, the sequestration of the assets of or the payment of a fine by (or all of the above) anyone who does not conform to a court order, including an interim order.

Courts have also been willing to issue debarring orders, known as 'unless orders', preventing a non-compliant defendant from defending himself or herself until he or she complies with a court order.

13 Obtaining evidence from other jurisdictions

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

A request of a Cypriot court to a foreign court for assistance in gathering evidence in that jurisdiction for the purposes of civil proceedings pending in Cyprus may be made through letters rogatory or other letter of request, pursuant to the framework provided for in the Taking of Evidence Regulation 1206/2001 (where the foreign court is a European Union member state court), the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (where the foreign state is a signatory) or any other relevant international treaty or bilateral convention ratified by Cyprus.

14 Assisting courts in other jurisdictions

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

Civil courts in Cyprus may give assistance in connection with civil asset recovery proceedings in other jurisdictions by granting interim protective measures in Cyprus in aid of such proceedings.

Courts have been willing to issue interim protective measures in aid of foreign proceedings on the basis of provisions found in local and European legislation, or other international treaties, expressly empowering the courts to do so (ie, article 35 of EU Regulation 1215/2012).

The courts' power to grant interim protective measures in aid of foreign proceedings in circumstances when the court is not expressly empowered to do so by legislation or another treaty, has not yet been tested in Cyprus.

Courts may also provide assistance in connection with foreign proceedings by assisting in the gathering of evidence in Cyprus for the purposes of the foreign proceedings, on the basis of letters rogatory or other letters of request sent by the foreign court.

Additionally, it has been expressly recognised by the Supreme Court that hearing disclosure orders prior to hearings (ie, *Norwich Pharmacal* orders) can be sought in Cyprus for the purpose of collecting information and evidence to be used in proceedings in other jurisdictions.

15 Causes of action

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

Civil asset recovery cases are usually founded on causes of action in tort, contract and equity. The main causes of action in civil asset recovery cases are as follows:

- fraud: a cause of action founded in tort that covers statements and representations made fraudulently for the purpose of defrauding a claimant who was in fact defrauded and as a result has suffered damage (codified under section 36 of the Civil Wrongs Law, Chapter 148);
- conspiracy to defraud (deceit): a cause of action founded in tort that covers situations when two or more persons have made an agreement, the real and predominant purpose of which was to injure the claimant and the execution of the agreement caused damage to the claimant by lawful means, or one of the purposes of the agreement was to injure the claimant and the execution of the agreement caused damage to the claimant through unlawful means (common law tort of deceit acknowledged in *Christoforou v Barclays Bank Plc* (2009) 1 AAD 25);
- breach of contract: a cause of action founded in contract that covers substantial breaches of agreements as a result of which

the claimant has suffered damage (codified by Contracts Law, Chapter 149);

- fraudulent misrepresentation: a cause of action founded in contract, which includes the presentation of an untrue fact as true, including the active negligent concealment of a fact (codified under section 18 of the Contracts Law, Chapter 149);
- breach of fiduciary duty and trust: a cause of action founded in equity that involves the breach of a fiduciary relationship between the claimant and the fiduciary, whether a trustee or another professional, which caused damage to the claimant as a result (principle of equity codified under the Trustee Law, Chapter 193); and
- action for unjust enrichment: where the defendant has enriched himself or herself at the claimant's expense (usually failing a contract between the parties) and the enrichment is in all circumstances unjust (principle of equity).

Equitable causes of action such as breach of trust or unjust enrichment may entitle the claimant to proprietary remedies.

16 Remedies

What remedies are available in a civil recovery action?

In a civil recovery action, the usual remedy is an award for damages for losses suffered. Punitive damages may also be awarded at the discretion of the court, depending on the facts of the case.

Where damages are inadequate in all circumstances, perpetual injunctive relief, which prohibits the defendant from engaging in certain practices, or mandatory and specific performance orders for the performance of an action, may be issued.

Alternatively to the court awarding remedies to compensate the loss suffered by the claimant, the court may order the restitution of any gains, benefits and profits received by the defendant to the claimant, provided the court considers it suitable and fair in all circumstances.

Apart from remedies granted in personam, courts, pursuant to their proprietary jurisdiction, may make tracing orders for the recovery of property owned by the claimant, or impose a constructive trust over property for his or her benefit.

In addition, declaratory judgments may be issued on the rights and interests of the claimant, or obligations and liabilities of the defendant.

17 Judgment without full trial

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

Default judgments may be issued against a defendant for failure to file an appearance or a statement of defence in an action. Prior to entering a default judgment, the claim must be proved before the court, usually by the submission of an affidavit attaching all relevant exhibits.

Summary judgments are generally available in civil actions when the defendant does not satisfy the court that he or she has an arguable defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him or her to defend.

A summary judgment is unavailable when fraud is alleged by the claimant.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

Courts have a wide discretion to issue any order, pending the execution of the judgment, including freezing injunctions, disclosure orders and orders for the appointment of a receiver.

The jurisdictional basis for issuing interim orders post-judgment is the same as for the issuance of interim orders pre-judgment. Accordingly, courts need to be satisfied that the necessary conditions have been met and that it is just and convenient in all circumstances for the interim orders to be issued.

Courts have also been willing, upon the issuance of a final judgment in proceedings to extend pre-judgment interim orders (that would otherwise be automatically cancelled) post-judgment in aid of execution.

19 Enforcement

What methods of enforcement are available?

A money judgment may be enforced, directly after issuance, in one or more of the following ways:

- writ of movables: permits the seizure of movable property owned by the judgment debtor. The movable property may then be sold to satisfy the judgment debt;
- writ of attachment (garnishee proceedings): attaches funds or property held by a third party on behalf or for the benefit of the judgment debtor (deposits in bank accounts, etc), and orders the third party to pay the same to the judgment creditor against the judgment debt;
- memo: registration in the Land Registry of the judgment as a legal charge on the title of immovable property located in Cyprus and owned by the judgment debtor. The judgment debt shall be settled upon the sale of the property;
- writ of sale: orders the sale of immovable property located in Cyprus and owned by the judgment debtor. The sale proceeds are applied towards the judgment debt;
- charging order: attaches shares owned by the judgment debtor in a Cyprus company. An order for the sale of shares in satisfaction of the judgment debt is normally ordered simultaneously;
- order for the appointment of a receiver by way of equitable execution: orders a receiver to hold, preserve and ultimately sell in satisfaction of the judgment debt property owned by the judgment debtor. This means of execution is available where the ordinary means of execution fail, such as in cases where the judgment debtor is not the legal but rather the beneficial owner of property; and
- application for examination of judgment debtor: orders the judgment debtor to attend the court for examination for the purpose of ascertaining the amount he or she can pay per month in satisfaction of the judgment debt. Thereafter, an order for the repayment of the judgment debt via monthly instalments may be made.

A money judgment may be enforced outside the jurisdiction against property situated abroad pursuant to the provisions of EU Regulation 1215/12, by means of a European Enforcement Order in agreement with the provisions of EU Regulation 805/2004, by way of a European Order for Payment pursuant to the provisions of EU Regulation 1896/2006, or under the provisions of another international treaty or convention ratified by Cyprus.

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?

Funding of litigation proceedings is normally undertaken by the parties. A lawyer may negotiate the legal fees of litigation proceedings and can reach any special arrangement or retainer freely with his or her client.

The permissibility of conditional or contingency fee agreements and damages-based agreements has not yet been examined by the courts; however, such arrangements are in general not permissible because of offending the equitable principle against champerty: an agreement where a person who maintains an action takes, as a reward, a share in the property recovered in the action. Accordingly, lawyers involved in the conduct of litigation are precluded from taking a share in the property recovered in the action pursuant to a conditional fee agreement or a damages-based arrangement.

Additionally, there is no regulated framework or availability of after-the-event insurance.

Where a party is in financial difficulty as regards funding litigation proceedings, it may apply to the court for legal aid. However, such an application can only be made in criminal cases, family cases and cases on the infringement of human rights.

Courts do not have any cost-management powers other than the power to make costs orders at the end of proceedings or stages in the proceedings. The court has a wide discretion and power to grant different awards; however, the general rule is that the losing party bears the costs of the proceedings.

Costs orders are made on the basis of fixed-fee scale rules that are based on the financial value of the claim. The rules set out in detail the

minimum and maximum costs for each particular step and describe the service provided throughout the proceedings.

Costs recoverable under the court scales usually only cover a very small portion of the actual costs incurred in the litigation as legal fees. This applies especially in commercial litigation and civil assets tracing actions where the value of the claim is very high and the work to be undertaken is substantial and complex.

Criminal asset recovery

21 Interim measures

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

The legal framework for the issuance of interim measures in criminal proceedings before courts is founded in the Prevention and Suppression of Money Laundering Activities Law (L 188(I)/2007) and the Criminal Procedure Law, Chapter 155.

The Prevention and Suppression of Money Laundering Activities Law sets the framework for issuing interim freezing and charging orders in relation to the realisable assets of a person where criminal proceedings for the commission of a primary offence (as defined in the legislation) have commenced or are about to commence against him or her; or the Unit for Combating Money Laundering (MOKAS) has information that creates a reasonable suspicion that criminal proceedings for the commission of a money laundering offence can commence against him or her, and in either case the court is satisfied that there is reasonable cause to believe that he or she has gained benefit from the commission of a primary offence.

Freezing injunctions prohibit any transactions with the realisable property of the person against whom the order was issued. Charging orders create a charge over the interest of the person against whom the order was issued in realisable property, comprising of real property, stocks in Cyprus, property under trust, units under trust in Cyprus or funds in court. At any time after the issuance of a freezing order, the court may appoint a receiver to take possession, manage or otherwise deal with the property affected by the freezing order. Additionally, following an application from a public interrogator, the court may issue a disclosure order for the provision of information in relation to an offence under investigation, including information relating to the recovery of proceeds of crime.

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?

A court that has convicted a person for a specified crime but that has not yet imposed a penalty for the conviction, further to a relevant application by the Office of the Attorney General, investigates whether the defendant has obtained any proceeds from illegal acts or from the commission of a money laundering offence.

The Office of the Attorney General has the discretion to decide whether to apply for an investigation.

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 Prevention and Suppression of Money Laundering Activities Law provides the legal framework that regulates the confiscation of the proceeds of crime.

A confiscation order is issued with regard to the product of a specified offence, which is in the possession of the defendant, or the defendant's proceeds from illegal acts or from the commission of a money laundering offence, or both. The product of an offence is the financial advantage deriving directly or indirectly from a specified offence, including any investment or conversion of direct products.

Proceeds of the defendant from illegal acts or from the commission of a money laundering offence are the total amount of payments or remuneration that have been paid towards him or her, or the product of the illegal acts or money laundering offence.

In ascertaining the amount of income obtained as a result of the commission of illegal acts or the commission of a money laundering offence, the court will assume, unless the contrary is proved or the court considers it unjust to so assume in all the circumstances, the following:

- (i) that any property obtained by the defendant after the commission of the said offence, or obtained during the preceding six years before the commencement of the criminal proceedings against him or her, constitutes income, payment or remuneration from illegal acts or from the commission of a money laundering offence;
- (ii) that any property obtained by the defendant under (i) was obtained by him or her free of any charge or interest for the benefit any other person; and
- (iii) that any expenditure the defendant incurred during the period referred to in (i) was paid from the income, payment or remuneration the defendant obtained from illegal acts or from the commission of a money laundering offence.

However, in case the court considers that the amount of the defendant's property that can be realised is less than the amount that the court has calculated as proceeds from illegal acts or from the commission of a money laundering offence, then the amount to be confiscated shall be the amount that can be obtained from the defendant's realisable property.

24 Confiscation procedure

Describe how confiscation works in practice.

Upon the conviction of a defendant, the Office of the Attorney General may submit an application to the court for an investigation of the defendant's proceeds from illegal acts or from the commission of a money laundering offence, together with a report providing facts and evidence relevant to the defendant's proceeds or to the 'product of the offence'.

The defendant may dispute or admit the content of the report submitted by the Office of the Attorney General. In case the defendant disputes the report, she or he will be required to submit a report in response, detailing the reasons for the dispute and presenting evidence relevant to the amount that may be confiscated from his or her realisable property.

The court may then fix a date for the purpose of conducting the investigation.

Upon the conclusion of the investigation, the court issues a relevant judgment. In case the court concludes that the defendant has obtained proceeds from the commission of illegal acts or a money laundering offence, it shall issue a confiscation order before imposing a penalty on the defendant. Upon the issuance of an order for confiscation, the court shall specify whether the defendant will need to pay the amount to be confiscated immediately, sometime in the future or via instalments.

25 Agencies

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

The agency that is responsible for receiving, requesting and analysing suspicious transactions and other information relevant to money laundering is the MOKAS. It provides the police and other governmental authorities with information whenever this is deemed necessary.

Powers conferred to the MOKAS by the Prevention and Suppression of Money Laundering Activities Law include conducting searches for locating and tracing proceeds of crime and other property that may be the subject of a confiscation order.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

The criminal confiscation regime is a value-based system, as a confiscation order does not attach particular assets or property received by the defendant. The process is rather that the court calculates the value of the benefit the defendant received as proceeds of crime, and issues a confiscation order for the confiscation of any available property of the defendant equalling the value of this benefit.

For the purposes of establishing the value of the benefit received by the defendant as the proceeds of crime, the court will take into account any reinvestment or transformation of direct proceeds and any valuable benefit the defendant obtained as a result of the commission of crime.

27 Third-party ownership

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

It is possible to confiscate any property of the defendant that is held by a third party or a member of his or her family where the same was unlawfully transferred to them by the defendant.

Property is regarded as being unlawfully transferred as follows:

- where the defendant has transferred the property as a gift to a third party during the past six years before the commencement of the criminal proceedings against him or her, or at any time after the commencement of the criminal proceedings against him or her;
- where the defendant has transferred as a gift to a third party property that the defendant has previously accepted as a gift for the commission of a primary criminal offence, which was committed by himself or herself or another; or
- where the defendant has transferred the product of crime, directly or indirectly, to another who knows or ought to have known that the purpose of the transfer was to avoid the confiscation of said property, and this can be inferred from particular circumstances, including that the transfer was effected without consideration or with consideration that was significantly lower than the market price of the property.

In addition, in case no sufficient explanations have been provided for the manner in which members of the defendant's family acquired certain property during a summary inquiry process for ascertaining the benefit received by the defendant as proceeds of crime, the court is entitled to assume that any property owned by the defendant's family for which no sufficient explanations were provided, and that was transferred to members of the defendant's family during the preceding six years before the commencement of the criminal proceedings against the defendant, have been transferred to them from the defendant as gifts to avoid the law.

28 Expenses

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

Costs to the MOKAS for receiving, requesting and analysing suspicious transactions and tracing proceeds of crime, inter alia, for the purposes of applying for confiscation orders are not recoverable.

Costs of the court-appointed receiver for the purpose of executing a confiscation order in case the defendant does not comply with the same are paid with priority from the property confiscated by the receiver during the of execution of the confiscation order.

29 Value-based confiscation

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

See question 26.

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?

Generally, the burden of proof in a procedure to confiscate the proceeds of crime rests on the Office of the Attorney General.

However, pursuant to article 7(2) of Law No. 188(I)/2007, there is a rebuttable presumption that any property obtained by a defendant after the commission of an offence, or during the preceding six years before the commencement of the criminal proceedings against him or her, constitutes income, payment or remuneration from the commission of the offence. The Office of the Attorney General, therefore, bears the burden of proving that property was obtained by the defendant after the commission of the offence or during the preceding six years before the commencement of the criminal proceedings against him or her; following which, the defendant bears the burden of proving that the property in question does not constitute proceeds from crime, that it would be unjust for the above presumption to apply or that his or her realisable property is less than the proceeds he or she received from the commission of crime.

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 general, the confiscated property cannot be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction. At the same time, the issuance of a confiscation order does not preclude the victim or the complainant from raising a civil claim for damages against the defendant. However, the Office of the Attorney General may not submit an application for confiscation or proceed with the execution of a confiscation order where the victim or the complainant has raised civil proceedings for damages against the defendant.

32 Confiscation of profits**Is it possible to recover the financial advantage or profit obtained through the commission of criminal offences?**

Financial advantage or profit obtained as a result of the commission of a criminal offence for which the defendant was convicted may be subjected to confiscation.

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.**

A non-conviction confiscation order may only be made where the suspect is outside the jurisdiction or deceased.

There is no other basis for non-conviction based confiscation and no legal framework for in rem confiscation.

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?**

In case timely payment under the confiscation order is not effected by the defendant, the court may appoint a receiver to take possession of any proceeds of crime, liquidate any property owned by the defendant, receive any realisable property of the defendant held by another person, or execute a charging order by disposing, selling or liquidating the property subject to the charging order, or all of the above. Accordingly, the property confiscated is under the management of the court-appointed receiver who holds, manages, sells and liquidates the same.

After the conclusion of the liquidation process, the funds held by the receiver are applied against the amount payable under the confiscation order, provided the fees and expenses of the receiver are paid, including the expenses for the management of the property. In case the liquidated

proceeds of crime are not sufficient to satisfy the fees and expenses of the court-appointed receiver, the government pays the same.

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.**

By virtue of the Prevention and Suppression of Money Laundering Activities Law, freezing, charging and confiscation orders issued by Cypriot courts in relation to property located in a country outside Cyprus are transmitted to the competent authorities of the said country for execution, or service by MOKAS through the Ministry of Justice. With regard to EU member states, the relevant order should be transmitted together with a prescribed form, and can be transmitted directly by MOKAS to the relevant foreign authorities.

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.**

The Prevention and Suppression of Money Laundering Activities Law provides that a provisional order of a foreign court relating to the recovery of assets in the context of criminal proceedings may be enforced in Cyprus, following an application for enforcement submitted by the requesting state to the Ministry of Justice. The Ministry of Justice then forwards the application to the MOKAS, which may then submit the order to a Cypriot court for recognition and registration if it deems appropriate under the circumstances. Upon the registration of the order, it becomes enforceable within the jurisdiction. With regard to EU member states, the relevant order of a foreign court should be transmitted together with a prescribed form and can be transmitted directly to the MOKAS by the relevant foreign authorities.

The Prevention and Suppression of Money Laundering Activities Law sets out detailed rules and procedures with respect to requests of legal assistance by EU member states, whereas special procedures for requests of legal assistance may apply with respect to specified states, in accordance with bilateral or international conventions, which supersede the above-mentioned provisions of national law.

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

Cyprus is a signatory to the following international conventions:

- the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990;

EROTOCRITOU

Andreas Erotocritou
Antreas Koualis
Irena Markitani

andreas erotocritou@erotocritou.com
antreas.koualis@erotocritou.com
irena.markitani@erotocritou.com

1 Arch Kyprianou and Ayiou Andreou Corner
Loucaides Building, 6th Floor
3036 Limassol
Cyprus

Tel: +357 2537 0101
Fax: +357 2537 0102
www.erotocritou.com

- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005;
- the United Nations Convention against Transnational Organized Crime 2000;
- the United Nations Convention against Corruption 2003;
- the treaty between the government of Cyprus and the government of the United States of America on Mutual Legal Assistance in Criminal Matters Nicosia, 20 December 1999; and
- the European Criminal Law Convention on Corruption 1999.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

Criminal asset recovery powers cannot be used by private prosecutors. The Prevention and Suppression of Money Laundering Activities Law grants extensive powers to the MOKAS for the purpose of receiving, requesting and analysing suspicious transactions and other information relevant to money laundering in Cyprus, including conducting investigations and exchanging information with government bodies and the police. Additionally, applications for the issuance of freezing, charging and confiscation orders may only be made by the Office of the Attorney General, whereas asset disclosure orders may only be obtained following a public interrogator's request.

England & Wales

Jeremy Garson, Daniel Hudson and Gareth Keillor*

Herbert Smith Freehills LLP

Civil asset recovery

1 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 is no restriction on parties pursuing civil proceedings in parallel with, or in advance of, criminal proceedings regarding the same subject matter. However, a party to civil proceedings may apply for a stay if it can be shown that the continuation of those proceedings will cause a real risk of serious prejudice to actual or threatened criminal proceedings, which could lead to injustice (*Financial Services Authority v Anderson & Ors* [2010] EWHC 308 (Ch)). This is a high threshold that is rarely met by the party applying for a stay, and there is a strong presumption against allowing such a stay; it is not enough that both proceedings arise from the same facts (*R v Panel on Takeovers and Mergers, ex parte Fayed* [1992] BCC 524).

Courts have refused to grant a stay in many cases where the risk of prejudice can be addressed through the court's case management powers. In *Akciné Bendrovė Bankas Snoras v Antonov and another* [2013] EWHC 131 (Comm), the court refused to grant the defendant's application for a stay pending the conclusion of criminal proceedings in Lithuania, on the basis that prejudice would be suffered by delaying the claimant bank and its creditors the opportunity to pursue the claim. Instead, the court imposed a number of safeguards to address the risk of prejudice to the defendant, such as preventing the dissemination of statements of case and other defence documents beyond the claimant bank and its legal team, witnesses or experts without the court's permission. The court held in this case that the possible prejudice that may be suffered by the defendant through disclosing its defence in civil proceedings before it does so in criminal proceedings was not sufficient to grant a stay of civil proceedings.

In *Polonskiy v Alexander Dobrovinsky & Partners LLP and others* [2016] EWHC 1114 (Ch), the claimant was pursuing an action in the English courts against his former lawyers, alleging improper conduct in relation to the sale of a business. The claimant was also subject to criminal proceedings in Russia, and alleged that the defendants in the English civil proceedings were being given access to their privileged documents. The claimant argued this would have a 'chilling effect' on the criminal proceedings and sought a stay of the civil proceedings on this basis. The court refused to grant a stay, on the basis that the claimant's allegation lacked credibility and a stay would cause real prejudice to the defendants.

2 Forum

In which court should proceedings be brought?

The High Court of Justice hears the most complex claims, and claims with a value exceeding £100,000 should usually be commenced in the High Court. There are a number of separate divisions within the High Court, and claims based upon fraud will generally be brought in either the Commercial Court (within the Queen's Bench Division) or the Business List (within the Chancery Division), although there are also a number of other specialist courts that might be appropriate for certain cases.

Claims that relate to sophisticated financial products with a value of more than £50 million, that require particular expertise in the financial markets or that raise issues of general importance to the financial markets, will be managed in a specialist financial list.

Both the Commercial Court and the Business List are used to dealing with complex fraud cases with an international element, although cases involving foreign law and conflicts of law issues are generally brought in the Commercial Court.

3 Limitation

What are the time limits for starting civil court proceedings?

The Limitation Act 1980 governs the limitation periods for most types of claims, and provides that claims relating to contract and tort must, in general, be brought within six years of the date that the cause of action accrued.

Equitable remedies, including claims for specific performance and injunctions, are not subject to a statutory limitation period under the Limitation Act 1980. However, there is a doctrine called laches, which applies to equitable remedies and means that the court can decline to grant relief where there has been unreasonable delay in bringing the claim.

There is no limitation period for claims brought by a beneficiary to recover trust assets or proceeds of trust property, or where there is a claim for fraudulent breach of trust. In other cases that concern fraud, the limitation period will not begin to run until the claimant has discovered, or could with reasonable diligence have discovered, the fraud.

Claims in restitution are not dealt with in the Limitation Act 1980; however, the courts have found them to be quasi-contractual and to have a corresponding limitation period of six years.

A claim must be issued by the claimant before the expiry of the relevant limitation period. It is not necessary to have served the defendant by the expiry of the limitation period. However, the claim form must be served on the defendant within four months of being issued if it is being served in the jurisdiction, and within six months of issue if it is to be served out of the jurisdiction. If a claimant seeks to extend the period of validity of the claim form, an application must be made to court under Civil Procedure Rule (CPR) 7.6.

4 Jurisdiction

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

There are two separate regimes for jurisdiction in England. First, there is the European regime, which is governed by Regulation 1215/2015 (the Recast Brussels Regulation) and the Brussels and Lugano Conventions. Secondly, there is the common law regime, which applies where the defendant is not domiciled within the EU or EEA.

Under the European regime, the starting point is domicile, and a defendant who is domiciled in England can generally be sued in England. A defendant will be domiciled in England if he or she is resident here, and the nature and circumstances of that residence indicate a substantial connection with the jurisdiction (sections 42(2) and 41A(2) of the Civil Jurisdiction and Judgments Act 1982 (CJJA)). A defendant is presumed to be domiciled in England if he or she has been resident here for three months (section 41(6) of the CJJA; *Cherney v Deripaska*

[2007] EWHC 965 (Comm)). The material date of domicile is that on which proceedings are issued (*Panagaki v Apostolopoulos* [2015] EWHC 2700 (QB)).

If a defendant is not domiciled in England, but is domiciled in another EU country, then there are also certain exceptions that might give the English courts jurisdiction, for example:

- if the claim concerns one of the matters set out in article 24 of the Recast Brussels Regulation (such as immovable property located in the jurisdiction);
- if the parties have agreed that the English court shall have jurisdiction over the dispute (article 25 of the Recast Brussels Regulation); or
- if the defendant ‘enters an appearance’ in the proceedings, other than to contest jurisdiction (article 26 of the Recast Brussels Regulation).

When the defendant is domiciled outside Europe, jurisdiction will be determined under the common law regime. If a defendant can be personally served within the jurisdiction, regardless of how temporarily the defendant may be in the jurisdiction, then that will be a basis for jurisdiction (although the court’s jurisdiction may be challenged on several grounds, including that another jurisdiction is a more appropriate forum, the proceedings are an abuse of process or the parties have entered into a jurisdiction agreement in favour of another jurisdiction).

If the defendant cannot be personally served in the jurisdiction, then the claimant will need to obtain permission to serve out of the jurisdiction.

This requires the claimant to show that there is a good arguable case that the claim falls within one of the categories set out in Practice Direction 6B(3.1), that there is a serious issue to be tried and that England is the proper place to bring the claim (CPR 6.37).

If a defendant wishes to dispute jurisdiction, it must do so by filing an acknowledgement of service with the court and applying for an order that the English court lacks jurisdiction or that it should not exercise its jurisdiction. Such an application will need to be made within the prescribed time limit, which varies depending on where the defendant was served and in which court the proceedings were issued. A defendant will not be deemed to have submitted to the jurisdiction by acknowledging service in order to dispute jurisdiction, or indeed by appearing before the court to contest the validity of a freezing order that has been granted against that defendant.

The English civil courts also have jurisdiction to grant a freezing order over assets located within the jurisdiction and elsewhere (section 37 of the Senior Courts Act 1981), or a *Norwich Pharmacal* order requiring a non-party to proceedings who is involved in the defendant’s wrongdoing to disclose documents or information to the claimant. The court will be cautious in granting either of these orders given their onerous nature on the defendant or respondent. This is discussed further in question 11.

Following the vote on 23 June 2016 by the United Kingdom to leave the EU, it is unclear precisely how the rules on jurisdiction will be affected. Under the draft withdrawal agreement dated 19 March 2018, it is anticipated that there will be a transition period from 29 March 2019 to 31 December 2020 during which the current provisions of the European regime will continue to apply to proceedings commenced before the end of that transition period. However, arrangements for jurisdiction and enforcement from 1 January 2021 will depend upon the terms of any bespoke agreement that is made between the EU and the United Kingdom.

5 Time frame

What is the usual time frame for a claim to reach trial?

The time frame to trial depends on a number of factors, including the complexity of the case and the nature of the claims involved, but generally cases will come to trial in around 12 to 18 months. In complex cases, it can take more time than this before a claim reaches trial.

In appropriate cases, the court will grant an order for expedition. There is also a Shorter Trials Scheme, which seeks to achieve shorter proceedings and quicker trials in certain straightforward cases, although the Shorter Trials Scheme is unlikely to be available in fraud or asset recovery cases.

6 Admissibility of evidence

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

As a general rule, evidence must be relevant to the issues in dispute between the parties to be admissible. Evidence in civil proceedings ordinarily takes the form of documents and written witness statements. Witnesses will also usually be required to provide oral testimony at trial, and will be subject to cross-examination by the opposing party’s lawyer. It is possible, in some circumstances, for evidence to be given by video link. Witness evidence is subject to strict rules, and will not be admissible if it is deemed to be ‘opinion evidence’, as it is for the witness to give evidence of facts in his or her evidence, and not to draw inferences or conclusions from those facts.

There are, in relation to evidence, a number of exclusionary rules. These rules exclude, for example, evidence that is privileged or where its disclosure would be contrary to public interest. Prior convictions in English criminal proceedings are admissible as rebuttable evidence that the defendant committed the offence for which he or she was convicted (section 11 of the Civil Evidence Act 1968); however, foreign convictions are inadmissible as such evidence unless the issues in the foreign criminal proceedings and English civil proceedings are the same (*Assets Recovery Agency v Virtosu and another* [2008] EWHC 149 (QB)). Hearsay evidence will not be automatically excluded, unless it is not relevant or falls within another exclusionary rule (Civil Evidence Act 1995).

The general rule is that evidence that is relevant to the facts in issue is admissible, no matter how it was obtained. This means that evidence that is ‘tainted’ or unlawfully obtained is usually still admissible in civil proceedings. However, such evidence may be inadmissible if its use would breach the other party’s right to privacy under article 8 of the European Convention on Human Rights. In determining whether evidence is admissible, the court will seek to balance the competing interests of hearing the case with all probative evidence before it, against protecting the other party’s right to privacy and discouraging the conduct by which the evidence was obtained.

Parties to civil proceedings do not need to adduce evidence that is subject to the privilege against self-incrimination (ie, evidence that would expose them to criminal proceedings in the United Kingdom (section 14 of the Civil Evidence Act 1968)). However, there are certain exclusions to this rule, in particular where the proceedings relate to the recovery of property or execution of any trust. In such proceedings, a party will not be able to rely on this rule to be excused from answering questions relating to the property or complying with orders in relation to that property. However, any statements made in this scenario will not be admissible as evidence against that party in criminal proceedings concerning fraudulent conduct (section 13 of the Fraud Act 2006).

7 Witnesses

What powers are available to compel witnesses to give evidence?

A witness summons (formerly known as a subpoena) may be used when a witness is unwilling to provide evidence. This is usually served by the court and compels a witness to provide certain documents or give oral evidence, or both. The general rule is a witness summons is binding if served at least seven days before the date on which the witness is required to attend court. The summons may require the witness to provide documents either prior to or at trial. Should a witness fail to comply with the summons in relation to High Court proceedings, they may be held in contempt of court and could be fined or imprisoned.

A party should pay a witness reasonable expenses and compensation for his or her time. Conduct money (a sum sufficient to cover the witnesses’ expenses for travelling to and from court, and to cover the period they are attending court (Practice Direction 34A 3.2)) must also be deposited at the court upon serving a witness summons. However, not all payment arrangements for witnesses are appropriate.

A witness summons cannot be served out of the jurisdiction in order to compel a witness from outside the jurisdiction to provide evidence a letter of request is used. This is a request from the English court to the court in another jurisdiction to take and send evidence from a witness for use in proceedings. It requires an on notice application to the English court to issue such a request. The English court has discretion as to whether to send a request under different regimes and will

consider the materiality of the evidence sought and cost associated with procuring it. Once evidence has been obtained, the judge will decide its admissibility and weight.

Although there are powers available to compel a witness, parties should consider the strategic risk of using a potentially hostile witness to provide evidence in their case.

8 Publicly available information

What sources of information about assets are publicly available?

There are a number of sources of publicly available information on assets held in England. These include the following:

- Her Majesty's Land Registry: which records freehold and leasehold interests in real estate. The Land Registry lists all those who hold a registerable interest in the relevant asset and the nature of their interest;
- the Driver and Vehicle Licensing Authority: which holds details of the 'registered keeper' of licensed (taxed) vehicles in the United Kingdom;
- Companies House: which maintains a register of the officers of limited companies, the persons with significant control over the company (often the beneficial owners) and other comparable entities in the United Kingdom. Information held on the register includes filed accounts, mortgages and charges over the company's assets, and details of any insolvency proceedings;
- the UK Register of Civil Aircraft: which is maintained by the Civil Aviation Authority. Publicly accessible information includes the registered owner of aircraft and details of the aircraft, including the year it was built; and
- the UK Ship Register and Small Ships Register: which is maintained by the Maritime and Coastguard Agency, records details of ships. The Small Ships Register includes yachts and other pleasure craft.

Additionally, in January 2018 the government launched a proposal to create a public register of the 'persons with significant control' of any overseas company that owns or purchases UK property (or bids on government procurement contracts). It is anticipated that this information will be online by 2021.

9 Cooperation with law enforcement agencies

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

In principle, it is open to law enforcement and regulatory agencies to voluntarily provide information and evidence to parties in civil proceedings, although they are generally reluctant to do so, particularly if there are ongoing criminal proceedings and disclosure might prejudice those proceedings.

However, the Crown Prosecution Service (CPS) has published guidance setting out how it will respond to requests for information, which state as follows:

Information may only be supplied to a person with a genuine interest in the proceedings or contemplated proceedings in question. The various types of proceedings are considered later on, but examples include persons who are bona fide engaged in or contemplating civil proceedings, or solicitors or insurance companies acting on their behalf. Requests must also be scrutinised to ensure that the requested material is relevant to the proceedings and that the party concerned is not conducting a 'fishing' exercise.

It is also possible to apply to court for a third-party disclosure order (see question 10) against the law enforcement and regulatory agencies. However, when deciding whether to grant such an order, the judge will take into account considerations such as the interests of other persons (such as the person who has provided a witness statement), as well as wider public interest considerations.

It might also be possible to obtain information through a freedom of information request or a data subject access request.

10 Third-party disclosure

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

Where a party has grounds to believe that a third party is in possession of information or documents that may be relevant to a claim, he or she might be able to apply to the High Court for an order requiring the disclosure of that information. Possible options (which, depending on the type, may be taken before or after proceedings are issued) include the following:

- an order for non-party disclosure pursuant to CPR 31.17. This requires the applicant to demonstrate that the documents sought are likely to support the applicant's case or adversely affect the case of one of the other parties to the proceedings. The applicant must also show that disclosure is necessary to dispose fairly of the claim or save costs;
- an order pursuant to the *Norwich Pharmacal* jurisdiction (after *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133). The applicant must show that the respondent has become mixed up in the alleged wrongdoing to make him or her more than simply a mere witness, although it is not necessary to show that the applicant intends to bring legal proceedings in respect of the alleged wrong;
- a *Bankers Trust* order (following *Bankers Trust v Shapira* [1980] 1 WLR 1274). Such an order requires a third party to disclose any information that might assist the claimant in pursuing a proprietary claim. Such orders are typically sought against parties who inadvertently become mixed up in laundering the proceeds of fraud, for example, a bank;
- an order under CPR 25.1.1(g) 'directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets, which are or may be the subject of an application for a freezing injunction'; and
- an order pursuant to section 7 of the Bankers' Books Evidence Act 1879. The court may make an order allowing a party to civil proceedings to inspect and take copies of any entries in a banker's book for the purposes of such proceedings.

Additionally, under the General Data Protection Regulation (GDPR), which came into effect in May 2018, an individual can also make a data subject access request (DSAR) to obtain information on whether personal data is being processed about them. That information can be requested notwithstanding that the purposes of the request might be to use it in litigation. The DSAR is made to a data controller, which is often an employer. Under the GDPR, 'personal data' is defined as 'any information relating to an identified or identifiable living individual'.

11 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 courts in England offer claimants a wide range of interim remedies to seek to assist the victims of fraud. Such applications are usually made without giving notice to the defendant. If made without notice, the applicant must give full and frank disclosure to the court of any matters that might influence its decision (including those detrimental to the applicant's case).

If a claimant has solid evidence of a risk that a defendant may dissipate assets in order to frustrate the enforcement of a judgment, he or she may apply to the High Court, usually without notice, for a freezing order. The effect of such an order is to prevent the defendant from dealing with any of his or her assets above a certain monetary level, either within England and Wales, or worldwide. A freezing order can affect any asset that the defendant has the power, directly or indirectly, to dispose of or deal with as if it were his or her own, including assets not legally or beneficially owned by him or her, but under his or her control (*JSC BTA Bank v Ablyazov* [2015] UKSC 64). The order is binding on any third party with notice of it (such as banks).

In order to obtain a freezing order, a party needs to demonstrate that it has a 'good arguable case' in relation to its substantive claim. This means that the claim needs to be properly arguable, although it

is not necessary to persuade the judge that there is a more than 50 per cent chance of success.

Granting the order must be ‘just and convenient’ in the circumstances.

The party seeking a freezing order will usually need to provide a ‘cross-undertaking’ that it will compensate the defendant (and any third parties) if it is later found that the injunction should not have been granted and those parties suffered losses.

A freezing order will usually include a disclosure order compelling the defendant to confirm, on affidavit, the nature and location of his or her assets, which could even include a defendant’s interest in a discretionary trust (*JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139).

A freezing order can also be extended to parties against whom no cause of action actually lies. In *TSB Private Bank International SA v Chabra* [1991] 1 WLR 231, it was held that the courts have jurisdiction (now known as the *Chabra* jurisdiction) to grant freezing orders against not only parties to a cause of action, but also third parties who are not party to the claim; for example, if the third party holds assets, which are in reality assets of the defendant or judgment debtor, or is a potential judgment debtor.

In rare cases, the court may direct that a receiver takes control of the defendant’s assets and manages them pending the determination of the claim to prevent assets being dissipated.

If there is an immediate risk that evidence is likely to disappear, a claimant may apply for a civil search order. This order requires a defendant to permit the claimant’s lawyers, in the presence of an independent supervising solicitor, to enter premises occupied or controlled by the defendant in order to identify and preserve evidence relevant to the case. Where a claimant seeks to recover specific property from the defendant or the traceable proceeds of that property, the court (subject to certain requirements) can grant an order for the detention, custody or preservation of that property. The court may also grant a search order against a non-party to the proceedings, where they are believed to have relevant evidence and there is good reason to grant the search order to preserve that evidence (*Abela and others v Baadarani* [2017] EWHC 269).

Tracing orders may require the defendant to confirm his or her dealings with a specific asset or monies over which the claimant asserts a proprietary right. The claimant may also apply for an order that the defendant deliver up his or her passport to the court, to prevent him or her from fleeing the jurisdiction until he or she has complied with the disclosure provisions in the order.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

A wide range of sanctions can be used to deter parties from committing procedural breaches and encourage compliance with court orders, directions and rules. Sanctions available to the court include the power to make adverse cost awards against a defaulting party or even to strike out its statement of case, ultimately preventing it from pursuing or defending its case. Over the past few years, strict adherence to court orders, directions and rules have become a priority in civil litigation. The use, or threat, of sanctions ensures the smooth running of cases, avoiding unnecessary delays, and encourages efficiency.

A party who is sanctioned for failing to comply with a procedural deadline or order may apply for relief from the sanction under CPR 3.9. The court’s approach in respect of applications for relief from sanctions is to apply a three-stage test and consider the significance of the breach, reason for the breach and all circumstances of the case (*Denton v TH White Ltd* [2014] 1 WLR 3926).

A litigant or third party who deliberately acts in breach of a court order containing a penal notice (ie, a statement on the face of the order warning of the penal consequences of a breach) may be held to be in contempt. A contemnor may be fined, have his or her assets seized (also known as ‘sequestration of assets’) or even be committed to prison. Proceedings for contempt do not excuse the requirement to comply with the original order. Additionally, in *JSC BTA Bank v Khrapunov* [2018] UKSC 19, contempt of court was deemed to constitute the unlawful means element required for the tort of conspiracy. This means that third parties who assist a defendant to breach a freezing order could, in principle, be held liable for losses caused by that breach.

CPR 81 details the procedure by which the failure to comply with a judgment, order or undertaking may be enforced by contempt proceedings: by either an order for committal (with a maximum sentence of two years’ imprisonment or an unlimited fine, or both) or a writ of sequestration to seize property to satisfy the judgment, or similar. Deliberate failure to comply may also result in the opposing party applying to the court for a debarment order (as in *JSC BTA v Ablyazov* (No. 3) [2010] EWCA Civ 1141), preventing the respondent from pursuing or defending a claim, potentially in the form of a sanction attached to an unless order (eg, a court order stating that unless a party to the proceedings does some act by a specified date, its defence will be struck out).

CPR 81.4, which relates to the enforcement of a judgment, order or undertaking to do or abstain from doing an act, has extraterritorial effect. A committal application was made in respect of a foreign company director and served on him outside the jurisdiction when it was alleged that he was responsible for the contempt of a company that was subject to the jurisdiction of the English courts (see *Dar Al Arkan Real Estate Development Co v Al-Refai* [2014] EWCA Civ 715).

13 Obtaining evidence from other jurisdictions

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

The main route for obtaining evidence from other courts is through a letter of request (also known as a letter rogatory).

In relation to letters of request made to other courts in the EU, this is governed by Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters (the Taking of Evidence Regulation).

Requests made to courts outside the EU are governed by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention).

An application for a letter of request should be made to the court that is dealing with the substantive proceedings in support of which the evidence is sought.

14 Assisting courts in other jurisdictions

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

The United Kingdom is a signatory to the Hague Evidence Convention and will therefore comply with incoming letters of request from other signatory countries. The government has issued a guide (albeit now several years old) on the procedure and process for dealing with incoming letters of request from other courts. The guide can be found at http://webarchive.nationalarchives.gov.uk/20100210171843/http://www.tsol.gov.uk/Publications/letter_of_request.pdf.

In addition, English courts will grant freezing injunctions in England in support of proceedings in other jurisdictions, pursuant to section 25 of the Civil Jurisdiction and Judgments Act 1982 where there is reason to believe that the defendant to the foreign proceedings has assets in England. This will usually be limited to an injunction over assets in England, but in some rare circumstances (where the defendant is resident in England, and there are other good reasons) it might be possible to obtain a worldwide freezing order.

The test for such an injunction is the same as the test for a standard freezing order, including in relation to a good arguable case, except that the applicant must also demonstrate the following:

- that the order will not be ‘inexpedient’ (see *Motorola Credit Corporation v Uzan* (No. 2) [2003] 1 WLR 113);
- that it is related and ancillary to the foreign proceedings; and
- that, where the main proceedings are taking place in another EU country, there must be a ‘real connecting link’ between England and the assets that the applicant seeks to freeze.

Where a defendant has assets in England, it is also, in most cases, relatively straightforward to enforce a judgment from the courts of another jurisdiction in England, or to enforce an arbitral award.

15 Causes of action

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

English courts have developed a wide range of tools to assist the victims of fraud. Although there are a number of others, the main causes of action arising in civil asset recovery cases are as follows:

- Breach of trust or fiduciary duty: where a person is in a fiduciary relationship with another person (broadly, a relationship of trust, confidence and loyalty) there are a number of potential claims if that person acts in breach of trust or fiduciary duty. A claim for breach of trust or fiduciary duty can lead to proprietary remedies (see question 16 for further details).
- Dishonest assistance or knowing receipt: where a person who is liable on either the basis of dishonest assistance (if he or she acted dishonestly in assisting a fiduciary to breach his or her duties) or knowing receipt (where he or she received monies knowing that the fiduciary was in breach of duty).
- Conspiracy: there are two forms of conspiracy under English law: lawful means conspiracy and unlawful means conspiracy. The key difference is that in lawful means conspiracy it is necessary to show a predominate intention to injure the claimant, whereas in unlawful means conspiracy, although there must be an intention to injure, it does not need to be the predominant intention (although there must be some unlawful action involved in the conspiracy).
- Deceit or fraudulent misrepresentation: if a person makes a false representation, knowing it to be false or reckless as to the truth of the statement, intending that the representee will rely upon that statement, that person can be liable for losses suffered by the victim as a result of reliance on the statement (for example, if the representee entered into a transaction on the basis of the representation).
- Breach of contract: claims might be available where a party has breached its contractual obligations. Additionally, there might be claims against third parties to a contract who have induced a breach of contract.
- Restitution: a claim for unjust enrichment might be available where a party has been unjustly enriched at the expense of another party, for example, if an asset was transferred on the basis of a mistake.
- Other torts: such as bribery and conversion (using an asset not belonging to oneself).

16 Remedies

What remedies are available in a civil recovery action?

The usual remedy in a civil recovery action is damages for losses suffered. However, in cases of unjust enrichment there can be an order for the restitution of the asset. A fiduciary who has acted in breach of trust can be required to give an account of profits.

Where someone has received property that was transferred in breach of trust (or breach of fiduciary duty), the victim of fraud may be able to claim a proprietary remedy to recover the specific asset (which will be held on constructive trust), unless it has been transferred to a bona fide purchaser for value, without notice of the breach of trust. In certain circumstances, where a fraudster has dealt with the asset, a victim of fraud may be able to trace the proceeds of sale or a new asset bought with those proceeds, which may mean that the victim recovers any increase in value of the asset.

17 Judgment without full trial

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

There are several possible routes for obtaining judgment without the need for a full trial.

First, if a defendant fails to acknowledge service, or to file a defence, then the claimant can apply for default judgment. This is a straightforward application that is dealt with by the court administratively without the need for a hearing. A defendant can apply to set aside a default judgment, but he or she must do so promptly, and will only be able to get the judgment set aside if either the court is satisfied that there is a real prospect of successfully defending the claim, or it appears to the court that there is some other good reason the judgment should be set aside, and the defendant should be allowed to defend the claim.

Secondly, it is possible to apply for summary judgment, and an order will be made where the defendant has no real prospect of successfully defending the claim or issue, and there is no other compelling reason why the case or issue should be disposed of at trial. Although it is generally difficult to obtain summary judgment in fraud claims, it is possible to do so (see *Fern v Burford* [2014] EWHC 762).

Finally, in some situations, such as where a defendant is found to be in breach of freezing orders, it is possible to obtain an order debaring him or her from defending the proceedings. Such orders are very unusual, but do provide another potential route for a swift judgment (given that if the defendant is unable to defend the claim, the matter is more likely to come to trial quicker).

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

English courts will generally assist successful claimants. It is possible to obtain a post-judgment freezing order if there is a real risk that the judgment debtor will dissipate assets. In certain circumstances, it might also be possible to obtain an order appointing a receiver over assets.

There is also a power to require a judgment debtor (or an officer of a judgment debtor in the case of a corporate) to attend court to be examined about the assets of the judgment debtor. A person may be in contempt of court if he or she fails to comply with the order to attend court, or refuses to answer questions asked by the examiner.

19 Enforcement

What methods of enforcement are available?

There are a number of potential methods of enforcement available to a judgment creditor. These include the following:

- A third-party debt order: this enables the judgment creditor to obtain an order that a third party must pay to the judgment creditor monies that would otherwise be paid to the judgment debtor. For example, this might be an order against a bank requiring it to pay money to the judgment creditor.
- Attachment of earnings order: this enables a judgment creditor to obtain an order against the employer of a judgment debtor to require it to pay monies to the judgment creditor.
- Writ of control: an order that enables a High Court enforcement officer to take control of assets of the judgment debtor and to sell those assets to satisfy the judgment debt and the enforcement costs.
- Charging order: an order granting a charge over land that grants the judgment creditor a security interest, and enables the judgment creditor to seek an order for sale.

Additionally, it is open to a judgment creditor to seek to take action to commence an insolvency process in relation to a judgment debtor. For example, petitioning for the liquidation of a company based upon an unsatisfied judgment debt.

If a final injunction is obtained against the defendant, it may be possible to seek to enforce that injunction through contempt proceedings if a respondent does not comply with the injunction. A finding of contempt can result in a prison sentence.

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?

The main types of funding arrangements available to parties to commercial litigation are as follows:

- Conditional fee agreement (CFA): a CFA is an agreement under which the lawyer will charge no fee (or perhaps a discounted fee) if the case is lost, but the lawyer's normal fee, typically with an uplift (referred to as a 'success fee') if the case is won. For CFAs entered into after 1 April 2013 (subject to limited exceptions), the success fee is not recoverable from an opponent.
- Damages-based agreement (DBA): a DBA is an agreement under which the lawyer will charge no fee if the case is lost, but a fee calculated as a percentage share of any damages recovered if the case

is won. The Damages-Based Agreement Regulations 2013 contain restrictive provisions governing DBAs. These include an apparent ban on 'hybrid' DBAs, under which a lawyer could receive, for example, a reduced hourly rate as the case proceeds plus a share of damages on success; under the Regulations it seems a valid DBA must be a 'no win, no fee' arrangement. Where the case is successful, the opponent will be liable for costs assessed on a traditional basis (essentially a reasonable hourly rate for a reasonable number of hours spent on the case), so long as this is not more than the amount payable under the DBA.

- After-the-event (ATE) insurance: This refers to a policy of insurance taken out after a dispute has arisen. It typically covers the client against its potential liability for the opponent's costs as well as the client's own disbursements if the case is unsuccessful, and may also cover some proportion of the client's own legal costs. ATE premiums are not recoverable from the losing opponent (subject to limited exceptions).
- Third-party funding: This involves a commercial litigation funder with no connection to the proceedings agreeing to pay some or all of the client's legal costs in return for a share of any monies recovered. Where a third party funder is involved, ATE insurance will commonly also be taken out to cover the adverse costs risk.

There is no requirement to notify an opponent where the litigation is funded by any of these methods.

The courts have the power to manage the costs of litigation through a procedure known as costs management or costs budgeting. The regime applies to Part 7 multi-track cases in all courts unless (broadly) the claim is for £10 million or more. However, the court has discretion to disapply budgeting where it would otherwise apply, or to order budgeting where it otherwise would not apply.

If the rules apply, they require that, at an early stage of the litigation, all parties (except litigants in person) file and exchange budgets setting out their estimated costs for each stage in the proceedings. The court will then make a costs management order unless it is satisfied that the litigation can be conducted justly and at proportionate cost without such an order being made. The costs management order will record the extent to which the budgets are agreed and (to the extent not agreed) record the court's approval of the budgeted costs after making appropriate revisions.

In assessing costs at the end of the case, the court will not depart from the budgeted costs unless satisfied that there is good reason to do so.

The court also has a power to make costs capping orders, which limit the amount of future costs a party may recover. However, such orders are rarely used.

Criminal asset recovery

21 Interim measures

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

There are three distinct interim measures for the freezing or seizure of assets suspected to be the proceeds of crime. These measures are set out in the Proceeds of Crime Act 2002 (POCA).

First, under section 41 of the POCA, the Crown Court (the superior court of record for criminal matters in England and Wales) may make a restraint order. To make such an order, the court must be satisfied that a criminal investigation or prosecution has been commenced but not concluded, and that there is reasonable cause to suspect that the alleged offender has benefited from the criminal conduct that is the subject of said investigation or prosecution. It is not necessary for a court to be satisfied that a suspect will frustrate any later confiscation proceedings by dissipating his or her assets.

Such orders have the effect of prohibiting the defendant from dealing in any way with the restrained assets (these can include assets that are specified in the order, or the whole of the defendant's property) unless agreed by the prosecutor or permitted by the court, and are binding on third parties with notice of the order, as well as on the defendant. Deliberate breach of a restraint order is a contempt of court (*R v OB* [2012] EWCA Crim 67) and is punishable by a fine, imprisonment for up to two years or both. Similarly, attempting to put the assets out of the reach of the court to circumvent the restraint order may constitute an offence of perverting the course of justice (*R v Kenny* [2013] EWCA Crim 1).

The defendant subject to a restraint order may draw down a limited sum from its restrained assets for living expenses, with consent from the court, but may not withdraw funds to pay for legal expenses connected to either the restraint proceedings themselves or to the underlying criminal investigation or prosecution. A defendant subject to a criminal restraint order is not prohibited from incurring new liabilities (for example, legal fees); incurring a liability is not the same as diminishing the value of the defendant's assets (*Revell-Read v Serious Fraud Office* [2013] EWHC 1483 (Admin)). However, the third party to whom the new liability is owed runs the risk that the defendant will never be in a position to settle the liability.

Where restraint orders cover the whole of the defendant's property, it is common for an asset disclosure clause to be included in the order requiring the defendant to disclose to the court, and the prosecutor dealing with the restraint proceedings, information concerning all property, wherever situated, in which he or she has an interest.

Second, prosecutorial agencies may exercise the non-conviction based forfeiture provisions in Part 5 of the POCA by applying to the High Court for a property freezing order, pending the determination of any Part 5 claim. Such an order freezes the relevant property where there is a good arguable case that the property represents the proceeds of crime.

Third, an officer of either the police, the Serious Fraud Office or Revenue and Customs who discovers and seizes cash that he or she suspects may be the proceeds of crime, or intended for use in a crime, may apply to the Magistrates' Court for it to be detained pending the outcome of his or her enquiries (section 294 of the POCA). This power exists regardless of whether there is any criminal investigation. Once seized and detained, an application can be made to the Magistrates' Court to forfeit that cash.

Fourth, an enforcement authority (such as the Serious Fraud Office) may apply to the High Court for an interim freezing order to protect property that is subject to an unexplained wealth order (section 362J of the POCA, which was inserted by section 2 of the Criminal Finances Act 2017).

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?

The police are under a duty to initiate an investigation where, following a complaint, there is evidence that a crime has been committed. Other investigative bodies are subject to similar obligations, albeit these are subject to certain case acceptance criteria. Although investigative bodies will consider whether, in the circumstances, steps should be taken to prevent the dissipation of suspected proceeds of crime by a suspect, not all investigations into acquisitive crimes lead to the freezing of assets.

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 POCA provides the legal framework for confiscating the proceeds of crime. In particular, Part 2 contains provisions for recovering the 'benefit' obtained by convicted defendants from their offences, whereby the benefit is the value of any property or pecuniary advantage obtained by the defendant as a result of or in connection with the criminal conduct. However, this benefit concept is deliberately broad and can, in certain circumstances, lead to the recovery of an amount that is greater than that represented by the offence in question (eg, the 'criminal lifestyle' provisions outlined below). Corporate entities that commit criminal offences may be subject to confiscation proceedings in an identical manner to natural persons.

The Crown Court may order property used in the commission of any offence (sometimes called the 'instrumentalities of crime') to be forfeited pursuant to section 143 of the Powers of Criminal Courts (Sentencing) Act 2000. The Crown Court also has specific powers in relation to drugs, firearms, things for producing counterfeit goods and other similar items, by virtue of a number of other statutes, such as the Firearms Act 1968 and the Misuse of Drugs Act 1971.

24 Confiscation procedure

Describe how confiscation works in practice.

