

# Asset Recovery

*Contributing editors*

Jonathan Tickner, Sarah Gabriel and Hannah Laming



2017

GETTING THE  
DEAL THROUGH 

GETTING THE  
DEAL THROUGH 

# Asset Recovery 2017

*Contributing editors*

Jonathan Tickner, Sarah Gabriel and Hannah Laming  
Peters & Peters Solicitors LLP

Publisher  
Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Business development managers  
Alan Lee  
alan.lee@gettingthedealthrough.com

Adam Sargent  
adam.sargent@gettingthedealthrough.com

Dan White  
dan.white@gettingthedealthrough.com



Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3708 4199  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016  
No photocopying without a CLA licence.  
First published 2012  
Fifth edition  
ISSN 2051-0489

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 August and September 2016. Be advised that this is a developing area.

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



## CONTENTS

<b>Global overview</b>	<b>5</b>	<b>Korea</b>	<b>85</b>
Jonathan Tickner, Sarah Gabriel and Hannah Laming Peters & Peters Solicitors LLP		Michael S Kim and Robin J Baik Kobre & Kim	
<b>Australia</b>	<b>9</b>	Yoon-Hee Kim and Jae Hwan Lee Shin & Kim	
Tobin Meagher, Andrew Moore and Alice Zheng Clayton Utz		<b>Liechtenstein</b>	<b>91</b>
<b>Bermuda</b>	<b>16</b>	Matthias Niedermüller Schwärzler Attorneys at Law	
Kevin Taylor, Nicole Tovey and Kai Musson Taylors (in association with Walkers)		<b>Monaco</b>	<b>97</b>
<b>Brazil</b>	<b>21</b>	Donald Manasse Donald Manasse Law Offices	
Arthur Sodré Prado, Gustavo Parente Barbosa and Fernando Augusto Bertolino Storto Malheiros Filho, Meggiolaro & Prado - Advogados		<b>Netherlands</b>	<b>103</b>
<b>British Virgin Islands</b>	<b>26</b>	Daan Folgering LXA The Law Firm Niels van der Laan De Roos & Pen	
Tim Prudhoe, Tim de Swardt and Alexander Heylin Kobre & Kim		<b>Nigeria</b>	<b>110</b>
<b>Canada</b>	<b>33</b>	Babajide O Ogundipe and Cyprian Nonso Egbuna Sofunde, Osakwe, Ogundipe & Belgore	
Maureen Ward and Nathan Shaheen Bennett Jones LLP		<b>Portugal</b>	<b>115</b>
<b>Cayman Islands</b>	<b>39</b>	Rogério Alves and Rodrigo Varela Martins Rogério Alves & Associados – Sociedade de Advogados, RL	
Jalil Asif QC, James Corbett QC and Pamela Mitchell Kobre & Kim		<b>Qatar</b>	<b>122</b>
<b>Cyprus</b>	<b>45</b>	Fouad El Haddad Lalive in Qatar	
Andreas Erotocritou and Antreas Koualis AG Erotocritou LLC		<b>Serbia</b>	<b>126</b>
<b>Greece</b>	<b>52</b>	Tomislav Šunjka Law Office of Tomislav Šunjka	
Ilias G Anagnostopoulos and Alexandros D Tsagkalidis Anagnostopoulos		<b>Switzerland</b>	<b>133</b>
<b>Hong Kong</b>	<b>58</b>	Marc Henzelin, Sandrine Giroud and Héloïse Rordorf Lalive	
Nick Gall and Felda Yeung Gall		<b>United Arab Emirates</b>	<b>141</b>
<b>Italy</b>	<b>64</b>	Ibtissem Lassoued Al Tamimi & Company	
Roberto Pisano, Valeria Acca and Chiara Cimino Studio Legale Pisano		<b>United Kingdom</b>	<b>146</b>
<b>Jersey</b>	<b>73</b>	Jonathan Tickner, Sarah Gabriel and Hannah Laming Peters & Peters Solicitors LLP	
Simon Thomas and William Redgrave Baker & Partners		<b>United States</b>	<b>156</b>
<b>Kazakhstan</b>	<b>78</b>	Carrie A Tendler, Jef Klazen and Matthew J Kokot Kobre & Kim	
Yerzhan Manasov and Maksud Karaketov Linkage & Mind LLP			

# Preface

## Asset Recovery 2017

Fifth edition

**Getting the Deal Through** is delighted to publish the fifth edition of *Asset Recovery*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://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 Bermuda, Brazil, Cyprus and Korea.

**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](http://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 also extend special thanks to the contributing editors, Jonathan Tickner, Sarah Gabriel and Hannah Laming of Peters & Peters Solicitors LLP, for their continued assistance with this volume.

GETTING THE  
DEAL THROUGH 

London  
September 2016

# Global overview

Jonathan Tickner, Sarah Gabriel and Hannah Laming

Peters & Peters Solicitors LLP

## The impact of Brexit

On 23 June 2016, the United Kingdom voted to leave the European Union. For the majority of commentators, the result was unexpected and the lack of a clear post-Brexit plan has fuelled speculation as to how the UK will uncouple itself from the myriad of laws and institutions to which it has been closely bound for more than 40 years. Although the UK is yet to trigger its formal exit from the EU, for civil and criminal practitioners specialising in asset recovery, Brexit gives rise to a number of important implications, a selection of which are discussed below.

### Civil jurisdiction, recognition and enforcement of judgments

Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Judgments Regulation) has provided a clear formula for the identification of the proper jurisdiction for disputes and automatic recognition and enforcement of judgments within member states. The benefits of the regime are clear and uncontroversial, and few (if any) would argue that the Regulation has had a negative impact on the English legal system. If the regime is completely scrapped in UK jurisdictions, it may lead to expensive early-stage satellite disputes on the question of *forum conveniens*, and unscrupulous defendants seeking to reopen the merits of an English judgment when it comes to enforcement in another European state (or vice versa). These outcomes would be obstructive for the ordinary course of justice, and as such it is considered likely that negotiators will seek to maintain the status quo, or a close analogue, in a post-Brexit world.

That said, the principle of judicial comity is freestanding, and, whatever the outcome of Brexit negotiations, courts in the UK and Europe will not turn on each other overnight. Moreover, the English court is avowed to fight international fraud and corruption, wherever it arises. As Field J made clear in *United States v Abacha* [2014] EWHC 993 (Comm)

*'it is unquestionably expedient for [the English] court to render the assistance sought [...] Corruption, like other types of fraud, is a global problem and it and its consequences are only going to be dealt with effectively if there is co-operation [...] between the courts of different national jurisdictions.'*

### European Account Preservation Order

In 2014 the European Parliament and Council devised the European Account Preservation Order (EAPO) procedure, which empowers the courts of one member state to make an order that immediately and directly freezes bank accounts in another member state. Although not due to come into force until 2017, the EAPO would have provided a slick way for UK claimants to freeze accounts across Europe without the need for various parallel applications. Following Brexit, unless negotiators find a way to maintain the EAPO regime that is acceptable to those in the vanguard of 'taking back control from Europe', the UK courts will not have jurisdiction to grant such an order.

Notwithstanding this, the English court is not ill-equipped to freeze bank accounts in other member states, thanks to the muscular use of its extraterritorial in personam jurisdiction. Similarly, section 25 of the Civil Jurisdiction and Judgments Act 1982 gives the court wide powers to grant interim relief in aid of foreign proceedings, meaning that the

English court will be able to achieve the same outcomes as the EAPO in any event, albeit with less efficiency and, probably, greater expense.

### The EU Confiscation Directive

The EU only legislated for a Pan-European confiscation regime in 2014, in the form of the Directive on Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union (the Confiscation Directive). Prior to that, the UK had signed up to the 2005 Warsaw Convention, which replaced a 1990 convention covering similar ground. The Warsaw Convention is a Council of Europe treaty, and is thus not EU legislation – there is some suggestion that the UK will remain a member of the Council of Europe as the incumbent Prime Minister has signalled that she will not seek to scrap the Human Rights Act 1998, as previously indicated. The Warsaw Convention obliges the UK and other signatories to cooperate in the enforcement of confiscation orders (subject to establishing double criminality).

Brexit will therefore mean the end of the Confiscation Directive for the UK. However, the UK's own Proceeds of Crime Act 2002 contains one of the most robust criminal confiscation regimes around, going beyond the provisions of the Confiscation Directive. Moreover, the Confiscation Directive did not provide for mutual recognition and enforcement of criminal confiscation orders among member states, which is governed instead by various EU framework decisions that provide for much discretion and require minimal harmonisation of confiscation regimes in any event.

### Money laundering

While UK anti-money laundering legislation is presently derived from the EU's Third Money Laundering Directive, both the UK and the EU are members of the global Financial Action Task Force (FATF) body, which was established in 1989. It is FATF that reports upon and recommends the standards of best practice in anti-money laundering. The Third Money Laundering Directive, and indeed the proposed Fourth Money Laundering Directive, are based on the recommendations of FATF.

As such, it is likely that Brexit will have no discernible effect on the content and equivalence of anti-money laundering legislation across the UK and EU as both are, and will continue to be, derived from the same source.

### Global corruption scandals

Already 2016 has seen developments in a number of existing corruption scandals as well as the emergence of others.

### Operation Car Wash

'Operation Car Wash' is Brazil's biggest ever corruption scandal with estimated losses to the state of over 42 billion reais. The scandal surrounding state-controlled company Petrobras involves allegations of money laundering and bribery of politicians and executives, and has implicated high-profile public figures including former President Luiz Inácio Lula da Silva (charged in March 2016) and suspended President Dilma Rousseff (whose impeachment trial began on 25 August and who may face charges over claims of obstructing the probe into corruption). Marcelo Odebrecht, head of Latin America's largest construction group, was sentenced to 19 years in prison.

Money was allegedly siphoned through artwork to African countries such as Angola to bank accounts in Switzerland, Andorra and the British Virgin Islands. The two-year long investigation has resulted in nearly 200 arrests, more than 100 convictions and prison sentences totalling in excess of 1,000 years. The Swiss authorities are acting to facilitate the return of some of the money to Brazil and the Attorney General has examined more than 1,000 accounts at more than 40 Swiss banks. To March 2016, assets totalling approximately US\$800 million have been frozen in Switzerland, with US\$190 million returned to Brazil. Prosecutors say about US\$1.8 billion of bribes have been recovered from offshore accounts in 36 countries. In August 2016, Brazil's federal auditing court TCU ordered the seizure of about 2.1 billion reais (US\$655 million) in assets from Odebrecht SA, OAS SA and a number of their executives.

### **Panama Papers**

In April 2016, following what it claims was a hack, Mossack Fonesca, the world's fourth largest offshore law firm, found itself at the centre of the Panama Papers scandal, the largest ever data leak (11.5 million files). The documents exposed a network of shell companies and offshore accounts concealing wealth linked to politicians and other public figures around the world. The data included information on 214,000 offshore companies and more than 500 banks, as well as on criminals who sought advice from the firm.

The data reveals the offshore holdings of 140 politicians, public officials and their families, including Sigmundur Davíð Gunnlaugsson (the prime minister of Iceland, who stepped aside following the leak), Nawaz Sharif (the prime minister of Pakistan), the King of Saudi Arabia and Petro Poroshenko (President of Ukraine). Two billion dollars in transactions connected to associates of Russian President Vladimir Putin, and offshore companies linked to the family of Chinese President Xi Jinping were also uncovered.

While no attempts at asset seizure and recovery have yet been made (at least publicly), information contained in the leaked documents could potentially be used to help victims of fraud to identify missing funds. In September 2016, Denmark's tax minister, Karsten Lauritzen, agreed to pay up to £1 million for data from the leak to aid investigations into possible tax evasion by Danes named therein. The US Department of Justice (DOJ) has launched a criminal investigation into the widespread international tax avoidance schemes exposed by the Panama Papers and a former trial attorney at the DOJ expects that the Kleptocracy Asset Recovery Initiative, discussed further below, will be heavily involved in related investigations. Columnists writing in Bloomberg speculate that Syrian opposition parties could seek to recover the assets of Rami and Hafez Makhoul, cousins of Bashar Al-Assad who are estimated to have once controlled more than half of Syria's economy, as well as millions of dollars' worth of real estate holdings belonging to Suleiman Marouf, an Assad ally based in London. The Papers have disclosed new information about three shell companies used by the Makhoul brothers -- Pangates International, Maxima Middle East Trading and Morgan Additives Manufacturing.

### **1Malaysia Development Berhad (1MDB)**

1MDB was established in 2009 by Najib Razak, Prime Minister of Malaysia, to boost the economy through strategic investments. In early 2015 it missed payments for some of the US\$11 billion it owed to banks and bondholders, leading to an investigation. Subsequent reports by the Wall Street Journal alleged that the investigation had traced nearly US\$700 million from the fund to Mr Najib's own bank accounts.

There has since been a number of domestic official investigations: a special task force headed by the attorney general, Abdul Gani Patail, raided 1MDB's offices in July 2015 and was provided with some documents and materials. Mr Abdul Gani subsequently stepped down for health reasons, and Mohamed Apandi Ali, who replaced him as attorney general, cleared Mr Najib of wrongdoing in January 2016. 1MDB has consistently denied having given any money to Mr Najib, and Mr Najib has also repeatedly denied taking money from 1MDB or any other public funds. There has been a government crackdown on reporting of the scandal, with media groups and journalists targeted and access to certain online news portals blocked.

A number of foreign authorities<sup>1</sup> are also investigating the fund. Switzerland has opened criminal proceedings alleging 'suspected corruption of public foreign officials, dishonest management of public

interests and money laundering'. In May of this year, Swiss bank BSI was ordered to shut down its operations in Singapore for breach of its money-laundering laws in relation to 1MDB.

The DOJ alleges that US\$3.5 billion was misappropriated from 1MDB and in July of this year the US moved to seize more than US\$1 billion in assets including mansions, art and private jets. Mr Najib is not named in the suit, which refers to 'Malaysian Official 1', described as 'a high-ranking official in the Malaysian government who also held a position of authority with 1MDB'. 1MDB said it had not benefited from the transactions described in the suit.

The asset seizure by the US would be the largest ever by the DOJ's anti-corruption unit.

### **The Kleptocracy Asset Recovery Initiative**

The Kleptocracy Asset Recovery Initiative (the Initiative) was established in 2010 to 'curb high level public corruption around the world'.<sup>2</sup> It is led by a team of individuals whose mission is to 'forfeit the proceeds of corruption by foreign officials and, where appropriate, to use recovered assets to benefit the people who were harmed'. The team consists of prosecutors in the DOJ Criminal Division's Asset Forfeiture and Money Laundering Section<sup>3</sup> working in tandem with the US Federal Bureau of Investigation (FBI) and other federal law enforcement agencies.<sup>4</sup>

### **Cases brought under the Initiative**

On 10 October 2014 the DOJ announced that the Vice President of Equatorial Guinea, Teodoro Nguema Obiang Mangue, had agreed to relinquish in excess of US\$30 million of assets which he had allegedly purchased with the proceeds of corruption. Of Obiang's conduct, Assistant Attorney General Caldwell stated: 'Through relentless embezzlement and extortion, Vice President Nguema Obiang shamelessly looted his government and shook down businesses in his country to support his lavish lifestyle, while many of his fellow citizens lived in extreme poverty'.<sup>5</sup> The DOJ stated that the settlement fulfilled the goals of the Initiative, namely 'to deny safe haven to the proceeds of large-scale foreign official corruption and recover those funds for the people harmed by the abuse of office'. This was achieved by sending US\$20 million of the settlement sum to a charitable organisation in Equatorial Guinea and forfeiting the remaining US\$10 million to the United States, to be 'used for the benefit of the people of Equatorial Guinea'.<sup>6</sup>

In 1997, the former president of the Republic of Korea, Chun Doo Hwan, was convicted of bribery offences. He was said to have received more than US\$200 million in bribes from Korean businesses and companies. Chun and his relatives allegedly laundered some of the corrupt payments through a web of nominees and shell companies in Korea and the United States. Chun was pardoned immediately after he was convicted. The court ordered Chun to pay back the corruption payments, however he only returned a fraction, claiming that he was impecunious. On 4 March 2015, the DOJ announced that the US authorities, as part of the Initiative, had assisted Korean authorities in recovering over US\$28.7 million in proceeds of corruption from Chun. Of the US\$28.7 million, the DOJ assisted in recovering US\$27.5 million in satisfaction of the outstanding criminal restitution order, and reached a settlement of US\$1.2 million, which represented the value of assets in the United States traceable to the corruption proceeds.<sup>7</sup>

As discussed above, on 20 July 2016 the FBI announced the largest single action ever brought under the Initiative, whereby it is seeking to recover over US\$1 billion in assets allegedly connected to the Malaysian entity 1Malaysia Development Berhad (1MDB).

### **Anti-corruption summit**

On 12 May 2016, then UK Prime Minister David Cameron hosted the Anti-Corruption Summit. Representatives from more than 40 countries came together with business and civil society organisations to agree a series of commitments to uncover and punish corruption. In a communique issued following the summit, countries promised to 'actively enforce anti-corruption laws and work together across international borders to pursue the corrupt, prosecute them and seek their punishment according to the law and, where possible, confiscate and return stolen assets consistent with the provisions of UNCAC'.<sup>8</sup> A number of measures and commitments relating to the recovery of assets were announced:



- The creation of a Global Asset Recovery Forum, to be held jointly by the US and the UK in Washington DC in 2017, supported by the UNODC Stolen Asset Recovery Initiative (StAR) and the World Bank. The first forum will focus on returning assets to Nigeria, Ukraine, Sri Lanka and Tunisia.
- Commitments from 21 countries (including the UK, Switzerland, Nigeria, France, Germany and Afghanistan) to strengthen legislation to ensure stolen assets can be recovered. The UK is consulting on measures including non-conviction based confiscation powers and the introduction of unexplained wealth orders (UWOs). UWOs would reverse the burden of proof, so that anyone suspected of having stolen assets and who could not show that their wealth was amassed legitimately could have it confiscated by the court.
- Australia, Canada, Germany, New Zealand, the UK, the US, Singapore and Switzerland will partner on an International Anti-Corruption Coordination Centre, hosted in London, to assist efforts to investigate and prosecute the corrupt and to recover stolen assets.
- Twenty-one countries (including the UK, the US, Switzerland, the UAE and Singapore) will establish public-private partnerships to fight corruption and money laundering. These may be developed along the lines of the UK's Joint Money-Laundering Intelligence Taskforce (JMLIT), which began as a one-year pilot project and whose work has so far led to arrests, the freezing of funds and the closure of bank accounts linked to crime.
- Agreement was reached between Britain, Afghanistan, Kenya, France, Nigeria and the Netherlands to publish registers of beneficial ownership. Twenty-nine other countries (including the Cayman Islands, Jersey, Bermuda, the Isle of Man and the UAE) will maintain and share private beneficial ownership. The US, the BVI and Panama will not share information.
- Eleven countries will develop internationally endorsed standards aimed at ensuring transparency and accountability in the recovery of assets.

Following the Summit, in June 2016, Nigerian President Muhammadu Buhari announced that his government is in the process of recovering more than US\$10 billion in stolen cash and assets. Nigeria is awaiting the return of US\$321 million from Switzerland, US\$9.9 million from the UK, and smaller amounts from the US and UAE.

#### **Global foreign bribery resolution of more than US\$795 million**

VimpelCom, the Amsterdam headquartered telecommunications company, and its wholly owned Uzbek subsidiary, Unitell LLC, agreed in February 2016 to a Deferred Prosecution Agreement (DPA) under which they admitted to a six-year conspiracy to pay US\$114 million in bribes to an Uzbek government official, later named as Gulnara Karimova, the eldest daughter of the Uzbek president. Karimova has been under house arrest since 2014. Alongside cooperation, controls and monitoring conditions, VimpelCom agreed to pay a financial penalty of US\$230 million to the DOJ, including US\$40 million in forfeiture. The company also agreed a settlement with the US Securities and Exchange Commission (SEC) and the Public Prosecution Service of the Netherlands (Openbaar Ministerie, or OM). The terms of the agreement include a total of US\$375 million in disgorgement of profits and prejudgment interest, divided between the SEC and OM, and a financial penalty in the Netherlands of US\$460 million. The DOJ agreed to credit the financial penalty paid to the OM as part of the DPA, and the SEC agreed to credit the forfeiture paid to the DOJ as part of its agreement with the company. The combined total amount of US and Dutch criminal and regulatory penalties paid in the case is US\$795 million, making it one of the largest global foreign bribery resolutions ever, with US\$167.5 million the third largest disgorgement figure under the FCPA.

On the day the DPA was agreed, the DOJ, under the Kleptocracy Asset Recovery Initiative in the Criminal Division's Asset Forfeiture and Money Laundering Section (AFMLS), filed a civil complaint seeking forfeiture of over US\$550 million held in Swiss bank accounts, claimed to be the proceeds of the bribes from VimpelCom, MTS (Russia) and Telia Sonera (Sweden), or related money that was laundered.

Investigations by the United States, the Netherlands and Switzerland (working with the Swedish Prosecution Authority and the Corruption Prevention and Combating Bureau in Latvia, and assisted by law enforcement officials in Belgium, France, Ireland, Luxembourg

and the United Kingdom) focused on Talikant, a company tied to Karimova. Swiss prosecutors had seized more than US\$900 million of suspected Uzbek assets by March 2014, and on 20 July 2016 a court in the Netherlands ordered the seizure of US\$135 million in assets from Talikant, finding that VimpelCom and Telia AB had paid bribes to Talikant in exchange for 3G licences, telecommunications frequencies and number blocks for their Uzbek subsidiaries. The court also ordered Talikant to pay a fine of €1.58 million and to forfeit shares in Telia AB's Uzbek subsidiary, Ucell. A separate civil forfeiture complaint was filed in June 2015 seeking more than US\$300 million held in bank and investment accounts in Belgium, Luxembourg and Ireland. At the end of July 2016, a stay – lapsing on 31 October 2016 – was granted on seizure orders over these assets to facilitate settlement talks between the Republic of Uzbekistan and the DOJ.

#### **Alternative means of asset recovery in the UK – deferred prosecution agreements and public-private partnership**

A milestone was reached on 30 November 2015 when the United Kingdom's first Deferred Prosecution Agreement (DPA) was agreed between the Serious Fraud Office (SFO) and Standard Bank (now ICBC Standard Bank).

In November 2012, mandate and fee letters were granted to Standard Bank, a UK regulated bank, and Stanbic Bank Tanzania (then both members of Standard Bank Group) to raise public funds for the government of Tanzania by way of a sovereign note private placement. This followed a bid and negotiations during which Stanbic had, without notifying Standard Bank, increased the proposed fee for the transaction from 1.4 per cent to 2.4 per cent. The additional 1 per cent would be paid to Stanbic's 'local partner' Enterprise Growth Market Advisors Limited (EGMA), whose chairman was a serving member of the government of Tanzania. There is no evidence that EGMA provided any services in relation to the transaction. By completion of the financing in March 2013, the amount to be raised was US\$600 million, and EGMA's 1 per cent fee of US\$6 million was paid by Stanbic into an account opened with Stanbic by EGMA earlier that month. Within 10 days of the payment, the vast majority had been withdrawn in large cash amounts. Concerns were raised and Standard Bank in London, through their lawyers, self-reported to the Serious and Organised Crime Agency and the SFO.

Under the terms of the DPA, Standard Bank admitted to an offence under section 7(1) of the Bribery Act 2010 (failure of a commercial organisation to prevent bribery by an associated person), and agreed to pay a financial penalty of \$16.8 million, disgorgement of profits of \$8.4 million (representing the fee of 1.4 per cent received for the transaction) and compensation to the government of Tanzania in the amount of US\$6 million plus interest (representing the 1 per cent of proceeds paid to EGMA). Sir Brian Leveson, President of the Queen's Bench Division, in his preliminary judgment, held that the compensation paid to the government of Tanzania was 'a necessary starting point for any DPA' and that the legislation identifying disgorgement of profit as a legitimate requirement of a DPA is 'underpinned by public policy which properly favours the removal of benefit in such circumstances'.

The UK's second DPA, between the SFO and a company known as XYZ Ltd, was approved by Sir Brian Leveson on 8 July 2016. Between June 2004 and June 2012 a number of the company's employees and agents were involved in the systematic offer and/or payment of bribes to secure contracts in foreign jurisdictions. XYZ's parent company, ABC, implemented a global compliance programme in late 2011. In August 2012 concerns were raised. XYZ retained a law firm that undertook an independent internal investigation, and a report was delivered to the SFO in January 2013. The SFO's independent investigation concluded that 28 contracts were procured as a result of bribes and that XYZ made a total gross profit of £6,553,085.

The SFO and XYZ agreed to a disgorgement of profits of £6.2 million (of which £1.95 million was voluntarily contributed by ABC as part repayment of dividends received since acquiring XYZ in 2000) and, due to the limited financial means of XYZ and the undesirability of forcing the company into insolvency, a smaller financial penalty of £352,000. Sir Brian Leveson reiterated in his preliminary judgment that the requirement for disgorgement of profits is underpinned by public policy which favours the removal of the benefit obtained. With regard to the payment of compensation, it was not possible to identify any specific victims: difficulties arose due to the absence of mutual

legal assistance mechanisms in place between the UK and the relevant foreign jurisdictions and a lack of evidence as to the exact amount of the bribe payments made.

### Sanctions

Sanctions are a foreign policy tool typically used by states and international bodies, particularly the US, UN and EU, to influence the behaviour of other states and persons. This is done, for example, by imposing trade restrictions, asset freezes and travel bans that will be lifted only once the target has changed its behaviour as required.

Although sanctions have most commonly been used in this way, for example, UN sanctions aimed at prompting North Korea to curb its nuclear programme,<sup>9</sup> certain EU sanctions on Tunisia,<sup>10</sup> Egypt<sup>11</sup> and Ukraine<sup>12</sup> focus instead on the recovery of assets that are said to have been misappropriated by people who are no longer in power. The latter kind of sanctions are intended to restrain those assets pending criminal investigation or the establishment of mutual legal assistance.

The EU Council has had mixed success in defending these sanctions against challenges brought before the European Court. In previous years, the Court annulled the listings of Fahed Al-Matri, Mohamed Trabelsi, Slim Chiboub and Mehdi Ben Ali<sup>13</sup> under the EU's Tunisia sanctions on the basis that being subject to judicial investigation for money laundering offences did not satisfy the listing criterion that they be responsible for the misappropriation of state funds, and the listing of Andriy Portnov under the EU's Ukraine sanctions on the basis that the EU had failed to give any specific reason for his listing.<sup>14</sup> In contrast, in April 2016 the EU successfully defended the re-listing of Mehdi Ben Ali under its Tunisia sanctions in Case T-200/14 *Ben Ali v Council*, and the sole annulment action brought under its Egypt sanctions to date was rejected on appeal in Case C-220/14 *P Ezz & Ors v Council* last year. However, the successful challenges brought in January 2016 by five people listed under the EU's Ukraine sanctions, on the same basis as in the earlier *Portnov* case, confirm that there is still scope for future challenges to the EU's attempts to recover assets on behalf of states through the use of its sanctions powers.<sup>15</sup>

### Recent update in Swiss asset recovery law

In Switzerland, the Federal Act on International Mutual Assistance in Criminal Matters governs requests from foreign states to seize and return illicit assets in Switzerland. The Federal Act on the Restitution of Assets obtained unlawfully by Politically Exposed Persons (RIAA) governs instances where the state structures of the foreign state are

insufficient to accommodate mutual assistance. Under such circumstances, the RIAA provides the Swiss authorities with the power to freeze assets suspected of being illicit and return the assets to the country of origin.

Switzerland recently enacted the Federal Act on the Freezing and Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means (FRAPA). The FRAPA, to a large extent, mirrors the RIAA, while providing 'a comprehensive framework for freezing, confiscating and returning potentate funds, thereby codifying Switzerland's current practice in this domain'.<sup>16</sup>

### Notes

- 1 The UAE, Switzerland, Luxembourg, United States, Singapore, Australia, Hong Kong, Thailand.
- 2 [www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign](http://www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign).
- 3 [www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign](http://www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign).
- 4 [www.fbi.gov/news/stories/us-seeks-to-recover-1-billion-in-largest-kleptocracy-case-to-date](http://www.fbi.gov/news/stories/us-seeks-to-recover-1-billion-in-largest-kleptocracy-case-to-date).
- 5 [www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased](http://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased).
- 6 [www.justice.gov/sites/default/files/press-releases/attachments/2014/10/10/obiang\\_settlement\\_agreement.pdf](http://www.justice.gov/sites/default/files/press-releases/attachments/2014/10/10/obiang_settlement_agreement.pdf).
- 7 [www.justice.gov/opa/pr/united-states-assists-korean-authorities-recovering-over-287-million-corruption-proceeds](http://www.justice.gov/opa/pr/united-states-assists-korean-authorities-recovering-over-287-million-corruption-proceeds).
- 8 Anti-Corruption Summit Communique – May 2016. Available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/522791/FINAL\\_-\\_AC\\_Summit\\_Communique\\_-\\_May\\_2016.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522791/FINAL_-_AC_Summit_Communique_-_May_2016.pdf).
- 9 UN Security Council Resolution 2270.
- 10 Council Regulation (EU) 101/2011.
- 11 Council Regulation (EU) 270/2011.
- 12 Council Regulation (EU) 208/2014.
- 13 Cases T-200/11 *Al Matri*, T-187/11 *Trabelsi*, T-188/11 *Chiboub* and T-133/12 *Ben Ali*.
- 14 T-290/14 *Portnov*.
- 15 Cases T-331/14 *Azarov*, T-332/14 *Azarov*, T-341/14 *Klyuyev*, T-434/14 *Arbuzov* and T-486/14 *Stavytskyi*.
- 16 [www.eda.admin.ch/eda/en/home/aussenpolitik/finanzplatz-wirtschaft/unrechtmassig-erworbene-vermoegenswerte-pep/paevention-finanzplatz.html](http://www.eda.admin.ch/eda/en/home/aussenpolitik/finanzplatz-wirtschaft/unrechtmassig-erworbene-vermoegenswerte-pep/paevention-finanzplatz.html).



# Australia

Tobin Meagher, Andrew Moore and Alice Zheng\*

Clayton Utz

## Civil asset recovery

### 1 Legislation

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

Australia has a federal system of government. Legislative power is divided between the Commonwealth, six states and two self-governing territories. Accordingly, the key pieces of legislation to consider in a private investigation vary, although similar legislation generally exists across the different states and territories.

For an investigation conducted in New South Wales (NSW), the key pieces of legislation include:

- Evidence Act 1995 (NSW), which sets out the rules of evidence that apply in NSW courts, including as to the admissibility of evidence and proof of matters in legal proceedings;
- Privacy Act 1988 (Cth) and Privacy and Personal Information Protection Act 1998 (NSW), which regulate the collection, use, disclosure and maintenance of a wide variety of personal information;
- Surveillance Devices Act 2007 (NSW) and Workplace Surveillance Act 2005 (NSW), which regulate the installation, use and maintenance of surveillance devices, including the surveillance of workplace e-mail and computer usage;
- Telecommunications (Interception and Access) Act 1979 (Cth), which prohibits the unauthorised interception of telecommunications or access to stored communications;
- Fair Work Act 2009 (Cth), which requires procedural fairness in deciding whether to dismiss an employee;
- Freedom of Information Act 1982 (Cth) and Government Information (Public Access) Act 2009 (NSW), which govern access to information held by the Commonwealth and NSW governments respectively;
- Commercial Agents and Private Inquiry Agents Act 2004 (NSW), which provides for the licensing of persons for commercial and private inquiry activities, and regulates their conduct; and
- Crimes Act 1900 (NSW), in particular section 316, which makes it an offence for a person who knows or believes that another person has committed a serious indictable offence to fail, without reasonable excuse, to bring relevant information about the matter to the attention of the police. This is particularly relevant for companies investigating employee misconduct.