A defendant will be liable for confiscation proceedings where he or she has been convicted of an offence in the Crown Court and either the prosecutor or court has determined that a confiscation hearing would be appropriate, or where he or she has been convicted of an offence in the Magistrates' Court and is committed to the Crown Court for consideration of a confiscation order, at the prosecutors' request.

When considering a confiscation order against a convicted defendant under the POCA, the court must determine as follows:

- whether the defendant has benefited from the criminal conduct and, if so, what benefit has been derived; and
- the amount of the defendant's realisable assets available to settle a confiscation order (the 'available amount').

The court will then make a finding of the recoverable amount under the confiscation order, which will be the lesser of the benefit derived by the defendant from his or her criminal conduct and the available amount. The court will also specify the time in which the defendant is to pay and, upon failure to pay, the term of imprisonment the defendant is to serve.

If the available amount is less than the total benefit that the defendant derived from the criminal conduct, then the difference will effectively remain as an outstanding debt to the state. If it can later be shown that the defendant is in possession of assets that may be used to settle this outstanding debt, then the prosecutor may apply to reopen the confiscation proceedings.

The purpose of UK confiscation legislation was considered by the Supreme Court in *R v Waya* [2012] UKSC 51. In particular, the court in this case considered whether the lower courts had gone too far in certain decisions by breaching the principles laid down in article 1 of Protocol 1 of the European Court of Human Rights (ECHR) (A1P1), which protects individuals from state interference with their possessions, and the conditions and principles necessary to justifiably do so. The case concerned the purchase of a flat by the defendant, using a combination of legitimate funds and funds that the defendant had obtained by deception from a mortgage lender. In calculating the criminal benefit to the defendant, the first instance court deducted from the then market value of the house an amount proportionate to the legitimate funds that were used by the defendant to purchase the property. The Supreme Court did not agree with this approach, stating that the POCA bestowed a discretion on courts that allowed them to 'mould a confiscation order to fit the facts and the justice of each case', and that the POCA should be construed strictly in a manner that avoids violation of A1P1. The court therefore decided that judges should take a proportionate and common-sense approach, assessing the true benefit to the defendant and avoiding punitive confiscation orders that are disproportionate to the actual benefit obtained by the defendant. Section 6(5) of the POCA, as amended in 2015, places this decision on a statutory footing, providing that the court must consider the extent to which it is proportionate to make the defendant pay the recoverable amount, and must only make a confiscation order if proportionate.

The decision in *Waya* was applied in *R v Axworthy (Liam)* [2012] EWCA Crim 2889. The Crown conceded that a confiscation order for £22,010 (representing the value of a Land Rover that the defendant fraudulently reported stolen, and in respect of which the defendant made an insurance claim) should be quashed. The vehicle had later been recovered near the defendant's flat in Ibiza, meaning that a confiscation order for the total value of the car would be disproportionate to the benefit obtained by the defendant. Courts must now only grant confiscation orders that reflect the true financial benefit obtained by the offender.

When calculating benefit, no deduction is made for costs incurred in the perpetration of the fraud (*R v Chahal* [2015] EWCA Crim 816).

Where multiple defendants jointly obtain a benefit from criminal conduct, each individual defendant is separately liable for the whole amount of the benefit, and confiscation orders must be made against each defendant for the whole amount. However, each individual confiscation order will only be enforced to the extent that the sum in question has not been recovered in satisfaction of another confiscation order against one of the other defendants. In short, a payment by one defendant of an amount due under the confiscation order should go to reduce the amount payable by the others (*R v Ahmad* (Shakeel) [2014] UKSC 36).

Benefit

When ascertaining the defendant's benefit from his or her criminal conduct, the court must first ascertain whether or not that defendant has a 'criminal lifestyle'. This is defined in section 75 of the POCA and means that the defendant has:

- been convicted of one of a number of specified offences set out in Schedule 2 of the POCA, including fraud, money laundering, bribery and drug trafficking;
- engaged in a course of criminal activity (ie, been convicted of a number of offences within a defined period); or
- committed an offence over a period of at least six months, and benefited from that conduct.

If the court determines that the defendant has a criminal lifestyle, the court must make certain assumptions in calculating his or her benefit. These are that all property transferred to him or her and all expenditure met by him or her in the six years preceding the date of conviction, as well as any property held by him or her after the date of conviction, represent the benefit he or she has obtained from his or her criminal conduct. Section 10 of the POCA provides that these assumptions can be displaced if they are shown to be incorrect, or that a serious risk of injustice would result from proceeding on the basis of these assumptions.

If the defendant does not have a criminal lifestyle, the court must decide whether he or she has benefited from the particular criminal conduct in question. If so, the court must then calculate the benefit from that specific conduct (section 8 of the POCA).

Where the benefit from the defendant's conduct has been obtained by a limited company that is under the defendant's control, the court may, in limited circumstances, be invited to 'lift' or 'pierce' the corporate veil and attribute some or all of that benefit directly to the defendant. An example of such action being taken by the court is where a corporate structure has been deliberately used to conceal the benefit resulting from a crime (*R v Seager* [2009] EWCA Crim1303).

Available amount

The available amount is the total value of the defendant's 'free property', minus any priority obligations that have been satisfied (section 9 of the POCA). A priority obligation is either a fine or an order following a previous conviction, or a preferred (ie, secured) debt as defined by section 386 of the Insolvency Act 1986. The defendant bears the burden of proof for showing that the available amount is less than the benefit figure. If no sensible explanation has been provided as to what happened to the proceeds of an offence, a judge is entitled to find hidden assets in an amount equal to the full benefit figure (*R v Saben* [2013] EWCA Crim 575).

'Free property' is any property, including all real or personal property wherever located, money, choses in action and intangible property, in which the defendant holds an interest. It also includes the value of any 'tainted gifts' (ie, transfers at undervalue made to third parties after the relevant offence was committed or, where the defendant has a criminal lifestyle, within six years of the date the relevant offence was committed).

Variation of a confiscation order

The POCA provides for four circumstances in which a confiscation order can be varied:

- the benefit can be reconsidered if new evidence of the defendant's benefit becomes available (section 21 of the POCA);
- the available amount can be reconsidered if there is evidence to suggest that it was originally under-assessed (section 22 of the POCA);
- the order can be varied owing to the defendant's means being inadequate to meet the confiscation order (section 23 of the POCA); and
- an order can be made in the defendant's absence if he or she absconds (section 29 of the POCA).

A prosecutor is able to make applications for a variation order under sections 21, 22 and 29 of the POCA, and either the defendant or the prosecutor may make an application under section 23 of the POCA. In each case, the parties can consent to a variation without a hearing where there is no dispute. For a contemporary example of a confiscation order being varied, in June 2018 the Financial Conduct Authority successfully applied under section 22 of the POCA to increase the

amount owed under a confiscation order by Benjamin Wilson (who was convicted of fraud in 2014) from £1 to £31,905.33. The increase to the available amount was owing to Wilson receiving funds left to him after his mother's death in 2015.

25 Agencies

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

Numerous UK state agencies have powers to pursue the proceeds of crime under the POCA. They include the following:

- the Serious Fraud Office (SFO);
- the Financial Conduct Authority;
- the CPS (Proceeds of Crime Unit);
- Her Majesty's Revenue and Customs;
- the National Crime Agency; and
- the police.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

A confiscation order that is made under the POCA relates to the benefit that is derived from the defendant's criminal conduct, rather than being made in rem against any specific property. Once the court has determined the value of the defendant's true benefit (as opposed to the more punitive approach that has previously been taken by the courts – see above), any property held by him or her may be confiscated up to that value. This includes any asset acquired using the proceeds of the original offence (as well as any lawfully obtained property).

Where the proceeds of crime are used to obtain an asset, and that asset subsequently increases in value, the defendant's benefit will be deemed to include the increase in value (section 80 of the POCA). If, for example, a defendant buys property for £200,000 using the proceeds of crime, and the value of the property later increases to £500,000, the defendant's benefit will be £500,000. If the defendant in fact purchased the property using a combination of £100,000 of the proceeds of crime and £100,000 of legitimate funds, his or her benefit would be proportionate to the illegitimate funds used and, in this scenario, would be £250,000 (50 per cent of the value of the asset at the time the confiscation order was made). If the defendant has a criminal lifestyle – as defined by section 75 and Schedule 2 of the POCA – then all property held by him or her at the date of conviction will be assumed to be part of his or her benefit, unless he or she can displace that assumption (see question 24).

27 Third-party ownership

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

The value of property that has been transferred from the defendant to a third party may be included in the calculation of a confiscation order if the property is determined to constitute a tainted gift, for the purposes of sections 77 and 78 of the POCA. The provisions operate to catch transfers of property from the defendant to a third party where the consideration given by the third party is 'significantly less' than the value of the property transferred; the true value of that property is then included in the defendant's available amount for the purposes of making a confiscation order. The Court of Appeal held that the legal and beneficial interest obtained in property by the wife of a defendant subject to confiscation proceedings constituted a tainted gift owing to the lack of financial contribution made in *R v Hayes* [2018] EWCA Crim 682 (applying the principle in *R v Richards* [2008] EWCA Crim 184). Here the appellant sought to argue that no tainted gift had been made because there was no transfer of property from the defendant to the third party as the property in question was transferred from the unrelated vendors to the joint names of the appellant and his wife; therefore, there was no relevant transfer to constitute a tainted gift. The Court of Appeal dismissed this argument as artificial and stated that allowing it to succeed would undermine the statutory purpose of the confiscation regime.

Under section 10A of the POCA, third parties are entitled to make representations to the court during confiscation proceedings in relation to property that they hold, provided that (i) the defendant also holds an interest in the property, and (ii) the property is likely to be realised or

otherwise used to satisfy the confiscation order. After representations have been made, the court may determine the extent of the defendant's interest in the property.

Aside from their rights under section 10A, third parties who wish to challenge a finding that property held in their name is a tainted gift must do so at the enforcement stage. It is at the enforcement stage that an enforcement receiver is appointed (section 50 of the POCA) and where the order may become an order against certain assets. Section 69(3)(a) of the POCA provides that at the enforcement stage, a third party must be allowed to recover the value of any interest held by him or her in any assets that are the subject of an order.

28 Expenses

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

The Crown Court may make an order for costs (ie, expenses incurred) against the defendant where it considers it just and convenient to do so (section 18 of the Prosecution of Offences Act 1985). This may include costs incurred in the proceedings themselves as well as investigative costs (see, in a different context, *Neville (Westminster City Council) v Gardner Merchant Ltd* [1983] 5 Cr App R (S) 349). The POCA provides that a confiscation order will have priority over any other financial order imposed by the court, with one exception being the imposition of a compensation order. Case law suggests that it would be disproportionate to make an order for both confiscation and compensation where the loss that is the subject of the compensation order is also the criminal benefit under the confiscation order (section 13 of the POCA) (*R v Jawad* [2013] EWCA Crim 644). Costs will therefore only be recoverable if the defendant possesses sufficient assets, in the first instance, to satisfy the whole of the benefit derived from his or her offence.

29 Value-based confiscation

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

The UK criminal confiscation regime is a value-based system, and a confiscation order made under the POCA is not made in rem against any specific property that derives directly from the defendant's criminal conduct. Rather, the court first determines the value of the benefit that the defendant has obtained from his or her offence, and then seeks to identify any available property held by the defendant that can be confiscated to satisfy the outstanding benefit figure.

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?

Pursuant to the POCA, the burden of proof lies with the defendant in two circumstances. First, if the defendant meets the definition of criminal lifestyle as set out in section 75 of the POCA, there is an assumption that a benefit has been derived from his or her general criminal conduct. Therefore, the defendant must convince the court that, on the balance of probabilities, such an assumption is incorrect, or that applying such an assumption would result in a serious risk of injustice.

Secondly, the defendant also bears the burden of persuading the court that he or she does not have assets available to satisfy a confiscation order. If the defendant is unable to satisfy the court on this point, the court will make a confiscation order for the full benefit with a sentence in default. If the defendant is suspected of enjoying the benefit of property that is not readily identifiable – 'hidden assets' – he or she will have the difficult task of either providing evidence on the available amount or an explanation regarding the potential hidden assets. If he or she is unable to do so, the court will likely issue a hidden assets order (*R v Dhall (Harpeet Singh)* [2013] EWCA Crim 892).

In regard to the correct available amount to be taken into account in confiscation orders, the court will have regard to the principles laid down in *Wayfa*. For example, in *R v Yew (Gabriel Kok)* [2013] EWCA Crim 809, the court granted an appeal to reduce the value of a confiscation order, on the basis that the order failed to take into account the beneficial interest in the property that was held by the defendant's wife. Therefore, the court found that the property had been overvalued. When establishing the value of a confiscation order, it is necessary to have clear evidence of the true available amount.

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?

Under the POCA, the confiscated property will generally be used in order to satisfy the confiscation order prior to satisfying any other financial orders and debts owed by the defendant to unsecured creditors. This will include any civil claimants who cannot establish a proprietary claim against the seized assets (*Serious Fraud Office v Lexi Holdings plc* [2008] EWCA Crim 1443).

However, there are several exceptions to this general rule as set out in section 13 of the POCA. In particular, an order to compensate a party who has suffered loss as a result of the defendant's conduct will take priority if granted by the court pursuant to the Powers of Criminal Courts (Sentencing) Act 2000. Where the defendant has the ability to pay both the confiscation and compensation orders, the court can make an order for both sums to be paid separately, (but see *R v Jawad* in question 28).

32 Confiscation of profits

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

Financial advantage or profit obtained through the commission of criminal offences can be the subject of a confiscation order, as it constitutes the defendant's 'benefit' under the POCA. For example, in *R v Mabey & Johnson plc* [2009] the profits flowing from contracts obtained through bribing or corrupting foreign officials were the subject of a confiscation order.

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.

Under Part 5 of the POCA, the High Court is able to make an in rem confiscation order without a conviction where the Court is persuaded, on the balance of probabilities, that the relevant property is recoverable as the proceeds of crime. Although the respondents to Part 5 proceedings are the beneficial owners of the property in question, the POCA provides that the court may make an order vesting the property in the state, and the proceedings are effectively in rem. The POCA sets out the rules for tracing recoverable property similar to the equitable jurisdiction of the civil courts.

The SFO has previously relied on Part 5 to recover assets obtained by companies who have engaged in overseas corruption. For example, in July 2012, the SFO reached an agreement with Oxford Publishing Limited to recover over £1.9 million after it self-reported corrupt sales practices in Kenya and Tanzania. However, the practice of addressing corporate criminality by the use of these powers has been the subject of judicial criticism (eg, see the sentencing remarks of Lord Justice Thomas in *R v Innospec Ltd* [2010] Crim LR 665).

In addition to the Part 5 civil recovery order, the Crime and Courts Act 2013 has introduced an additional tool for tackling financial crime without having to resort to a criminal prosecution – the deferred prosecution agreement. Such an agreement can be entered into between a corporate body and the prosecutor, where the former agrees to comply with certain financial penalties and requirements imposed by the agreement. Criminal proceedings are initiated but are suspended while the agreement is operative. If the corporate body complies with the requirements of the agreement, the prosecuting authority will not pursue the criminal proceedings, enabling the company to avoid prosecution. There have been four deferred prosecution agreements in the United Kingdom to date: *Serious Fraud Office v Standard Bank Plc* [2016] Lloyd's Rep FC 102, *Serious Fraud Office v XYZ* [2016] Lloyd's Rep FC 509, *Serious Fraud Office v Rolls Royce Plc* [2017] Lloyd's Rep FC 249 and *Serious Fraud Office v Tesco Stores Limited* [2017] (unreported owing to reporting restrictions in place at time of publication).

Sections 1 to 9 of the Criminal Finances Act 2017 amended section 362 of the POCA so as to create a new regime of unexplained wealth orders. Under this new regime, from 31 January 2018, certain UK authorities have been able to require both individuals and

corporate bodies reasonably suspected of investment in or connection with a serious crime to account for possession of assets that appear to be disproportionate to their known lawful income, otherwise those assets will be presumed to be recoverable property. To make an unexplained wealth order, the High Court must be satisfied that there is reasonable cause to believe the respondent holds the property and that its value is greater than £50,000. It must also be satisfied that there are reasonable grounds for suspecting the respondent's lawfully obtained income would have been insufficient to obtain the property, and that the respondent is a politically exposed person or there are reasonable grounds for suspecting that the respondent or someone connected with them is, or has been, involved in serious crime.

Failure to respond to an unexplained wealth order within the prescribed time and without reasonable excuse will give rise to a presumption that the property specified in the unexplained wealth order is recoverable for the purposes of a civil recovery order, and may amount to contempt of court.

When a court makes an unexplained wealth order, it may also make an interim freezing order (see question 21).

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?

Where assets have been restrained pending a criminal trial, the prosecutor and the defendant's legal representatives will attempt to reach an agreement on how the assets should be managed. However, if an agreement cannot be reached, either party can apply to court to vary the order. Both parties, including the court, should have regard to the 'legislative steer' set out in section 69 of the POCA. This requires the restrained property to be preserved as far as possible in order to meet any later confiscation order.

In certain situations, the Crown Court may deem it necessary to appoint a management receiver over the defendant's assets (section 48 of the POCA). For example, the defendant may have property that he or she is incapable of managing while held on remand, or may own a corporate entity that cannot be run efficiently as significant management decisions must continually be approved by the prosecution. The management receiver has the right to receive remuneration for his or her services out of the defendant's assets, unless the defendant is subsequently acquitted and the restraint order discharged, in which case this responsibility should lie with the prosecution. This point was addressed by the Supreme Court in *Crown Prosecution Service v Eastenders Group* [2014] UKSC 26, in which the assets of a group of companies were being used to remunerate the receiver appointed following the making of a restraint order. The Court held that such remuneration would be a breach of Protocol 1, article 1 of the ECHR 1950 if it was later found that the restraint and receivership orders should never have been made. In such cases, the responsibility for the receiver's remuneration and expenses should lie with the CPS as it requested the receiver's work to be undertaken.

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.

Enforcing restraint orders under the POCA can be difficult, as they purport to freeze the defendant's assets regardless of where those assets may be located. Therefore, if the defendant's assets are located overseas, enforcing the restraint order in practical terms is likely to require cooperation of the court in the relevant jurisdiction. Such cooperation can be sought by way of a mutual legal assistance (MLA) request made pursuant to either section 7 of the Crime (International Co-operation) Act 2003 or, more likely, section 74 of the POCA (which makes specific provision for MLA requests in respect of restraint and confiscation matters).

Under section 74, the prosecutor may send a letter of request to the Secretary of State, which will then be forwarded to the relevant foreign state. The letter must contain the information set out in the UK

government's Mutual Assistance Guidelines (for further information see the 12th edition, available online).

Following the decision in *Perry and Others v SOCA* [2012] UKSC 35, there was doubt over whether the court had jurisdiction under Part 5 of the POCA to effect civil recovery orders for property located outside of the jurisdiction, or disclosure orders on individuals located outside of the jurisdiction. However, the Crime and Courts Act 2013 expressly extended the power of the UK courts in relation to both of these matters where there is a 'connection' between the case and the United Kingdom. *The National Crime Agency v Azam* [2014] EHCW 4742 and 3573 (QB) was the first case where a foreign state (in this case, Luxembourg) recognised and enforced a UK civil recovery order.

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.

Foreign bodies may send a letter of request to the UK Home Office for help in relation to the recovery of assets. The SFO or other equivalent body will then make an application for the restraint order under the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (ERO). The ERO provides the Crown Court with the power to make a restraint order over the assets of a defendant against whom criminal proceedings are active in a foreign state. Furthermore, there is also a mechanism under the ERO by which funds can be repatriated, if confiscation proceedings are determined against the defendant.

On 20 June 2018, a new EU regulation was informally agreed between the European Parliament and Council concerning the mutual recognition of freezing and confiscation orders. The new regulation seeks to make it quicker and simpler for EU member states to ask each other to freeze criminal assets or confiscate criminal property. The European Parliament is expected to adopt its first-reading position on the proposal on 1 October 2018, following which the Council is expected to formally adopt the regulation.

37 Treaties

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

The United Kingdom is a signatory to a number of international conventions on asset recovery, including the following:

- the United Nations Convention against Transnational Organized Crime 2000;
- the United Nations Convention against Corruption 2003;

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997;
- the European Council Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990; and
- the European Union Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union 2000.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

Section 6 of the Prosecution of Offences Act 1985 preserves the right of any person to bring a private criminal prosecution, meaning, in theory, any legal person may bring confiscation proceedings following that prosecution.

The number of private prosecutions brought by companies and high-net-worth individuals has grown exponentially over the past few years, possibly owing to cuts in funding and the lack of resources available to law enforcement agencies and regulators over the same period. Although there are some restrictions in bringing such a prosecution, and the cost of doing so can be substantial, private prosecutions can sometimes be used when a deterrent effect is important, or to bring cases that may not be possible to bring using the civil courts, for example, because of limitation or jurisdiction issues.

In 2014, the largest private prosecution brought by an individual in the United Kingdom to date resulted in a sentence of eight years' imprisonment being imposed on Ketan Somaia for defrauding an investor, Mr Mirchandani, of US\$19.5 million. This followed his conviction at the Central Criminal Court by a jury on 13 June 2014 of nine counts of obtaining a money transfer by deception, contrary to section 15A of the Theft Act 1968. Cases such as this are likely to increase in the United Kingdom following the Court of Appeal's judgment in *R (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 52, which held that private prosecutors may pursue confiscation proceedings even if they have no financial or personal interest in the outcome.

* *The authors thank Kevin Kilgour, Holly McCann, Elizabeth Court, Jessica Chappatte and Will Merry of Herbert Smith Freehills LLP for their assistance.*



HERBERT
SMITH
FREEHILLS

Jeremy Garson
Daniel Hudson
Gareth Keillor

jeremy.garson@hsf.com
daniel.hudson@hsf.com
gareth.keillor@hsf.com

Exchange House
Primrose Street
London
EC2A 2EG
United Kingdom

Tel: +44 20 7374 8000
Fax: +44 20 7374 0888
www.hsf.com

Greece

Ilias G Anagnostopoulos and Alexandros D Tsagkalidis

Anagnostopoulos

Civil asset recovery

1 Parallel proceedings

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

No.

2 Forum

In which court should proceedings be brought?

A victim of fraud may file an action in tort against the defendant with the competent court of first instance seeking restitution for the loss or damage sustained (article 914 et seq of the Greek Civil Code (GCivC)).

The general rule lies with the jurisdiction of the courts of the defendant's place of residence (article 22 of the Greek Code of Civil Procedure (CCivPr)) or, concurrently in the case of tort (article 35 CCivPr), of the courts of the location where the damaging incident took place or where such damaging effect is threatened.

With regard to the monetary value of the claim, as a general rule, Greek courts of first instance are divided into the following:

- courts of small claims: hearing disputes up to €20,000;
- single-member courts of first instance: hearing disputes from €20,000 to €250,000; and
- multi-member courts of first instance: hearing disputes exceeding €250,000.

3 Limitation

What are the time limits for starting civil court proceedings?

The right of the defrauded party to issue civil court proceedings lapses five years after the claimant has acquired knowledge of the commission of the fraudulent act and the party liable for compensation. Furthermore, the claim is proscribed after 20 years from the date the wrongful act was committed. If the fraudulent act also constitutes a criminal offence, which is subject to a longer limitation period, preclusion of the civil claims follows the latter (article 937 GCivC). The limitation period of the civil action is interrupted after filing said action with the competent court of first instance.

4 Jurisdiction

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

See question 2. Although the court may decide on its own initiative regarding matters of jurisdiction, the defendant could challenge jurisdiction by filing an objection during the stage of the filing of the pleadings.

5 Time frame

What is the usual time frame for a claim to reach trial?

According to the CCivPr, the claimant has to serve the civil complaint on the defendant within 30 days of its submission to the competent court. Should the defendant reside abroad or his or her address is unknown, the deadline is 60 days.

Following the submission of the civil complaint, a period of 100 days is granted to the parties to file their pleading, as well as all supporting evidence. For defendants residing abroad, the deadline is 130 days.

After the expiry of the above-mentioned deadline for the pleadings, the parties are granted 15 additional days to file their rebuttals. After expiry of the rebuttals deadline, the case file is considered complete and a judge is assigned to the case.

Within 30 days of assignment of the judge, a trial date is set.

6 Admissibility of evidence

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

All information obtained lawfully may constitute means of proof and be used as such in civil proceedings before the courts. The general principle is that evidence must be relevant to the case under consideration and focus on the factual basis of the civil action (article 335 CCivPr). Means of proof under article 339 of the CCivPr are as follows:

- the confession of a litigant;
- the inspection of premises;
- the experts' reports;
- the witnesses and their testimonies before the courts;
- the examination of litigants;
- the documents;
- the judicial presumptions; and
- the sworn written testimonies.

The evaluation of evidence is made freely by the court, except for facts stated in public documents or facts confessed by litigants, which are accepted as true. The court may weigh the specific means of evidence in any way it deems proper to reach its ruling (article 340 CCivPr). Moreover, the civil court's decision must expressly state the reasons that led the judge to reach his or her ruling.

7 Witnesses

What powers are available to compel witnesses to give evidence?

Witnesses cannot be compelled to provide evidence in civil proceedings.

8 Publicly available information

What sources of information about assets are publicly available?

- The Land Registry, which includes the following:
 - mortgage offices: in mortgage offices a property cannot be located by its address, but it is registered under the name of the owner of the property because properties are registered based on the legal titles (contracts) regarding their transfer; and
 - cadastre offices, which are gradually replacing mortgage offices;
- the General Commercial Registry (GEMH), which has been established by Law No. 3419/2005 to promote transparency when conducting commercial activity. It is expected that, once the GEMH becomes fully operational and functional, corporate information on all types of companies registered with the GEMH shall easily become publicly available to third parties, unless public disclosure

is not required or is prohibited by law. Until now, corporate information on the registration, corporate status, articles of association, existing directors and their duties, annual financial statements, etc, of companies was only publicly available, with respect to limited and public limited companies, through announcements of their corporate actions made in the Greek Government Gazette, available online at www.et.gr; and

- the Trademark Registry, which is accessible through the competent office of the Ministry of Development, Competitiveness, Infrastructure, Transport and Networks.

9 Cooperation with law enforcement agencies

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

Evidence from law enforcement and regulatory agencies may be obtained for use in civil proceedings. The litigant must file a request in which he or she has to specify the reasons for which he or she is interested in obtaining the evidence. Permission shall be granted by the prosecutor and the investigating judge, or by the president of the court (article 147 of the Greek Code of Criminal Procedure (GCCP)), on condition that the litigant proves that he or she has a legal interest in obtaining such evidence.

Moreover, if the litigant is a party in criminal proceedings who has access to documents of the case file, he or she may in principle use this evidence in civil proceedings.

10 Third-party disclosure

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

A litigant may file an application with the court for the presentation of a specific document by another litigant or a third party (article 450 et seq CCivPr). The party filing the application should expressly and in great detail specify in its application the document, disclosure of which is sought. An order granting or dismissing the application is issued by the competent court.

11 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?

In urgent circumstances, even before or after the commencement of ordinary proceedings, a claimant having legal interest may apply for an interim injunction or provisional order, seeking freezing of movable or real estate assets, or rights in rem over such assets, as well as claims with respect to them, mandatory injunctions, prohibitory injunctions and interim payments (articles 683 et seq, 691 et seq and 707 et seq CCivPr).

The range of such injunctions is wide, thus empowering the judge to shape them in the manner most appropriate for each particular case. Interim injunctions and provisional orders are granted upon application of the claimant to the single-member court of first instance, whereas provisional orders may also be issued ex parte, even without the service of a notice to the opposing litigant. Injunctions that are granted prior to the commencement of ordinary proceedings automatically cease to exist unless an action is filed by the claimant within 30 days or within the time frame set by the court.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

Punishment owing to failure to comply with interim measures is provided for by article 232A of the Greek Criminal Code (GCC). According to this article, anyone who intentionally fails to comply with a temporary order of a judge or court, or with a provision of a court decision by which they are obliged to act or to refrain from acting, may be punished by up to one year's imprisonment.

Also, article 397 GCC provides protection against a defendant who tries to conceal, transfer, destroy, etc, his or her property in order to prevent the enforcement of a judgment. According to this article, a

debtor who intentionally frustrates, in whole or in part, the satisfaction of his or her debt by damaging, destroying, transferring without value, concealing or appropriating without equivalent and marketable collateral any of his or her property, or who creates false debits of false contracts, shall be punished by imprisonment of up to two years or by pecuniary penalty.

13 Obtaining evidence from other jurisdictions

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

Judicial cooperation in civil matters is based on multilateral or bilateral translational agreements, or EU regulations. Greece is a signatory state to multilateral agreements within the scope of international organisations, such as the United Nations, the Council of Europe, the Hague Conference, etc. In this case, the Ministry of Justice operates as the competent authority that exchanges information in the field of civil law, acts as an intermediary authority for providing judicial assistance, facilitates the commencement and continuation of judicial procedures, etc.

Evidence located in foreign jurisdictions shall be obtained through the following instruments:

- European Council Regulation (EC) No. 1206/2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters; and
- the Hague Convention of 1970 on the taking of evidence abroad in civil and commercial matters.

Greece is also a party to numerous bilateral agreements with other states regarding civil matters.

14 Assisting courts in other jurisdictions

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

Recognition and enforcement of foreign judgments in Greece is done by virtue of EU law regulations with regard to judgments issued in EU member states, bilateral international conventions between Greece and other countries, ratified by the Greek parliament with regard to judgments issued by the courts of those countries, and the provisions of the CCivPr for judgments from all other countries.

EU regulations

Greece, as an EU member, is a party to and bound by the following EU regulations in the field of 'judicial cooperation in civil matters':

- European Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation);
- Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (EEO Regulation); and
- Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December creating a European Order for Payment procedure (EOP Regulation).

Judgments and payment orders issued in another EU member state and falling within the scope of application of the above regulations are automatically recognised in Greece and are declared enforceable under the Regulations' provisions. Reasons that would bar enforceability of such judgments in Greece are strictly those mentioned in the above regulations. The competent court for the declaration of the enforceability of an EU judgment in Greece is the single-member court of first instance (article 39 Brussels I Regulation). The relevant judgment is issued ex parte, on the basis of the documents submitted by the claimant. If the defendant so wishes, he or she may file an appeal before the competent court of appeal to challenge the judgment of the single-member court of first instance (article 43 et seq Brussels I Regulation). In such instance, a full hearing shall take place before the court of appeal, although no review as to the substance of the foreign judgment is allowed to take place (article 45(2) Brussels I Regulation).

Recognition and enforcement of foreign judgments based on the EEO Regulation and on the EOP Regulation is also made in accordance with the relevant provisions included therein.

Other foreign judgments

The recognition and enforcement of judgments issued in countries with which Greece has a bilateral convention regarding enforcement of judgments, or countries with which Greece has not entered into such a bilateral convention, is provided for in articles 323, 904 and 905 of the CCivPr.

Article 904(f) of the CCivPr provides that foreign judgments are enforceable in Greece, provided that they are declared enforceable by the competent single-member court of first instance in accordance with article 905 of the CCivPr. A foreign judgment is not declared enforceable in Greece unless the following apply:

- it is a title of enforcement in the country of issuance;
- it does not violate the Greek rules of public order; and
- it meets the requirements of article 323 of the CCivPr as follows:
 - it constitutes *res judicata* in the country of issuance;
 - the defeated litigant was not deprived of its right to a fair trial unless such deprivation was done on the basis of the applicable foreign procedural law that does not discriminate in favour of its nationals; and
 - the foreign judgment is not contradictory to a prior decision of a Greek court that constitutes *res judicata* between the same litigants on the same dispute.

15 Causes of action

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

In most civil asset recovery cases the victim may file an action in tort against the defendant with the competent court of first instance, seeking restitution of the loss or damage sustained (article 914 et seq GCivC). There is no fixed claim form and the content of an action in tort is determined by the claimant, provided that it meets the requirements defined in the CCivPr (articles 118 and 216 CCivPr). To this effect, an action in tort should at least contain the names and addresses of the litigants, the court to which it is addressed and the particulars of the claim (ie, factual allegations) that, if proved, would establish the action against the defendant along with the prayer for the relief sought. In the case of monetary claims, the action should also contain a statement of value. For an action in tort to be granted in favour of the claimant, the latter should expressly allege that the defendant acted in a liable manner (ie, under wilful default or negligence) and that the damage sustained is attributable to, and was the result in the normal course of action, of the tortious acts or omissions of the defendant.

16 Remedies

What remedies are available in a civil recovery action?

Damages shall be awarded as compensation for the pecuniary harm caused by the defendant. This may include loss of profits.

Moral damages could also be awarded in the form of compensation owing to non-pecuniary harm (psychological) as a result of the unlawful behaviour.

17 Judgment without full trial

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

The CCivPr stipulates specific provisions encouraging the resolving of disputes without the need for a full trial. In particular, as follows:

- Article 293 of the CCivPr, titled 'Procedure and results of conciliation', stipulates that litigants may, at any stage of the trial, reach a compromise, provided that the conditions of the law on the merits are fulfilled. The conciliation is done by means of a declaration before the court or the surrogate judge, or before a notary, and entails *ipso facto* the end of the trial. The minutes of the conciliation constitute an enforceable title (article 904(2) CCivPr).
- According to article 214A of the CCivPr, after the occurrence of pendency and until a final judgment is issued, litigants may attempt to reconcile through negotiation efforts regardless of the standing stage of the trial. The minutes of the agreement should be recorded in writing, signed by the parties and ratified by the judge or the presiding judge before whom the case is pending. The minutes of the conciliation constitute an enforceable title.

- Article 233 of the CCivPr stipulates that a settlement initiated and facilitated by the judge, before whom the case is pending, is possible in all court hearings provided that the nature of the dispute qualifies for settlement. These proceedings may be initiated after the commencement of the hearing of the case and at every stage of the trial until a final decision is reached.
- According to article 208 of the CCivPr, the judge of the district court (court of small claims) is obliged to make an attempt at conciliation of the litigants before he or she starts to hear a case. However, omitting such obligation does not nullify the procedure.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

The claimant may apply for an interim injunction or provisional order before the judgment becomes final.

19 Enforcement

What methods of enforcement are available?

Final judgments or first instance judgments that have been issued as provisionally enforceable may be immediately enforced. A certified copy of the enforcement order, which is provided by the presiding judge of the court that issued the relevant judgment, is required in order to initiate the enforcement procedure (articles 904 and 918 CCivPr). Once the order is served, enforcement actions may take place after three working days have passed (article 926 CCivPr).

Enforcement actions include garnishment (confiscation) of the defendant's assets and real estate property or auction of said assets and property, or both.

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?

Legal fees and expenses are usually paid by the client. The latter includes a court duty of 0.8 per cent of the claim value. Also, courts order the unsuccessful litigant to pay the 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.

Parties of limited financial resources can avoid legal costs based on the provisions of articles 194 to 204 of the CCivPr.

A person can be insured against future litigation expenses, based on his or her contract with the insurer.

Criminal asset recovery

21 Interim measures

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

Asset recovery is mainly regulated by Law No. 4557/2018, which contains provisions of freezing, confiscation and forfeiture of assets of illicit origin. Similar provisions are to be found in Law No. 4022/2011 on procedures to be followed in cases of corruption of high-ranking public officials, and in Law No. 3126/2003 on the criminal liability of ministers.

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?

A criminal investigation is initiated by the prosecutor following a criminal complaint (by an individual or entity, usually the victim of fraud) against certain persons, or information submitted to the Public Prosecutor's Office by another authority, or even information that has come to the attention of the Public Prosecutor's Office through the press or other sources. The prosecutor is also responsible for initiating and supervising investigations that may be performed by other agencies, for example, the Financial and Economic Crime Unit (SDOE).

In recent years, the SDOE has become the agency that primarily investigates cases of large-scale fraud, tax evasion, corruption and

money laundering. Other special departments include police departments (eg, organised crime or cybercrime), and they are bound by the rules of police conduct and the general provisions of the GCCP.

All agencies have powers of investigation but need to follow the general rules of the GCCP. For example, the SDOE has the right to perform searches and seizures of documents, but needs the presence or the authorisation of a prosecutor, magistrate or judge in order to search private premises or seize documents and data containing privileged information. However, agencies such as the SDOE and the Hellenic Financial Intelligence Unit (FIU) do not need an authorisation to obtain tax records and bank account information when conducting an investigation. Special judicial authorisation is always needed to obtain the content of confidential correspondence.

23 Confiscation – legal framework

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

According to article 42 of Law No. 4557/2018, during the main investigation the investigating judge, with the consent of the public prosecutor, may order the freezing of any accounts, securities or financial products and safe deposit boxes kept at a credit or financial institution, including those owned jointly with any other person (third person). During the preliminary inquiry, the freezing shall be ordered by the judicial council. Freezing may take place even at the earliest stages of information gathering by the FIU. In this case, the head of the FIU may freeze assets by issuing an order. The above-mentioned measures may also be imposed in respect of real estate property.

The order of the investigating judge and the judgment of the judicial council have the power of a confiscation report, and thus produce the same effects as confiscation, and shall be issued without prior summoning of the defendant or the third person. It is not necessary for the validity of the freezing order or judgment to mention any specific account, security, financial product or safe deposit box.

The interested party (the defendant or the third person) may appeal against the above orders to the competent judicial council within 20 days after the freezing order is served on him or her.

The value of the benefit, which was unlawfully obtained, is calculated by the authority that orders the freezing of assets. In principle, such benefit corresponds to the proceeds of the alleged crime.

These measures may be imposed provided there are well-founded suspicions that the above assets derived from the commission of money laundering or a predicate offence (such as fraud), or are subject to forfeiture according to article 40 of Law No. 4557/2018. Subject to confiscation are assets derived from a predicate or money laundering offence, or that were acquired directly or indirectly out of the proceeds of such an offence, or that constitute the means that were used or were going to be used for committing such offence.

In case of a guilty verdict, all frozen assets are confiscated according to article 40 provisions. In particular, assets derived from a predicate offence or the offences referred to in article 2, or acquired directly or indirectly out of the proceeds of such offences or the means that were used or were going to be used for committing such offences, shall be seized. If there is no legal reason for returning them to the owner according to articles 310(2) and 373 of the GCCP, they shall be compulsorily confiscated as a result of the court's sentence. Confiscation shall be imposed even if the assets or means belong to a third person, provided that such person was aware of the predicate offence or the offences referred to in article 2 of Law No. 4557/2018 at the time of their acquisition. Where the assets or proceeds no longer exist, have not been found or cannot be seized, assets of equal value (as at the time of the court sentence) shall be seized and confiscated. Their value shall be determined by the court. The court may also impose a pecuniary penalty up to the value of the said assets or proceeds if it rules that no additional assets can be confiscated or the value of the existing assets falls short.

Furthermore, according to the recently amended article 76 of the GCC, in case of a guilty verdict, all assets derived from the commission of a felony or serious misdemeanour, as well as all assets acquired (directly or indirectly) from the proceeds of such offences, are subject to confiscation. In case these assets have been 'mixed' with lawfully obtained assets, confiscation shall extend only to the value of the assets

that derived from the offence. Confiscation of assets is not enforced when it is deemed as a disproportionate measure (ie, it is highly likely that it will cause serious and irreparable damage to the defendant's livelihood or that of his or her family).

24 Confiscation procedure

Describe how confiscation works in practice.

The freezing order or judgment is served on the defendant, on the third person (in case of jointly owned accounts, securities, etc) and on the managing officer of the credit or financial institution. When the freezing order or judgment is served to the credit or financial institution, the safe deposit box cannot be opened and any withdrawal of money from an account or any sale of securities or financial products is null and void towards the state. Any officer or employee of the credit or financial institution who intentionally violates the above restrictions shall be punished with imprisonment of up to two years and a pecuniary penalty (article 42(2) of Law No. 4557/2018). In practice, assets remain seized or frozen until the end of the trial stage (ie, when the court's decision becomes final). In case of a guilty verdict, all assets that have been seized or frozen are confiscated by the state. If the defendant is found not guilty, previously frozen assets become available to the defendant or third parties.

25 Agencies

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

Agencies such as the SDOE and the FIU, along with the judicial authorities (the investigating judge and the prosecutor during the main investigation, or the judicial council during the preliminary inquiry) are responsible for tracing and freezing assets that are allegedly the proceeds of crime. Forfeiture of such assets can solely be ordered by the court that tries the case, if the defendant is found guilty of committing such crimes.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Yes. Confiscation extends to all assets derived from a predicate or money laundering offence, or acquired directly or indirectly out of the proceeds of such offence, or that constitute the means that were used or were going to be used for committing the offence.

27 Third-party ownership

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

Yes. Confiscation shall be imposed even if the assets or means belong to a third person, provided that such person was aware of the predicate offence or of the offences referred to in article 2 of Law No. 4557/2018 (money laundering offences) at the time of their acquisition (articles 42 and 40 of Law No. 4557/2018 and article 76 of the GCC).

28 Expenses

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

No.

29 Value-based confiscation

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

Confiscation of assets unrelated to the crime is allowed (if the assets that originated from the crime do not exist, or are untraceable or cannot be confiscated – article 40(1) of Law No. 4557/2018 and article 76(3) of the GCC). In principle, the value is calculated by the court that reached a guilty verdict, and corresponds to the proceeds of the alleged crime.

Update and trends

Anti-money laundering legislation, which is the key legislation for criminal asset recovery, is used extensively by the competent authorities in order to detect and prosecute corruption practices, large-scale fraud, tax evasion, etc, and freezing orders for assets are quite common even in the very first stages of an inquiry or investigation on thin evidence.

A number of high-profile cases of fraud have opened during the past year following evidence gathered by the FIU in relation to suspicious transactions or unjustified changes to the property of certain individuals and entities. The FIU has unlimited access to bank records, tax records, etc, and also the ability to exchange information with FIUs of different countries regarding money transactions and asset transfers to and from other jurisdictions. This information gathering has become very important in the way money laundering is correlated to corruption and financial crime cases. On many occasions, the findings of the FIU's investigations have become the basis for detecting and prosecuting serious criminal offences. However, the FIU's conduct has received some criticism (especially from defence lawyers) for over-aggressive tactics, which have a negative impact on defendants' procedural rights.

Judicial review of freezing orders is provided for but, in practice, is not effective enough because the judicial council, which examines the appeals against such orders, is reluctant to release assets when an inquiry of the FIU or an investigation of the prosecuting authorities is open. As a result, assets remain frozen for long periods, especially in cases that require lengthy and complex investigations.

Moreover, there have been steady efforts by the relevant enforcement agencies in detecting assets connected to tax offences. Large-scale investigations are carried out by the competent tax authorities with support from the FIU and the SDOE. Because anti-money laundering legislation provides for access to privileged information and efficient exchange of such information, it is used to detect undeclared assets as well as money transactions to and from other jurisdictions.

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?

In criminal proceedings, the burden of proof lies primarily with the authorities that are responsible for ordering the confiscation or freezing of the proceeds of crime, namely the head of the FIU, the investigating judge or the judicial council (see question 23). Although the defendant is not legally required to prove his or her innocence and the legality of the frozen or confiscated assets, in practice, he or she is expected to provide the authorities with all the necessary evidence in relation to the legitimacy of their origin.

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?

No. According to article 40 of Law No. 4557/2018 and article 76 of the GCC, the court that tries the case, if it reaches a guilty verdict, orders the forfeiture of all assets that have been previously frozen or confiscated. In this case, these assets are considered to be the property of Greece.

Nevertheless, confiscation shall not be ordered if the confiscated or frozen assets can be returned to their rightful owner (article 40(1) of Law No. 4557/2018 and articles 310(2) and 373 GCCP). The owner may participate in the criminal proceedings as a third party, requesting the return of the seized or frozen assets to him or her.

32 Confiscation of profits

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

Yes. See question 26.

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.

Yes. Proceeds of crime may be subject to forfeiture even when criminal proceedings have not been initiated or have been terminated because of the death, unavailability, etc, of the offender, or if the prosecution was terminated or declared inadmissible on other grounds. In these cases, forfeiture shall be ordered by the judicial council or by the court (article 40(3) of Law No. 4557/2018). These decisions are subject to appeal on the merits and on points of law according to articles 492 and 504(3) of the GCCP.

Owing to the punitive nature of forfeiture in criminal proceedings, non-conviction based forfeiture has been said to be in breach of articles 2(1), 7(1) and 96(1) of the Greek Constitution, which establish the principles of *nulla poena sine processu* and *nullum crimen, nulla poena sine culpa*.

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?

According to article 5 of Law No. 4478/2017, which transposed article 10 of the Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, following a decision of the Minister of Justice, Transparency and Human Rights, a new bureau shall be established that will be responsible for managing confiscated or frozen assets. In particular, the economic value of frozen property shall be preserved by taking all necessary measures (such as liquidation of stocks, etc), and confiscated property shall be used for public interest or social purposes.

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.

Law No. 4478/2017 transposed the relevant provisions of Framework Decisions 2003/577/JHA, 2005/212/JHA and 2006/783/JHA and of Directive 2014/42/EU. Greece now recognises and executes freezing and confiscation orders provided that the acts that give rise to them belong to certain categories of offences and are punishable in the issuing state by a custodial sentence of at least three years. For other offences, the principle of dual criminality applies.

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.

Greek authorities offer broad assistance to requests of mutual legal assistance concerning provisional measures in relation to the recovery of assets. Most enforcement agencies and the FIU, apart from being points of contact and competent to handle such requests by virtue of international instruments, enter into administrative agreements of cooperation, which enable them to exchange information faster and more efficiently. In principle, requests for freezing and seizing of assets are executed without significant delay if they meet the standards and criteria set in the relevant agreements for mutual assistance.

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

Greece is a signatory to the following conventions (non-exhaustive list):

- the European Convention on Mutual Assistance in Criminal Matters (1959);
- the Convention of the Council of Europe on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990);
- the UN Convention against Transnational Organized Crime (2000);

- the UN Convention against Corruption (2003); and
- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005).

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

Private prosecution does not exist in the Greek legal system.



A N A G N O S T O P O U L O S

Ilias G Anagnostopoulos
Alexandros D Tsagkalidis

ianagnostopoulos@iag.gr
atsagkalidis@iag.gr

Odos Patriarchou Ioakeim 6
106 74 Athens
Greece

Tel: +30 210 729 2010
Fax: +30 210 729 2015
www.iag.gr

Hong Kong

Nick Gall and Ashima Sood

Gall

Civil asset recovery

1 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. However, 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.

2 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.

3 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, enforcing a recognisance (ie, a conditional obligation undertaken by a person before a court), enforcing an award, and recovering 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, enforce any charge against him or her, or set aside the transaction affecting the property against an innocent third party who purchased the property with valuable consideration.

4 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 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 the following circumstances:

- 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 do the following 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.

5 Time frame

What is the usual time frame for a claim to reach trial?

The courts are generally quite busy. Assuming all goes smoothly, a matter can proceed to trial within 24 to 36 months of the commencement of proceedings.

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, the 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 if it is relevant to an issue in the proceedings. Evidence is relevant if it renders

the existence of a fact in issue 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:

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

7 Witnesses

What powers are available to compel witnesses to give evidence?

In criminal proceedings, the Court of First Instance and the District Court are empowered to issue a witness summons to compel the attendance of a person at court and to compel that person to give evidence or produce a document specified in the summons.

A magistrate is empowered to issue a witness order in relation to a witness called or whose statement was tendered at a preliminary inquiry, requiring that witness to attend and give evidence at the trial of the accused before the Court of First Instance.

A person who disobeys without just excuse a witness order or a witness summons requiring him or her to attend before a court, or refuses to be sworn or to give evidence when duly required to do so, whether or not he or she is the subject of a witness order or a witness summons, is guilty of contempt of that court.

As for civil trial, generally the parties are free to decide which witnesses they call and in what order. The attendance of witnesses in civil proceedings in the Court of First Instance can be enforced by a writ of subpoena issued by the Court Registry.

8 Publicly available information

What sources of information about assets are publicly available?

The following information about assets is publicly available:

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

9 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 the prevention or detection of crime, or for the purpose of legal proceedings within Hong Kong, is 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.

10 Third-party disclosure

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

Pre-action discovery

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 likely to have or 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, the witness can be compelled to do so by the serving of a writ of subpoena.

11 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 the following:

- 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 disclose, by affidavit, to the plaintiff 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.

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 court's 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. Although 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 for an order may be made to the court 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, 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 are as follows:

- 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 the following:

- 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 a statement of claim or an acknowledgement of service, the plaintiff may enter the following:

- (i) final judgment if the writ is indorsed:
 - for a liquidated sum (ie, an amount that is certain, fixed or agreed, or both); or
 - for 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);
 - for the detention of goods only;
 - for 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 the following:

- 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 following methods of enforcement are available:

- a writ of *feri 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.

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 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, 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 Organised 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 the following:

- 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 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?

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 Organised 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. This includes 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 Organised and Serious Crimes Ordinance.

The two Ordinances also have a wide reach in terms of place and time. They 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 following:

- the Commercial Crime Bureau;
- the Organised Crime and Triad Bureau; and
- the Joint Financial Intelligence Unit, which is jointly run with the Customs and Excise Department.

Update and trends

Hong Kong has recently introduced amendments to the Anti-Money Laundering and Counter-Terrorist Financing Ordinance with a view to extend the statutory customer due diligence and record-keeping requirements to cover designated non-financial businesses and professions (such as legal and accounting professionals, estate agents, and trust or company service providers) 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.

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?

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 Prosecutions 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?

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 through 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 the following:

- 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.

Although 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 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 taking evidence and the 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 following:

- 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 Hong Kong to follow;
- a statement setting out the wishes of the foreign jurisdiction 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 following are the international conventions or treaties to which Hong Kong is a party:

- 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 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

Domestically, 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 on its own, using the name Hong Kong, China, such as the Financial Action Task Force against Money Laundering.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

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



Nick Gall
Ashima Sood

nickgall@gallhk.com
ashimasood@gallhk.com

3rd Floor, Dina House
Ruttonjee Centre
11 Duddell Street
Central
Hong Kong

Tel: +852 3405 7688
Fax: +852 2801 7202
www.gallhk.com

Ireland

Gavin Smith and William Greensmyth

Walkers

Civil asset recovery

1 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 is no legislative rule that civil proceedings must be suspended pending the outcome of criminal proceedings. The onus is on the party seeking a stay of the civil proceedings to establish grounds necessary to enable the relevant court to make such an order. The test to be applied by the court in deciding whether the civil action can proceed before the criminal proceedings is whether there may be a real risk that prejudice might be caused to the criminal proceedings. The court will have regard to the extent to which it may be possible, by measures to be adopted in the criminal process, to minimise or ameliorate any such prejudice as might arise.

2 Forum

In which court should proceedings be brought?

The appropriate court is dependent on the amount of the claim:

- up to €15,000: the District Court;
- between €15,001 and €75,000: the Circuit Court; and
- greater than €75,000: the High Court.

In addition, for disputes of a commercial nature between commercial bodies where the value of the claim is at least €1 million, an application can be made to have the matter entered in the Commercial List of the High Court, which involves a detailed case management system.

3 Limitation

What are the time limits for starting civil court proceedings?

The Statute of Limitations Act 1957 (as amended) prescribes time periods within which different causes of action are to be taken in Ireland. If a particular cause of action is not commenced within the prescribed period as provided for in the Act, then it is said to be 'statute barred'.

In the case of a simple debt or a claim in tort or contract, the limitation period is six years. However, in cases of fraud the limitation period is regarded as having commenced on the date the claimant discovered the fraud or could with reasonable diligence have discovered it.

4 Jurisdiction

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

Irish courts generally recognise express choice of governing law in civil and commercial contracts between parties in EU member states under Regulation (EC) No. 593/2008 and the law applicable to contractual obligations.

In the case of non-EU member states, the courts will recognise a choice of law under common law rules subject to the following qualifications:

- courts can apply overriding mandatory provisions of Irish law; and
- the application of legal provisions may be refused if the application is manifestly incompatible with Irish public policy.

Irish courts will respect the choice of jurisdiction in a commercial contract in accordance with the provisions of Regulation (EC) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Irish courts can also accept jurisdiction to determine a dispute where they accept jurisdiction is not exclusive or where both parties agree to Irish courts accepting jurisdiction.

5 Time frame

What is the usual time frame for a claim to reach trial?

In the High Court, the usual time frame for an asset recovery claim to reach trial would be approximately two years from the date of issuance. However, where those proceedings are entered into the Commercial List (see question 2), the time frame can be significantly shorter, with the claim reaching trial approximately one year from the date of issuance.

6 Admissibility of evidence

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

The cardinal principle is that evidence is, in general, to be given orally. This is enshrined in the Rules of the Superior Courts, which also allow for a number of exceptions. This evidence is principally given by way of testimony in open court. However, in certain circumstances and actions, evidence is given by way of sworn written testimony on affidavit. In some limited situations, oral evidence can be taken on commission or before an examiner. Certain evidence can also be taken through the exchange of written interrogatories and replies.

In relation to documentary evidence, the 'best evidence' rule continues to apply in Ireland, namely that the original of a document should be produced. There are exceptions to the 'best evidence' rule, for example, copies of documents generally would suffice where the original is not capable of being produced (destroyed, lost or impossible to obtain).

7 Witnesses

What powers are available to compel witnesses to give evidence?

The general position is that anyone who is competent can be compelled to give evidence in a criminal or civil case. One is considered to be a competent witness if one is capable of giving admissible evidence in a court. If a witness receives a subpoena to attend court to give evidence and fails to do so, that witness can be found to be in contempt of court.

8 Publicly available information

What sources of information about assets are publicly available?

Land registration

It is possible to search the Property Registration Authority of Ireland (PRAI) website (www.landdirect.ie) to ascertain the ownership of property. There are two distinct forms of property registration: the Registry of Deeds and the Land Registry. The Land Registry is a more modern form of registration and the jurisdiction is moving towards that particular format for all counties. It is possible on the PRAI website to ascertain

when property was transferred, from whom and to whom, and also to ascertain whether the property is charged in favour of any third party.

Vehicle registration

In relation to vehicle registration, it is possible to request details of vehicle ownership from the national database. Similar databases are maintained in relation to aircraft and maritime vessels.

Company information and securities registration

It is possible to obtain a considerable amount of information in relation to Irish corporate entities. There is an obligation on limited corporates to file annual financial statements, which will disclose their financial performance together with management and ownership, including shareholder details. In relation to shareholding, there is no obligation on private companies to indicate whether a particular shareholding is held on trust for a named beneficiary.