### 2 Parallel proceedings

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

There 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.

### 3 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 in Australia.

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.

### 4 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 limitations 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, the courts also have the discretion to extend the time to commence proceedings.

### 5 Jurisdiction

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

The jurisdiction of Australian 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, that the forum chosen by the plaintiff was an inappropriate forum (*forum non conveniens*) or because the dispute falls within the scope of a foreign exclusive jurisdiction clause to which the plaintiff 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.

## 6 Admissibility of evidence

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

The 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 speaking, 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 Publicly available information

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

Publicly available sources of information about assets include:

- the Australian Securities and Investment 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.

## 8 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. For example, by:

- 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 Commonwealth Attorney General approves of its use for the purposes of that other proceeding: Mutual Assistance in Criminal Matters Act 1987 (Cth) (MAA), section 43B.

## 9 Third-party disclosure

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

In Australia, 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 in Australia 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.

## 10 Interim relief

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

The key interim relief in Australia 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 plaintiff must show that it has a good arguable case against the defendant and there exists a real danger that the defendant will deal with their assets in such a way as to wholly or partly deprive it 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 their assets. Other, less common, ancillary orders may include an order requiring the delivery up 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 plaintiff 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 which is in the defendant's possession.

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

## 11 Right to silence

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

Generally speaking, defendants in civil proceedings in Australia are afforded the privilege against self-incrimination. Consequently, they are not bound to answer any question or produce any document, if the answer or the document would have a tendency to expose that person to the imposition of a civil penalty or conviction for a crime. The privilege is not available to corporations.

A defendant will still be required to file a defence, although it will be relieved from complying with the rules of pleading if, and to the extent which, those rules would override the privilege.

Evidence legislation limits the privilege in various ways. In particular, there are specific rules governing objections to compliance with ancillary orders made in conjunction with the obtaining of freezing or search orders (eg, an assets disclosure order).

## 12 Non-compliance with court orders

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

In Australia, 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. The 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 (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 request 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 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 international 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 recently 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 which 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?

In Australia, the main causes of action in civil asset recovery cases include:

- 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 in Australia 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?

In Australia, the main remedies available in a civil recovery action include:

- 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, compensation orders, etc), 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 its 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 plaintiff 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 plaintiff 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, 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 plaintiff 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 them to answer specific questions or produce documents to aid enforcement.



## 19 Enforcement

### What methods of enforcement are available?

The principal means of enforcement are:

- 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?

In Australia, various funding arrangements are available to parties contemplating or involved in litigation.

Generally speaking, lawyers can offer 'conditional' billing where the lawyer's ability to recover their 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 in Australia. The market for such funding is well established and active.

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

Australian courts seek to manage the costs of litigation in various ways, including by the exercise of broad case management powers. Generally speaking, 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.

This section focuses 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 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 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 Tax Office (ATO) and 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 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 which 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: investigation by the relevant state agency, including to substantiate unlawful conduct and identify property; obtaining a court order restraining property; obtaining a subsequent court order confiscating property; and disposal 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 the property which is neither the proceeds or 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 longstanding 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 their 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 their 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 responsibility for 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 speaking, for most states and territories, the police force is responsible for investigating assets, and the Director of Public Prosecutions is responsible for confiscation proceedings. However, the NSW Crime Commission and 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 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 which is acquired by a third party is generally permitted unless it has been acquired:

- for sufficient consideration, which means 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 that 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 the jurisdictions. The following focuses on POCA.

Under POCA, the Commissioner of the AFP or 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 for definition).

The court must quantify a pecuniary penalty order in accordance with Division 2 of Part 2-4. Broadly speaking, this involves a determination of the value of the benefits derived from the commission of the offence. In assessing the value of those benefits, the court is to have regard to the evidence before concerning 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. On the other hand, in a recent 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: *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,



### Update and trends

The AFP and relevant state agencies continue to actively litigate proceeds of crime matters. In 2014–2015, the Taskforce successfully restrained a record A\$246.6 million in assets (up from A\$134 million in 2013–14). The AFP's strategic priorities include leading the Commonwealth's efforts to disrupt organised criminal groups by restraining and seizing their assets and unexplained wealth. Another priority is to contribute effectively to whole-of-government efforts to prevent Australia from being a safe haven for proceeds of crime, including from corruption, or used for money laundering purposes.

POCA has also recently been amended by the Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Act 2016 (Cth). This legislation introduced amendments in response to the High Court of Australia's decision in *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46. In that case, the High Court unanimously upheld a decision staying forfeiture proceedings brought under POCA against a person facing criminal proceedings in respect of the same conduct, until the criminal proceedings had concluded. Following that

decision, the AFP expressed concern that it was likely to delay other cases where the AFP had applied to seize the proceeds of crime ahead of criminal trials.

The amending legislation seeks to clarify the principles a court may consider when granting an application for a stay of proceedings under POCA, including specifying grounds on which a stay is not to be granted. Significantly, it is insufficient for an applicant seeking a stay to merely show that criminal proceedings are on foot that relate to the same circumstances as the proceedings under POCA. More must be shown: *Commissioner of Australian Federal Police v W* [2016] NSWSC 683. In the white-collar crime space, the AFP has stated that this reform, together with new false accounting offences, is having a significant positive impact on the ability of the AFP to combat serious financial crime, including by ensuring its continued ability to take civil action to reduce the ability of perpetrators to enjoy their illegitimate profits.

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 speaking, 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.

### 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 which 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 though 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 (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 its 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 Commonwealth Attorney General, usually on behalf of the AFP or CDPP, 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 Commonwealth 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 to obtain 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:

- United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- United Nations Convention Against Transnational Organized Crime 2000;
- United Nations Convention Against Corruption 2003;
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997;
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990; and
- International Convention for the Suppression of the Financing of Terrorism 1999.

**38 Private prosecutions**

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

In no Australian 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, Sophia Giardini and Laura Peck for their assistance in preparing this chapter.*

# CLAYTON UTZ

**Tobin Meagher**  
**Andrew Moore**  
**Alice Zheng**

**tmeagher@claytonutz.com**  
**amoore@claytonutz.com**  
**azheng@claytonutz.com**

Level 15, 1 Bligh Street  
Sydney  
NSW 2000  
Australia

Tel: +61 2 9353 4000  
Fax: +61 2 8220 6700  
[www.claytonutz.com](http://www.claytonutz.com)

# Bermuda

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

## Civil asset recovery

### 1 Legislation

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

The Companies Act 1981 provides for the information concerning a company that must be made publicly available for inspection.

The Evidence Act 1905 provides the Supreme Court of Bermuda (Court) with the power to assist in obtaining evidence for international civil and criminal proceedings. On request from a foreign court and an application made under Rule 70 of the Rules of the Supreme Court 1985 (RSC), the Court can order the examination of witnesses, production of documents, inspection, preservation of photography, detention of property, taking of samples and medical examinations.

The Personal Information Protection Act 2016 has not at the time of publication come into force. It will govern the use and transfer of personal information that is held by organisations.

In addition to legislation, parties can avail themselves of remedies available under common law and equitable principles concerning asset tracing.

### 2 Parallel proceedings

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

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 right of a plaintiff 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.

The Criminal Code Act 1907 section 25(3) 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.

### 3 Forum

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

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

### 4 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:

- 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;
- recovery of land – 20 years from the date on which the right accrued;
- breach of trust (other than fraudulent) – six years; 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.

### 5 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 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 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.

### 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 Rule 38 of the RSC. In particular, Part IIA of the Act addresses admissibility of hearsay evidence.

### 7 Publicly available information

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

#### Companies

Public records available from the Registrar of Companies include the company name, registration number and 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 notices 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 originating process for civil and

commercial cases, save for winding up proceedings, applications relating to trusts or arbitrations, cases relating to the administration of deceased estates and divorce proceedings or any proceeding involving children. Request for access to documents not otherwise automatically available can be made to the Registrar.

## 8 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 the 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.

## 9 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 mixed up in the wrong doing (innocently) so as to have facilitated it. Orders will not be granted for mere 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 plaintiff'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.

## 10 Interim relief

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

Rule 29 of the RSC provides a range of interim remedies such as injunctions, 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 the circumstances of the case it is just and convenient.

Section 110 of the Companies Act 1985 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 to investigate 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.

## 11 Right to silence

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

Bermuda upholds the common law right to silence in a civil proceeding against self-incrimination, which must, by necessity, extend from the right to silence which is guaranteed to any person tried for a criminal offence, pursuant to Bermuda Constitution Order 1968 section 6(7).

## 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?

Application may be made to the Court under Rule 39 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 (standalone 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 of the Act, or where the judgment is a non-monetary judgment, 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:

- damages – compensatory (and punitive in appropriate cases);
- declarations 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 the 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 service of proceedings, the plaintiff 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, standalone freezing orders will be ordered against a defendant in foreign proceedings where there are no local proceedings on foot.

Rule 48 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 of the action, although costs awards fall within the discretion of the Court. While litigants are usually self-funded, third-party funding is permitted. Contingency fees are not permitted in Bermuda.

The RSC prescribe an overriding objective of the Court to deal with cases justly, which includes saving expense and dealing with cases proportionately to the amount of money involved, 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 the making of 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.

The powers of the Court under the PCA for the production of information to assist in certain criminal investigations and in 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(s), make a confiscation order and determine the amount to be recovered. The Court shall then, 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; but
- subject to (ii) leave the confiscation order out of account in 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 making determinations as to whether the defendant has benefited or the amount to be recovered under a confiscation order if it considers 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 assessing 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, to give particulars of any matters on which it is proposed to rely.
- The Court decides on the balance of probabilities whether or not 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 co-mingling of the property of the defendant and the third party and 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 agencies responsible for tracing and confiscating the proceeds of crime are:

- 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, moveable or immoveable, 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 made 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 power to make other orders involving payment by a defendant where a confiscation order has been made. However, it must take account of the confiscation order, 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 on by the defendant or another person are the defendant's proceeds of criminal conduct, and the value of the proceeds of criminal conduct is the aggregate of the values of the 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 which (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:

*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:*

- (a) the total of the values at that time of all the realisable property held by the defendant; less*
- (b) 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 Act are determined in accordance with section 6 of the PCA.

## 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 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 shall be satisfied from moneys recovered via confiscation.

## 32 Confiscation of profits

### Is it possible to recover the financial advantage or profit obtained though 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 the proceeds of realisation of property, the receiver shall apply the proceeds to the confiscation order. Where there are excess funds the receiver shall distribute those sums among such of 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. The 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 Bermuda law and to implement 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 to execute 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 be made only by countries listed in Schedule 1 to the PCO (Vienna Convention). 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 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;
- the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; and
- the United Nations Treaty on 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 1500  
[www.walkersglobal.com](http://www.walkersglobal.com)

# Brazil

**Arthur Sodré Prado, Gustavo Parente Barbosa and Fernando Augusto Bertolino Storto**  
**Malheiros Filho, Meggiolaro & Prado - Advogados**

## Civil asset recovery

### 1 Legislation

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

The key pieces of legislation to consider in a private investigation in Brazil are:

- the Brazilian Constitution of 1988 (BC88);
- the Brazilian Civil Code (BCivC) – Law No. 10,406/2002;
- the Brazilian Code of Civil Procedure (BCCivP) – Law No. 13,105/2015;
- the Brazilian Criminal Code (BCrimC) – Decree No. 2,848/1940;
- the Brazilian Code of Criminal Procedure (BCCrimP) – Decree No. 3,689/1941;
- the Anticorruption Act – Law No. 12,846/2013; and
- the Money Laundering Act – Law No. 9,613/1998.

For civil procedures, there is no obstacle for an individual looking for proof that may corroborate a suspected infringement to conduct a private investigation, especially because the interested party may want to convince the judge that its claims are to be accepted. Thus, it is important to consider the principles of burden of proof provided by article 373 of the BCCivP.

Nonetheless, the interested party cannot enforce its requests over third parties, for which it may need a judicial provision demanding the delivery of information (article 396 of the BCCivP).

In relation to crimes, the power to investigate is exclusive to the state (articles 129 and 144 of BC88 and article 4 of BCCrimP). Nonetheless, the individual may contribute to the investigation by helping the authorities in the search for evidence, although he or she does not have power to enforce his or her requests.

### 2 Parallel proceedings

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

In the Brazilian legal system, the criminal and civil jurisdictions are independent so that there is no restriction on the same matter being brought before criminal and civil courts at the same time.

However, there are a few situations in criminal law that may influence civil court procedures. Article 386, items I and III of BCCrimP provides that the judge has to acquit the defendant if it has been proved that there was no felony or that the defendant was not the criminal. In this case, if there is any civil procedure regarding the same subject, the civil court may dismiss the case as the innocence of the defendant has already been proved.

Nonetheless, there are activities that may not be considered a crime but, on the other hand, may be a civil infringement. Thus, the civil procedure may endure regardless of any criminal proclamation.

### 3 Forum

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

A recovery claim is usually linked to the judicial district where the defendant resides. If the defendant cannot be found, the proceedings may be brought in the judicial district of the plaintiff.

If the asset is a property, the claimant must file in the real estate's corresponding judicial district, as of articles 46 and 47 of the BCCivP.

However, there are several specific rules regarding jurisdiction in the Brazilian legal system. If the asset is worth less than forty times the minimum wage (which is 880 reais) the proceeding has to be brought to the small claims court, according to article 3, item I, of the Small Claims Court Act – Law No. 9,099/95.

Nevertheless, according to article 109 of the Constitution, if the plaintiff is a foreign state or international entity the competent jurisdiction is the federal court, regardless of the value of the assets.

### 4 Limitation

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

The limit for starting civil procedures is ruled by articles 205 and 206 of BCivC. According to article 205, if there is no specific law or statute that corresponds to the type of claim, the time limit is 10 years.

However, the article lists several circumstances where limits for starting civil procedures may vary from one to five years. For instance, the recovery of debts has a five-year limit whereas the time limit for ordinary civil reparations or credit instruments enforcement is four years.

As for bankruptcy procedures, ruled by the Bankruptcy Act – Law No. 11,101/05, there is no specific time limit to file a motion, but the procedure is much more complex. As soon as the bankruptcy motion is filed, the creditors have 15 days to present to the judicial administrator – nominated by the Justice – their proof of claim. If the creditors fail to comply, they may file a late proving and their credit may lose preference over other creditors.

### 5 Jurisdiction

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

As for the BCCivP, the civil court shall have jurisdiction over every civil claim, regardless of it being individual or collective.

The defendant may only challenge jurisdiction if the claim is related to labour rights, which has its own court of law, or to territorial jurisdiction (see question 3).

### 6 Admissibility of evidence

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

The rules that govern evidence in civil proceedings are laid out in a separate chapter in the BCCivP (Chapter XII).

Article 369 states that the inclusion of evidence must be in accordance with the law, even though there is no explicit legal provision stating types of evidence.

Also, BC88, in its article 5, LVI, prohibits in its entirety the usage of proof obtained through illicit ways. However, there are some very restricted exceptions admitting its usage. In short, the civil proceeding makes it indispensable for the judge to measure different rights and possibilities with regards to the admissibility of illicit evidence or evidence obtained through illicit ways.

## 7 Publicly available information

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

When it comes to vehicle registration, information is managed by the State Traffic Department, and information about debts and restrictions on third-party vehicles can be obtained from the vehicle licence plate number and the National Registry of Vehicles number.

As for land registration, a certificate can be obtained from the real estate public registry to allow an individual to check that a property does not have any conditions that may make it unavailable. Concerning municipal taxes, a certificate can be issued by the local government informing if the asset has any tax debt.

## 8 Cooperation with law enforcement agencies

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

Yes, it can, although this possibility only exists when the information is publicly available; if not, the interested party may need to bring this before the court and request the judge to provide a written notice demanding the agency to provide the information required (article 396 of the BCCivP).

## 9 Third-party disclosure

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

In Brazil, a third party not suspected of wrongdoing does not have an obligation to share information, in which case the individual may have to bring the case before the court to be granted access to the information (article 396 of the BCCivP).

## 10 Interim relief

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

Articles 294 to 310 of the BCCivP provide for the specific processing of interim reliefs. According to article 300, the party must prove the existence of its right and that the non-granting of its plea may end up harming or damaging the good course of the procedure.

The most common interim reliefs to prevent the disposal of assets are the seizure of the asset subjected to the court's decision, and the seizure of assets in order to guarantee any of the requests of the plaintiff.

## 11 Right to silence

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

In the BCCivP there is no provision regarding the right to silence of the defendant. On the contrary, if the defendant does not disavow the claim, article 344 states that the plaintiff's allegations may be presumed true. However, according to article 388, there are specific situations in which the defendant has the right to be silent without any consequences, which are:

- if a criminal act is alleged against him or her;
- if for professional reasons the defendant is not allowed to provide certain information (eg, medics, lawyers, etc);
- if the defence may cause dishonour to the defendant, his or her partner or any other relative; and
- if the information may put in harm's way the defendant, his or her partner or any other relative.

## 12 Non-compliance with court orders

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

There are several types of punishment for individuals who do not comply with judicial orders. As a rule, a fine is imposed by the judge as a result of non-compliance.

In extreme situations, the party or any third parties may be charged for disobedience (article 330 of BCCrim) if they persist in not complying with the court's demands.

## 13 Obtaining evidence from other jurisdictions

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

Information needed for civil proceedings may be requested directly by the original judge through legal letters sent to the holder.

If the information must be gathered from a witness that does not reside in the same jurisdiction, the original judge may send a letter of request to the judge of the correspondent jurisdiction to set a hearing for the respective witness, working as a *longa manus* of the original judge (article 260 of the BCCivP).

## 14 Assisting courts in other jurisdictions

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

The system explained above (question 13) is applicable for recovery 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?

The main causes of action in civil asset recovery cases are provided for in the BCCivC and other laws, such as the Corporate Act – Law No. 6,404/1976, the Bankruptcy Act – Law No. 11,101/2005 and the Real Estate Financial System Act – Law No. 9,514/1997, among others. Examples of common suits in Brazilian courts are breach of contract and corporate administration fraud. The exercise of the right to the recovery of assets (article 497 of the BCCivP) may depend on the type of suit to be brought before the court; for example, search and seizure of vehicles or real estate.

## 16 Remedies

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

The legal measure mainly used for the recovery of credits is the claim for the determination of reparation for material and moral damages, loss of profit, fines, lien of money of the defendant to be transferred and deposited in judicial accounts; lien and transfer of property of any asset of the defendant; and lien of profits, among others, always depending on the case in question.

## 17 Judgment without full trial

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

In 2015 the new BCCivP was enacted, substantially amending several provisions of the previous code. The Brazilian legislature opted, in an attempt to reduce the number of processes that reach the courts every day, to permit a negotiated solution before the start of trials.

Article 334 of the BCCivP states that a mandatory hearing of conciliation or mediation should be set, which precedes the defendant's answer to the claim. If reconciliation occurs, the case is dismissed.

Another possibility is provided when the plaintiff obtains a judgment without the need for a full trial. This may occur when the defendant, properly subpoenaed, does not appear to answer the claim, causing the judge to decide in advance, without the need for a full trial, considering the plaintiff's claim true.

Moreover, article 355 of the BCCivP provides that the Justice may judge the case in advance if he or she understands that the claim refers exclusively to the existence of a right that does not need the production of evidence.



**18 Post-judgment relief****What post-judgment relief is available to successful claimants?**

After conclusion of the trial, the claimant's credit shall be enforced in a post-judgment procedure (article 523 of the BCCivP) that may vary depending on the will of the defendant to comply with the court's decision (eg, lien of property or financial resources).

**19 Enforcement****What methods of enforcement are available?**

See questions 16 and 18.

**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 Brazilian law, the defeated party is always obligated to pay the litigation costs, including the plaintiff's (section 2, article 82 of the BCCivP). There are some exceptions, such as the contemplation by the court of litigation gratuity – only if the party proves that it does not have resources to pay for the litigation costs – (article 98) and the sharing of costs between the defendant and the plaintiff in cases where some of the claims are dismissed and some are ruled in favour (article 86).

**Criminal asset recovery****21 Interim measures****Describe the legal framework in relation to interim measures in your jurisdiction.**

Brazilian law provides certain types of interim measures that are specific to Brazil. The most important are the following:

- The seizure of real estate or goods is the measure created to ensure the effectiveness of a future criminal sentence, ensuring the loss of proceeds of crime and reparations to the victim or third parties in good faith. In case of the defendant's acquittal, the seizure shall be cancelled and the assets returned. According to article 125 of the BCCrimP, to apply this type of measure it is mandatory to prove the relation between the asset and the crime. Article 126 of the BCCrimP states that the seizure of goods or real estate must be based on 'vehement evidence of illicit origin of the proceeds', for example, a mere doubt is not enough. The public prosecutor and the victim are the ones legitimised to propose this measure.
- There is another interim measure called 'judicial mortgage', provided for in articles 134 and 135 of the BCCrimP, which is a measure to safeguard part of the defendant's property for future compensations for the damages caused to the victim, as well as payment of the procedure expenses, including any fee or penalty that the accused must pay in compliance of a sentencing. Objects to be restricted shall constitute properties that were legally acquired. Only the victim can apply for this measure, seeking reparation. Generally the prosecution may not require this measure, however, in relation to money laundering cases, there is a discussion in Brazilian law regarding the possibility of the public prosecutor filing for compensation to the victim.
- There is also the search and seizure measure, which aims to seize objects obtained by criminal practices that are guarded at the residence or at the company of the defendant.
- It is important to say that the Money Laundering Act also provides that the defendant or public prosecutor may request to the judge the early liquidation of seized objects, in order to avoid deterioration or depreciation (section 2, article 4). In case of conviction, these values shall be used as reparations and to safeguard the right of eventual third party in good faith. In case of acquittal, all values shall return to the defendant (article 141 of the BCCrimP).

**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 the police receive information that someone has committed a felony, or when a crime is detected by the police or public prosecutors, as long as the authorities have evidence of the authorship and criminal materiality, whether a serious crime or not, the police are obligated to initiate a criminal inquiry (article 5 of the BCCrimP), which also aims to identify, detect and freeze the income achieved by the illegal practices.

However, the procedure to freeze proceeds achieved through a crime is not automatic. According to the BCCrimP (articles 125 to 144), the interim measures (see question 21) must be requested by prosecutors, the police or by the victim, depending on the case. It will be up to the judge to decide, according to the situation, whether to perform restriction of proceeds. It is worth mentioning that interim measures shall not, generally, be determined ex officio by the judge.

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

For the framework in relation to confiscation, see question 21.

Any measure shall only be enacted up to the amount of the financial benefit obtained through illegal activities. There is an exception provided by the Money Laundering Act – section 2 of article 4, in which the seizure and or confiscation may be extended to other assets of the defendant, even if they do not relate to the crime, as a measure to secure future reparations, fines and procedural costs.

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

See question 21.

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

There are no specific agencies for this matter. In Brazil, after a judicial decision, the police, court official or even banks can be responsible for tracing and confiscating, depending on the case.

As for financial activities, the responsibility of its supervision remains with the Financial Activities Control Council (COAF). If COAF detects any suspicious operation, it shall inform the authorities, which may initiate an investigation.

Furthermore, when the subject must be submitted to international legal cooperation, the central authority (see question 35) is responsible for requesting the tracing and confiscation of the proceeds to its counterpart in the foreign jurisdiction. In Brazil, the Ministry of Justice performs this function for most international agreements, through the Department of Assets Recovery and International Legal Cooperation of the National Secretariat of Justice and Citizenship (DRCI/SNJ).

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

According to the BCCrimP, all possessions that are directly or indirectly related to a criminal practice shall be confiscated in order to guarantee future compensation for the damages caused by the offence and especially to ensure the loss of the product or profit obtained from the crime (article 125).

The public prosecutor has to prove the relation between the asset and the previous illegal conduct, however, so that the court will accept the request.



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

In article 125, BCCrimP provides the possibility of confiscating real estate properties, as well as mobile assets, even if already transferred to a third party, regardless of any intimate relation.

If the third party has acted in good faith, article 130 provides that it may file a motion against the court's decision.

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

If the defendant is found guilty, he or she shall be charged of all the procedural costs. Articles 133 and 144 of BCCrimP provides that part of the seized assets shall be guarded to guarantee the payment of all procedural costs.

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

Article 91, sections 1 and 2, of the BCrimC provide that the court may confiscate any asset of the defendant, to the limit of the benefit obtained from the felony, if the recovery of the proceeds of crime is impossible.

**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?**

Article 5, paragraph LVII of the BC88 establishes the principle of presumption of innocence, which requires, among other things, that the burden of proof lies with the accusatory party.

Article 126 of the BCCrimP provides that the public prosecutor or the victim has to demonstrate that the asset has been acquired with resources obtained from illegal activities. This is the general provision, although it has its exceptions.

The exception is provided by article 4, section 2 of the Money Laundering Act, which states that the court shall only release the asset if the owner (defendant or third party) demonstrates its licit origin. In this case, the burden of proof is reversed and transmitted to the defendant, which is considered by Brazilian specialists as unconstitutional.

**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 article 91 of the BCrimC, one of the immediate effects of a criminal conviction is the obligation to pay reparations to the victim.

Article 133 of the BCCrimP provides that the money obtained from the confiscation of assets shall be used to compensate the damages caused by the offence to the victim.

If the victim does not agree with the amount set as reparations by the criminal court, he or she may take his or her plea to the civil court, using the criminal conviction as grounds to the claim (article 63 of the BCCrimP). In this case, if the civil court confirms the victim's plea, it shall deduce from the civil reparation the value already determined by the criminal court.

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

See question 31.

**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.**

Interim measures mentioned in question 21 may happen before trial. 'Definitive' confiscation, most of time, may only occur upon conviction ruled by the court.

However, article 119 of the BCCrimP and article 91 of the BCrimC provide that in some cases confiscation is mandatory. It may occur when there is at least evidence of the illicit origin of the assets (eg, restricted weapons, drugs or counterfeit products shall be confiscated regardless of any rule of 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?**

Generally, assets seized are either stored at public warehouses or put into judicial guard by the defendant itself. Brazilian law also dictates that a third party may be nominated to manage all the assets seized or confiscated until they are auctioned or returned to the defendant (article 159 of the BCCrimP).

All costs derived from the managing of seized assets must be paid by the defendant, if condemned, or by the state if the case is dismissed.

Article 4-A, section 12 of the Money Laundering Act provides that the public authorities may utilise the assets seized (especially vehicles and real estate) until the end of the procedure. In this case, the authorities may be responsible for the state of the asset, answering for eventual damages.

**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.**

Brazilian law admits two types of legal assistance, which involve requests from administrative and judiciary bodies.

If the scope of the request is to gather information or evidence of criminal practices or to enforce interim measures, the system to be used is mutual assistance, which may differ from:

- Indirect assistance: this usually involves the foreign affairs bodies of both countries and is mainly used when Brazil does not have a mutual legal assistance treaty (MLAT) but has, at least, diplomatic relations with the counterpart (article 26, section 1, of the BCCivP). In this system, the Brazilian foreign affairs body receives the request and transmits it to the Ministry of Justice, which is responsible for submitting the request to the judiciary or administrative authority.
- Direct assistance: is usually used when Brazil has signed an MLAT with the other country, which provides that any assistance may be requested directly to the other Ministry or Department of Justice, which is responsible for submitting the request to the judiciary or administrative authority responsible (article 28 of the BCCivP).

Regarding the enforcement of foreign judiciary decisions, the instrument used is the letter rogatory, making it imperative that any alien sentence must be previously analysed by the Superior Court of Justice, whose exequatur is necessary (article 36 of the BCCivP).

**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?**

Brazil is signatory to several bilateral agreements that involve criminal matters with a large number of nations, including Canada, China, Colombia, South Korea, Cuba, Spain, United States, France, Italy, Mexico, Nigeria, Panama, Peru, Portugal, Switzerland, Suriname and Ukraine.

Brazil is also signatory to several international conventions with provisions on asset recovery. In particular:

- Protocol of Judicial Mutual Assistance in Criminal Matters for the Mercosur;
- Inter-American Convention On Mutual Assistance In Criminal Matters,
- UN Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances; and
- UN Convention against Corruption and UN Convention against Transnational Organized Crime.

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

There is no private prosecution in the Brazilian legal system. However, as explained in question 22, interim measures may be requested by private individuals.

Furthermore, article 63 of the BCCrimP also allows private individuals, their legal representative or heirs, to go to the civil court, after a final criminal judgment not subject to appeal, for damages, seeking a reparation due to the recognition of a criminal practice by the criminal judge.

# MALHEIROS FILHO MEGGIOLARO PRADO

**ADVOGADOS**

Arthur Sodré Prado  
Gustavo Parente Barbosa  
Fernando Augusto Bertolino Storto

arthur@malheirosfilho.adv.br  
gustavo@malheirosfilho.adv.br  
fernando@malheirosfilho.adv.br

Rua Almirante Pereira Guimaraes, 537  
Pacaembú, São Paulo  
São Paulo  
Brazil

Tel: +55 11 3864 7233 +55 11 3864 7581  
Fax: +55 11 3862 3816  
www.malheirosfilho.adv.br

# British Virgin Islands

Tim Prudhoe, Tim de Swardt and Alexander Heylin

Kobre & Kim

## Civil asset recovery

### 1 Legislation

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

British Virgin Islands (BVI) laws are composed of English common law, equitable principles, locally enacted legislation and some English statutory law. English common law was extended to the BVI by virtue of the Common Law (Direction of Application) Act 1705, and the rules of equity are recognised in the BVI pursuant to the West Indies Associated States Supreme Court (Virgin Islands) Ordinance (Cap 80). A decision at the Privy Council level in respect of any Eastern Caribbean Court of Appeal decision on BVI law is binding. Below that level of authority, decisions of English higher courts are simply highly persuasive. Other Commonwealth jurisprudence (Australia, New Zealand, Canada and others) is also often relied on.

BVI statutes of potential relevance include the BVI Business Companies Act 2004, the BVI Insolvency Act 2003 and the BVI Evidence Act 2006.

In the asset-recovery context, it is worth noting that the Privy Council (hearing a Cayman Islands appeal in 2005) concluded that section 122 of the Bankruptcy Act 1914 – which requires courts in former colonial or Commonwealth territories to assist each other in bankruptcy matters – was still in force in British Overseas Territories despite its repeal in England (*Al Sabah and Another v Grupo Torras SA* [2005] UKPC 1).

### 2 Parallel proceedings

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

There is no statutory bar, but rather discretion to stay (ie, suspend) the civil proceedings. The Civil Procedure Rules (CPR) restrict the use of documents disclosed in civil proceedings being used by the parties outside of those civil proceedings. However, BVI would follow the line of cases commencing (at least in modern times) with *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898 at 904 and culminating in the English Court of Appeal decision in *Attorney General of Zambia v Meer Care & Desai* [2006] EWCA Civ 390 and in which the defendants facing concurrent civil and criminal proceedings (the civil proceedings taking place in England) were given the protection of the civil proceedings being ‘ring-fenced’ such that nothing in those civil proceedings could be used against the defendants in the criminal context. See also *Swallow v Commissioners for Revenue and Customs* [2010] UKFTT 481 (TC), John Walters QC.

Attempts to stay civil proceedings on the basis of concurrent criminal investigations have been seen in the Turks and Caicos Islands, following the commission of an inquiry by Sir Robin Auld. Such attempts have failed: see *Attorney General of the Turks & Caicos Islands v Salt Cay Devco Limited and others* CL51/2010, TCI Supreme Court, as well as *Attorney General of the Turks & Caicos Islands v Emerald Cay Limited and others* CL192/2010. In the latter case, an application to access the embargoed decision from the former case was supported by the claimant (in that jurisdiction ‘plaintiff’), but nevertheless was refused. In *Emerald Cay and others* the definition of the ‘defendant’ in the civil

context was narrowly construed (to exclude an unserved defendant facing police interviews under caution), and an order for evidence to be given by video link was allowed such that the relevant hearing progressed that way in light of expressed fears of arrest in attending in person to give evidence (see also *Polanski v Condé Nast* [2005] 1 WLR 637).

### 3 Forum

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

The principal trial court is the Eastern Caribbean Supreme Court (ECSC).

In April 2009, a new commercial division of the court was opened in the BVI. Generally, under Part 69A and 69B of the ECSC CPR (Application to the Virgin Islands) (Amendment) Order 2009, subject to a statutory discretion to include other (ie, ‘non-qualifying’) cases, a case is suitable for determination in the Commercial Court if it is a commercial claim, namely arising out of the transaction of trade or commerce, and the value of the claim exceeds US\$500,000. The discretion to include cases outside these qualifying criteria is exercised on the basis of the claim still being of a commercial nature and one that warrants being in the commercial list.

The intermediate Court of Appeal is the itinerant appellate division of the ECSC and the ultimate court of appeal is the Judicial Committee of the Privy Council in London, England.

### 4 Limitation

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

Cause-of-action limitation periods are governed by statute and broadly follow the English framework. Thus the statute of limitation will differ depending on the cause of action, as set out in the Limitation Act (Cap 43). For example, the relevant limitation period for claims based in tort or contract is six years; the same limitation period applies for the enforcement of a debt or an award.

Applicable limitation with respect to claims against trustees differs by reference to the way in which such a claim is characterised and whether the trust on which the claimant relies pre-exists the conduct relied on so as to found the cause of action. When a breach of fiduciary duty in the absence of deliberate concealment is based on the same facts as a claim for either or a claim in contract or in tort, then the same six-year period will apply.

However, when the fiduciary has deliberately concealed facts relevant to the cause of action, then the limitation will not apply (for example, an undisclosed interest in a transaction), but considerations of laches (unjustified delay causing prejudice to the defendant in defence of the claim) will still be necessary in respect of consideration of a claim.

### 5 Jurisdiction

**In what circumstances does the civil court have jurisdiction?**

**How can a defendant challenge jurisdiction?**

#### Freezing orders

Jurisdiction of the courts in the BVI is based on section 24(l) of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance (Cap 80) and is ordinarily ancillary to the court’s substantive jurisdiction.

In *Black Swan Investment ISA v Harvest View Limited et al* BVIHCV 2009/399, the Commercial Court held that it had discretion to grant stand-alone freezing injunctions in support of foreign proceedings in which the respondent was subject to the in personam jurisdiction of the BVI court. A defendant may still challenge jurisdiction on a freezing order based on the principles set out in *Yukos CIS Investments Limited & Ors v Yukos Hydrocarbons Investments Ltd & Ors* HCVAP 2010/028 (eg, the relief obtained in the main, foreign proceedings would not lead to a judgment that is enforceable against BVI assets owned or controlled by the defendant).

### Receivership

Jurisdiction is based on section 24 of the West Indies Associated States Supreme Court (Virgin Islands) Act.

## 6 Admissibility of evidence

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

In broad terms, in civil cases, the law of evidence of England and Wales has been adopted in the BVI. The primary test is one of relevance; that is, evidence is admissible if, 'if it were accepted, could rationally affect, whether directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings' (section 63 of the Evidence Act 2006).

Sections 67–79 of the Evidence Act 2006 make admissible (in prescribed circumstances):

- hearsay documentary evidence;
- the statement of an unavailable witness who previously made an out-of-court statement;
- the out-of-court statement of an available witness while testifying;
- expert reports; and
- oral opinion evidence.

## 7 Publicly available information

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

Typical information available to the public includes:

- company information, including:
  - the present and historical status of a BVI company;
  - the identity of the registered agent;
  - the place of its registered office;
  - the date when it was incorporated;
  - certificates of good standing (available to any member of the public for a BVI company);
  - the contents of its memorandum and articles of association; and
  - registered charges (if any);
- list of entities regulated by the BVI Financial Services Commission;
- court documents and judgments;
- Land Registry: can provide certain details including confirmation of the owner of BVI land or real estate upon application;
- BVI Ship Registry: certain information regarding vessels registered under a BVI flag; and
- list of disqualified directors.

## 8 Cooperation with law enforcement agencies

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

Because civil proceedings may be conducted in parallel with the criminal investigation and prosecution, the information obtained and promulgated in a public trial can be used to justify civil proceedings subject to the caveats set out in question 2.

The sharing of information during investigative action is at the discretion of the Serious Crimes Unit of the Royal Virgin Islands Police Force and the Financial Investigation Agency, which is primarily responsible for investigating white-collar crimes. The BVI attorney general also has discretion in such matters, particularly relating to advising the government on requests for information or sharing

evidence outside the territory (eg, with intranational groups such as Interpol).

## 9 Third-party disclosure

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

There is no statutory basis for third-party disclosure or pre-action disclosure as is now possible under English procedural law (English Civil Procedure Rules 34.16 and 34.17). The remnant of the old equitable bill of discovery, the *Norwich Pharmacal* order, is possible in the BVI and most often obtained when a person, through no fault of his or her own, has become involved in the tortious acts of another and facilitates his or her wrongdoing. This gives rise to a duty to assist the person who has been wronged by giving them full information, including as to the location of assets (see *Al-Rushaid Petroleum Investment Company et al v TSJ Engineering Consulting Company Limited*, BVIHCV(Com) 37/2010), and disclosing the identity of the wrongdoers. This is subject to the usual provisos in respect of *Norwich Pharmacal* relief (including that it be relevant, necessary to enable the assertion of rights and not simply a mechanism for accelerating standard disclosure, and that it follow the 'mere witness rule'). *Norwich Pharmacal* orders have been made in the BVI in support of foreign proceedings and against the registered agents of respondent companies incorporated in the BVI (see, eg, *JSC BTA Bank v Fidelity Corporate Services Limited et al*, HCVAP 2010/035; *Jeremy Outen et al v Mukhtar Ablyazov*, HCVAP 2011/30) to disclose details of the BVI company's assets. Note that, as an equitable remedy, the grant of *Norwich Pharmacal* relief is subject to the exercise of discretion.

Disclosure orders can also be made ancillary to a freezing order in the BVI (as in England and Wales). The High Court has recently ruled that this is not, however, available as against a 'non cause of action' defendant (ie, in support of a *Black Swan* freezing order): *Bascunan v Elsaca* BVIHC (Com) 2015/0128.

## 10 Interim relief

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

#### Freezing orders

These are granted if:

- the applicant has a good, arguable case;
- the court uses its discretion to decide whether an order is 'just and convenient'; and
- the defendant presents a risk of asset flight.

These orders are often coupled with a disclosure order regarding the defendant's assets to ensure that the freezing order is effective (ie, by which to 'police' the order). Orders can be granted ex parte, but cannot exceed 28 days. A claimant who successfully obtains an interim freezing order must give an undertaking for damages and costs with the object of compensating the defendants if the claimant should ultimately be unsuccessful at the trial and the court should later find that the defendants have suffered loss as a result of the grant of the order.

#### Appointment of a receiver

There are three requirements for appointment:

- there must be sufficient evidence to show a good, arguable case;
- there must be property to be preserved; and
- the claim must not be frivolous or vexatious.

There are two specific cases in which an appointment is made:

- when the applicant already has an existing right to the property to be preserved (the claimant must have a good prima facie title and the property that is the subject matter of the proceedings must be in danger if left in the possession or under the control of the party against whom the appointment of a receiver is asked for); and
- when a receiver is appointed to preserve property to ensure its proper management pending litigation to decide the rights of the parties to that property.

The appointment of a receiver is often regarded as a remedy of last resort and they are usually appointed ex parte when the court is faced



with allegations of fraud and immediate action is needed to prevent the court's orders from being rendered futile.

## 11 Right to silence

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

Privilege against self-incrimination may be available to a defendant pursuant to both the common law and the as-yet-untested provisions within the Evidence Act. On that basis, the defendant will be able to invoke privilege when a defendant may expose himself or herself to criminal proceedings or, when he or she has failed to comply with the order, contempt proceedings. As noted in question 2, tensions arise in respect of concurrent civil and criminal proceedings.

## 12 Non-compliance with court orders

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

Non-compliance with court orders can be punished by holding a party in contempt of the court. This might include a punitive fine, sequestration of assets, or even jail time, depending on the seriousness of the non-compliance. Contempt proceedings are quasi-criminal in nature, regarding both the standard of proof and the strict observance of procedural requirements, such as personal service of the application to commit to prison.

The recent English Court of Appeal decision in *Dar Al Arkan Real Estate Development Co and another v Al Refai and others* [2014] EWCA Civ 715, gave a committal order extraterritorial effect. In this case, the court held that the principle against the extraterritorial application of legislation does not prevent a committal order under the CPR being made against a foreign director who was not within the jurisdiction and cannot be served in the country. The director was resident and domiciled in Saudi Arabia. In the context of asset recovery, a party can apply to commit a company director to prison – wherever in the world the director may be – as a handy weapon to enforce an order or an undertaking against the company. There is not yet a Caribbean equivalent case to *Dar Al Arkan*.

## 13 Obtaining evidence from other jurisdictions

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

The BVI is a signatory to the March 1970 Convention on Taking Evidence Abroad in Civil or Commercial Matters, and it is pursuant to this convention that letters rogatory requests are usually pursued. The proceeding must be civil or commercial in nature and in respect of actual or contemplated proceedings in the BVI. The permissible breadth of such questions would obviously require input from legal practitioners in the receiving state. Typically, when there are asset-dissipation issues, such requests are not appropriate because of the notice of such provided to the target of the request.

## 14 Assisting courts in other jurisdictions

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

BVI courts have the power to stay (ie, suspend) their own proceedings after granting a freezing order so as to permit litigation to be conducted in another jurisdiction.

Under the BVI's Reciprocal Enforcement of Judgments Act of 1922 (the 1922 Act), final money judgments competently obtained in the High Court in England and Wales, Northern Ireland, or the Court of Session in Scotland (extended to the Bahamas, Barbados, Bermuda, Belize, Grenada, Guyana, Jamaica, St Lucia, St Vincent, Trinidad and Tobago, New South Wales (Australia), and Nigeria) can be registered in the BVI if the court is satisfied with registration and it is made within 12 months of perfection of the judgment.

In cases in which a money judgment has been obtained in a country other than those listed under the 1922 Act, the judgment will be treated by BVI courts as the basis for a cause of action at common law called a 'suit on a foreign money judgment'. The judgment may be the subject of enforcement proceedings in the courts in the BVI under the common law doctrine of obligation by action on the debt evidence by the final money judgment of the competent foreign court, which does

not require a retrial of the issues provided that the following conditions are satisfied:

- the foreign court must have had jurisdiction in the matter and the BVI defendant must either have submitted to such jurisdiction or must have been resident or carrying on business within such jurisdiction and was duly served with process;
- the foreign judgment must not be in respect of penalties, taxes, fines, or similar fiscal or revenue obligations;
- the judgment must not have been obtained by fraud; and
- if recognised or enforced, the judgment in the BVI would not be contrary to public policy.

The BVI will also accept letters rogatory for judicial assistance in the civil proceedings (ie, the inbound inverse of the outbound scenario in question 13); however, the nature and scope of the assistance given to the foreign jurisdiction is at the discretion of the BVI court. It will be refused in respect of enforcement of a non-BVI tax judgment in the BVI itself. Note, however, the decision in *Re: Norway* [1990] 1 AC 723, which is the judicial authority that the BVI courts will follow as to obtaining information via the BVI court for subsequent use back in the home jurisdiction or elsewhere out of the BVI, in respect of enforcement of a tax judgment. Such use will not fall foul of the well-recognised general rule against tax gathering for overseas sovereign states.

Finally, BVI courts will assist other courts in recovering assets in bankruptcy. At present, Part XIX of the Insolvency Act 2003 is not in force, so applicants are limited to ad hoc assistance under Part XVIII. This only applies to applicants from 'relevant countries' (Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, United Kingdom and the United States of America at present). Section 122 of the (English) Bankruptcy Act 1914 is likely to apply in the BVI following the *Gruppo Torres* case mentioned in question 1, although it has not been relied upon to date. Although the specific assistance sought in that case was the recognition of a foreign trustee in bankruptcy, the scope of assistance contemplated in section 122 is wider than that.

Outside of statute, the BVI courts are likely to recognise 'a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up', so long as the information could be obtained in equivalent proceedings in the home jurisdiction: *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36. The BVI courts also will grant *Norwich Pharmacal* relief to foreign litigants in appropriate cases.

## 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 fraud, fraudulent transfer, breach of trust or fiduciary duty, unjust enrichment, conspiracy (an intentional infliction of harm by unlawful means and unlawful means conspiracy) and breach of contract.

Proprietary claims are a permissible subset of the claims listed above, in which the claimant can show title and interest in the property at issue in the matter. There are certain practical advantages in alleging a proprietary claim as compared to a non-proprietary claim: for example, in the context of seeking injunctive relief, unjustified delay may well ruin a non-proprietary claim. This is not so in respect of a proprietary claim. Further proprietary funds are usually exempt from the defendant's carve-out of permissible expenses in the context of a *Mareva* injunction.

## 16 Remedies

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

#### Constructive trust

This can arise in the following ways:

- liability in dishonest assistance, where:
  - there is a breach of trust or fiduciary duty;
  - the party assisted in that breach of trust or breach of fiduciary duty; or
  - the target defendant was dishonest;
- liability for knowing receipt:



- when a third party knowingly receives property impressed with a trust in favour of the claimant;
- when the assets were disposed of in breach of fiduciary duty and received with such knowledge;
- when the recipient beneficially received the assets; and
- when the recipient's state of knowledge at the time of receipt is such that it is unconscionable for him to retain the benefit.

### Tracing

Rules of tracing are an important equitable tool, whereby a victim of fraud can identify its asset or the proceeds and those persons who have handled or received them and assert a proprietary claim against that property.

They can be traced under the following circumstances:

- there must be a distinct equitable title to the property;
- the claimant can elect to follow the original asset and enforce his or her equitable title or alternatively trace the 'substituted' asset in the hands of the fraudster;
- the claimant can choose whether to enforce an equitable lien for the value of the original asset or claim the entire beneficial ownership of the substituted asset under a constructive trust;
- tracing can take place into a mixed fund to which the fraudster has contributed, although when the fund is mixed, beneficial ownership over the entire substituted asset cannot be asserted;
- when tracing into a mixed fund that includes funds belonging to an innocent volunteer, the court will use different identification rules that provide parity between the parties; and
- when the mixed fund has been used to buy a further asset, the claimant will be able to trace his or her share in the new asset, which may increase or depreciate in value.

### Common-law claims

The common-law equivalent of knowing receipt is a personal (ie, not a proprietary) claim.

It is usually used in more-straightforward recovery cases, in which the claimant still retains title at the time of its receipt by another party. In the absence of payment of any consideration or a potential change of position defence, a court can order that monies are paid back.

Restitutionary claims arising from unjust enrichment are, like most other common-law claims, an allegation of wrongdoing on the part of the recipient. However, in respect of restitutionary claims, the recipient must have been one of the wrongdoers. Restitutionary claims are not dependent on tracing into any specific property.

### Fraudulent misrepresentation

A fraudulent misrepresentation is a statement of fact made without belief in its truth, knowingly or recklessly made with the intention that it should be acted upon. Bad faith is not a prerequisite to proof of fraudulent misrepresentation. When a contract has been entered into by reason of fraudulent misrepresentation, the person so induced may rescind the contract, claim damages, or do both.

## 17 Judgment without full trial

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

Yes. Summary judgment is an option under Part 15 of the Civil Procedure Rules 2000.

Rule 12.4 of the BVI Civil Procedure Rules provides for an automatic default judgment for failure to file an acknowledgement of service within the prescribed period on a claim for a specified sum of money.

Types of judgment in which declaratory relief is sought (such as declarations of ownership or other legal rights) cannot be obtained on a default basis.

## 18 Post-judgment relief

### What post-judgment relief is available to successful claimants?

Orders for the delivery of information post-judgment are available in a variety of different contexts: for example, oral examination of a judgment debtor or of a former director or officer by a liquidator of a

company in liquidation, as well as for such former director or officer to deliver up records of the company in liquidation. In the case of money judgments, the judgment creditor may also serve a financial position notice requiring the judgment debtor to complete a statement of its financial position.

The appointment of a receiver and freezing orders are also possible.

## 19 Enforcement

### What methods of enforcement are available?

#### Garnishment

A judgment creditor may obtain payment of a judgment debt from a person who owes money to the judgment debtor, including money in a BVI bank or financial institution.

The court will initially issue a provisional order against the garnishee and debtor and will subsequently consider whether to make a final attachment of debts order at hearing.

#### Charging orders

A judgment creditor will seek to enforce a judgment against shares in a BVI company held by the debtor by obtaining a charging order over the shares and thereafter making an application for the sale of those shares.

An application is made without notice, but must be supported by affidavit evidence.

#### Writs of possession or execution

These are available upon court order.

The bailiff is then able to enforce judgment against land or goods as the case may be.

## 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 no statutory provisions in place governing the funding of litigation in the BVI, and the BVI courts have not had occasion to assess the lawfulness of third-party funding arrangements such as conditional-fee agreements (CFAs) or damages-based agreements. The torts of champerty and maintenance have not been formally abolished as in England and Wales, but it can be expected that BVI courts would give consideration to the global trends towards permitting third-party funding of litigation, and CFAs, at least, would be possible. Note that in *Hugh Brown & Associates (Pty) Ltd v Kermas Limited* (BVIHCV(COM) 2011/13), the Commercial Court was willing to assume, without actually deciding, that there was nothing unlawful about a third-party funding arrangement adopted by the claimant. Although uncommon, it is possible to obtain after-the-event insurance in the BVI.

Reflecting this trend, the litigation-funding market in the BVI is growing.

The courts can manage the costs of litigation through case management orders. Part of the court's case management functions include considering whether the likely benefits of taking a particular step will justify the cost of taking it (Part 25 of the ECSC Civil Procedure Rules). Part 26 of the CPR gives the court a wide spectrum of powers that could be used to manage costs directly or indirectly in the proceedings. These powers supplement the existing costs rules in the BVI, which cap costs in one of three ways: fixed, prescribed or budgeted costs. Costs are usually prescribed, meaning that a successful defendant will receive a percentage of the value of the claim, and a successful claimant would receive a percentage of the sum recovered. This costs regime often results in under-recovery to the prevailing party, and the courts have gone to some lengths to alleviate or circumvent it. Since 2009, updated rules have applied in large commercial cases (ie, those cases heard in the Commercial Division, which could include asset-recovery cases), to allow greater recovery to the successful party based on an English-style assessment of costs.

## Criminal asset recovery

### 21 Interim measures

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

In 1997, the BVI enacted the Proceeds of Criminal Conduct Act (the 1997 Act), which (with several amendments) is now the statutory basis for both prosecuting a criminal offence that results in the financial benefit or gain for a defendant, as well as ensuring the preservation of such assets when awaiting the outcome of such prosecutions.

Should there be sufficient evidence and cause, the 1997 Act empowers the court to issue confiscation orders, restrain property and prevent parties from engaging in business with the defendant, among other interim measures. Some of the specific sections are described in greater detail in the answers given below.

### 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 trigger. Investigations can be the result of regulatory action taken by the Financial Investigative Authority, when in the course of conducting its duties it detects some serious crime of a financial nature.

Similarly, the attorney general can employ the enforcement agencies to initiate an investigation if a situation is referred to its office that merits further action, but there is no automatic trigger.

### 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 1997 Act is the legal basis for granting the court the ability to issue confiscation orders and determines other powers that can be used to effect the confiscation orders. Under subsection 6(6) of the 1997 Act, the benefit figure is calculated as the value of the property obtained as a result of or in connection with the commission of the offence. Section 9 (as amended) requires the court to make certain assumptions as to what the defendant's benefit includes in the case of 'qualifying offences', which is defined very broadly to include any offence to which the 1997 Act applies and that was committed after it came into force. In broad terms, these are that a defendant's benefit includes property held at or from the time of conviction, that any transfers to the defendant from the six years prior to the bringing of criminal proceedings constitutes benefit from crime, and that any expenditure paid by the defendant in the same time frame was done out of the benefit of his or her crime. The assumptions can be disappplied if shown to be incorrect, to avoid double-counting with a previous confiscation order, or to avoid injustice.

### 24 Confiscation procedure

**Describe how confiscation works in practice.**

Pursuant to section 6 of the 1997 Act, if an offender is convicted of an offence in any proceedings before a court and the court determines that the offender has benefited from any relevant criminal conduct, it shall determine the amount to be recovered in his or her case and make an order directing the offender to pay the amount determined.

A person benefits from the offence if he or she obtains property as a result of or in connection with its commission and his or her benefit is the value of the property so obtained.

The sum that an offender is required to pay by virtue of an order shall be equal to:

- the benefit in respect of which it is made; or
- the amount appearing to the court to be the amount that might be realised at the time the order is made, whichever is the lesser.

### 25 Agencies

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

The agencies responsible for tracing and confiscating the proceeds of crime are the Office of the Director of Public Prosecutions for the BVI government and the Financial Investigation Agency (FIA).

### 26 Secondary proceeds

**Is confiscation of secondary proceeds possible?**

Yes. The definition of realisable property at section 3(9) of the 1997 Act includes 'property which, in whole or in part, directly or indirectly represent in his hands the property he received [as a result of his criminal conduct]'.

Based on this, any property in which a person has an interest as a result of his or her criminal proceeds would be subject to a confiscation order.

### 27 Third-party ownership

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

No. Section 4 of the 1997 Act catches gifts of the proceeds of crime as it relates to the convicted party, including the value of such gifts in any confiscation order made as against the convicted criminal defendant. The 1997 Act does not provide for a confiscation order to be made against the spouse or cohabitee of that defendant (or other third-party transferee) when such person(s) are not also convicted criminal defendants. It is possible for the confiscation order to be made in respect of the convicted criminal defendant's interest in property in which the spouse or cohabitee holds their own interest.

Instead, recovery as against those transferees would be by way of civil claim (whether on a proprietary or other basis, see above).

Section 11 of the 1997 Act requires the convicted criminal defendant to provide information in the context of any confiscation proceedings, and any failure to cooperate gives rise to adverse inference as to benefit. This adverse inference would not be to the detriment of any third-party transferee.

### 28 Expenses

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

The 1997 Act does not address this directly. That said, the 1997 Act does enable the imposition of a fine. There is no statutory or otherwise known direct hypothecation as to the way in which any such fine is applied (for example, there is no equivalent scenario to that of the US Department of Justice participating financially in forfeiture recoveries). In the BVI context, it is possible that the proceeds of a fine (or part thereof) could be applied to defray investigative or prosecutorial costs, but whether this in fact occurs is neither publicly known nor ascertainable.

### 29 Value-based confiscation

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

Yes. Pursuant to section 18(l) of the 1997 Act, the court may make a charging order on realisable property for securing the payment to the Crown, when a confiscation order has been made for an amount equal to the value of that 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 prosecuting authorities. The proof of criminal benefit and also the amount of such benefit is subject to the civil standard of proof (ie, the balance of probabilities, see section 6(9) of the 1997 Act). Although the 1997 Act does not explicitly place the burden of disproving the assumptions mentioned in question 23 on the

defendant, in practice it would likely be the defendant who would have to disprove them.

### 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. There is no statutory regime for compensation to the victims of crime, whether from recovered amounts or otherwise.

Note, however, that the information that surfaces from a criminal trial, including a court's determination of guilt, can be used in civil proceedings to make a claim.

### 32 Confiscation of profits

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

Yes. There is scope for exactly this by the prosecuting authorities: sections 16 to 18 of the 1997 Act provide the basis for restraint or charging orders so as to freeze property when there are pending proceedings.

### 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. Confiscation of criminal proceeds under the BVI statutory regime requires a criminal conviction (see subsection 6(1) of the 1997 Act), although offences 'taken into consideration' (ie, when there is no conviction) at the time of sentencing can also form 'relevant criminal conduct' that triggers confiscation (subsection 6(5)(b)) at the same time. Additionally, there is legislation subsidiary to the Criminal Justice (International Cooperation) Act 1991, namely the Criminal Justice (International Cooperation) (Enforcement of Overseas Forfeiture Orders) Order 1996 (liaising with designated countries in relation to particular triggers at schedules 1 to 3 thereof) and that creates a regime under which BVI enforcement of non-BVI forfeiture orders is feasible in specific circumstances.

An alternative to domesticating the non-BVI forfeiture order would be civil proceedings in the BVI on the basis of the non-BVI order.

When, as is very often the case, extremely prompt action is required pre-conviction to safeguard assets pending a criminal trial and anticipated confiscation, a restraint order can be obtained pursuant to section 17 of the 1997 Act, and this can be an application made ex parte – see section 17(2)(4)(b).

### 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 manages the seizure of assets on a case-by-case basis and subject to its general supervision (as distinct from day-to-day control). The most common approach is the appointment of an experienced accountant or insolvency practitioner as receiver. There is no government agency to do so. As to running costs referable to such assets, these can be defrayed from income (when the assets produce income, such as real estate or a business). The running costs of other types of assets (ie, non-income-producing) will be an expense to the BVI government itself.

When seized assets are 'put to work' by means of commercial use, this would be on an arm's-length (ie, charge-for) basis.

### 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 framework for making requests for foreign legal assistance is essentially the same as the framework described in question 36. For

### Update and trends

The BVI government has pressed ahead with changes to the regimes governing company transparency and beneficial ownership. In particular, registers of directors will be mandatory and registers of members will be optional by March 2017 for existing companies. The rules are already in force in respect of newly incorporated companies. Additionally, registered agents can no longer rely on third-party 'introducers' to conduct 'know your customer' and hold client information in respect of the end client. The registered agent must hold this information itself in the BVI or be able to obtain it without delay from the introducer. The most recent changes will require the registered agent to maintain beneficial ownership information on a separate server that is directly accessible by the BVI regulator (the Financial Services Commission). That will, in turn, be available to the United Kingdom authorities in as short a time frame as one hour. The BVI has so far successfully resisted calls for a public register of beneficial owners. Issues around the data theft known generally as the 'Panama Papers' will continue to keep these issues in the public eye.

some countries, bilateral or multilateral treaties are in place to facilitate mutual requests for foreign legal assistance. In other cases, the various UN conventions and treaties assist the BVI in requesting legal assistance as needed. In cases of mutual legal assistance in tax matters, the BVI is signatory to several tax information exchange agreements that comply largely with the Organisation for Economic Co-operation Development's model template.

### Procedure

As is also described below, the procedures for requesting foreign legal assistance are very similar to the process of complying with requests for foreign legal assistance.

When a treaty is in place, the process can be streamlined such that courts and law enforcement agencies can work directly together.

When no treaty exists, the court will have the option to submit letters rogatory to other courts for assistance or direct letters to relevant agencies in other countries.

### 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.**

#### Framework

##### *Mutual Legal Assistance (United States of America) Act 1990*

Implements the bilateral treaty between the United States and the United Kingdom to improve the effectiveness of the law enforcement authorities of both the BVI and the US in relation to the prosecution and suppression of crime through the process of cooperation and mutual legal assistance. It is limited to criminal matters.

##### *Criminal Justice (International Cooperation) Act 1993*

Creates a flexible and comprehensive regime that enables the BVI to cooperate with other countries in matters pertaining to criminal investigations. It also regulates substances useful for the manufacture of controlled drugs.

##### *Proceeds of Criminal Conduct Act 1997*

Represents an all-crimes, anti-money laundering legislation. It provides for the recovery of the proceeds of crime and establishes a regime for the registration and enforcement of external confiscation orders.

##### *Financial Services Commission Act 2001*

Establishes the Financial Services Commission as the BVI's autonomous regulatory institution with powers to license, regulate and develop the financial services industry. It empowers the commission to receive and grant assistance on request from a foreign regulatory authority for the purpose of enabling the foreign authority to discharge its regulatory functions.

**Financial Investigation Agency Act 2003**

Establishes the FIA, which works with foreign governments and regulatory agencies to prosecute financial crimes and offences. It has the authority to order persons to refrain from completing transactions, freeze bank accounts and produce documents.

**Mutual Legal Assistance (Tax Matters) Act 2003**

Gives effect to the agreement between the government of the US and the government of the UK (including the government of the BVI) for the exchange of information relating to tax matters, and it extends to any similar agreements the government of the BVI may enter into.

**Procedures**

The FIA (see above) remains the focal point for conducting investigations. Mutual legal assistance is only provided in respect of valid requests from established government or government-related authorities or agencies. With respect to the current regime, no assistance is provided to individual non-government persons or institutions. Every request for legal assistance must be clear and precise regarding its nature and purpose. It must be written legibly in English.

With respect to requests for legal assistance:

- law enforcement: requests for assistance are sent to the governor and the attorney general. The attorney general will advise the governor on how to respond to the request;
- regulatory breaches or investigations: the managing director or chief executive of the Financial Services Commission will receive the request; and
- tax matters (information exchange): requests of this nature are managed by the financial secretary.

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

The BVI is party to the following international conventions:

- UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- UN Convention against Transnational Organized Crime 2000;
- UN Convention for the Suppression of the Financing of Terrorism 1999; and
- UN Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970.

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

The present state of the law in the BVI does not provide for this.

**KOBRE & KIM****DISPUTES  
AND INVESTIGATIONS**

**Tim Prudhoe**  
**Tim de Swardt**  
**Alexander Heylin**

**tim.prudhoe@kobrekim.com**  
**timothy.deswardt@kobrekim.com**  
**alexander.heylin@kobrekim.com**

Commerce House  
Waterfront Drive  
Road Town, Tortola, VG 1110  
British Virgin Islands

Tel: +1 284 852 1600  
Fax: +1 284 852 1620  
www.kobrekim.com



# Canada

Maureen Ward and Nathan Shaheen

Bennett Jones LLP

## Civil asset recovery

### 1 Legislation

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

In Canada, civil legislation relevant to private investigations is primarily made at the provincial level. Such legislation varies in certain respects in name and substance across provinces. However, with the exception of the province of Quebec, all Canadian provinces are based in English common law traditions. The largest province – and the financial centre of Canada – is Ontario. The majority of information in this chapter is based on Ontario law, which is broadly reflective of the laws across the common law provinces. In Quebec (which is generally not addressed in this chapter), relevant legal principles are found in the Civil Code.