In relation to publicly traded companies, there is a requirement to notify the Irish Stock Exchange when there is a change in the percentage of shares to above 3 per cent or more of the relevant share capital of a publicly traded company.

9 Cooperation with law enforcement agencies

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

The Freedom of Information Act 2014 asserts the right of members of the public to obtain access to official information to the greatest extent possible consistent with the public interest and the right to privacy of individuals. However, this does not extend to records concerning criminal case files.

Any person may make an application to the An Garda Síochána or to the Director of Public Prosecutions (DPP) for a copy of their personal data, as held by An Garda Síochána or the DPP. There is an exemption under section 5 of the Data Protection Act 1988 in respect of personal data kept for the purpose of prosecuting offenders where the disclosure of that data would be likely to prejudice such a prosecution. The exemption is finite and no longer applies after the prosecution process has concluded, allowing time for any appeals. There is also an exemption under the same section in respect of privileged material for which there is no such time limit. Only personal data in respect of the applicant can be provided, and all the personal data of other parties must be redacted unless such parties give their consent.

10 Third-party disclosure

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

Irish courts have granted *Norwich Pharmacal* orders on numerous occasions, requiring the respondent to provide information and documentation to the applicant.

In addition, where it appears to the court that any person or entity not a party to an action is likely to have or have had in their possession, custody or power any documents that are relevant to an issue arising or likely to arise, in the action, discovery of such documents may be directed by the court. The court must be satisfied that the documents are not available to the applicant from another source.

11 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?

Interim relief can include injunctions: requiring a party to either take or cease a particular course of action. *Mareva* injunctions are also a feature of Irish proceedings, which freeze a defendant's assets pending the hearing of the matter. *Anton Piller* orders are also available to claimants in Ireland. A European Account Preservation Order (EAPO) could also be sought.

If the proceedings relate to the disposal of land, it is possible to register a *lis pendens* over that land, which will directly impact on any proposed further disposal of the land while the proceedings are ongoing.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

Where a defendant fails or refuses to comply with the terms of a court order, that person may be committed to prison for contempt for an indefinite period until that person is willing to purge his or her contempt.

The courts may also make adverse costs orders or strike out pleadings for failure to comply with court directions.

13 Obtaining evidence from other jurisdictions

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

Ireland has not adopted the 1970 Hague Convention and, accordingly, if overseas witnesses are unwilling to cooperate, it would not be possible to compel them to do so by way of subpoena. However, an application can be made for letters rogatory (letters of request) to be issued to the courts of the appropriate jurisdiction, to seek their assistance in compelling the attendance of an individual to give testimony. In practice, the procedures are similar to those that would be applicable under the Hague Convention.

Alternatively, if the witness is located in an EU member state, then procedure (under Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters) is available that allows the taking of evidence from one member state to another without recourse to consular and diplomatic channels.

14 Assisting courts in other jurisdictions

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

As referenced in question 13, Ireland is not a signatory to the Hague Convention on the taking of evidence. The letters rogatory process is a formal request from the overseas court to the Irish court to compel witnesses to give oral evidence for use in overseas litigation, in addition to the production of documents relating to the witness testimony.

The relevant legislation governing requests for international judicial assistance by way of letters rogatory is the Foreign Tribunals Evidence Act 1856, and the procedural rules to be followed by applicants seeking the Irish courts to give effect to a letter of request are set out in Order No. 39 of the Irish Rules of the Superior Courts 1986 (as amended).

15 Causes of action

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

Among the causes of action are the following:

- fraud or fraudulent misrepresentation;
- negligent misstatement;
- breach of fiduciary duty;
- breach of contract;
- fraudulent disposition; and
- conspiracy.

16 Remedies

What remedies are available in a civil recovery action?

The main remedies available include the following:

- damages;
- restitution;
- rescission;
- specific performance;
- account of profits; and
- declaratory relief.

17 Judgment without full trial

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

If a defendant does not enter an appearance, it is possible to obtain judgment in default of appearance. Similarly, if a defendant has entered an appearance but does not enter a defence, it is possible to

obtain judgment in default of defence. Such an application for default judgment is on notice to the defendant.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

A freezing order can be sought from the court to prevent the dissipation of assets. Similarly, an EAPO can be sought.

The defendant can also be examined in court as to his or her means. Following such examination, the court can make an instalment order.

19 Enforcement

What methods of enforcement are available?

If the defendant has property assets in the jurisdiction and the judgment is for a liquidated sum, it is possible to register a judgment mortgage against that property.

If the defendant is resident in Ireland or has property assets in Ireland, it is possible to have the judgment executed by the county sheriff in the county in which that defendant is resident or has property. This will involve the sheriff seizing goods or assets up to the value of the judgment.

It may also be possible to obtain a garnishee (attachment) order against monies due and owing to the defendant.

It will also be open to the claimant to petition to have the defendant placed into liquidation (corporate) or into bankruptcy (individual).

Where there are assets located in another EU jurisdiction, a European Enforcement Order can be sought.

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?

A third party professional funding agreement to support a party in legal proceedings offends against the rules of maintenance and champerty, and is prohibited under Irish law. This position was upheld in May 2017 by the Supreme Court of Ireland.

After-the-event insurance, however, is gaining traction as a possible method for parties to litigation to mitigate the risk of the expense of an adverse costs order, should the party lose.

Criminal asset recovery

21 Interim measures

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

Section 2 of the Proceeds of Crime Act 1996 (as amended) (PCA) provides for the making of an interim order. An application for an interim order is only sought where there is an immediate threat of dissipation of property or where a receiver needs to be appointed to preserve its value. Interim orders prohibit a person from disposing of the assets in question for the duration of the order.

An application for an interim order is the preliminary application that may be brought in order for an interlocutory order to be subsequently granted; however, it is not a prerequisite for an interlocutory order. An interlocutory application may be made even when no interim order is in place.

The application is made by an authorised officer of the Revenue Commissioners, a member of the An Garda Síochána (a member not below the rank of chief superintendent) or the Criminal Assets Bureau. To seek an interim order, the applicant must show the High Court the following:

- that a person is in possession or in control of property that constitutes, directly or indirectly, proceeds of crime; and
- that the value of the assets is not less than €5,000.

The application is made on notice of motion grounded on affidavit. The court may, in cases of urgency, hear an application for an interim order on oral evidence. Applications for interim orders are heard on camera.

If granted, an interim order will prohibit the person (or any other specified person, or person having notice of the order) from disposing

of or otherwise dealing with the whole or specified part of the property, or from diminishing its value during the period of 21 days from the date of the making of the order. An interim order may contain such provisions, conditions and restrictions as the High Court considers necessary or expedient. Section 10 of the PCA provides for mandatory notification to the Companies Office, the Land Registry and the Registry of Deeds where an interim order is made.

Where an interim order is in force, the High Court may discharge or vary the order on application to it by the respondent (or any other person claiming ownership of any of the property concerned); however, it must be shown to the satisfaction of the High Court that the property is not the proceeds of crime or that the value of the property is less than €5,000. If the applicant applies to court to discharge an interim order at any time, the High Court will accordingly discharge the interim order; the application must be made by notice of motion grounded on affidavit.

The terms of an interim order will provide for notice of it to be given to the respondent and any other person who appears to be affected by it, unless the High Court is satisfied that it is not reasonably possible to ascertain his or her whereabouts. An interim order has a lifespan of 21 days, and lapses unless an interlocutory order is sought within that time frame.

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?

The DPP Guidelines for Prosecutors state the following:

Confiscation is an issue to be considered and advised upon from the outset in all cases. It should not be regarded as a mere optional addition to sentence proceedings or to the conduct of a prosecution. The question of whether or not a confiscation application might be appropriate should be addressed by the investigator when preparing or submitting the file and should be considered by the professional officer dealing with the case when a prosecution is being directed.

See question 21 for details regarding interim orders.

More generally, as set out in question 24, a confiscation application will be made following the conviction of the defendant.

23 Confiscation – legal framework

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

Confiscation of the proceeds of crime is governed by the Criminal Justice Act 1994 (as amended).

The legislation provides an option to the DPP to apply to court following the conviction of an individual for certain offences for a confiscation order.

The DPP must be of the view that the defendant has benefited from the offence of which he or she has been convicted. Benefit is defined by the reference to the obtaining of property as a result of the commission of the offence.

In relation to how the amount in the confiscation order is calculated, the order shall not be for an amount greater than the amount of the benefit and the pecuniary advantage, or the amounts realisable, whichever is less.

In relation to the amount realisable, this is a calculation of the value of all the realisable property held by the defendant minus the value of priority obligations relating to that property, plus all gifts made by the defendant after the commission of the offence (where the court considers this appropriate).

24 Confiscation procedure

Describe how confiscation works in practice.

The DPP applies to court for the order following the conviction of the defendant. Essentially, the court will compare the standard of living of the defendant with his or her bona fide income and generate the order based on that.

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

The main agencies involved in Ireland are the An Garda Síochána and, in particular, the Criminal Assets Bureau. The Irish tax authorities, the Revenue Commissioners, are also heavily involved, particularly with regard to providing information relating to the income and assets of the defendant.

26 Secondary proceeds**Is confiscation of secondary proceeds possible?**

Yes. The definition of realisable property is wide enough to cover property that has been acquired through the proceeds of crime.

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

It is possible to confiscate property acquired by a third party and there have been a number of cases where a family home, which has been acquired from the proceeds of crime, has been confiscated.

In addition, all gifts made by the defendant after the commission of the offence where the court considers it appropriate, may also be taken into account in calculating the quantum of the realisable assets.

All gifts would include transfers, directly or indirectly, to another person at a value significantly less than the value provided by the defendant at the time of acquiring that property.

Where property is held in trust on behalf of the defendant, it is also possible to make an order of confiscation in relation to this asset.

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

Money paid or recovered in respect of a confiscation order may be applied to meet expenses incurred in exercising any powers under the Criminal Justice Act, and used for the remuneration of any person employed for that purpose.

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

As stated in question 23, the courts will make a confiscation order for an amount not greater than any amount of the benefit of a pecuniary advantage, or the amount realisable, whichever is less. The courts do not make orders relating to specific property, but rather to a monetary amount.

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 standard proof is that applicable in civil proceedings, namely the balance of probabilities.

It is possible for the DPP to make statements in relation to assets and income of the defendant, and if any averment contained in those statements is not refuted by the defendant, the court may infer certain conclusions from that. In addition, the court may order the defendant to provide information to assist the court, and failure to do so may lead to negative inferences being drawn by the court.

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?**

The court may take into account civil proceedings that have been brought by victims of the convicted offence, and the court may direct payments to a third party as appropriate.

Update and trends

Owing to its procedural effectiveness and certainty, common law is the preferred governing law for a high proportion of global cross-border commercial contracts and arbitrations. Although the extent of post-Brexit changes remains uncertain as negotiations continue, Ireland will become the largest common law jurisdiction in the EU. Thus, Ireland is likely to become a more popular jurisdiction of choice in cross-border contracts where certainty regarding an EU passport for civil and commercial judgments is required. With a legal system closely analogous to the highly respected English system, Ireland benefits from the fact that judgments of the Irish courts are, and will continue to be, recognised under the Recast Brussels Regulation. Indeed, the recent announcement by the International Swaps and Derivatives Association – that Irish law will henceforth be an option for parties to its derivatives documentation – underscores the potential attractiveness of Ireland and Irish law in the context of international transactions post-Brexit. As transactional activities increasingly turn to Ireland as a legal jurisdiction of choice, this in turn should increase the utilisation of the Irish legal system for asset recovery measures and remedies in the medium to long term.

32 Confiscation of profits**Is it possible to recover the financial advantage or profit obtained through the commission of criminal offences?**

Yes. It is possible to recover the financial advantage received by a company.

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.**

It is possible to update freezing orders or seizure orders.

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?**

The court can appoint a receiver to the realisable property and bestow that receiver with powers to dispose of the property.

Receivers have a duty to take reasonable care in obtaining the best price reasonably possible for those assets at the time of sale. Generally, a receiver will not hold on to the property for an extended period of time but will dispose of it once appropriate, and the costs of management of those assets must be borne by the receiver and would be deducted from the gross sales proceeds of any asset.

There is no prohibition in Irish legislation to property assets being used by the Irish state, but this would be an unusual approach to take.

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.**

Ireland is a signatory to various mutual legal assistance agreements with other jurisdictions. The law that allows Ireland to provide mutual legal assistance to, and to ask for mutual legal assistance from, other countries is contained in the Criminal Justice (Mutual Assistance) Act 2008.

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.**

See question 35.

37 Treaties

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

Ireland is a party to the following international conventions:

- the Council of Europe Convention on Mutual Assistance in Criminal Matters 1959, and its Additional Protocol;
- the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990;
- the OECD Convention on Combating Bribery of Foreign Public Official in International Business Transactions 1997; and
- the Council of Europe Criminal Law Convention on Corruption 2003.

Requests made outside the provisions of an international convention will be decided on an individual basis.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

Private prosecutions of criminal law offences are not a feature of Irish law.



Gavin Smith
William Greensmyth

gavin.smith@walkersglobal.com
william.greensmyth@walkersglobal.com

The Exchange
George's Dock
IFSC
Dublin 1
Ireland

Tel: +353 1 470 6600
Fax: +353 1 470 6601
www.walkersglobal.com

Italy

Roberto Pisano, Valeria Acca and Chiara Cimino

Studio Legale Pisano

Civil asset recovery

1 Parallel proceedings

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

According to the law, in the event that a crime has caused damage, the 'person injured by the crime' is entitled to bring a civil action for restitution and damages not only before a civil court, but also by 'standing as a civil party' in a criminal proceeding.

There is no express restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter, with the exception that if the civil action is brought after the issuance of the criminal decision of first instance, the civil proceeding is suspended until the issuance of the final decision (article 75(3) of the Code of Criminal Procedure).

Even if the main principle governing relations between criminal and civil proceedings on the same subject matter is the one of autonomy, some exceptions do apply. In particular, the final criminal decision of conviction (issued after a full trial) has the effect of *res judicata* in a civil proceeding for restitution and damages (regarding the assessment of the main elements of the unlawful conduct; article 651 of the Code of Criminal Procedure).

However, a final criminal decision of acquittal does not have the effect of *res judicata* in a civil proceeding, if the civil action was brought before the civil court in a timely manner (article 652 of the Code of Criminal Procedure).

2 Forum

In which court should proceedings be brought?

The relevant criteria for the geographical competence of civil courts are provided for by the Code of Civil Procedure. For ordinary proceedings, the court of the place where the defendant has his or her residence, domicile or abode is competent. In the absence of a residence, domicile or abode in Italy, the court of the place of residence of the claimant is competent (article 18).

For legal entities, the court of the place where the entity or defendant has its legal seat or, alternatively, where it has a place of business and a representative authorised to stand trial, is competent (article 19).

For actions relating to civil obligations, an alternative criterion provides additionally for the competence of the court where the obligation arose or must be carried out (article 20).

For the enforcement or execution on movable goods or real property, the court of the place where the goods are located is competent (article 26).

With respect to interim measures (temporary seizure of goods or properties of the defendant, etc), proceedings should be brought in the court competent to decide the merits of the case or, in its absence, the court of the place where the interim measure should be executed (article 669-ter).

3 Limitation

What are the time limits for starting civil court proceedings?

In the event of damage deriving from a crime, the 'fact constituting crime' is considered to represent a 'civil tort' as well, with significant consequences on the statute of limitations period concerning the civil action for damages.

According to civil law, such a statute of limitations period is ordinarily five years from the moment of the civil tort. However, if the fact represents a criminal offence as well, and the statute of limitations for the criminal offence is longer, then the longer criminal statute of limitations period applies (article 2947 of the Italian Civil Code).

In addition, if the civil action is brought during the longer criminal statute of limitations period, this qualifies as an interruption of the civil statute of limitations, and the original five-year period provided for by the civil law starts running again from the moment the decision on the criminal proceeding becomes final.

4 Jurisdiction

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

The relevant criteria for the jurisdiction of civil courts are provided for by Law No. 218 of 31 May 1995 (the Law on Private International Law). According to article 3, Italian jurisdiction exists when the defendant is domiciled or resident in Italy, or when he or she has a representative in Italy authorised to stand trial. Additionally, article 3 provides that Italian jurisdiction also exists when the criteria laid down by the Brussels Convention of 27 September 1968 are met.

With respect to interim measures, article 10 of the Law on Private International Law provides that Italian jurisdiction exists when the interim measure should be executed in Italy or when the Italian court has jurisdiction on the merits of the case.

The lack of jurisdiction should be objected to by the defendant in his or her first brief of defence, to be filed at least 20 days before the first hearing. When this condition is met, the lack of jurisdiction can then be assessed in every stage and instance of the proceeding (articles 4 and 11 of the Law on Private International Law). In relation to proceedings in absentia, or when Italian jurisdiction is excluded by international provisions or by the fact that the action concerns real property located abroad, the lack of jurisdiction can be assessed *ex officio* by the court.

5 Time frame

What is the usual time frame for a claim to reach trial?

A claim can reach the first trial hearing rather quickly, namely within 90 days if the defendant is a resident of Italy, or within 150 days if the defendant has his or her residence abroad. However, the length of civil trials is usually significant, between three and four years at least for a decision in first instance, and six to seven years or more for a final decision (after a possible second instance decision before an appellate court, and a third instance decision before the Court of Cassation).

6 Admissibility of evidence

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

Discovery as known in common law jurisdictions is not provided for by the Italian legal system; accordingly, parties have no duty of disclosure unless the court so orders.

According to the main legal principle on the burden of proof, anyone who claims a certain right or entitlement must prove the underlying facts and the grounds for it; in turn, anyone who objects to the mentioned right or entitlement must prove the facts on which the objection is based (article 2697 of the Civil Code). The taking of evidence (interrogatories, testimonies, technical expertise, etc) is carried out within the trial, and is governed by the court mainly on the request of the parties. With respect to documentary evidence, parties may produce all documents that, in their view, prove the grounds of their claim. With regard to oral evidence, however, prior authorisation by the court is required.

With a few exceptions, the court can evaluate any evidence at its discretion (article 116 of the Code of Civil Procedure), but has to provide the reasons for such evaluation in the written grounds of the judgment. The decision of the court must be based on the evidence submitted by the parties and, in addition, on the facts not specifically challenged and on the factual notions of common knowledge (article 115 of the Code of Civil Procedure).

7 Witnesses

What powers are available to compel witnesses to give evidence?

Witnesses have a duty to appear to give evidence, except in the event of a legitimate impediment (owing to health or other reasons). If they do not appear without a justified reason, they can be sanctioned and compelled to appear by the police, further to a court order.

8 Publicly available information

What sources of information about assets are publicly available?

The main sources of publicly available information about assets concern real estate and land, vehicles and companies.

In addition, under certain conditions, data concerning the taxable income of a certain taxpayer (ie, yearly tax returns) can also be obtained.

With respect to real estate and land, the most relevant public source is the archive of real estate registers. This archive, which constitutes the local agencies of the Ministry of Economy and Finance, allows all entries made in the register concerning real estate in Italy to be identified in relation to the name of a certain individual or entity (an entry determines the ownership of relevant real estate with regard to third parties and mortgages, etc, which are recorded in the register).

As far as vehicles are concerned, the relevant register is the public register of vehicles, where all relevant information concerning a certain vehicle and its owner (name, surname, date of birth, address and domicile, existence of mortgages, etc) is recorded.

With respect to companies, information can be obtained from the register of enterprises that records the most relevant information about a company (deed of incorporation, by-laws, data about shareholders, directors, etc, and balance sheets).

Finally, according to the law, the relevant tax returns of a certain taxpayer may be obtained, further to a grounded request to the competent tax authority, if the applicant can prove to have a concrete and qualified interest to obtain them (article 24(7) of Law No. 241/1990, governing the 'transparency' of public administration activity and relevant acts). In general terms, this criterion is considered fulfilled when obtaining the relevant document (ie, the tax returns) is 'necessary to protect its own juridical interest'. In the event of denial, an appeal can be made to the competent administrative court (the TAR, which on a number of occasions has granted the release of tax returns).

9 Cooperation with law enforcement agencies

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

From a practical point of view, the most efficient way for a defrauded party to obtain information and evidence from law enforcement and regulatory agencies for use in a civil proceeding is to file a criminal complaint, and at the end of a criminal investigation by accessing the 'public prosecutor file' (containing all acts carried out and evidence gathered by the public prosecutor in the course of the investigations, including information and documentation mentioned above). In compliance with case law, such a request is usually granted.

In the event the criminal route mentioned above is not pursued, information and evidence can be directly requested from law enforcement and regulatory agencies, in accordance with certain criteria and conditions (concrete and qualified interest to obtain such information, because it is 'necessary to protect its own juridical interest'). However, such requests are often not granted, owing to the concurring needs of the relevant office or regulator (investigations still pending, duty of confidentiality, etc).

In the course of a civil trial, the court, on request of a party, can order a third person (including law enforcement and regulatory agencies) to produce documents or other things that it considers necessary to decide the case (article 210 et seq of the Code of Civil Procedure). A party cannot request the court to order a third person to disclose a certain document possessed by it, unless there is no way for the party to obtain it directly.

10 Third-party disclosure

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

See question 9. The treatment of banking information is protected by strict rules, which generally prevent any disclosure, with the exception of criminal investigations, tax assessments and anti-money laundering compliance. The Italian Data Protection Authority, on 25 October 2007, issued the Guidelines for the Processing of Customers' Data in the Banking Sector, which expressly provide strict rules for banks and other financial intermediaries about disclosing information in their possession to third parties, and even to the interested party if he or she is the owner of the account; see article 119 of the Consolidated Banking Law.

11 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?

To prevent the dissipation of assets by the suspects of fraud (ie, any circumstances where there is a material risk of dissipation), the law provides for 'conservative seizure' that can be requested by the claimant and ordered by the court on the suspects' assets also at the pretrial stage (articles 669-bis et seq and 671 et seq of the Code of Civil Procedure).

In terms of procedure, the seizure order can be issued ex parte where knowledge by the target could prejudice the successful execution of the order; in that scenario, a hearing is subsequently fixed within 15 days, where the target is entitled to raise his or her defence and the order is subject to confirmation, amendment or revocation by the court. Otherwise, the court decides on the application for conservative seizure after a hearing where all relevant parties are entitled to make their representations (article 669-sexies).

The subject of the seizure order can be movable goods, or real estate or rights of third persons. Usually the order is issued not in relation to specific assets to be seized, but with the indication of a maximum amount to be subject to seizure, with the consequence that the claimant will have to trace the assets on which to carry out the enforcement of the order.

As far as the substantive requirements for conservative seizure are concerned, they are represented by the *fumus boni iuris* and *periculum in mora*. The first is prima facie evidence of the existence of the right that the seizure order is aimed at protecting; the second is the serious and concrete risk that delay could compromise the satisfaction of the right.

Conservative seizure is instrumental to a full trial on the merits, aimed at assessing the existence of the right claimed, whose sentence

could then be enforced by targeting the assets subject to conservative seizure. However, conservative seizure can also be granted during the trial stage, and after a judgment on the merits, on condition that the requirements mentioned above are fulfilled.

With respect to interim relief concerning the obtaining of information, the law provides that, on request of a party, the court can order pretrial taking of testimonies when there is a serious risk that they may become unavailable during the trial, and that these testimonies could be considered necessary for a future trial. If the court grants the application, by the same order it fixes the hearing for the taking of evidence (article 692 et seq of the Code of Civil Procedure).

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

Intentional failure to comply with court orders is punished, under certain conditions, as a criminal offence under article 388 of the Criminal Code, provided that a criminal complaint is filed by the interested party. The punishment is imprisonment for up to three years, or alternatively a fine, and the prohibited conduct is that of non-compliance with a court order, in addition to carrying out sham transactions or other fraudulent acts on his or her own or other assets with the purpose of avoiding compliance with the order.

With respect to the civil procedure for ensuring the enforcement of court orders, it is provided for by Book Three of the Code of Civil Procedure (articles 474 to 632). See questions 18 and 19.

13 Obtaining evidence from other jurisdictions

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

Judicial cooperation in civil matters is mainly governed by European Commission (EC) legislation (with respect to EU countries) and the international conventions signed by Italy, although domestic law has a residual function to supplement and regulate the aspects not regulated by the above-mentioned legislation.

With respect to all EU countries (except Denmark), the requests by Italian courts for the taking of evidence in a foreign state are governed by EC Regulation No. 1206/2001. The requests must be submitted by courts (not by private parties) using the forms contained in the annex to the Regulation, and in compliance with the provisions of the same Regulation. In particular, the taking of evidence should be executed expeditiously (ordinarily, within 90 days); refusal should be confined to exceptional situations, and if a special procedure is requested in accordance with the law of the requesting state, the requested court shall comply with such a requirement unless this procedure is incompatible with its own law (article 10). In addition, the Regulation provides that requests shall be transmitted directly from the 'requesting court' to the competent 'requested court' of the foreign state (article 2); that the presence and participation in the foreign state of the relevant parties and of representatives of the requesting court can be allowed (articles 11 and 12); and even that the direct taking of evidence by the requesting court can take place under certain conditions (article 17).

As far as non-EU countries are concerned, the most relevant international convention is the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the 1970 Convention), which entered into force in Italy as of 21 August 1982, and is currently in force in 57 states. In accordance with the 1970 Convention, the requests to obtain evidence (or to perform some other judicial act) shall be made by means of a letter or request (article 1); shall be sent to the central authority of the foreign state designated for that purpose (article 2; in Italy, the Minister for Foreign Affairs); and shall be executed in accordance with the law of the requested state, unless the special method or procedure requested by the requesting state is not compatible with the internal law of the state of execution (article 9). The presence of the parties, their representatives and members of the requesting judicial authority can be allowed (articles 7 and 8), as well as the direct taking of evidence in the foreign state through a commissioner duly appointed for the purpose under certain conditions (article 17).

For states that are not signatories of the 1970 Convention, where a bilateral treaty with Italy exists (Italy is a signatory of many such treaties), this will regulate the obtaining of evidence by Italian civil courts.

In the absence of an applicable treaty, Italian domestic law will apply, whose main provision prescribes that 'rogatories of Italian judges

to foreign authorities for the execution of orders on the taking of evidence shall be transmitted through diplomatic channels' (namely the Minister for Foreign Affairs, and the relevant diplomatic representatives in the foreign country, article 204 of the Code of Civil Procedure).

14 Assisting courts in other jurisdictions

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

With respect to foreign requests to take evidence in Italy and enforce foreign judgments, the most relevant provisions are of EC legislation (with respect to EU countries) and of the international conventions signed by Italy, although Italian domestic law ordinarily applies only in order to supplement and regulate the aspects not regulated by this legislation, see question 13.

Foreign requests to take evidence in Italy

The most relevant domestic provision in this respect is article 69 of the Law on Private International Law which states the following:

- (1) *The judgments and the orders of foreign judges concerning examination of witnesses, technical assessments, swearing or other means of evidence to be taken in the Italian Republic are made executed by decree of the Court of Appeal of the place where such acts have to be taken [. . .].*
- (2) *[. . .] If the request is made by the judge itself, the request has to be made through diplomatic channels [. . .].*
- (3) *The court decides in chambers and, in the event it grants the execution, sends the acts to the competent judge.*
- (4) *The taking of evidence or the execution of other evidentiary acts not provided for by the Italian law can be ordered on condition that they do not conflict with the principles of the Italian system.*
- (5) *The taking of evidence or the execution requested is regulated by the Italian law. However, the forms expressly requested by the foreign authority are complied with on condition that they do not conflict with the principles of the Italian system.*

Enforcement of foreign judgments

With respect to EU countries (except Denmark), the enforcement of foreign judgments is governed by EC Regulation No. 44/2001. Its basic principle is that the procedure for making a judgment given in one member state enforceable in another must be as efficient and rapid as possible; as a consequence, the declaration that a judgment is enforceable is issued virtually automatically by the court of the requested state (for Italy, the court of appeal of the place of execution), after purely formal checks of the documentation supplied (article 33 et seq). However, in an adversarial procedure the defendant is entitled to appeal against the declaration of enforceability, where he or she considers one of the grounds for non-enforcement to be present.

In addition, EC Regulation No. 805/2004 provides for the abolition of the exequatur procedure, and the creation of a European enforcement order, for 'uncontested claims' (namely, all situations in which a creditor, given the verified absence of any dispute by the debtor as to the nature or extent of a pecuniary claim, has obtained either a court decision against that debtor or an enforceable document that requires the debtor's express consent, such as a court settlement or an authentic instrument). According to this Regulation, such a procedure offers 'significant advantages' as compared with the exequatur procedure provided for by EC Regulation No. 44/2001, 'in that there is no need for approval by the judiciary in a second member state with the delays and expenses that this entails'.

As far as non-EU countries are concerned, the enforcement of foreign judgments is dealt with by a number of bilateral treaties signed by Italy, which regulate the requirements. In the absence of an applicable treaty, and in order to supplement EC and international legislation where necessary, Italian domestic law applies, whose main provisions are the ones laid down by articles 64 and 67 of the Law on Private International Law.

In particular, article 67 provides that an Italian civil proceeding aimed at the formal recognition of a foreign judgment before the court of appeal of the place of execution, is necessary only in case of a challenge to the recognition, or where forced enforcement of the foreign judgment is required.

However, where there is no challenge to the recognition or where no enforcement is required, foreign judgments are recognised in the Italian legal system without the need for a specific civil proceeding, on condition that the following requirements are fulfilled (article 64):

- the judgment was issued by a judge who had jurisdiction according to the principles on jurisdiction of the Italian legal system;
- the writ of summons was brought to the knowledge of the defendant according to the procedural rules of the *lex fori*, and the defendant's fundamental rights of defence were not breached;
- the parties had regular standing in trial according to the *lex fori*, or 'default of appearance' was declared in accordance with that law;
- the judgment has become *res judicata* according to the *lex fori*;
- the judgment does not conflict with another judgment issued by an Italian judge that has become *res judicata*;
- there is no pending proceeding before an Italian judge on the same subject and between the same parties that started prior to the foreign proceeding; and
- the judgment does not produce effects contrary to Italian public order.

15 Causes of action

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

The main cause of action in civil asset recovery cases is civil tort, defined by the law as 'any fact intentional or negligent, which causes unlawful damage to others', and that obliges the perpetrator to pay damages (article 2043 of the Civil Code). Often, the cause of action may concur with that of breach of contract (article 1218 et seq of the Civil Code), and the two actions may also be exercised in parallel.

Proprietary claims have a limited relevance in the typical scenario of fraudulent behaviours affecting money or other fungible goods.

16 Remedies

What remedies are available in a civil recovery action?

The typical remedy is restitution (where possible) and damages. For the enforcement of a successful judgment providing for restitution and damages, see question 19.

17 Judgment without full trial

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

Law No. 69/2009 has introduced a summary proceeding (article 702-bis et seq of the Code of Civil Procedure) that can be selected by the claimant when the dispute falls under the jurisdiction of a single judge and not of a panel of judges (this covers a wide range of actions). The proceeding is identical to an ordinary one for the first stage – the filing of the writ of summons by the claimant and the first written response by the respondent – but it is much more concise during the stage of the taking of evidence. However, in the event the judge evaluates that the proceeding requires an ordinary taking of evidence and declares so by a non-appealable order, the proceeding continues in accordance with the ordinary rules.

Another type of summary proceeding is represented by the 'injunction proceeding' (article 633 et seq of the Code of Civil Procedure), which can be selected by creditors of a cash amount of money or of a determined quantity of fungible goods, who have written evidence of it. If proper evidence is provided, the judge issues *ex parte* an order of injunction to the debtor to pay or deliver the relevant goods within a certain deadline (usually 40 days). Within the same deadline, the debtor is entitled to challenge the injunction, in which case the proceeding will continue in a fully adversarial way in accordance with the ordinary rules. In the absence of that, and in case of non-compliance with the injunction, the procedure for its enforcement can start (see question 19).

Finally, it should be noted that where a defendant fails to respond to a writ of summons by the deadline provided for by the law, a 'default of appearance' is declared by the competent court. This does not mean an automatic adjudication of the case to the claimant, but simply that the decision of the court will only be based on the evidence provided for by the claimant (with no objections from the defendant).

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

Conservative seizure can also be granted during the trial stage and after a judgment on the merits, on condition that the related requirements are fulfilled. At that stage, therefore, the conservative seizure represents the most significant relief during the time when proceeding with the enforcement of court judgments, in accordance with the procedure explained in question 19.

19 Enforcement

What methods of enforcement are available?

As stated in question 12, the civil procedure for ensuring the enforcement of court orders is provided for by Book Three of the Code of Civil Procedure (articles 474 to 632). In essence, the procedure provides that the successful claimant, after obtaining an enforceable decision, must provide it with the execution formula and serve it to the defendant giving him or her a deadline to comply with it. In the event of non-compliance, the complex procedure for forced enforcement can start, under the supervision and with the relevant intervention of the judge of execution (article 479 et seq).

The ordinary way to start forced enforcement is garnishment (article 491 et seq). The defendant is entitled to request the judge of execution for the substitution of garnishment with an equivalent amount of money. A specific section of the Code of Civil Procedure regulates the interplay among the various creditors of the defendant (with the possibility of them obtaining a forced sale of the defendant's assets, and the subsequent sharing of money resulting from the sale).

Garnishment can be ordered both on movables at the respondent's premises (article 513 et seq) or at third parties' premises, on real estate (article 555 et seq), undivided assets (article 599 et seq), assets of a third party subject to pledge or mortgage for another person's debt, or on assets whose transfer by the defendant was revoked for fraud (articles 602 to 604).

The defendant always has the right to raise a formal objection against the injunction (article 615 et seq), so starting a dispute before the judge of execution.

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?

Until 2006, agreements between counsel and clients aimed at determining the counsel's fees depending on the outcome of the proceedings (conditional fee agreements) were prohibited by the law. In particular, the prohibition covered the determination of fees both as a percentage or quota directly affecting the goods disputed and as a percentage of the value of the goods disputed, or the value of the entire litigation (article 2233(3) of the Civil Code and article 45 of the Lawyers' Ethical Code): such agreements were considered null and void, and they produced an ethical responsibility for the counsel.

In that scenario, however, the law allowed that an additional and extraordinary compensation could be granted to counsel owing to the positive outcome of a proceeding, on condition that this compensation is indeed additional to normal compensation, and is reasonable and justified by the outcome achieved.

As of 2006, the law has recognised, to a limited extent, and subject to a written agreement, the lawfulness of conditional fee agreements (first by Law No. 248/2006 and currently by Law No. 247 of 31 December 2012). In particular, according to article 13(4) of Law No. 247/2012, 'agreements by which counsel obtains as fee totally or partially a quota of the good subject to the performance or to the disputed claim are prohibited'. However, according to article 13(3) of Law No. 247/2012, 'the determination of the fees is free: it is allowed the determination based on timing, on a *forfait* method [. . .] on a percentage of the value of the case or of what it is predicted could be advantageous, not only in pure patrimonial terms, to the beneficiary of the services'.

In essence, therefore, the current regime allows for the determination of fees depending on the outcome of a proceeding as a percentage of the value of the goods disputed or the value of the entire litigation,

though prohibiting the determination of fees as a percentage or quota directly affecting the goods disputed.

As far as damages-based agreements are concerned, they should be considered allowed on the basis of the principles and legislation mentioned above.

After-the-event insurance is prohibited by law, as it always requires as a precondition that the actionable event did not occur or in any case was not known by the insured party.

With respect to the courts' powers in managing the overall cost of a litigation, losing parties in civil litigation ordinarily have to pay their own legal costs, as well as the winning party's legal costs, in the amount determined by the courts (on the basis of a note of legal costs filed with the court by the relevant parties; articles 91 and 92 of the Code of Civil Procedure). In that scenario, the amount of legal costs ordinarily decided by the courts is significantly lower than the fees that could be legally agreed upon by counsel and clients, according to the principles explained above. As a consequence, it will be up to the client to pay the difference between the legal costs adjudicated by the court (and refunded by the losing party) and the higher fees agreed upon with the counsel, always within the limits of the principles explained above.

Criminal asset recovery

21 Interim measures

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

The interim measures provided for by the criminal system are the following:

- 'preventive seizure' (article 321 et seq of the Code of Criminal Procedure), which is aimed at freezing the proceeds of crime (and the instrumentalities of crime) in view of a future confiscation (when the final conviction sentence will be issued);
- 'evidentiary seizure' (article 253 et seq of the Code of Criminal Procedure), which is aimed at collecting the evidence necessary to prove the commission of a certain crime; and
- 'conservative seizure' (article 316 et seq of the Code of Criminal Procedure), which is aimed at protecting and satisfying the credits of the state or of the victim of the crime, or both, by freezing the assets of the defendant in order to prevent their dissipation (in substantial analogy with the 'conservative seizure' provided for civil purposes).

Preventive or conservative seizure can only be ordered by a judge or court on application of the public prosecutor (and, with respect to the conservative seizure, also of the victim or civil party, in accordance with the procedure indicated in question 1). An evidentiary seizure, on the contrary, is a measure that can be adopted by the public prosecutor itself by issuing a grounded decree, without need for a court order.

Furthermore, although in theory the differences between the nature and aims of the mentioned forms of seizure are extremely clear, in practice, certain overlapping (and even abuse) can take place, especially between evidentiary seizure and preventive seizure, because the goods or assets that can be subject to such measures often coincide.

This is because, according to the law, the subjects of an evidentiary seizure are the 'corpus of the crime' and the 'items related to the crime', when they are necessary to prove the commission of the crime (article 253(1)), and because the corpus of the crime is defined by the law as 'the things on which or through which the crime was committed, as well as the things which represent the product, profit or price of the crime' (article 253(2)). For the same proceeds and instrumentalities of crime that can be subject to preventive seizure (for the purpose of confiscation), see question 23.

As far as the practical modality for the execution of preventive seizure is concerned, see question 24. With respect to the requirements and practical modalities for the execution of a conservative seizure, from the standpoint of a victim or civil party, see question 31.

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?

Yes. When serious crimes are detected, a criminal investigation is automatically initiated, aimed at identifying and punishing the perpetrators of the crime, as well as identifying, tracing, freezing and later confiscating the proceeds of the same crime (in the framework of the same investigation and criminal proceeding).

23 Confiscation – legal framework

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

A confiscation procedure (in broad terms) often starts at the pretrial stage, by freezing the proceeds and instrumentalities of the crime through preventive seizure (article 321 et seq of the Code of Criminal Procedure), see question 21.

More specifically, the items that can be subject to confiscation, and the time and conditions that apply to confiscation, are generally provided for by article 240 of the Criminal Code, which states as follows:

In the event of conviction, the judge can order confiscation of the things that were used or destined to be used to commit the crime, and of the things that represent the product or profit of it.

Confiscation is always ordered:

- (1) *of the things that represent the proceeds of the crime [. . .].*

In essence, therefore, and as a general rule, confiscation is ordered where a judgment of conviction is issued (through the same judgment), and is executed when such judgment becomes final. Furthermore, according to consolidated case law, the notion of 'proceeds' of crime includes 'profit', 'product' and 'price' of crime (Court of Cassation, Unified Sections, No. 26654 of 27 March 2008). The profit relates to the 'economic advantage obtained in a direct and immediate way from the crime'; the product is the 'empiric result of the crime, namely the things created, transformed, adulterated or acquired through the crime'; and the price is 'compensation given or promised to a determined person, as consideration for the execution of the crime'.

According to the general rule above, in case of conviction confiscation is always compulsory (for the court) for the price of crime, although it is only discretionary for the profit and product of crime. However, for the most serious crimes (corruption, money laundering, market manipulation, insider trading, etc) special provisions expressly provide for compulsory confiscation in relation to the profit of crime.

In addition, where confiscation of the direct profit or price of crime is not possible, the same special provisions provide for the confiscation 'for equivalent', namely, the confiscation of other money or goods for the same value (see article 322-ter of the Criminal Code for corruption, etc).

For the determination of the benefit figure (ie, the value of the benefit unlawfully obtained), see questions 29 and 32.

A special form of confiscation was introduced in relation to a compulsory list of crimes (such as Mafia association, extortion, usury, corruption and money laundering), according to which in the event of conviction for these crimes, confiscation is compulsory not only on the related identified proceeds of crime, but also on 'money, goods and other things of value of which the individual convicted cannot justify the provenance' and of which 'he has the availability under any title in a value disproportionate to his income, declared for his income tax purposes, or his economic activity' (article 12-sexies of Law Decree No. 306/1992). In essence, therefore, the provision has introduced a burden for the persons convicted for these crimes to justify the provenance of assets that appear to be disproportionate to their income or economic activity, otherwise they will be confiscated (see question 30).

24 Confiscation procedure

Describe how confiscation works in practice.

Confiscation is expropriation by the state of certain goods (mainly proceeds and instrumentalities of crime) relating to a determined crime. As explained in questions 22 and 23, confiscation is ordinarily ordered where a judgment of conviction is issued (through the same judgment), and is executed when such judgment has become *res judicata* (ie, is not appealable any more; ordinarily, judgment of first instance can be appealed before the Court of Appeal, and judgment of the Court of Appeal can be appealed before the Court of Cassation).

The court competent for the execution of confiscation is the court of execution, before which a concise adversarial proceeding can take place, on application of the public prosecutor, the defendant and the interested party, in the event of a dispute about the execution of confiscation (articles 676 and 665 of the Code of Criminal Procedure). If a dispute arises about the ownership of the confiscated assets (ie, even in the event a third party, who did not take part in the criminal proceeding, claims to be the owner of the relevant assets), the court of execution shall remit the case to the civil court of first instance, in order to determine legitimate ownership (see questions 27 and 31).

In the absence of disputes about the execution of confiscation, or when they are solved, the law provides that the clerk of the court of execution proceeds to the sale of the confiscated assets, unless special provisions provide for a particular destination of such assets, or unless the destruction of the assets has to be ordered, where sale is considered inconvenient (article 86 of the implementing legislation of the Code of Criminal Procedure). Money deriving from the sale is passed to the state. As for the particular destination of certain assets, special provisions (with regard to the Mafia, contraband, etc) provide that confiscated assets (either movable or real estate) can be acquired and maintained as the patrimony of the state (and of local municipalities), and destined to a particular use in the public interest.

As explained in question 21, the confiscation procedure (in broad terms) often starts at the pretrial stage, by freezing the proceeds and instrumentalities of crime through the preventive seizure (article 321 et seq Code of Criminal Procedure), in such a way that at the moment of the final judgment of confiscation the relevant assets are already under control of the state authorities. Specific provisions provide for the practical modalities of executing preventive seizure, in relation to the targeted assets. According to article 104 and 104-bis of the implementing legislation of the Code of Criminal Procedure, preventive seizure is executed as follows:

- on movable goods and credits, according to the civil procedure for garnishment (see question 19);
- on real estate and registered movable goods, through the entry of the seizure in the relevant registers (see question 9);
- on the assets of a company or enterprise, through the entry of the seizure in the register of enterprises (see question 9) and, where necessary, through appointing a special receiver (see question 34); and
- on shares and quotas of companies, through the entry of the seizure on the company's books and in the register of enterprises.

25 Agencies

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

Public prosecutors are responsible for the investigation and prosecution of all criminal offences, and in that framework they identify and trace the related proceeds of crime, and request their freezing and later confiscation to the competent judge or court.

Public prosecutors are not part of the government but are professional magistrates, and their duty to bring criminal prosecutions is compulsory and not discretionary (unless they assess that no crime was ever committed and then request a dismissal from a competent judge).

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Yes, case law is consolidated in the sense that confiscation applies not only to the proceeds directly and immediately derived from crime, but also to any other property acquired by the offender through the investment of such unlawful proceeds (Court of Cassation, Unified Section,

No. 10,280 of 25 October 2007). However, the burden to strictly prove all the transfers and modifications deriving from the original proceeds of crime lies with the public prosecutor.

27 Third-party ownership

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

The general principle (with a few exemptions, see question 33), is that confiscation does not take place when the ownership of the items subject to potential confiscation is of a 'person extraneous to the crime' (a third party in good faith): in this case, the items should be handed over to such third party. However, case law is consolidated in adopting a very strict notion of a 'person extraneous to the crime', according to which any subject who – although not being criminally liable – has, through his or her conduct, made the commission of the crime easier, cannot be considered extraneous to the crime, and therefore is not entitled to prevent confiscation and to obtain the restitution of the relevant items. In particular, according to case law, the only subject who can be considered extraneous to the crime is the subject who does not have any kind of negligent link – direct or indirect, owing to a lack of vigilance or other causes – with the commission of the crime (Court of Cassation, No. 16,405 of 21 April 2008).

In accordance with these principles, only in very limited situations has case law maintained that close relatives could be considered 'persons extraneous to the crime' and as such had title to prevent confiscation.

28 Expenses

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

Yes, all the costs of a criminal proceeding (with some exceptions) in case of conviction are attributed to and enforced against the defendant, including the costs relating to the tracing and confiscating of the assets (see Presidential Decree No. 115/2002). As explained in question 21, at a pretrial stage the credits of the state against the defendant (including all the costs of the criminal proceeding, the potential fines, etc) can be secured by the interim measure of the conservative seizure (article 316 et seq of the Code of Criminal Procedure), which is ordered by the competent court on application of the public prosecutor, in order to prevent the dissipation of the defendant's assets. See question 31 with respect to the requirements and practical modalities for the execution of conservative seizure.

29 Value-based confiscation

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

Yes, as explained in question 23, confiscation for equivalent is allowed by special provisions only in relation to a compulsory list of crimes (corruption, money laundering, tax fraud, market manipulation, insider trading, usury, etc), where recovery of the direct profit or price of crime is impossible. Confiscation for equivalent is also allowed on the company assets, under the same conditions, with respect to the particular responsibility of companies for certain crimes committed by their managers or employees in the interest or for the benefit of the company (article 19 of Legislative Decree No. 231/2001).

The value assessment of assets to be confiscated is first made by the public prosecutor (even at a pretrial stage, for the purposes of the interim measure of preventive seizure) by determining the quantum of the relevant proceeds of crime, where necessary by appointing an expert witness for the task. Such determination, however, must be confirmed (or amended) by the competent court, when granting the interim measure, and subsequently when ordering confiscation.

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?

As mentioned in questions 22 and 23, when serious crimes are detected, a criminal investigation is automatically initiated, aimed at identifying and punishing the perpetrators of the crime, as well as at identifying, tracing, freezing and later confiscating the proceeds of the crime (in

the framework of the same investigation and criminal proceeding). Therefore, in accordance with the general principles (and in particular with article 27(2) of the Constitution, which provides that a defendant cannot be considered guilty until final conviction), the burden of proof lies with the public prosecutor, either in proving 'beyond reasonable doubt' the guilt of the defendant in relation to a certain crime, or in proving that specific assets or money are the proceeds of the mentioned crime and as such must be confiscated.

The burden is reversed, to a certain extent, in relation to the special form of confiscation provided for by article 12-sexies of Law Decree No. 306/1992. In that respect, as explained in question 23, the Law provides that in relation to a compulsory list of crimes, in the event of conviction, confiscation is compulsory not only on the related identified proceeds of crime, but also on 'money, goods and other things of value of which the individual convicted cannot justify the provenance' and of which 'he has the availability under any title in a value disproportionate to his income, declared for his income tax purposes, or his economic activity'. Therefore, the burden of the public prosecutor is only to prove the existence of the mentioned disproportion (in addition to the commission of the relevant crimes); however, it lies with the defendant to prove that his or her assets were acquired in a legitimate way.

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?

According to the law, as explained in question 1, in the event that a crime has caused damage, the 'person injured by the crime' is entitled to bring the civil action for the related restitution and damages not only before a civil court, but also in a criminal proceeding, by 'standing as civil party' in the latter. Where such standing as civil party takes place, the victim of the crime is entitled, as explained in question 21, to request and obtain from the competent court conservative seizure (article 316 et seq of the Code of Criminal Procedure).

In particular, the law provides that 'where there is grounded reason to believe that the guarantees of the civil obligations deriving from crime will lack or will be dissipated, the civil party can request the conservative seizure of the defendant's assets [. . .]' (article 316(2)), as well as the following:

- 'conservative seizure ordered on request of the public prosecutor goes to the advantage also of the civil party' (article 316(3));
- by virtue of the seizure, the credits of the state and the civil party are considered 'privileged' (article 316(4)); and
- criminal conservative seizure is executed in accordance with the civil procedure provided for its enforcement on movable goods and real estate (article 317; see question 19).

Furthermore, the law expressly provides that criminal conservative seizure is converted into garnishment when the judgment convicting the defendant to pay a fine becomes final, and to oblige the defendant to pay civil damages to the civil party (article 320(1)). In addition, the law provides as follows:

- the forced enforcement on the assets seized takes place in accordance with the provisions of the Code of Civil Procedure; and
- the money derived from the sale of the mentioned assets is first paid to the civil party under title of damages and of refund of its costs for the proceeding, and subsequently it is used for the fines, costs of the proceeding and any other amount to be paid by the defendant to the state (article 320(2)).

In the event that the victim of the crime does not request to stand as a civil party in the criminal proceeding, it can claim the ownership of the assets subject to confiscation by intervening before the court of execution of the confiscation (as a third party in good faith or person extraneous to the crime), in accordance with the procedure explained in question 24 and the conditions explained in question 27. If a dispute arises about the ownership of the assets to be confiscated, the court of execution shall remit the case to the civil court of first instance, in order to determine legitimate ownership.

Update and trends

The most relevant trend is represented by the increasing role of confiscation 'for equivalent', which in recent years has been extended to a significant number of criminal offences and has been consequently widely used in the practice of public prosecutors and courts, in addition to the related difficulty of precisely determining the notion of 'profits' of crime, and the amount subject to seizure or confiscation, especially in relation to the profits deriving from public procurements obtained through corruption or fraud.

A relevant peculiarity of the legal system to be taken into account when selecting a civil or criminal route in relation to asset recovery is the possibility of a victim bringing the civil action for restitution and damages directly in a criminal proceeding by 'standing as civil party', with significant advantages resulting from it (including the possibility of obtaining criminal 'conservative seizure' at a pretrial stage, with related entitlement to be satisfied with precedence on the defendant's assets in case of conviction).

32 Confiscation of profits

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

Originally, public prosecutors and courts had adopted a wide definition of 'profits' of crime, such as that where a company obtained a public procurement through the payment of a bribe, the entire value of that procurement could then be subject to preventive seizure or confiscation. In that scenario, costs incurred by the company in order to comply with its obligations in accordance with the procurement could not be deducted from the amount subject to seizure or confiscation. In recent years, however, the Court of Cassation has restricted such a wide notion of profits of crime, maintaining that the amount subject to seizure or confiscation should be determined by deducting from the entire value of the procurement the value of the services effectively carried out by the company in accordance with the procurement, and that resulted to the benefit of the relevant public authority (Court of Cassation, Unified Sections, No. 26,654 of 27 March 2008; Court of Cassation, No. 42,300 of 26 June 2008).

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.

The most relevant cases of confiscation without conviction relate to such 'things, the manufacturing, use, carry, detention or alienation of which represent a criminal offence': in relation to such things, confiscation is always ordered, even if a conviction is not issued (article 240(2), No. 2 of the Criminal Code). The rationale is that such things (clothes with a counterfeited trademark, drugs, etc) are intrinsically criminal and dangerous for society, and as such must be confiscated, even if the defendant is acquitted from the related charges.

Another type of confiscation without conviction that can be assimilated to in rem confiscation is the confiscation as a 'preventive measure' (namely, measure *ante delictum*), which it is provided for socially dangerous people who are members of mafia organisations, in relation to the assets they possess, where the value of such assets is disproportionate to their income and their economic activity and they cannot justify their legitimate provenance (Law No. 575/1965 and subsequent amendments). In that scenario, such an exceptional form of confiscation without conviction can be justified by the need to ensure public security by preventing the commission of future offences by individuals who have already been shown to be socially dangerous. Out of these exceptional cases, the introduction in the legal system of additional cases of confiscation without conviction is unanimously considered a violation of the Constitution, and in particular of the principle laid down by article 27(2), according to which a defendant cannot be considered guilty until final conviction.

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?

As explained in question 24, the law provides that where the subject of preventive seizure is an enterprise or company as a whole, or relates to assets for which management is necessary, the competent court appoints a special receiver (article 104-bis of the implementing legislation of the Code of Criminal Procedure). The receiver performs its task in accordance with the instructions, and under the supervision, of the competent court (which can be addressed by the public prosecutor and the defendant for any matters related to the above).

The costs of management of the assets are ordinarily provided by the state, but in case of conviction they are then attributed to and enforced against the defendant, as are all other costs relating to the criminal proceeding, and to the tracing and confiscating of the assets (see question 28).

As a general principle, assets seized (such as cars, houses, etc) can be used by state authorities as their own only after the confiscation procedure has been completed and where the specific attribution to such authorities of the confiscated assets has taken place, in accordance with the special laws on the subject (see question 24). However, where the subject of preventive seizure is an enterprise or company as a whole, the assets of such enterprise or company can be used by the receiver, to the extent necessary to grant the continuation of the enterprise or company's activity. The same principle applies to the seizure of other assets for which management is considered necessary.

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.

Requests for mutual legal assistance to foreign countries, including with respect to provisional measures relating to the recovery of assets, are governed by the international treaties signed and ratified by Italy. They include the following:

- the European Convention on Mutual Legal Assistance in Criminal Matters (Strasbourg, 1959);
- the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 1990); and
- many bilateral treaties.

In the absence of a treaty, requests for mutual legal assistance are governed by specific provisions of the Code of Criminal Procedure (articles 727 to 729).

In particular, Italy has implemented the Strasbourg Convention of 1990 by introducing a provision according to which the seizure or confiscation of proceeds of crime localised abroad must be requested from

the foreign state by the Italian Minister of Justice, who has the faculty (and not the duty) to do so, even where an Italian court has issued an order providing for the freezing or confiscation. See article 745(2-bis) of the Code, as introduced by Law No. 328/1993, as follows:

The minister additionally has the faculty, in the cases provided for by international treaties, to request the carrying out of investigations for the identification and the search of assets that are located abroad and that can become the subject of a request for the execution of confiscation, as well as the faculty to request their seizure.

Notwithstanding the clear wording of this law provision, which reserves the power to request the freezing or confiscation of proceeds of crime localised abroad to the Minister of Justice, this is often not complied with in the Italian requests to foreign states on the subject.

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.