In Ontario, for example, there are various legislative sources relevant to undertaking a private investigation. There are two primary legislative sources that provide for court-sanctioned investigations – the Courts of Justice Act, RSO 1990, chapter C 43 and Ontario's Rules of Civil Procedure, O Reg 147/16. Together these statutes provide the legislative foundation for obtaining pre-action disclosure of financial and other relevant information, private search warrants, injunctive relief and the ability to register notice of pending litigation to prevent the dissipation of real property. The availability of such relief is discussed further below.

Depending on the circumstances, various other legislation may also assist with private investigations. At both the provincial and federal level, there is legislation pertaining to how evidence may be obtained and used in courts (eg, Ontario: Evidence Act, RSO 1990, chapter E 23; Federal: Canada Evidence Act, RSC 1985, chapter C 5). There is municipal, provincial and federal legislation providing a regime for accessing documents and information held by government departments and agencies (eg, Ontario: Freedom of Information and Protection of Privacy Act, RSO 1990, chapter F 31; Federal: Access to Information Act, RSC 1985, chapter A 1).

In Ontario, other relevant provincial legislation includes:

- Private Security and Investigative Services Act, 2005, SO 2005, chapter 34, which addresses the licensing of and standards to be met by private investigators;
- Securities Act, RSO 1990, chapter S 5, which allows for, among other things, the appointment of a receiver (with investigative powers) in connection with securities-related wrongdoing;
- Civil Remedies Act, 2001, SO 2001, chapter 28, which addresses compensation for losses suffered as a result of unlawful activity; and
- Fraudulent Conveyances Act, RSO 1990, chapter F 29 and Assignments and Preferences Act, RSO 1990, chapter A 33, both of which deal with, among other things, the steps available to claw-back improper transfers of funds or other assets for the purpose of defeating creditors.

At the federal level, further legislation relevant to private investigations includes:

- Bankruptcy and Insolvency Act, RSC 1985, chapter B 3, which provides various tools to be used by court officers and others to obtain information relevant to corporate entities in financial distress, including as a result of fraud; and
- Privacy Act, RSC 1985, chapter P 21, which relates to an individual's right to access and correct personal information the federal

government holds about them and the government's collection, use and disclosure of such information.

In addition to the foregoing, and as discussed below, under the Canadian common law system, the courts are also often responsible for establishing rules and principles that are relevant to conducting private investigations.

### 2 Parallel proceedings

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

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.

### 3 Forum

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

Before commencing a claim in Canada, a decision should be made about which province the claim should proceed in. Plaintiffs 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 plaintiff's chosen province, or demonstrates that the chosen forum is not 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, Canadian 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 superior courts are also divided by certain subject matters such as bankruptcy, 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.

#### 4 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 limitations periods, with two years increasingly emerging as the chosen time period. In some general limitations legislation, other more specific causes of action are also addressed. For instance, the province of Manitoba's The 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.

Canadian 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 and in the circumstances of the person with the claim 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 capacity to commence claims such as minors or persons with certain disabilities.

#### 5 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. While the courts maintain the inherent jurisdiction to control their own procedure, a presumption in favour of jurisdiction is generally applied. As discussed above, 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 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.

#### 6 Admissibility of evidence

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

In Canada, 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, Canadian courts have rules available for summary judgment motions, which can avoid the need for full trials. In Ontario, while 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 vis-à-vis motions.

#### 7 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.

#### 8 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 (noted above) 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.

#### 9 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:

- 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).

#### 10 Interim relief

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

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 materials 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 plaintiff 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.

## 11 Right to silence

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

No. In a civil action, neither party has the right to remain silent. All relevant, non-privileged information must be produced. Even non-parties may be compelled to give evidence if such evidence is sufficiently material to the proceedings. Subject to certain protections, information must be produced in a civil proceeding even if the evidence is also relevant to a concurrent criminal proceeding.

A significant protection, however, is the deemed undertaking rule. This common law rule provides that where evidence has been produced in a civil proceeding but not filed with the court, the parties and their lawyers may use the evidence only within the proceeding in which the evidence was obtained. In many provinces, the deemed undertaking rule has been codified in the relevant rules of civil procedure (eg, rule 30.1 of Ontario's Rules of Civil Procedure). In addition, both the provincial and federal evidence acts provide that, where a witness is compelled to testify, the witness may elect to declare that the resulting evidence is not admissible against the witness in any subsequent civil or criminal proceeding.

## 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 (*CAS 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 at 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 both other provinces and foreign jurisdictions anywhere in the world.

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

- 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 main causes of action for civil asset recovery are tort claims including fraud, fraudulent misrepresentation, 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 above, there are preliminary remedies focused on preservation of assets and disclosure of information. Remedies at the conclusion of an action on the merits include:

- a monetary award as compensation for damages;
- 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 plaintiff 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 plaintiff 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 in Canada includes primarily the relief set out below at 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, either to supervise the judgment debtor's affairs or take control of the debtor's assets.

In addition, a plaintiff or judgment creditor can bring a fraudulent conveyance claim either in 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 above, if a judgment debtor fails to comply with a judgment, the plaintiff 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 Canadian 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. However, Canadian courts have recently loosened these restrictions and opened the door to litigation funding arrangements in appropriate circumstances.

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. Canadian 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), Canadian 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 Canada's 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 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 Canadian 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. FINTRAC analyses these reported transactions. It 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 proceeds of crime and that the offender committed the designated offence in relation to that property, then the court must order the forfeiture of the property to the Crown (see section 462.37(1)).

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:

- 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 attorney generals 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 Works and Government Services 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 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; *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)). 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 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 of 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.**

Ontario, Alberta, Manitoba, British Columbia, Saskatchewan, Nova Scotia, Quebec and New Brunswick 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 Works and Government Services. 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.**

Canada's Department of Justice has an International Assistance Group (the 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 speaking, 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;

- 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 include:

- 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).
- Summarize the case.

- Set out the applicable legal provisions. Include verbatim text of the relevant provisions, including applicable penalties.
- 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 attorney generals 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:

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



**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

Jalil Asif QC, James Corbett QC and Pamela Mitchell

Kobre & Kim

## Civil asset recovery

### 1 Legislation

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

The primary laws in the Cayman Islands to consider in a private investigation to trace assets are:

- the Confidential Information Disclosure Law, 2016 – this replaced the Confidential Relationships (Preservation) Law (2015 Revision) with effect from 22 July 2016 and has decriminalised the disclosure or use of confidential business information connected to the Cayman Islands. Confidential information is now protected under the common law of breach of confidence. Persons who disclose such information with the court's permission, in providing court evidence or in circumstances in which there is a serious threat to life, have a statutory defence against any claim for breach of confidence; and
- the Evidence (Proceedings in other Jurisdictions) (Cayman Islands) Order 1978 – this gives effect within the Cayman Islands to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970. It therefore allows the Cayman Islands court, on request from a foreign court, to order examination of witnesses; documentary discovery; inspection, preservation, detention, taking of samples, or testing of any property; and the medical examination of any person, provided that such measures are legally permissible in the requesting country.

In addition to the legislation summarised above, recourse can be had to common law and equitable remedies in asset tracing. The criminal jurisdiction in relation to tracing and seizing proceeds of crime may have indirect benefit for individuals seeking to pursue their own investigations and asset tracing.

### 2 Parallel proceedings

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

Parallel civil and criminal proceedings are permissible in the Cayman Islands courts: *The Matter of Fraser* (2003) CILR 227 is authority that the civil court can make findings concerning property rights notwithstanding ongoing criminal proceedings. The case concerned property that had been restrained by the Crown in confiscation proceedings in which the court determined the third party's civil rights in that property.

In *Panton v Financial Institutions Servs Ltd*, PC App No. 95 of 2002 (an appeal from Jamaica), the Privy Council indicated that a defendant in criminal proceedings would have to show that, in all the circumstances, he or she would suffer unjust prejudice by the continuance of civil proceedings in order to obtain a stay of them until the conclusion of the criminal process. For example, the absence of a right to silence in civil proceedings, and the resulting impact on the criminal proceedings of the defendant having to give evidence, was a factor, but the defendant should not be able to use the stay to obtain a tactical advantage. In *Tasarruf Mevduati Sigorta Fonu v Wisteria Bay Ltd & Ors* (2007) CILR 185, the Cayman Islands court applied *Panton* and refused to stay a

domestic civil claim in which there were parallel criminal proceedings abroad arising out of the same issues.

### 3 Forum

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

Because of the financial jurisdiction limits, commercial claims are likely to be commenced in the Grand Court of the Cayman Islands. Certain types of claims are specifically required to be commenced within the Financial Services Division of the Grand Court, for example proceedings relating to Cayman-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.

### 4 Limitation

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

The statutory limitation periods for bringing a civil claim in the Cayman Islands depend on the nature of the cause of action:

- tort: six years from the date of the damage;
- breach of contract: six years from the date of the breach;
- breach of trust (other than fraud): six years;
- fraudulent breach of trust: no limitation period; and
- claims for the recovery of land: 12 years from the date when the right accrued.

The starting date of the limitation period can be delayed where the claimant is only able with reasonable diligence to discover the facts on which the cause of action is based at some time after the conduct giving rise to the claim occurred.

### 5 Jurisdiction

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

The Grand Court's jurisdiction is based on service of process – provided that the defendant is properly served, the court will have jurisdiction over him or her. Service may take place within the jurisdiction, however fleetingly the defendant is physically present. There is also a discretionary extraterritorial jurisdiction, under which the court may permit service on a defendant overseas if certain gateways apply. A defendant served out of the jurisdiction, who has not already submitted, can challenge jurisdiction, and any defendant may raise forum non conveniens arguments.

### 6 Admissibility of evidence

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

Generally, hearsay evidence is admissible in civil proceedings. The Evidence Law (2011 Revision) provides in sections 42–56 statutory direction as to how admissibility is determined. The approach is very similar to pre-1999 English law, and English pre-1999 case law can often be persuasive. The *UK Supreme Court Practice* (1999 edition) (White Book) is a useful reference text.

## 7 Publicly available information

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

#### Securities registration

Securities listed on the Cayman Islands Stock Exchange must be registered with the Cayman Islands Monetary Authority (CIMA). The only information publicly available is the registration number and the type of securities fund that is registered. The date of registration may also be available.

#### Court records

Court files can be inspected to obtain copies of the originating process in each case. Other case documents can be inspected only by the parties to those proceedings. A non-party who wishes to inspect a court file must make an application to the judge setting out the reason for the application and the portion of the file that he or she wishes to inspect. Such applications may be granted if the applicant demonstrates an interest, financial or otherwise, in the outcome of the proceedings.

#### Exempt companies

The certificate of incorporation, confirmation of the company's registered office and copies of the memorandum and articles of association can be obtained from the Registrar of Companies. The registers of members and mortgages and charges, and details of the directors, are not publicly available.

Enquiries can be made at the registered office for other information, but will usually be refused unless very good reasons for disclosure are provided.

#### Ordinary companies

The register of members for ordinary resident companies is open to inspection.

#### Limited liability companies

The location of the registered office and other general information such as the date of incorporation for Cayman limited liability companies can be obtained from the Registrar of Companies. A company's register of security interests can only be inspected by persons who are permitted under the LLC agreement or the manager.

#### Exempted limited partnerships

Filings available for public inspection primarily comprise a statutory statement containing information such as the general nature of the partnership's business, the location of its registered office, and the name and address of the general partner. The partnership agreement will be available if filed, but filing is not mandatory.

#### Land registry

This is open to public inspection.

#### Motor vehicle registry

Information on the ownership of vehicles is available for public inspection.

#### Shipping and aircraft registries

Information on the ownership of Cayman-registered vessels and aircraft is available for public inspection.

In the majority of the above cases, a fee is payable.

## 8 Cooperation with law enforcement agencies

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

The Proceeds of Crime Law (2014 Revision) includes power for the court to order the Financial Reporting Authority to provide information, documents or evidence. In addition, the Freedom of Information Law (2015 Revision) provides a general right of access to information held by public bodies, except when those records are considered exempt under Part III of the law, which includes records that affect

national security, records subject to legal privilege and records relating to personal information.

## 9 Third-party disclosure

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

#### Norwich Pharmacal relief

This provides a mechanism for obtaining pre-action discovery from third parties when the claim could not be commenced without discovery of the information sought or when the person against whom discovery is sought has become involved, albeit innocently, in the wrongdoing.

#### Bankers Trust orders

Discovery from banks can be obtained following *Bankers Trust v Shapira* (1980) 1 WLR 1274. The court's power can be exercised when:

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

## 10 Interim relief

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

The Cayman Islands court has the full range of powers to grant interim relief in appropriate cases. In particular:

- *Mareva* injunctions (freezing orders) to prevent dissipation of assets, with ancillary disclosure requirements;
- *Anton Piller* orders, requiring admission to a defendant's property to search for and remove documents or property or both; and
- (in insolvency proceedings) an order appointing a provisional liquidator in company winding-up proceedings to prevent:
  - dissipation of the company's assets;
  - oppression of minority shareholders; or
  - mismanagement or misconduct by the company's directors.

## 11 Right to silence

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

A defendant in civil proceedings has a right to silence against incriminating itself or its spouse in relation only to criminal offences under the laws of the Cayman Islands: section 55 of the Evidence Law (2011 Revision).

## 12 Non-compliance with court orders

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

Persons who fail to comply with court orders risk contempt proceedings being brought against them. If proved, the party in default could be subject to a fine, sequestration of assets, imprisonment for up to two years or a combination of these. A court may issue an 'unless' or debarring order, which will prevent the party in default from taking other steps or action in the case specified in the order (for example, they may be debarred from relying on documents, adducing factual or expert evidence or from defending the case).

## 13 Obtaining evidence from other jurisdictions

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

Application for assistance can be made under The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents and under The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970.



#### 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 serving proceedings within the Cayman Islands**  
The Grand Court Rules permit service of foreign proceedings under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents by a bailiff, attorney or process server.

If service by the bailiff is required, the proceedings (including any necessary translation) should be sent by the relevant authority in the other jurisdiction to the clerk of the Cayman Islands court with a written request for service to be effected.

##### Disclosure and interim remedies

The Grand Court can, in appropriate circumstances, order the disclosure of documents for use in proceedings in another jurisdiction, subject to compliance (if necessary) with the Confidential Information Disclosure Law, 2016.

Pre-action discovery can be sought from the proposed defendant, in an appropriate case, in accordance with the principles set out in *Black v Sumitomo* [2003] 3 All ER 643. However, when the application is made to assist civil asset recovery proceedings elsewhere, the requirements may be difficult to satisfy.

Third-party discovery may be obtained in certain cases, using the *Norwich Pharmacal* and *Bankers Trust* powers.

*Mareva* injunctions (freezing orders) and *Anton Pillar* injunctions (search-and-seizure orders) are available to assist with asset preservation and evidence gathering.

##### Taking evidence from a witness within the Cayman Islands

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 can be used. The foreign court must usually issue a letter of request seeking the assistance of the Grand Court. Application is then made locally to the Grand Court for an order giving effect to the request. The witness is then examined before a judge of the Grand Court and a transcript of the evidence provided to the requesting court.

##### Enforcing foreign judgments

The Cayman Islands will allow enforcement of foreign judgments and orders (including in personam orders) at common law by means of commencing a new proceeding based on the foreign judgment. Details are contained in the *Getting the Deal Through* book *Enforcement of Foreign Judgments*.

The statutory enforcement regime in the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) is currently applicable only to specified Australian judgments.

#### 15 Causes of action

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

The full range of common law remedies is available. These include contract, tort and equity-based claims, such as conversion, unjust enrichment and fraud. Proprietary claims (tracing at law and in equity) are available.

#### 16 Remedies

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

The court may grant the following remedies in civil recovery actions:

- damages at law – both compensatory and aggravated (if certain limited criteria are met);
- compensation in equity;
- interim and permanent injunctions;
- restitution of property (unjust enrichment cases);
- an account of profits (breach of trust or fiduciary duty cases);
- declarations as to the parties' rights; and
- orders allowing the claimant to follow, trace and recover from the trustees or a third-party property that has been applied or transferred in breach of trust.

#### 17 Judgment without full trial

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

The Grand Court Rules permit default judgment or summary judgment to be obtained when specified criteria are met.

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

Summary judgment can be obtained when the plaintiff satisfies the court that there is no genuine defence to the claim with a realistic prospect of success and no other reason why the case should go to a full trial.

#### 18 Post-judgment relief

##### What post-judgment relief is available to successful claimants?

The full range of pre-judgment interim relief is similarly available against defendants post-judgment to secure funds or property pending enforcement.

#### 19 Enforcement

##### What methods of enforcement are available?

Available methods of enforcement include:

- seizure and sale of assets;
- garnishee orders (requiring a third party who owes money to the judgment debtor to pay it to the judgment creditor);
- charging orders over land or other assets; 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?

The Cayman Islands is a costs-shifting jurisdiction: the general rule is that the loser pays the winner's legal costs, subject to the court reviewing their reasonableness.

The Cayman Islands does not permit contingency fees to be charged. Conditional fees are permitted, but the court must approve the fee agreement in each case. It is unclear to what extent the Cayman Islands courts will permit litigation funding by third parties; the doctrines of maintenance and champerty are still relevant in the Cayman Islands. The issue of conditional fees is still under review by the Law Reform Commission.

The overriding objective contained in the Grand Court Rules requires the court to deal with every cause or matter in a just, expeditious and economical way. The court has a duty actively to manage proceedings by considering whether the likely benefits of taking a particular step justify the cost of taking it. There are, however, no explicit powers to make costs-management orders or to require case budgets, nor has there been a comprehensive review of costs as in England and Wales under the Civil Procedure Rules.

#### Criminal asset recovery

##### 21 Interim measures

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

The Cayman Islands has enacted legislation addressing seizure and confiscation of criminal assets: Proceeds of Crime Law (2014 Revision) (PCL). This legislation empowers the court to issue orders to the police or other enforcement agencies to restrain or seize property.

Such orders can prevent a specified person from dealing with any realisable property held by him or her, subject to such conditions and exceptions as the court may specify.

**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 can be initiated by enforcement authorities when serious crimes are detected.

The powers of the Grand Court under the PCL to issue orders for the production of information to assist in civil recovery investigations are not automatically applied but are often invoked.

**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 governed by the PCL. The court can make a confiscation order against a defendant in addition to any other sentence passed upon him or her. The court must decide whether the defendant has a criminal lifestyle, in which case there is a presumption that all of his or her assets are benefits from criminal conduct; otherwise the court can order confiscation only to the extent that it concludes that the defendant has received a benefit from the particular criminal conduct in question. The court must determine the amount of the benefit and can then order confiscation of that amount or a lesser amount.

**24 Confiscation procedure**

**Describe how confiscation works in practice.**

The criminal court must consider at the time of sentencing the defendant whether to make a confiscation order (although consideration can be adjourned and the actual order can be made up to two years after sentence).

The procedural stages are as follows:

- The attorney general must file at court a statement of information setting out the Crown's case as to why the defendant has a criminal lifestyle, whether he or she has benefited from the criminal conduct and the extent of the benefit. The statement must also include any information relevant to the assumptions that the court can make about the fact of the defendant's criminal lifestyle. When it is not the Crown's case that the defendant has a criminal lifestyle, the statement must give details of the Crown's case as to the defendant's specific benefit from his or her particular criminal conduct and the amount of such benefit.
- The court may then order the defendant to indicate the extent to which he or she accepts the Crown's statement and, where he or she does not, to set out his or her own case.
- The court then decides whether to make a confiscation order based upon the material in the statements and upon evidence heard in court. The court's decision is made on the balance of probabilities only.
- Once the order is made, enforcement agencies, such as the police or customs officers, can seize property belonging to the defendant up to the amount of the confiscation order. Orders can also be applied to third-party holders of the property (ie, banks or funds) provided that the defendant's property can be sufficiently identified and is not mixed with that of third parties.

**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 the proceeds of crime:

- the police and customs officers are the main agencies active in confiscation of criminal proceeds, in conjunction with the attorney general;
- CIMA can initiate its own actions (as mentioned above), which can include asset tracing; and
- the Financial Reporting Authority.

**26 Secondary proceeds**

**Is confiscation of secondary proceeds possible?**

Under section 76 of the PCL, realisable property includes money and all forms of real or personal property, things in action and other tangible or incorporeal property. There is no distinction under the law between primary proceeds and secondary proceeds. Rather, confiscation is possible across all asset classes.

**27 Third-party ownership**

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

Property acquired by third parties or relatives can be at risk of confiscation when the property is a 'tainted gift' within the meaning of sections 70 and 71 of the PCL, namely property directly or indirectly connected with general or specific criminal conduct (as applicable) or transferred at a significant undervalue. Property that represents a tainted gift is 'realisable' against a third party in the same way it would be against the individual that gifted it to them.

**28 Expenses**

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

While the PCL does allow the imposition of a fine, it does not directly address the recovery of costs by agencies.

**29 Value-based confiscation**

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

Confiscation under the Proceedings of Crime Law (2014 Revision) is value-based, but depends on whether the defendant is found by the court to have a 'criminal lifestyle'. If he or she does, then the court can make a number of specified assumptions regarding the defendant's assets (under section 19) before proceeding to fix the amount of the confiscation order. If the defendant does not have a criminal lifestyle then the court is limited to making a confiscation order in the amount of the defendant's benefit from his or her specific criminal conduct (as determined by the court).

Under Part s18(1) of the Proceedings of Crime Law (2014 Revision):

*For the purposes of deciding the recoverable amount, the available amount is the aggregate of the total of all the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority; and the total of the values (at the time) of all tainted gifts.*

Any property held by the defendant within this definition is potentially 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?**

There are a number of assumptions built into the Proceedings of Crime Law (2014 Revision) that effectively reverse the burden of proof if the court rules that the defendant either has a criminal lifestyle or has benefited from a particular crime, and it is then for the defendant to prove that the property he or she acquired or disposed of in the six years before the proceedings was not obtained through 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?**

There is a separate regime for making compensation orders within criminal proceedings to compensate victims of the crime. The court can order that the compensation payment be satisfied from moneys recovered through the confiscation process.

If the court has information that the victim intends to commence a civil claim for damages, then the court can take that into account in deciding whether to make a confiscation order, but there is no express power to order that funds confiscated can be used to satisfy a civil claim.

### 32 Confiscation of profits

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

Because the confiscation regime is based upon the benefit from a criminal lifestyle or specific gain from criminal behaviour, financial advantage or profit obtained is automatically caught within the confiscation regime. There is no specific reference to a power to confiscate such types of benefit, but this is not necessary given the statutory language in the PCL.

### 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 PCL permits the confiscation procedure to be commenced before the defendant is formally sentenced. It would be very unusual for the court to do so before conviction, but the attorney general can apply to restrain assets in order to preserve them pending conclusion of confiscation proceedings. In certain circumstances, the Cayman authorities may consider a situation serious enough to justify in rem restraint or confiscation or both. For instance, in the *Montesinos-Torres* case, the court made a confiscation order following a judicial request from the Peruvian court, without any conviction occurring within the Cayman Islands.

### 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?

Under the PCL, the attorney general may order a management receivership in respect of any realisable property to which a restraint order applies, or an enforcement receivership. The court can empower the official or management receiver to realise so much of the defendant's property as is necessary to meet the receiver's remuneration and expenses.

Once the relevant expenses have been paid, the proceeds are paid to the accountant general of the Cayman Islands. When there are excess funds arising from realisation under a confiscation order, the accountant general is to treat the remainder as if it were a fine imposed by the court.

### Update and trends

The Cayman Islands has introduced limited liability companies. The information that can be obtained about companies in the Cayman Islands remains very limited. Information as to the identity of the ultimate owners is not accessible to the general public.

Issues surrounding access to such information were first highlighted in 2014 in response to the UK government and the European Union's initiative to create public registers of legal and beneficial ownership information on overseas shell companies and trusts, which remains a priority area for the UK government. The most significant change is the repeal of the Confidential Relationships (Preservation) Law and its replacement by the Confidential Information Disclosure Law, 2016, which moves the regulation of the release of information from the criminal jurisdiction to that of the common law of breach of confidence.

### 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 to various international treaties regarding asset tracing in criminal matters, the Cayman Islands can implement many of the legal tools generally available including letters rogatory for requests for evidence procurement, freezing orders, etc. The procedural framework for implementing these tools is dependent on the international treaty and can vary substantially.

### 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 Criminal Justice (International Cooperation) Law (2010 Revision) (CJICL) allows for mutual legal assistance in the context of all serious offences under Cayman Islands law if requested by a country listed in the annex to the CJICL (identical to signatories of the Vienna Convention).

The Proceeds of Crime Law (2014 Revision) and the Misuse of Drugs Law (2014 Revision) (MDL) govern the registration or enforcement of external confiscation orders. Requests for the enforcement of such orders may be requested only by countries listed in the annex (Vienna Convention).

The Evidence (Proceedings in other Jurisdictions) (Cayman Islands) Order (EO) enables the Grand Court to provide assistance to foreign courts in obtaining evidence in the criminal and civil cases in which charges have been brought against the defendant. Requests are to be made through letters rogatory. The measure may be requested by any country.

KOBRE & KIM

DISPUTES  
AND INVESTIGATIONS

Jalil Asif QC  
James Corbett QC  
Pamella Mitchell

jalil.asif@kobrekim.ky  
james.corbett@kobrekim.ky  
pamella.mitchell@kobrekim.ky

45 Market Street, Suite 3207  
Camana Bay  
Grand Cayman KY1-9006  
Cayman Islands

Tel: +1 345 749 4000  
Fax: +1 345 749 4020  
www.kobrekim.com

**Procedure**

The central authority for all requests made pursuant to the CJICL, the MDL and the PCL is the attorney general; counsel in the Attorney General's Chambers will be instructed to execute the request.

The central authority for all requests made through letters rogatory based on the EO is the Grand Court. All applications to the Grand Court for the grant of letters rogatory are formally handled by the attorney general. If granted, the evidence will be transmitted to the requesting court by the clerk of the Grand Court.

The central authority to receive mutual legal assistance requests based on the bilateral treaty with the United States is the chief justice.

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

The Cayman Islands is a signatory to the following conventions:

- the Vienna Convention;
- the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;
- the United Nations Treaty on Organized Crime;
- the United Nations Convention against Corruption; and
- the Organisation for Economic Co-operation and Development Anti-Bribery Convention.

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

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



# Cyprus

**Andreas Erotocritou and Antreas Koualis**

**AG Erotocritou LLC**

## Civil asset recovery

### 1 Legislation

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

Anyone undertaking private investigations in Cyprus must take notice of and heed the following legislation regulating matters of personal data, confidentiality, privacy and criminal liability:

- the Processing of Personal Data (Protection of the Individual) Law of 2001 (138(I)/2001), which provides for criminal and administrative sanctions for the misuse of personal data;
- the Protection of the Confidentiality of Private Communications Law of 1996 (Monitoring of Conversations and Access in Recorded Content of Private Communication) (92(I)/1996), which provides for maintaining the confidentiality of private communications, the circumstances in which interception with private communications can be lawfully done and criminal sanctions in case of unlawful interception with private communications;
- the Regulation of Electronic Communications and Mail Services Law of 2004 (112(I)/2004), which regulates providers of electronic communication and mail services and provides for administrative and civil sanctions in case of infringement;
- the Prevention and Suppression of Money Laundering Law of 2007 (188(I)/2007), which inter alia provides for the submission to the competent authorities of information in relation to suspicion or knowledge of money laundering, by individuals carrying out financial activities; and
- sections 100–109 of the Penal Code Law in relation to the bribery of and abuse of powers by public officers.

### 2 Parallel proceedings

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

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

### 3 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.

### 4 Limitation

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

The limitation periods for civil proceedings are mainly provided by the Limitation of Causes of Action Law of 2012 (Law 66(I)/12) and are as follows:

- torts: six years' 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 years' limitation period from the date of accrual of the cause of action;
- mortgage or pledge: 12 years' limitation period from the date of accrual of the cause of action;
- bills of exchange, etc: six years' limitation period from the date of accrual of the cause of action; and
- causes of action for which no particular provision is made: 10 years' 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 plaintiff discovers or could, with reasonable diligence, have discovered the fraud or concealment.

### 5 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, when:

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

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

A defendant can dispute the court's jurisdiction by filing a conditional appearance followed by an application to dismiss and set aside the proceedings, before taking any fresh step 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.

## 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 the Republic of Cyprus and evidence covered by privilege are not admissible.

Evidence obtained by illegal means, but not in contravention of the Constitution, may be admissible.

Opinion evidence is not admissible; however, expert evidence and expert opinions are admissible where such evidence is required to determine an issue of scientific or technical nature.

## 7 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 Companies Registry, which maintains registers of the 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 Property Branch of the Companies Registry, 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 Cyprus nationality are registered. The publicly available information include the owner and operator of the aircraft and details of the aircraft.
- The Road Transport Department, which holds details of the registered holders of licensed vehicles in Cyprus.

## 8 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.

## 9 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 the court when the following conditions are met:

- a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;
- there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and
- the person against whom the order is sought must:
  - be mixed up in so as to have facilitated the wrongdoing; and
  - be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

Pre-action disclosure orders are not available in Cyprus, however, the Supreme Court of Cyprus 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.

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

## 10 Interim relief

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

By virtue of section 32 of the Courts of Justice Law 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 plaintiff:

- 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 deemed necessary has been acknowledged by the Supreme Court of Cyprus, although Cypriot law does not codify the particular types of orders that are available in Cyprus.

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 the Cypriot 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 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 the courts:

- *Norwich Pharmacal* orders for the disclosure of information that is necessary for instituting 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.

## 11 Right to silence

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

Defending a civil action is a matter of choice for the defendant. In civil proceedings there is no general right to silence. However, parties to civil proceedings enjoy the benefit of privilege against self-incrimination and may refuse to provide an answer to a question or produce a document that may expose them to criminal liability.

It is noted that the privilege against self-incrimination applies only where a party is compelled to provide evidence or produce documents such as under a disclosure order or an *Anton Piller* order. The privilege against self-incrimination does not apply to real 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, and or the payment of a fine by anyone who does not act in conformity with a court order, including an interim order.

The 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.

The 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 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 other 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 of Cyprus that pre-hearing disclosure orders (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 plaintiff who was in fact defrauded and as a result has suffered damage (codified under section 36 of the Civil Wrongs Law Cap 148);
- conspiracy to defraud (‘deceit’): a cause of action founded in tort that covers the situations when two or more persons have made an agreement, the real and predominant purpose of which was to injure the plaintiff and the execution of the agreement caused damage to the plaintiff by lawful means, or one of the purposes of the agreement was to injure the plaintiff and the execution of the agreement caused damage to the plaintiff through unlawful means (common law tort of deceit acknowledged in the *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 plaintiff has suffered damage (codified by Contracts Law, Cap 149);
- fraudulent misrepresentation: a cause of action founded in contract that 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, Cap 149);

- breach of fiduciary duty and trust: a cause of action founded in equity that involves the breach of a fiduciary relationship between the plaintiff and the fiduciary, whether a trustee or another professional, which caused damage to the plaintiff as a result (principle of equity codified under the Trustee Law, Cap 193); and
- action for unjust enrichment: where the defendant has enriched at the plaintiff’s expense (usually failing a contract between the parties) and the enrichment is in all the circumstances unjust (principle of equity).

Equitable causes of action such as breach of trust or unjust enrichment may entitle the plaintiff 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 the circumstances, perpetual injunctive relief, prohibiting 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 plaintiff, the court may order the restitution of any gains, benefits and profits received by the defendant to the plaintiff, provided the court considers it suitable and fair in all the circumstances.

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

In addition, declaratory judgments may be issued declaring the rights and interests of the plaintiff 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 for failure to file an appearance or a statement of defence in an action. Prior to entering a default judgment, the claim of the plaintiff 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.

Summary judgment is not available when fraud is alleged by the plaintiff.

### 18 Post-judgment relief

#### What post-judgment relief is available to successful claimants?

Cypriot courts have 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, the Cypriot courts need to be satisfied that the necessary conditions have been met and it is just and convenient in all the circumstances for the interim orders to be issued (for the conditions see question 10).

### 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 moveables: permits the seizure of moveable property owned by the judgment debtor. The moveable 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 (eg, 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 charge on the legal 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 is normally simultaneously for the sale of the shares in satisfaction of the judgment debt.
- Order for the appointment of 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.
- 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 pursuant to the provisions of EU Regulation 805/2004, by means 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. Champerty is 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.

The courts do not have any cost-management powers other than the power to make costs orders at the end of the proceedings or stages in the proceedings. The court has a wide discretion and power to make 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 value of the claim. The rules set out in detail the minimum and maximum charges for each particular step and describe the service provided throughout the proceedings.

The 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 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 Cypriot courts is founded in the Prevention and Suppression of Money Laundering Activities Law L 188(I)/2007 and the Criminal Procedure Law, Cap 155.

The Prevention and Suppression of Money Laundering Activities Law L 188(I)/2007 sets the framework for the issuance of 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 MOKAS (Special Police Unit for Combating Money Laundering) 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 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. The property may also be seized for the purpose of preventing its transportation or removal out of the Republic.

Additionally, following an application from an 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?**

No investigation to identify, trace and freeze proceeds is initiated automatically. Following a complaint, an investigation may be triggered by the authorities if there is evidence that a crime has been committed.

### 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 L 188(I)/2007 provides the legal framework regulating the confiscation of the proceeds of crime.

A confiscation order may be made in relation to:

- any financial advantage the defendant obtained, directly or indirectly, as a result of the commission of the criminal offence for which he or she was convicted;
- the amount of proceeds the defendant obtained as a result of the commission of a primary offence (as defined in the legislation), whether committed by the defendant or another; and
- any property used or intended to be used in any manner, wholly or in part, in the commission of a primary offence.

In ascertaining the amount of income obtained as a result of the commission of a primary offence, the court will assume, unless the contrary is proved or the court considers it unjust in all the circumstances, 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 or payment or remuneration from the commission of the primary offence and any expenditure the defendant incurred during the said period of time was made from the income or payment or remuneration the defendant obtained from the commission of the primary 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 calculated as the amount of proceeds of the defendant from the commission of the primary criminal offence, then the amount to be confiscated shall be the amount that can be obtained from the defendant's realisable property.

The value of property, other than monies, is calculated on the basis of the market price of the property after the amount corresponding to any charge on the property or any interest held by another in the property is deducted.

## 24 Confiscation procedure

### Describe how confiscation works in practice.

A confiscation order under the aforementioned legal framework may be applied for by the office of the attorney general once the defendant is convicted for a criminal offence, either a primary offence (as defined in the legislation) or a money laundering offence, and prior to imposing any penalty for the said offence.

Upon the application of the attorney general, the court shall examine whether the defendant has obtained any proceeds from the commission of a primary offence and where the court reaches the conclusion that the defendant has indeed obtained proceeds from the commission of a crime, it may issue a confiscation order against the defendant.

Upon the issuance of an order for confiscation, the court shall specify whether the defendant shall need to pay the amount to be confiscated immediately, sometime in the future or via instalments. The court may also specify the period of imprisonment to which the defendant may be subjected in case timely payment is not effected.

## 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 in Cyprus is MOKAS.

The powers conferred to MOKAS by the aforementioned legislation include conducting searches for locating and tracing proceeds of crime and other related property that may be the subject of a confiscation order, and executing confiscation orders pursuant to provisions of international conventions.

## 26 Secondary proceeds

### Is confiscation of secondary proceeds possible?

The criminal confiscation regime in Cyprus 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 the benefit received as proceeds of crime.

For the purposes of establishing the value of the benefit received by the defendant as 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 where:

- the defendant has transferred the property as a gift to a third party during the last 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;
- the defendant has transferred as a gift to a third party property that the defendant has previously accepted as a gift for the commission

## Update and trends

### Civil proceedings:

The recent amendments to the Civil Procedure Rules furnish the courts with enhanced case-management powers, inter alia, empowering the courts to control the number of witnesses, the evidence to be put forward at trial and the duration of the hearing. The amendments apply to all actions filed after January 2016 and aim to expedite the adjudication process in civil cases.

### Criminal proceedings:

The Criminal Procedure Law, Cap 155, has been recently amended in order to expressly provide for the option to apply to the court for an order for the substituted service of an indictment on a defendant. The amendment aims to enable a prosecutor to serve criminal proceedings on a defendant who is avoiding service, or to a person who is otherwise impossible to serve via personal service.

of a primary criminal offence, which was committed by himself or herself or another; or

- the defendant, has transferred property, directly or indirectly, to another who knows or ought to have known that the purpose of the transfer is to avoid the confiscation of the 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 which 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?

The costs of 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.

The 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 process of execution of the confiscation order.

## 29 Value-based confiscation

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

The criminal confiscation regime in Cyprus is a value-based system, as a confiscation order does not attach particular assets or property received by the defendant. The process, as explained in question 26, is that the value of the benefit the defendant received as a result of the commission of a criminal offence is estimated by the court and a confiscation order is then made for the confiscation of any available property of the defendant of that value.

## 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 a procedure to confiscate the proceeds of crime rests in general on the authorities applying for the order.

However, and pursuant to article 7(2) of the Law 188(I)/2007, the applicant for the issuance of a confiscation order enjoys the benefit of the rebuttable presumption that any property obtained by the defendant after the commission of the primary offence or obtained during the preceding six years before the commencement of the criminal

proceedings against him or her, constitutes income or payment or remuneration from the commission of the primary offence. The authorities, therefore, bear the burden of proving that property was obtained by the defendant after the commission of the primary 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 or that it would be unjust for the above presumption to apply in relation to the property in question, and that his or her realisable property is less than the proceeds he or she received from the commission of crime and thus that he or she does not have the necessary funds to satisfy the confiscation order.

### 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 confiscated property cannot in general be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction.

However, when imposing a sentence, a criminal court may order the payment of damages to a victim.

### 32 Confiscation of profits

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

Financial advantage or profit obtained as a result of the commission of the 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 liquidate property owned by the defendant, take possession of the proceeds of the

criminal offence, or execute a charging order by disposing, selling or liquidating the stocks and units of trust which are subject to the charging order. 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 L 188(I)/2007, 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 and service by MOKAS through the Ministry of Justice.

Special procedures for the request of legal assistance may apply in accordance with bilateral or international conventions providing for mutual legal assistance between Cyprus and other states, which supersede the above-mentioned provisions of national law.

### 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 L 188(I)/2007 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 state where the order was issued to the Ministry of Justice. The Ministry of Justice then forwards the application to MOKAS, who may then submit the order to a Cypriot court for recognition and registration if it deems that appropriate under the circumstances. Upon the registration of the order it becomes enforceable within the jurisdiction.

Special procedures relating to the receipt of legal assistance requests may apply in accordance with bilateral or international conventions providing for mutual legal assistance between Cyprus and other states, which supersede the abovementioned provisions of national law.

## EROTOCRITOU

ADVOCATES - LEGAL CONSULTANTS

**Andreas Erotocritou**  
**Antreas Koualis**

**andreas erotocritou@erotocritou.com**  
**antreas.koualis@erotocritou.com**

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

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

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

The Republic of Cyprus is a signatory to the following international conventions:

- United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime 1990;
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005;
- United Nations Convention against Transnational Organized Crime 2000;
- United Nations Convention against Corruption 2003; and
- 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 L 188(I)/2007 grants to MOKAS, which is a governmental agency headed by the attorney general, extensive powers 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 governmental bodies and the police. Additionally, applications for the issuance of freezing, charging and confiscation orders may only be made by the attorney general, while asset disclosure orders may only be obtained following a public interrogator's request.

# Greece

Ilias G Anagnostopoulos and Alexandros D Tsagkalidis

Anagnostopoulos

## Civil asset recovery

### 1 Legislation

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

Civil remedies available to a victim of fraud under the Greek Civil Code (GCivC) and the Greek Code of Civil Procedure (CCivPr) are primarily an action, in the course of ordinary proceedings, seeking compensation for the damage caused by a liable defendant as a result of its wrongful acts and interim injunctions requesting the freezing of assets located in Greece.

### 2 Parallel proceedings

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

No.

### 3 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 of the loss or damage sustained (article 914 et seq GCivC).

The general rule lies with the jurisdiction of the courts of the place of residence of the defendant (article 22 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:

- 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 the monetary value of which exceeds €250,000.

### 4 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. In any event the claim is proscribed after 20 years from the date the wrongful act was committed. It should be noted that 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.

## 5 Jurisdiction

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

See question 3. It should be noted that 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.

## 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 Greek 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 the CCivPr are: 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 (article 339 CCivPr).

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). In any case, the civil court's decision must expressly state the reasons that led the judge to reach his or her ruling.

## 7 Publicly available information

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

- The Land Registry, which includes:
  - 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 a 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](http://www.et.gr).
- The Trademark Registry, which is accessible through the competent office of the Ministry of Development, Competitiveness, Infrastructure, Transport and Networks.



## 8 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), 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.

## 9 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 for the presentation of a document 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.

## 10 Interim relief

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

In urgent circumstances, even before or after the commencement of ordinary proceedings, a plaintiff having legal interest may apply for an interim injunction or provisional order, seeking freezing of moveable or real estate assets or of rights in rem over such assets as well as of claims with respect to them, mandatory injunctions, prohibitory injunctions and interim payments (articles 683 et seq, 691 et seq, 707 et seq CCivPr).

The range of such injunctions is thus wide, 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 plaintiff 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 plaintiff within 30 days or within the time frame set by the court.

## 11 Right to silence

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

No. If the defendant does not attend the trial, provided proper service of the proceedings was made, he or she is considered 'absent' by the court and all the claimant's allegation will be accepted as true (article 271 CCivPr).

## 12 Non-compliance with court orders

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

Punishment due 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.

It should be noted that 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 European Union (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':

- Regulation 44/2001 of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation);
- Regulation (EC) 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) 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 their 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 plaintiff. 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 in Greece 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 CCivPr.

Article 904(f) 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 CCivPr. A foreign judgment is not declared enforceable in Greece unless:

- 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 CCivPr, that is:
  - 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 plaintiff, provided that it meets the requirements defined in 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 plaintiff, 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.

It should be noted that moral damages could also be awarded in the form of compensation due 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?

CCivPr stipulates specific provisions encouraging the resolving of disputes without the need for a full trial. In particular:

- Article 293 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 paragraph 2 CCivPr).
- According to article 214A 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 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 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 cause nullity of 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 (see question 10) 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 include a court duty of 0.8 per cent of the claim value. Also, Greek courts order the unsuccessful litigant to pay costs of the proceedings, which, as a rule, are of nominal value and cover a small part of the actual costs incurred by the winning party.

Parties of limited financial resources can avoid legal costs based on the provisions of articles 194 to 204 CCivPr.

It should be mentioned that 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 3691/2008, which contains provisions of freezing, confiscation and forfeiture of assets of illicit origin (articles 46 to 48). Similar provisions are to be found in Law 4022/2011 on procedures to be followed in cases of corruption of high-ranking public officials and in Law 3126/2003 on the criminal liability of ministers. It should be noted that in the above laws 'freezing' and 'confiscation' of proceeds of crime are of similar meaning and lead to the same results.

#### 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 Prosecutor's Office by another authority or even information that has come to the attention of the 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 Agency (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 Greek Code of Criminal Procedure (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 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 48 of Law 3691/2008, 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. It should be noted that freezing may take place even at the earliest stages of information gathering by the Hellenic FIU. In this case, the head of the FIU may freeze assets by issuing an order.

These measures may be imposed provided that 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 46 of Law 3691/2008. Subject to forfeiture are assets that derived from a predicate offence or from a money laundering offence, or that were acquired directly or indirectly out of the proceeds of such offences, or that constitute the means that were used or were going to be used for committing these offences.

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 which orders the freezing of assets. In principle, such benefit corresponds to the proceeds of the alleged crime.

## 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 referred to in article 44 paragraph 1 of Law 3691/2008 or the manager of the branch where the investigating judge or the public prosecutor have their seat. 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 48 paragraph 2 of Law 3691/2008).

## Update and trends

Anti-money laundering provisions for securing assets are used extensively, and it is quite common to have freezing orders for assets even in the very first stages of an enquiry or investigation with little evidence. Judicial review of freezing orders is provided for, but in practice it is not effective enough because the Judicial Council, which examines the appeals against such orders, is reluctant to release the assets while the enquiry of the Hellenic FIU or the investigation of the prosecuting authorities is open. As a result, assets remain frozen for long periods of time, especially in cases that require lengthy and complex investigations. Moreover, there have been steady efforts by the relevant enforcing agencies to detect assets connected to tax offences. Large-scale investigations are carried out by the competent tax authorities with support by the FIU and the Financial and Economic Crime Unit. Because anti-money laundering legislation provides for access to privileged information and speedy exchange of such information, it is used to detect undeclared assets as well as money transactions to and from other jurisdictions. Such investigations are combined with freezing of assets, which in most cases remain frozen until conclusion of the investigations.

## 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 offence or from money laundering or acquired directly or indirectly out of the proceeds of such offences, or that constitute the means that were used or were going to be used for committing such offences.

## 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 said law (money laundering offences) at the time of their acquisition (article 48 paragraph 1 and article 46 of Law 3691/2008).

## 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?**

There is legal debate as to whether value-based confiscation is allowed.

According to one view, since forfeiture of assets unrelated to crime is allowed (if the assets that originated from the crime do not exist or are untraceable or cannot be confiscated – article 46 paragraph 1 of Law 3691/2008), confiscation of such assets should also be allowed.

According to an opposing view, property unrelated to the crime should not be subject to confiscation, due to the fact that confiscation is a measure imposed solely on the grounds that there are well-founded suspicions that the confiscated assets are related to the money laundering or predicate offence. Thus, value-based confiscation, which is

imposed on assets of legitimate origin, is considered to be in breach of the presumption of innocence.

### 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 48 of Law 3691/2008 and articles 174 to 176 GCivC any legal act concerning confiscated property is prohibited and shall be considered as null and void.

It should be noted that according to article 46 of Law 3691/2008, the court which 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 the Greek state.

Nevertheless, forfeiture shall not be ordered if the confiscated or frozen assets can be returned to their rightful owner (article 46 paragraph 1 of Law 3691/2008 and article 310 paragraph 2 and article 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 though 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 46 paragraph 3 of Law 3691/2008). These decisions are subject to appeal on the merits and on points of law according to articles 492 and 504 paragraph 3 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 paragraph 1, 7 paragraph 1 and 96 paragraph 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?**

Currently there is no legal regime in relation to the management of assets after they have been confiscated or frozen.

### 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.**

In relation to assets located in foreign jurisdictions, Greece can request the execution of provisional measures based on the mechanisms of mutual assistance. The relevant requests shall be filed under the provisions of the applicable international conventions (see question 37) ratified by Greece.

### 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 enables 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):

- European Convention on Mutual Assistance in Criminal Matters (1959);



ANAGNOSTOPOULOS

**Ilias G Anagnostopoulos**  
**Alexandros D Tsagkalidis**

**ianagnostopoulos@iag.gr**  
**atsagkalidis@iag.gr**

Patriarchou Ioakeim 6  
106 74 Athens  
Greece

Tel: +30 210 729 2010  
Fax: +30 210 729 2015  
www.iag.gr



- Convention of the Council of Europe on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990);
- UN Convention against Transnational Organized Crime (2000);
- UN Convention against Corruption (2003); and
- 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.

# Hong Kong

Nick Gall and Felda Yeung

Gall

## Civil asset recovery

### 1 Legislation

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

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

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

### 2 Parallel proceedings

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

There are no restrictions on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter. However, a plaintiff in civil proceedings will need to consider carefully, and as a matter of strategy, whether to choose to wait until the criminal proceedings are concluded before commencing any civil proceedings. On one hand, 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.

### 3 Forum

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

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

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

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

### 4 Limitation

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

There are different limitation periods for different causes of action.

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

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

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

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

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

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

### 5 Jurisdiction

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

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

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

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

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

## 6 Admissibility of evidence

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

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

- because of public policy the evidence is inadmissible; 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 Publicly available information

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

The following sources of information about assets are publicly available:

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

## 8 Cooperation with law enforcement agencies

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

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

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

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

## 9 Third-party disclosure

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

#### Pre-action discovery

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

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

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

## Post-action discovery

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

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

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

## 10 Interim relief

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

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

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

## 11 Right to silence

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

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

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

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

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

## 12 Non-compliance with court orders

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

Courts can order severe sanctions such as striking out a party's claim or entering judgment against a party unless the courts' orders are complied with within the prescribed time. This is the most common sanction in Hong Kong to ensure a party's compliance with court orders.

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

## 13 Obtaining evidence from other jurisdictions

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

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

## 14 Assisting courts in other jurisdictions

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

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

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

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

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

## 15 Causes of action

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

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

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

Proprietary claims are possible as well.

## 16 Remedies

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

The common remedies available in civil asset recovery actions include:

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

## 17 Judgment without full trial

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

#### Default judgment

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

- (i) final judgment if the writ is indorsed for:
  - a liquidated sum (ie, an amount which is certain, fixed and or agreed); or
  - the recovery of land only;
- (ii) interlocutory judgment if the writ is indorsed for:
  - unliquidated damages (ie, damages that are yet to be ascertained or assessed);
  - the detention of goods only; or
  - the detention of goods and damages; and
- (iii) final and interlocutory judgment if the writ is indorsed with mixed claims under (i) and (ii).

#### Summary judgment

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

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

## 18 Post-judgment relief

### What post-judgment relief is available to successful claimants?

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

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

## 19 Enforcement

### What methods of enforcement are available?

The methods of enforcement available include:

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



- a writ of sequestration (ie, a process of contempt by proceedings against the property of the contemnor. It is available if the person is in contempt of court as a result of disobedience to a court order, or in breach of an injunction);
- bankruptcy proceedings; or
- winding-up proceedings.

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

## 20 Funding and costs

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

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

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

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

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

## **Criminal asset recovery**

### 21 Interim measures

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

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

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

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

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

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

defendant has benefited from that specified offence or drug trafficking offence.

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

### 22 Proceeds of serious crime

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

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

### 23 Confiscation – legal framework

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

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

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

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

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

### 24 Confiscation procedure

#### **Describe how confiscation works in practice.**

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

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

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

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

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

### Update and trends

Section 25 of the Organized and Serious Crimes Ordinance states that a person commits an offence if 'knowing or having reasonable grounds to believe that any property in whole or in part, directly or indirectly, represents any person's proceeds of an indictable offence, he deals with that property'.

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

Another development has been seen in the context of courts' power to grant interim relief in relation to foreign proceedings. The Court of Appeal has recently clarified that the Hong Kong courts, in exercising their ancillary jurisdiction to provide assistance to a foreign court, must respect the view and the approach of the foreign court.

Finally, the Court of First Instance has recently made it clear that investigating agencies (eg, the police) can disclose certain information containing personal data, such as the identity and address of the wrongdoer, to victims of accidents where proceedings are contemplated or have been commenced.

## 25 Agencies

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

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

- the Commercial Crime Bureau;
- the Organised Crime and Triad Bureau; and
- the Joint Financial Intelligence Unit, which is jointly run with the Hong Kong Customs and Excise Department.

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

## 26 Secondary proceeds

### Is confiscation of secondary proceeds possible?

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

## 27 Third-party ownership

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

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

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

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

## 28 Expenses

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

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

## 29 Value-based confiscation

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

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

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

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

## 30 Burden of proof

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

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

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

## 31 Using confiscated property to settle claims

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

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

## 32 Confiscation of profits

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

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

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

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

## 33 Non-conviction based forfeiture

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

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

## 34 Management of assets

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

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

there is any money remaining after the court has made all payments it will be paid into the general revenue.

### 35 Making requests for foreign legal assistance

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

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

### 36 Complying with requests for foreign legal assistance

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

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

The request must be accompanied by:

- the name of the authority concerned with the criminal matter;
- a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;
- a description of the purpose of the request and the nature of the assistance being sought;
- details of the procedure that the foreign jurisdiction concerned wishes to be followed by Hong Kong;
- a statement setting out the wishes of the place concerning the confidentiality of the request and the reason for those wishes;

- details of the time within which the foreign jurisdiction wishes the request be complied with;
- details of allowances to which the person will be entitled and the arrangements for accommodation for that person while the person is in the foreign jurisdiction, if the request involves a person travelling there from Hong Kong; and
- a statement setting out the maximum penalty for the external offence.

### 37 Treaties

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

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

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

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

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

### 38 Private prosecutions

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

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

**GALL**

**Nick Gall  
Felda Yeung**

**nickgall@gallhk.com  
feldayeung@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

# Italy

Roberto Pisano, Valeria Acca and Chiara Cimino

Studio Legale Pisano

## Civil asset recovery

### 1 Legislation

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

The most relevant provisions concerning private investigations are contained in:

- the Unified Code of Laws on Public Security (Royal Decree No. 773/1931; articles 133 to 141) and its related implementing measures (Presidential Decree No. 153/2008 and Decree of the Minister of Home Affairs No. 269/2010);
- the Italian Code of Criminal Procedure (article 222 of the implementing legislation; article 391-bis et seq and article 103 of the Code); and
- the Code of Ethics and of Best Practice for the Treatment of Personal Data Carried out in performing Defence Investigations (issued by the Italian Data Protection Authority on 6 November 2008) and the Ethical Code of the Private Investigator (issued by the association of private investigators, Federpol).

### 2 Parallel proceedings

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

First, it should be noted that, according to Italian law, in the event 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 in the framework of a criminal proceeding by 'standing as a civil party' in the 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 criminal decision (article 75, paragraph 3, of the Code of Criminal Procedure).

It should be added that, even if the main principle governing the 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 the civil proceeding for restitution and damages (about the assessment of the main elements of the unlawful conduct; article 651 of the Code of Criminal Procedure).

However, the final criminal decision of acquittal does not have the effect of *res judicata* in the civil proceeding, on condition that the civil action was brought before the civil court in a timely manner (article 652 of the Code of Criminal Procedure).

### 3 Forum

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

The relevant criteria for the geographical competence of Italian 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 plant 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 moveable goods or real property, the court of the place where the goods are located is competent (article 26).

With respect to interim measures (ie, 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).

### 4 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 Italian 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.

### 5 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 exists also when the criteria laid down by the Convention of Brussels 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 11 and 4 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.

## 6 Admissibility of evidence

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

It is worth noting that discovery as known in common law jurisdictions is not provided for by the Italian legal system; accordingly, the 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 has to prove the underlying facts and the grounds for it; in turn, anyone who objects to the mentioned right or entitlement has to 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 it is governed by the court mainly on the request of the parties. With respect to documentary evidence, the parties may produce all the documents that, in their view, prove the grounds of their claim. With regard to oral evidence, however, a previous 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 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, the yearly tax returns) can also be obtained.

With respect to real estate and land, the most relevant public source is the archive of the 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 (the entry is to determine the ownership of the 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 (PRA), 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; balance sheets).

Finally, it is worth noting that, according to Italian law, the relevant tax returns of a certain taxpayer may be obtained, further to a grounded request to the competent tax authority, on condition that the applicant can prove to have a concrete and qualified interest to obtain them (article 24, paragraph 7 of Law No. 241/1990, governing the 'transparency' of the public administration activity and relevant acts). In general terms, the 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 Italian administrative court (the TAR, which on a number of occasions has recently granted the release of the tax returns).

## 8 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 more fruitful way for a defrauded party to obtain information and evidence from law enforcement and regulatory agencies for use in civil proceedings is to file a criminal

complaint, and at the end of the criminal investigations to access 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 the 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 the law enforcement and regulatory agencies, in accordance with the criteria and conditions mentioned in question 7 (concrete and qualified interest to obtain such information, because they are 'necessary to protect its own juridical interest'). However, such requests are often not granted, due to the concurring needs of the relevant office or regulator (investigations still pending, duty of confidentiality, etc).

In the course of the civil trial, the court, on request of the 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* Code of Civil Procedure). It should be noted that 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.

## 9 Third-party disclosure

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

See question 8. It should be added that 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 Treating Personal Data of Clients within Banks, which expressly provide for strict rules for banks and other financial intermediaries about disclosing information in their possession to third parties and even to the interested party if they are the owner of the account; see article 119 of the Consolidated Banking Law.

## 10 Interim relief

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

To prevent the dissipation of assets by the suspects of a fraud (as in any other circumstances where there is a material risk of dissipation), Italian law provides for the 'conservative seizure' that can be requested by the claimant and ordered by the court on the suspects' assets also at the pretrial stage (article 669-bis *et seq* and articles 671 *et seq* 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 in a maximum of 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 either moveable goods, or real estate or rights existing towards 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 one is a *prima facie* evidence of the existence of the right that the seizure order is aimed at protecting; the second one is the serious and concrete risk that delay could compromise the satisfaction of the right.

'Conservative seizure' is instrumental to a full trial in the merit, 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 be granted also during the trial stage, and after a judgment in the merit, on condition that the requirements mentioned above are fulfilled.

With respect to the interim relief concerning the obtaining of information, Italian 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 their testimonies can be considered necessary for the 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 Code of Civil Procedure).

## 11 Right to silence

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

Unlike in criminal proceedings, defendants in civil proceedings do not have a right to silence. Where the formal interrogatory of a defendant has been requested by the claimant and granted by the court in relation to a detailed list of relevant circumstances, if the defendant does not show up or refuses to answer without justified grounds, the court, having evaluated all the other evidence, can consider the claimant's account of the circumstances confirmed (articles 230 to 232 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 not complying with the injunction to execute a court order, and 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 the entire 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 the EC legislation (with respect to EU countries) and the international conventions signed by Italy, while 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 (with the exception of 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) by 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, EC Regulation No. 1206/2001 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 representations 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 both foreign requests to take evidence in Italy and the enforcement of foreign judgments, the most relevant provisions are of EC legislation (with respect to EU countries) and of the international conventions signed by Italy, while 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:

- (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). In that framework, 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 exequatur, 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 EC Regulation No. 805/2004, such a procedure offers 'significant advantages' as compared with the exequatur procedure provided for by the 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 the foreign judgment before the Court of Appeal of the place of execution, is necessary only in case of challenge to the recognition or where the forced enforcement of the foreign judgment is required.

On the other hand, where there is no challenge to the recognition or where no enforcement is required, foreign judgments are recognised in the Italian legal system without 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 author to pay damages (article 2043 Civil Code). Often, the cause of action may concur with the one of breach of contract (article 1218 et seq 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 within the Italian system a summary proceeding (article 702-bis et seq 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 the 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 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 in the deadlines 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?

As explained in question 10, 'conservative seizure' can also be granted during the trial stage, and after a judgment in the merit, on condition that the related requirements are fulfilled. Also at that stage, therefore, the 'conservative seizure' represents the most significant relief, during the time necessary to proceed with the enforcement of court judgments, in accordance with the procedure explained in question 19.

## 19 Enforcement

### What methods of enforcement are available?

As anticipated in question 12, the civil procedure for ensuring the enforcement of court orders is provided for by the entire 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, has to provide it with the execution formula and to 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 the 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 the 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 for them to obtain a forced sale of the defendant assets, and the subsequent sharing of money resulting from the sale).

The garnishment can be ordered both on moveables at the respondent premises (article 513 et seq) or at third parties' premises, on real estate (article 555 et seq), on undivided assets (article 599 et seq), on 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 Italian 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, paragraph 3 of the Italian 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, Italian law allowed that an additional and extraordinary compensation could be granted to counsel due to the positive outcome of the proceeding, on condition that this compensation is indeed additional to normal compensation, and is reasonable and justified by the outcome achieved.

As of 2006, Italian law has partially 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, paragraph 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, paragraph 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 the proceeding as a percentage of the value of the goods disputed or the value of the entire litigation, while prohibiting the determination of the 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.

With respect to after the event insurance, it is not allowed by Italian law, which 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 the litigation, the Italian regime is in essence the following. Losing parties in civil litigation have ordinarily 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 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 Italian criminal system are the following:

- the 'preventive seizure' (article 321 et seq Code of Criminal Procedure), which is the typical measure 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);
- the 'evidentiary seizure' (article 253 et seq Code of Criminal Procedure), which is the typical measure aimed at collecting the evidence necessary to prove the commission of a certain crime; and
- the 'conservative seizure' (article 316 et seq Code of Criminal Procedure), which is the typical measure aimed at protecting and satisfying the credits of the state, and of the victim of the crime, by freezing the assets of the defendant in order to prevent their dissipation (in substantial analogy with the 'conservative seizure' provided for civil purposes, and explained in question 10).

It should be noted that the preventive seizure and the conservative seizure indicated above 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 2). The 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, it is worth noting that, 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 abuses) can take place, especially between the evidentiary seizure and the preventive seizure, because the goods or assets that can be subject to such measures often coincide.

This is because, according to Italian law, the subjects of the 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, paragraph 1); and because the 'corpus of the crime' is then 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, paragraph 2). For the same proceeds of crime, and instrumentalities of crime, that can be subject to preventive seizure (for the purpose of confiscation), see question 23.