As explained in question 35, the subject is governed by international treaties signed by Italy, and the Italian domestic provisions apply in the absence of an applicable treaty in order to supplement and regulate the aspects not regulated by the treaties.

In particular, domestic law provides (article 723 et seq of the Code of Criminal Procedure) that where a request for mutual legal assistance is made from a foreign authority, both the Minister of Justice and the court of appeal geographically competent (depending on the place of execution of the request) must approve it. If approved, the court of appeal delegates the Italian 'judge for the preliminary investigations' (not the public prosecutor) for the execution of the request.

In essence, the Minister of Justice can deny the request as follows:

- (i) where the acts requested compromise the sovereignty, security or other essential interests of the state;
- (ii) where the acts requested are expressly prohibited by Italian law or they conflict with the fundamental principles of the Italian juridical system;
- (iii) where there are grounds to believe that considerations relating to race, religion, gender, nationality, language, political opinions or personal or social conditions can negatively affect the carrying out or the outcome of the trial in the requesting state; or
- (iv) where the requesting state does not provide proper guarantees of reciprocity (article 723).

In addition, the court of appeal can subsequently deny the request where the conditions under (ii) and (iii) are met, or the dual criminality principle is not fulfilled (article 724).

The procedures above apply in general with respect to requests for mutual legal assistance from foreign states, and procedures substantially similar are provided for in relation to foreign requests aimed at identifying and freezing assets located in Italy (articles 737 to 737-bis).

The relevant international treaties can simplify the conditions for granting assistance.

Studio Legale Pisano

Roberto Pisano
Valeria Acca

robertopisano@pisanolaw.com
valeriaacca@pisanolaw.com

Via Cino del Duca, 5
20122 Milan
Italy

Tel: +39 2 7600 2207
Fax: +39 2 7601 6423

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

The most relevant convention signed by Italy on the subject is the Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990; for references to it and to the Strasbourg European Convention on Mutual Legal Assistance in Criminal Matters of 1959, see question 35.

In any case, the additional international and EU instruments of which Italy is a signatory or addressee, which can have a certain relevance on asset recovery, are as follows.

European Union

- The Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of the Member States of the European Union, Brussels, 26 May 1997 (ratified by Law No. 300/2000, which entered into force on 26 October 2000);
- the EU Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence of 22 July 2003 (not implemented yet); and
- the EU Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders of 6 October 2006 (not implemented yet).

Council of Europe

- The Criminal Law Convention on Corruption, Strasbourg, 27 January 1999 (ratified by Law No. 110/2012, which entered into force on 27 July 2012); and
- the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16 May 2005 (signed but not yet ratified by Italy).

International

- The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 17 December 1997 (ratified by Law No. 300/2000, which entered into force on 26 October 2000);
- the UN Convention against Transnational Organized Crime, New York, 15 November 2000 (ratified by Law No. 146/2006, which entered into force on 12 April 2006); and
- the UN Convention against Corruption, New York, 31 October 2003 (ratified by Law No. 116/2009, which entered into force on 15 August 2009).

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

Private individuals or organisations are not entitled to prosecute within the Italian legal system because the criminal action is always and only public, and criminal asset recovery powers must only be exercised by public prosecutors.

Jersey

Simon Thomas and William Redgrave

Baker & Partners

Civil asset recovery

1 Parallel proceedings

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

In Jersey, there is a maxim of customary law (*le criminel tient le civil en état*), which operates to give the court discretion to manage any civil proceedings so as not to prejudice any related criminal proceedings. Generally, this means that criminal proceedings take place first, but this is far from a rigid rule. Even where criminal proceedings are decided first, it is nevertheless possible to proceed with the interlocutory stages of related civil proceedings.

2 Forum

In which court should proceedings be brought?

Cases involving asset tracing will almost invariably be brought before the Royal Court, which is the island's main court. The usual way of commencing proceedings is by Order of Justice, which can include a claim for injunctive relief.

The intermediate court of appeal is the Jersey Court of Appeal and the ultimate court of appeal is the Judicial Committee of the Privy Council, which sits in London.

3 Limitation

What are the time limits for starting civil court proceedings?

There is no general limitation statute. When deciding what time limit applies to a particular case, it is first necessary to identify the cause of action that is being pursued. The common law of Jersey (known as 'customary law') has developed different limitation periods for different causes of action. Identifying the relevant period in a particular case is not always straightforward, and local legal advice is invaluable. In general, the following limitation periods apply:

- actions in contract: 10 years;
- actions in tort and for breach of trust: three years;
- actions to recover trust property from a trustee or actions against a fraudulent trustee: no limitation period applies;
- actions for possession of immovable property: a year and a day;
- actions relating to title of immovable property: 40 years;
- actions relating to the recovery of movable property: 10 years;
- in respect of claims for dishonest assistance in a breach of trust: three years (*Nolan v Minerva* [2014] JRC 078A); and
- actions for breach of directors' duties under Companies (Jersey) Law: considered to be 10 years by the English High Court (*O'Keefe v Caner & Others* [2017] EWHC 1105), which may be persuasive in Jersey, but is not binding.

It may be possible to argue that time has not run for the period when a claimant was impeded from bringing his or her claim, either as a matter of law, or as a matter of fact. In the latter case, it is important to consider not only what a claimant knew about the possibility of bringing a claim, but also what he or she could have found out on reasonable enquiry. It is also generally accepted in fraud cases that a time limit will be suspended for as long as the victim is ignorant of the fraud perpetrated against him or her. An action against a non-fraudulent trustee must be brought within 21 years.

4 Jurisdiction

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

The court will have jurisdiction if a defendant is physically in Jersey and can therefore be served with proceedings. If a defendant is outside the island, then leave of the Royal Court is required. In general, the claimant will have to satisfy the Court as follows:

- that there is a good arguable basis on which service out of the jurisdiction should be allowed;
- that the claim involves a serious issue to be tried; and
- that Jersey is clearly the most appropriate forum to litigate the matter.

These requirements are set out in more detail in the Service of Process Rules 1994.

Generally, asset recovery actions in Jersey often include an international element. Defendants may challenge the jurisdiction of the Jersey court or seek a stay of the Jersey proceedings on the grounds of *forum non conveniens* on the basis that an action could be more suitably tried in an alternative available forum.

The test to be applied in respect of applications for a stay on the grounds of *forum non conveniens* is that set out by Lord Goff in the English case of *Spiliada Maritime Corp v Cansulex Limited* [1987] AC 460, such that the court will consider which forum 'the case may be tried most suitably in the interests of all parties and the ends of justice'. In applying this test, the court will consider the following 'connecting' factors:

- matters concerning convenience or expense (eg, location of witnesses and documents relative to the proposed forum);
- the governing law of the transaction; and
- the jurisdictions where the respective parties reside and carry on their business.

It is possible to make an application for a stay on the grounds of *forum non conveniens* at any stage of the proceedings, although it is safer to make the application as soon as possible.

5 Time frame

What is the usual time frame for a claim to reach trial?

The Royal Court Rules 2004 govern civil procedure. A recent practice direction requires a letter before a claim. The potential defendant has 14 days to acknowledge receipt of the letter, and any substantive response shall be provided as soon as reasonably practical - 14 days in a straightforward case and no more than three months for the most complex cases. Following exchange of communications, the parties are obliged to consider negotiation or some form of alternative dispute resolution, which is a continuing requirement.

Once an action has commenced, by service of a claim with the requisite notice, and has been placed on the Table (list of cases displayed in the Royal Court building), a defendant wishing to defend the claim, or contest the service, jurisdiction, or both, will ask for the action to be placed on the Pending List. Thereafter, the timetable is governed by the Royal Court Rules: filing of answers (21 days); disputing jurisdiction

(21 days); and subsequent directions hearings. The number and timing of adjournments by consent are set out in practice directions.

An action may be dismissed if not completed within two years from the date it was placed on the Table, but the Royal Court generally expects actions to conclude within 12 months. An Order of Justice remains in force for one year, though may be renewed annually by the Bailiff (the chief judge) in chambers.

The Petty Debt Court Rules 2018 govern timings for claims with a value of less than £30,000.

6 Admissibility of evidence

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

The primary way for the court to receive evidence is through witness testimony and the production of documents by a witness. It has also become normal practice for the court to order evidence in chief to be given by witness statements made on affidavit.

The Civil Evidence (Jersey) Law 2003 permits the admissibility, with notice, of hearsay evidence in civil proceedings. If the court receives hearsay evidence it will assess the weight to be given to such evidence, which will include an assessment of its reliability.

7 Witnesses

What powers are available to compel witnesses to give evidence?

A witness may be summoned to give evidence, and where competent to give evidence in civil proceedings, they will generally be compellable to do so. There are some exceptions to this rule:

- a spouse or civil partner shall not be compelled to disclose any communication made to him or her by their spouse or civil partner in civil or mixed cases;
- witnesses giving evidence in response to a letter of request under the Service of Process and Taking of Evidence (Jersey) Law 1960 cannot be compelled where to do so would be prejudicial to state security. Nor can a witness be compelled to give evidence that they could not be compelled to give in the requesting country, if supported by a statement to that effect in the letter of request or conceded by the applicant;
- the Jersey Comptroller of Income Tax is most likely non-compellable;
- the Bankers Book Evidence (Jersey) Law 1986 gives an exemption from being compelled to produce a banker's book or appear as a witness, where the bank is not a party to proceedings unless by order of the court; and
- a witness may refuse to answer questions on recognised grounds of privilege, including self-incrimination, duty of confidentiality and legal professional privilege.

8 Publicly available information

What sources of information about assets are publicly available?

Publicly available sources of information about assets include the following:

- the Public Registry Index and Document Enrolment database – this records interests in real property and charges against that property within the island;
- the Companies Registry of the Jersey Financial Services Commission – this contains a register of limited companies. Information held on the register includes annual returns, articles of association and changes in registered office;
- the Security Interests (Jersey) Law 2012 came into force on 2 January 2014 and established a searchable, online, public register of security interests; and
- Article 8 of the Charities (Jersey) Law 2014 came into force on 1 May 2018 and established an online public register of charities with information about purposes, finance and public benefit.

A register of beneficial owners of companies and legal entities is maintained centrally by the Companies Registry, but is not accessible to the public at large.

9 Cooperation with law enforcement agencies

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

A party may have material that has come into his or her possession in the course of criminal proceedings. Such material can only be used in other proceedings with the leave of the court.

Often, a party will be aware of a criminal investigation relating to the subject matter of his or her case that has been carried out by the police or the Attorney General. Moreover, the police may be in possession of material provided by the Jersey Financial Services Commission, which has a statutory power to disclose information to the police with a view to investigation. In certain circumstances, it may be possible to obtain material through an informal approach to the investigating authority, particularly where the owner of the material consents to it being provided.

If an informal approach fails or is judged inappropriate, material may be obtained in some cases by serving a witness summons on the investigating authority requiring it to produce documentation. One would expect to encounter resistance to some degree from an authority holding material and a prospective claimant will need local advice as to the best way of overcoming any legal obstacles.

10 Third-party disclosure

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

The Royal Court recognises and applies the English *Norwich Pharmacal* principle, namely:

[T]hat if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he incurs no personal liability but he comes under a duty to assist the person who has been wronged by giving him the full information and disclosing the identity of the wrongdoers.

The standard of proof has recently been clarified (*Riba Consultaria Empresarial v Pinnacle Trustees Ltd* [2018] JRC033A) as follows:

- are we satisfied that there is a good arguable case that the plaintiff is the victim of wrongdoing?;
- are we satisfied that there is a reasonable suspicion that the defendant has been mixed up in the wrongdoing?; and
- as a matter of discretion, do we consider it to be in the interests of justice to order the defendant to make disclosure?

The court also recognises and applies the English *Bankers Trust* principle, namely that the court may order the disclosure of information about the location and value of assets against a bank or another third party where the plaintiff is seeking to trace funds that might be dissipated and there is strong evidence that the plaintiff has been fraudulently deprived of these funds. The court considers that the *Norwich Pharmacal* jurisdiction has, to a considerable extent, subsumed this equitable jurisdiction.

11 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?

Interim interlocutory injunctions, including freezing (*Mareva*) orders, can be obtained ex parte in order to secure assets, preventing their dissipation, prior to the determination of substantive proceedings. These can apply to assets in Jersey and elsewhere.

Jersey allows an injunction to be granted in aid of foreign proceedings even if there are no other substantive proceedings in Jersey (*Solvalub Ltd v Match Invs Ltd* [1996] JLR 361). It further allows leave to serve out of the jurisdiction if the defendant is outside the territory and the only proposed Jersey proceedings are those for injunctive relief.

A caveat (opposition) is a Jersey-specific freezing injunction to prevent any dealing with Jersey real property. It is available to a creditor of the proprietor of the property, and is in effect a form of injunction to

prevent the realisation of the immovable property asset and dissipation of the proceeds of sale.

Where civil asset recovery proceedings have been instituted, or are to be instituted, in another territory and there are reasonable grounds to believe an external civil asset recovery order may be made, the Attorney General may apply, on behalf of a government outside Jersey, for a property restraint order over recoverable property in Jersey (Civil asset recovery (International Co-operation) (Jersey) Law 2007). The restrained property vests in the Viscount, the executive officer of the Jersey court, until variation or discharge.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

Faced with a party who has not complied with a court order, it will be open to the non-defaulting party to apply for an 'unless order'. It requires compliance and imposes a sanction for non-compliance – usually, the striking out of an action, or an order debaring a defendant from defending an action.

Failure to comply with a court order can be treated as contempt of court and is punishable by way of fine or, in very serious cases, imprisonment. The Jersey court treats failure to comply with the terms of an injunction very seriously and substantial fines are often imposed.

13 Obtaining evidence from other jurisdictions

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

An application can be made to the Royal Court for a letter of request to be issued to another jurisdiction. How such a letter of request is treated once it has been issued will depend upon the procedures in place in the foreign court.

14 Assisting courts in other jurisdictions

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

This is provided for by the Service of Process and Taking of Evidence (Jersey) Law 1960. Incoming letters of request are addressed to the Jersey court and submitted via official channels, usually to the Attorney General. The court will grant assistance in respect of civil proceedings before a court in another jurisdiction that have either been instituted or are contemplated. The assistance that the court can provide includes the following:

- examination of witnesses, either orally or in writing (such evidence is taken on oath by the Viscount);
- production of documents;
- inspection, photographing, preservation, custody or detention of any property; and
- taking of samples of any property and the carrying out of any experiments on or with any property.

In appropriate cases, *Norwich Pharmacal*-type relief may be given in support of prospective proceedings abroad.

The Attorney General has powers under the Civil asset recovery (International Co-operation) (Jersey) Law 2007 to require, inter alia, the production of documents and the giving of evidence following a request for assistance from a responsible authority in relation to external civil asset recovery proceedings or investigations. The Attorney General will have to be satisfied that there are reasonable grounds to suspect the evidence relates to property that has been used or obtained in unlawful conduct.

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 are breach of contract, civil fraud (referred to as *dol*), dishonest assistance and knowing receipt. Proprietary claims may also be made.

The law also provides for a personal claim in restitution on the basis of unjust enrichment. Such a claim can arise in cases where there is no fault or blameworthiness on the part of the party who has been

unjustly enriched. The claim is subject to a change in position defence where the unjustly enriched party no longer holds the property.

16 Remedies

What remedies are available in a civil recovery action?

The principal remedies available in Jersey are as follows:

- damages;
- restitution;
- giving of an account;
- transfer of assets;
- vesting of assets;
- specific performance;
- injunctions (whether interim or permanent); and
- declarations.

Importantly, the law recognises a constructive trust as arising in favour of a defrauded beneficiary who is considered as having an equitable proprietary interest in the assets that are the subject of the trust. Consequently, tracing remedies are available in such a case.

In *Lloyds v Fragoso* [2013] JRC 211, the Royal Court held that a principal has a proprietary interest in a bribe or secret profit obtained by his or her agent.

17 Judgment without full trial

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

Under Royal Court Rule 6/6(6), judgment by default may be entered in favour of a plaintiff where the defendant fails to file an answer to the plaintiff's statement of claim, an answer has been struck out without leave being given to file another answer or the time limit for filing another answer has expired. Judgment by default does not follow automatically, but the plaintiff must make an application to the court, which may be defeated if the defendant files an answer, even if late. If judgment by default is entered against the defendant, he or she may apply to set aside that judgment.

Under Part 7 of the Royal Court Rules, summary judgment may be given in favour of a plaintiff, or a defendant bringing a counterclaim, where the plaintiff has no real prospect of succeeding on the claim or issue, or the defendant has no real prospect of successfully defending the claim or issue and there is no other compelling reason why the case or issue should be disposed of at trial. Summary judgment may be ordered by the Royal Court of its own motion or made on application by either party. The Court applies the English principles derived from the Civil Procedure Rules as set out in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch): summary judgment offers a 'realistic' as opposed to a 'fanciful' prospect of success, without conducting a mini-trial.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

Freezing orders are available against an unsuccessful defendant, as are orders for the disclosure of documents or other information about the defendant's assets. The Viscount has various powers, including the arrest, uplifting and selling of assets.

19 Enforcement

What methods of enforcement are available?

It is usual for a judgment to include an authority to realise or sell assets. Orders such as arrest of wages are also available where a defendant is in employment. A debt can also be secured over a defendant's immovable property by obtaining a judicial hypothec, which is registered in the public registry.

As noted in question 18, the Viscount has various powers exercisable over a defendant's property with a view to enforcing judgment. Foreign judgments are not automatically enforceable in Jersey. There is a statutory scheme for the enforcement of judgments obtained in England and Wales, Scotland, Northern Ireland, the Isle of Man and Guernsey. Enforcement of judgments from other jurisdictions

generally has to proceed by way of commencement of fresh proceedings in Jersey, and where possible suing on the judgment debt.

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?

The Jersey court has upheld third-party funding agreements as valid and enforceable. The court took the view that public policy strongly pointed towards litigation funding agreements being valid and enforceable. To that extent, this recent development opens the door for funding arrangements in Jersey. However, whether a particular agreement will be valid will depend on the circumstances of each case as well as the terms of the agreement. Conditional fee agreements are prohibited in Jersey. Recent practice directions are concerned with costs budgeting. Not later than seven days before the first directions hearing, unless the court otherwise orders, all parties must file and exchange budgets where the value of the claim, including any counterclaim, is less than £500,000. When making any costs order, the court will not permit a party to depart materially from such a costs budget, unless satisfied there is good reason to do so, and may take into account any such costs budget both in deciding what costs order to make and upon taxation.

Criminal asset recovery

21 Interim measures

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

The Jersey version of a restraint order is known as a *saisie judiciaire* (*saisie*) and is obtained on application by the Attorney General to the Bailiff. The effect of a *saisie* is that all of the subject's realisable property in Jersey will vest in the Viscount. An application for a *saisie* can be made where there are instituted, or about to be instituted, proceedings in which there is reasonable cause to believe that a confiscation order will be made. The criteria and procedure for granting a *saisie* are contained in the Proceeds of Crime (Jersey) Law 1999 (the 1999 Law), which also provides for applications for variation or discharge.

Where a financial institution that holds funds makes a suspicious activity report in relation to those funds (which would happen where there is reason to suspect that the funds in question represent the proceeds of crime), the institution requires the consent of the police (invariably the Joint Financial Crimes Unit) to deal with those funds. Unlike the position in England and Wales, there is no time limit imposed on the police within which a decision on consent must be given. It is quite common for funds to be informally frozen for lengthy periods of time where police consent has not been forthcoming.

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?

There is no automatic investigation. In practice, this will happen in the vast majority of cases involving fraud, corruption and other financial crimes. Under the 1999 Law, the court may confiscate assets following a request by the Attorney General or of its own motion. Over the past decade, Jersey has seen a large number of substantial confiscation orders imposed on defendants by the court.

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 1999 Law is the principal statute. Along with the provisions for freezing assets, mentioned above, it gives the court power to make confiscation orders consequent upon conviction for any criminal offence for which a person is liable to imprisonment for one or more years. In relation to a course of criminal conduct, a confiscation order will relate to at least two qualifying offences in the proceedings or at least one qualifying offence in the previous six years. The Terrorism (Jersey)

Law 2002 criminalises certain activity surrounding the funding of terrorism, and makes provision for forfeiture of property connected with such offences.

The benefit figure is the amount assessed by the court to be the value of the defendant's benefit from the relevant criminal conduct. Where the court is considering a course of criminal conduct, it may, if it thinks fit, make three rebuttable assumptions as set out in the 1999 Law to determine whether the defendant has benefited from relevant criminal conduct, and assess the value of the benefit. These assumptions relate to the earliest time property was received by the defendant, expenditure and an assumption that the property is free of any other interests in it.

Where the amount that might be realised is less than the assessed value, the penalty will be the amount that appears to the court might be so realised.

24 Confiscation procedure

Describe how confiscation works in practice.

Confiscation should take place before an offender is sentenced, but invariably, with contested cases, the court will exercise its power to postpone the issue of confiscation until after sentencing.

In practice, the prosecution presents the court with its assessment of benefit. The defendant is then required to provide the court with a statement of available assets.

The Jersey court approaches confiscation proceedings in accordance with what was set out by the House of Lords' decision in England in the case of *May* [2008] 1 AC 1028, namely:

- has the defendant benefited from criminal conduct?;
- if so, what is the value of the benefit that he or she has so obtained?; and
- what sum is recoverable from the defendant?

These are treated as distinct questions.

Where any issue is contested, the court has the ability to hear evidence. Where the contest is as to the sum recoverable, in most cases, it will be for the defendant, who bears the burden of proof, to give evidence that his or her realisable assets are less than the amount of benefit.

25 Agencies

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

In practice, the Joint Financial Crimes Unit of the States of Jersey Police and the Jersey Customs and Immigration Service carry out investigations to trace the proceeds of crime, under the direction of the Attorney General's department. The Attorney General has the power to commence his or her own investigation in cases of serious fraud pursuant to the Investigation of Fraud (Jersey) Law 1991. In such cases, the investigation is likely to be led by the Attorney General's department and is often multi-jurisdictional in nature.

As noted in question 22, it is the Attorney General who is responsible for applying to the court for a confiscation order.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Yes. Because there is a clear distinction in the confiscation legislation between a defendant's benefit from criminal conduct and his or her available assets, it is possible not only for secondary proceeds in the hands of a defendant to be confiscated, but also property that has a legitimate provenance.

27 Third-party ownership

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

In the case of jointly owned property (eg, the matrimonial home), there will in most cases be a division in the property to take account of the portion owned by the spouse, which will not be confiscated. Usually, it will be necessary either for the matrimonial home to be sold in order to satisfy an offender's confiscation order or for the offender's spouse to raise the funds to buy the offender's share in the property.

An important caveat is the provision relating to tainted gifts. Under the 1999 Law, any gift made by a defendant may be treated as available to him or her for the purposes of a confiscation order, even if it has been transferred to a third party at any time after the commission of the offence, and the court thinks it appropriate to take the gift into account. A transfer at an undervalue is treated as a gift.

28 Expenses

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

The costs of tracing and confiscating assets are not usually recovered from a defendant. Any sums confiscated are transferred to a criminal offences confiscation fund, established under the 1999 Law, which are then used for specified purposes such as crime prevention.

29 Value-based confiscation

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

Yes, see question 24. It is for the defendant to show that his or her available assets are less than his or her benefit from the proceeds of crime.

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 has the initial burden of proving first that the defendant obtained assets, and second that those assets represent the proceeds of crime. On both issues, the standard of proof is the civil standard.

The prosecution may be assisted in showing the provenance of certain assets held by the defendant in the six years preceding the institution of proceedings against him or her, by certain statutory assumptions that any property held or transferred by him or her is the proceed of crime.

Once the court has arrived at a benefit figure, it is for the defendant to prove, also on the balance of probabilities, that he or she does not have sufficient funds available to satisfy a confiscation order in that sum.

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?

It is possible for a sentencing court to order that the defendant compensate identifiable victims. A compensation order is distinct from a confiscation order. The court may make a compensation and a confiscation order against a defendant in the same proceedings. Where a defendant does not have the means to pay a compensation order in full the court may order that the shortfall be paid out of any sums confiscated.

While it is not possible to use funds confiscated in satisfaction of a civil claim for damages, where the court is satisfied that a victim of crime has taken or intends to take civil action, it may reduce the amount of a confiscation order to take account of this fact, in order to leave funds available to satisfy a civil judgment.

32 Confiscation of profits

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

Yes. This is part of the assessment of benefit from criminal conduct. It is likely that the court would follow the English Court of Appeal decision in *R v Sale* [2013] EWCA Crim 1306, which followed the Supreme Court decision in *Petrodel Resources v Prest*. Although the court would not hesitate in an appropriate case to lift the corporate veil of a company that had obtained profit following a corrupt procurement process so as to treat those profits as benefit of criminal conduct, it would also strive to achieve a confiscation order that was proportionate in all the circumstances of the case.

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.

The Proceeds of Crime (Cash Seizures) (Jersey) Law 2008 allows the seizure of 'tainted cash', which is defined as cash used in, or intended to be used in, unlawful conduct; or obtained in the course of, from the proceeds of, or in connection with, unlawful conduct.

Cash may be seized for a period of 48 hours by a police or customs officer. Thereafter, the Attorney General may apply to the Bailiff for an order that the cash be detained. The cash may then be forfeited by order of the Royal Court on the application of the Attorney General.

Anyone seeking to obtain the release of the cash has the burden of showing on the balance of probabilities that it is not tainted cash. Such proceedings are treated as civil and not criminal.

A victim of crime who lays claim to the seized cash may apply to the court for the release of the cash back to him or her.

A new law dealing with the seizure and forfeiture by way of civil proceedings of tainted cash and other assets will be in force in the near future.

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?

There is a statutory provision that allows the payment of the Viscount's fees and expenses that arise in the course of seizing and managing assets that are subject to a *saisie*. In some cases, especially where immovable property is managed over a lengthy period, the management costs can be substantial. Where possible, these costs will be taken out of any liquidated assets held under the same *saisie*. Because the funds ultimately need to be made available to satisfy a future confiscation order, Jersey is not entitled to treat seized assets as its own. There is a provision in the 1999 Law for a party whose property has been the subject of a *saisie* to apply for compensation in the event of acquittal.

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.

If a Jersey investigation identifies the proceeds of criminal conduct committed in Jersey situated in another jurisdiction, the Attorney General will seek assistance of that other jurisdiction in effecting the freezing or seizure of the property identified. This will be done by the mutual legal assistance route. The timing of such a request depends on the particular investigation and the stage at which foreign assets are identified. In some cases, assistance will be sought to effect freezing or seizure of assets pre-conviction. In other cases, assistance will be sought in enforcing a Jersey confiscation order against property overseas.

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.

External confiscation orders in relation to foreign proceedings are governed by the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey)(Regulations) 2008, which modifies the 1999 Law. Under the 1999 Law, the court has the power to grant a *saisie* over property that features in an external confiscation order. The Attorney General can apply for a *saisie* on behalf of a foreign government as follows:

- where an external confiscation order has been made in proceedings outside Jersey;
- where there are reasonable grounds for believing that an external confiscation order may be made in such proceedings; or
- where proceedings are to be instituted outside Jersey and there are reasonable grounds for believing that a confiscation order will be made in those proceedings.

If a *saisie* is granted, then the property vests in the Viscount in the same way as it does in respect of a domestic *saisie*.

Obtaining a *saisie* is a necessary first step in enforcing an external confiscation order. The court has the power to register an external confiscation order upon the Attorney General's application. Once the order has been registered, any property subject to a *saisie* listed in the order can be realised by the Viscount and applied in satisfaction of the external confiscation order.

As mentioned in question 35, it is common for the Attorney General to enter into asset sharing agreements with foreign governments in respect of seized funds.

37 Treaties

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

The following are conventions of relevance that have been extended to Jersey:

- the Council of Europe Convention on Mutual Assistance in Criminal Matters (Strasbourg, 1959), extended to Jersey in 2008 (Spain and Italy entered declarations);
- the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 1988), extended to Jersey in 1997;

- the Organisation for Economic Co-operation and Development Convention on Combating of Bribery of Foreign Public Officials in International Business Transactions (Paris, 1997), extended to Jersey in 2010;
- the International Convention for the Suppression of the Financing of Terrorism (New York, 1999), extended to Jersey in 2008;
- the Council of Europe Criminal Law Convention on Corruption (Strasbourg, 1999), extended to Jersey on 13 June 2013; and
- the United Nations Convention against Corruption (New York, 2003), extended to Jersey in 2009.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

No, all criminal proceedings within Jersey are brought by the Attorney General in his or her capacity as a public prosecutor.



Simon Thomas
William Redgrave

simonthomas@bakerandpartners.com
williamredgrave@bakerandpartners.com

Midland Chambers
2-10 Library Place
St Helier
Jersey
JE1 2BP

Tel: +44 1534 766254
Fax: +44 1534 737355
www.bakerandpartners.com

Korea

Michael S Kim, Robin J Baik and S Nathan Park Kobre & Kim*

John P Bang and Seokchun Yun Bae, Kim & Lee

Civil asset recovery

1 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. A claimant, however, should carefully consider whether to wait until the conclusion of the criminal proceedings first before commencing any civil proceedings. On the one hand, a conviction against a defendant in a criminal proceeding may assist the claimant in proving civil liability of the defendant. On the other hand, there may be situations in which the claimant needs to move quickly (eg, making an application to freeze and seize assets). In practice, courts are quite willing to stay the civil proceeding to wait until the conclusion of the relevant criminal proceedings, if one of the parties requests a stay.

2 Forum

In which court should proceedings be brought?

Civil proceedings should be brought to the district courts or the branches thereof (based on the amount in dispute), which are located in most major municipalities. Generally, proceedings should be brought in the district court (or the branch thereof, as the case may be) of the region in which a defendant debtor or a tortfeasor is located. The Civil Procedure Act (KCPA) also provides that civil proceedings involving property right disputes can be brought in the district court (or the branch) in which the relevant property is located.

3 Limitation

What are the time limits for starting civil court proceedings?

For most civil claims (eg, breach of contract), the statute of limitations is 10 years. However, shorter periods apply for certain contractual disputes. For example, the statute of limitations for claims in commercial contract disputes is five years, and the statute of limitations for claims for construction price or claims for interests is three years.

Tort claims must be brought either within 10 years from the date the tort was committed, or within three years from the date the claimant became aware of the damage and the identity of the tortfeasor (whichever is earlier).

4 Jurisdiction

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

District courts (and branches thereof) are the courts of general and original jurisdiction. They try all civil and criminal cases at first instance.

In deciding the jurisdiction of a court, the parties' relationship, or the connection of the subject matter with the territory through various points of contact – comparable to the criteria used by the modern American long-arm statutes – is of primary importance. Doctrines of in rem and quasi in rem jurisdiction have not gained a foothold in civil law countries. In Korea, the presence of a defendant's assets forms a

basis for jurisdiction, but this basis allows the courts to render an in personam, not in rem, judgment.

At trial, parties can challenge the court's jurisdiction or apply for dismissal based on grounds such as lack of standing or lack of capacity. However, article 34 of the KCPA prescribes the court not to dismiss a lawsuit that lacks jurisdiction for the cases filed with an incorrect division of the court, rather, it must transfer such lawsuit by its ruling to the competent division, so that the claimant is relieved of detriments.

5 Time frame

What is the usual time frame for a claim to reach trial?

First, Korean civil proceedings, as opposed to their counterparts in the United States, are composed of several hearing dates. After the complaint and the answer are filed, parties are to exchange 'preparatory briefs' until the court is satisfied that the case, or particular point of legal or factual issue for complex cases, is 'ripe' enough to proceed to trial. Preparatory briefs become effective as argued in the proceeding only when and whether they are verbally pleaded in an open-court hearing. Typically, the court sets the hearing dates at intervals of four to six weeks, and the parties file the preparatory briefs sequentially during the intervals. When the court is prepared to render the judgment, it announces the closure of the hearings and sets a date for pronouncement of the judgment. It usually takes about nine to 18 months from the filing of the complaint until the court issues the judgment.

6 Admissibility of evidence

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

The KCPA does not provide discovery similar to that afforded by US courts or in other common law jurisdictions that recognise relatively broader discovery. A party in a civil litigation may only obtain evidence from the other party through the court. The court may, upon a request of the parties, examine evidence prior to the commencement of a civil proceeding (ie, the service of complaint on the defendant).

The court may grant a party's request for pretrial examination of evidence if the court finds potential undue hardship in examining evidence later in the trial unless there is an immediate examination (see article 375 of the KCPA). The pretrial examination in such a case may include witness testimony, production of documents or inspection of the actual site of controversy.

Although article 308-2 of the Criminal Procedure Act expressly prescribes that any evidence obtained in violation of the due process shall not be admissible, there are no provisions in the KCPA on limiting the admissibility of collected evidence in a civil suit. Nor has the KCPA any provision on relevance. Rather, the KCPA (article 202) follows the civil law principle of free evaluation of evidence, which courts have interpreted to give them flexible room for assessing the probative value of the collected evidence, rather than following any set formalistic rules such as requiring the signature of the person who created a document (see the Supreme Court 8 November 1994 94Da31549). In the same vein, civil proceedings do not have limitations on the admissibility of documents created even after the initiation of a lawsuit, let alone on hearsay evidence. Case law is no different, as courts have found that even illegally taken evidence (eg through unconsented recording of a

phone call) may be admitted subject to the court's discretion (see the Supreme Court 14 April 1981 80Da231.4). However, the party that took evidence illegally would nonetheless face liability based on applicable laws (eg, the Protection of Communications Secrets Act for an illegal recording).

7 Witnesses

What powers are available to compel witnesses to give evidence?

If a witness does not appear to testify without a justifiable ground after receiving a subpoena, he or she will be subject to an administrative fine of up to 5 million won and shall bear the litigation costs increased by the non-compliance with the subpoena. If the witness does not comply regardless, he or she will be subject to detention up to seven days. As soon as the witness is detained, the court shall hold a hearing to examine the witness, and if the witness testifies, he or she will be released. If the witness does not testify without a justifiable ground (after voluntarily appearing before the court or taken to the court), the witness will be subject to an administrative fine up to 5 million won (see article 311 of the KCPA).

8 Publicly available information

What sources of information about assets are publicly available?

The following sources of information about assets are publicly available (for free or for a fee):

- land and building registration;
- companies and business registration;
- intellectual property (patents and trademarks) registration;
- securities registration;
- vehicle, boat and aeroplane registration;
- factory estate registry; and
- mine estate registry.

There are also private companies that can run collective searches for various assets.

9 Cooperation with law enforcement agencies

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

In the course of the proceedings and also during trial, the court, at its own discretion or upon request by an interested party (including victims of the underlying fraud), may order law enforcement and regulatory agencies (and other public bodies) to provide or deliver documents deemed necessary for the court's final decision. In addition, private persons may file an information disclosure request with the relevant government agencies. Such information requests are, however, subject to close scrutiny and complex requirements, and are often denied if there is a pending trial.

10 Third-party disclosure

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

A party can request the court to issue an order to produce specific documents in the possession of the other party or any third party. Specifically, under article 344 of the KCPA, a party can file an application for an order for document production under any of the following circumstances:

- the other party possesses the document that it cited in the action;
- the applicant is legally entitled to request the document holder to deliver or make the document available for inspection; or
- the document has been prepared for the benefit of the applicant, or prepared as a result of the legal relationship between the applicant and the document holder.

A party's application for document production must clearly indicate the following (article 345 of the KCPA):

- the document requested;
- the contents of the requested document;
- the holder of the document;
- the fact to be proved by the document; and
- the grounds on which the document should be produced.

11 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?

In order to maintain the status quo of a tortfeasor's or a debtor's assets, a claimant can apply for one or both of the following provisional reliefs – provisional attachment or provisional injunction.

A creditor may apply for these reliefs *ex parte* in cases of provisional attachment and provisional injunction to prohibit the debtor from disposing of the relevant asset.

A provisional attachment is invoked by a creditor with a monetary claim against a debtor, and it covers personal properties as well as real properties (article 276 of the Civil Execution Act). Provisional attachments remain effective even if the assets were later disposed to third parties. The creditor must identify in his or her application the specific assets the debtor owns or possesses. If the claimant wins the lawsuit, he or she can enforce his or her right through the court auction.

A creditor who has a non-monetary claim (eg, specific performance for transfer of real property) may apply for a provisional injunction to prohibit the debtor from disposing the asset, and seek delivery of personal property, transfer of accounts receivable or bank account, or registration of real property (articles 257 to 259 of the Civil Execution Act). The order prevents the owner or holder of the property from delivering possession of or assigning the property to a third party, or encumbering the property. Like a provisional attachment, a provisional injunction is effective against third parties who obtain the property in violation of the injunction.

A creditor who is seeking to prohibit certain actions (eg, unfair competition), copy financial documents of the debtor corporation, dismiss directors or appoint a provisional representative to the debtor corporation may file a petition for a provisional injunction to set a tentative status (article 304 of the Civil Execution Act). The court shall hold a hearing to decide on this type of application. The court usually reviews the petition and supporting evidence without witness testimony, and has discretion as to the issuance of the injunction and the necessary undertakings to protect the parties' interest.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

As a general matter, the court may impose fines (of up to 5 million won) or detention (up to seven days) for witnesses who fail to appear to testify under oath (see article 311 of KCPA). In addition, a witness who makes a false testimony under oath may be punished for perjury by imprisonment for up to five years and a fine of up to 10 million won (see article 152 of the Criminal Act). Finally, when applicable, the court may draw adverse inferences against a party refusing to comply with a procedural order, such as an order to produce documents (see article 349 of KCPA).

The law provides for additional sanctions against debtors who refuse to comply with court orders. The court may detain a debtor for up to 20 days for failure to appear at a disclosure hearing, refusal to provide the list of his or her assets or refusal to testify under oath. A debtor who files a false list of assets is subject to up to three years of prison or a fine of up to 5 million won (see article 68 of the Civil Execution Act). Further, if a debtor does not satisfy his or her obligation within six months after the court order, the creditor may petition to list the debtor on the 'defaulters' list', a publicly available list that serves as a detriment to obtaining a loan or otherwise conducting business activities (see article 70 of the Civil Execution Act).

13 Obtaining evidence from other jurisdictions

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

Information can be obtained through courts in other jurisdictions under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970. Korea is also a party to several multilateral or bilateral legal assistance treaties with foreign nations that concern the sharing of evidence.

14 Assisting courts in other jurisdictions

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

Assistance with service of process

Korea is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. In accordance with the Convention, service of process is conducted by the Ministry of Court Administration at the Supreme Court, which is the designated central authority for processing the service of documents from other contracting states. Documents from other contracting states are served on a Korean resident according to the method prescribed by the KCPA.

Taking evidence from a witness in Korea

Korea is a party to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Under the Convention, a request to take evidence from a witness in Korea can be sent through a letter of request to the Korean central authority, which will then transmit the letter to the relevant Korean court. If accepted, the court will conduct an in-court witness examination in accordance with the KCPA.

Enforcing foreign judgments

A judgment obtained in a jurisdiction outside Korea can be recognised and enforced by Korean courts. To enforce a foreign judgment, a party must request and obtain an enforcement judgment from a Korean court (article 217 of the KCPA and article 26 of the Civil Execution Act). The recognition of a foreign judgment is subject to certain requirements (article 217 of the KCPA), including the following:

- the judgment is final and conclusive;
- the court that rendered the judgment has jurisdiction under the principles of international jurisdiction laid down in Korean law or treaties;
- the defendant was properly served with the complaint or summons in advance to allow sufficient time for preparation of his or her defence, or the defendant responded to the suit without having been served;
- the effect of the judgment is not contrary to Korean public policy; and
- a guarantee of reciprocity exists.

15 Causes of action

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

Under Korean law, a party injured by fraud may file a suit under at least two legal theories: breach of contract or tort under the Civil Act. Particulars of the case and other considerations such as the statute of limitations should dictate with which of the two theories to present the case. The amount of damages from either action is the same, and there are no punitive damages available under the law.

In certain limited circumstances, fraudulent transfer suits are allowed against third parties who received the property or benefit from the debtor with knowledge. Proprietary claims are allowed subject to strict showing of chain or flow of interests from the original rightful owner claimant to the debtor or third party.

16 Remedies

What remedies are available in a civil recovery action?

Courts can order the following:

- performance of specific obligations (eg, delivery, transfer or both of certain property);
- seizure;
- restitution;
- damages; and
- injunctions.

As to damages, punitive or treble damages are not allowed in most civil litigation (but see, for example, article 3 of the Product Liability Act, No. 14716, last amended 18 April 2017 (treble damages are allowed for manufacturers found liable under the Act).

17 Judgment without full trial

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

If the defendant does not file an answer within 30 days from service of the complaint, the court may render the judgment on the premise that the defendant is deemed to have admitted all the facts alleged by the claimant (see article 257 of the KCPA). In cases without significant disputes, if the claimant asks for a cash payment and requests an order for such payment, the case proceeds based only on written submissions and without oral arguments. If the defendant requests a full trial, however, the regular proceeding is automatically commenced.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

The main post-judgment relief available to successful claimants include the following:

- appointment of a receiver, in a case in which an insolvent debtor otherwise meets the requisite elements under the Debtor Rehabilitation and Bankruptcy Act;
- examination of judgment debtors in identifying the whereabouts of their assets;
- enrolment of the debtor on the 'defaulters' list';
- attachment or garnishment of debtors' assets; and
- discovery of the judgment debtors' assets held by the debtors or third parties (eg, banks) through a separate court application.

19 Enforcement

What methods of enforcement are available?

Methods of enforcement include seizure and sale of assets, garnishee orders and insolvency proceedings.

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?

There are currently no clear court precedents or jurisprudence on third-party litigation funding. The Attorney-at-Law Act, however, prohibits a lawyer from becoming an assignee of any rights in dispute.

Contingency fees for representation in civil matters are permitted under the law and are frequently used in practice. Nonetheless, parties and attorneys are advised to exercise caution with regard to contingency fee arrangements. For instance, a court may reduce an excessive contingency fee to a reasonable level if the fee amount is found to violate public policy.

Insurance is available to cover all or part of a party's legal costs for certain types of civil and commercial cases. With respect to costs, a final court judgment includes a decision on the allocation of costs of the proceedings. The losing party bears litigation costs in principle (article 98 of the KCPA). In a partial win, the court has the discretion to decide the ratio or amount of litigation costs that the respective parties must pay. However, there is a ceiling on the reimbursable attorney's fees as set out in the Supreme Court regulations, which in most cases is not high enough to cover the actual costs.

Criminal asset recovery

21 Interim measures

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

The law prescribes the act of disguising the proceeds of crime as legitimately acquired or concealing such proceeds (ie, money laundering), and recovers assets based upon relevant laws, including the Criminal Act, the Act on Regulation and Punishment of Criminal Proceeds Concealment and the Act on Special Cases Concerning the Confiscation and Return of Property Acquired through Corrupt Practices (the Criminal Proceeds Act). Korean law also governs concealment or disposition of properties with a 'preservation order for the purpose of confiscation', which allows the freezing of assets prior to conviction or indictment under certain specific statutes.

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?

Article 10-3 of the Act on Regulation and Punishment of Criminal Proceeds Concealment provides for the grounds for the prosecutors' investigation to identify, trace and free proceeds from serious crimes. Although the language of the provision does not provide for an automatic initiation of the relevant investigation, there is a special department at Seoul Central District Prosecutors' Office that is in charge of the relevant investigations.

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 Criminal Act (article 48) and the Criminal Proceeds Act (articles 8 to 10) provide the general framework for confiscation of the proceeds of crime, as well as properties, equipment and instrumentalities used or planned to be used in corruption offences, with due protection of the rights of bona fide third parties. Additionally, there are confiscation provisions in the Criminal Proceeds Act (articles 3 to 6) and the Act on Special Cases Concerning Confiscation on Offences of Public Officials (articles 3 to 6). Criminal proceeds include income derived from such proceeds. Value-based confiscation is also possible. The value of the property is determined by the court based on the prosecution's evidence.

The laws above, together with the Act on Reporting and Use of Certain Financial Transaction Information, address the identification, freezing or seizure of criminal proceeds and instrumentalities.

24 Confiscation procedure

Describe how confiscation works in practice.

Typically, law enforcement authorities seize the proceeds and the instruments used to commit crime to preserve them as evidence, pursuant to search-and-seize warrants during an investigation, and keep them during the trial. Once the court decides that the seized property should be confiscated, the prosecutor will enforce the court's confiscation order and the property will belong to the government.

In cases of cash proceeds, the prosecutor will deposit the proceeds with the Treasury. For instrumentalities with value, the prosecutor will sell them via a public auction and deposit the proceeds with the Treasury. A legitimate owner of the confiscated property (eg, a bona fide third party who had no knowledge of the crime) can request the return of such property or its proceeds (if it has already been sold at an auction).

25 Agencies

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

Agencies responsible for tracing and confiscating the proceeds of crime are as follows:

- the Public Prosecutor's Office (under the supervision of the Supreme Prosecutor's Office);
- the police; and
- the Financial Services Commission.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Yes. Several Korean laws, including the Act on Special Cases Concerning Confiscation on Offences of Public Officials and the Criminal Proceeds Act, provide prosecution with the authority to confiscate secondary proceeds.

27 Third-party ownership

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

Yes. Several Korean laws, including the Criminal Law (article 48) and the Criminal Proceeds Act, provide that the proceeds of crime transferred to a third party may be confiscated if the third party knew of the crime at the time of acquisition.

28 Expenses

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

Yes. When confiscating from the criminal perspective, the person upon whom a judicial decision is being executed must bear the execution costs under article 493 of the Criminal Procedure Act. Such costs must be paid concurrently with the execution. Thus, costs arising from asset recovery and confiscation must first be paid out of the asset that is being confiscated. However, costs arising from asset tracing, other than those arising from legal procedures, constitute investigation expenses.

29 Value-based confiscation

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

Yes. If the exact property cannot be confiscated, the value of the property will be subject to confiscation. The value of the property will be determined by the court based on the prosecution's evidence.

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?

As a general matter, the burden of proof is on the prosecution. Under the Criminal Act and Criminal Procedure Act, no provision alleviates the burden of proof regarding confiscation in general. However, certain special acts have provisions on the burden of proof regarding the calculating or proving of illegal profits or assets.

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?

Yes, partially. Under relevant laws, the property of the victim of a predicate offence, which has been confiscated or an equivalent value of which has been collected, must be returned to the victim (eg, article 333 of the Criminal Procedure Act).

32 Confiscation of profits

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

Yes. Particularly under relevant laws on redemption of the proceeds of crime, the scope of assets that could be confiscated or redeemed is extensive, which allows for confiscating secondary proceeds derived from the proceeds of crimes. Article 48 of the Criminal Act prescribes that only a thing that has been used or was sought to be used in the commission of a crime, produced by or acquired by means of criminal conduct, and received in exchange for such a thing can be subject to confiscation. However, various statutes extend the scope of confiscation to include proceeds of crime or assets obtained as fruits to such proceeds.

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.

Article 48 of the Criminal Act provides for confiscation of a thing (in whole or in part) used or sought to be used in the commission of a crime, produced by or acquired by means of criminal conduct, and received in exchange for such a thing. Article 49 provides for confiscation even when a conviction has not been achieved when the requisites of confiscation in article 48 have been met.

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?

In principle, the prosecution manages confiscated assets. However, upon the transfer of ownership rights to the government, which causes the assets to become government property, the Korea Asset Management Corporation manages such assets under the supervision of the Ministry of Strategy and Finance. Once the assets become national property, no more taxes or maintenance costs arise. The duty of the Korea Asset Management Corporation is to sell the obtained personal and real properties, and it may lease them until sold.

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.

Under the Act on International Judicial Mutual Assistance in Criminal Matters, a prosecutor seeking mutual assistance prepares and sends a written request for mutual assistance to the Minister of Justice. If the Minister of Justice deems it reasonable, he or she will send it to the Minister of Foreign Affairs, who will then send it to the foreign country. Such requests may be made for assistance in relation to the following:

- investigation into the whereabouts of a person or object;
- provision of documents and records;
- service of documents, etc;
- gathering of evidence – seizure, search and inspection;
- delivery of objects, such as evidence; and
- hearing of statements and other measures to make any person testify or cooperate with an investigation in the requesting country.

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 Act on International Judicial Mutual Assistance in Criminal Matters, a foreign request for legal assistance in a criminal matter should be directed to the Minister of Foreign Affairs, who will then send the written request to the Minister of Justice, along with related materials and his or her opinion.

KOBRE & KIM LLP

Michael S Kim
Robin J Baik
S Nathan Park

michael.kim@kobrekim.com
robin.baik@kobrekim.com
nathan.park@kobrekim.com

9F, Tower B, The-K Twin Towers
50, Jong-ro 1-gil, Jongno-gu
Seoul 03142
Korea

Tel: +82 2 369 1212
www.kobrekim.com

bkl BAE, KIM & LEE LLC

John P Bang
Seokchun Yun

john.bang@bkl.co.kr
seokchun.yun@bkl.co.kr

133 Teheran-ro, Gangnam-gu
Seoul 06133
Korea

Tel: +82 2 3404 0000
Fax: +82 2 3404 0001
www.bkl.co.kr

Such requests may be made for assistance in relation to the following:

- investigation into the whereabouts of a person or object;
- provision of documents and records;
- service of documents;
- gathering of evidence – seizure, search and inspection;
- delivery of objects, such as evidence; and
- hearing of statements and other measures to make any person testify or cooperate with an investigation in the requesting country.

Any request for mutual assistance shall be made in writing specifying the following matters:

- the agency taking charge of the investigation or the trial related to the request for mutual assistance;
- a summary of the case for which mutual assistance is requested;
- objectives and contents of a request for mutual assistance; and
- other matters necessary for providing mutual assistance.

In a recent case, the Korean law enforcement and Ministry of Justice assisted US government agencies in executing US confiscation judgment against a debtors' assets located in Korea. This reflects the trend of broader assistance by the Korean government, expanding cooperation from traditional information gathering to assistance in seizure and recovery of assets.

37 Treaties

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

Korea is a signatory to several international conventions, including the following:

- the Council of Europe Convention on Mutual Assistance in Criminal Matters 1959;
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 17 December 1997;
- the UN International Convention against Corruption, New York, 31 October 2003; and
- the UN Convention against Transnational Organized Crime, New York, 15 November 2000.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

Private prosecution does not exist in Korea.

- * *This article was written as a collaborative project between Bae, Kim & Lee and Kobre & Kim. Bae, Kim & Lee contributed summaries of Korean law. Kobre & Kim contributed thoughts on strategy in judgment enforcement and asset recovery matters.*

Liechtenstein

Thomas Nigg and Eva-Maria Rhomberg

Gasser Partner Attorneys at Law

Civil asset recovery

1 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, if the outcome of the criminal proceeding is of the utmost importance for the civil proceeding, the latter may be suspended until a verdict is reached (section 191(1) of the Civil Procedure Act (ZPO)).

2 Forum

In which court should proceedings be brought?

According to section 30 et seq of the Law on Jurisdiction (JN), the District Court has jurisdiction *ratione loci* and *ratione materiae* under the condition that the defendant has his or her common residence in Liechtenstein. Depending on the nature of the matter, there are several particular places of jurisdiction (section 37 et seq of the JN). Under certain conditions relating to the assets of the defendant, it is possible to sue a person who resides abroad if he or she has his or her assets based in Liechtenstein (section 50 of the JN, 'asset-based jurisdiction').

3 Limitation

What are the time limits for starting civil court proceedings?

Provisions regarding statutes of limitation are found under section 1478 et seq of the Civil Code (ABGB). Time limits can vary between three, five, 10 and 30 years, depending on the nature of the matter (sections 1478, 1480 and 1486 of the ABGB). According to section 1489 of the ABGB, the time limit for a compensation claim is, for instance, three years starting from the date at which the wronged party gains knowledge about the damage and the tortfeasor, regardless of whether the grounds are based on a contract or not. If the damage is caused by crime, the time limit is 30 years (section 1489 of the ABGB). A compensation claim regarding financial services expires after three years, but the ultimate time limit is 10 years instead of 30 years (section 1489a of the ABGB). For the mere non-use of a right, however, the general time limit is 30 years.

4 Jurisdiction

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

Generally, the District Court, as a civil court, has jurisdiction if the forum is given according to section 30 et seq of the JN. The Court has jurisdiction *ratione loci* and *ratione materiae* if, and to the extent, the qualifications of a person's jurisdiction (usually determined by his or her place of residence) are met.

The District Court must examine the circumstances of jurisdiction *ex officio* (section 23 of the JN). As in most other jurisdictions, courts first check on the duty to accept the case. In civil proceedings, this examination is primarily based on the statements of the claimant. In

case jurisdiction is not given, the claim must be dismissed at each and every stage of proceedings according to section 24 of the JN.

Further, in cases where the court does not examine jurisdiction *ex officio* the defendant must raise the defence of the lack of jurisdiction at the first opportunity before pleading to the merits of the claim. This usually happens in the first statement of defence.

5 Time frame

What is the usual time frame for a claim to reach trial?

Compared to trials in other jurisdictions, Liechtenstein's justice is considerably swift. There are no rules requiring criminal cases to be granted priority. Once the relevant pleadings are filed, a hearing is usually scheduled within weeks. Although the median time from commencement of a lawsuit to judgment is 12 months, it may take longer if the case is complex and international, foreign law must be applied or witnesses who live abroad must be heard in court. Even if all instances of courts are gone through, a final decision in most civil cases can be reached within two or three years.

6 Admissibility of evidence

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

Rules regarding the admissibility of evidence in civil proceedings can be found under section 266 et seq of the ZPO. There are five different types of evidence named in the ZPO, all of which have equal weight:

- evidence by documents (section 292 et seq);
- hearing of witnesses (section 320 et seq);
- evidence by (qualified) experts (section 351 et seq);
- evidence by inspection of the court (section 368 et seq); and
- evidence by party interrogation (section 371 et seq).

Under civil procedure law, a judge is free to weigh and consider the evidence submitted by the parties.

In case certain evidence is likely to be destroyed or the giving of evidence would be aggravated, the court can take evidence before the trial begins. These possibilities, named in section 384 et seq of the ZPO, are handled restrictively to avoid pre-trials and evasion of procedural principles.

Under certain circumstances, hearings of evidence or applications for evidence may also be rejected by the court (eg, in cases where information and evidence could have been provided sooner (section 179(1) of the ZPO)).

7 Witnesses

What powers are available to compel witnesses to give evidence?