As far as the practical modalities for the execution of preventive seizure are concerned, see question 24. With respect to the requirements and practical modalities for the execution of conservative seizure from the standpoint of the 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 authors 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.**

The confiscation procedure (in broad terms) often starts at the pre-trial stage, by freezing the proceeds and instrumentalities of the crime through the preventive seizure (article 321 et seq 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, according to which:

*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, it should be noted that, according to the Italian 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'; 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, while it is only discretionary for the profit and product of crime. However, it should be noted that for the most serious crimes (corruption, money laundering, market manipulation, insider trading, etc) special provisions expressly provide for the compulsory confiscation also 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 and usury, but also 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 anymore; 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 dispute about the execution of confiscation (articles 676 and 665 of the Code of Criminal Procedure). If 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 not convenient (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 (ie, with regard to mafia, contraband, etc) provide that assets confiscated (either moveable 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 execution of preventive seizure, in relation to the targeted assets. In particular, preventive seizure is executed (article 104 and 104-bis of the implementing legislation of the Code of Criminal Procedure):

- on moveable goods and credits, according to the civil procedure for garnishment (see question 19);
- on real estate and registered moveable goods, through the entry of the seizure in the relevant registers (see question 7);
- on the assets of a company or enterprise, through the entry of the seizure in the register of enterprises (see question 7) 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 as well, 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, Italian 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 on 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, Italian case law is consolidated in adopting a very strict notion of '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 did not have any kind of negligent link – direct or indirect, due 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 the 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 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 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 (including 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, has to 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 authors of the crime, and as well at identifying, tracing, freezing and later confiscating the proceeds of the same crime (in the framework of the same investigation and criminal proceeding). Therefore, in accordance with the general principles (and in particular with article 27, paragraph 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 have to 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, indeed, 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), while 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 Italian law, as explained in question 2, in the event 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 the conservative seizure (article 316 et seq Code of Criminal Procedure), which is the typical measure aimed at protecting and satisfying the credits of the state, and of the victim of the crime, by freezing the assets of the defendant in order to prevent their dissipation.

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, paragraph 2). In addition:

- 'conservative seizure ordered on request of the public prosecutor goes to the advantage also of the civil party' (article 316, paragraph 3);
- by virtue of the seizure, the credits of the state and the civil party are considered 'privileged' (article 316, paragraph 4); and
- criminal conservative seizure is executed in accordance with the civil procedure provided for its enforcement on moveable 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, paragraph 1). In addition, the law provides that:

- 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 is it used for the fines,

costs of the proceeding and any other amount to be paid by the defendant to the state (article 320, paragraph 2).

In the event 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.

### 32 Confiscation of profits

#### Is it possible to recover the financial advantage or profit obtained though 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 which 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, paragraph 2, No. 2 of the Criminal Code). The rationale is that such things (ie, clothes with counterfeited trademark, drugs, etc) are intrinsically criminal and dangerous for society, and as such have to 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) that 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 Italian 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, paragraph 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 (that 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 the 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 Strasbourg European Convention on Mutual Legal Assistance in Criminal Matters of 1959;
- the Strasbourg Convention on Money Laundering, Search, Seizure and Confiscation of the Proceeds of Crime of 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, it should be noted that 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 has to 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, paragraph 2-bis of the Code, as introduced by Law No. 328/1993, according to which:

*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 the 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 Code of Criminal Procedure) that where a request for mutual legal assistance is made from a foreign authority, both the Italian Minister of Justice and the Italian Court of Appeal geographically competent (depending on the place of execution of the request) have to approve it. If

#### Update and trends

The most relevant trend is represented by the continuously increasing role of confiscation 'for equivalent', which in recent years has been extended by Italian law to a significant number of criminal offences, and that has been consequently widely used in the practice of public prosecutors and courts (with the related difficulty to precisely determine 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 Italian system, to be taken into account in selecting the civil or the criminal route in relation to asset recovery, is the possibility for the victim to bring the civil action for restitution and damages directly in the frame of the criminal proceeding, through the 'standing as civil party', with significant advantages resulting from it (including the possibility to obtain a criminal 'conservative seizure' at a pretrial stage, with related entitlement to be satisfied with precedence on the defendant assets in case of conviction).

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 where:

- the acts requested compromise the sovereignty, security or other essential interests of the state;
- the acts requested are expressly prohibited by Italian law or they are conflicting with the fundamental principles of the Italian juridical system;
- there are grounds to believe that considerations relating to race, religion, sex, 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
- 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) above 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.

### 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 Money Laundering, Search, Seizure and Confiscation of the Proceeds of Crime of 1990; for references to it and to the Strasbourg European Convention on mutual legal assistance in criminal matters of 1959, please see question 35.

In any case, the additional international and EU instruments of which Italy is a signatory or addressee, that can have a certain relevance on asset recovery, are as follows.

#### European Union

- Convention on the Fight against Corruption Involving Officials of the European Community 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);
- 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
- 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**

- Criminal Law Convention on Corruption, Strasbourg, 27 January 1999 (ratified by Law No. 110/2012, which entered into force on 27 July 2012); and
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of 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 International 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 it has to be exercised only by public prosecutors.

## Studio Legale Pisano

**Roberto Pisano**  
**Valeria Acca**  
**Chiara Cimino**

**robertopisano@pisanolaw.com**  
**valeriaacca@pisanolaw.com**  
**chiaracimino@pisanolaw.com**

Via Cino del Duca, 5  
 20122 Milan  
 Italy

Tel: +39 027 600 2207  
 Fax: +39 027 601 6423  
[www.pisanolaw.com](http://www.pisanolaw.com)



# Jersey

Simon Thomas and William Redgrave

Baker & Partners

## Civil asset recovery

### 1 Legislation

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

In the pretrial and investigation stages the following may be important:

- Service of Process and Taking of Evidence (Jersey) Law 1960;
- Royal Court Rules 2004, which deal with court procedure, including interlocutory applications; and
- Service of Process Rules 1994, which include rules about the circumstances in which process can be effected upon defendants outside Jersey.

It is almost inevitable that an investigation into Jersey assets will encounter a variety of structures and entities. The following pieces of legislation are likely to be relevant.

- the Trusts (Jersey) Law 1984;
- the Companies (Jersey) Law 1991; and
- the Foundations (Jersey) Law 2009.

If an approach to the authorities is being contemplated, an investigator will need to be aware of the powers of the Attorney General to investigate serious fraud under the Investigation of Fraud (Jersey) Law 1991.

The freezing by the authorities of assets which may be the proceeds of crime is pursuant to the Proceeds of Crime (Jersey) Law 1999.

An investigator should be aware of the investigative powers of the Jersey Financial Services Commission, which are set out principally in the Financial Services (Jersey) Law 1998.

The Civil Evidence (Jersey) Law 2003 deals with the admissibility of evidence, particularly hearsay evidence, in civil proceedings.

The Judgments (Reciprocal Enforcement) (Jersey) Law 1960 provides for the enforcement of judgments obtained in another jurisdiction.

### 2 Parallel proceedings

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

In Jersey there exists 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.

### 3 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.

### 4 Limitation

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

There is no general limitation statute in Jersey. 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 will be invaluable. In general terms 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 immoveable property, a year and a day;
- actions relating to title of immoveable property, 40 years;
- actions relating to the recovery of moveable property, 10 years; and
- in the recent case of *Nolan v Minerva* [2014] JRC 078A, the Royal Court held that a three-year limitation period applies in respect of claims for dishonest assistance in a breach of trust.

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 will be 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.

### 5 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 terms the claimant will have to satisfy the Court that:

- there is a good arguable basis on which service out should be allowed;
- the claim involves a serious issue to be tried; and
- 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 speaking, 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 have in mind 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 proceedings, although it is safer to make the application as soon as possible.

## 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 Publicly available information

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

Publicly available sources of information about assets include the following:

- The Pride Database. This records interests in real property and charges against that property within the island.
- The Companies Registry. 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 establishes a searchable, online, public register of security interests.

## 8 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 which 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, who have 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.

## 9 Third-party disclosure

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

The Jersey court recognises and applies the English *Norwich Pharmacal* principle, namely 'that 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 court also recognises and applies the English *Bankers Trust* principle, namely that the court may order 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 which might be dissipated and there is strong evidence that the plaintiff has been fraudulently deprived of these funds.

## 10 Interim relief

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

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 immoveable property asset and dissipation of the proceeds of sale.

## 11 Right to silence

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

Yes, but an adverse inference may be drawn from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action. If the court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness, as was the position in the case of *Federal Republic of Brazil and anor v Durant International Corporation and anor* [2012] JRC 211, [2012] JCA 071.

## 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' which requires compliance and imposes a sanction for non-compliance – classically the striking out of an action, or an order debarring a defendant from defending an action.

Failure to comply with a court order can be treated as a 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 obviously 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. The court will grant assistance either in respect of civil proceedings before a court in another jurisdiction which have been instituted or where the institution of civil proceedings there is contemplated. The assistance that the court can provide includes:

- the examination of witnesses, either orally or in writing (such evidence is taken on oath by the Viscount, the executive officer of the Jersey court);
- the production of documents;
- the inspection, photographing, preservation, custody or detention of any property; and
- the 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.

## 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.

Jersey 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: damages, restitution, giving of an account, transfer of assets, vesting of assets, specific performance, injunctions (whether interim or permanent) and declarations.

Importantly, Jersey 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 which 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 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. 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 (including a defendant bringing a counter-claim) where he or she can establish beyond reasonable doubt on affidavit evidence that the defendant does not have a reasonable defence to the claim.

## 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 executive officer of the court, known as 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 Jersey 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 above, the Viscount has various powers exercisable over a defendant's property with a view to enforcing judgment.

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, 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.

The court does not become involved in managing the overall cost of such litigation, although it will scrutinise costs in the usual way at the conclusion of a case.

## 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 chief judge) in chambers. 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 crime. Under the 1999 Law the court may confiscate either 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 and applies to all crimes. Along with the provisions for freezing assets, mentioned above, it gives the court power to make confiscation orders consequent upon conviction

for a criminal offence. The Terrorism (Jersey) Law 2002 criminalises certain activity surrounding the funding of terrorism and makes provision for forfeiture of property connected with such offending.

## 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 would exercise its power to postpone the issue of confiscation until after sentence.

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 way that the Jersey court approaches confiscation proceedings is 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.

## 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 above, 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. Classically, 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. It will usually be appropriate to take such a gift into account where it has been transferred at an undervalue.

## 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 above. 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 institution of proceedings against him or her by certain statutory assumptions that any property held or transferred by him or her is the proceeds 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 though 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 recent English Court of Appeal decision in *R v Sale* [2013] EWCA Crim 1306, which followed the Supreme Court decision in *Petrodel Resources v Prest*. While the court would not hesitate in an appropriate case in lifting 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 which 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.

### 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 which allows the payment of the Viscount's fees and expenses that arise in the course of seizing and managing assets which 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.**

Under the 1999 Law, the court has the power to grant a *saisie* over property which features in an external confiscation order. The Attorney General can apply for a *saisie* on behalf of a foreign government where:

- an external confiscation order has been made in proceedings outside Jersey;
- 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 already mentioned, 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 Legal Assistance (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 OECD 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 public prosecutor.



Simon Thomas  
William Redgrave

simonthomas@bakerandpartners.com  
williamredgrave@bakerandpartners.com

Midland Chambers  
2-10 Library Place  
St Helier  
JE1 2BP  
Jersey

Tel: +44 1534 766254  
Fax: +44 1534 737355  
www.bakerandpartners.com

# Kazakhstan

Yerzhan Manasov and Maksud Karaketov

Linkage & Mind LLP

## Civil asset recovery

### 1 Legislation

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

Private investigation activity is not prescribed and regulated by the Kazakhstani laws, but it is not prohibited. It should be carried out in compliance with all applicable laws and with due regard to numerous data protection legal provisions, in particular:

- Personal privacy rules set out in the Civil Proceedings Code (the CPC) and the Criminal Proceedings Code (the Criminal PC).
- Pursuant to article 10 CPC and article 16 Criminal PC, the private life of citizens, that is, personal and family life, shall be protected by law. Everyone has a right to privacy of private contributions and savings, secrecy of correspondence, telephone conversations, post, telegraph and other mail.
- Nobody may collect, store, use and disseminate information about an individual without his or her approval excepting for cases prescribed in the law. Data on an individual's private life received during the criminal investigation can be used only for the purpose of these proceedings.
- The right to privacy can be waived during civil proceedings, but only in cases prescribed in the laws and under the current statutory procedures.

### Inviolability of dwelling, prescribed in article 17 Criminal PC

According to article 17 Criminal PC, the dwelling is inviolable. Home invasions against the will of resident persons and any visit and search there are allowed only in cases prescribed in the laws and under the current statutory procedures.

### Inviolability of private property

Pursuant to article 18 Criminal PC and article 11 CPC, the property is inviolable and nobody can be deprived of his or her property on any grounds other than under a judgment of a court.

Any proofs and evidence should be received in a legal manner.

Any private investigation shall be carried out in compliance with the applicable laws. Otherwise, a defrauded party risks being responsible for violation of law, for instance, protection of personal data.

### 2 Parallel proceedings

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

The laws of the Republic of Kazakhstan do not establish any restrictions on civil proceedings.

Article 167 Criminal PC allows individuals and legal entities to file a civil claim for compensation of all damages caused by the crime any time from the beginning of the pretrial investigation to the end of the trial. A claim is filed against a suspected, accused person, or criminal defendant.

However, it should be noted that a court may refuse in satisfaction of a civil claim, in case a court enters an acquittal. In addition, a court may decline such civil claim when:

- there is an acquittal;
- there is no complaint from an injured person or waiver of prosecution by a prosecutor;
- another court verdict on the same matter is in force or there is an unreversed court ruling establishing the impossibility of criminal proceedings;
- criminal authorities issued a decree on abolition of criminal proceedings on the same suspicion before the trial; and
- a claimant petitions for consideration of the statement of claim to be declined.

Civil proceedings can be conducted in parallel with, or in advance of criminal proceedings concerning the civil violation within the same subject matter, but in this case a civil court cannot pass a judgment prior to judgment of a criminal court. The judgment of a criminal court will be considered *res judicata* for civil litigation.

### 3 Forum

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

Pursuant to article 51 Criminal PC, criminal justice is administered by the:

- Supreme Court of the Republic of Kazakhstan;
- regional courts and others equated to the regional courts and the Military Court; and
- Special Inter-District Criminal Court, Special Inter-District Military Court on Criminal Matters, Special Inter-District Court on Juvenile Delinquency and the Military Court of Military Reservation.

If a defrauded party intends to file a claim under criminal proceedings, he or she shall join the criminal proceeding as a civil claimant in the district criminal courts of first instance. A claim is filed against a suspected, accused person or criminal defendant. Otherwise, in cases where a defrauded party would like the case to be heard in a civil court, the defrauded party should file a claim with a district civil court. It should be noted that disputes as to business activity (merger, acquisition, sale and purchase) are heard in the special economic courts.

### 4 Limitation

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

A lawsuit can be brought to court within three years after a claimant discovers that his or her rights were violated.

### 5 Jurisdiction

**In what circumstances does the civil court have jurisdiction?**

**How can a defendant challenge jurisdiction?**

Under Kazakhstani laws, civil jurisdiction is the defendant's home location (ie, place of residence of an individual and legal address of a legal entity).

However, a claimant may use other jurisdictions in cases where a defendant's location is unknown or the defendant is not in Kazakhstan. In this case, a claim should be filed with a court in the place where the defendant's property is located or the defendant's last location.

Under the CPC, certain matters should be considered and heard somewhere other than the defendant's home location:

- lawsuits on alimonies, establishment and examination of paternity and divorce are brought to court at the place of a claimant's location;
- lawsuits on immovable property should be brought only at the location of an immovable property;
- lawsuits as to the protection of consumers' right shall be brought at the claimant's location or where an agreement between a customer and a seller was signed or performed;
- lawsuits as to redressing of injury in connection with the breadwinner's death and damage to health can be brought at a claimant's location or location of infliction of injury;
- lawsuits for the restitution of property and non-property rights, violated by illegal imposition of criminal liability, the illegal application of a pretrial restriction, such as recognition not to leave, house imprisonment, arrest and illegal imposition of administrative liability in the form of administrative arrest can be filed at the claimant's domicile;
- lawsuits on the collision of ships and maritime rescue can be filed at the defendant's location or home port of the ship;
- lawsuits against a carrier arising out of a transportation agreement should be heard at the place of domicile of the management body of a carrier;
- lawsuits on the reimbursement of losses owing to the violation of jurisdiction immunity should be heard at the claimant's location; and
- lawsuits against several defendants are filed at a claimant's location or place of any of the defendants at the discretion of the claimant.

Pursuant to article 34 CPC, a defendant may challenge a jurisdiction by filing a petition to move a matter to the court at his or her location, provided that his or her location was unknown before and there was no written agreement between claimant and defendant as to the jurisdiction for disputes.

## 6 Admissibility of evidence

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

The main rule applying to the admissibility of evidence is legal obtaining of evidence. The issue of how the evidence was obtained is more important than the nature of the evidence. The CPC sets out certain requirements for the process of obtaining the evidence and proof, and if anything was obtained illegally, it will not be accepted by the courts.

In addition, each party may request that the court oblige the other party to provide certain evidence.

Each party has to prove the facts that form the basis of the party's claim. In addition, it should be noted the parties are not obliged to disclose all evidence to each other as in common law.

## 7 Publicly available information

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

The following data are usually available in publicly accessible sources:

- intellectual property items (most are covered, but not all);
- employment data (employer's name);
- affiliated persons of joint stock companies; and
- tax data.

The state electronic registers on vehicles and real estate are currently semi-open. In fact, such registers are publicly available; however, only owners, authorised organisations or state authorities may retrieve data from them.

## 8 Cooperation with law enforcement agencies

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

Yes, if the evidence in civil proceedings includes a written statement of governmental bodies (eg, a letter from the law enforcement bodies or regulatory agencies confirming some facts or actions). Anyone

in Kazakhstan can file a request with a relevant state agency or law enforcement agency to ascertain or confirm facts. No other evidence, except for the formal written statements, can be received from the law enforcement and regulatory governmental bodies.

A defrauded party can therefore obtain any evidence from these agencies for use in civil proceedings in the framework of criminal investigation (proceedings) by:

- taking part in criminal proceedings as a party whose rights are violated (in such case law enforcement shall be obliged to provide all information concerning the rights of the defrauded party);
- asking the court to obtain certain data from law enforcement and regulatory agencies; or
- engaging a certified criminal advocate who is authorised to request certain information from law enforcement and regulatory agencies to gather evidence.

## 9 Third-party disclosure

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

If the third parties are governmental agencies, the information can be obtained through a formal request. If the third parties are individuals or legal entities, they do not have to give any information and, accordingly, may refuse to do so.

As to the banks, any and all information regarding customers falls under secret information and is subject to non-disclosure to the third parties except for the owner of an account, or as per the formal request of law enforcement bodies, provided that they produce an approval (sanction of the prosecutor).

Thereby, information from third parties, inter alia, banks, can only be obtained by the law enforcement bodies.

## 10 Interim relief

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

A claimant can apply to court for interim relief and the court may make a judgment on interim relief to prevent dissipation of assets. It should be noted that such application for interim relief should be made and announced at the pre-judgment stage. The following is interim relief pre-judgment:

- seizure of defendant's property;
- prohibition for defendant to execute certain actions;
- prohibition for third persons to transfer property to the defendant or to execute other obligations in regard to the defendant;
- suspension of sale of property in case of dispute of releasing the property from the seizure and result of appraisal of the property;
- suspension of effectiveness of legal act of the state authority; or
- suspension of a collection under the writ of execution disputed by debtor in litigation.

## 11 Right to silence

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

The CPC contains no provisions on the right of a defendant to silence. Generally, a defendant is required to produce a statement of reply to the claim and evidence supporting his or her statement. In other words, a defendant cannot be silent and if this is the case, the judgment will be made in favour of a claimant. However, the court is authorised to consider the case even if the defendant fails to provide the revocation or evidence.

## 12 Non-compliance with court orders

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

Article 21 CPC states that court judgments are passed in the form of a decision, ruling, decree and order. Disobedience or wilful disregard to court orders, as well as other contempt of court, create consequently administrative and criminal liability.

An administrative fine for failure to comply with a court judgment will amount to 10–50 fold monthly calculation index (MCI), depending

on a category of an offender, or administrative arrest for five days (120 hours).

Under article 430 Criminal Code, failure to comply with any court judgment or obligatory writ (enforcement order) within six months or more will be punished by custody, restraint or imprisonment for a period of three years. The same offences involving corruption will be punished by three to seven years' forfeiture of the right to act in a certain position or to engage in certain activity.

### 13 Obtaining evidence from other jurisdictions

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

Any data from foreign countries can be obtained only by virtue of an existing treaty between Kazakhstan and the foreign state.

On 22 July 2015, Kazakhstan joined and ratified the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (concluded on 16 November 1965) (Law on Ratification No. 338-V of 22 July 2015).

Pursuant to article 3 of the Hague Convention, the authority or judicial officer competent under the law of the state in which the documents originate shall forward to the central authority of the state a request conforming to the model annexed to the present convention, without any requirement for legalisation or equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

As per article 17 of the Hague Convention, extrajudicial documents emanating from authorities and judicial officers of a contracting state may be transmitted for the purpose of service in another contracting state by the methods and under the provisions of the present convention.

The convention has been ratified recently and, presumably for this reason, there is still no legal act on designation of the central authority for receiving requests on servicing under the convention in the legal database, so we cannot at this moment say what governmental agency will be the central authority.

Therefore, evidence in the form of confirmation that is a writ of summons or any extrajudicial document that was properly serviced abroad to the defendant can be obtained through procedures stipulated by the convention.

Any evidence, other than confirmation on servicing abroad, can only be obtained from CIS countries that have bilateral treaties on legal assistance in civil issues. The legal database does not contain any treaties on mutual assistance in civil proceedings with other countries.

### 14 Assisting courts in other jurisdictions

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

As Kazakhstan is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965), it undertakes to fulfil contractual obligations for transmitting a judicial or extrajudicial document.

All other actions and assistance can be given on the basis of an existing treaty between two countries. Moreover, Kazakhstani courts are obliged to refuse requests for legal assistance if the execution of the request is not in line with Kazakhstani neutrality or threatens Kazakhstan's safety, and the execution of the request is not within the competence of the Kazakhstani court.

### 15 Causes of action

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

The CPC does not contain the term 'fraud or fraudulent transfer'; the word 'fraudulent' is used.

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

- recognition of the invalidity and nullity of a transaction under the grounds set out in articles 159-160 of the Civil Code, which are, inter alia:
  - the transaction was made without a required licence and permission;

- the transaction aimed at unfair competition (business practices) and violated business ethics;
- the transaction was made by a person under age or a person who has reached the age of 14 without the consent of his or her authorised representatives, except for certain cases provided in the Civil Code;
- the transaction was made by a mentally incapacitated person;
- the transaction was made by a person under the influence of violence or deception, owing to error and misconception, threat, or in a condition where the person cannot be aware of his or her actions and consequences; and
- the transaction was made for the purpose of collusion in bad faith of one party to a transaction with another third party; and
- transactions made by a legal entity in contravention with business purposes, set out in the law and its constituent documents:
  - simulated or fraudulent transactions (simulated and fraudulent transactions shall be considered invalid, as stated in article 160, but it is not specified under which grounds. It is the fact of invalidation itself);
  - unjustified enrichment;
  - civil tort claim; and
  - proprietary claim.

### 16 Remedies

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

The Civil Code provides the following non-exhaustive list of remedies:

- recognition of title;
- restitution;
- suppression of acts violating the law or creating the threat of its violation;
- awarding the execution of an obligation in kind;
- compensation of losses and damages, recognition of the transaction as invalid, compensation of moral losses;
- termination or alteration of legal relations; and
- recognition as invalid or voiding of a state authority act that does not comply with legislation.

Other legal acts could provide remedies, for instance, termination of registration of title for real estate.

### 17 Judgment without full trial

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

Yes. As per the CPC, the following judgments do not require a full trial – court order judgment, writ proceedings and default judgment.

A court order is a decree of the judge issued within three days on the grounds of the claimant's application for collection of funds or reclamation of property from the debtor. The court order is issued without calling the defendant, plaintiff, their explanations and litigation. A court order can be issued if, inter alia:

- the claimant's request is undisputed;
- the request is based on a notarised transaction; or
- the defendant's terms of execution of his obligation have expired under the agreement and the defendant has agreed to this in writing.

However, a court order is subject to cancellation in cases when a defendant declares objections.

Writ proceedings is a litigation held by one judge in one month according to the general rules of a full trial. The CPC states the list of cases that could be considered under the writ proceedings:

- claims on the reclamation of funds, if the cost of the claim for legal entities does not exceed 700 MCI for an individual entrepreneur and 200 MCI for individuals; and
- claims, notwithstanding the cost of claims, based on documents stating the financial obligation of the defender or documents confirming the debt under an agreement, or both.

The decree of court in a writ proceedings is the court decision.

Default judgment is applied when a defendant is absent, provided that:



- the defendant was properly informed of the time and place of the litigation;
- the defendant did not provide valid reasons for his or her non-appearance; and
- the defendant did not request for the case to be considered in his or her absence.

The defendant is authorised to challenge the default decision within five days of the defendant being notified of the decision. The decision should be cancelled if the court finds that the defendant was absent owing to serious reasons and was unable to notify the court about this or he or she provides evidence that may influence the decision.

## 18 Post-judgment relief

### What post-judgment relief is available to successful claimants?

An effective court decision is currently executed by virtue of a writ of execution. The court issues the writ of execution to a claimant upon the closure of litigation and issuance of a judgment. A claimant delivers to a judicial enforcement agent (bailiffs) a writ of execution. Judicial enforcement agents can be state and private. As to the fee of judicial enforcement agents, under the laws a state agent should be paid an enforcement fee after he or she completes all procedures as per the writ of execution, while a private agent should be paid in advance for partially starting and carrying out enforcement actions. When a private agent recovers his or her fee from the debtor, the agent must return the advance payment for carrying enforcement actions to a recoverer (claimant), as stated in article 119, point 3, Law on Judicial Enforcement Agents.

## 19 Enforcement

### What methods of enforcement are available?

The laws of the Republic of Kazakhstan stipulate the following methods of enforcement:

- attachment of property, including money and securities of a debtor, in ownership of a debtor or the third parties, individuals or legal entities, including assets in banks, insurance and other organisations;
- in case of insufficient funds, the sale of the debtor's property by tender (if the court decision is satisfactory any remaining money shall be transferred to the debtor);
- seizure of a debtor's property;
- sealing of property;
- forbidding the debtor to perform certain actions in regard to property;
- forbidding the management of a legal entity to adopt certain decisions;
- extraction of documents establishing title; and
- forbidding third parties from transferring property, including money, or executing other actions in favour of the debtor.

It should be noted that in a Kazakhstani court a decision can be enforced in two ways: voluntarily or forcibly.

## 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 laws of Kazakhstan do not regulate the terms of payment between advocates (criminal law) or lawyers (civil law) and clients (freedom of the agreement rule is applied). Thus, any and all funding arrangements are available to parties contemplating or involved in litigation.

## Criminal asset recovery

## 21 Interim measures

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

According to the Criminal PC, seizure of property is available in Kazakhstan. Such seizure can be applied only on the basis of a relevant court decree on seizure. The seizure of property consists of the following measures:

- forbidding the owner or other holder of property to dispose of or to use such property; and
- extraction of property for storage.

## 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?

According to the Criminal PC, the investigation of a crime is initiated by the investigation authorities by virtue of:

- information on a committed crime, other than an anonymous tip;
- admission of guilt;
- a report in the mass media; and
- a report of an official of the state authority on criminal investigation, including cases where the official is an eyewitness to a crime.

The investigation authorities are obliged to seize property during the investigation to verify property claims or applicable confiscation.

## 23 Confiscation – legal framework

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

In Kazakhstan confiscation is legally regulated by two main acts, the Criminal Code dated 16 July 1997 (the Criminal Code of 1997) and the Criminal Code dated 2 July 2014 (New Criminal Code).

Here we set forth the provisions of the Criminal Code of 1997, which will be effective through 2018 and from 1 January 2018 the New Criminal Code will come into force. These terms only apply to confiscation, other issues are regulated by the New Criminal Code.

According to article 51 of the Criminal Code of 1997, the following property can be confiscated:

- private property of a convicted person – for any kind of crime;
- private property of a convicted person, property acquired illegally;
- property bought by funds obtained illegally, property granted to third parties for corruption, money laundering, organised and transnational crime, gang crimes; and
- private property of a convicted person, property acquired illegally and property used or designated to financing of terrorism activities.

Confiscation can be applied only if it is directly prescribed in a court judgment (verdict) (punishment).

The main provisions regulating confiscation are stipulated by article 48 New Criminal Code. In its legal definition of confiscation article 48(1) of the New Criminal Code states four categories of property that can be confiscated:

- property acquired illegally;
- property bought with funds obtained illegally;
- property that is the tool or instrument of crime; or
- property transferred by the convicted person to others.

In addition, article 48(2) New Criminal Code states the list of property that is subject to confiscation:

- money;
- property acquired as the result of a criminal offence and any proceeds of such property, excluding property and proceeds that should be returned to the legal owner;
- the above-mentioned property and proceeds modified in part or in whole into another property; and
- property used or designated to financing of extremism and terrorism activities or criminal group.

If the confiscation of an item included in the above-mentioned list of property could not be performed by virtue of usage, sale or other reason, the funds equal to the price of the item shall be confiscated on the basis of a court decision.

It should be noted that the New Criminal Code states cases where confiscation could be executed prior to the court sentence (punishment):

- the suspected or charged person is wanted internationally; or
- criminal prosecution was cancelled by reason of:
  - an act of amnesty;

- expiration of the term of criminal liability; and
- death of the suspected or charged person.

A criminal investigator submits to the prosecutor a report along with relevant evidence stating that there are legal grounds for confiscation in favour of the state or a victim of a criminal offence filing a claim on the invalidation of transactions and, accordingly, confiscation of property. Based on the report and evidence, a prosecutor decides whether or not to apply to the court with a request for confiscation. The court decides on the matter of confiscation. The court has to review and pass a decision on the following matters:

- whether or not the property of a suspected or charged person is connected with a crime;
- whether or not the property of a third party was acquired in a manner stated in article 48 of the Criminal Code (see above);
- whether there are sufficient grounds for confiscation;
- the future of arrested and extracted property that is not subject to confiscation; and
- the cost of the confiscation and the person responsible for such expenses.

It should be noted that the Criminal PC states the list of essential property that cannot be confiscated under either the Criminal Code of 1997 or the New Criminal Code.

## 24 Confiscation procedure

### Describe how confiscation works in practice.

Confiscation is depriving of and taking private property for the public treasury.

Based on an effective sentence and writ of execution the judicial enforcement agents issue a special decree on the execution procedure. An executor then starts a confiscation procedure by sending a formal notice of seizure to all banks (financial organisations), relevant organisations or persons and state authorities. Once the seizure is formally documented and executed no one is able to use or dispose of such property. Judicial enforcement agents extract the property or ensure the registration of the title to real estate in favour of the state. A judicial enforcement agent has a right to involve special experts, inter alia, law enforcement agencies, in the confiscation.

## 25 Agencies

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

It depends on the category and type of crime. Generally, the following agencies are responsible for tracing:

- the Public Prosecutor;
- the Committee of National Security;
- Authorities of Internal Affairs;
- the Anti-corruption Agency;
- the Agency of Economic Investigation; and
- judicial enforcement agents executing the confiscation based on an effective sentence.

## 26 Secondary proceeds

### Is confiscation of secondary proceeds possible?

Under the Criminal Code of 1997, all and any property and assets that have been gained through money-laundering actions or using the funds acquired from money-laundering, as stated in article 193, or through crime of terrorism or using the funds acquired from crime of terrorism is subject to confiscation. Thus, secondary proceeds from money-laundering or terrorism can be confiscated. Under the New Criminal Code, any and all property and funds gained through criminal offences as well as any profit and gains from such property are subject to confiscation.