According to section 326 of the ZPO, the recognising court decides whether, and in what way, the progress of the proceedings in the main case is influenced by the unjustified refusal to testify, the performance of the witness's oath or by the coercive measures instituted against the witness for this reason. However, in all cases of unjustified refusal to give evidence, the disobedient witness is liable to both parties for the damage caused to them by thwarting or delaying the provision of

evidence (section 333 of the ZPO). In particular, he or she is also obliged to reimburse all relevant litigation costs caused by his or her refusal. Moreover, if the witness's refusal to give evidence was wilful, the witness may be punished with a 'wanton penalty' by the court.

In the case of a duly summoned witness who does not appear at the hearing without a sufficient excuse, the judge is allowed to issue an order to reimburse all costs caused by his or her absence. In addition, the witness will be summoned again and an administrative fine can be imposed. In the event of repeated absence, the fine could be doubled to the legal extent, and the forced arraignment of the witness is ordered.

8 Publicly available information

What sources of information about assets are publicly available?

There are different sources of information about assets that are publicly available. One of the most important sources is the Liechtenstein Commercial Register. Article 6 of the Commercial Register Regulation states the publicity of the Commercial Register. Generally, the Commercial Register contains information regarding corporations, trusts, foundations and establishments, etc, that are domiciled in Liechtenstein. The information given about a corporation by the Commercial Register includes the name, domicile and purpose, including members of the board. In specific cases, especially regarding certain foundations, the information may be limited and restricted.

Furthermore, information about real estate and its limitations is available through the Land Register, which is publicly available as well. Anyone who has a vested interest may seek information. However, any person, even without an interest, is entitled to receive basic information such as the name and description of a property, owner's name and type of ownership, date of acquisition, as well as its easements. Information or an extract from the Land Register may only be provided in respect of a specific property. An individual-related inquiry is not permitted (article 551 of the Property Law).

There is no special or publicly available enforcement or insolvency register. However, bankruptcy information is published on the District Court's website (www.gerichte.li/publikationen).

9 Cooperation with law enforcement agencies

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

No party can obtain on his or her own authority evidence for no reason from law enforcement and regulatory agencies in civil proceedings. However, this is different when a party is an additional party in criminal proceedings. In such a case, the court may allow further inspection of files. According to section 183(1), number 3 of the ZPO, the judge may procure documents held by public authorities or notaries if parties relate to these documents.

10 Third-party disclosure

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

If a third party is in possession of a required document, the judge can decide upon a motion by the evidence leader. After hearing the third party and the other party of the trial, the judge decides through a court order whether the third party must provide the specific document or produce certain types of documents (section 308 of the ZPO).

Furthermore, information from third parties not suspected of wrongdoing can be obtained by hearing witnesses (section 320 et seq of the ZPO). A witness is always cautioned and instructed about section 288 of the Criminal Code (StGB), stating that false testimony is a criminal offence. Moreover, a witness is instructed that he or she has the right to remain silent if certain conditions are met (section 321 of the ZPO). If a request of evidence is aimed at clarifying a law-producing or law-destroying fact, the elements of which were not clear to the party itself and that were neither presented nor substantiated by it, this is an inadmissible proof of exploration or discovery.

11 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?

As in many other jurisdictions, the success of court actions often depends on the effectiveness of interim remedies or provisional measures taken before or in place of the main proceedings. Generally, for preventing (irreparable) injuries to the applicant, a party might obtain measures for interim relief from a court upon motion. During the pendency of extrajudicial proceedings, interim relief (such as an injunction) may be rendered ex officio (article 270(3) of the Enforcement Act (EO)). The EO deals with interim relief, particularly with such injunctions as described in the following. It is also possible to reduce or avoid the loss of assets through interlocutory injunctions.

Interlocutory injunctions may either take the form of a security restraining order or an official order, the choice of which generally depends on the nature of the claim. Though security restraining orders aim exclusively at securing pecuniary claims, official orders deal with claims other than those of a pecuniary nature. That is why the focus hereinafter is based on security restraining orders.

Security restraining order

As long as the party has direct access to enforcement, thereby achieving the same results, injunctions are inadmissible. If the applicant is already sufficiently secured, either by a right of lien or retention, or the court views him or her as sufficiently protected, an injunction may be denied.

A court will only grant injunctions if two major conditions are met. Besides certifying the claim that warrants such a legally far-reaching measure, it is necessary to establish reasonable security reasons. The applicant must furnish prima facie evidence that he or she is going to face risk. In some cases, it is sufficient to certify that the opposing party is a 'domiciliary company' (B 27.01.1997, 1 C 208/96-35, LES 1998, 166).

As security for pecuniary claims, the court may order different injunctions as follows:

- the seizure, custody and compulsory administration of movable tangible property;
- the deposit of funds in court;
- an injunction by order of the court on the sale or seizure of movable tangible property to the effect that the sale or seizure is rendered invalid; or
- an injunction addressed to a third party in which the alleged debtor must file a pecuniary claim against that third party.

In urgent cases, an applicant may file a preliminary request to the competent authorities to render a provisional order. However, the applicant must file the motion with the court in writing. A preliminary court order loses any effect if the applicant fails to do so (article 272 of the EO).

Interim injunctions are always issued and enforced at the expense of the applicant. Upon service of the injunction, the applicant can be required to pay in advance to the court the amount of money required for the enforcement of the issued injunction. The enforcement may not be effected until that amount has been paid (article 286 (paragraphs 1 and 3) of the EO).

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

There are two types of court sanctions. The first are court orders during court hearings, the second are court orders as final court decisions.

During ongoing court proceedings, a judge may ask the speaker to give up the floor as well as to forbid him or her from making further statements (section 197 of the ZPO). The judge may punish improper behaviour through a fine, a short prison sentence or exclusion from a court hearing. The exclusion of a lawyer from a court hearing is not possible. However, the latter may be fined in cases of non-compliance with court orders.

If a party does not comply with a (final) decision of a court, the judgment is enforceable (article 1 of the EO). If a judgment obliges a party to perform or not perform a specific action, the opposing party may file a motion for a fine or a prison sentence to force the party to perform the required action (article 257 of the EO).

13 Obtaining evidence from other jurisdictions

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

Liechtenstein is a signatory to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 (the Hague Evidence Convention). As a result, Liechtenstein obtains evidence such as judicial documents, local inspections, witness statements, taking parties to disputes, the production of documents and expert opinions from other jurisdictions.

Parties not signatories to the aforementioned convention may obtain mutual legal assistance but only after case-by-case evaluation.

14 Assisting courts in other jurisdictions

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

As a signatory to the Hague Evidence Convention, Liechtenstein also assists in the service of judicial documents, local inspections, witness statements, taking parties to disputes, the production of documents, providing expert opinions, etc.

Furthermore, the District Court is obliged to assist courts from other jurisdictions unless the assistance would be against the law of Liechtenstein, or there would be no reciprocity (section 27 of the JN).

Foreign judgments are generally not enforceable in Liechtenstein. There are bilateral agreements with Austria and Switzerland. Although Liechtenstein is a member of the European Economic Area, Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (EuGVVO, Brussels I) does not apply. Liechtenstein is not subject to EC regulations and directives in this area and is not a signatory to the Lugano Convention. However, Liechtenstein is a signatory to the New York Convention, which entered into force in 2011, which guarantees enforcement of Liechtenstein arbitral awards and vice versa.

To enforce a foreign judgment in Liechtenstein, the decisions of a foreign court must usually be converted into an enforceable Liechtenstein court order.

15 Causes of action

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

Civil asset recovery claims may be brought on the basis of many different causes of action. In general, the main cause of action in civil asset recovery cases is damages according to section 1293 et seq of the ABGB. These articles are relevant for nearly every claim for damages, regardless of whether the cause is *ex contractu* or *ex delicto*. Contract-based claims may be filed for breach of contract (section 1295(1) of the ABGB). This cause of action also applies where there is no contract but a party unlawfully caused damage to another party (eg, through fraud). Claims based on illegal enrichment (section 1041 et seq of the ABGB) as well as liability regarding entities (article 218 et seq of the PGR) are also possible. With respect to insolvency and bankruptcy matters, legal acts, provided that the debtor carried them out within the year before an enforcement was granted and that he or she was already overindebted at the time of execution, are also contestable according to article 66 of the Liechtenstein Code of Securing Legal Rights (RSO).

Moreover, it is possible to take legal actions on the grounds of ownership.

16 Remedies

What remedies are available in a civil recovery action?

There are several remedies when it comes to a civil recovery action. However, applicable remedies usually depend on the cause of action.

According to section 1323 of the ABGB, the first remedy is always restitution in kind if the cause of action allows it. If restitution in kind is not possible, damages may be awarded in cash. Regarding a breach of contract, a party may seek fulfilment of the agreement (specific performance) or sue the other party for damages. With respect to tort-based claims, remedies are usually granted in the form of damages.

Article 277 of the EO grants provisional remedies, such as security restraining orders and official orders.

17 Judgment without full trial

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

Under certain circumstances, the law allows a judgment without full trial. If a defendant, for instance, does not attend a court hearing, he or she can be judged, but only under certain circumstances in his or her absence (default judgment, section 396 et seq of the ZPO).

Moreover, the ZPO allows a simplified procedure for pecuniary claims, which is a summary proceeding. For recovery of debt or liquidated demand, summary proceedings are highly relevant. A creditor could simply file a motion for a summary notice to pay the specific amount. The summary notice will be granted by a judge without questioning the merits of the case and subsequently served upon the debtor. The debtor may lodge a protest within 14 days, which leads to the cancellation of this summary notice or, in case such a protest is not lodged within 14 days, to legal validity of the summary notice, which therefore means it is enforceable.

If a protest is lodged within these 14 days, the creditor may bring a claim by way of a *Rechtsöffnungsverfahren*: a motion for setting aside the debtor's protest (section 49 et seq of the RSO). In contrast to full trial proceedings, this simple and swift proceeding is particularly favourable to foreign creditors.

For non-pecuniary claims, in order to assert any claim to a declaration, legal form, performance or omission, the ZPO also allows a simplified procedure, the *Rechtsbotverfahren* (section 593a et seq of the ZPO).

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

If a judgment becomes legally binding and a party is not willing to honour his or her obligations out of this judgment, the EO states that judgments are enforceable (article 1 of the EO). Enforcement proceedings are usually initiated by a motion from the prevailing party, which must refer to the enforceable judgment, the settlement or the payment order.

19 Enforcement

What methods of enforcement are available?

Methods of enforcement are enlisted in the EO. Inter alia, the following measures are available to enforce court judgments:

- compulsory creation of a lien;
- compulsory auction;
- seizure of movable and immovable assets;
- forced administration through an official receiver; and
- seizure, confiscation and sale of movable tangible assets.

Article 201 of the EO states several provisions regarding pecuniary claims that must be considered during enforcement proceedings. As mentioned in question 12, a creditor may also file a motion for a fine or a prison sentence to honour the binding judgment if a judgment obliges a party to perform or not perform a specific action (articles 256 and 257 of the EO).

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?

In general, each party bears his or her own costs a priori (section 40 of the ZPO). However, the party wholly unsuccessful in a legal dispute must reimburse its opponent all costs caused by the conduct of the lawsuit, which were necessary for appropriate legal prosecution or legal defence (section 41 of the ZPO). If each party wins or loses in part, costs are usually set off against each other or divided proportionately. However, even in such cases, the court may order one party to reimburse the other party for all costs incurred by the other party, if the prerequisites set forth in section 43(2) of the ZPO are met.

Nevertheless, a party may seek legal aid if he or she is unable to fund legal costs and lawyer's fees without putting his or her 'daily needs' in danger (section 63 et seq of the ZPO). Legal aid is available

for natural persons as well as legal entities and can include a temporary exemption from, inter alia, paying court fees.

Another common funding arrangement is an insurance regarding legal expenses.

Lawyer's fees are regulated by a statutory tariff. This tariff is applicable on a party-to-party basis and determines what costs must be reimbursed to the other party. That aside, lawyers may freely agree their fees. Lawyers are not allowed to assert a contingency fee and are not allowed to purchase a client's claim, which is the object of ongoing court proceedings.

Normally, parties themselves fund court proceedings. Even though there are no specific provisions with respect to third-party funding, litigation funding by an independent third party is possible.

Criminal asset recovery

21 Interim measures

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

The Criminal Procedure Act (StPO) contains several provisions regarding interim measures in criminal procedures. Regarding assets of criminal origin, the seizure of those assets plays an important role. Further, this issue is of the utmost importance when it comes to anti-money laundering measures.

During investigation proceedings, the seizure of assets is ordered by the court, usually upon request of the public prosecutor. In general, the measures are the seizure of assets (section 96 et seq of the StPO), search warrants and observations (section 98 et seq of the StPO) as well as arrests and custody measures according to section 127 et seq of the StPO. According to section 97a of the StPO, and upon request of the public prosecutor, the court may order the seizure and administration or depositing of movable assets, or prohibit the disposal of such assets, including cash.

In the wider international context, as well as concerning anti-money laundering measures, one of the important measures is freezing bank accounts.

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?

Criminal proceedings before a criminal court are usually initiated upon request or notification of the public prosecutor.

During ongoing criminal proceedings, the identification, tracing and freezing of proceeds is usually initiated upon motion of the public prosecutor. If someone becomes aware of a serious crime, and the as yet undiscovered proceeds of such a crime, he or she usually notifies the public prosecutor; in case any suspicion concerning money laundering arises, financial intermediaries under the Due Diligence Act are obliged to issue a notification to the relevant financial intelligence unit.

Regarding the proceeds of serious crimes, see the aforementioned measures in question 21, such as the seizure of assets and bank accounts. Moreover, a court may declare assets as 'forfeited' in cases where assets have been obtained for or through the commission of an offence punishable by law (section 20 of the StGB). Liechtenstein has adopted its forfeiture provisions from Austrian law.

23 Confiscation – legal framework

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

There are several measures relating to confiscation of the proceeds of crime.

During investigation proceedings, provisions under section 97a of the StPO are applicable. These regulations mainly deal with the seizure of assets of all forms during ongoing proceedings to secure possible measures stated in section 19 et seq of the StGB.

The StGB states, inspired by Austrian jurisdiction, the following measures to confiscate the proceeds of crime:

- section 19a (confiscation of tangible assets or objects); and
- section 20 et seq (forfeiture provisions with regard to assets).

Provisions concerning the confiscation of the proceeds obtained through illegal enrichment are incorporated in section 20 et seq of the StGB. Usually, the convicted person is ordered by the court to pay back the appropriate sum. Regarding this type of confiscation, the benefit is calculated to the gross principle. When calculating the benefit, the actual enrichment is confiscated and expenses incurred to obtain the specific assets are not deducted.

According to section 20b of the StGB, assets issuing from criminal organisations, terrorist organisations or terrorist financing, should be confiscated and must be declared as 'null and void'. For this measure, the public prosecutor has the burden to prove that the proceeds or assets have their roots in crime.

Provisions regarding specific proceedings are stated under section 353 et seq of the StPO.

24 Confiscation procedure

Describe how confiscation works in practice.

Most of the investigation procedure is based on applications from the public prosecutor. It is the investigating judge's duty to decide and weigh the facts as to whether he or she will allow specific measures. If the public prosecutor considers measures according to section 97a of the StPO, he or she must file a motion. The judge then has several options to obtain evidence. Available measures range from house searches to the seizure of documents and other objects (section 91a et seq of the StPO).

As an example, the freezing of bank accounts is one of the most important instruments in securing assets. Once the account is frozen, access is very limited. Hence, the owner of the account is not allowed to drain assets from it. However, in practice, the main problem is naming the assets concerned, including the specific bank accounts. For a successful investigation and the ordering of appropriate measures, these facts must be known and shown to the public prosecutor or a private participant. Regarding the seizure of bank documents during criminal investigations, the law does not protect bank secrecy. Consequently, bank documents can be seized. Legally privileged documents, such as the confidential correspondence between a lawyer and a suspect, cannot be sequestrated (Constitutional Court of Liechtenstein, 28 February 2000, StGH 1999/23, LES 2003, 1).

In the case of a conviction through a Liechtenstein court, the court itself orders the measures of confiscation (section 20 et seq of the StGB). If a crime was committed abroad but the assets are located in Liechtenstein, the public prosecutor may file for a separate and new proceeding (section 356 of the StPO).

Nonetheless, declaring proceeds as forfeited is not allowed if prerequisites under sections 20a and 20c of the StGB are met.

25 Agencies

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

Under the law, it is upon the public prosecutor to propose appropriate measures to the investigating judge, which he or she considers as necessary and useful to secure assets. Only upon request of the public prosecutor can the investigating judge, who is usually a single judge, order the required measures. The judge must examine whether the requested measures are necessary and appropriate.

Upon seizure and searching of documents, the police are involved as well.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Under certain conditions, confiscation of secondary proceeds is possible. Secondary proceeds are usually proceeds that have been converted into other assets. Regarding secondary proceeds consisting of tangible assets, ownership by the perpetrator (section 19a of the StGB) must be given in a first-instance decision, otherwise confiscation is not allowed.

However, the court must always determine who has been enriched by the crime and if proceeds have been converted into other assets. Regarding the forfeiture procedure in section 20b of the StGB, it is upon the suspect to prove that assets do not issue from criminal organisations, terrorist organisations or terrorist financing. In the event of

Update and trends

With regard to relevant developments, reference should be made to the forfeiture provisions that have been in force since 1 June 2016 and the latest case law issued in connection to them. The core elements of the amendments were the replacement of the net principle by the gross principle, a new and very broad understanding of the term 'assets', the extension of forfeiture to include emoluments and replacement values, and the explicit inclusion of assets saved by the commitment of a criminal offence. The first case law on these new provisions shows that the objective of the amendment ('crime must not be worthwhile') has been achieved (see decisions of the Supreme Court 6 October 2017 OGH 12 RS.2013.2001 and December 2017 OGH 13 UR.2016.112, and decisions of the Court of Appeal 10 April 2018 OG 13 UR.2018.73, 24 April 2018 OG 09 KG.2014.1 and 24 April 2018 OG 11 UR.2017.176).

undetermined inflows of assets, it is upon the suspect to make the legal acquisition credible.

Further, it is not possible to declare assets as forfeited if a third party, *inter alia*, obtained bona fide ownership, or the perpetrator must use the proceeds in satisfaction of civil claims (section 20a of the StGB). In cases under section 20b of the StGB, these rules also apply, but section 20c of the StGB provides for further exemptions.

27 Third-party ownership

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

It is possible, if certain prerequisites are met and if exceptions do not apply, to declare assets as forfeited, or confiscate property acquired by a third party or close relatives. If assets are under control of a criminal organisation or a terrorist group, or have been provided or collected as a means of financing terrorism, they could be confiscated regardless of whether they were acquired by a third party (section 20b of the StGB).

As mentioned in question 26, there are several prerequisites that could prevent forfeiture to third parties or confiscation of assets acquired by a third party (section 20a of the StGB). Further, the declaration of assets as forfeited is not allowed if third parties have legal titles to the concerned assets (section 20c of the StGB).

28 Expenses

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

Under the law, there are no special provisions regarding the recovery of costs arising out of tracing and confiscating assets. However, note the general provisions in section 300 et seq of the StPO.

29 Value-based confiscation

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

Regarding the confiscation of tangible assets, no provisions regarding a value-based confiscation are given.

In fact, section 20(2) of the StGB states a value-based forfeiture of assets, which means the declaration of assets as forfeited may also affect alternative rights or assets. However, for a legally binding verdict, assets must be located in Liechtenstein when declaring them as forfeited.

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?

In criminal proceedings, the burden of proof usually lies with the public prosecutor. Regarding confiscation proceedings and forfeiture proceedings, he or she must prove the criminal origin of the assets in question. However, if a third party refers to his or her bona fide ownership, the burden of proof lies on this party. With respect to section 20b of the StGB, it is upon the suspect to prove credible legal acquisition of asset inflows.

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?

Section 20a(2), number 2 of the StGB expressly states that the forfeiture of assets is not allowed if the perpetrator has, or had, to pay any damages or compensation for a civil claim arising from the conviction. Furthermore, the extended forfeiture of assets is not allowed as far as third parties that have legal titles to the concerned assets (section 20c of the StGB).

32 Confiscation of profits

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

Provisions according to section 20 et seq of the StGB allow for profits forfeiture. In particular, section 20(2) of the StGB explicitly states that forfeiture of assets is extended to benefits and replacement values. According to legal doctrine and case law, benefits include interest, distribution of profits regarding securities or an increase of value.

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.

If assets are located in Liechtenstein while a criminal investigation or trial takes place abroad, a domestic verdict is not necessary to confiscate proceeds or declare them as forfeited. Instead, the public prosecutor files a charge of a new and objective proceeding (article 356 of the StPO). Regarding the forfeiture of proceeds, fulfilment of the necessary and objective conditions is sufficient. Regarding proceedings for the forfeiture of assets, the two conditions are the location of the assets in Liechtenstein and the proof of the criminal origin of the assets in question.

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?

After the seizure of bank accounts, the assets usually remain on the specific account. However, the administration of the assets is controlled by the court. Every single action regarding the assets must be approved by court order. The specific management and investment of these assets must be evaluated on a case-by-case basis.

Nonetheless, a legal entity who is the owner of a frozen bank account or frozen assets is allowed to file a motion for a 'part-reversal' of the specific court order to cover running expenses such as legal fees, tax and necessary administrative expenses. This possibility is handled restrictively and is also evaluated case by case (LES 2015, 57 or LES 2016, 236).

There are no provisions for frozen assets to be utilised by managing authorities.

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.

Liechtenstein is a signatory to the following:

- the European Convention on Mutual Legal Assistance in Criminal Matters 1959;
- the International Convention Against the Taking of Hostages 1979; and
- the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973.

Therefore, mutual legal assistance to parties of these conventions is guaranteed.

Additionally, the Law on International Mutual Legal Assistance in Criminal Matters 2000 (the Mutual Legal Assistance Act) and the Law on Cooperation with the International Criminal Court and International Tribunals 2004 serve as the legal framework for foreign legal assistance in criminal matters.

Needless to say, there are several bilateral agreements with neighbouring countries Austria, Germany and Switzerland.

Liechtenstein is signatory to further multilateral agreements on international mutual legal assistance in criminal matters as well as on extradition, which are listed under www.regierung.li/international-mutual-legal-assistance-in-criminal-matters.

The procedure to request legal assistance is usually initiated by an official letter from foreign public prosecution offices to the Ministry of Justice or District Court, requesting special measures such as freezing specific bank accounts or the seizure of certain documents.

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.

The main legal frameworks for complying with requests for foreign legal assistance in criminal matters are the European Convention on Mutual Legal Assistance in Criminal Matters 1959 and the Mutual Legal Assistance Act.

According to article 55(1) of the Mutual Legal Assistance Act, the District Court is the competent authority for foreign legal requests

regarding legal assistance. As in many other jurisdictions, the District Court decides whether the required measures comply with the law and can be granted to foreign authorities.

37 Treaties

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

Liechtenstein is a signatory to several international conventions with provisions on asset recovery. Among others, it is a signatory to the following international conventions:

- the European Convention on Mutual Legal Assistance in Criminal Matters 1959;
- the European Convention on the Transfer of Proceedings in Criminal Matters 1972;
- the European Convention on Extradition 1957; and
- the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

Under the law, private prosecutors are not known in this context. The power to recover criminal assets belongs exclusively to the public prosecutor and the courts. Nonetheless, private individuals can report to the public prosecution office, which is competent to initiate investigation proceedings. Provisions regarding the possibility of using a private prosecutor can be found in section 31 of the StPO.

GASSER PARTNER

Thomas Nigg
Eva-Maria Rhomberg

thomas.nigg@gasserpartner.com
eva-maria.rhomberg@gasserpartner.com

Wuhrstrasse 6
9490 Vaduz
Liechtenstein

Tel: +423 236 30 80
Fax: +423 236 30 81
www.gasserpartner.com

Monaco

Donald Manasse

Donald Manasse Law Offices

Civil asset recovery

1 Parallel proceedings

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

Victims in criminal proceedings are entitled to be party to the criminal investigation and court proceedings and to demand and receive damages. Parallel proceedings before civil courts can also be maintained, although the maxim is that 'penal proceedings hold civil proceedings in abeyance'. It is likely, therefore, that any independent civil proceeding will be suspended awaiting the outcome of the criminal proceeding.

A decision from the criminal court determining guilt and liability for the defendant and granting damages to the civil party victim will be considered *res judicata* for purposes of the civil proceeding. A decision acquitting the defendant of criminal responsibility will not definitively determine the outcome of the civil liability.

2 Forum

In which court should proceedings be brought?

As a microstate, Monaco has a single court building where all courts sit: the civil, penal and criminal courts – thus there is no choice of forum.

3 Limitation

What are the time limits for starting civil court proceedings?

Civil statutes of limitations apply to civil actions. However, the victim cannot begin a criminal action requesting damages if the statute of limitations for the crime has run. Penal infractions are classed in three categories: contraventions, 'offences' (*delits*) and 'crimes'. 'Offences' are tried before the correctional tribunal, and 'crimes' before the criminal tribunal. The statute of limitations for an offence is three years from the date of the infraction. The statute of limitations for a crime is 10 years (a special five-year statute of limitations applies to the delit of corruption and influence peddling).

The civil statute of limitations is generally five years from the time the claimant knew or should have known of the facts giving rise to the right to sue, although certain actions are time-barred only after 10 years, and others 30 years.

Where there is an action founded on the obtaining of consent on the basis of intentional misinformation the limitation period is five years, which starts to run from the date of discovery.

Any act taken to investigate a criminal offence in a formal proceeding suspends the running of the statute. The civil statute of limitations is suspended during the criminal procedure if the civil action has been initiated and suspended.

4 Jurisdiction

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

Jurisdictional rules are set out in the Code of Civil Procedure (CCP) and in the Code of Private International Law adopted in 2017 (CDIP). Monégasque courts have jurisdiction over any defendant domiciled in

the principality. They also have jurisdiction where the matter concerns the following:

- an obligation created in the principality or requiring execution there;
- inheritance issues where the equivalent to probate has begun in Monaco;
- cases involving companies that have their principal establishment in the principality;
- the execution of foreign judgments; and
- real property situated in the principality.

This list is not exhaustive.

The CDIP introduced the possibility for the judge to declare that the court does not have jurisdiction, even where neither party has contested jurisdiction.

5 Time frame

What is the usual time frame for a claim to reach trial?

The usual time frame to reach a final judgment before the Court of First Instance is 18 months. This is shorter if the procedure is a *référé* or urgent action. Appeals will usually be heard within nine months. Appeals of refusals to issue freezing orders will be heard within six months, with sometimes less than one week's notice to the parties.

Criminal investigations would take, on average, three to four years to come to trial, but have been known to take much longer.

6 Admissibility of evidence

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

Written evidence is admissible in civil proceedings provided it has been translated into French by a sworn translator. The evidence is communicated (by a Monégasque defence counsel, as members of the Monaco Bar – which is restricted to Monaco nationals – have a monopoly on communicating evidence, even where they are not lead counsel, as is often the case) to the defence counsel of the other party. Irrelevance to the proceedings will not prevent written evidence from being introduced. Foreign documents will require an apostille.

Oral testimony is not ordinarily taken during civil proceedings. Witness statements must be handwritten and signed with an acknowledgment that they will be used as evidence and that any false statement can be sanctioned in criminal proceedings. Parties to the civil action do not make witness statements or affidavits, as they are considered to be parties in interest. Related parties and employees may be witnesses, but their written testimony will be attacked as unreliable and not impartial because of their relationship with a party having an interest in the outcome. Nonetheless, the statements will not be excluded for that reason alone.

There is no process similar to deposition and discovery, and no obligation for either party to disclose evidence. However, prior to the start of proceedings, a party may request and be granted a compulsion order from the court to produce evidence. The order will be served by a bailiff, sometimes in the presence of police officers. However, there is no sanction for failing to produce the evidence despite the court order. Once proceedings have begun, the court can be requested by a party to

order production of a document. The consequence for failing to produce the document without justification will be that the court will infer that it contains information contrary to the interests of the party failing to produce it.

Where documents are produced solely for the purpose of damaging a party's reputation with the court, the opposing party may request that they be excluded and that the portions of the written pleadings referring to the libellous material be deleted. Lawyers are immune from prosecution for defamatory statements contained in their written pleadings or oral arguments, and there are no sanctions imposed in such cases.

7 Witnesses

What powers are available to compel witnesses to give evidence?

The CCP provides for the possibility of compelling evidence (article 329 et seq) and sanctions, including fines for a refusal to testify. In practice, however, such coercive measures are unknown. Spouses – including former spouses – parents and children (ascendants and descendants) cannot be compelled to testify.

In a pending matter before the Court of First Instance, a common law court's order to produce evidence is being sought to be enforced against a party and against a child of that party, but this is a case of first impression.

A compulsion order can seek documents from a witness.

8 Publicly available information

What sources of information about assets are publicly available?

Information is publicly available about real property and companies.

For real property, the Registry of Deeds will provide a report for any individual or company of any real property transaction in which they engaged in the principality (however, the reverse is not the case: it is not possible to search the record to identify the owner of a particular piece of property or flat). The report will include the purchase price, liens and mortgages – both voluntary and judicial, which can lead to uncovering banking relationships – the description of the land and the name of the notary before whom the act or execution was signed. All transfers of property must be signed before one of the Monégasque notaries, of which there are three. A copy of the act of purchase can be ordered from the registry.

For commercial companies, there is a company register that will provide information on the company, its objects clause and the names of the directors. Further information can be obtained in respect of voluntary or judicial liens filed on the business. With sole proprietorships, partnerships and limited liability closely held companies it is possible to obtain information identifying the shareholders. This is not possible for Monégasque public limited companies and civil companies, although the compulsion order (see question 6) may order that information to be released.

A new register of beneficial owners is being established under anti-money laundering legislation. Parties will require a court order to obtain access, and the new law indicates that the request must involve money laundering, terrorism or corruption investigations.

9 Cooperation with law enforcement agencies

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

Lawyers for the civil party victims who have become 'civil parties' in a criminal action have access to the criminal file throughout the preliminary investigation and during the main portion of the investigation, which follows the formal indictment of the defendant. Copies can be made of the file and produced to the lawyers defending the accused or the civil parties. However, the documents in the criminal investigation file are subject to professional secrecy requirements, and use in a separate civil proceeding without authorisation can be considered a violation of professional secrecy and subject to sanction under article 308 of the Penal Code.

Once a matter has been tried in the criminal courts and all appeals exhausted the information in the criminal file can be freely used.

As a civil party, the victim through his or her lawyers may demand that the investigating magistrate take any steps that are considered necessary for the investigation, including requesting information both locally and internationally, hearing witnesses, holding a confrontation with the accused and naming experts to examine evidence. Costs for such investigations are borne by the state, although the civil party will be requested to file a deposit at the time that it joins the criminal procedure.

10 Third-party disclosure

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

The judge in a criminal investigation can obtain any information that is considered useful for the 'manifestation of truth', including any banking information. A compulsion order may be obtained (see question 6) forcing disclosure from public officials (for example, for statutes of civil companies, which are not otherwise publicly available, or information regarding employment).

A bailiff may be instructed to request or demand information from a third party. This has no force of law, but the answers to the bailiff from the third party may sometimes be revelatory and form the basis for a request for compelled evidence (compulsion order). It is a frequently used tactic, but may disclose to the potential defendant the fact that an action is planned (thereby giving advance warning of the intention to seek interim relief, see question 11).

The Penal Code provision making it a crime to reveal confidential information (article 308) is very broad and covers people who, by their profession or position, have received confidential information. Bankers, lawyers, doctors and accountants are covered, but it is not clear whether other professionals (corporate service providers, tax representatives and building managers, for example) are also covered.

11 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?

In criminal cases, the investigating magistrate may order the seizure of assets. If a declaration is made to the financial intelligence unit of the principality (SICCFIN) by a professional of a suspected transaction (and a fraudulent transaction will be among these), the SICCFIN may act very quickly to request the prosecutor to block accounts.

In civil cases, a party may file an ex parte request to seize assets with the court of general jurisdiction of the principality. The request need not identify specific bank accounts, but it must name banks in which such accounts are likely to be situated. The order freezing the accounts will specify a specific amount to be blocked. Regardless of pending actions in other jurisdictions, an action will have to be filed in Monaco to validate the seizure. The existence of assets in Monaco will be sufficient to justify jurisdiction for the action in validation.

A party may declare 'temporarily indisposable' funds held by a third party by filing a request with the clerk of the court, prior to obtaining a court order. This measure must be contained in the request for a seizure order, it cannot be filed independently.

The action and request for seizure must be filed through a Monégasque defence counsel (or member of the Monaco Bar). The Monaco defence counsel has a statutory right to fees of 0.4 per cent of the amount at issue. Although this should be the stated amount in the request and seizure orders, there have been cases of statutory fees being awarded for much larger percentages when these have been mentioned in subsequent pleadings. The statutory amount will often be claimed whether or not assets have been found and, if litigation ensues, the defence counsel of the winning party (and each defence counsel if there is more than one) is entitled to the statutory fees. Care must be taken when instructing Monégasque counsel that the issue of statutory fees is determined at the outset.

Seizure orders can apply to bank accounts, real property, movable property (art collections, for example), motor vehicles and yachts having either Monaco registration or found in Monaco, and safety deposit boxes.

The seized party may move to have the seizure lifted, but must do so (by an urgent action known as an expedited summons) before the first hearing of the action on the merits.

In respect of obtaining evidence, the compulsion order discussed in question 6 is available.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

There is no equivalent to a contempt of court citation for failing to observe court orders. Both civil and criminal courts may order a defendant to do or to cease doing something, and assess a fine for each day that he or she fails to comply. This fine is paid to the party requesting the measure.

13 Obtaining evidence from other jurisdictions

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

Monaco has ratified the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970 (the Hague Convention). Monaco will not, however, entertain requests for pretrial deposition and discovery. The authority for the receipt of requests for assistance is the Director of Judicial Services. Monaco is not a member of the EU and, therefore, EU regulations for the taking of evidence will not apply.

For countries that have not ratified the Hague Convention and where bilateral judicial assistance treaties do not exist (Monaco has several bilateral treaties for judicial assistance, notably with France), the CCP (article 975) provides that Monégasque judges may issue rogatory commissions through the appropriate authorities, but this is seldom done in civil matters.

14 Assisting courts in other jurisdictions

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

Monaco's ratification of the Hague Convention provides the framework for assisting foreign courts in obtaining evidence in Monaco. In addition, article 975 of the CCP provides that requests from foreign courts may be entertained provided they are transmitted in French or Italian translation through diplomatic channels, unless the Prince (as the high authority) authorises otherwise.

Enforcement of foreign judgments

Monaco will order the enforcement of foreign judgments (known as *exequatur*) under the provisions of article 13 et seq of the CDIP. The court will order the judgment to be effective in Monaco without examining the matter on the merits provided that it is not proven:

- that it is issued by a court whose assertion of jurisdiction is in conflict with Monégasque rules on the matter;
- that the parties have not had an opportunity to defend;
- that the judgment is definitive and can be executed in the country that issued it;
- that it contains nothing contrary to public order; and
- that there is not a prior action pending in the principality between the same parties on the same subject. (The CDIP introduced *lis pendens* so that where there is a prior pending action in another jurisdiction the Monégasque court can now suspend proceedings.)

In no event can a judgment rendered by a foreign court be examined on the merits. The Monaco court may not issue a revised judgment.

The request for *exequatur* is filed with the court on an *ex parte* basis and then served on the party against whom execution is sought. The defendant can object to execution through a legal procedure.

Documents accompanying the request for *exequatur* are as follows:

- an authentic (certified) copy of the judgment;
- the original of the service documentation, or any other act proving service of the judgment in the foreign jurisdiction; and
- a certificate delivered by the foreign judge or by the clerk of the court confirming there has been no appeal and that the judgment can be executed in the foreign country.

Documents must either be legalised or carry an apostille. They must be translated into French.

15 Causes of action

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

The main cause of action in civil recovery cases is the equivalent of tort (article 1229 et seq of the Civil Code), which provides that any act that causes another person damage obliges the person by whom the damage was caused to repair it. Proprietary claims will have little use where money is involved since this is fungible. An action requesting rescission or nullity of a contract because consent was obtained with intentional misinformation (as provided in article 1152 of the Civil Code) is also used.

Contractual causes of action based on failure to repay obligations will also frequently be used.

16 Remedies

What remedies are available in a civil recovery action?

The typical remedy is damages, although rescission of a fraudulently obtained contract (see question 15) can be ordered, with restitution.

17 Judgment without full trial

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

A procedure known as an expedited summons (different to the procedure set out in question 11) can be initiated to obtain temporary relief or a money judgment. The claimant suing by this method must allege that the issues cannot be seriously contested by the other party (although it almost inevitably will) and that there is urgency. The judge is said to be the 'judge of appearances' and will judge only on the issues presented and according to the documentation. If there are serious legal arguments, the judge will declare that it is not within his or her jurisdiction to decide. The procedure is similar to an action on the merits, although oral argument and a judgment can be issued relatively quickly.

The order issuing from an expedited summons can be appealed, but can be executed despite appeal.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

Post-judgment, conservatory measures such as seizures of assets can become definitive and will render the assets subject to execution.

19 Enforcement

What methods of enforcement are available?

Title IV of the Civil Code is dedicated to the compulsory execution of judgments, following notification of the judgment and expiration of the time to appeal (unless the judgment orders provisional execution). If third parties are holding funds, and the judgment is by default (the defendant having failed to appear), execution can be enforced two months following the notification. If the judgment provides for provisional execution, only notification of the judgment to the defendant and the third party is required.

Where the assets seized are real property, objects or shares of companies, then a procedure for public sale at auction is required.

Special provisions in the Commercial Code apply to pledges of assets, depending on their nature and depending on whether (for companies) the shares are traded on a public exchange.

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?

Contingency fee arrangements are prohibited for Monégasque and French lawyers. However, fee arrangements providing for retainers on an hourly fee basis and to cover costs, with additional payments based on outcome, are allowed. An agreement should be reached with the Monégasque defence counsel who will be assisting foreign counsel (whether or not Monaco-based) as to the statutory fees discussed

in question 11. Some counsel will require that the statutory fees be deposited with them in order to commence proceedings. Other counsel request their own clients to pay the statutory fees awarded against the opponent, prior to requesting the opponent to pay. There does not appear to be an agreed route among the defence counsel at the Monégasque Bar as to how the statutory fees apply, and these can be a source of both surprise and contention as they come in addition to fees paid for the Monaco counsel's intervention. There is no agreement possible with opposing counsel and, as indicated, if there is more than one opposing counsel, the statutory fees will be requested by each. Statutory fees are again applicable on appeal.

Criminal asset recovery

21 Interim measures

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

Interim measures, including seizure of assets, are available to preserve evidence and the interests of the parties or of third-party victims.

The basic principle is that the investigating magistrate takes all measures that he or she considers useful for the 'manifestation of truth' (for the establishment of the facts) or to safeguard the interest of the parties, including third parties. All evidence useful to establish the facts can be seized and put under seal, including objects, papers, cash and coins, and correspondence.

Communication of seized documents without the authorisation of the accused, or of parties having rights to the documents, to a person not qualified to receive them can result in a fine of up to €15,000.

In matters relating to money laundering, corruption or influence-peddling the investigating magistrate can seize all property after obtaining the opinion of the Prosecutor General of the principality.

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?

Yes, when serious financial crimes are detected (even where there is a mere suspicion of serious financial crimes), including fraud, Ponzi schemes, money laundering, corruption and influence-peddling, the investigating magistrate will seek to identify any related funds, including bank accounts directly or indirectly held by the perpetrators, and to seize the funds with a view to protecting the interests of third parties or civil victims and eventually with a view to confiscation. Article 596-1 of the Penal Code allows the freezing of assets for serious financial crimes until adjudication of the matter, and article 12 of the Penal Code allows the confiscation of the proceeds of crime.

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 Penal Code provides for confiscation of the proceeds of crime (article 12) as one of the penalties to which a person condemned for a contravention, offence or crime can be sentenced.

Article 105 of the CCP provides for restitution during the investigation to any party claiming the assets seized (including a civil party victim). All parties concerned (defendant, civil party victim and the prosecutor) will be informed and the matter will be decided by the investigating magistrate. The decision can be appealed before the Court of Appeals in closed session.

Where there is a money laundering allegation and conviction, confiscation is provided for by article 219 of the Penal Code. Ordinance No. 15,457 of 9 August 2002 applies the Council of Europe Convention of 8 November 1990 in the principality. Both assets and funds of illicit origin, or other funds in an amount equal in value to those having been determined to be of illicit origin, can be confiscated. Real and personal property can be confiscated. The court can order the confiscation of assets held by third parties that they knew to be of illicit origin.

24 Confiscation procedure

Describe how confiscation works in practice.

The tribunal can order confiscation of objects that are the proceeds of crime (article 32 of the Penal Code). Decisions have been known to create a conflict between the confiscation orders and the interests of third-party victims in financial fraud cases, as the assets confiscated will escheat to the state, rather than be applied to the reimbursement of the victims.

The criminal court can specifically order (and should be requested by the civil parties to order) that seized assets be first applied to indemnify civil party victims.

Monaco will cooperate with requests to seize and confiscate assets in the principality at the request of foreign authorities, under the applicable conventions and under the general provisions of the Penal Code (article 87) allowing the investigating magistrate to take all appropriate measures necessary for the manifestation of the truth and the protection of third-party interests.

However, execution of a foreign decision to confiscate under a treaty will only be granted if the foreign decision is final and not subject to appeal. A Court of Appeals' decision not only refused confiscation, but granted release of the seized amounts (*MP v dS*, Court of Appeals, Monaco, 6 March 2006, Legimonaco) when the decision of the foreign court (Italy in this case) was determined to have been appealed.

25 Agencies

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

The Prosecutor General is responsible for the investigation and prosecution of all criminal offences. The Prosecutor will also receive and respond to requests of the money laundering unit SICCFIN. The Prosecutor will transmit to an investigating magistrate (of which there are two in the principality) all documents relating to complaints and denunciations that require investigation. The investigating magistrate will then conduct the investigation independently, and can mandate the judicial police for all acts of investigation, other than the taking of live testimony from the accused.

The decision on seizure will be made by the investigating magistrate or by the court. The decision to confiscate will be made by the court trying the accused.

Prosecutors and investigating magistrates are named by the Prince and are drawn from a professional corps of magistrates, trained in France (at the Ecole Nationale de Magistrature) of French and Monégasque nationality.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Although this is not specifically provided for by the statutes or case law, the proceeds of crime are understood to include the fruits of the proceeds.

27 Third-party ownership

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

It is possible to confiscate property acquired by a third party (whether or not related), but the confiscation must not affect the rights of third parties who legitimately acquired it, and the third party or relative must be given the right to oppose the confiscation. If a foreign confiscation order to be executed in the principality includes property held by third parties, then it will be executed unless it is shown the third parties were not given an opportunity to defend in the same conditions available under Monégasque law. Confiscation from third parties who knew or should have known of the illicit origin is specifically provided for where there is a conviction for money laundering offences.

In civil matters it is possible to pursue a third party who knowingly received assets from a debtor in fraud of the creditor's rights. This is known as the *action paulienne*.

Update and trends

A topic that will occasion additional jurisprudence is the use of beneficial owner registers and Common Reporting Standard (CRS) information. At the moment, the existence of an effective beneficial owner does not justify seizing assets held by an entity against which a creditor has no claim. CRS information from foreign countries is not specifically protected from a court compulsion order.

28 Expenses

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

Yes, the costs of the prosecution (including the investigation) can be recovered from a defendant who is found guilty.

29 Value-based confiscation

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

As explained in question 23, confiscation of illicitly obtained funds will be applied to other assets or funds if the funds considered to be illicitly obtained have been commingled, or if the funds specifically determined to have been of illicit origin are insufficient to cover the entire amount in question.

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 basic principle in Monégasque law is that any accused is presumed innocent. However, in practice, in matters where money laundering is alleged in particular, it is up to the person owning the funds to prove that the funds do not have an illicit origin, and in the case of third parties that they were not aware of the illicit origin. The investigating magistrate will often name an expert to review financial movements on accounts, foreign and local, and provide an opinion. The expert analysis may take a number of years and the expert's determination may seek to apply French and Monégasque generally accepted accounting practices to foreign offshore structures holding accounts, without taking into consideration custom and practice in the home jurisdiction.

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?

Yes, under the provisions of article 32 of the Penal Code, which specifically delegates jurisdiction to the tribunals charged with the matter, confiscated property can be used to settle damages awarded to civil claimants in a criminal action.

32 Confiscation of profits

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

The Penal Code's articles on confiscation (articles 12, 32 and 219) do not exclude the confiscation of 'fruits' of the assets obtained through the commission of a criminal offence.

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.

The Penal Code does not provide for confiscation where there is no conviction. However, in matters relating to illegal drugs or counterfeiting, confiscation can occur despite the absence of a conviction.

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?

There is no public written procedure for the management of seized assets, other than that there is a responsibility for their preservation and reasonable and conservative management. Where assets are seized in financial institutions, the institution will hold them and no longer act on the instructions of the owner. Often, this means holding cash in a non-interest-bearing account. With stock, bonds and funds this will mean the inability to purchase or sell, but does not prevent the financial institution from taking fees or selling exposed positions and compensating itself to avoid risk. With real property, cases have been known of buildings standing empty for years. Authorities cannot use the assets. With companies, a judicial administrator can be named to ensure their continued existence (more often the liquidation of the companies) if the asset seizure prevents this.

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.

As a signatory of the European conventions on judicial assistance in criminal matters (Strasbourg, European Convention on Mutual Legal Assistance in Criminal Matters of 20 April 1959) and on money laundering (European Council Convention relating on Money Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990), Monaco regularly issues commissions rogatory to foreign states in relation to information and assets situated there.

In the absence of a treaty, article 203 of the CCP confirms that when it is necessary to obtain information in a foreign state, the investigating magistrate or the competent jurisdiction will request these through the Prosecutor General's office.

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.

As explained in question 35, the international conventions to which Monaco has adhered provide the framework to meet foreign requests for legal assistance. In the absence of bilateral treaties relating to the exchange of information on fiscal matters - Monaco has now signed 30 such treaties - Monaco has exempted tax issues from its undertaking to provide legal assistance. However, Monaco will meet foreign requests in matters relating to VAT fraud and to other infractions related to fiscal issues that consist of criminal activity, provided these are also sanctioned in Monaco.

Article 204 of the CCP provides the legal framework if the country requesting the measures is not a signatory of the treaties in question.

Requests can be refused:

- where they will affect sovereignty, security or public order;
- where the facts to which they relate have already led to a final penal judgment in the principality;
- where the infraction is political or relates to tax (with the exceptions listed above);
- where the rights of the defendant in the foreign state were not guaranteed; or
- where the criminal infraction alleged, or for which a conviction was obtained, is not a sanctioned criminal act in Monaco.

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

Monaco is not a member of the European Union, but as a member of the Council of Europe it is a signatory (see question 35) of the following:

- the Strasbourg Convention on Money Laundering, Search, Seizure and Confiscation of the Proceeds of Crime of 8 November 1990;
- the Strasbourg European Convention on Mutual Legal Assistance in Criminal Matters of 20 April 1959; and
- the Strasbourg Convention on Corruption of 27 January 1999.

The principality has also ratified the following:

- the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 3 July 1991;
- the United Nations Convention against Transnational Organized Crime of 15 November 2000; and
- the United Nations Convention against Corruption of 31 October 2003.

In addition, Monaco has signed a number of bilateral treaties on mutual judicial assistance, notably with France, and an agreement exists with the United States in respect of confiscation of the proceeds of crime.

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

Although civil party victims can have a strong role in public prosecution, only the Prosecutor General can prosecute (other than in specific matters dealing with defamation and calumnious denunciation).

Donald Manasse Law Offices

Donald Manasse

dmm@manasselaw.com

Est-Ouest

Tel: +377 9350 2921

24 Boulevard Princesse Charlotte

Fax: +377 9350 8208

98000 Monte Carlo

www.manasselaw.com

Monaco

Nigeria

Babajide O Ogundipe and Nneka I Ofili
Sofunde, Osakwe, Ogundipe & Belgore

Civil asset recovery

1 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 is no restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter. Nevertheless, a court retains the discretion to stay civil proceedings during the pendency of criminal proceedings.

2 Forum

In which court should proceedings be brought?

Proceedings should be brought in a High Court. There are state High Courts in each of Nigeria's 36 states and the Federal Capital Territory, as well as a Federal High Court, which has a presence in every state.

3 Limitation

What are the time limits for starting civil court proceedings?

Six years for actions in tort and contract, and 12 years for actions seeking to recover land.

Where there has been an acknowledgement of the cause of action, the limitation period runs from the date of the acknowledgment. Where the cause of action is based on fraud, the period of limitation does not start until the claimant has discovered the fraud or could have discovered it with reasonable diligence. Similarly, where an action seeks relief from the consequences of a mistake, the limitation period will not start until the claimant has discovered it or could have discovered it with reasonable diligence.

4 Jurisdiction

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

Jurisdiction of the court is determined by the cause of action of the claimant as stated on the writ of summons and statement of claim. A defendant who wishes to challenge the jurisdiction of the court may enter a conditional appearance. The practice is to file a preliminary objection challenging the competence of the suit at the earliest possible time and before taking any steps in the matter, on the grounds that the court lacks the jurisdiction to entertain the action. Alternatively, the defendant may set his or her objections out in his or her statement of defence.

5 Time frame

What is the usual time frame for a claim to reach trial?

The time for civil court claim to reach trial will depend upon the court in which it is made. If the claim is made in a jurisdiction (there are 38 different civil jurisdictions where claims can be brought in Nigeria) where the courts deal with numerous actions (such as in Lagos State), claims will take longer to reach trial than in jurisdictions that receive fewer cases. Under the civil procedure rules applicable in most jurisdictions in Nigeria, civil claims can be expected to reach trial within a year from when they are filed.

6 Admissibility of evidence

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

Under the Evidence Act, evidence may be given in any suit or proceeding of the existence or nonexistence of every fact in issue, such other facts as are relevant (listed below) and of no others. All relevant facts are admissible subject to conditions that may be specified in each case under the Act. Generally, the following are relevant and admissible:

- facts forming part of the same transactions;
- facts that are the occasion, cause or effect of facts in issue;
- facts that show motive, preparation and previous or subsequent conduct;
- facts necessary to explain or introduce relevant facts;
- facts about things said or done by conspirators in reference to a common intention;
- facts not otherwise relevant but that are inconsistent with any fact in issue or relevant fact, and by themselves or in connection with other facts they make the existence or nonexistence of any fact in issue or relevant fact probable or improbable;
- facts that enable the court to determine the amount of damages to be awarded in proceedings where damages are claimed;
- facts showing the existence of a state of mind, body or bodily feeling;
- facts that have a bearing on the question of whether an act was accidental or intentional; and
- facts showing the existence of any course of business.

Evidence obtained improperly, in contravention of a law, or in consequence of an impropriety or a contravention of a law shall be admissible unless the court is of the opinion that the desirability of admitting the evidence is outweighed by the undesirability of admitting evidence that has been obtained in such a manner.

7 Witnesses

What powers are available to compel witnesses to give evidence?

The court has the power to summon witnesses to attend court for the purpose of giving evidence, and to produce documents. Failure to attend upon a summons may result in punishment by the court, by way of a fine or imprisonment.

8 Publicly available information

What sources of information about assets are publicly available?

The Investment and Securities Act 2007 requires that all securities of a public company be registered with the Securities and Exchange Commission, and information may be found at the Commission concerning such shares. Information concerning the securities of companies generally may also be found at the Corporate Affairs Commission, which is the body charged with the statutory duty of company registration. Information is available to any member of the public upon formal application and payment of requisite fees.

Information concerning the registration of vehicles is decentralised and may be obtained at the relevant local governments in the state where the vehicle is licensed.

All information relating to land registration may be found at the land registry of the state where the land is situated. Information concerning any land in the state may be obtained upon formal application to conduct a search of the relevant file at the land registry and the payment of requisite fees.

9 Cooperation with law enforcement agencies

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

Information and evidence obtained from law enforcement and regulatory agencies may be obtained for use in civil proceedings. The challenge, however, is in getting such agencies to provide information. Other than under the Freedom of Information Act, the only method of securing the production of evidence obtained by law enforcement and regulatory agencies unwilling to provide the evidence voluntarily is by resorting to the powers of the court to issue a summons, as described in question 7.

10 Third-party disclosure

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

Generally, third parties could be summoned to court to testify or produce documents where the court, in the exercise of its discretionary powers, considers it appropriate to do so in the interests of justice. It is the claimant's duty to provide materials that would guide the court in the exercise of its discretion.

Banks in Nigeria are usually reluctant to divulge any information concerning their customers and are only likely to give out any information upon an order made by a court directing them to do so.

However, where it appears to the court that there exists a basis to suggest that a wrong has been committed, the court may, in the interests of justice, make an order compelling a third party to present information requested by an applicant. The applicant must, however, convince the court that the information required from the third party is one without which the matter cannot be decided.

11 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?

A claimant who is anxious to prevent the dissipation of assets during the pendency of a matter may approach the court by a motion *ex parte* for an injunction to freeze assets. This would prevent a defendant from dissipating the assets beyond the jurisdiction of a court in an attempt to frustrate a judgment.

In appropriate circumstances, the courts will grant injunctions, following principles developed in the English case of *Mareva Compania Naviera SA v International Bulk Carriers SA* (1975) 2 Lloyd's Rep 509. The Supreme Court has ruled that such injunctions may be granted where the following appears likely:

- the claimant would recover judgment against the defendant for a certain or approximate sum;
- there are reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, wholly or in part, but might arrange it that he or she will not be available or traceable when judgment is given against him or her; or
- where a party seeks to obtain information from a person suspected of involvement in the fraud but who is not a part of the action, such party may approach the court for an order requiring such third party to disclose certain documents or information to the applicant. The onus is on the applicant to show that the action before the court would not be possible without the third party's information.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

A party who refuses to comply with court orders may be cited for contempt of court. In the case of individuals, this may result in punishment by imprisonment, a fine or sequestration of assets. In the case of a corporation, the punishment may be by sequestration of assets or a fine.

13 Obtaining evidence from other jurisdictions

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

Information may be obtained from courts in jurisdictions with which Nigeria has made an agreement in that regard. The party that obtains an order for the examination of a witness abroad is expected to file an undertaking, at the registry of the court issuing the order, of financial responsibility for expenses incurred by the Ministry of Foreign Affairs with a letter of request to be issued concerning the order. The undertaking is to be accompanied by a copy of interrogatories where necessary. These documents are then dispatched alongside a request form to be signed by the chief judge of the issuing court addressed to the competent judicial authority of the other jurisdiction, requesting that the witness be summoned for examination at a specified time and place before the authority or person competent to take the examination.

14 Assisting courts in other jurisdictions

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

The civil courts can assist in the examination of witnesses where such witnesses are in Nigeria, and a request to that effect has been made from a jurisdiction with which Nigeria has made an agreement regarding this matter.

15 Causes of action

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

Fraud, fraudulent transfer and breach of contract are common causes of action in civil asset recovery cases. Such actions could also include proprietary claims.

16 Remedies

What remedies are available in a civil recovery action?

A claimant in a civil recovery action could approach the court for an order of restitution, damages, seizure, constructive trust or account of profits.

17 Judgment without full trial

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

Where a defendant fails to appear, a claimant may proceed upon such default of appearance to obtain judgment under the appropriate provisions of the rules of court. Some rules of court also contain summary judgment provisions, which provide that where a claimant believes that there is no defence to his or her claim, he or she may seek summary judgment in a procedure that requires the defendant to demonstrate to the court the existence of facts that disclose a *prima facie* defence to the claims.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

A successful claimant may have judgment enforced by taking out a writ of execution:

- the property of the judgment debtor may be seized and sold;
- debts due to the judgment debtor from third parties may be attached;
- imprisonment;
- sequestration of assets;

- bankruptcy (in the case of individuals); and
- through a winding-up order in the case of a corporation.

19 Enforcement

What methods of enforcement are available?

The Sheriffs and Civil Process Act, laws of the various states and the Judgments (Enforcement) Rules made thereunder make provisions for the enforcement of a judgment in Nigeria. Judgment for payment of money to a party is enforced by one or more of the following methods:

- writ of fieri facias (seizure and sale of goods): this is the most commonly used means of judgment enforcement in Nigeria, known as the 'writ of fifa'. Under this method, a judgment sum is realised by the seizure and sale of a judgment debtor's properties;
- garnishee proceeding: this type of proceeding allows for the attachment of debts that a third party owes the judgment debtor or money belonging to the judgment debtor, which is in the custody of a third party;
- judgment summons: a judgment debtor may be summoned and examined on oath as to his or her means and may be sent to prison if the court determines that although he or she has the means to discharge the judgment debt, he or she has wilfully refused to do so;
- bankruptcy and winding-up proceedings;
- writ of delivery: a claimant who obtains judgment for the delivery of certain goods may have judgment enforced by means of a writ of delivery addressed to the sheriff. The writ requires the sheriff to immediately seize the goods wherever they might be within the judicial division of the issuing court and to deliver them to the judgment creditor; and
- sequestration: a writ of sequestration empowers the bailiff to seize a person's property, movable and immovable, in certain circumstances. These include where an order or warrant of arrest, commitment or imprisonment has been issued against that person but he or she cannot be found; or where he or she has been detained for failing to obey the judgment of the court but continues to disobey the judgment.

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?

A party may enter into a contract with his or her attorney for a contingent fee in respect of a civil matter to be undertaken on his or her behalf. The fee may be paid or agreed to be paid for the attorney's service under an arrangement where compensation is contingent in whole or in part upon the successful accomplishment or deposition of the subject matter of the agreement, and is to be an amount that is either fixed or is to be determined under an agreed formula.

Costs incidental to all proceedings are solely at the discretion of the court. The court will normally take into consideration factors such as the cost of legal representation of the successful party, and travel and other expenses of parties and witnesses.

Criminal asset recovery

21 Interim measures

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

In reality, there is no single legal framework in relation to interim measures for the freezing or seizure of the proceeds of crime. Various statutes in Nigeria make provisions for the forfeiture of property where such property is the subject matter or evidence in a criminal action.

The Economic and Financial Crimes Commission (Establishment) Act 2004 (the EFCC Act) provides for the establishment of the Economic and Financial Crimes Commission (EFCC), a body charged with the enforcement of all economic and financial crimes laws.

Under section 27 of the Act, where a person is arrested for committing an offence, he or she must make a full disclosure of his or her assets and property by completing the declaration of assets form as specified in Form A of the Schedule to the Act. The completed form shall then be investigated by the EFCC. It is an offence to make a false declaration or refuse to make full disclosure or any disclosure at all.

Upon the attachment of any property under the Act, the EFCC shall apply to the court for an interim forfeiture order.

Where a person is arrested for an offence under the Act, the EFCC shall immediately trace and attach all assets and property of the person as a result of such economic or financial crime and shall then obtain an interim attachment order from the court.

The Act further provides that where assets or property of any person arrested for an offence under the Act have been seized, or any assets or property have been seized by the EFCC under the Act, the EFCC shall cause an ex parte application to be made to the court for an interim order. This forfeits the property concerned to the federal government and the court will, if satisfied that there is prima facie evidence that the property concerned is liable to forfeiture, make an interim order in accordance with section 29.

The Corrupt Practices and Other Related Offences Act 2000 also makes provisions in this regard; the Act empowers an officer of the Independent Corrupt Practices and Other Related Offences Commission to seize property in the course of investigation if he or she suspects it is the subject matter of an offence, or evidence relating to the offence.

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?

Under section 27 of the EFCC Act, an arrest triggers the investigation of assets and property of a person arrested for an offence under the Act.

The Corrupt Practices and Other Related Offences Act empowers the Chairman of the Commission, where he or she has reasonable grounds to believe that an offence under the Act has been committed, to require a person to identify every property, whether movable or immovable, within or outside Nigeria, belonging to this person or in his or her possession, or in which this person has any interest, whether legal or equitable, and specify the date on which each of the properties identified was acquired and the manner in which each was acquired.

23 Confiscation – legal framework

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

Under the EFCC Act, a person convicted of an offence shall forfeit to the federal government all assets or property derived from any proceeds the person obtained, directly or indirectly, as a result of such offence. Any of the person's property or instrumentalities used in any manner to commit, or to facilitate the commission of, such offence may also be forfeited to the federal government. The order confiscating the proceeds and instrumentalities of crime may be made in addition to any other sentence to be imposed at the time of sentencing.

Under the Corrupt Practices and Other Related Offences Act, the court may make an order of forfeiture of any property that is proved to be the subject matter of an offence, where the offence is proved against the accused, or the offence is not proved against the accused but the court is satisfied that the accused is not the true and lawful owner of such property and that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

The Criminal Code Act also makes provisions for forfeiture in respect of certain offences. The court may, in addition to or in lieu of the penalty that may be imposed, order the forfeiture of any property that has passed in connection with the commission of the offence or, if such property cannot be forfeited or found, of such sum as the court shall assess as the value of the property.

There is no legal framework by which the court may calculate the value of the benefit unlawfully obtained, other than the provision in the Criminal Code Act that empowers a court to assess the value of property to be forfeited. The assessment and value to be ascribed to such proceeds appears to be at the discretion of the court, exercised upon a consideration of all relevant materials placed before the court by parties.

24 Confiscation procedure

Describe how confiscation works in practice.

Where a person is convicted for an offence under the EFCC Act, the EFCC or any authorised officer may apply to the court for an order of confiscation and forfeiture of the convicted person's assets and properties acquired or obtained as a result of the crime subject to an interim order under the Act.

Assets forfeited under the EFCC Act are to be disposed of by the Secretary to the Commission and the proceeds paid to the federal government.

Under the Criminal Procedure Act, every article (not pecuniary) forfeited in respect of an offence, or the seizure, forfeiture or disposal of which may be enforced by the court, may be sold or disposed of in such a manner as the court may direct, and the proceeds of such sale shall be applied in a like manner as if the proceeds were a penalty imposed under the written law on which the proceeding for forfeiture is founded.

Under the provisions of the Administration of Criminal Justice Act 2015, where the court orders the forfeiture or confiscation of any property but does not make an order for its destruction or for its delivery to any person, the court may direct that the property be kept or sold, and that if the property is sold, the proceeds of the sale be held as the court directs until some person establishes to the court's satisfaction a right to the property. Where no person establishes a right within six months from the date of forfeiture or confiscation of the property, the proceeds of the sale are to be paid into the Consolidated Revenue Fund of the Federation, the Consolidated Revenue Fund of the State or any other appropriate account, as the case may be.

25 Agencies

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

The police, the EFCC and the Independent Corrupt Practices Commission are the agencies responsible for tracing and confiscating the proceeds of crime.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Secondary proceeds may be confiscated if such proceeds are traceable to crime.

27 Third-party ownership

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

Property acquired by third parties may also be confiscated if such property was acquired with the proceeds of crime.

28 Expenses

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

Under section 255 of the Criminal Procedure Act, a court may order any person convicted of an offence before it to pay to the prosecutor such reasonable costs as the court deems fit. Such costs may include the costs of asset tracing and confiscation.

Also, under section 338(2) of the Administration of Criminal Justice Act, at any time within six years from the date of the property coming into the possession of the police, the court may direct the property or the proceeds of the sale of the property to be delivered to any person proving his or her title to it, on payment by him or her of any expenses incurred by the court in the matter.

29 Value-based confiscation

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

Yes, value-based confiscation is allowed. Under the Corrupt Practices and Other Related Offences Act, where the court has made an order for the forfeiture of any property that is proved to be the subject matter of an offence or to have been used in the commission of an offence, and

Update and trends

Following the suspension of the Nigerian Financial Intelligence Unit (NFIU) by the Egmont Group, the National Assembly enacted the NFIU Act, which makes the NFIU an independent body. The NFIU, notwithstanding the enactment of this legislation, is yet to be restored to the Group, and a decision on this is expected to be taken at the meeting of its Heads of Financial Intelligence Units to be held in September 2018.

In December 2017, at the Global Forum on asset recovery that took place at the International Finance Corporation Headquarters in Washington, DC, US, the Attorney General of Nigeria signed a tripartite agreement with the government of Switzerland and the World Bank for the repatriation of US\$321 million recovered from the estate of former Head of State Sani Abacha. This amount has, reportedly, been returned to Nigeria.

At the end of December 2017, the government announced a whistle-blowing policy, under which it sought to encourage persons with information about the violation of financial regulations, the mismanagement of public funds and assets, financial malpractice, fraud and theft to report it to the government, offering the incentive of a percentage of recovered funds to persons providing information leading to the recovery of funds by the government. The government claims that this programme is a success and that, as at March 2018, approximately 9.12 billion naira, US\$368 million and £27,800 have been recovered as a direct result of the introduction of the policy.

such property has been disposed of or cannot be traced, the court shall order the accused to pay a penalty sum equivalent, in the opinion of the court, to the value of the property.

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 burden of proof is on the party making an assertion. However, where a person is accused of an offence, the burden of proving the existence of circumstances that would make the case eligible for any exception, exemption from, or qualification to, the operation of the law creating the offence with which he or she is charged, is upon that person. The burden of proof may therefore be shifted where the defendant seeks to establish that the property to be confiscated does not form part of the proceeds of crime or that it is one that cannot be seized for another reason.

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?

Section 331(1) of the Administration of Criminal Justice Act makes provisions for the following:

[C]onfiscation or delivery to a person appearing to be entitled to the possession or otherwise, of any movable property or document produced before it or in its custody or regarding which an offence appears to have been committed, or which has been used for the commission of an offence.

Also, section 336 provides that where it appears to the court that by force a victim has been dispossessed of any immovable property, the court may, where it deems fit, order the possession of the property to be restored to the victim.

32 Confiscation of profits

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

Under the Criminal Procedure Act, during or at the conclusion of trial, the court may make such order as it deems fit for the forfeiture or confiscation of any property produced before it regarding which an offence appears to have been committed or which has been used for the commission of any offence. Property in this context is not only property

originally in the possession or under the control of any party, but also any property into which the property has been converted or any property for which it has been exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

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.

The proceeds of crime may only be confiscated on an interim basis without a conviction, although under the Corrupt Practices and Other Related Offences Act where there is no prosecution or conviction for an offence in respect of any property seized under the Act, the Chairman of the Independent Corrupt Practices and Other Related Offences Commission may, before the expiration of 12 months from the date of the seizure, apply to a judge of the High Court for an order of forfeiture of the property if the Chairman is satisfied that such property has been obtained in connection with the giving or taking of gratification (money, donation, reward, among other things), or the fraudulent acquisition or receipt of property.

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?

Generally, seized assets are managed by the court, which may make such order as it deems fit for their disposal. Where the court orders the forfeiture or confiscation of any property but does not make an order for its destruction or for its delivery to any person, the court may direct that the property be kept or sold, and the proceeds thereof held until some person establishes such a right within six months from the date of forfeiture or confiscation. Such property or its proceeds shall therefore be paid into, and form part of, government revenue in accordance with section 263(2) of the Criminal Procedure Act 2004 and section 332(2) of the Administration of Criminal Justice Act.

Where the proceeding is one initiated by the EFCC, section 31 of the EFCC Act provides that upon the delivery of a final order of forfeiture, the Secretary to the EFCC is expected to take all steps to dispose of the property concerned by sale or otherwise, and the proceeds of sale of such property shall be paid into the Consolidated Revenue Fund of the Federation.

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.

International legal assistance concerning provisional measures in relation to the recovery of assets may be sought from countries with which Nigeria has signed a mutual legal assistance treaty (MLAT). Under an MLAT, the foreign country could assist in proceedings relating to the forfeiture and immobilisation of proceeds or instrumentalities of criminal offences.

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.

Foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets would be met where the requesting country has signed an MLAT with Nigeria.

37 Treaties

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

Nigeria is signatory to the following international conventions with provisions on asset recovery:

- the United Nations Convention against Corruption (signed on 9 December 2003 and ratified on 14 December 2004);
- the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth (including amendments made by law ministers in April 1990, November 2002 and October 2005);
- the London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed at Kingstown in November 2002); and
- the United Nations Convention against Transnational Organized Crime (signed on 13 December 2000 and ratified on 28 June 2001).

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

Although a private prosecutor may file information in court subject to provisions of the law, the power to arrest, trace and seize the proceeds of crime lies with the agencies of the state, and as such it is always advisable to solicit the support of these agencies.

Sofunde Osakwe Ogundipe & Belgore

legal practitioners

Babajide O Ogundipe
Nneka I Ofili

boogundipe@sooblaw.com
niofili@sooblaw.com

7th Floor
St Nicholas House
Catholic Mission Street
Lagos
Nigeria

Tel: +234 1 462 2502
Fax: +234 1 462 2501
www.sooblaw.com

Serbia

Tomislav Šunjka

ŠunjkaLaw

Civil asset recovery

1 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 limitations for parallel progression of civil and criminal proceedings. Elements of civil legal liability are certainly broader than the elements of criminal legal liability. The civil court is bound by the judgment of a criminal court, and the responsibility determined by a criminal court cannot be reduced or annulled by the judgment of a civil court. Likewise, someone who is released in a criminal proceeding can be sentenced for damage and civil liability in a civil proceeding. If proceedings progress in parallel, the criminal court shall issue a procedural decision by which it shall question the victim of fraud and ascertain property claim, and the realisation of the request and claim shall instruct the civil proceeding.

2 Forum

In which court should proceedings be brought?

The competent court is the civil court of general jurisdiction or commercial court, depending on who the litigants are and whether natural persons or a legal entity. Likewise, it depends on claim amount whether a basic civil court of general jurisdiction or a High Court of general jurisdiction is deemed competent.

3 Limitation

What are the time limits for starting civil court proceedings?

The initiation of civil proceedings is limited by the statute of limitations applicable to the underlying claim. However, there is no procedural statute of limitations restricting civil court proceedings as such.

As a rule, claims that arise out of a breach of contract become time-barred after 10 years unless otherwise prescribed by law. Some specific contractual claims become time-barred after five years, commercial claims after three years and damage claims after three or five years.

4 Jurisdiction

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

Commercial courts have jurisdiction in commercial and business matters between legal entities or entrepreneurs.

Civil courts mainly have jurisdiction for contentious civil matters, court orders in non-contentious matters and court orders in matters of debt collection and bankruptcy law, as well as arbitration.

The court examines ex officio whether the procedural requirements of a claim are satisfied when it receives a court claim. A party has a right to object to the jurisdiction of the court before and at the preliminary hearing. The court has an obligation to decide on any objection immediately in a written decision, or in the main decision in the later stage of the hearing with a final judgment.

5 Time frame

What is the usual time frame for a claim to reach trial?

After receiving the claim, the court executes the preliminary examination of the lawsuit, examining whether the lawsuit is incomprehensible or incomplete, or if there are disadvantages concerning the ability of the parties to be litigated parties, deficiencies in the legal representation of the party or deficiencies relating to the authorisation of the representative to initiate a lawsuit if such authorisation is required. If the court determines there is, it can either call upon a party to correct the deficiency, if it can be corrected, or reject the claim. Further, the court will reject the claim if it determines the following:

- that deciding on a claim does not fall within the jurisdiction of the court;
- that the lawsuit was filed after the statute of limitations;
- that there is already a litigation with the same claim;
- that final judgement of court settlement on the same claim already exists; or
- that there is no legal interest of the claimant to file a lawsuit.

If there are none of the aforementioned circumstances, the court will deliver the lawsuit to the defendant within 15 days starting from the day of receiving the lawsuit. The defendant is obliged to submit a response to the lawsuit, within 30 days of the date of delivery of the lawsuit. The court will schedule and hold a preparatory hearing within 30 days of the date of delivery of the defendants' response to the claimant. Having the aforementioned provisions in mind, in litigation, the time frame from the moment of filing the claim to the court to the first hearing is approximately 80 days.

6 Admissibility of evidence

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

Provisions of the Civil Procedure Code regulate the admissibility of evidence. The court rules on the admissibility by taking into consideration each item of the evidence individually and afterwards jointly putting all the evidence together in one logical and legal whole.

7 Witnesses

What powers are available to compel witnesses to give evidence?

If the witness who is duly summoned does not come and does not justify his or her absences, or if he or she leaves the place where he or she is to testify without authorisation or justified reason, the court may order that said witness is to be brought by force and bear the enforcement expenses. The court can also fine the witness in the amount of 10,000 to 150,000 Serbian dinars. If the witness comes to the scheduled hearing, but refuses to give his or her statement without valid reason, the court can fine the witness in the amount of 10,000 to 150,000 Serbian dinars, and if he or she still refuses, the court can fine the witness again. Concerning physical evidence, pursuant to articles 241 and 242 of the Civil procedure Code, the court may request from the defendant and from a third party any documents, evidence, or both, in his or her possession. A court order can be enforceable in terms of physical

enforceability with the assistance of court bailiffs, according to Law on Enforcement and Security. Likewise, the court may fine any person who does not present a document upon a court order.

8 Publicly available information

What sources of information about assets are publicly available?

There are many open public registries that do not require permission to check and use data, such as the register of companies (the Business Entities Register), the intellectual property register, the civil registry, the real estate cadastre, mortgage registers and the Register of Pledges, etc. There are registers where data is public but cannot be accessed directly except through authorised persons, such as the register of shares where all data can be accessed through an authorised broker. Additionally, there is a register of addresses and identification numbers of natural persons, and a vehicle register, which is managed by the police, who will present such data at the request of the authorities.

9 Cooperation with law enforcement agencies

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

All evidence, including evidence obtained by law enforcement, can be used in civil proceedings without exception. This raises the question of whether law enforcement agencies are willing to cooperate with private persons and exchange evidence. Cooperation is successful if it does not interfere with the pre-investigation, investigation or criminal proceeding. From the moment that the prosecutor takes over the case from the police department and issues the indictment, the counsel of the victims can obtain all evidence without exception. Assessment of whether cooperation would interfere with proceedings and the stages of proceedings falls solely to the law enforcement authorities.

10 Third-party disclosure

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

In general, pursuant to articles 241 and 242 of the Civil Procedure Code, documents in their possession may be requested from defendants and third parties. Such decisions can be enforceable. The court may fine a person who does not present a document at the court's request.

Bank secrecy in the legal system

Bank secrecy rules are regulated by the Law on Banks (Official Herald of RS, Nos. 107/2005, 91/2010 and 14/2015). The Law on Banks defines bank secrets under article 46 and prescribes that they shall be considered as business secrets, and that the following shall be considered as bank secrets:

- data that is known to a bank and refers to personal data, financial status and transactions, as well as ownership or business relations of the clients of such bank or another bank;
- data on balance and transactions on individual deposit accounts; and
- other data that the bank has become aware of in the course of performing business activities with clients.

The Law on Banks prescribes that the following shall not be considered as a bank secret:

- public data and data accessible from other sources to interested persons with legitimate interest;
- consolidated data on the basis of which the identity of an individual client is not disclosed;
- data on bank shareholders and the amount of their participation in the bank share capital, and data on other persons holding a share in the bank and the data on such share, regardless of whether they are bank clients; and
- data related to a client fulfilling its obligations towards the bank in good time.

The Law on Banks prescribes several exceptions to the obligation to guard bank secrets. The obligation to guard bank secrets shall not apply if the data is disclosed as follows:

- on the basis of the decision or request of the competent court;
- for the needs of the Ministry of Internal Affairs, which is the authority responsible for combating organised crime and preventing money laundering, according to the regulations;
- in connection with property proceedings, on the basis of a request by the guardian of the property or the consular representative offices of foreign states, upon submission of written documents that prove the legitimate interest of these persons;
- in the case of execution by the competent authority regarding property of the bank's client;
- to regulatory authorities for the purpose of performing activities within their field of competence;
- to a person established by banks for the purpose of collecting data on the total amount and type of, and timeliness in fulfilling, obligations of individuals and legal entities that are clients of the bank;
- to a competent authority with regard to supervising payment system operations of legal entities and individuals conducting their activities, in compliance with payment system regulation;
- to the tax administration pursuant to regulations on activities within its field of competence;
- to the authority competent for the supervision of foreign currency operations;
- upon the request of the organisation for deposit insurance, in compliance with the law that governs deposit insurance; or
- to a foreign regulatory authority under the conditions stipulated in the memorandum of understanding concluded between the foreign regulatory authority and the National Bank of Serbia.

Except for the provisions specified above, a bank has the right to disclose data that represents bank secrets to the investigative judge, public prosecutor and courts, or other public and legal authoritative bodies, solely for the purpose of the protection of its rights in compliance with the law.

11 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?

Temporary measures and preliminary measures in criminal and civil proceedings

Temporary measures in legislation are regulated both in criminal and civil proceedings by the Law on Enforcement and Security (Official Herald of RS, No. 106/2015).

A temporary measure may be ordered before, or in the course of, a court (both in civil and criminal proceedings as well as in an enforcement proceeding) or administrative proceeding, as well as after the termination of such a proceeding, until such time as the enforcement proceeding is conducted.

There are two types of temporary measures.

Temporary measures for securing a monetary claim

Requirements for imposing such measures are that temporary measures for securing monetary claims may be ordered if the enforcement creditor shows the probability of the existence of a claim and the risk that without such temporary measure the judgment debtor would prevent or considerably hinder satisfaction of the claim by disposing of, concealing, or otherwise making unavailable his or her property or means. The risk exists especially if the claim is to be realised abroad, if there is already an enforcement procedure against the same debtor for due instalment payments, if the paying obligations exceed the debtor's earnings or there has been an unsuccessful enforcement procedure already against the same debtor, because he or she refused to disclose data about his or her assets, or gave false data about the assets.

Within this temporary measure the following measures may be imposed:

- prohibition on the disposal of movable property and possible confiscation of that property;
- prohibition on the disposal or mortgage of immovable property;

- order to a debtor's debtor to pay a claim to the debtor or to hand over property, and the prohibition on the debtor to receive property, or collect a claim and dispose of it;
- order to a bank or other financial institution, with which the debtor has an account, to deny payment of an amount determined by the temporary measure;
- prohibition on the disposal and pledge of stocks and shares in the company that is the subject of the claim, and registration of such prohibition in the Central Register of securities; and
- confiscation of cash and securities and their depositing.

Temporary measures for securing a non-monetary claim

Requirements for imposing such measures are that temporary measures for securing non-monetary claims may be ordered to secure a non-monetary claim if the enforcement creditor has shown the probability of the existence of the claim and a risk that without such measure satisfaction of the claim would will be prevented or considerably hindered. A temporary measure may also be ordered when an enforcement creditor shows that the temporary measure is necessary to prevent the use of force or the infliction of irreparable damage.

Under this temporary measure, the following measures may be imposed:

- prohibition on the disposal and pledge of movable property that is the subject of the claim – confiscation of these items, and entrusting them to an execution creditor or a third party, or the safekeeping of the court;
- prohibition on the disposal or mortgage of immovable property concerning the claim, and the registration of such prohibition in the public registry;
- prohibition on taking actions that could harm the creditor;
- prohibition on making changes to the property that is the subject of the claim;
- prohibition on the debtor's debtor to hand over property that is the subject of the claim;
- prohibition on the disposal and pledge of stocks and shares in the company that is the subject of the claim, and registration of such prohibition in the Central Register of Securities;
- order to the debtor to perform certain actions necessary to preserve the movable or immovable property, prohibit its physical alteration, damage or destruction; or
- a temporary arrangement on the dispute to eliminate the danger of violence or major irreparable damage.

In criminal proceedings, on the motion of authorised persons, temporary measures can be determined for securing the claim for damage, under the provisions of the law governing the enforcement and security, for damage that arose from the commission of a criminal offence, or unlawful acts that are prescribed by law as a criminal offence.

A decision of the court by which the temporary measure is determined must specify the duration of the temporary measure. When such a decision is made in civil proceedings before filing a lawsuit or commencing other legal proceedings, such measure must be justified by filing a lawsuit, or commencing other legal proceedings within the period set by the court.

Preliminary measures

Preliminary measures are regulated both in criminal and civil proceedings by the Law on Enforcement and Security (Official Herald of RS, Nos. 106/2015, 106/2016 and 113/2017 – authentic interpretation).

A preliminary measure shall be imposed on the basis of a decision of a domestic court on a monetary claim that has not become final or enforceable, if an enforcement creditor establishes that there is a likely risk that, without such measure, satisfaction of the claim will be impossible or made significantly more difficult.

For presumed risk, a risk is deemed to exist if the motion for security is based on one of the following decisions:

- a payment order issued because of a bill of exchange or cheque, against which timely objection has been made;
- a judgment issued in a criminal matter in which the claim is accepted, against which a repeat of the procedure is allowed;
- a decision according to which enforcement should take place abroad;

- a judicial or administrative settlement, or a notary public record of the settlement being contested in accordance with the law; or
- a judgment on the pleadings that has been appealed.

A settlement is made before a court or body deciding on the administrative procedure, contested in a manner prescribed by law.

Types of preliminary measures

The court may order the following preliminary measures:

- inventory of goods and the registration of a lien on the movable property listed in the Register of Pledges;
- seizure of monetary claims of the enforcement debtor and the acquisition of a lien on them;
- order for the National Bank of Serbia to order the banks in which the enforcement debtor has bank accounts to transfer the funds in the amount of the secured claim to the deposit of the public executor;
- prohibition of disposal of financial instruments, and registration of a lien on them in the Central Register of Securities;
- registration of a lien in favour of the enforcement creditor on shares of the enforcement debtor in a limited liability company, a partnership or limited partnership in the Register of Pledges and registration of seizure of shares in the Business Entities Register;
- seizure of a claim that an enforcement debtor has towards a third person, which consists of the debtor's right to be handed over certain immovable or movable property, or to be delivered a certain amount of movable property, and acquisition of a lien on such claim; or
- registration of prior notice – mortgage on immovable property owned by the enforcement debtor, or on a claim of the enforcement debtor registered on immovable property.

The court may, on request of the enforcement creditor, and in accordance with the circumstances of the case, order two or more preliminary measures if necessary.

A decision imposing a preliminary measure must specify the amount of the claim that is secured with interest and costs, and the preliminary measure and its duration.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

Pursuant to articles 241 and 242 of the Civil Procedure Code, the court may request from the defendant and from a third party any documents in their possession. A court order can be enforceable in terms of physical enforceability with the assistance of court bailiffs, according to the law that regulates enforcement procedure. Likewise, the court may fine any person who does not present a document upon a court order. The latest amendments to the Criminal Code have made non-compliance with a court decision a criminal offence punishable by a prison sentence.

13 Obtaining evidence from other jurisdictions

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

Rogatory rules are the governing rules in respect of international legal assistance and aid. A letter rogatory, or letter of request, is a formal request from a court to a foreign court for some type of judicial assistance. The most common remedies sought by letters rogatory are the service of process and taking of evidence.

Serbian courts seek international aid and assistance in accordance with international agreements or treaties on assistance and aid that Serbia has entered into with other countries.

Unless otherwise stipulated by an international agreement, requests of a domestic court for legal aid are submitted to foreign courts through diplomatic channels. The applications and attachments must be written in the language of the relevant country or officially translated into that language.

14 Assisting courts in other jurisdictions

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

In accordance with the Civil Procedure Code, Serbian courts are obliged to secure and provide legal aid to foreign courts in cases determined by international agreements and where there is reciprocity in providing legal aid. If there is doubt concerning reciprocity, the Ministry of Justice shall give an expert opinion.

Courts provide legal aid to foreign courts in compliance with Serbia's national laws. An action requested by a foreign court may also be performed as the foreign court requires and in accordance with foreign proceeding regulations, but only if this is not contrary to the laws of Serbia.

The Civil Procedure Code prescribes that if it is not otherwise stipulated by an international agreement, courts shall proceed upon the request of a foreign court for legal aid only if such requests are submitted through diplomatic channels and if the application and attachments are in the Serbian language or officially translated into Serbian.

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 in civil asset recovery cases are fraud, fraudulent transfer, breach of contract, debts, statutory causes, proprietary claims, damage cases including loss of profit, directors' and officers' misappropriation of company funds, and fraudulent misrepresentation including sale of company at inflated or underestimated price, etc.

16 Remedies

What remedies are available in a civil recovery action?

In a civil recovery action, restitution, damages, account of profits, *actio pauliana* and monetary compensation (if restitution is not possible) are available.

17 Judgment without full trial

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

If the court finds that the basis of the lawsuit is uncontested it may issue a partial judgment by which it decides on the merits of the claim. If the defendant does not respond to the lawsuit, the court then renders a judgment on the grounds of absence. If the defendant does not appear at the preparatory hearing, the court may render a judgment adopting the claim owing to non-appearance. However, even such judgment cannot be executed automatically because the defendant has a right to appeal.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

The successful claimant of a monetary claim can launch debt collection proceedings from all the debtor's accounts and assets. In the enforcement procedure, it is possible to seek and gain a temporary measure, as detailed in question 11.

19 Enforcement

What methods of enforcement are available?

The enforcement procedure is regulated by the Law on Enforcement and Security (Official Herald of RS, Nos. 106/2015, 106/2016 and 113/2017 - authentic interpretation).

An enforcement procedure is initiated by a motion of enforcement submitted by the enforcement creditor before a competent court (before first instance courts of general jurisdiction or commercial courts considering parties in the proceeding). The execution procedure may be initiated by submitting a motion for enforcement based on executive titles (final and enforceable court judgments, decisions, settlements, etc) or authentic documents (invoices, bills, bills of exchange or cheques, business book excerpts, bank guarantees, etc).

When submitting a motion for enforcement, a judgment creditor must propose the means and object by which the enforcement proceeding shall be conducted. The court may, during the enforcement proceeding, at the request of the judgment creditor or debtor, designate a means or object of enforcement other than that proposed or determined.

Objects of an enforcement proceeding are things and rights on which enforcement of a claim may be carried out (for example, money, funds in bank accounts, movable and immovable property); the means by which enforcement proceedings may be conducted are enforcement actions used to enforce a claim in accordance with the law (eg, sale of chattels, sale of immovable property, transfer of monetary claim).

This kind of procedure is urgent and the court acts rapidly in proceedings for enforcement. The court shall decide on a motion of enforcement within eight days of filing a motion to the court.

If the motion for an enforcement is based on authentic documents, when the court issues the decision on enforcement, the judgment debtor may challenge this decision by objecting within eight days of receipt of the enforcement decision.

If the motion for an enforcement is based on executive titles, when the court issues the decision on enforcement the judgment debtor may challenge this decision by appealing within eight days from the receipt of the enforcement decision.

Objection and appeal postpone the enforcement procedure only when it is prescribed by the law.

Enforcement of foreign executive title

If the enforcement creditor's motion to enforce is based on a foreign executive title, he or she must submit the original or a certified copy, translated into the language that is in official use in the court, together with proof of the finality and enforceability under the law of the country of the executive title.

A foreign executive title previously recognised by the domestic court in accordance with the law shall be enforced in the same manner and procedure as applicable to the enforcement of domestic executive titles. An enforcement creditor may initiate an enforcement procedure before a competent court in Serbia on the basis of a foreign executive title that has not previously been recognised by the domestic court. When the motion to enforce has been filed on the basis of a foreign executive title that has not been recognised, the court shall decide on the recognition of such document as a preliminary matter.

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?

Parties finance cases in a dispute themselves. The source of financing of parties varies. Besides their own funds, it is possible for parties to sell or transfer in whole or in part their claim from the litigation, or to obtain funds for conducting litigation, which is less common. More commonly, parties that cannot pay for a lawyer sign a success fee agreement no higher than 30 per cent of the claim, and thus finance the dispute. Companies that finance disputes as their main business activity are not active on the legal market. Apart from a possible contracting success fee and an hourly fee, there is an official lawyer's tariff. When the court renders a judgment and obliges the losing party to reimburse the costs of the successful party, the fee amount is determined solely by the current lawyer's tariff, which is very low compared with an hourly fee and success fee.

Criminal asset recovery

21 Interim measures

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

See question 10.

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?

The law prescribes that asset recovery is possible in criminal proceedings for the following criminal offences:

- organised crime;
- abduction;
- crimes against property (such as robbery, fraud or extortion);
- criminal offences against businesses (such as counterfeiting of money, credit cards and securities);
- creating, obtaining and providing other means for forgery;
- money laundering;
- smuggling;
- abuse of position of the responsible person;
- false bankruptcy;
- damage to the creditor;
- unauthorised production, possession and distribution of narcotics; and
- crimes against public order, official duty (such as the criminal offence of abuse of official position), humanity and other goods protected by international law.

23 Confiscation - legal framework

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

Legislation prescribes certain rules on tracing assets that have derived from committing a criminal offence.

The Law on Confiscation of Assets Derived by Criminal Offence (Official Herald of RS, Nos. 32/2013 and 94/2016) prescribes the rules and conditions, procedures and authorities responsible for detection, seizure and management of assets of natural and legal persons that derive from committing a criminal offence.

The benefit figure is calculated according to an expert report during the criminal case. This figure is used in the process of confiscation.

The Criminal Code (Official Herald of RS, Nos. 85/2005, 88/2005 - correction, 107/2005 - correction, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016) also prescribes rules on the confiscation of objects, and seizure of property gained by committing a criminal offence.

Article 87 of the Criminal Code regulates the security measure of the confiscation of objects and prescribes that objects used or intended to be used for the commission of a criminal offence, or objects arising from a criminal offence, may be confiscated in criminal proceedings, as well as objects when there is a danger that the object will be reused for the commission of a crime, when it is necessary to protect the public safety, or for moral reasons.

In respect of the seizure of property gained by a criminal offence, the Criminal Code prescribes in article 92 that any property gained by committing a criminal offence shall be confiscated from the offender. Under the court's decision, property gained by committing a criminal offence, such as money, things of value and any other property, shall be confiscated from the offender to the amount of the profit acquired by a criminal offence as determined in a criminal proceeding.

If in criminal proceedings a claim on the property of the victim is determined, the court shall order the confiscation of property gained through a criminal offence only if it exceeds the amount of the property claim awarded to the victim.

Under the Criminal Procedure Code, property gained by commission of a criminal offence shall be determined in the criminal proceedings ex officio. The court is obliged to determine the amount of property gained by the criminal offence. To that end, the court has to present all the necessary evidence in a criminal proceeding.

The court is entitled by the provisions of the Criminal Procedure Code to determine temporary measures in a criminal proceeding in accordance with the provisions of the Law on Enforcement and Security, in order to secure the claim of the victim and the collection of property gained during the criminal offence.

24 Confiscation procedure

Describe how confiscation works in practice.

Under the law, a request for seizure of assets may be submitted at any stage of the criminal proceedings when reasonable doubt exists that assets have derived from a criminal offence.

This request for seizure of assets is submitted by the public prosecutor. The decision on the seizure is rendered by the investigating judge, the judge for the previous proceedings or the president of a panel of judges who presides over the main hearing, depending on the stage of the criminal proceeding.

Assets and funds obtained from the sale of assets (conducted by the Directorate for the Management of Seized Assets (the Directorate)) will become the property of Serbia when the decision on the confiscation of assets becomes final.

The law also prescribes that seized assets, as well as confiscated funds or funds obtained from the sale of assets, be immediately returned to their owner when it has been determined that the seized assets have not been obtained from and by a criminal offence.

25 Agencies

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

An organisational unit responsible for financial investigation has been legally established. This unit is a specialised organisational unit of the Serbian Ministry of Internal Affairs for the detection of assets derived from criminal offences.

The unit acts on the order of a court, Public Prosecutor's Office or ex officio.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Confiscation of secondary proceeds is certainly possible and very often is in practice. In such case, the defendant must prove that this property has no legitimate link to a criminal act.

27 Third-party ownership

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

Confiscation is permitted from a third party, provided that the assets to be confiscated are obtained directly from an offence. Otherwise, this kind of request can be successfully challenged by a third party.

28 Expenses

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

The cost of tracing and confiscating assets is the state's responsibility until the end of the case. In the final and binding court decision after sentencing and fining, the court will determine the resolution cost. The defendant must pay the cost. If the defendant refuses to pay court costs, a state agency will have the right to recover the cost from confiscated assets according to the enforcement law.

29 Value-based confiscation

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

Value-based confiscation is permitted if the assets subject to confiscation are no longer available. In such a case, the court may uphold a claim for compensation by the state in respect of a sum of equivalent value. The amount of compensation must be equivalent to the value of the assets, were the assets still available for confiscation.

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?

When the prosecutor initiates an official investigation proceeding, he or she immediately orders the Financial Investigation Unit to investigate

financial aspects of a specific criminal offence, and all assets of a suspect. The prosecutor then delivers an order on the confiscation of those assets that have been found. When the court receives the prosecutor's order, a hearing is scheduled in which the defendant explains and proves whether those assets have any connection with the crime. The burden of proof is with the defendant.

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?

The state has precedence over payment collection. Should any assets remain, they can be partly used in satisfaction of 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 through the commission of criminal offences?

It is possible to recover the financial advantage or profit obtained through the commission of criminal offences as part of the court judgment in a criminal procedure.

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.

Without a conviction assets cannot be confiscated (ie, should the suspect be released or should the prosecutor abandon the criminal prosecution, the assets should be returned). They (eg, money and weapons of unknown origin, jewellery and works of art without a certificate of origin and similar) will not be returned even though no conviction has taken place; then the burden of proof will be on the suspect to prove the legality of those funds.

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?

In accordance with the law, the state established the Directorate, which is part of the Ministry of Justice.

The Directorate acts on and undertakes the following actions prescribed by the Law on Confiscation of Assets:

- manages temporarily and permanently assets seized after a criminal offence, temporarily seized assets under the order of the Public Prosecutor's Office in investigatory proceedings, objects used in

committing an offence and that derived from committing a criminal offence, and assets gained by a criminal offence;

- makes an assessment of seized assets derived from criminal offences;
- stores, keeps and sells temporarily seized assets, and manages funds gained;
- keeps records on seized assets; and
- provides international legal assistance.

The Directorate usually covers its own costs by renting or leasing seized assets as it collects the monthly rent.

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.

Rogatory rules in criminal proceedings in Serbia are set out in the Law on International Legal Aid in Criminal Matters (Official Herald of RS, No. 20/2009).

The Law prescribes that international legal assistance shall include extradition of the accused or convicted, takeover and transfer of criminal prosecution, and execution of the sentence.

Other forms of mutual legal assistance include the following:

- the performance of court process activities, such as summoning and sending documents, interrogating the accused, trial witnesses and expert witnesses, investigating, searching premises and persons, and seizing property;
- the implementation of measures such as surveilling and recording telephone and other conversations or communications, and optical recording entities, controlling delivery, providing simulated business services, concluding simulated legal affairs, using undercover investigators, conducting computer searches and processing;
- the exchange of information and delivery of documents and items related to criminal proceedings to the requesting state, the submission of data without request, the use of audio and video conferencing and the establishment of joint investigation teams; and
- the temporary handover of a prisoner for examination before a competent authority of the requesting state.

It also prescribes that international legal assistance shall be provided in proceedings relating to a crime where the request for assistance falls within the jurisdiction of the state that requested the assistance.

International legal assistance is provided in proceedings instituted before administrative authorities for an offence punishable under the law of the state submitting the request or the law of the state receiving the request.

International legal assistance is also provided at the request of the International Court of Justice, the International Criminal Court, the European Court of Human Rights and other international institutions established by an international treaty ratified by Serbia.



Tomislav Šunjka

tomislav.sunjka@sunjkalawoffice.com

Sremska Street No. 4, First Floor
21000 Novi Sad
Vojvodina
Serbia

Tel: +381 21 472 17 88
Fax: +381 21 661 75 41
www.sunjkalawoffice.com

Authorities responsible for providing international legal assistance are the domestic courts and the Public Prosecutor's Office.

A request for providing international legal assistance must be submitted in the relevant request form.

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.

See question 35.

37 Treaties

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

Serbia is a signatory to the following:

- the Agreement on Cooperation to Prevent and Combat Trans-Border Crime (Official Gazette of Serbia and Montenegro – International Agreements, No. 5/2003);

- the United Nations Convention against Corruption (Official Gazette of Serbia and Montenegro – International Agreements, No. 12/2005);
- the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Official Gazette Serbia – International Agreements, No. 7/2002);
- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing Terrorism (Official Gazette of Serbia – International Agreements, No. 19/09);
- the Terrorist Financing Convention (Official Gazette of Serbia – International Agreements, No. 7/2002); and
- the Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters (Official Gazette of Serbia – International Agreements, No. 10/2001).

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

Not applicable.

Switzerland

Marc Henzelin, Sandrine Giroud and Maria Vinogradova

Lalive

Civil asset recovery

1 Parallel proceedings

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

Civil proceedings can be conducted in parallel with, in advance of, or within criminal proceedings. The law provides for several procedural means by which civil and criminal proceedings can be coordinated. For example, civil courts can suspend or stay proceedings, if appropriate (article 126 of the Swiss Code of Civil Procedure (SCCP)). Proceedings may be stayed, in particular, if the decision depends on the outcome of other proceedings, such as criminal proceedings. In practice, only in limited cases will the existence of parallel criminal proceedings be sufficient grounds to stay civil proceedings. Civil and criminal proceedings can also be coordinated by granting victims of criminal offences the right to bring civil claims as private claimants in criminal proceedings (article 122 of the Swiss Code of Criminal Procedure (SCCrP)).

2 Forum

In which court should proceedings be brought?

Civil proceedings are generally brought before cantonal civil courts. In certain cases, however, civil claims can also be brought before the competent criminal authority for proceedings concerning the same subject matter (article 122 of the SCCrP) (see question 1).

As a rule, ordinary civil proceedings should be brought before the courts at the defendant's domicile (natural person), or seat (legal person) (article 10 of the SCCP). Civil procedural rules also set forth special venues depending on the subject matter of the dispute (eg, family law, employment law, inheritance law, property law, contract law, torts, company law), the existence of other relevant connections (eg, place of business establishment), as well as the nature of the claims or parties involved (eg, counterclaims or third-party claims). In particular, for contractual matters, a claim can be filed before the courts either at the domicile or registered office of the defendant, or at the place where the characteristic performance must be rendered (article 31 et seq of the SCCP). The same is also provided in the context of international proceedings (article 10 of the Swiss Private International Law Act (PILA)).

As to interim measures, unless the law provides otherwise, they can be ordered either by the court that has jurisdiction to decide the main action or the court of the place where the measure is to be enforced (article 13 of the SCCP). The same is also provided in the context of international proceedings (article 10 of the PILA). As to attachment proceedings in support of a monetary claim, they are regulated specifically by the Swiss Debt Enforcement and Bankruptcy Act (DEBA) (see question 11).

3 Limitation

What are the time limits for starting civil court proceedings?

The initiation of civil proceedings is limited by the statute of limitations applicable to the underlying claim. However, there is no procedural statute of limitations limiting civil court proceedings as such.

As a rule, claims that arise out of a breach of contract become time-barred after 10 years unless otherwise provided by law (article 127 of

the Swiss Code of Obligations (CO)). Some specific contractual claims become time-barred after five years:

- rent, interest on capital and all other periodic payments;
- delivery of foodstuffs;
- work carried out by tradesmen and craftsmen;
- purchases of retail goods;
- medical treatment;
- professional services provided by advocates, solicitors, legal representatives and notaries; and
- work performed by employees for their employers (article 128 of the CO).

A few contractual claims are subject to other statutes of limitations such as two years for a customer's general claim for defects in a contract for work (article 371(1) of the CO).

In general, the limitation period commences as soon as the debt is due (article 130 of the CO). The limitation period is interrupted if the debtor acknowledges the claim and, in particular, if the debtor makes interest payments or partial payments, or if debt enforcement or judicial proceedings are initiated by the creditor (article 135 of the CO). The effect of such interruption is that a new limitation period commences as of the date of the interruption (article 137 of the CO).

A claim for damages based on tort becomes time-barred one year from the date on which the injured party became aware of the loss or damage and of the identity of the person liable for it, or 10 years after the date on which the loss or damage was caused, whichever is earlier. If the action for damages is derived from an offence for which criminal law provides for a longer limitation period, that longer period also applies to the civil law claim (article 60 of the CO).

If a claim has been acknowledged by public deed or confirmed by a court judgment, the new limitation period is always 10 years (article 137(2) of the CO).

There is, however, no statutory limitation regarding the enforcement of a judgment (Swiss or foreign).

4 Jurisdiction

In what circumstances does the civil court have jurisdiction?

How can a defendant challenge jurisdiction?

Civil courts mainly have jurisdiction for contentious civil matters, court orders in non-contentious matters and court orders in matters of debt collection and bankruptcy law, as well as arbitration (article 1 of the SCCP).

The court examines ex officio whether the procedural requirements of a claim are satisfied. This includes, in particular, the subject matter, territorial jurisdiction of the court seized (articles 59 and 60 of the SCCP) as well as the immunity defence. A party can, however, object to the jurisdiction of the court as a preliminary matter. The court can thereupon decide to clarify this issue before entering into the merits of the case as a means to simplify the proceedings (article 125 SCCP).

If the court decides that it lacks jurisdiction, it closes the proceedings by deciding not to consider the merits of the case (article 236 of the SCCP). This decision is subject to either appeal (article 308 of the SCCP) or objection (article 319 of the SCCP), depending on the circumstances of the case. Conversely, the court may confirm its jurisdiction either in the final judgment on the merits or by way of an interim

decision (although rare in practice) if a contrary appellate decision could end the proceedings and thereby save substantial time or cost. The interim decision can be challenged separately, but cannot later be challenged as part of the final judgment (article 237 of the SCCP).

5 Time frame

What is the usual time frame for a claim to reach trial?

The trial phase is dedicated to the adjudication of the matter on its admissibility and merits. The trial phase must be preceded by a conciliation procedure (article 197 of the SCCP) subject to certain exceptions as foreseen by articles 198 and 199 of the SCCP. There is no conciliation in summary proceedings, and for certain actions arising from the DEBA. For financial disputes over 100,000 Swiss francs, the parties can jointly waive the conciliation phase, and if the defendant's place of residence is abroad or unknown, the claimant has the right to unilaterally waive conciliation.

For cases subject to a preliminary conciliation attempt, as a rule, a conciliation hearing is scheduled within two months of receiving the request for conciliation (article 203 of the SCCP). If no agreement is reached, the conciliation authority delivers an authorisation to proceed on the merits (ie, to proceed to the trial phase before court (article 209 of the SCCP)). In such a case, the claimant must file the claim on the merits within three months of receiving the authorisation to proceed (article 209(3) of the SCCP).

Once the action on the merits is filed, the time frame to reach a final decision on the claim largely depends on the complexity of the case. Approximately one or two years is a minimum for reaching final judgment at first instance.

6 Admissibility of evidence

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

Under civil procedural rules, each party is entitled to have the court accept evidence that he or she offers in the required form and time frame (article 152 of the SCCP).

As to the form, the SCCP provides an exhaustive list of admissible means of evidence, which encompasses witness testimony, documents, expert opinions, inspection, written statements from official authorities or individuals (if witness testimony appears to be unnecessary), and interrogation of the parties (article 168 of the SCCP). Documentary evidence comprises audio recordings, films, electronic files and the like (article 177 of the SCCP).

Illegally obtained evidence is only considered by the court if there is an overriding interest in finding the truth (article 152(2) of the SCCP).

7 Witnesses

What powers are available to compel witnesses to give evidence?

Witnesses, as third parties, have a duty to cooperate in the taking of evidence. In particular, they have the duty to make a truthful witness statement, produce physical records (with the exception of correspondence with lawyers provided that such correspondence concerns the professional representation of a party or third party) and allow an examination of their person or property by an expert (article 160 of the SCCP).

In certain cases, witnesses may, however, refuse to cooperate. Witnesses have an absolute right to refuse to cooperate if they have a family link or a close personal relationship to one of the parties (article 165 of the SCCP). In other specific cases, witnesses only have a qualified right to refuse to cooperate, which must be justified (article 166 of the SCCP). This relates, for instance, to cases where in establishing facts, witnesses would expose themselves or a close associate, as specified by law, to criminal prosecution or civil liability, or where a witness is bound by professional secrecy (eg, lawyers and clerics).

Furthermore, confidants of other legally protected secrets may refuse to cooperate if they credibly show that the interest in keeping the secret outweighs the interest in establishing the truth (article 166(2) of the SCCP). This provision could apply, for instance, to bankers who are otherwise bound by banking secrecy (article 47 of the Swiss Federal Act on Banks and Saving Banks). If a witness refuses to cooperate without justification, the court may impose a disciplinary fine of up to

1,000 Swiss francs, threaten sanctions under article 292 of the Swiss Criminal Code (SCC) (see question 12), order the use of compulsory measures or charge the third party the costs caused by the refusal (article 167 of the SCCP). There is, however, no such sanction as contempt of court under Swiss law.

8 Publicly available information

What sources of information about assets are publicly available?

There are several publicly available sources that provide information on assets located in Switzerland. In particular:

- the commercial register provides information on companies (eg, share capital, legal seat, address, corporate purpose). Each canton maintains its own commercial register, which is freely accessible. A summary version of the commercial register is available online;
- the Swiss Official Gazette of Commerce, in addition to gathering some of the information published in every cantonal commercial register, provides information regarding bankruptcies, composition agreements, debt enforcements, calls to creditors, lost titles, precious metal control, other legal publications, balances and company notices;
- the land register records every single plot of land in Switzerland, with the exception of those in the public domain. Each canton maintains its own land register, which can be consulted upon the showing of a legitimate interest (eg, for purposes of contractual negotiations for the purchase of a property);
- the Swiss aircraft registry contains the records of all Swiss-registered aircraft and provides detailed information regarding the owner and the holder, the type of aircraft, its year of construction, the serial number, the maximum take-off mass and the fee according to its noise level;
- the debt enforcement and bankruptcy register records all debt collection proceedings filed against a debtor, and can be consulted upon request by anyone showing a prima facie legitimate interest;
- an unofficial will register that records wills and other testamentary dispositions. This register is, however, not exhaustive and only contains information that has been provided freely;
- in certain cantons (eg, Vaud and Fribourg), it is possible, under specific conditions, to access information contained in a person's tax certificate; and
- judgments rendered by civil courts are in principle made accessible to the public (article 54 of the SCCP); a copy thereof will be provided upon the showing of a legitimate interest and depending on the practice of the courts after having been made anonymous.

There is no register of bank accounts in Switzerland. Swiss banking secrecy protects the privacy of banks' clients. However, banking secrecy is not unlimited and can be lifted in the context of criminal proceedings (see question 21), among others.

9 Cooperation with law enforcement agencies

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

A civil court may obtain information in writing from all 'official authorities' (article 190 of the SCCP). There is no list of entities falling under the definition of official authorities, but it should be interpreted broadly as encompassing every entity financed or subsidised by a public agency. Courts are, moreover, obliged to provide mutual assistance to each other (article 194 of the SCCP). A party to civil proceedings may request the civil court in charge of the matter to order the adverse party or another authority to provide specific information. Moreover, a civil court may be requested to take evidence at any time (ie, even before the initiation of proceedings) if the law grants such right to do so and the applicant credibly shows that the evidence is at risk or that it has a legitimate interest (article 158 of the SCCP).

As mentioned in question 8, information may be obtained from the Debt Collection Office regarding the debt enforcement and bankruptcy register records, as well as from civil courts. Moreover, a party to a civil dispute that is also a party to criminal proceedings on the same facts, if granted the right to access the criminal file, can use such information in the context of civil proceedings.

10 Third-party disclosure

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

Third parties are subject to the same rules as witnesses for the taking of evidence, as described under question 7.

11 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 law distinguishes between non-monetary and monetary claims. Although enforcement of the former is regulated by the SCCP, enforcement of the latter is regulated by the DEBA. Interim relief, both before a claim has been filed or during the proceedings, can be requested by way of interim measures for non-monetary claims, and attachment for monetary claims.

Courts can order any interim measure suitable to prevent imminent harm in support of a non-monetary claim (article 262 of the SCCP). In particular, such interim relief can take the form of an injunction, an order to remedy an unlawful situation, an order to a registry or third party, a performance in kind or the remittance of a sum of money (if provided by law). In practice, interim measures that are often requested are the registration of property rights in a public register, such as the land register. Interim measures can also be requested to prevent a party from disposing of assets such as company shares or movable property. In cases of special urgency, and in particular where there is a risk that the enforcement of the measure will be frustrated, the court may order the interim measure immediately and without hearing the opposing party (ie, ex parte) (article 265 of the SCCP). Moreover, although pre-trial discovery is alien to civil procedure, the SCCP allows the taking of evidence before the initiation of legal proceedings exclusively in cases where the law grants the right to do so and evidence is at risk, or where the applicant has a justified interest (article 158 of the SCCP).