## 27 Third-party ownership

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

Under the Criminal Code of 1997, it is possible to confiscate property acquired by a third party or close relatives, if it is proved that it was

gained through money-laundering actions. Under the New Criminal Code, if confiscation of a property is impossible owing to its sale, its use by someone or for any other reason, an amount of money will be recovered.

## 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?

No. However, a property obtained by a criminal action is subject to confiscation; see question 23.

## 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 public prosecutor. In the procedure to confiscate the proceeds of crime, the burden cannot be reversed.

## 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, confiscation is a measure where ownership changes from private to state, thus confiscated property is always in state ownership (republican or local administrative). After completion of the confiscation a special commission (formed by the authority on state property or local administrative authority) decides whether the confiscated property remains in state ownership, is sold, granted to private organisations or destroyed.

## 32 Confiscation of profits

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

It will be possible to confiscate any and all advantages and profits (dividends, fees, etc) from property gained through criminal offences after 1 January 2018. The Criminal Code of 1997 states that only property acquired through the commission of criminal offences or by using funds gained through the commission of criminal offences can be confiscated. It says nothing about future profits and advantages.

## 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.

In Kazakhstan, confiscation is an additional sanction, therefore property is always confiscated provided the person is pronounced guilty and convicted. Therefore, in rem confiscation is not applied. Under the Criminal Code, the proceeds of crime can be confiscated prior to delivering a conviction, when a suspected person is internationally wanted, or the criminal proceedings should be closed due to the death of a suspected person, act of amnesty, or expiry of period of limitations.

## 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 of seizure of property, a judge may at his or her own discretion transfer property to a representative of a local governmental authority, housing management organisation, owner of the property or other person. These entities shall be notified on the liability for preservation of the property. Such notification shall be confirmed by the entities. The

storage of property is executed according to a storage agreement, the Civil Code and other legal acts. A keeper is entitled to use the property provided permission of the judicial enforcement agent is obtained. Generally, a keeper is entitled to remuneration and compensation for storage expenses with the deduction of actual profits obtained from the use of the property.

As to monetary values (ie, money in bank accounts or accounts of credit organisations), all debit transactions with respect to such accounts shall be stopped in the amount of the seized funds.

All expenses for the management of seized property in a criminal case shall be considered as court costs. Generally, such costs are subject to compensation by the accused person if found guilty by the court – or the state, in case 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.**

International legal assistance concerning provisional measures in relation to the recovery of assets can be requested according to existing treaties (eg, under the Hague Convention 1965). Kazakhstan undertakes to assist in servicing judicial and extrajudicial documents. Any other assistance at international level, except for servicing of judicial and extrajudicial documents, can be carried out at the request of central state authorities; usually it is General Public Prosecution Office in Kazakhstan.

When no treaty exists between two countries, the maxim of mutual assistance can be applied: the central authority of Kazakhstan in its request for foreign legal assistance confirms in writing it will consider the request of a foreign state in the future. The central authority should consider:

- the General Public Prosecution Office of Kazakhstan or authorised prosecutor – for prejudicial investigation request; and
- the Supreme Court of Kazakhstan – for a request executed during court proceedings.

Moreover, the central authorities put forward their request through diplomatic channels.

### 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.**

Here again we can refer to the Hague Convention 1965, the judicial and extrajudicial documents can be served in Kazakhstan, all other assistance will be carried out on the basis of either a bilateral agreement or the request of an authorised state body, but the latter case does not guarantee that the request will be met and executed.

When no treaty exists between two countries, the maxim of mutual assistance shall be as follows:

- pursuant to article 558 Criminal PC, in the absence of an international treaty, legal and other aid can be provided on the basis of a request of a foreign state or a central state agency on the principle of mutuality. In cases when a central state agency of the Republic of Kazakhstan sends a request for legal aid to a foreign state, the agency guarantees by default to accept and consider a legal aid request of this foreign state in future; and
- according to the Criminal PC, in the absence of an international treaty the governmental authorities must reject the request of a foreign court in the following cases:
  - execution of the request contradicts Kazakhstani legislation or may cause damage to sovereignty, security, public order or other interests of Kazakhstan;
  - the foreign state did not confirm mutual assistance in its request;
  - the request relates to a deed that could not be considered a criminal act in Kazakhstan; or
  - there are sufficient grounds to consider that the goal of the request is to trace, convict and punish a person on the grounds of his or her origin, social, official position and property status, gender, race, nationality, language, religion, creed, place of residence or in other circumstances.

### 37 Treaties

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

Kazakhstan is a signatory to the following conventions relating to asset recovery (non-exhaustive list):

- the Convention of the Council of Europe on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg 1990), extended to Kazakhstan in 2011;
- the Agreement on the Eurasian Group on Counteraction to the Legalization of the Proceeds of Crime and Financing of Terrorism (Moscow, 2011), extended to Kazakhstan in 2012;
- the Convention on Legal Assistance and Legal Relations on Civil, Family and Criminal cases (Minsk, 1993), extended to Kazakhstan in 1993;
- the Convention on Legal Assistance and Legal Relations on Civil, Family and Criminal cases (Chisinau, 2002), extended to Kazakhstan in 2004;
- the UN Convention against Transnational Organized Crime (Palermo, 2000), extended to Kazakhstan in 2008;
- the UN International Convention for the Suppression of the Financing of Terrorism (New York, 2000), extended to Kazakhstan in 2002; and
- the UN Convention against Corruption (New York, 2003) extended to Kazakhstan in 2008.



LINKAGE & MIND LLP

**Yerzhan Manasov**  
**Maksud Karaketov**

**yerzhan.manasov@linkagemind.com**  
**maksud.karaketov@linkagemind.com**

7 Imanov Street  
Office 21  
Astana 010000  
Kazakhstan

Tel: +7 7172 200 701  
Fax: +7 7172 200 703  
www.linkagemind.com

---

**38 Private prosecutions**

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

Private prosecution does not exist in the Kazakhstani legal system.



# Korea

Michael S Kim and Robin J Baik Kobre & Kim

Yoon-Hee Kim and Jae Hwan Lee Shin & Kim

## Civil asset recovery

### 1 Legislation

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

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

- Korean Civil Procedure Act (KCPA);
- Civil Execution Act; and
- Personal Information Protection Act.

As a general matter, private investigation without any court involvement is fairly limited. In particular, obtaining financial information from banks and other financial institutions without court permission is permitted only in a very limited set of exceptional circumstances and through strictly regulated institutions, such as credit rating agencies.

### 2 Parallel proceedings

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

There are no restrictions on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter. A plaintiff, 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 plaintiff in proving civil liability of the defendant. On the other hand, there may be situations in which the plaintiff needs to move quickly (eg, making an application to freeze and seize assets).

### 3 Forum

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

Civil proceedings should be brought to the district courts, which are located in most major municipalities across Korea. Generally speaking, proceedings should be brought in the district court of the region in which a defendant debtor or a tortfeasor is located. The KCPA also provides that civil proceedings involving property right disputes can be brought in the district court in which the relevant property is located.

### 4 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.

Tort claims must either be brought (whichever is earlier) 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.

## 5 Jurisdiction

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

District courts are the courts of general and original jurisdiction. They try all civil and criminal cases at first instance.

In deciding the jurisdiction of a Korean 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. It should also be noted that the 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, the 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; rather, it must transfer such lawsuit by its ruling to the competent court, so that the plaintiff is relieved of detriments. Furthermore, the act allows the court to adjudicate the case instead of transferring if the court deems it proper to do so.

## 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 laws. A party in 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. 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.

Above all, neither the KCPA nor the Criminal Procedure Act has provisions on relevance in Korea. Next, while article 308-2 of the KCPA expressly prescribes that any evidence obtained in violation of the due process shall not be admissible, the KCPA does not have any provisions on limiting the admissibility of collected evidence. Therefore, civil proceedings do not have limitations on the admissibility of documents even created after initiation of a lawsuit, let alone hearsay evidence. As the case law is no different, except the cases in which evidence was found inadmissible based on the illegality of the taking of evidence (eg, in violation of privacy law or trade secret law), it is difficult to find a civil case in which the admissibility of evidence was limited.

## 7 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 registration;
- companies and business registration;

- intellectual property (patents, trademarks) registration;
- securities registration;
- vehicle registration; and
- factory foundation registry and mine foundation registry.

There are also private companies that can run collective searches for various assets.

## 8 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 oftentimes denied if there is a pending trial.

## 9 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 that are 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 for 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 production of documents must clearly indicate the following (article 345 of the KCPA):

- the document requested;
- the contents of the requested document;
- the document holder;
- the fact to be proved by the document; and
- the grounds on which the document should be produced.

## 10 Interim relief

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

In order to maintain the status quo of a tortfeasor's or a debtor's assets, a claimant can apply for one or all of the following provisional reliefs – provisional attachment order, provisional prohibition order from asset disposal or provisional injunction.

A creditor may apply for these reliefs *ex parte*.

A provisional attachment order 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 are effective even if the assets were disposed to third parties. The creditor must identify in his or her application the specific assets the debtor owns or possesses. After 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 may apply for a provisional prohibition order from asset disposal in order to obtain delivery of personal property, transfer of accounts receivable or bank account, or registration of real property (article 300 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 order, a provisional prohibition order from asset disposal is effective against third parties.

A creditor who is seeking to prohibit certain actions (eg, unfair competition), seeking to dismiss directors or to appoint a provisional representative of debtor corporation, or seeking to copy financial documents of debtor corporation may file a petition for a provisional injunction (article 304 of the Civil Execution Act). The court usually reviews the petition and supporting evidence without witness testimony and has discretion as to the issuance of the order and the necessary undertakings to protect the parties' interest.

## 11 Right to silence

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

Defendants in a civil proceeding do not have a right to silence. If a defendant chooses to remain silent, an adverse inference may be drawn by the court.

## 12 Non-compliance with court orders

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

Korean courts have limited contempt powers and generally do not sanction a party for disobeying a court order. The court may impose fines (up to 5 million won) or detention (up to seven days) for witnesses who fail to appear to testify under oath. In addition, a witness who makes 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.

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.

## 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 and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970.

Korea is also a party to several multi- 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

South 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 South Korean resident according to the method prescribed by the KCPA.

#### Taking evidence from a witness in South Korea

South 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 South Korea can be sent through a letter of request to the South Korean central authority, which will then transmit the letter to the relevant South 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 the Korean courts. To enforce a foreign judgment, a party must request and obtain an enforcement judgment from a South Korean court (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 judgment is final and conclusive;

- the court that rendered the judgment has jurisdiction under the principles of international jurisdiction laid down in South 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 South 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. The particulars of the case and other considerations such as the statute of limitations should dictate with which of the two legal theories to present the case. The amount of damages from either action is the same, and there are no punitive damages available under Korean 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?

South Korean courts can order the following:

- performance of specific obligations (eg, delivery of certain property);
- seizure;
- restitution;
- damages; and
- injunctions.

As to damages, punitive or treble damages are not allowed.

## 17 Judgment without full trial

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

Default judgment exists in Korea. However, it is distinguished from summary judgment, as default judgment requires a separate procedure. In cases without significant disputes, if the plaintiff asks for a cash payment and requests an order for such payment, the case proceeds based only on written submissions and without oral arguments. In addition, although interlocutory judgment is allowed under article 201 of the KCPA, it is rarely practised in Korea.

## 18 Post-judgment relief

### What post-judgment relief is available to successful claimants?

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

- the appointment of a receiver, in a case in which an insolvent debtor otherwise meets the requisite elements under insolvency and debtor rehabilitation law;
- the examination of judgment debtors in identifying the whereabouts of the assets of the judgment debtors;
- the attachment or garnishment of debtors' assets; and
- the discovery of judgment debtors' assets held by 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 legal restrictions to third-party litigation funding in Korea. 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 Korean 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.

## Criminal asset recovery

### 21 Interim measures

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

Korean law prescribes the act of disguising 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 of Punishment on Criminal Proceeds Concealment and the Act on Special Cases of Confiscation and Forfeiture of Assets Acquired through Corrupt Practices. Korean law also governs concealment or disposition of properties with a 'preservation order for the purpose of confiscation', which allows 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?

A criminal investigation is initiated by the prosecutor following a criminal complaint against certain persons, information submitted to the Prosecutor's Office by another authority, or even information that has come to the attention of the Prosecutor's Office through the press or other sources.

### 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 Act on Regulation of Punishment of Criminal Proceeds Concealment (articles 8–10) provide the general framework for confiscation of 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 Act on Special Cases of Confiscation and Forfeiture of Assets Acquired through Corrupt Practices (articles 3–6) and the Act on Special Cases Concerning Forfeiture for Offences by Public Officials (articles 3–6). 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.

### Update and trends

The legislation and courts recognise the need to simplify the asset recovery process, particularly for relatively smaller claims (generally defined as claims up to 20 million won, ie, approximately US\$20,000). The task force on court proceedings reform is considering the introduction of a summary procedure for asset recovery, which would include a summary auction procedure for real estate and certain types of financial assets using a simple form application. The proposed reform may also allow an automatic search of a debtor's assets upon issuance of judgment.

## 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 the 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?

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

- the Public Prosecutor's Office (under the supervision of the Supreme Prosecutor's Office);
- the Ministry of Justice;
- 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 Forfeiture for Offenses of Public Officials and the Act on Special Cases of Confiscation and Forfeiture of Assets Acquired through Corrupt Practices, 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 Act on Special Cases of Confiscation and Forfeiture of Assets Acquired through Corrupt Practices, provide that 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, 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 illegal 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 recent 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.

## 32 Confiscation of profits

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

Yes. Particularly under recent laws on redemption of proceeds of crime, the scope of assets that could be confiscated or redeemed is extensive, which allows for confiscating the secondary proceeds derived from 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, 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 Korea Asset Management Corporation is to sell the obtained personal and real properties, and it may lease such personal and real properties 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:

- investigation into the whereabouts of a person or object;
- provision of documents and records;
- service of documents, etc;
- gathering of evidence, seizure, search and verification;
- transfer 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. Such requests may be made for assistance in relation to:

- investigation into the whereabouts of a person or object;
- provision of documents and records;
- service of documents;
- gathering of evidence, seizure, search and verification;
- transfer 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 descriptions 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 to execute US confiscation judgment against debtors' assets located in Korea. This reflects the trend of broader assistance by the Korean government, expanding the 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:

- Council of Europe, Convention on Mutual Assistance in Criminal Matters;

**KOBRE & KIM****DISPUTES  
AND INVESTIGATIONS**

**Michael S Kim**  
**Robin J Baik**

**michael.kim@kobrekim.com**  
**robin.baik@kobrekim.com**

9F, Tower B, The K Twin Towers  
50, Jong-ro 1-gil, Jongro-gu  
Seoul 03142  
Korea

Tel: +82 2 369 1212  
www.kobrekim.com/home-ko-kr/

**SHIN & KIM**

**Yoon-Hee Kim**  
**Jae Hwan Lee**

**yhekim@shinkim.com**  
**jhwlee@shinkim.com**

8th Floor, State Tower Namsan  
100 Toegye-ro, Jung-gu  
Seoul 04631  
Korea

Tel: + 82 2 316 4114  
Fax: +82 2 756 6226  
www.shinkim.com

- 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;
- 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 Shin & Kim and Kobre & Kim. Shin & Kim contributed summaries of Korean law. Kobre & Kim contributed thoughts on strategy in judgment enforcement and asset recovery matters.*

# Liechtenstein

Matthias Niedermüller

Schwärzler Attorneys at Law

## Civil asset recovery

### 1 Legislation

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

Private investigation is not specifically regulated by Liechtenstein legislation. Any private gathering of evidence must be in compliance with the applicable laws, such as laws providing for personal privacy and protection of personal data. The excessive infringement of personal privacy can also constitute a criminal offence (article 118 et seq of the Criminal Code).

The Liechtenstein Civil Procedure Code (CPC) provides several regulations regarding the gathering of evidence in the course of a civil proceeding.

Additionally, rules dealing with asset recovery can be found in the following statutes:

- General Civil Code (GCC);
- Criminal Code (CC);
- Criminal Procedure Code (CrPC);
- Persons and Companies Act (PCA);
- Property Law (PL);
- Enforcement Act (EA); and
- Bankruptcy Act.

### 2 Parallel proceedings

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

Generally there is no restriction in law on parallel proceedings. A civil proceeding can be conducted in parallel with criminal proceedings concerning the same subject matter. In law the facts found in a criminal judgment are not binding for a civil proceeding. The same applies vice versa. In the course of criminal proceedings victims of the offence under investigation may also join as a private party and assert their civil claims in the criminal proceeding.

If the outcome of a criminal proceeding is a prejudicial question for the civil proceeding the judge may suspend the civil proceeding until the decision in the criminal proceeding is final and binding (article 191 paragraph 1 CPC).

### 3 Forum

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

There is only one first-instance court in Liechtenstein, namely the Princely District Court in Vaduz, which deals with all civil matters. There are different kinds of proceedings, such as civil, non-litigant, enforcement proceedings, etc, which have different procedural requirements. The competence of the District Court does not have any limitation for the amount in dispute. In selected proceedings such as claims for state liability the Court of Appeal is the first instance.

In accordance with article 31 of the statutory regulation on jurisdiction (SRJ), civil proceedings are generally to be brought before the court if the defendant's domicile (natural person) or seat (legal entity) is in Liechtenstein (general forum rule). However, it is also possible to bring a claim before the Liechtenstein courts if the defendant is domiciled

abroad, but has assets in Liechtenstein (asset-based jurisdiction, article 50 SRJ).

Until 1 July 2015 a claimant had to apply and hold a mediation hearing before being allowed to file a claim. After an amendment of the law this requirement has been omitted and lawsuits can be filed without any compulsory requirement of a mediation attempt.

### 4 Limitation

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

The regulations dealing with statute of limitations are found in article 1478 et seq GCC. The general statute of limitations is 30 years after the emergence of a claim. However, there are several exceptions and particularities. For claims arising out of a breach of contract the statute of limitation is five years (article 1486 GCC).

Claims for damages have a statute of limitation of three years starting from the time the damage, the damaging party and the causal connection become known. The absolute statute of limitation for such cases, however, is always 30 years. If the damage has been caused by an offence, the statute of limitation is 30 years (article 1489 GCC). Additionally, for claims for damages in correlation with financial services business conducted by a financial intermediary the above three-year rule applies. However, the absolute time limit is 10 years after the conduct at the latest (article 1489a GCC).

### 5 Jurisdiction

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

The general rule for international jurisdiction is that the Liechtenstein District Court has international jurisdiction if it has domestic jurisdiction according to the SRJ. Because there is only one court of first instance in Liechtenstein the domestic jurisdiction may be equalised with international jurisdiction. It falls upon the court to examine on a case-by-case basis whether international jurisdiction is given.

The District Court according to article 31 SRJ generally has domestic jurisdiction if the defendant resides or is based in Liechtenstein. Civil proceedings are generally to be brought before court if the defendant's domicile (natural person) or seat (legal entity) is in Liechtenstein. It is also possible to bring a claim before the Liechtenstein courts if the defendant is domiciled abroad but has assets in Liechtenstein (asset-based jurisdiction, article 50 SRJ). Furthermore, there are additional regulations allowing jurisdiction.

### 6 Admissibility of evidence

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

The Liechtenstein CPC expressly mentions five types of admissible evidence. These are documentary evidence (article 292 et seq CPC), evidence by witnesses (article 320 et seq CPC), evidence by qualified experts (article 351 et seq CPC), evidence by legal inspection (article 368 et seq CPC) and evidence of the parties (article 371 et seq CPC). However, the listed types of evidence are not exhaustive and the CPC also accepts other types of evidence such as tape and video recordings, electronic data, biological evidence, etc. Furthermore,

subject to exceptions, illegally obtained evidence may also be used in the proceeding.

The general rule is that each party has to evidence the facts that form the basis of his or her claim and are favourable to him or her. Each party is entitled to offer evidence to substantiate the claim or respectively the non-existence of the claim and can do so until the taking of evidence is closed. However, the court may reject such offers if they are deemed insignificant or an intention to delay the proceedings.

## 7 Publicly available information

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

There are several sources of information that are publicly available and provide information on assets in Liechtenstein.

The Commercial Register contains information on companies, trusts, foundations, institutions, etc, based in Liechtenstein. Such information includes name, seat, purpose and directors. The Commercial Register is publicly accessible. However, with regard to some entities, the publicly available information is limited.

The Land Registry contains information on every plot of land in Liechtenstein. The Land Registry can be consulted by anyone who can substantiate a legal interest in the information contained there.

## 8 Cooperation with law enforcement agencies

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

None of the parties of a civil proceeding may directly obtain evidence from law enforcement agencies if no further requirements are met. If the party is either victim or accused in a criminal proceeding or shows particular legal interest in the files of a criminal investigation it will be granted access to the files of a particular proceeding.

According to article 183 CPC the District Court may obtain documents that are deposited with a public authority if a proceeding party has referred to them in the pleadings. Since the term 'public authority' should be interpreted broadly it encompasses any entity established and financed by the state.

## 9 Third-party disclosure

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

Information from third parties can, in particular, be obtained by hearing them as witnesses. If a third party is offered by a party as evidence and it is thereafter summoned by the court, it generally has the duty to comply with the summoning and to testify completely and truthfully.

However, a third party is allowed to reject answering questions that could lead to dishonour, criminal prosecution or pecuniary disadvantages against them or their family, or could constitute a breach of confidentiality or professional secrecy such as trustees secrecy, attorney secrecy and bank secrecy (article 321 CPC). Furthermore, it is illegitimate to have third parties testify if they are unable to communicate what they perceived or were unable to perceive the facts in question or if they are bound by secrecy (eg, clerics and civil servants; article 320 CPC).

## 10 Interim relief

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

In terms of civil asset recovery it is possible to prevent the dissipation of assets through the means of an injunction. The general regulations regarding injunctions are found in article 270 et seq EA.

Provisions specifically regarding monetary claims are regulated in article 274 et seq EA. According to these regulations, relief can be obtained by seizing the moveables of the debtor and putting them into the District Court's safekeeping. Furthermore, the debtor can be judicially forbidden to alienate or pledge any of his or her moveables. Also, any third person against whom the debtor has a claim or receivable can be prohibited from fulfilling his or her obligations or to surrender any

objects that are due to the debtor. By these means, all assets located in bank accounts of the debtor and all receivables of the debtor can be seized. By means of the injunction, the claimant obtains a lien on the assets and receivables that are seized and attached by the injunction.

With regard to non-monetary claims, the court can order that the objects in custody of the debtor at which the claim for restitution is aimed are to be deposited at court (article 277 EA). Furthermore, the court may make orders to uphold a status quo and forbid certain actions that would amend that status quo.

An application for injunctive relief can be made separately from or within the action. Such application must substantiate the claim and the endangerment of the claim and therefore the necessity of the injunction (article 282 EA).

## 11 Right to silence

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

Generally defendants (regarded as parties) are obliged to testify and do not have a right of silence. However, if they refuse to testify, or even to appear before the court, the CPC does not provide any direct sanctions or means of enforcement against them (article 380 paragraph 3 CPC). It should also be noted that defendants who are deemed incapable of testifying (such as clerics and civil servants as far as bound by official secrecy) may not be interrogated (article 372 CPC).

If the defendant does not appear before court for the first hearing or at a later hearing the court may pass a default judgment. Additionally, any refusal of a party to give evidence is taken into consideration by the judge within the scope of the free appraisal of evidence.

## 12 Non-compliance with court orders

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

With regard to the maintenance of order in the court hearings the judge may forbid any person who does not comply with court orders to make further statements. Also, any person disturbing the hearing in spite of being cautioned can be excluded from the hearing. A party to the proceedings being excluded from the hearing must be informed of the possibility of a judgment by default. It is also possible for the court to impose fines and short detention sentences (up to three days).

If a court decision rules for an obligation of the party for a personal act, omission or performance to the other party, such order, if it is final and enforceable, may be enforced by the entitled party in an enforcement proceeding. If the act or omission is a matter of personal action of the obligator that may not be taken by a third person (article 257 EA), the court may enforce the title by threat of penalty, penalty payments and imprisonment of up to six months. If the action may also be taken by a third party, it will be taken by a third party at the costs of the obligator (article 256 EA).

## 13 Obtaining evidence from other jurisdictions

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

On the basis of the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, it is admissible to request legal assistance by the competent authorities in the respective state (provided that it has ratified the convention as well). Such requests of the court are sent to the Department of Justice, which forwards the request to the foreign country. The foreign authority may take appropriate coercive measures in order to execute the request. Usually the Hague Convention is utilised to execute the questioning of witnesses who are not able or willing to personally appear before the court in Liechtenstein.

Furthermore, Liechtenstein has concluded a multilateral treaty agreement regarding obtaining information regarding foreign law and, by this means, the Liechtenstein courts in civil matters may obtain information regarding foreign law.

## 14 Assisting courts in other jurisdictions

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

According to article 27 SRJ, the District Court has a general duty to provide legal assistance upon the requests of foreign courts, provided that



international agreements do not specify differently. The Liechtenstein court is obliged to refuse requests for legal assistance if it is not competent to take the requested action (it may, however, transfer the request to the competent authority), if the requested action is prohibited by legal provisions that are binding for the court or if mutuality between Liechtenstein and the requesting state is not preserved.

If the requesting state has also ratified the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial matters, the provisions of this convention apply. Liechtenstein, however, is not a member of the Lugano Convention.

## 15 Causes of action

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

The most important cause of action is the claim for damages (article 1293 et seq GCC). This cause of action is relevant for both damages caused by a breach of contract and by tort. The latter is particularly applicable to cases of fraud.

Another relevant cause of action is provided by a claim for unjustified enrichment (article 1041 et seq GCC).

Furthermore, the PCA also provides for a further basis for liability action in the form of claims for responsibility against the organs of an entity if the organs have taken action damaging the entity (article 218 et seq PCA).

Proprietary claims are possible as well. Any owner who is deprived of its ownership regarding assets can claim their restitution (article 20, paragraph 2 LP).

## 16 Remedies

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

Following the principles of the law of damages restitution is the primary remedy (article 1323 GCC). If restitution is not feasible the claimant may sue for monetary damages. This applies for contractual and for tort claims.

In the context of a contractual relationship the claimant is able to request the defendant to fulfil his or her contractual duties (specific performance), but also to claim damages on the basis of breach of contract.

Furthermore, Liechtenstein law also provides for several reasons for restitution because of unjust enrichment. In general, however, unjust enrichment is subsidiary to the claim for damages.

Regarding responsibility claims against organs the entity may request payment of damages because of actions to the detriment and damage of the legal entity based on article 218 et seq PCA.

Furthermore, restitution is also a possible remedy with regard to proprietary claims, especially a claim for surrender of property (article 20 paragraph 2 PL). Monetary damages can also be claimed under certain specific circumstances, such as intentional or negligent infringements of personality rights (article 40 PCA).

## 17 Judgment without full trial

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

The Liechtenstein CPC regulates a simplified civil procedure, which is intended to be more efficient in comparison with a 'regular' litigation with regard to its duration and cost. Upon a corresponding petition by the claimant, the court issues a payment order without an evidentiary hearing. This payment order is only based on the allegations of the claimant. If the defendant does not oppose the payment order it becomes binding and thus an enforceable title.

If the defendant objects to the payment order it becomes invalid. The claimant thereafter has to file his or her claim by the means of a 'regular' civil litigation. Alternatively, the claimant may request the lifting of the objection in a judicial annulment procedure if certain conditions are fulfilled (article 49 Injunction Proceedings Act). If this request is followed by the court the defendant may file a claim for disallowance of the claim.

Furthermore, the court may render a default judgment if the defendant fails to appear at a court hearing to which he or she was summoned correctly. In such a case the court, upon application of the

claimant, would issue a default judgment based on the content of the statements of the claimant alone (article 396 et seq CPC).

## 18 Post-judgment relief

### What post-judgment relief is available to successful claimants?

If the decision is final and binding and the defendant has not complied with his or her obligations according to the decision within the performance period, the decision is enforceable. The claimant may thereafter request the enforcement of his or her claim under the provisions of the EA. The enforcement proceedings are initiated by a respective application that must refer to the enforceable judgment, payment order, settlement, etc, and must contain the methods of enforcement that are to be applied as well as the assets that shall be recovered.

## 19 Enforcement

### What methods of enforcement are available?

The methods of enforcement are specified in the EA. Regarding the enforcement of monetary claims, the applying creditor may request the seizure and auctioning of the debtor's immovables and moveables (articles 58 et seq and 168 et seq EA). The latter also includes the most common enforcement method, namely the seizure of any receivable or monetary claim of the judgment debtor (article 210 et seq EA).

If the decision obliges the judgment debtor to a specific action or performance, the application for enforcement can also request the obtainment of an act or an omission of the judgment debtor. If the act or omission is a matter of personal action of the debtor that may not be taken by a third person (article 257 EA), the court may enforce the title through threat of penalty, penalty payments and imprisonment of up to six months. If the action may also be taken by a third party, it will be taken at the costs of the debtor (article 256 EA).

## 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 the parties have the obligation to fund their own representative based on an agreement between the party and the representative. If a party is not able to afford the cost of litigation without preventing itself providing for its own maintenance, it has the possibility of applying for legal aid (article 63 CPC) subject to certain strict prerequisites.

In the relation between the parties of the proceeding the rule is that the losing party has to reimburse the costs of the successful party according to the lawyers' tariff. If the party is only partly successful it is only reimbursed a part of the costs based on the quota of success. The law, however, also provides for several exceptions and special rules.

Furthermore, a foreign claimant is obliged upon request of the defendant to provide a security deposit for the presumed procedural costs of the defendant if he or she resides in a country where Liechtenstein cost decisions are not enforceable. Such deposit may be made by wire transfer but also by bank guarantee and is deposited with the court.

The fees and costs for hearings, pleadings, etc, are strictly regulated by tariffs, thus the courts can manage the overall cost of the litigation in an indirect way. The court has to comply with the principle of procedural economy and proceedings must be conducted as efficiently and cost-effectively as possible. On that basis, applications for taking of evidence can be dismissed if the court finds that they only serve the purpose of delaying the proceedings.

## Criminal asset recovery

### 21 Interim measures

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

The Liechtenstein CrPC contains various regulations providing for interim measures. With regard to the recovery of assets, the seizure of assets according to articles 96 and 97a CrPC plays an important role. According to these regulations, assets that are subject to confiscation

or forfeiture may be seized. Other interim measures include the execution of a search warrant, the arrest of a suspect and pretrial detention.

During the preliminary proceedings seizures are ordered by the court in accordance with the applications of the public prosecutor. In the context of the final hearing the court itself is able to order interim measures.

Any orders concerning seizures (or any interim measure) must be passed by means of a written decision with a reasoning and may be appealed.

## 22 Proceeds of serious crime

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

In Liechtenstein criminal investigations in general are not automatically initiated, but require either a complaint or a reporting to the prosecutor. If the public prosecutor finds that a criminal complaint or report contains sufficient grounds for a criminal prosecution it requests the District Court to initiate a preliminary investigation and take certain measures. In the course of the investigation proceeding, upon application of the prosecutor, documents are seized, assets are frozen, witnesses are heard and the information is analysed by the prosecutor regarding criminal offences.