In the context of a monetary claim, assets could be frozen by way of attachment proceedings (article 272 et seq of the DEBA). Such attachment is granted ex parte and must thereafter be validated. In support of its application, the applicant must do the following prima facie:

- show a claim against the debtor;
- identify assets of the debtor in Switzerland that can be attached; and
- show that one of the specific grounds for attachment, as set out by law, exists (eg, if the debtor does not live in Switzerland and the claim has sufficient connection with Switzerland or is based on a recognition of debt, or if the creditor holds an enforceable title – judgment or award – against the debtor).

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

If the court order provides for an obligation to act, to refrain from acting or to tolerate something, the enforcement court may do as follows:

- issue a threat of criminal penalty under article 292 of the SCC;
- impose a disciplinary fine not exceeding 5,000 Swiss francs;
- impose a disciplinary fine not exceeding 1,000 Swiss francs for each day of non-compliance;
- order a compulsory measure, such as taking away a movable item or vacating immovable property; or
- order performance by a third party (article 343 of the SCCP).

Moreover, failure to comply with an official order issued by a court under the threat of criminal penalty for non-compliance in terms of article 292 of the SCC is a criminal offence and gives rise to a fine.

Courts can accompany their orders directly with the above-mentioned execution measures. Such measures can also be requested separately by one of the parties to the enforcement court if the other fails to comply with a court order.

13 Obtaining evidence from other jurisdictions

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

Requests for judicial assistance for the taking of evidence abroad must follow the legal framework applicable between Switzerland and the requested state (eg, bilateral or multilateral treaties such as the 1954 Hague Convention on Civil Procedure or the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters). In Switzerland, in the absence of a specific international instrument, such requests must be addressed to the Swiss Federal Office of Justice, which then transfers the requests abroad (article 11 of the PILA).

14 Assisting courts in other jurisdictions

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

Swiss courts will assist foreign courts in relation to proceedings of asset recovery (eg, service, taking of evidence, recognition and enforcement of foreign awards, interim measures) within the legal framework applicable between Switzerland and the requesting state. Save for the existence of other bilateral or multilateral agreements between the two states (eg, the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters or the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters), by default, Switzerland will apply the 1954 Hague Convention on Civil Procedure to foreign requests for service and the taking of evidence (article 11a(4) of the PILA).

Service of judicial or extrajudicial documents from abroad in Switzerland, as well as the taking of evidence in support of foreign proceedings, is considered as being the exercise of public authority on Swiss territory. Accordingly, the execution of such measures on Swiss territory, without passing through the channel of judicial assistance, constitutes a violation of territorial sovereignty and is a crime under Swiss law (article 271 of the SCC).

15 Causes of action

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

Under the law, a civil asset recovery action may be brought to court on the basis of many different causes of action (eg, contract law, tort law, inheritance law, property law).

In particular, contract-based claims may be filed for breach of contract (article 97 of the CO). If there is no contract between the parties, and if a person unlawfully causes a loss or damage to another, a tort-based action may be lodged (article 41 of the CO). This applies particularly to cases of fraud. Proprietary claims are also possible, notably in the event the owner has been deprived of its ownership (article 641 of the Swiss Civil Code (CC)). In insolvency and bankruptcy law, if the debtor has transferred assets or favoured certain creditors to the detriment of others, an avoidance action may be brought (article 285 et seq of the DEBA).

16 Remedies

What remedies are available in a civil recovery action?

Remedies available under the law generally depend on the cause of action.

In the context of a contract, the claimant may request that the defendant be ordered to perform the contract in accordance with its precise terms (specific performance) (article 107(2) of the CO). Instead of asking for specific performance, the claimant may also choose to claim damages (article 97 of the CO). Other remedies are available for specific contracts (eg, contracts for work). Similarly, the remedy available for tort-based actions is damages.

The law provides for restitution in the event of unjust enrichment (article 62 et seq of the CO). In general, the claim for unjust enrichment is considered subsidiary to other, more specific, claims. Restitution is also the remedy available to the owner of an object deprived of its ownership (article 641 of the CC).

The law provides for an account of profits under specific circumstances. For instance, in the case of a contract of agency without authority, the principal is entitled to appropriate any resulting benefits where the agency activities were not carried out with the best interests of the principal in mind, but with those of the agent's (article 423(1) of the CO). An account of profits is also foreseen in relation to profits realised by the infringement of personality rights (article 28a(3) of the CC).

17 Judgment without full trial

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

In certain circumstances, the law allows a judgment to be issued without a full trial. For instance, civil proceedings can continue and a judgment by default can be rendered even if the defendant is in default (articles 147, 206, 223 and 234 of the SCCP). In other specific cases, the trial is conducted pursuant to simplified or summary proceedings. Simplified proceedings apply, *inter alia*, to small cases (ie, where the value in dispute is below 30,000 Swiss francs) (articles 243 to 247 of the SCCP). Summary proceedings go even further in terms of simplification and expediency. They apply, in particular, to urgent requests and requests for interim measures (articles 248 to 270 of the SCCP). They also apply to 'clear-cut cases', which are non-contentious matters or matters where the facts can be immediately proven, or where the legal situation is straightforward and non-disputable (article 257 of the SCCP).

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

The successful claimant of a monetary claim can launch debt collection proceedings under the DEBA, which also allows for attachment proceedings depending on the circumstances (see question 11).

For a non-monetary claim, if the judgment provides for an obligation to act, to refrain from acting or to tolerate something, the successful claimant may request the court for execution measures as set out in question 12. If the judgment relates to a declaration of intent, the enforceable decision takes the place of the declaration. If the declaration concerns a public register, such as the land register or the commercial register, the court making the decision must issue the required instructions to the registrar (article 344 of the SCCP).

19 Enforcement

What methods of enforcement are available?

As mentioned, the successful party can request execution measures in support of a non-monetary claim, such as the issuance of a threat of a criminal penalty under article 292 of the SCC or performance by a third party (article 343 of the SCCP) (see questions 12 and 18). Moreover, the successful party may demand damages, if the unsuccessful party does not follow the orders of the court or conversion of the performance due into the payment of money.

In turn, monetary claims can be enforced under the DEBA. Eventually, the proceedings set forth by the DEBA will lead to the seizure of any of the unsuccessful defendant's assets as well as garnishes (article 89 *et seq* of the DEBA), and their auctioning (article 125 *et seq* of the DEBA). The seizure of a real estate property will be automatically registered in the land register (article 101 of the DEBA).

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?

The law does not prohibit litigation funding arrangements. Although a rather limited phenomenon in practice, funding of civil litigation may be available through specialised litigation financing companies. The law further allows lawyers and their clients to negotiate fee arrangements to a certain degree. Though pure contingency fee arrangements are prohibited, arrangements according to which an incentive may be paid depending on the success of the case are allowed.

In principle, the court will charge the procedural costs, which encompass court costs and party costs as determined by cantonal tariffs (article 95 *et seq* of the SCCP), to the unsuccessful party (article 106 of the SCCP). Party costs include the reimbursement of necessary outlays, the costs of professional representation and, in justified cases, compensation for personal efforts if a party is not professionally represented. In general, cantonal tariffs are established based on the value in dispute, the complexity of the matter and the time spent. Unnecessary costs are, however, charged to the party that caused them (article 108 of the SCCP). In practice, the party costs awarded by the courts to the successful party do not cover the full cost of the litigation, which usually acts as a barrier for malicious proceedings. Courts have, however, no power to issue costs management orders.

Criminal asset recovery

21 Interim measures

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

The SCCrP provides for interim measures, in particular, in relation to the remand and preventive detention of the suspect, as well as to the seizure of assets or items under specific conditions (articles 224 *et seq* and 263 *et seq* of the SCCrP).

Such interim measures can only be ordered as follows:

- if it is permitted by law;
- if there is reasonable suspicion that an offence has been committed;
- if the aims cannot be achieved by less stringent measures; and
- if the seriousness of the offence justifies the measure (article 197(1) of the SCCrP).

According to article 263(1) of the SCCrP, items or assets belonging to a suspect, accused or third party may be seized, if it is expected that such items or assets will, as follows:

- have to be confiscated or used for the purpose of a claim for compensation (see questions 23 and 29);
- be used as evidence;
- be used as security for procedural costs or monetary penalties; or
- have to be returned to the persons suffering harm.

Furthermore, except in the case of a seizure ordered to secure procedural costs and monetary penalties, or claim for compensation, there must be a nexus between the items or assets seized and the offence committed. Fishing expeditions are not allowed under the law.

During preliminary proceedings (which start when the police begin an inquiry or the prosecutor opens an investigation), the seizure is ordered by the cantonal or the federal prosecutor, depending on the offence under investigation (article 22 *et seq* of the SCCrP). During trial proceedings (which start with the receipt by the court of the indictment rendered by the prosecutor), jurisdiction for seizure lies with the court (article 198(1) of the SCCrP).

A seizure is usually ordered on the basis of a written warrant (a 'seizure order') containing a brief statement of grounds (article 263(2) of the SCCrP). In cases of banking assets, the competent authorities can order the bank not to disclose the seizure to the suspect or accused, or any third-party holder of the seized bank account for a certain period. Swiss banking secrecy is lifted in the context of criminal proceedings.

The continued fulfilment of the conditions underlying a seizure order must be regularly examined by the criminal authorities. The longer the seizure is maintained, the stricter the review of such conditions will be. In case of seizure of assets for the purpose of a future confiscation, it must appear *prima facie* that the assets should be confiscated (ie, that there exist sufficient grounds to suspect that an offence has been committed and that the assets seized have been used for, or are the proceeds of, this offence). To maintain a seizure of assets over a prolonged period, these suspicions must heighten and there must be a high likelihood of the existence of a causal link between the seized assets and the offence. If the conditions are no longer met, the seizure order must be revoked and the property or assets handed over to the person entitled to them (article 267(1) of the SCCrP). According to case law and doctrine, the persons affected by the seizure can request the seizure order to be revoked when there is a change in the circumstances of the case and, in particular, if the length of the proceedings becomes disproportionate.

Once a seizure order, or an order refusing to revoke the seizure, has been rendered, the suspect or accused, as well as third parties whose rights have been directly affected by the order, can file an objection within 10 days after they have been served with or informed of the order (articles 393 and 396 of the SCCrP). Such an objection is, however, subject to the demonstration of a legitimate interest in the quashing or amendment of the order (article 382(1) of the SCCrP). For assets held with a bank, only the account holder has such legitimate interest and thus the right to appeal, to the exclusion of the beneficial owner of assets.

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?

Criminal authorities have the duty (*ex officio* or upon a criminal complaint) to investigate and, if necessary, to prosecute offences under their jurisdiction. In particular, they must identify, trace and seize the proceeds of offences depending on whether the seriousness of the offence justifies the measure (see question 21).

Additionally, pursuant to law provisions against money laundering, financial intermediaries or even, in certain circumstances, dealers (ie, natural persons and legal entities that deal with goods commercially, and in doing so accept cash) must immediately file a report with the Money Laundering Reporting Office Switzerland (MROS) if they know or have reasonable grounds to suspect the following of the assets:

- they are the proceeds of a felony or a serious tax offence within the meaning of article 305-bis(1-bis) of the SCC;
- they are connected to an offence of money laundering or of participation or support to a criminal organisation;
- they are subject to the power of disposal of a criminal organisation; or
- they serve to finance terrorism (articles 9(1) and 9(1-bis) of the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector (AMLA)).

Financial intermediaries are prohibited from informing the persons concerned or third parties that they have filed a report (article 10a of the AMLA).

The MROS has the power to forward the report to the competent prosecution authority for further investigation. It shall inform the financial intermediary concerned within 20 working days whether it will pass on the report to a prosecution authority (article 23 of the AMLA).

Financial intermediaries only seize the assets once apprised by the MROS that their report has been forwarded to the competent prosecution authority (article 10 of the AMLA). Prior to this information and during the analysis conducted by the MROS, financial intermediaries shall execute customer orders relating to the assets reported (article 9a of the AMLA). Upon transmission of the report by the MROS to the prosecution authority, this authority then becomes the competent authority for the seizure of the assets (article 10(2) of the AMLA).

23 Confiscation – legal framework

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

Confiscation is regulated by article 69 et seq of the SCC, which provides for the confiscation, irrespective of the criminal liability of any person, of the following:

- assets that have been acquired through the commission of an offence or that were intended to persuade the offender in the commission of an offence, or as payment thereof; and
- assets of a criminal organisation (ie, assets that are subject to the power of disposal of a criminal organisation, in particular, assets of a person who participated in or supported a criminal organisation).

Assets other than those belonging to a criminal organisation can only be confiscated as follows:

- if they are directly and immediately connected to the commission of an offence;
- if they are still available; and
- if they have not been passed on to the person harmed for the purpose of restoring the prior lawful position (article 70 of the SCC).

Regarding the calculation of the value of the benefit unlawfully obtained, see question 29.

As to the confiscation of assets acquired by a third party, see question 27.

The right to order the confiscation of assets is limited to seven years since the commission of the offence. However, if the prosecution of the offence is subject to a longer limitation period (article 97 of the SCC), this period applies (article 70(3) of the SCC).

24 Confiscation procedure

Describe how confiscation works in practice.

Confiscation can be ordered within pending criminal proceedings with the final decision (article 267(3) of the SCCrP), or outside any criminal proceedings.

In the first case, the prosecutor has the competence to order confiscation by way of any decision ending the proceedings, such as a no-proceedings order (article 310 of the SCCrP), a ruling of abandonment of proceedings (article 320 of the SCCrP) or a summary penalty (article 352 of the SCCrP). Similarly, the court has the competence to order confiscation within its final decision (article 351(1) of the SCCrP). When the requirements for the confiscation are fulfilled, the criminal authority must order the confiscation. The confiscation order is subject to appeal or objection depending on the nature of the decision that has been rendered (articles 322(2), 354 et seq and 399 of the SCCrP).

In case of separate confiscation proceedings (ie, when a decision is made on the confiscation of property or assets outside criminal proceedings because, among other things, the Swiss authorities do not have jurisdiction over the offence (articles 376 to 378 of the SCCrP, see question 33)), they must be carried out at the place where the items or assets to be confiscated are located (article 37(1) of the SCCrP). The confiscation order can be challenged within 10 days by the person affected by the confiscation (articles 377(4) and 354 et seq of the SCCrP). Following the opposition, the court will render a decision or order, which can be further challenged within 10 days (article 393 et seq of the SCCrP).

Finally, in cases where confiscation is ordered within pending criminal proceedings or in separate confiscation proceedings, official notice must be given of the confiscation in order to protect the third parties' right on confiscated assets. If the person harmed or third parties are identified only after the final decision has entered into force, the assets or items confiscated may be restored to them provided that they claim their rights on the assets within five years of the date on which official notice is given (article 70(4) of the SCC).

25 Agencies

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

Generally, prosecutors have jurisdiction to investigate, trace and seize the proceeds of crime and to confiscate said proceeds, whereas the courts limit their role to the confiscation of assets. As to the competence and duties of financial intermediaries and the MROS, see question 22.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Pursuant to case law and doctrine, prosecutors or courts are allowed to confiscate secondary proceeds (assets or items). However, there must be a paper trail that demonstrates a nexus between the secondary proceeds to be confiscated and the offence committed. If the proof of such nexus cannot be provided, authorities would have to, should the requirements be fulfilled, uphold a claim for compensation (see question 29).

27 Third-party ownership

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

Confiscation is not permitted if a third party (ie, any natural person or legal entity) has acquired the assets (after the commission of the offence), he or she has done so in ignorance of the grounds for confiscation and provided such person has paid a sum of equal value, or

confiscation would cause him or her to endure disproportionate hardship (article 70(2) of the SCC). However, regardless of the foregoing, the assets are subject to confiscation if the third party (eg, a corporation) received the assets directly from the offence.

28 Expenses

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

There is no specific provision under the law on the recovery by criminal authorities of the costs of tracing and confiscating assets. Such costs can, however, be considered part of the procedural costs and can be borne by the accused if he or she is convicted (article 426(1) of the SCCrP), or paid by means of seized assets (article 268 SCCrP).

29 Value-based confiscation

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

Value-based confiscation is permitted if the assets subject to confiscation are no longer available (ie, in particular if there is a breach in the paper trail between the proceeds to be confiscated and the offence committed). In such a case, the court may uphold a claim for compensation by the state in respect of a sum of equivalent value (article 71 of the SCC). The amount of compensation must be equivalent to the value of the assets, would the assets still be available for confiscation. To calculate the amount of compensation, the question of whether the gross or the net income shall be taken into consideration is controversial. Courts usually apply – and under certain exceptions – the criterion of the gross income in relation to illicit trade. The value must be determined at the time the assets became unavailable.

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?

As a rule, the burden of proof in a confiscation procedure lies with the criminal authorities. However, regarding the assets of a person who participated in or supported a criminal organisation, it is presumed that the assets are subject to the power of disposal of the organisation, and can thus be confiscated, until the contrary is proven (article 72 of the SCC).

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?

If the assets have not been passed on to the person harmed for the purpose of restoring the prior lawful position, and are hence subject to confiscation, confiscated property or compensatory claims may be used in the satisfaction of civil claims for damages, or moral satisfaction arising from an offence, up to the amount set by a court or agreed in a settlement, and subject to the following conditions:

- the person claiming compensation has suffered harm as a result of a felony or a misdemeanour;
- the person is not entitled to benefits under an insurance policy;
- it is anticipated that the offender will not pay damages or satisfaction; and
- the person harmed assigns the corresponding element of the claim to the state (article 73(1) and (2) of the SCC).

32 Confiscation of profits

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

Under article 70 of the SCC, all financial advantages obtained through the commission of a criminal offence can be confiscated. For instance, in case of a company's profit obtained after a corrupt public procurement process, such profit must be confiscated. Even if it is considered that the corporation is not criminally liable and hence is a third party, article 70(2) of the SCC does not apply when the company profited directly from the corrupt public procurement process (see question 27).

Update and trends

The SCCP and the SCCrP entered into force on 1 January 2011 and unified civil and criminal procedures that were previously ruled by cantonal laws. After seven years of implementation in practice, the government has proposed several amendments to these two codes.

With respect to the SCCrP, the government sent a preliminary draft for consultation. The proposed amendments include, among others, the limitation of the suspect's right to participate in investigation procedure (eg, hearings and access to the file) if the suspect has not yet been questioned on the specific facts targeted by such procedure, and the exclusion of issuing a penalty order in certain cases in order to protect a victim's rights, as well as the possibility for prosecution authorities to include the decision on a victim's civil claim when issuing penalty orders.

With respect to the SCCP, the government initiated a consultation process on 2 March 2018 regarding selected amendments. These amendments include concrete proposals for the strengthening of collective redress in Switzerland. At the time of writing, group action rights do not include the right to bring monetary claims. The proposed amendments intend to facilitate the enforcement of mass claims by allowing groups to file monetary claims, and introduce collective settlement proceedings.

The government is also considering several changes regarding negotiated criminal proceedings. At present, the law provides for several types of negotiated procedures, such as the simplified procedure (articles 358 to 362 of the SCCrP), the penalty order (articles 352 to 356 of the SCCrP), which allows room for negotiation, and finally the dismissal of a case against reparation by the offender for the damage caused (article 53 of the SCC), as used in the *HSBC*, *Alstom* and *Addax* cases. The dismissal of a criminal case against reparation is frequently criticised as being abused by companies in order to escape criminal liability by paying a financial reparation, thus circumventing the punitive rationale of the law. As a result, on 4 July 2018, the government approved a parliamentary initiative aiming to limit the scope of application of article 53 of the SCC to non-serious offences. In parallel, the Office of the Attorney General proposed the introduction of a procedure similar to the deferred prosecution agreement, which has also been submitted for consultation. It remains to be seen how these proposed amendments will be implemented.

Finally, as already underlined, the question of whether the gross or the net income shall be taken into consideration is controversial (see question 29).

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.

The SCCrP provides specific procedural rules allowing for a confiscation decision to be made independently of criminal proceedings (articles 376 to 378). First, property or assets that will probably be confiscated in independent proceedings are seized (article 377(1) of the SCCrP). If the requirements for confiscation (article 69 et seq of the SCC) are fulfilled, the prosecutor orders their confiscation and gives the person concerned the opportunity to file observations (article 377(2) of the SCCrP). Conversely, if the requirements are not fulfilled, the prosecutor must order the abandonment of the proceedings and return the property or assets to the entitled person (article 377(3) of the SCCrP).

The prosecutor or the court must also decide whether to accept the application made by the person suffering harm for the confiscated property or assets to be used for his or her benefit (article 378 of the SCCrP).

For legal challenge, see question 24.

Finally, within criminal proceedings, the prosecutor can order a confiscation within a no-proceedings order or a ruling of abandonment of proceedings (see question 24).

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?

As a rule, the holder of the assets or items that have been seized must hand them over to the competent criminal authority (article 265(1) of the SCCrP). As an exception, in certain circumstances, the following persons can refuse to hand over seized property:

- the suspect or accused;
- the persons who have the right to remain silent or to refuse to testify; and
- the corporate undertakings, if by doing so they could incriminate themselves (article 265(2) of the SCCrP).

The authority must safeguard the property and assets appropriately (article 266(2) of the SCCrP). It cannot use the assets as its own. Property that is subject to rapid depreciation or that requires expensive maintenance, as well as securities or other assets with a stock exchange or market price, may be sold immediately in accordance with the DEBA, and the proceeds of sale seized (article 266(5) of the SCCrP). The investment of seized assets is further regulated by the Federal Ordinance on the Investment of Seized Assets.

In practice, private managers of assets continue to manage them under the surveillance of the prosecutor. If tax must be paid or costs have been incurred, the prosecutor must give its consent before the payments are made.

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.

Requests for international legal assistance concerning provisional measures must follow the legal framework applicable between Switzerland and the requested state (eg, bilateral and multilateral agreements such as the 1959 European Convention on Mutual Assistance in Criminal Matters, the 2001 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters and the 1985 Convention Implementing the Schengen Agreement). Absent any applicable agreement, the request must follow the rules set up by the law of mutual legal assistance in criminal matters of both countries (ie, in Switzerland, the Federal Act on International Mutual Assistance in Criminal Matters (IMAC)).

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.

In an international context, Swiss authorities may grant a foreign state request for interim measures (eg, the seizure of assets) in order to preserve an existing situation, to safeguard threatened legal interests or to protect jeopardised evidence, provided that proceedings under the IMAC do not clearly appear inadmissible or inappropriate (article 18(1) of the IMAC).

Upon the request of a foreign state, seizure of assets is usually ordered by the prosecutor after delegation from the Federal Office of Justice (article 198(1)(a) of the SCCrP). Moreover, if any delay would jeopardise the proceedings and if there is sufficient information to determine whether all the conditions are met, the Federal Office of Justice may order the seizure of assets as soon as a request is announced. However, such measures are revoked if the requesting state does not make the request of mutual legal assistance within the deadline set by the Federal Office of Justice (article 18(2) of the IMAC).

The seizure of assets on Swiss territory is considered to be within the exclusive jurisdiction of Swiss public authorities, and the execution of such measure on Swiss territory without passing through the channel of legal assistance constitutes a violation of Swiss territorial sovereignty, and is a criminal offence (article 271(1) of the SCC).

Usually, provisional measures remain in force until a final decision on the request for legal assistance is rendered. If objects and assets are to be handed over to the requesting state based solely on a final and enforceable order of that state (article 74a(3) of the IMAC), assets will remain seized until such order is issued or the requesting state notifies the competent executing authority that such an order may no longer be issued, in particular owing to the lapse of time (article 33a of the Federal Ordinance on International Mutual Assistance in Criminal Matters).

Switzerland enacted specific rules regarding the seizure, confiscation and restitution of illicit assets of politically exposed persons (PEPs) located in Switzerland, which provides for a subsidiary solution to mutual legal assistance, such as the Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (FIAA). The FIAA provides, in particular, the preventive administrative seizure of assets of PEPs for the purposes of mutual legal assistance as follows:

- when the government of the state of origin has lost power or a change in power appears inexorable;
- when the level of corruption in the state of origin is notoriously high;
- when the assets are likely to have been acquired through corruption, misappropriation or other crimes; and
- when the safeguard of Switzerland's interests requires such seizure.

LALIVE

Marc Henzelin
Sandrine Giroud
Maria Vinogradova

mhenzelin@lalive.law
sgiroud@lalive.law
mvinogradova@lalive.law

35 Rue de la Mairie
PO Box 6569
1211 Geneva 6
Switzerland
Tel: +41 58 105 2000
Fax: +41 58 105 2060

Stampfenbachplatz 4
PO Box 212
8042 Zurich
Switzerland
Tel: +41 58 105 2100
Fax: +41 58 105 2160

www.lalive.law

The FIAA further provides for the continuous administrative seizure of assets of PEPs already seized within mutual legal assistance proceedings for the purposes of confiscation. This applies in case of failure of mutual legal assistance because the state of origin qualifies as a failing state (ie, it is unable to satisfy the requirement of mutual legal assistance proceedings owing to the total or substantial collapse or failures of its national judicial system) or proceedings in the state of origin may not meet the basic procedural requirements of the European Convention on Human Rights or the International Covenant on Civil and Political Rights. Frozen assets can further be confiscated if a PEP's assets are of illicit origin, which is presumed when the wealth of the PEP has increased inordinately, facilitated by the exercise of a public function, and the level of corruption in the state of origin or surrounding the PEP in question was notoriously high during his or her term of office.

37 Treaties

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

Switzerland is party to several international conventions with provisions on asset recovery. In particular, the following:

- the 1959 European Convention on Mutual Assistance in Criminal Matters;
- the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;

- the 1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime;
- the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the 1999 European Criminal Law Convention on Corruption;
- the 1999 UN Convention for the Suppression of the Financing of Terrorism;
- the 2000 UN Convention against Transnational Organized Crime; and
- the 2003 UN Convention against Corruption.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

Not applicable.

Ukraine

Vitaliy Kasko and Andrii Sliusar

Vasil Kisil & Partners

Civil asset recovery

1 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 advance of criminal proceedings concerning the same subject matter.

According to the Criminal Procedure Code of Ukraine, the person to whom pecuniary or non-pecuniary damage has been caused by a criminal offence has the right to enter a civil action in the course of criminal proceedings against the suspect, accused or other person or entity civilly liable by law for the damage caused. However, if an action has been dismissed in separate civil proceedings, the claimant cannot file the same civil claim in the course of criminal proceedings, and vice versa. Moreover, the claimant must confirm that he or she did not file the same claim (concerning the subject and grounds of the dispute) regarding the same defendant. Hence, the person has no right to bring a civil action before the civil court in parallel with the civil action in the criminal proceedings concerning the same subject matter.

2 Forum

In which court should proceedings be brought?

According to the Civil Procedure Code of Ukraine, all cases that are examined in accordance with civil procedure are considered by the district courts as the first instance courts. In this regard, if the claimant wishes to recover his or her property from a defendant, it is a private property dispute. Therefore, such claims for the recovery of assets shall be brought in district courts, which have jurisdiction to hear at first instance any civil actions. However, there is a specificity of jurisdiction depending on the legal status of parties to the dispute. According to the Commercial Procedure Code of Ukraine, if the dispute is raised between legal entities, the claim shall be brought in the district commercial courts as the first instance courts.

3 Limitation

What are the time limits for starting civil court proceedings?

The Civil Code of Ukraine provides general and specific time limitations for starting civil court proceedings. As regards asset recovery claims, the general time limitation shall be applied; the general limitation of an action is three years. In addition, the Civil Code provides that the duration of a limitation period shall begin from the day when a person finds out, or could find out, about the violation of his or her right, or about a person that violated the right.

4 Jurisdiction

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

Under the Civil Procedure Code, civil jurisdiction is the defendant's home location, namely, the place of residence of an individual, and the legal address of a legal entity. However, a claimant may use other jurisdictions. In particular, claims for damage caused to property may also be filed at the place of the damage.

In terms of challenging jurisdiction, first, a defendant can submit a response to the claim concerning jurisdiction irrelevance. Secondly, a defendant has the right to appeal the decision of the court of first instance under the Civil Procedure Code providing, inter alia, arguments are challenging jurisdiction.

5 Time frame

What is the usual time frame for a claim to reach trial?

In general, there are several steps to the proceedings. This affects their general time frame. Pursuant to the Civil Procedure Code, the court commences proceedings in a case within five days of claim submission. The next step provides preliminary proceedings, which shall be conducted within 60 days of the day when proceedings are opened. The last step is a consideration on the merits. The court shall consider a case within 30 days. Therefore, if the hearings are not postponed, a claim reaches trial within approximately 90 days.

6 Admissibility of evidence

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

Evidence in a civil proceeding is witnesses and their testimony, material evidence, written evidence, electronic evidence and experts' reports.

The Civil Procedure Code establishes the following for recognising evidence as admissible:

- relevance of evidence: it shall include any information regarding the subject matter of the dispute;
- admissibility of evidence: the court shall not consider evidence obtained by violation of the procedure established by law;
- reliability of evidence: the credibility of a source that is being used as evidence; and
- sufficiency of evidence: it provides the possibility of establishing the existence or absence of the relevant circumstances of the case concerning the subject matter of the dispute.

7 Witnesses

What powers are available to compel witnesses to give evidence?

Under the Civil Procedure Code, there are several actions that may be used to compel witnesses to give evidence. For instance, parties in a case can summon witnesses by issuing a summons. However, if a properly summoned witness does not appear at the court hearing without a justified reason, or did not report the reason for non-appearance, he or she may be subject to the relevant authorities of the National Police of Ukraine with reimbursement to the state's revenue for the costs of its implementation.

8 Publicly available information

What sources of information about assets are publicly available?

In order to obtain information relevant for finding and tracing assets, the following databases or state registers can be used (the list is non-exhaustive):

- the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organisations of Ukraine contains

information on legal entities and individual entrepreneurs registered in Ukraine and information on the ownership structure of legal entities, including the beneficial owners (controllers) of such persons, etc;

- the State Register of Proprietary Rights to Real Estate, and the State Land Cadastre contain information on land plots, other real estate objects and their owners;
- the Unified State Register of the Ministry of Internal Affairs, concerning vehicles contains information on registered vehicles and their owners; and
- the Unified State Register of Declarations of Persons Authorised to Perform Functions of the State or Local Self-Government contains information about property, income, expenses, financial obligations and private interests of all public servants, including the beneficiary ownership of assets.

The mentioned registers are publicly available, and information therefrom can be obtained via the internet (in some cases, it may require a fee payment), with the exception of certain confidential data.

9 Cooperation with law enforcement agencies

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

Yes, the information and evidence from law enforcement and regulatory agencies may be obtained for use in civil proceedings. Under national legislation, any person has the right to information, namely, the free acquisition, use, distribution, storage and protection of information that is necessary for the exercising of rights, freedoms and legitimate interests. In order to obtain certain information, a person shall file a request to the competent authorities. If such information includes relevant circumstances, it can be recognised by a court as admissible evidence.

10 Third-party disclosure

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

Information can be obtained from third parties by a witness summons in accordance with the special procedure under the Civil Procedure Code (see question 7). Moreover, concerning a legal entity, a party of the dispute can obtain relevant information by making a request to a different competent agency or authority. As to banks, the customer has the right to access information concerning bank activities. However, if a person wants to obtain information related to bank secrecy, it may be possible only under judicial procedure.

11 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?

According to the Civil Procedure Code, the following interim relief can be used as measures of procedural compulsion in a civil proceeding:

- seizure of property and money (or both) belonging to, or subject to transfer or payment to, the defendant and held by him or her or other persons;
- prohibition of taking certain actions;
- obligation of performing certain actions;
- prohibition of other persons taking actions on the subject matter of the dispute, making payments, transferring the property to the defendant or performing other obligations on behalf of him or her;
- suspension of the sale of the arrested property, if a claim is filed for the recognition of title to this property and a challenge to the property's arrest;
- suspension of enforcement based on an executive document, which is contested by the debtor in court;
- transfer of the item that is the subject of the dispute to the custody of other persons who are not involved in resolving the dispute; and
- suspension of customs clearance of goods or objects.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

There are several types of legal liabilities on this matter. For instance, according to the Law on Enforcement Proceedings, when a debtor does not comply with a binding decision, the bailiff makes a resolution to impose a fine on the debtor and establishes a new term of execution. The amount of the fine depends on the status of the debtor (individual, legal entity or official). If the debtor repeatedly fails to comply with a decision without valid reasons, the bailiff in the same order imposes a double fine and appeals to the bodies of the pretrial investigation with a statement of commission of a criminal offence. Pursuant to the Criminal Code of Ukraine, failure to comply with a legally binding court order is recognised as a criminal offence and shall be punished by a fine or imprisonment. Moreover, the deprivation of the right to occupy certain positions or engage in certain activities within a certain term shall also be applied to officials. The Civil Procedure Code also provides a fine for non-compliance with a court order. Namely, if a person fails to comply with court requirements during the civil proceedings; disobeys or resists the lawful order, process or other mandate of a court; does not provide relevant evidence in time; or interferes with the judicial proceedings.

13 Obtaining evidence from other jurisdictions

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

On 21 July 2001, Ukraine ratified the Hague Convention on the taking of evidence abroad in civil or commercial matters. According to article 1 of this Convention, in civil or commercial matters, a judicial authority of a contracting state may, in accordance with the provisions of the law of that state, request the competent authority of another contracting state, by means of a letter of request, to provide evidence or to perform some other judicial act. According to article 2 of this Convention, a contracting state shall designate a central authority, which will undertake to receive letters of request coming from a judicial authority of another contracting state and to transmit them to the authority competent to execute them.

On 11 November 1994, Ukraine ratified the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters. According to article 6 of this Convention, the contracting parties grant legal assistance to each other by carrying out the following procedural (and other) actions envisaged by law of the contracting parties, in particular:

- compiling and sending documents;
- requisition;
- sending and delivering exhibits;
- conducting expertise and interrogations of the parties, witnesses and experts; and
- recognising and fulfilling court decisions in civil cases, writs of execution and by way of handing.

14 Assisting courts in other jurisdictions

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

As mentioned in question 13, Ukraine is a party to the Hague Convention. Therefore, it undertakes to fulfil obligations for transmitting judicial documents. In accordance with the Convention, the contracting state makes a request to the competent central body designated by the international treaty with Ukraine. The central body sends the request to the Ministry of Justice of Ukraine to process the service of documents from the contracting state. For information on the Minsk Convention, see question 13.

15 Causes of action

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

Under the Civil Code, the main causes of action in civil asset recovery cases are as follows:

- breach of a contract;
- tort as the main cause of action;
- unjust enrichment; and
- infringement of intellectual property rights.

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

The Civil Code provides the following possible remedies in a civil recovery action, namely:

- recognition of title;
- recognition of the transaction as invalid;
- termination of the action that violates the right;
- restitution;
- compulsory fulfilment of duty;
- change in a legal relationship;
- termination of the legal relation;
- indemnification and other methods of compensation of property damage;
- compensation of moral (non-property) damage; and
- recognition of decisions, actions or omissions of the state authorities or their officials as illegal.

Moreover, the court may protect civil rights or interests in another way established by the contract, the law or by the court in cases determined by law.

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

Under the Civil Procedure Code, the following proceedings do not require a full trial:

- simplified proceedings (or summary proceedings), which are applied to minor cases (depending on the cost of the claim, the importance of the case, the legal remedies that the claimant is asking the court to apply, the category and complexity of the case, the existence of public interest in the current case, etc); and
- default proceedings, which are applied when all conditions are fulfilled as follows:
 - a defendant was duly notified about the judicial hearing;
 - a defendant did not appear at the judicial hearing and did not have a valid reasons for non-appearance or did not inform the court about the reasons;
 - a defendant did not submit a response; and
 - a claimant does not object to the dispute resolution.

18 Post-judgment relief**What post-judgment relief is available to successful claimants?**

Under the Civil Procedure Code, the successful claimant can apply for debt collection by filing an action before the court. The court also can limit the right of a person to cross the border until the defendant complies with the court's decision. Moreover, the state enforcement officer can take coercive measures to enforce the judgment and recover the debt, including, but not limited to, seizure of the debtor's funds or other assets, sale of the debtor's assets at a public auction and collection of any regular payments.

19 Enforcement**What methods of enforcement are available?**

The Law on Enforcement Proceedings provides for the following methods of enforcement:

- collection of funds, securities or other property (property rights);
- recovery of salary, pension, scholarship and other debtor income;
- withdrawal from the debtor and transfer to the collector of the items specified in the decision; and
- a prohibition on the debtor to dispose of or use property owned by him or her on the right of ownership, including funds, or to establish a debtor's obligation to use the property on terms and conditions specified by the bailiff.

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 Civil Procedure Code, there is a general rule that provides for the proportional partition of the court fee. This partition depends on the party's satisfied claims: if a claim is fully satisfied by the court, the defendant shall pay the total sum of the court fee. If the claim is refused by the court, the claimant shall pay the total sum of the court fee. In the case of partial satisfaction, the parties shall pay a sum that is proportional to the satisfied claim. The same rule is established for overall court costs, including the costs of the legal assistance. In addition, a court has the power to limit the compensation of the overall costs. However, this limitation can only be applied based on a party's application in cases of non-proportionality of costs, and complexity of the claim and trial.

Criminal asset recovery**21 Interim measures****Describe the legal framework in relation to interim measures in your jurisdiction.**

According to the Criminal Procedure Code, the seizure of property as an interim measure can be applied by the court based on the motion of the investigator and prosecutor for the following:

- preservation of material evidence;
- special confiscation;
- confiscation of property as a type of punishment or criminal measure against a legal entity; and
- compensation for damage caused as a result of a criminal offence, or recovery from the legal entity of wrongful benefit received.

The court's verdict can result in special confiscation orders transferring to the state any of the following property:

- that was obtained as a result of the commission of crime, or that was a proceed of such crime;
- that was intended (or used) to induce a person to commit a criminal violation, or finance and provide material support to, or as a reward for, its commission;
- that was the object of a criminal offence, except those items that should be returned to its owner; or
- that was found, fabricated, adapted or used as means or instrument for the commission of a criminal offence, preserved signs of it, or all of the above.

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?**

Proceeds of crime can be subject to special confiscation. Special confiscation can be applied in cases where the offence warrants imprisonment as the basic punishment or a fine of more than 3000 tax-free minimum incomes of citizens (approximately 51,000 hryvnas at the time of writing). The investigator or prosecutor, or both, shall identify and trace proceeds of mentioned crimes through investigative and procedural actions (including but not limited to filing official requests to the National Agency of Ukraine for Finding, Tracing and Management of Assets Derived from Corruption and Other Crimes) and applying measures to ensure criminal proceedings (eg, temporary arrest of property).

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

According to the Criminal Code and the Criminal Procedure Code, the proceeds of crime could be confiscated under the special confiscation procedure applied by a court's verdict (see question 21).

The approach for calculating the value of the benefit unlawfully obtained is not prescribed by the law, thus it should be established by

court practice. However, owing to the lack of relevant proceedings, common case practice has not yet been established in this regard.

Additionally, the Criminal Procedure Code provides that to determine the value of damage caused by a criminal offence, expert research should be conducted in criminal proceedings.

24 Confiscation procedure

Describe how confiscation works in practice.

The procedure of confiscation is established in the Criminal Executive Code of Ukraine. In particular, a court that has issued a verdict with confiscation of property sends an executive letter, a copy of the description of the property (if available) and a copy of the sentence for execution to the State Executive Service. The execution of punishment in the form of confiscation of property shall be carried out by the State Executive Service at the location of the property in accordance with the Law on Enforcement Proceedings.

If the property subject to confiscation was not defined in the court verdict, the bailiff shall locate a person's assets by referring to public authorities, legal entities and individuals. The executive officer of the State Executive Service also has direct access to all state registers of property rights. All real estate property and vehicles shall be appraised by a professional appraiser. All other property shall be appraised by a bailiff based on the market prices or the information provided by parties. After the appraisal, the property is transferred for sale via electronic trading. The funds from the sale of confiscated property shall be transferred to the special account in the State Treasury. If the property is not sold through electronic trading, it shall be transferred for sale once more with a decreased price. If the property is not sold on the third electronic trading attempt, it becomes the property of the state.

The execution of the court rulings on confiscation, and special confiscation of assets with a value exceeding 10,000 minimum wages (approximately 37 million hryvnas at the time of writing), can be conducted by the National Agency for Finding, Tracing and Management of Assets Derived from Corruption and Other Crimes instead of the State Executive Service.

25 Agencies

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

According to the Criminal Procedure Code, only courts are empowered to make a decision on confiscation. As mentioned in question 24, the state agency dealing with the actual enforcement of confiscation ruling is the State Executive Service.

The tracing of proceeds of crime can be conducted by several state agencies, such as the following investigative authorities:

- the National Anti-Corruption Bureau of Ukraine;
- the National Police of Ukraine;
- the State Security Service of Ukraine;
- the State Bureau of Investigation of Ukraine (currently in the process of being established); and
- the Prosecutor General's Office of Ukraine.

Also, the tracing of assets, including proceeds of crime, is one of the core functions of the National Agency for Finding, Tracing and Management of Assets Derived from Corruption and Other Crimes. The State Service for Financial Monitoring of Ukraine can also conduct some activities related to the tracing of assets, namely, monitoring suspicious financial transactions.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

The Criminal Code provides that special confiscation can be applied to both property that was a proceed of crime and property that was an earning of one (secondary proceeds). Moreover, if the money, profits and other proceeds of crime have been completely or partially converted into other property, that property is also subject to special confiscation.

27 Third-party ownership

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

The Criminal Code provides the possibility of special confiscation of property acquired by any third party, including close relatives. In particular, proceeds of crime shall be confiscated from a third party if this party acquired the property from a suspect or accused person and knew, or should and could have known, that the proceeds were obtained illegally. Special confiscation shall not be applied to property owned by a bona fide purchaser.

28 Expenses

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

Costs of tracing and confiscating assets are allocated from the budget of Ukraine for the purpose of the corresponding state agency conducting the actions. These costs cannot be recovered by other state authorities.

29 Value-based confiscation

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

If the special confiscation of proceeds of crime is inapplicable owing to their use, the impossibility of their separation from legally acquired property, their disposal or for other reasons, the court shall apply a confiscation of the amount of money equivalent to the value of the property. This amount will be determined by the court based on the evidence provided by the prosecution.

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 burden of proof in criminal proceedings is borne by the prosecution, and it cannot be reversed.

However, in civil proceedings the burden of proof could be reversed on the owner of assets in the case of a prosecutor filing a claim recognising the assets as unjustified, and recovering them after the judgment of conviction against a public official comes into legal force, convicting him or her of the corruption (embezzlement, bribery, abuse of power, etc) or money laundering.

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?

As mentioned in question 24, the proceeds from selling confiscated property must be transferred to the state budget, which means that it cannot be used for compensation of damage. Moreover, according to the Criminal Code, special confiscation is not applicable to the proceeds, profits and other property intended for return to the owner, or for compensation for damage caused by a crime.

32 Confiscation of profits

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

As mentioned in questions 21, 26 and 27, the financial profit obtained through the commission of crime is a subject to special confiscation in the case of meeting all other requirements for the legal procedure.

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.

No, proceeds of crime can only be confiscated based on the judgment of conviction, both in criminal and civil confiscations.

Update and trends

First, the trend of more openness and transparency of state registers regarding ownership rights should be underlined. Ukraine became the second country in the world, after the United Kingdom, to implement a public register of beneficial owners of corporate entities registered in country. The relevant laws were passed in 2014 and 2015, and a decree of the Cabinet of Ministers stipulated that this information should be published by spring 2016. Moreover, in May 2017 Ukraine signed the Memorandum of Understanding and Cooperation between the Ministry of Justice of Ukraine, the State Agency for E-Governance of Ukraine and OpenOwnership regarding integrating information on beneficial ownership to the Global Beneficial Ownership Register.

Furthermore, the Cabinet of Ministers approved the implementation of blockchain technology into the work of the State Register of Proprietary Rights to Real Estate and the Electronic Trading System of Arrested Property to provide additional openness, and security of registers.

Secondly, in December 2017, when the new Civil Procedure Code came into force, the provisions regarding compensation of costs for legal assistance were significantly revised. The new Code cancelled the limitation of a maximum amount of compensation for legal assistance costs. Thereafter, the court can only limit the amount of compensation of such costs on the basis of the claimant's or defendant's application, exclusively in the case of non-proportionality of the costs with the

complexity of the case and legal assistance provided by the attorney; the scope of provided legal assistance or time spent by the attorney for it; and the value of the claim or its importance to the party. Before these amendments, the maximum amount of compensation was limited to 40 per cent of the minimum cost of living per hour of legal assistance (approximately 730 hryvnas at the time of writing).

Finally, the institution of civil forfeiture, which appeared in Ukraine in 2015, should be mentioned.

In accordance with the Civil Procedure Code, the claim to recognise assets as unjustified and recover them shall be submitted by the prosecutor for the benefit of the state within the general limitation period of three years from the date when the judgment of conviction against a public official comes into legal force, convicting him or her of corruption or money laundering.

The court may recognise assets of that public official as unjustified, in case it was not proved in court, based on the provided evidence, that the assets, or money needed to acquire these assets, had been legally obtained. The defendant's assets recognised as unjustified by the court shall be recovered to the government revenue.

However, considering the imperfections of the institution of civil forfeiture in Ukraine, there is no sustainable case practice of its implementation yet.

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?

According to the Criminal Procedure Code, the seized assets with a value exceeding 200 minimum wages (approximately 368,000 hryvnas as at the time of writing), based on the court ruling, can be transferred to the National Agency for Finding, Tracing and Management of Assets Derived from Corruption and Other Crimes for management. The management of the seized assets should be efficient, and maintain or increase their value; additionally, the managing agency cannot sell the managed property. The costs of management of the assets can be recovered by the manager from the revenue obtained from such management.

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.

The request for foreign legal assistance is possible under the Criminal Procedure Code and the relevant international treaties that were ratified by Ukraine. As a general rule, in order to obtain foreign legal assistance, the prosecutor, or the court or investigator (with approval of the prosecutor), shall send to the empowered central authority of Ukraine a request for foreign legal assistance in criminal proceedings. During the pretrial investigation, the central authority is the Prosecutor General's Office or the National Anti-Corruption Bureau of Ukraine. If the competent authority recognises this request as applicable, it sends the request to the empowered central authority of the country from which legal assistance is required directly or via diplomatic channels. Ukraine also has decentralised communication with Poland, Moldova and Hungary according to bilateral treaties.

Evidence obtained as a result of foreign legal assistance can be used only in the criminal proceeding related to the request sent if no other agreements were made with the requested party. This evidence shall not be recognised as admissible by the court if the request was transferred to the requested party by violating established procedures.

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 Criminal Procedure Code, the foreign request can be executed in the following way. First, after receiving a foreign request, the central authority assesses its relevance and compliance with the laws or international treaties of Ukraine. If the request is appropriate, the central authority sends it to the competent authority for execution. The central authority of Ukraine shall send materials obtained during the execution of the request to the designated authority of the requesting party within 10 days of receiving them from the competent authority concerned. During the pretrial investigation, the empowered central authority is the Prosecutor General's Office or the National Anti-Corruption Bureau.

If, according to Ukrainian law, permission is required from the court to carry out a specific procedural action, it can only be carried out after obtaining permission, even if it is not required under the legislation of the requesting party.

Based on the request for foreign legal assistance, the relevant state authorities of Ukraine can conduct procedural actions aimed to trace and seize proceeds of crime and property owned by suspected or convicted persons. Those assets can be confiscated to the state budget of Ukraine if it is prescribed by a verdict or other judgment of the requesting party court. The Ukrainian court can decide to transfer confiscated assets to the requesting party as compensation for the damage caused to the victims of a crime, or following the international treaties on distribution of confiscated assets or its monetary equivalent.

Providing foreign legal assistance can be fully or partially postponed if it interrupts a pretrial investigation or court trial in Ukraine. Transferring seized and confiscated assets can also be postponed until after the conclusion of a pretrial investigation, the court trial or hearing of the case regarding third parties' rights.

37 Treaties

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

Ukraine is a signatory to the following conventions relating to asset recovery:

- the United Nations Convention against Corruption 2003;
- the European Convention on Mutual Assistance in Criminal Matters 1959, Additional Protocol of 1978 and Second Additional Protocol of 2001;

- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990 and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism;
- the Council of Europe Criminal Law Convention on Corruption 1999; and
- the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters 1993 (the Minsk Convention), which can be applicable only in relations between Ukraine and some Commonwealth of Independent States countries.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

No, there is no private prosecution service in Ukraine. However, if after filing an indictment to the court, a public prosecutor refuses to continue to press charges during the trial, the victim or victim's attorney can press charges instead of the public prosecutor.



VASIL KISIL

Vitaliy Kasko
Andrii Sliusar

kasko@vkp.ua
sliusar@vkp.ua

17/52A Bohdan Khmelnytsky Street
Kiev 01030
Ukraine

Tel: +380 44 581 7777
Fax: +380 44 581 7770
www.vkp.ua

United Arab Emirates

Ibtissem Lassoued

Al Tamimi & Company

Civil asset recovery

1 Parallel proceedings

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

United Arab Emirates (UAE) Federal Law No. 35 of 1992, as amended (the Penal Procedures Law), allows a party that is directly harmed by the occurrence of a given crime to claim civil damages against the perpetrator of that crime as a civil claimant in criminal proceedings.

Federal Law No. 5 of 1985 (Civil Code) allows a civil claim for damages to be filed independently of any criminal proceedings. However, in the event that there are parallel civil and criminal proceedings with the same subject matter, the civil matter will be stayed until the criminal matter is irrevocably settled.

2 Forum

In which court should proceedings be brought?

The general rules of the law stipulate that civil proceedings are to be brought before civil courts, whereas criminal proceedings are to be brought before separate and distinct criminal courts. The exception to this is a claim for civil damages resulting from a crime punishable under the Federal Penal Code. In this case, the aggrieved party can file a civil claim for damages against the perpetrator in the criminal court. Such a claim will be transferred to the civil courts for the purpose of establishing the appropriate quantum in the event of a relevant conviction in criminal proceedings.

In addition to the 'onshore' courts in the UAE, Dubai International Financial Centre (DIFC) courts and Abu Dhabi Global Market (ADGM) courts have jurisdiction over civil proceedings in or related to the DIFC and the ADGM respectively. DIFC and ADGM courts operate under the common law system, as opposed to the civil law system in the rest of the UAE. Laws of DIFC and ADGM courts contain similar provisions on interim remedies as those in common law jurisdictions such as England and Wales. However, DIFC and ADGM courts have no criminal jurisdiction, such matters being dealt with by criminal courts, regardless of whether criminal conduct took place within the DIFC or the ADGM. Given the similarity of DIFC and ADGM courts' provisions to those of common law jurisdictions, there will be no further reference to DIFC or ADGM courts.

3 Limitation

What are the time limits for starting civil court proceedings?

Civil court proceedings for 'acts causing harm' will be time-barred after three years from the date on which the claimant became aware of the harm and the identity of the person responsible for it. However, if the claim arises out of a crime and criminal proceedings are active after the expiry of this three-year period, the claim shall not be time-barred.

Nonetheless, there is a long-stop limitation period of 15 years from the day on which the harmful act took place.

Limitation periods in civil matters are not generally matters of 'public order'. Therefore, a defendant must raise an affirmative defence that the claim is time-barred in order for the court to consider dismissing the claim as such.

4 Jurisdiction

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

With the exception of actions in rem relating to real property outside the UAE, civil courts have jurisdiction to hear actions brought against UAE nationals and claims brought against non-UAE nationals who have a domicile or place of residence in the UAE.

Further, civil courts have jurisdiction to hear actions against non-UAE nationals who do not have a domicile or place of residence in the UAE if as follows:

- they have an elected domicile in the UAE;
- the action relates to property in the UAE or the inheritance of a UAE national or an estate opened therein;
- the action relates to an obligation entered into or performed or that is stipulated to be performed in the UAE, a contract intended to be notarised therein, an event that occurred therein or a bankruptcy declared in one of its courts;
- the action is brought by a spouse, having a domicile in the UAE, against the other spouse who had a domicile therein;
- the action relates to the maintenance of a parent, a spouse, a person under a restriction or a minor, or in connection with the guardianship of property or of a person if the applicant for the maintenance or the spouse, minor or person under a restriction has a domicile in the UAE;
- the action relates to personal status and the claimant is a UAE national or a non-UAE national having domicile in the UAE, if the defendant has no known domicile abroad or if UAE law is mandatorily applicable in the action; or
- one of the defendants has a domicile or place of residence in the UAE.

In addition, civil courts have jurisdiction to determine preliminary issues and interim applications in original actions within their jurisdiction. Further, they have jurisdiction to determine any application connected with such original actions, which the proper administration of justice requires to be heard together. Furthermore, they have jurisdiction to make orders for expedited and preservative procedures to be carried out in the UAE, even if they do not have jurisdiction in the original action.

A defendant can challenge jurisdiction in a number of ways, such as by raising the following:

- lack of local jurisdiction;
- transfer of the action from one court to another to join an ongoing related case;
- nullity unconnected with public order;
- lack of the court's authority because of the category or value of the action;
- lack of legal capacity relating to the claim; or
- the action has been previously determined.

5 Time frame

What is the usual time frame for a claim to reach trial?

There is no definitive time period within which civil actions must reach trial stage. Trials are scheduled at the discretion of the court and may be adjourned on several subsequent occasions to allow time for parties to file their necessary submissions. The matter will only be considered

for judgment by the court once it is satisfied that both parties have been afforded this opportunity and sufficiently pleaded their arguments. As a general guide, where there is no expert evidence, proceedings may take between six to nine months to reach judgment in a court of first instance, a further three to six months for a court of appeal and finally a further four to six months for the Court of Cassation.

Claims can also be delayed by the absence of a defendant, as the court will afford every opportunity to locate him or her before proceeding to trial. If such efforts are unsuccessful, a judgment may still be obtained with the defendant in absentia.

6 Admissibility of evidence

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

Federal Law No. 10 of 1992 regarding Evidence in Civil and Commercial Transactions (the Civil Evidence Law) regulates the admissibility of evidence in civil proceedings. In summary:

- the facts to be proved must relate to the claim and be material to it;
- the judge is not permitted to make rulings on the basis of his or her personal knowledge;
- a legal document shall be evidence for all matters recorded in it, if they were undertaken by the official within the limits of his or her capacity, or if the document was signed before him or her by the parties concerned, so long as it is not shown to be forged;
- a customary document shall be considered to originate from the person signing it provided he or she does not explicitly deny any handwriting, signature, seal or fingerprint pertaining to him or her;
- traders' ledgers shall not be evidence with regard to anyone else but them;
- electronic signatures shall have the same evidential weight as written signatures (if they comply with the provisions prescribed in Federal Law No. 1 of 2006 on Electronic Commerce and Transactions (the Electronic Commerce Law));
- electronic writing, instruments, registers and documents shall have the same evidential weight as official and customary writing and instruments (if they fulfil the conditions and provisions prescribed in the Electronic Commerce Law); and
- in certain circumstances, a party may request the court to oblige his or her adversary to present original documents or papers that are in his or her possession.

7 Witnesses

What powers are available to compel witnesses to give evidence?

Civil proceedings are almost entirely based on written submissions supported by documentary evidence. There are, however, circumstances in which the court will allow witness evidence to be heard.

The Civil Evidence Law provides punitive measures to be applied to witnesses that fail to appear before the court when validly requested to do so. The witness may be fined up to 500 UAE dirhams for failing to appear, increasing to 1,000 UAE dirhams if the case is one of extreme urgency. The court may quash any applicable fines if the witness subsequently presents himself or herself to the court and offers acceptable explanation for his or her absence.

8 Publicly available information

What sources of information about assets are publicly available?

The law protects the privacy of individuals in accordance with the UAE Constitution and hence does not allow for any private information pertaining to any person to be available publicly. All required information must only be disclosed following an official request from the authorities.

9 Cooperation with law enforcement agencies

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

Law enforcement and regulatory agencies will not provide information or evidence without a court order directing them to do so. The court will only make such an order if the information or evidence sought is relevant to the proceedings.

10 Third-party disclosure

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

A party to proceedings may request a court order for third parties to disclose information that is deemed by the court to be relevant to the proceedings.

11 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?

Federal Law No. 11 of 1992 (Civil Procedures Law) allows for attachment orders to be made in respect of assets belonging to any debtor, as long as the preconditions are fulfilled. A creditor may apply to the court that is hearing the action, or to the judge for expedited matters if it is pre-action, to impose a preservative attachment over the real estate and movable property of his or her opponent.

Attachment orders may also be made over assets that are in the possession of third parties (eg, bank accounts). Creditors may apply to the court, or to the judge for expedited matters, for an attachment over movable property of, or debts owing to, his or her debtor in the hands of third parties, notwithstanding that it may be deferred or subject to a condition. Such an attachment also covers movable property of the debtor that is in the possession of his or her legal representative.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

The Civil Procedures Law allows the court to impose fines on parties who fail to comply with court orders within the timetable set by the court.

In criminal matters, failure to testify when required to do so by a judicial authority, except in cases where there is an acceptable excuse, carries a penalty of imprisonment of up to one year or a fine of up to 5,000 UAE dirhams, or both.

Failure to produce any written instrument or any other evidence where there is a legal obligation to do so, except in cases permitted by law, amounts to the criminal offence of 'obstructing judicial proceedings' and is punishable by imprisonment of up to six months or a fine of up to 5,000 UAE dirhams, or both.

13 Obtaining evidence from other jurisdictions

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

A party to civil proceedings would need to persuade the court to order the Ministry of Justice to make a request for mutual legal assistance on the basis of any applicable treaties between the UAE and jurisdiction from where assistance is sought, or on the basis of the principle of reciprocity.

14 Assisting courts in other jurisdictions

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

UAE civil courts may assist foreign courts with, for example, enforcement of court orders or judgments, the provision of information or the questioning of witnesses, subject to applicable treaties with the relevant foreign government, or on the basis of reciprocity.

Foreign court orders or judgments are not executable ipso facto in the UAE. Such proceedings must first be ratified by UAE courts before being executable and thus enforceable, which will require compliance with UAE law on issues such as exclusive jurisdiction and public order.

Update and trends

The UAE recently participated in the Terrorist Financing Targeting Center with the United States, targeted at identifying, freezing and deconstructing terrorist financing networks operating through the UAE's foreign exchange market. This is emblematic of the UAE's initiative to eradicate money laundering and the financing of terrorism within its jurisdiction.

15 Causes of action

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

Sources of civil obligations are as follows:

- contracts;
- unilateral acts;
- acts causing harm (torts);
- acts conferring a benefit; and
- the law (statutory causes of action).

A breach of these obligations would form the cause of action in civil asset recovery claims.

16 Remedies

What remedies are available in a civil recovery action?

Under the law, a claimant may claim for damages, which can include restoring the parties to a contract to the position they were in prior to the contract being made, making good the harm caused by the defendant and making good the harm resulting from the defendant's deception of the claimant. In all cases, the compensation shall be assessed on the basis of the amount of harm suffered, together with the loss of profit, provided that it is a natural result of the harmful act.

Further, the right to have damage made good includes moral damage; an infringement of the liberty, dignity, honour, reputation, social standing or financial condition of another shall be regarded as being moral damage.

17 Judgment without full trial

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

There is no provision in UAE law for summary judgment. The court may pass default judgment on the matter if the defendant has been duly served and fails to attend without providing an acceptable excuse.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

Various forms of relief are available under the law. In respect of civil asset recovery claims, successful claimants may obtain attachment over the real estate and movable property of the defendant. In the event that the defendant has failed to comply with a final judgment or final order for payment, or if it is feared that he or she will flee the country, the execution judge may make an order, on an application submitted by the judgment creditor, for the detention of the debtor.

Under certain conditions, a travel ban can be requested against the defendant. In practice, the court would need to be satisfied that there is a risk of dissipation; there must be serious reasons giving grounds to fear that the debtor may abscond, and the debt must be not less than 10,000 UAE dirhams.

19 Enforcement

What methods of enforcement are available?

The main method of enforcement is the attachment and sale through auction of any real estate or movable property a defendant may have.

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?

There is no legal restriction on funding litigation by conditional fee agreements, damage-based agreements, after-the-event insurance or third-party funding. However, given the costs regime, most litigation is funded directly by the client, whether on the basis of a damage-based agreement or an arrangement based on a fee estimate unrelated to the claimed amount.

Courts have complete discretion in respect of costs, which are included as part of the award for damages (as opposed to a separate 'costs award') and usually only include the court fees and a nominal amount for lawyers' fees.

Criminal asset recovery

21 Interim measures

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

The public prosecutor is empowered to take any steps it deems necessary in the process of prosecuting an offender, which may include measures to freeze or seize the proceeds and instrumentalities of a crime.

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?

There is no automatic investigation to identify, trace and freeze proceeds in respect of any specific crimes. However, all financial institutions have a duty to report any offences or suspicious transactions that come to their knowledge to the Anti-Money Laundering and Suspicious Cases Unit of the UAE Central Bank, which is the financial intelligence unit for the UAE. The Central Bank may undertake administrative measures against the offender's assets before forwarding the matter to the public prosecutor.

In respect of offences that do not pass through the Central Bank, the public prosecutor will determine the need for an investigation into the proceeds of crime on a case-by-case basis.

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 Federal Penal Code gives the court discretion, upon pronouncing judgment, to confiscate 'the things caught and connected with' the offence 'without prejudice to the rights of any bona fide third party'. The concept of a 'benefit figure' is not applied in the UAE and there is, therefore, no mechanism in the law for determining such a figure. Confiscation in the context of UAE law relates to the direct proceeds of an offence and the articles used in its commission.

24 Confiscation procedure

Describe how confiscation works in practice.

When settling amounts due to the government, such as fines, the public prosecutor must, prior to execution, notify the convicted defendant of the aggregate of these amounts, unless they are assessed in the judgment.

In order to establish what assets are available, the public prosecutor may make enquiries with all bodies that may have assets relating to the defendant (eg, banks or the Land Department). These bodies are obliged to respond to the public prosecutor or risk being charged with obstruction of justice. According to their responses, the public prosecutor may proceed with execution on identified assets.

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

The public prosecutor is responsible for tracing and confiscating the proceeds of crime, with the assistance of any other body it deems appropriate, such as the Central Bank or other financial institutions.

26 Secondary proceeds**Is confiscation of secondary proceeds possible?**

Anti-money laundering and counter-terrorism laws of the UAE provide that, where the proceeds of crime have been wholly or partially converted into, or combined with, other property derived from lawful sources, the amount equivalent to the (primary) proceeds may be confiscated from the convicted person.

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

The Federal Penal Code recognises the rights of a bona fide third party. Therefore, when evidence successfully shows that the ownership was transferred to a third party with the aim of dissipating the proceeds of a crime, such conveyance would be declared a sham, permitting the confiscation of such property.

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

The law does not allow the recovery of the costs of tracing and confiscating assets.

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

Yes, see question 26. UAE law allows attachment of property, to the value of the proceeds of crime, in order to satisfy the amount specified in the judgment. The valuation of such property will be conducted by a court-appointed expert and the property will be sold at public auction.

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?**

There is no separate procedure to confiscate the proceeds of crime; the determination as to what constitutes the proceeds of crime will have taken place before the court's judgment on the trial, which will include a confiscation order of the proceeds and the value thereof. The public prosecutor has the burden of proving the value of the proceeds of crime

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?**

Property confiscated under anti-money laundering and counter-terrorism laws may be used in satisfaction of civil claims.

32 Confiscation of profits**Is it possible to recover the financial advantage or profit obtained through the commission of criminal offences?**

The recovery of profit obtained through the commission of a criminal offence is not available as a punishment or punitive measure in the criminal process.

In theory, however, a civil claimant (such as a competing bidder) could claim for loss of profits resulting from a competitor corruptly obtaining a contract. This would require proof that the contract would have been won by the claimant but for the corrupt act of the defendant.

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.**

Under the law, confiscation requires a conviction, as it is a punishment. It is, therefore, not possible to confiscate the proceeds of crime without a conviction.

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?**

Seized assets are managed by the public prosecutor, and the Ministry of Justice bears the associated costs.

Assets cannot be utilised by a government agency as its own.

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.**

The UAE has signed numerous bilateral and multilateral treaties on mutual judicial cooperation in criminal matters. Where applicable, these treaties will set out the procedure for the request of legal assistance. In cases where the UAE does not have a treaty with the requesting country, domestic law (Federal Law No. 39 of 2006 on International Judicial Cooperation in Criminal Matters) will be applicable.

التميمي و شركاه
AL TAMIMI & CO.

Ibtissem Lassoued

i.lassoued@tamimi.com

Dubai International Financial Centre (DIFC)
Building 4 East, 6th Floor
Sheikh Zayed Road
PO Box 9275
Dubai
United Arab Emirates

Tel: +971 4364 1641
Fax: +971 4364 1777
www.tamimi.com

Requests for assistance under domestic law should be sent from the relevant UAE department to the foreign judicial authority through diplomatic channels. Other routes may be specified in treaties, such as direct communication between ministries of justice.

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.

Similar to the situation concerning outgoing requests, the legal framework and procedure to meet foreign requests for legal assistance will be governed by applicable treaties or, in the absence of any treaty, by domestic law (Federal Law No. 39 of 2006).

There is a contingency in domestic law for provisional measures to be undertaken by the competent judicial authority in the UAE in cases of urgency, upon written request from a foreign judicial authority in cases where legal interests are threatened or it is necessary to secure prosecution evidence or documents that are likely to be lost or tampered with.

37 Treaties

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

The UAE is a signatory to major international conventions with provisions on asset recovery, such as the following:

- the United Nations Convention against Corruption, ratified by the UAE in 2006;
- the United Nations Convention against Transnational Organized Crime, ratified by the UAE in 2007; and
- the Riyadh Arab Agreement for Judicial Cooperation, brought into force in the UAE by Federal Decree No. 53 of 1999.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

The legal system does not acknowledge private prosecutions, *per se*. However, a civil claimant may bring a parallel claim for damages together with his or her criminal complaint. The validity of the claim for damages will be determined by the criminal court in conjunction with the accused's guilt or innocence. The task of evaluating the damages will then be passed from the criminal to the civil court.

United States

Carrie A Tendler, Jef Klazen and Clinton J Dockery

Kobre & Kim

Civil asset recovery

1 Parallel proceedings

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

Absent a showing of substantial prejudice to the defendant's rights against self-incrimination, there are no blanket restrictions on civil cases proceeding in parallel with criminal cases. The management of parallel civil and criminal proceedings, however, can bring challenges. In particular, the assertion of Fifth Amendment privileges against self-incrimination can slow down civil proceedings, especially if deponents are examined before the resolution of criminal proceedings. Additionally, civil litigants should be aware that the Speedy Trial Act may give the criminal proceeding priority in resolving the action, if simultaneous adjudication is not practicable.

Because of these challenges, prosecutors sometimes seek a stay of private civil litigation pending the conclusion of criminal proceedings, asserting that the government's interests in punishing and deterring crime outweigh those of private parties. Nevertheless, normally, civil litigants should neither delay in bringing the civil proceeding in anticipation of such a stay, nor rely on the outcome of the criminal case to bring them relief. Not only could such a delay potentially cause the statute of limitations for any claim to expire, but even if the sentence imposed on the debtor in the criminal case includes an order for restitution to be paid to the victims, these orders can sometimes cap the amount lower than what could be claimed in a civil case, and can also sometimes limit victims from pursuing higher amounts through civil litigation.

2 Forum

In which court should proceedings be brought?

Generally, counsel should consider all relevant state and federal courts in which a particular action may be brought. Often, more than one court may be available and the decision on where to file depends on many factors. A few considerations should guide counsel in making the determination of the particular forum:

- counsel should determine whether the facts of the case justify a federal action;
- counsel should determine the states in which the defendant has assets and where the activity at issue took place; and
- if the defendant is a business entity, counsel should determine the jurisdiction under which the entity was formed and where its principal operations are located.

Counsel should also consider whether filing in a particular court affords advantages not available elsewhere. For example, potential causes of action and related remedies vary by state. Because material differences can exist among jurisdictions, counsel should analyse the pertinent laws of the considered jurisdictions in determining where to pursue asset recovery.

3 Limitation

What are the time limits for starting civil court proceedings?

Time limitations on initiating civil court proceedings vary widely depending on the type of action sought as well as the jurisdiction in which the action is brought. Because the number of potential actions is significant, only two types of common federal actions are considered here. Counsel should conduct a thorough statutes of limitations analysis on applicable causes of action in the relevant jurisdiction as soon as practicable in anticipation of litigation.

Time restraints on bringing actions for securities fraud in federal court typically bar cases brought more than one year after the victim had actual or constructive notice of the fraud and more than three years after the date the securities were offered to the public or otherwise sold, regardless of when the fraud was discovered (see generally 15 United States Code (USC) section 77(m) (governing the limitations of securities actions)).

Claimants may also consider filing a civil action under the federal Racketeering Influenced Corrupt Organization (RICO) Act (18 USC section 1962). The statute of limitations for civil RICO claims is generally four years from the date a claimant knew or should have known of his or her injury. See *Rotella v Wood*, 528 US 549 (2000) and *Agency Holding Corporation v Malley-Duff & Associates, Inc.*, 483 US 143 (1987).

4 Jurisdiction

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

Jurisdiction questions can be broken down into three elements:

- whether the court has jurisdiction over the person (or property in certain actions);
- whether the court has jurisdiction over the subject matter; and
- whether the court has the jurisdiction to render the decision sought.

Jurisdiction in a civil case is determined by considering a series of factors from the main elements above, including the following:

- the location of the at-issue assets, transactions or defendants;
- the nationality or citizenship of the defendants;
- the relationship of the defendants to the particular jurisdiction;
- whether the law or contract under which the action was brought stipulates venue; and
- the subject matter of the action.

Defendants may challenge jurisdiction by calling into question the factors that were considered in making the jurisdiction determination. Such objections are most typically raised (or, at the very least, preserved) at the outset of an action – failure to do so can result in a waiver of any challenge to jurisdiction, and counsel should make sure to avoid this result where jurisdictional issues may be present.

5 Time frame

What is the usual time frame for a claim to reach trial?

The time frame to reach trial on a private civil asset recovery case depends on a variety of factors, including the court in which the case is

pending and the complexity of the claims. The overwhelming majority of civil cases never reach trial, and are instead resolved on a motion to dismiss or a motion for summary judgment, or settled. On average, civil actions in state and federal courts are resolved within one to two years from filing to final judgment. Some jurisdictions routinely resolve matters in less than a year. For example, based on a recent survey, the district court for the Eastern District of Virginia resolves civil actions, on average, in less than six months. In jurisdictions with limited resources, however, it is not uncommon for cases to remain pending for longer than three years. Parties may also agree to expedite proceedings. For example, New York's Commercial Division, which may hear commercial disputes, including fraud and business torts in which money damages in excess of US\$500,000 are sought, offers an expedited case process that limits discovery to no more than nine months.

6 Admissibility of evidence

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

For actions in federal courts, litigants should consult the Federal Rules of Evidence (and, to a lesser extent, the Federal Rules of Civil Procedure). If an action is brought in a state court, litigants should consult the applicable rules of evidence in the particular jurisdiction, although the evidentiary rules of many states closely follow the Federal Rules of Evidence. Litigants should also review any relevant case law to understand how the applicable evidentiary rules have been interpreted by courts in the relevant jurisdiction.

7 Witnesses

What powers are available to compel witnesses to give evidence?

The ability of a litigant to compel witnesses to give testimony depends on whether the case is pending in a state or federal court, and whether the testimony would infringe on a witness's rights under the Fifth Amendment to refrain from self-incrimination. Assuming that Fifth Amendment rights are not implicated, litigants should consult the applicable rules of procedure governing procuring deposition and trial testimony from adversaries and third parties, as well as mechanisms available to enforce court orders compelling testimony.

For actions in federal court, the Federal Rules of Civil Procedure govern whether a witness will be compelled to provide testimony. Subject to certain restrictions, Federal Rule of Civil Procedure 30 allows a party to a civil action to depose any person, including a party to the litigation. Federal Rule of Civil Procedure 45 provides a mechanism by which a party may command attendance at a trial, hearing or deposition. In practice, a party to a litigation may be deposed in the federal district where the case is pending and may be ordered to attend a trial or evidentiary hearing. Unless they consent, third parties may only be deposed or ordered to attend a trial or evidentiary hearing within 100 miles of where the third party resides, is employed or regularly transacts business in person. Any person commanded to appear at a deposition may object on the grounds that his or her deposition testimony would not be relevant to any party's claim or defence, or proportional to the needs of the case, the latter of which requires the court to consider, among other things, the importance of the issues at stake and whether the burden of ordering a person to testify outweighs the expense that would be incurred. If the objection cannot be resolved without judicial intervention, the party seeking the deposition may move to compel attendance at the deposition, or the party commanded to appear may move to quash the subpoena. If the witness is ordered to testify but refuses, the court may enforce its order by sanctions or contempt rulings. See question 12.

For actions in a state court, the rules of procedure for the state in which the case is pending will govern the circumstances under which litigants may procure or compel testimony from adversaries and third parties.

8 Publicly available information

What sources of information about assets are publicly available?

Various public offices and agencies collect information on assets and, in some cases, make that information available to the public. Depending on the jurisdiction in which the asset is located and the type of asset at issue, there can be various public records available. Examples of public records include the following:

- lien filings;
- real estate records;
- property tax records;
- automobile filings;
- aircraft filings; and
- business registration filings.

Generally, counsel should investigate the relevant federal and state agencies charged with regulating certain asset types and work from there. There is no shortage of databases and investigative agencies available to assist counsel in identifying assets. Some major firms and sources are listed below:

- annual and quarterly accounting reports for publicly traded companies;
- business libraries;
- government databases;
- court records and other public filings with national and local public agencies;
- online databases: Datastream, Infocheck, etc;
- company search agencies: Jordan's, Infocheck, ICC and Bloomberg Law;
- credit reference agencies: Dun & Bradstreet, Hoovers and Factiva; and
- public records asset locators: LexisNexis KnowX and Westlaw Asset Locators (including PeopleMap and Accurant).

In addition, statements and photographs published by defendants on social media platforms may provide clues as to the existence and location of potentially recoverable assets, which may provide counsel with a starting point for further investigation.

9 Cooperation with law enforcement agencies

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

Yes, but to a limited extent and only by use of specific victims' rights laws. Generally, information collected in the course of a criminal investigation is confidential, even from the victim of the crime. There are limited exceptions that permit a lawyer for a crime victim to access certain types of information in the government's possession. Asset recovery practitioners should leverage criminal proceedings and law enforcement resources when possible, as this may provide fruitful avenues for recovery while minimising the considerable expense involved in civil litigation. Evidence entered in criminal proceedings may also be useful for civil proceedings, and litigants should utilise discovery mechanisms to gather related information, where possible. Legislation such as the Freedom of Information Act (which provides access to information possessed by the federal government) should also be considered.

US financial reporting requirements also provide valuable documentation that may become available to an asset recovery practitioner. These requirements implement rigorous record-keeping from the moment the account is opened until years after the account is closed, preserving an accurate and effective asset tracing tool. Civil litigants can attempt to secure relevant information by US discovery mechanisms (eg, subpoenas). Three major types of required reports from financial institutions that may be of use to asset recovery practitioners are suspicious activity reports, currency transaction reports and 'know your customer' requirements.

10 Third-party disclosure**How can information be obtained from third parties not suspected of wrongdoing?**

Rule 45 of the Federal Rules of Civil Procedure governs discovery, including gathering documents or taking testimony from non-parties to a federal action. A plenary or substantive action must already be pending before a district court before employing Rule 45.

This is not, however, necessarily the case in a state court. Certain states (including New York and Texas) have adopted pre-suit discovery mechanisms that permit prospective claimants to obtain varying degrees of information before initiating a plenary action, provided that the prospective claimant can make the requisite showing (which can vary by state). In Connecticut, for example, a claimant may commence an independent equitable action to obtain discovery for use in another case, regardless of whether that case is already pending. See *Berger v Cuomo*, 644 A2d 333, 337 (Conn 1994).

In addition, litigants can try to leverage discovery mechanisms to pursue government-required financial institution reports, as discussed in question 9.

11 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?**

As discussed in question 10, Rule 45 of the Federal Rules of Civil Procedure allows subpoenas for testimony, and documents to be served upon third parties, well in advance of any judgment. The Federal Rules of Civil Procedure also allow requests to be served on parties to civil proceedings, including for testimony (Rule 30) and documents (Rule 34), among other things.

A temporary restraining order or preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure or state law may also be a useful tool for civil litigants fearing the dissipation of assets before judgment. Litigants should, however, be aware of the relatively high requirements for obtaining such relief – especially if it is sought *ex parte* – and restrictions on the ability of federal courts to issue injunctions to prevent a defendant from transferring assets in certain actions. Generally, courts consider the following four elements in granting a preliminary injunction or temporary restraining order:

- whether the claimant will be irreparably harmed if the injunction is not issued;
- whether the defendant will be harmed if the injunction is issued;
- whether public interests will be served by the injunction; and
- whether the claimant is likely to prevail on the merits.

Litigants should also consider the availability under state law of pre-judgment remedies such as attachment or garnishment to secure payment on a potential judgment. Some state jurisdictions, such as Connecticut, afford litigants a comparatively broad opportunity to obtain pre-judgment relief. Pre-judgment remedies under state law should be considered whether a litigant is proceeding in a federal or state court. Under Rule 64 of the Federal Rules of Civil Procedure, every remedy supplied by the law of the state where the court is located is available to a litigant in a federal proceeding unless a federal statute provides otherwise.

Civil proceedings should not be viewed as an alternative to criminal proceedings when issues of criminal law are involved. Coordinating with federal prosecutors and local law enforcement agencies, who may also seize or freeze assets, can provide a fruitful avenue for efforts to secure and ultimately recover assets.

12 Non-compliance with court orders**How do courts punish failure to comply with court orders?**

Failure to comply with court orders can result in the non-compliant party being held in contempt of the court. A contempt finding may have consequences that range from monetary fines to imprisonment.

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

Two major channels for obtaining evidence from foreign jurisdictions include forfeiture-related bilateral treaties or multilateral treaties and letters of request under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention).

The United States has over 70 mutual legal assistance treaties (MLATs) with foreign nations that concern the sharing of evidence. MLATs are typically employed by the United States to pursue its own law enforcement interests and are not directly available to private litigants. Nevertheless, coordination with US authorities can be used in pursuit of information. If the government does make such a request, then private litigants can utilise US discovery mechanisms to attempt to obtain information after information is produced in response to the MLAT request.

The Hague Evidence Convention is also in force in the United States, as well as in a long list of other jurisdictions that includes (among others) China, Hong Kong and the United Kingdom. The Convention allows private litigants to seek, by letter of request, evidence from another participating jurisdiction for use in judicial proceedings.

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

The United States has a variety of channels open to foreign requests for legal assistance in both the civil and criminal contexts. In the civil context, common means include utilising 28 USC section 1782, and issuing letters rogatory to the US Department of State (DOS) in conjunction with 28 USC section 1781.

Section 1782 allows non-US tribunals, interested parties and litigants to apply for assistance from a US district court to gather documents or testimony from individuals and companies located in that district. Under the statute, an interested party can make an application or a letter rogatory may be issued from a foreign proceeding. If successful, the breadth of discovery allowed under section 1782 is comparable to regular civil discovery in the United States.

In general, three statutory requirements must be met in order to qualify for assistance under section 1782:

- the entity from which the documents or testimony is sought must be located within the district of the court to which the request was made;
- the documents or testimony sought must be for use in an active or planned (ie, within reasonable contemplation and not merely speculative) proceeding in a foreign tribunal (which an increasing number of federal circuit courts have found to include foreign arbitrations, although the Supreme Court has yet to formally resolve the issue); and
- the documents or testimony must be requested by the tribunal itself, a litigant to the proceeding or another interested party.

In addition to the statutory factors, the Supreme Court has articulated additional factors for a court to consider in deciding whether to grant a Section 1782 request:

- whether the material sought could be accessed through the foreign tribunal's jurisdiction absent section 1782;
- the nature of the foreign tribunal, the character of the proceedings and the receptivity of the tribunal to US assistance;
- whether section 1782 is being used to circumvent restrictions or policies of the foreign tribunal or of the United States; and
- whether the subpoena contains unduly intrusive or burdensome requests.

A less common means by which foreign tribunals may seek evidence is by a letter rogatory pursuant to section 1781. The request must be made directly by the tribunal to the DOS, which in turn sends the request to the tribunal, agency or officer from which the evidence is sought (within the United States). The scope of available evidence is the same as that under section 1782. However, because section 1781 requires that the request be made directly by the tribunal, generally, a better option for an interested party would be to utilise section 1782.

15 Causes of action

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

There are a large number of causes of action for civil recovery within the United States. A few common causes of action (eg, fraud, conversion and conspiracy) are touched on below. Owing to the various jurisdictions under the federal system and their peculiar laws and statutes, however, counsel must analyse the particular causes of action available within the relevant jurisdiction before initiating any legal action.

Fraud is a cause of action based on the misrepresentation of facts. Although there may be jurisdiction-specific nuances, a prima facie case of fraud in most US jurisdictions requires five elements:

- false representation or omission of a material fact;
- scienter;
- intention to induce the party claiming fraud to act or refrain from acting;
- justifiable reliance; and
- damage.

Most states have also adopted a version of the Uniform Fraudulent Transfer Act (UFTA), which provides a cause of action for creditors (even those that have contingent or unmatured claims) against debtors and transferees that have received assets from a debtor. A purpose of the UFTA is to prevent debtors from dissipating assets while claims are pending or in anticipation of future claims, or to recover assets that were previously transferred. The UFTA typically requires a showing of the intent to hinder, delay or defraud a creditor, or that the debtor was insolvent when it made the transfer.

Conversion is a common law tort action for the wrongful possession or dispossession of another's property, or simply the control of property that seriously interferes with the owner's use of it. Relief available for conversion is damages. In order to prove conversion, the claimant must typically demonstrate the following:

- that he or she had an ownership interest in the property before the conversion;
- that the defendant's use of the property was unauthorised and interfered with the claimant's use of the property;
- that the defendant's act was contrary to the claimant's right of possession; and
- that the claimant was harmed because of the defendant's act.

Various US jurisdictions allow for civil conspiracy claims founded on vicarious liability based on an independent, underlying tort. These claims are similar to 'aiding and abetting' claims in the criminal context. According to the formulation set forth in section 876 of the Restatement (Second) of Torts (which has been adopted as the law in some courts), one is subject to liability for harm that is caused to a third person by the tortious conduct of another if he or she:

- commits a tortious act in concert with the tortfeasor, or pursuant to a common design with him or her;
- knows that the tortfeasor's conduct constituted a breach of duty, and substantially assists or encourages it; or
- gives substantial assistance to the tortfeasor in accomplishing the tortious result and, in so doing, independently breaches a duty that he or she owes to the third person.

Some other potential causes of action include fraudulent transfer claims, civil theft claims and statutory civil racketeering claims.

16 Remedies

What remedies are available in a civil recovery action?

US law allows various remedies in civil recovery actions, depending on the type of action initiated and the jurisdiction in which the action was commenced. For instance, under a conversion action, the claimant is typically only entitled to damages. In a fraud action, however, there is a host of potential remedies, including the following:

- damages;
- recovery of property by detinue and replevin; and
- the potential equitable remedies of reformation, constructive trust, accounting, rescission and injunction.

Because the list of available remedies in civil actions may differ materially between jurisdictions, counsel should investigate the potential remedies in each pertinent jurisdiction before bringing an action. Common types of remedies in civil actions are as follows:

- accounting;
- attachment;
- constructive trust;
- damages;
- injunction;
- punitive damages;
- recovery of consideration;
- recovery of property;
- rescission; and
- reformation.

17 Judgment without full trial

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

In some circumstances, a victim in a civil action can obtain a judgment without a full trial. Under federal and state law, summary judgments are not uncommon, especially in the realm of contractual disputes between debtors and creditors. Under Rule 56 of the Federal Rules of Civil Procedure, a 'court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law'. When a motion for summary judgment is made, the evidence is viewed in a light most favourable to the non-moving party and all inferences will likewise be made against the party making the motion.

A pretrial default judgment is allowed if the party against whom a judgment for affirmative relief is sought fails to plead, answer or otherwise defend the case. See Rule 55 of the Federal Rules of Civil Procedure.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

Post-judgment relief in the United States varies according to the subject matter of the case, the language of the relevant statute and the jurisdiction in which the underlying action is brought. Depending on these factors, there may be a wide variety of options available for post-judgment relief.

One option may be the appointment of a receiver, which is not uncommon in federal or state courts. Rule 66 of the Federal Rules of Civil Procedure, for instance, allows the appointment of a receiver when it accords with the historical practice in federal courts or a local rule.

Similarly, post-judgment disclosure may be available under Rule 69 of the Federal Rules of Civil Procedure, which allows the judgment debtor or successor in interest to obtain post-judgment discovery from the judgment debtor in aid of execution, under the rules of procedure of the state where the court is located. The scope of post-judgment discovery is broad, permitting a judgment creditor to obtain evidence about any assets in which the debtor has any interest, and information that may lead to such evidence or assist in the execution of the judgment worldwide. In some cases, judgment creditors are also entitled to post-judgment discovery in relation to a judgment debtor's alleged alter egos or transferees.

19 Enforcement

What methods of enforcement are available?

Asset recovery laws and procedures vary greatly from state to state, and the precise rules differ depending on whether the party that is attempting to recover the assets is a government authority or a private litigant. In private actions that are brought in federal courts, the enforcement of money judgments typically draws upon the particular asset recovery laws of the state in which the particular federal court is located (see Rule 69 of the Federal Rules of Civil Procedure). The enforcement of money judgments typically begins with the court's issuance of a writ of execution. Generally, most jurisdictions also allow for attachment and garnishment.

Certain jurisdictions, such as New York, provide for generous enforcement mechanisms. For instance, New York state courts allow

creditors to issue restraining notices to third parties that may be in possession of a debtor's assets without prior court approval. New York courts have also allowed for turnover orders essentially requiring debtors subject to personal jurisdiction to bring property located abroad into the United States, or face risk of sanctions if they do not comply. Other states allow for a variety of alternative enforcement mechanisms, and litigants should consult the applicable rules in the particular jurisdiction.

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?

Parties to litigation have historically been able to rely on alternate fee arrangements to pay the legal expenses and fees associated with bringing civil litigation. On the claimant's side, contingency fee agreements (whereby the claimant's attorney's compensation is derived from a percentage of the damages award or settlement (if any) instead of an hourly or task-based rate) are commonplace in civil fraud cases, particularly in those involving racketeering or federal securities laws violations affecting a large number of victims who often join together in a single 'class' with joint legal representation. Moreover, companies that might be subject to civil litigation often purchase liability insurance, such as directors and officers insurance, which can help pay for the legal expenses of defending against litigation (as well as any resulting settlement or judgment).

More recently, large-scale third-party litigation financing (TPLF), in which an outside investor with no other interest in the dispute funds the litigation in exchange for a percentage of the recovery, has become increasingly popular in certain jurisdictions as an alternate funding mechanism for litigation that is likely to be particularly lengthy, complex or otherwise too expensive for even major law firms to fund on a contingency basis. However, certain states still subscribe to traditional notions of champerty, maintenance and barratry, and prohibit or restrict TPLF on that basis (including Delaware, where many US corporations are organised and registered, whose courts have condoned TPLF only so long as certain conditions are satisfied). Still, others take a blended approach that permits the practice subject to varying degrees of oversight (such as Maine and Ohio). Importantly, even in those jurisdictions that permit TPLF, the practice may implicate ethical considerations and affect the scope and availability of otherwise applicable privileges and protections. Accordingly, counsel should always take care to thoroughly analyse the applicable rules of professional conduct and pertinent privilege laws in the relevant jurisdiction.

Costs of litigation in the United States tend to be higher than those in other jurisdictions, and the default rule is that regardless of whether a party wins or loses, it is responsible for paying its own attorney's fees unless a specific authority (ie, contract or statute) 'shifts' those fees to the adversary. Although a fair number of federal and state statutes fall within this exception and entitle the 'prevailing' party to recover reasonable attorney's fees from its adversary, it is not always clear which, if any, party has prevailed in a particular litigation, and fee shifting may be unavailable on that basis.

Additionally, at the beginning of the litigation, the court on its own initiative may impose reasonable limits on discovery and motion practice, including a requirement that attorneys submit an estimate of the hours that they anticipate the case will require. If the attorneys expend more time than the estimate, the court may presume that the overage is unreasonable and seek to exclude it from any shifting of fees.

Criminal asset recovery

21 Interim measures

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

Depending on the subject matter of the criminal activity and related statutes, the government is allowed to apply a wide range of interim measures upon suspicion of a crime. As discussed in question 23, forfeiture proceedings provide the government broad discretion in seizing assets, as well as the proceeds of crime.

Interim measures are especially powerful under the provisions of money laundering and anti-terrorism statutes. Under the Patriot Act, for instance, the United States has the ability to also issue a 'pretrial

restraining order or take any other action necessary' to ensure the property is available to satisfy a judgment (see 18 USC section 1956(b)(3)). This also includes orders directed at criminal defendants to cause property worldwide to be brought into the United States for preservation pending the resolution of legal proceedings.

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?

No. Typically, asset forfeiture specialists in the appropriate prosecutor's office must be staffed on the matter, and that often happens as a result of insistence by the victim's private attorneys. Once adequate personnel resources are allocated, the process can work very well as there is substantial legal infrastructure to support asset freezing and recovery efforts that run in parallel with criminal prosecutions. The United States has an array of criminal statutes covering transactions involving the proceeds of crime or transactions that are structured to prevent such illicit proceeds from being discovered. Complementing these laws, a series of reporting requirements on institutions in an effort to identify potentially criminal transactions have been imposed. These requirements are central to enforcement activities and prompt enforcement actions. Victims of crime can also coordinate with relevant authorities to spur investigation.

23 Confiscation – legal framework

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

There are three types of asset confiscation (or forfeiture) procedures available to the government under federal law: administrative, civil and criminal. In terms of prevalence, administrative forfeitures are by far the most common, followed by civil, then criminal.

Administrative forfeitures are executed by government agencies and apply only to uncontested cases, which require no prosecutor or court. Once the property has been seized, the seizing agency commences the proceeding by sending notice of its intent to anyone with a potential interest in the property. This notice is typically distributed by publishing a notice in a newspaper. If no one contests the forfeiture by filing a claim within the specified time period, then the agency enters a declaration of forfeiture, which in practice has the same effect as a judicial order. If someone files a claim, the government may choose to pursue a civil or criminal forfeiture.

In civil forfeitures, the action is taken in rem against property that was derived from committing, or was used to commit, a criminal offence. Because the action is against the property itself, the owner's culpability is irrelevant to the decision of whether it is forfeitable, and the action may be filed before, after or even if there is no indictment filed at all. The owner, or any other third party, must affirmatively intervene to protect his or her interest in the property.

Civil forfeiture actions are procedurally akin to other civil cases, with the government filing a verified complaint alleging that the at-issue property is subject to forfeiture pursuant to the relevant statute, and claimants are required to file claims within a certain period. The civil forfeiture procedure is governed by 18 USC section 983 and Supplemental Rule G of the Federal Rules of Civil Procedure. The process is also described in detail in chapters 3 to 14 of Stefan D Cassella, *Asset Forfeiture Law in the United States*, second edition (New York, Juris 2012).

The government succeeds in its civil forfeiture action if it establishes a nexus between the property and a criminal offence by a preponderance of the evidence. The government may seek civil forfeiture actions concurrently with criminal forfeiture actions, and no criminal conviction is necessary to support a civil forfeiture. Moreover, prosecutors may change their criminal forfeiture action into a civil forfeiture action.

Unlike civil forfeiture, criminal forfeiture is part of a sentence in a criminal case. Accordingly, it may be conceptualised as an action taken in personam against a defendant (rather than in rem against the property itself). The specific criminal statute pursuant to which the action is brought determines which types of forfeiture are available in a given case.

Because it is an in personam proceeding, criminal forfeiture only applies to the defendant's interest in a particular piece of property. If third parties have an interest in that property, then those rights will be considered in an ancillary proceeding that follows the entry of the forfeiture order against the defendant's interest (see 21 USC section 853(n)). Third-party rights are further discussed in question 27.

Procedurally, at the underlying criminal trial no mention is made of the forfeiture until and unless the defendant is convicted. If the defendant is convicted and the forfeiture is contested, the court will hear additional evidence and argument before instructing the jury on how to determine whether the government has sufficiently proven the facts upon which the forfeiture claim is predicated. To prevail, the government must establish by a preponderance of the evidence the requisite nexus between the property and the crime (see Rule 32.2(b) of the Federal Rules of Criminal Procedure; see also *United States v Treacy*, 639 F3d 32, 48 (Second Circuit, 2011) (reiterating that because criminal forfeiture is part of the sentencing phase, the government need only prove the forfeiture allegations by a preponderance of the evidence)).

The amount of forfeiture is determined depending on the specific crime involved. In a securities fraud situation, for example, the criminal proceeds will be determined by assessing the difference between the price at which the stock actually traded and the price at which it would have traded absent the misrepresentations at issue.

24 Confiscation procedure

Describe how confiscation works in practice.

In criminal confiscation, following conviction a defendant's interest in a property (either the proceeds of an offence or the property used in commission of the offence) is forfeited to the United States as part of the sentence. Often, the government will require the defendant to transfer the applicable funds in full to a government account shortly after conviction, or pursuant to a payment plan agreed to by the government and defence counsel. In civil forfeiture scenarios, the action is taken against the property itself, not a particular defendant. In pursuing the confiscation, the United States does not need a criminal conviction. If the government succeeds in its forfeiture action, the underlying property is typically either returned to claimants with ownership interest in the property or preserved until the rightful owners claim the property.

25 Agencies

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

There are many agencies, on federal, state and local levels, through which the United States operates to trace and confiscate the proceeds of crime, such as the following major federal agencies supporting asset recovery:

- the Department of Justice's (DOJ) Criminal Division's Asset Forfeiture and Money Laundering Section;
- the DOJ's Criminal Division's Office of International Affairs (OIA);
- the Department of Homeland Security's Immigration and Customs Enforcement (ICE) Homeland Security Investigations;
- the DOJ's Federal Bureau of Investigation (FBI);
- the Department of the Treasury's Financial Crimes Enforcement Network;
- the Internal Revenue Service; and
- the Securities and Exchange Commission.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

This is possible in most instances. The government must consult the applicable criminal statute to determine what, if anything, is subject to forfeiture. There are federal statutes that do not provide for forfeiture of secondary proceeds, but others have a broader scope. For example, 18 USC section 981(a)(1)(G) permits the government to confiscate virtually all assets of a person who is engaged in planning, perpetrating or concealing any terrorism, and 18 USC section 1963(a)(2)(D) permits the government to confiscate 'all property or contractual right[s] of any kind affording [a RICO defendant] a source of influence over' the racketeering enterprise.

27 Third-party ownership

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

This depends on the circumstances of the third party's ownership interest and the nature of the property at issue. In general, forfeiture of third-party interests is limited to situations involving property that was fraudulently transferred, is illegal to possess (ie, contraband) or is tainted by the criminal conduct (for example, property that constitutes proceeds of the criminal activity; that is derived from such proceeds; that was used in the commission of the crime; or that was otherwise used to facilitate the criminal activity).

Third parties may have defences to such confiscation attempts. Such defences ordinarily turn on whether the third parties had adequate notice of the cloud on title (or of other facts that would render the property forfeitable); whether they received the property in exchange for the provision of adequate consideration (ie, fair value); or whether the otherwise forfeitable interest pertains to a primary residence.

28 Expenses

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

Yes. The Comprehensive Crime Control Act of 1984 established the DOJ's Assets Forfeiture Fund, which receives the proceeds of forfeiture, and aids in paying the costs associated with such forfeitures.

The DOJ may also pay amounts to other agencies for assistance in forfeiture cases. Equitable sharing payments reflect the degree of direct participation in law enforcement efforts resulting in forfeiture.

29 Value-based confiscation

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

Yes. If the forfeitable property has been dissipated, commingled with non-forfeitable property from which it cannot be severed, placed beyond the court's jurisdiction or cannot be found through the exercise of due diligence, federal law empowers the court to order the forfeiture of substitute assets of the defendant that are equal in value to the original property (see, for example, 21 USC section 853(p) and 18 USC section 1963(m)). Value assessments are typically made via expert testimony.

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 burden of proof in civil forfeiture actions is on the government, and requires showing that the property is subject to forfeiture by a preponderance of the evidence (see 18 USC section 983(c)(1)). Similar burdens apply to private claimants seeking to recover such proceeds under civil fraud theories.

In criminal forfeiture actions, the underlying crime must first be proven by the government beyond a reasonable doubt. The related forfeiture action only requires showing that the relevant property is subject to forfeiture by a preponderance of the evidence. Once established, the burden shifts to the defendant to prove otherwise.

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?

Yes, this is routinely done. In criminal cases, much time and effort is expended to ensure that the wrongdoer's assets are preserved pending trial, so that they remain available for civil claimants (see 18 USC section 981(e)(6) and 21 USC section 853(i) (authorising the government to retain or transfer forfeited property as restoration, in civil and criminal forfeiture cases, to the victims of the underlying crime)).

Remission and restoration procedures provide a compensatory mechanism to victims of crime through which to access proceeds of forfeitures in order to cover or offset losses incurred as a result of the crime (see 28 Code of Federal Regulations (CFR) section 9.4).

Update and trends

Ongoing evolution of the concept of general personal jurisdiction

A court must have personal jurisdiction to exercise power over an individual or company, for instance, to allow legal claims to be brought against that person or entity, order that person or entity to comply with discovery demands, or order that person or entity to turn over assets of a judgment debtor. Personal jurisdiction is generally derived from a defendant's contacts or presence in the forum.

The Supreme Court's decision in *Daimler AG v Bauman*, 134 S Ct 746 (2014) sharply limited the circumstances in which a court can exercise one of two types of personal jurisdiction, known as general personal jurisdiction, over a corporation. General jurisdiction allows a court to hear a case even when the defendant's contacts or presence in the jurisdiction are unrelated to the claim pursued.

In *Daimler*, the Supreme Court held that general personal jurisdiction is permissible only where 'that corporation's affiliations with the State are so continuous and systematic as to render it essentially *at home* in the forum state' (*Daimler*, 134 S Ct at 761 (citation omitted) (emphasis added)). Although the previous test for general jurisdiction was relatively flexible and generous, the *Daimler* court cabined future cases to two bases of general jurisdiction:

- the corporation's place of incorporation; or
- the corporation's principal place of business.

It all but eliminated general personal jurisdiction over a corporation short of either of those conditions being met.

Following *Daimler*, courts have reached different conclusions on the reach of an important exception to the rule – jurisdiction by consent. Initially, a number of state and federal courts in New York found that consent to jurisdiction – for instance, by a company's registration to do business in a particular state – survives *Daimler* as a basis for general jurisdiction (eg, *Fallman v Hotel Insider, Ltd*, 2016 WL 316378, at *2 (SDNY 15 January 2016) ('It is well-settled that registering one's corporation with the New York Department of State and designating an agent to receive process in New York constitutes consent to general jurisdiction in New York courts') and *Serov v Kerzner International Resorts, Inc*, 52 Misc 3d 1214(A) (S Ct 26 July 2016) (similar). The Court of Appeals for the Second Circuit offered mixed guidance in *Brown v Lockheed Martin Corp*, 814 F.3d 619 (Second Circuit 2016), in which it held that defendant Lockheed Martin did not consent to jurisdiction in Connecticut solely by registering to conduct business and appointing an agent for service of process in the state. Although *Brown* was specific to Connecticut's business registration statute and expressly left open the possibility that registration statutes in other states (including New York) might very well confer jurisdiction over companies registered to do business in those states, several decisions by New York state and federal courts have held that corporations do not consent to general jurisdiction when they register to do business in New York and appoint an agent for service of process (eg, *Sae Han Sheet Co v Eastman Chemical Corp*, 2017 WL 4769394, at *6 (SDNY 19 October 2017) (collecting cases and declining to find general personal jurisdiction by consent where the 'registration statutes are not carefully drawn to expressly require consent to general jurisdiction'). Courts in dozens of other states have drawn similar conclusions. For example, the Delaware Supreme Court, another important jurisdiction for judgment enforcement purposes, came out firmly against registration as a form of consent to general jurisdiction. In *Genuine Parts Co v Cepec*, 137 A.3d 123 (Del 2016), the Delaware Supreme Court held that corporations not incorporated in Delaware that register to do business in that state are not subject to the general jurisdiction of Delaware courts.

Despite this trend, the law in the United States is not currently uniform, nor fully settled, on whether a foreign company's registration to do business in a particular US state constitutes consent to general personal jurisdiction in that state. Compare *Sae Han Sheet Co v Eastman Chemical Corp*, 2017 WL 4769394, at *6 (SDNY 19 October 2017) ('In light of *Daimler* and . . . *Brown*, the more recent authority in this district has held that

corporations do not consent to general jurisdiction when they register under the various New York registration statute') with *Wheeler v CBL & Associates Properties, Inc*, 2017 WL 3611295, at *2-3 (NY S Ct 2017) (finding 'registration . . . sufficient to establish consent-based general in personam jurisdiction').

Absent a binding ruling that is directly to the contrary, judgment creditors can still attempt to rely on decisions such as *Fallman*, for example, when seeking to compel a foreign company to comply with asset discovery requests or to turnover assets of a judgment debtor. Further, where the foreign company's presence or activity in the United States is at issue in the proceeding, the company may also be subject to a court's specific personal jurisdiction – which is the other type of personal jurisdiction that was not addressed in the *Daimler* decision.

Discovery requests from the US: overcoming blocking statutes

The discovery process in the United States may be used to request information or documents located abroad. Provided the court has personal jurisdiction over the discovery target, the target can be compelled to produce material that is within its possession, custody or control, even if it is located outside the United States. Some foreign jurisdictions, however, have data privacy laws, bank secrecy laws or 'blocking statutes' – laws that prohibit litigants from providing information for use in a US judicial proceeding – that might ostensibly thwart such discovery efforts. But courts in the United States have shown a willingness to ignore or discount such foreign laws in certain circumstances, such that a litigant based in the United States might succeed in having a court compel production of information or documents from foreign jurisdictions where those laws apply.

Blocking statutes increasingly come up in US litigation when, for example, a private party or the Internal Revenue Service seeks to enforce a subpoena requesting bank records or other documents from entities accused of tax malfeasance in the United States or abroad. Those entities may have relevant bank accounts in jurisdictions such as the British Virgin Islands, China, France, Israel, Singapore and Switzerland where there are strong national banking laws that prevent disclosure of certain information sought by the United States or private parties.

The Supreme Court has stated that 'American courts are not required to adhere blindly to the directions' of blocking statutes (*Societe Nationale Industrielle Aerospatiale v US District Court for Southern District of Iowa*, 482 US 522 (1987)). Consequently, lower courts have sometimes refused to give any deference to such laws (eg, *Chevron Corp v Donziger*, 296 FRD 168, 198 (SDNY 2013) ('[T]he [trial] court may impose discovery under the Federal Rules of Civil Procedure when it has personal jurisdiction over the foreign party, notwithstanding provisions of foreign law that would prohibit production') and *In re Activision Blizzard, Inc*, 86 A.3d 531, 549 (Del Ch 2014) ('[T]he Blocking Statute is expansively broad . . . It does not focus on a specific kind of material, nor does it identify a specific French sovereign interest'). Other courts have considered the stated purpose of the blocking statute and how expansive it is in deciding whether it should be heeded, and will excuse production of the information requested. Applying that analysis, a New York court has held that deference was owed to the Swiss blocking statute but not the French equivalent (see *Motorola Credit Corp v Uzan*, 73 F Sup. 3d 397 (SDNY 2014)).

Thus, based on current case law, the existence of data privacy laws, bank secrecy laws and blocking statutes in a foreign jurisdiction where relevant information or documents are located will not necessarily prevent a litigant from obtaining production of that material through the US discovery process. Parties conducting discovery in the European Union (EU), however, should also be mindful of the EU's new data privacy law, the General Data Protection Regulation (GDPR). Although many believe the GDPR will make it easier for US litigants to seek discovery in the EU, several commentators have expressed concern that the record-keeping, data-security and enforcement provisions of the new regulation represent compliance risks that a party should consider when seeking discovery for use in US legal proceedings.

32 Confiscation of profits

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

A prosecutor looking into forfeiture options needs to consult the applicable statute and the options for forfeiture associated with it. Some criminal statutes do not provide for any forfeiture, though others allow

for the forfeiture of proceeds or the instrumentalities (ie, property that facilitated the commission of the crime).

One of the most often-used statutes for forfeiture of the proceeds of crime is 18 USC section 981(a)(1)(C), which lays out a comprehensive list of applicable criminal offences, including fraud, bribery, embezzlement and theft. Statutes regarding drug enforcement, money laundering, RICO and terrorism further augment the government's forfeiture authority.

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.

Yes, see question 22.

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?

The Marshals Service (USMS) is the primary authority over management and disposal of seized assets in the United States. The authority of the Attorney General to dispose of forfeited real property and warrant title was delegated to the USMS pursuant to 28 CFR section 0.111(i).

Generally, DOJ personnel may not use or allow others to use property following seizure and pending forfeiture, except in circumstances where the use of equipment under seizure is necessary to maintain the property if the property is a seized business or ranch.

In addition, DOJ employees are generally prohibited from purchasing or using any property forfeited to the government, even if the property was purchased by a spouse or a minor.

In some circumstances, in order to minimise storage and management costs, the DOJ may ask state and local agencies to serve as substitute custodians of the property, pending forfeiture. This is typical in the context of motor vehicles. Alternatively, the DOJ may enter into storage or maintenance agreements with local agencies for the storage, security and maintenance of the assets in custody.

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.

The United States is a signatory to over 70 mutual legal assistance treaties (MLATs) with other nations, providing a wide breadth of foreign legal assistance, and can also seek evidence by submitting a letter rogatory with a foreign court with specific countries. The OIA is the central US authority for MLAT requests and coordinates all international evidence gathering.

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.

The United States has a variety of channels open to foreign requests for legal assistance under letters of request and letters rogatory under 28 USC section 1781, as well as relevant MLATs. The United States

responds to MLAT requests pursuant to 28 USC section 1782 and 18 USC section 3512, even in cases where there is no existing treaty relationship. The legal requirements for assistance are laid out within the applicable bilateral or multilateral treaty, as well as the grounds for refusals of assistance (see, for example, article 46 of the Merida Convention, article 7 of the Vienna Convention and article 18 of the Palermo Convention).

The OIA executes MLAT requests through law enforcement authorities including US attorneys' offices, ICE, the US Secret Service, the FBI, the USMS, the DOJ and Interpol.

Common provisional measures of enforcement of foreign requests for freezing, seizing and restraint orders are all covered by 28 USC section 2467.

37 Treaties

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

The United States is able to provide extensive support in response to requests from foreign authorities regarding asset recovery under relevant treaties. These treaties provide a potentially quick mechanism for exchanging information regarding suspects subject to criminal investigations. The DOS regularly publishes a full list of treaties in force, which can be found on the DOS website.

The major treaties regarding asset recovery are as follows:

- the Merida Convention;
- the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the Inter-American Convention Against Corruption and Inter-American Convention on Mutual Assistance in Criminal Matters;
- the Inter-American Convention Against Terrorism and Inter-American Convention on Letters Rogatory as well as Additional Protocol to the Convention; and
- the Vienna, Palermo and Financing of Terrorism Conventions.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

Private practitioners cannot directly use criminal asset recovery powers. However, victims' rights legislation allows for extensive cooperation and coordination between private practitioners and relevant authorities in obtaining compensation for crime victims. Remission and restoration proceedings, by which funds seized by the sovereign for its own account under asset forfeiture laws are given back to private victims, are examples of how civil practitioners can reap the fruits of criminal recovery efforts (see 28 CFR Part 9 (governing remission or mitigation of civil and criminal forfeitures)).

KOBRE & KIM LLP

**Carrie A Tendler
Jef Klazen
Clinton J Dockery**

**carrie.tendler@kobrekim.com
jef.klazen@kobrekim.com
clinton.dockery@kobrekim.com**

800 Third Avenue
New York
New York 10022
United States

Tel: +1 212 488 1200
Fax: +1 212 488 1220
www.kobrekim.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com