## 23 Confiscation – legal framework

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

Based on the demands of international organisations, Liechtenstein regulations regarding confiscation of proceeds of a crime have been completely revised and amended in 2016 into an entirely new framework. The new regulations became effective on 1 June 2016 and are mainly based on the corresponding regulations of the Austrian CC and CrPC. Parts of the Austrian doctrine have held that the old framework would have been sufficiently effective and less complicated to handle. It remains to be seen how these new regulations will be interpreted and applied in Liechtenstein.

Regulations regarding seizure during a preliminary investigation are found in article 96 et seq CrPC. According to article 96 CrPC, assets that may be relevant for the investigation or that are subject to confiscation according to articles 19a CC or 26 CC may be seized. Article 97a CrPC specifically regulates the seizure of proceeds, according to articles 20 and 20b CC, stemming from criminal offences. According to this provision the court may seize immovables, moveables and bank receivables, and prohibit the disposal of the assets or take a lien on them.

The confiscation of assets is regulated in article 19a CC. According to this provision, items that have been used to commit intentional criminal offences, that were intended to be used to commit intentional criminal offences or that result from such criminal offences, may be confiscated under the condition that they were owned solely by the offender at the time of the court decision. Items that may be subject to article 19a CC are tools of crime (ie, escape vehicles) or products of the crime (ie, drugs). It is to be emphasised that the confiscation according to article 19a CC has to be considered a punishment.

Assets that were received for or by committing a punishable act, may be forfeited according to article 20 CC. According to article 20(2) CC, the forfeiture also covers the benefits deriving from use and the replacing values. If the assets are no longer available or if the forfeiture is impossible due to other reasons, the court may determine a corresponding value compensation to be forfeited according to article 20(3) CC. Even assets that were saved by committing the punishable act are subject to forfeiture. The court has the power to estimate the scope of the assets that shall be forfeited if the actual scope cannot be determined (or if it could be determined only with disproportional efforts).

Assets of criminal or terrorist organisations or assets that have been used for the financing of terrorism are subject to forfeiture according to article 20b CC. Furthermore, article 20b CC regulates that any assets that have been received in close temporal relation to a crime or to continued offences according to articles 165, 278, 278c and 304 to 309 CC, shall be forfeited, if it has to be assumed that they result from the crime

or the continued offence and if their lawful origin is not plausible. This effectively leads into a reversal of the burden of proof.

Assets may also be forfeited if they are in the hands of a third party. However, assets in the hands of a third party may in particular not be forfeited if the third party acquired them in ignorance of the punishable act (as regards article 20(2) and (3)) and against payment (as regards article 20(1)).

While under the old regulation the value of the proceeds stemming from a crime was calculated according to the net principle (as regards article 20 CC), under the new framework in general only the gross principle is applied. This means that no expenses in direct connection with the crime may be deducted from the gross proceeds. As a result, for instance in the case of drug dealing, it is not possible to deduct expenses for the purchase of drugs, but the full gross proceeds of the sale of the drugs are subject to forfeiture. This amendment is considered to be critical. Under the previous regime only the net profit would have been subject to forfeiture.

Article 26 CC regulates the confiscation of items that were used to commit a punishable act or that were intended to be used to commit a punishable act or that result from such act. A confiscation according to article 26 CC requires that the item is considered as a threat to the safety of persons, morality or public order. Articles 19a and 26 CC overlap in many respects, which is considered to be critical.

Finally, the procedural provisions regarding the forfeiture of the proceeds of criminal offences as well as the confiscation of items are regulated in article 353 et seq CrPC. In cases of confiscation according to article 26 CC usually a separate proceeding is conducted, while the forfeiture and the confiscation according to article 19a CC are subject to the main proceedings.

## 24 Confiscation procedure

**Describe how confiscation works in practice.**

There is not yet any evidence to show how the new regulations regarding forfeiture and confiscation will affect established practice. This remains to be seen. According to the established practice in a preliminary investigation, the public prosecutor requests the investigating judge to order the seizure of assets or specific measures provided in article 97a CrPC. The investigating judge bases the decision on the known facts, the suspicion of a criminal offence and whether the requested measure is appropriate and necessary in order to secure a possible future forfeiture or confiscation.

The investigating judge regularly orders that the assets located in a bank account of the suspect or an entity of which the suspect is beneficial owner are frozen. With the seizure the state of Liechtenstein obtains a lien on the frozen assets. If the preliminary proceedings and investigations take longer than two years, the court may extend the seizure upon application of the prosecutor and with consent of the Court of Appeal.

If the decision on forfeiture or confiscation becomes final it will be enforced in an enforcement proceeding that is similar to a civil enforcement proceeding and the assets are confiscated for the benefit of the state.

Confiscation in particular is excluded according to articles 20a and 20c CC if the enriched person has used the assets to settle civil claims emerging from the offence or if he or she has provided security for such claims.

## 25 Agencies

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

It is the responsibility of the prosecutor to establish what kind of measures need to be taken in the context of the preliminary proceedings. The prosecutor is therefore the driving force in the preliminary proceedings. The investigating judge decides on the applications and whether the requested measure is appropriate and necessary. Furthermore, the police are often involved in analysing seized documents and tracing assets as assistants to the court.

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

The forfeiture of secondary proceeds is possible to a wide extent, since article 20 covers the forfeiture of replacing values, benefits and even of assets that were saved by committing the punishable act.

The confiscation of secondary proceeds is, other than according to the Austrian regulation, not possible in Liechtenstein.

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

Confiscation according to article 19a CC is only possible if the assets are solely owned by the offender at the time of the court decision. Therefore, confiscation of assets acquired by a third party or close relatives is not possible under this provision. It has to be emphasised that only the ownership position (but not the possession of the assets) is crucial.

It is generally possible that assets acquired by third parties are forfeited under provisions of article 20. However, the forfeiture of assets held by third parties is for instance excluded if the third party acquired the asset in ignorance of the punishable act or for consideration. The new law in this regard provides for a detailed and unfortunately complicated regulation.

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

There are no specific regulations in Liechtenstein regarding the recovery of costs with regard to tracing and confiscating assets. However, in cases of confiscation or forfeiture, the assets in general go to the state and the state recovers its costs of the proceedings from the confiscated assets.

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

Subject to confiscation according to articles 19a and 26 CC are items that were used to commit a punishable act or an intended offence, that were intended to be used in such act or offence or that result from such act or offence. Only these items themselves may be declared confiscated and there is no value-based confiscation according to articles 19a and 26 CC.

However, within the framework of forfeiture according to article 20 et seq CC, a value-based confiscation is possible to a wide extent. According to article 20(1) CC, primarily the assets that are received for or by committing a crime shall be declared forfeited. According to article 20(2) CC, also the benefit and the replacing values of these assets shall be declared forfeited. Article 20(3) CC regulates that the court may determine an amount of value compensation in the case that the forfeiture of the above mentioned proceeds proves to be impossible. Article 20(4) CC finally states that the court may determine the amount of the value compensation according to its discretion. Articles 20(2) to (4) are also applicable in connection with article 20b CC.

**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 rule in criminal proceedings the burden of proof lies with the criminal authorities. This also applies to the forfeiture of any proceeds of crime or the confiscation of any items in connection with a crime. The criminal authorities have to prove that all the requirements of the regulation are fulfilled.

However, the burden of proof is reversed in exceptional cases. According to article 20b(2) and (3), there is a legal assumption that certain increases of assets stem from a crime or continued offences. To prevent the forfeiture of such assets, the offender or suspect has to present evidence for the legitimate origin of the assets and therefore effectively has to prove that the assets are not contaminated.

**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 forfeiture is excluded according to article 20a CC if the enriched person has used the assets to settle civil claims emerging from the offence or if he or she has provided security for such claims.

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

The provisions of article 20 et seq CC provide that all profits and benefits obtained from the commission of a criminal offence are declared forfeited. The new regulation provides that profits and advantages emerging from criminal offences may be declared forfeited to a very wide extent, as also the benefit, replacing values as well as assets which could be saved by committing the crime, are subject to forfeiture.

**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.**

According to article 356 CrPC, neither confiscation nor forfeiture require a conviction. Both forfeiture and conviction may be imposed if the legal requirements are fulfilled.

As under the previous regulation, a forfeiture of proceeds of a crime committed in a foreign country would be conducted in an objective forfeiture proceeding.

**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?**

Bank assets that have been seized remain in the account of the legal owner. The active management of assets is restricted. Any act of management generally requires the consent of the court. Therefore, the management or change in investment requires an application and the courts are rather restrictive in allowing the management. The question of management of assets, however, is dealt with on a case-by-case basis by the courts and the legal owner may also apply for the approval to a certain category of management actions.

In the case of seizure, the entity owning the assets is still entitled to use a portion of the assets to cover the running costs of necessary administration as well as the costs of legal defence. The entity, however, has to apply to the court for the release of the respective amounts.

**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 basic legal framework for requests for international legal assistance in general (including measures in relation to the recovery of assets) consists of the European Convention on Mutual Legal Assistance in Criminal Matters 1959 (ECMLA). This treaty provides a mutual basis for legal assistance between Liechtenstein and the member states of the European Council that have ratified this treaty. Furthermore, regarding national law the basis for legal assistance in criminal matters is the Criminal Legal Assistance Act (CLAA).

Also in matters of criminal legal assistance the provisions of the CrPC apply as far as the CLAA does not provide any other regulation. Any measure such as seizure of documents or freezing of assets is then conducted according to the provisions of article 97a et seq CrPC, as stated above.

Generally, foreign prosecution authorities send a letter rogatory to the Liechtenstein Ministry of Justice requesting the Liechtenstein authorities to take certain measures. Such request is usually for seizure

and handover of documents because the documents are of importance for foreign investigations and the assets shall be confiscated abroad or a foreign confiscation decision shall be enforced in Liechtenstein.

### 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.**

A key piece of the legal framework regarding legal assistance in Liechtenstein is the ECMLA. This convention has been signed by all member states of the Council of Europe. Also there are further bilateral or multilateral agreements on legal assistance in criminal matters such as a treaty with the United States on criminal legal assistance.

In terms of national law the CLAA is relevant. In matters of criminal legal assistance the District Court is competent to decide on the measures applied for (article 55 paragraph 1 CLAA). In criminal legal assistance the foreign prosecution authorities have the same role as the Liechtenstein prosecution office in domestic proceedings.

As in domestic proceedings the court decides on the applications in the letter rogatory based on the respective provisions of the Liechtenstein CrPC. Measures taken by the District Court in legal assistance proceedings may be appealed against by the directly affected entity or person. However, the provisions are more restrictive than in domestic proceedings.

Furthermore, under article 64 CLAA foreign countries may apply for the enforcement of a foreign confiscation decision in Liechtenstein if the respective conditions are fulfilled. Such proceeding may follow the provisional freezing of assets. The District Court is also competent for enforcement proceedings.

### 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. They include in particular:

- European Convention on Mutual Legal Assistance in Criminal Matters 1959 (ECMLA);
- Convention on Money Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990;
- UN Convention for the Suppression of the Financing of Terrorism 1999;
- UN Convention against Transnational Organized Crime 2000; and
- UN Convention against Corruption 2003.

### 38 Private prosecutions

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

In Liechtenstein there are no private prosecutors. Private persons are only able to initiate criminal investigations and seizures by reporting criminal offences to a prosecutor who then takes the measures he or she deems appropriate and necessary. Furthermore, they may assist the prosecutor and the court by providing documents and information that is material to an investigation.

**schwärzler**

Rechtsanwälte | Attorneys at Law

**Matthias Niedermüller**

**mn@s-law.com**

Feldkircherstrasse 15  
FL 9494 Schaan  
Liechtenstein

Tel: +423 239 8540  
Fax: +423 239 8545  
www.s-law.com



# Monaco

Donald Manasse

Donald Manasse Law Offices

## Civil asset recovery

### 1 Legislation

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

The most relevant provisions concerning private investigations are contained in:

- the Monaco Penal Code (particularly article 308-2 et seq, concerning privacy);
- \* the Monaco Code of Civil Procedure (particularly articles 490 et seq on freezing orders against intangibles);
- Law 1,194 of 1991 concerning commercial, professional or industrial activities performed in Monaco territory; and
- Ordinance No. 15,457 of 9 August 2002 regarding international cooperation in regard to seizure and confiscation in money laundering matters.

### 2 Parallel proceedings

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

In Monaco, 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 the 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 proceedings. A decision acquitting the defendant of criminal responsibility will not definitively determine the outcome of the civil liability.

### 3 Forum

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

As a micro-state, Monaco has a single court where all courts sit: the civil courts, the penal courts and the criminal courts, thus there is no choice of forum.

### 4 Limitation

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

The 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 plaintiff 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 based 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.

## 5 Jurisdiction

**In what circumstances does the civil court have jurisdiction?**

**How can a defendant challenge jurisdiction?**

The jurisdictional rules are set out in the Code of Civil Procedure. Monégasque courts have jurisdiction over any defendant domiciled in the principality. The Monégasque courts also have jurisdiction where the matter concerns 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.

A defendant who is a foreign national can challenge jurisdiction even where he or she holds a permit to reside in the principality, by showing both that he or she has retained a domicile in law in his or her country of origin and that the plaintiff could bring an action in that jurisdiction.

## 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 the French language by a sworn translator. The evidence is communicated (by the Monaco 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 at 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. However, prior to initiating proceedings, a party may obtain 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 sanction for failing to produce the document without justification will be that the court will infer that the document contains information contrary to the interests of the party failing to produce.

Where documents are produced solely for the purpose of putting a party in a bad light, 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 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 apartment). 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.

## 8 Cooperation with law enforcement agencies

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

The 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 then 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. The 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.

## 9 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 10).

The Penal Code provision making it a crime to reveal confidential information (article 308) is very wide and covers people who by their profession or their position have received confidential information. Bankers, lawyers, doctors and accountants are certainly covered, but it is not clear whether other professionals (corporate service providers, tax representatives and building managers, for example) are also covered.

## 10 Interim relief

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

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) then 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 render '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 Monaco 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. While this should be the stated amount in the request and seizure orders, cases have been known of statutory fees being awarded for percentages of much larger amounts 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) are entitled to the statutory fees. Care must be taken when instructing Monaco counsel that the issue of statutory fees is determined at the outset.

Seizure orders can apply to bank accounts, real property, moveable property (art collections, for example), motor vehicles and yachts, either having 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.

## 11 Right to silence

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

While the Code of Civil Procedure (CPP) provides for testimony from third parties (title XIV, article 323 et seq), in practice other than for the handwritten attestation provided for in article 324, live testimony is very seldom presented to or ordered by the court. If an inquest is ordered by the court, those refusing to testify can be fined. There is otherwise no obligation to provide evidence and defendants can remain silent.

More frequently a civil court will name an expert to determine facts, draw conclusions and estimate damages. This can occur in financial cases. All parties to the action participate in the expertise, but in practice there is no sanction (other than the inferences that can be drawn against non-participants) for failing to attend or be represented.

**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 in Monaco 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 they fail 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 and 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 the 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 CPP provides (in article 975) 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 CPP 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 articles 472 et seq (particularly articles 473 and 475) of the CPP. The court will order the judgment to be effective in Monaco without examining the matter on the merits provided that it is proven that the foreign jurisdiction affords reciprocity to Monégasque judgments and that it can be shown:

- that the judgment is regular in its form (ie, that it states the facts, the arguments of each party and the reasoning behind the judge's order) and in addition is dated and signed;
- that it is issued by a court of competent jurisdiction, whose assertion of jurisdiction is not in conflict with Monégasque rules on the matter;
- that the parties have been served with notice and have had an opportunity to defend;
- that the judgment is definitive and can be executed in the country that issued it; and
- that it contains nothing contrary to public order.

If these conditions are absent, then the Monégasque court may examine the case on the merits and 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:

- 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.

The documents must either be legalised or carry an apostille. They must be translated into French.

Problems arise most frequently in proving reciprocity (as Monaco is not a member of the EU and has only one treaty, with France, providing

for the mutual enforcement of judgments), in proving that foreign forms of judgments are 'regular in their form' (common law court orders do not always fulfil these requirements) and in proving the judgment is definitive. Temporary injunctions, for example, will not qualify, nor will the nomination of judicial administrators.

**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 which causes another 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. Action requesting rescission or nullity of a contract because consent was obtained with intentional mis-information (as provided in article 1152 of the Civil Code) is also 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 (other than the procedure set out at question 10) can be initiated to obtain temporary relief or a money judgment. The plaintiff 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), then there can be execution two months following notification. If the judgment provides for provisional execution, then 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. 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 10. Some counsel will require that the statutory fees be deposited in order to commence proceedings. Other counsel request their own clients to pay the 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. The 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 to preserve 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 CPP 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 (in 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 CPP 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 holding assets 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, both 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 of the principality's office 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.



**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 articles 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 though 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 and 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. The authorities cannot use the assets. With companies, a judicial administrator can be named to ensure the continued existence of the companies (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 to Money Laundering, Search, Seizure and Confiscation of the Proceeds of 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 CPP 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 Monégasque Prosecutor's office.



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

**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 CPP 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 United Nations Convention against the Illicit Traffic in Drugs and Illegal 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?**

While 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).

# Netherlands

Daan Folgering LXA The Law Firm

Niels van der Laan De Roos & Pen

## Civil asset recovery

### 1 Legislation

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

When conducting a private investigation the most relevant legislation is to be found in the Dutch Civil Code (DCC) and the Dutch Code of Civil Procedure (DCCP). In addition, the Dutch Constitution (DC) and international treaties such as the European Convention on Human Rights (ECHR) provide for merely general rules regarding the fundamental rights of persons under investigation; for instance, articles 10, 12 and 13 of the DC and article 8 of the ECHR contain provisions protecting the privacy of individuals. Dutch legislation does not provide for extensive rules and possibilities when it comes to discovery. A very useful provision is article 843a DCCP. For more detailed information on this provision see question 9. Additional legislation that may have to be observed, depending on the merits of the case, in a private investigation includes, among others: the Personal Data Protection Act; the Privacy Protection Act; the Dutch Criminal Code (eg, articles 139f and 441b); and the Computer Crime Act.

The nemo tenetur principle is highly valued in the Netherlands, but this principle applies only to evidence that incriminates an individual. In civil matters any debtor is in principle obliged to provide information regarding its income and assets in order to enable a creditor to seek and find reimbursement.

### 2 Parallel proceedings

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

There is no restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter. However, it is to be noted that when criminal proceedings are pending a party seeking recovery of assets may decide to join a claim for civil damages in criminal proceedings. The public prosecutor will then seek a criminal conviction together with an award on behalf of the defrauded party for compensation of the latter's damage or loss. The advantage is clearly that a civil party benefits – from a practical and cost-reduction point of view – from the prosecutor's investigation and more extensive possibilities to obtain evidence for possible additional civil proceedings.

### 3 Forum

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

All civil matters in which claims are filed that exceed €25,000 are to be brought in the district courts. After a recent reorganisation there are 11 district courts in the Netherlands. The most common rule for competence of the relevant district court is the place of residence of the defendant. Any final judgment of the district court can be appealed in one of the four courts of appeal, within three months after the date of the judgment rendered by the district court. Judgments of the court of appeal may subsequently be challenged before the supreme court.

### 4 Limitation

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

Time limits for starting civil proceedings are to be found in the DCC. The time limits depend on the legal basis of the claim filed. Most claims become time-barred after five years (articles 3:310 et seq DCC), such as:

- claims that result from a breach of contract;
- claims for damages that result from any tortious act;
- claims to collect a financial penalty; and
- the right to dissolve an agreement after a default.

Some claims become time-barred after less than five years. For instance, any right that can be derived from the nonconformity of goods purchased will lapse after two years.

The period of limitation commences only after the aggrieved party becomes aware of the loss or damage and the identity of the party liable for the damage or loss. All claims – except for special matters such as with asbestos or that result from pollution – become time-barred after 20 years after the loss-causing occurrence. Any limitation period can be interrupted, after which it will apply as before the interruption.

### 5 Jurisdiction

**In what circumstances does the civil court have jurisdiction?**

**How can a defendant challenge jurisdiction?**

The district courts have jurisdiction in all national matters and this jurisdiction cannot be challenged. In the event a claimant has filed a claim not properly taking into account the rules on geographical competence, the matter will simply be referred to the competent district court, which will subsequently review the matter and render its judgment. In international matters the jurisdiction of the Dutch courts will need to be carefully assessed taking into account all relevant multi- and bilateral treaties, such as the Brussels Ibis Regulation and EVEX Convention. In the event private international law provides for competence of any foreign court, the competence of the Dutch courts can be successfully challenged.

### 6 Admissibility of evidence

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

Under Dutch law the rule on admissibility of evidence in civil matters is rather simple: evidence can be produced through all means, unless the law states the contrary. In practice this means that nearly all evidence is admissible. For instance, secretly recorded telephone conversations or photos and film taken when the subject was unaware are admissible, unless these provide information that is to be labelled as an invasion of privacy. The level of intimacy of the evidence will determine whether the court will admit evidence. Recordings of, for instance, telephone conversations that relate to 'business' are admissible. Recordings of conversations on private matters – health, sexual preference, religion – are not.

## 7 Publicly available information

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

In the Netherlands the following databases are publicly available:

- the Trade Register at the Chamber of Commerce;
- the Land Registry Office; and
- IP databases (trademarks, designs, patents, breeders right and domain names) provided by national and international intellectual property offices such as Octrooiencentrum NL, WIPO, BOIP, OHIM, EPO, sidn.nl, etc.

Information held by the RDW Centre for Vehicle Technology and Information is not publicly available. The same applies to information in the municipal personal records database (the GBA). Information from RDW and GBA can in particular circumstances be obtained by certain officials and attorneys.

The Government Information (Public Access) Act enables civil parties to request documents and information from all governmental authorities pertaining to their actions, performance and knowledge. Certain governmental actions or knowledge are, of course, deemed not to be disclosed to the public, but clearly such confidentiality is an exemption and not the rule.

## 8 Cooperation with law enforcement agencies

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

Other than the Government Information (Public Access) Act – see question 7 – there is no statutory obligation for law enforcement and regulatory agencies to provide documents or information – to civil parties – for use in civil proceedings. In certain matters it may nevertheless be expedient to file a written and reasoned request with the relevant agency; however, as these agencies are to a large extent legally bound to confidentiality, it is unlikely that documents and information will be easily provided upon request. In the case of criminal proceedings against a fraudulent party, it can be sensible to join a civil claim in the criminal matter in order to obtain a judgment for compensation of loss or damages and – if not – to obtain access to the file of the Public Prosecutor. See also question 2. Of course, public information – see question 7 – will be provided at the first request and upon payment of an administrative fee.

## 9 Third-party disclosure

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

As mentioned above, Dutch legislation does not provide for extensive possibilities for discovery. However, article 843a of the DCCP provides for the possibility to obtain information from either an opposing or third party. In addition, the Netherlands has a rather liberal system when it comes to attachments and seizures. This liberal system entails the possibility to, inter alia, seize evidence. The criteria that need to be met under article 843a DCCP and for seizing evidence are to a large extent similar.

Under article 843a DCCP any party that has a 'rightful interest' may claim copies of clearly specified documents or electronic data, but only in the event that these documents or data relate to any legal relationship – including that originating from tortious actions – to which the claimant is a party. If the claimant has reasonable doubts that documents or data will be made unavailable by the opposing or a third party, it may file a request to seize the documents or data. The request for this seizure will be granted ex parte. The seized documents and data will be placed under the custody of an appointed expert and will only be made available to the claimant when the court has granted additional leave to review the content of documents or data seized.

## 10 Interim relief

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

See question 9.

## 11 Right to silence

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

Under article 21 of the DCCP all parties in civil proceedings are obliged to present all relevant facts in full and truthfully. If either party does not comply with this stipulation, the court may draw any conclusion it deems appropriate. As a consequence a party may choose not to provide information or produce evidence if it demonstrates that the interest in secrecy outweighs the obligation to inform the court. Such a refusal will affect, inter alia, the burden of proof and appraisal of evidence. As said, the nemo tenetur principle is highly valued in the Netherlands. Certain confidants such as attorneys, clergymen or medical doctors are entitled to privilege in respect of information that relates to their occupation.

## 12 Non-compliance with court orders

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

If the court awards a claim to act, to refrain from acting or to tolerate any action it may impose an order subject to a financial penalty for non-compliance (article 611 et seq DCCP). An award to settle a financial claim cannot be subjected to the same. The financial penalty is a stimulus to honour the award and does not function as compensation for damages or costs incurred. The amount of the financial penalty will be determined by the court in anticipation of the stimulus required in the particular matter.

Article 3:299 DCC provides for the possibility to request that the court authorises the claimant to rightfully undertake all necessary actions to fulfil the counterparty's obligation, while article 3:300 DCC allows the court to order that its judgment replaces one or more relevant authentic documents required by the claimant.

As ultimum remedium the court may grant leave to commit a party for failure to comply with a judicial order.

## 13 Obtaining evidence from other jurisdictions

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

Dutch legislation obviously does not provide for any power to compel courts in other jurisdictions to assist in any way. Nevertheless, the Netherlands is party to several multi- or bilateral treaties and is bound by regulations that provide for opportunities to request foreign courts to assist. In the event that Dutch courts need assistance from a court in another EU member state for the taking of evidence, EC Regulation No. 1206/2001 applies. Making use of the appropriate forms the Dutch courts may lodge a request directly with the relevant foreign court, which is to deal with the request in an expedient manner. If the Dutch courts seek assistance for the taking of evidence outside the EU, the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters is the most relevant instrument.

## 14 Assisting courts in other jurisdictions

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

The Netherlands is a member of the EU and as such the Dutch courts are bound by the rules of EC Regulation No. 1206/2001. In the case of a foreign request for the taking of evidence in the Netherlands, the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters applies for signatory states.

The most used international instruments on recognition and enforcement of foreign civil judgments are EC Regulations No. 44/2001 of the European Parliament and of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and its recast No. 1215/2012 (Brussels Ibis). Brussels Ibis is applicable to all legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015. Its articles 36 (32 Brussels I) to 66 (65 Brussels I) provide for rules regarding the recognition and enforcement of judgments rendered by courts in another member state. Further international instruments regarding recognition and enforcement of foreign judgments are:



- the Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Lugano Convention);
- 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;
- Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European Payment Order Procedure;
- Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure; and
- the most used international instrument regarding recognition and enforcement of foreign arbitral awards is the 1958 New York Convention.

The DCCP is applicable in the absence of an international treaty, convention or regulation. Article 94 DC states that domestic statutory regulations will not be applied when such application is in conflict with international provisions of treaties. It is for this reason that in most cases the DCCP is not applicable. When applied it is mostly used to fill deficiencies in existing international regulations.

## 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 and a large variety of tortious conduct.

## 16 Remedies

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

The Dutch legal system is designed to allow a party to seek remedies in order to bring it to the same position as if the loss-causing event had not occurred. As such only claims for compensation of damage actually suffered or loss in fact incurred may be awarded. Claims that have a punitive nature are ruled out. A defrauded party may claim – among other things – reimbursement of damage, loss and costs, interest, restitution of property and a fee for compensation of extrajudicial and judicial costs.

## 17 Judgment without full trial

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

In case of default of the defendant the Dutch courts will award the plaintiff's claims, unless the court deems these claims to be ill-founded at face value. Default judgments will be rendered only after close examination of whether the defendant was served properly and within sufficient time to prepare its defence. The statutory time limit is seven days.

In urgent matters a defrauded party may seek preliminary injunctions in summary proceedings. Such injunctions may not be a declaratory decision nor a constitutive judgment. A claim in summary proceedings for financial compensation will only be awarded when it is beyond reasonable doubt that the court will award the same claim in proceedings on the merits and lacking any substantial recovery risk on behalf of the defendant.

## 18 Post-judgment relief

### What post-judgment relief is available to successful claimants?

Both pre- and post-judgment Dutch legislation provides for extensive possibilities for a claimant to attach and seize assets of its counterparty. Attachments can be levied not only on assets that are under the control of the counterparty, but also on assets that are with third parties. In accordance with article 3:296 DCC any debtor is liable to the full extent of one's property. The power to enforce judicial awards is reserved to bailiffs. It is up to the bailiffs to levy executory attachments on the debtor's property, which includes real estate, moveable property, bank accounts and claims of the debtor on third parties.

## 19 Enforcement

### What methods of enforcement are available?

See question 18.

## 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 limited restrictions pertaining to the arrangements that can be put in place for the funding of litigation, based on the principle that Dutch attorneys are bound by strict rules of conduct and have to remain independent. As a result a Dutch attorney is not permitted to enter into an agreement with their client under which the client agrees to pay the attorney a percentage of the sums recovered in a claim. However, there are several other alternative funding models available to Dutch attorneys and their clients, such as success fees, blended fees, fixed fees, etc.

Third-party funding and after-the-event insurance are available. In a letter to Parliament dated 26 June 2012 the Dutch Minister of Justice extensively elaborated on third-party funding, especially focusing on class actions. The method of funding litigation is not to affect the outcome of the proceedings. Under Dutch law the party losing civil litigation will bear its own costs and in addition is to reimburse the winning party's costs as determined by the court. The court will determine the legal costs of the winning party on the basis of a graduated rate. This rate will as a rule not cover the winning party's entire costs. Only in proceedings regarding intellectual property rights will the winning party be awarded compensation for its entire costs, including full legal counsel's fees.

## Criminal asset recovery

## 21 Interim measures

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

There are two different kinds of interim measures concerning the seizure of goods.

The first deals with the seizure of goods for evidentiary reasons or for reasons relating to the public interest (such as firearms and drugs and goods that can be related to the crime). This type of seizure is described in article 94 of the Dutch Code of Criminal Procedures.

The second type of interim measure is the seizure or freezing order for the confiscation of goods and proceeds of criminal offences as described in article 94a of the Dutch Code of Criminal Procedures, which is used in order to safeguard the enforcement of the payment of a fine or the confiscation of goods following a conviction by the court.

### Article 94 seizure

Article 94 (et seq) of the Dutch Code of Criminal Procedures sets the conditions for confiscating proceeds and instruments of crimes for two purposes:

- the use of evidence in a criminal trial; and
- to get control over the goods in order to remove them from society or to declare them forfeit to the state, on the grounds that they are:
  - considered to be dangerous and can be confiscated on the grounds that they pose a threat to society; or
  - considered to be goods or assets related to the crime. This is the case with goods or assets that have been used in relation to the crime or have been obtained by means of the crime.

The decision regarding the seizing or freezing of goods on the basis of article 94 of the Dutch Code of Criminal Procedures rests solely in the hands of the prosecutor.

### Article 94a seizure

Article 94a of the Dutch Code of Criminal Procedures entails the conditions for the possibility to confiscate goods on the basis of an interlocutory seizure or freezing order. This article makes it possible to seize or freeze objects and funds to secure:

- the payment of a fine in the case of a criminal conviction;
- the fulfilment of a measure in accordance with article 36e of the Dutch Criminal Code to confiscate the proceeds of crime. A suspect can be convicted for such a measure in a separate proceeding; or
- the payment for damage incurred by the victim of a crime in accordance with article 36f of the Dutch Criminal Code.

The following conditions must be fulfilled in order to execute an interlocutory seizure or freezing order:

- there has to be a suspect of a felony;
- that felony must be punishable by a fine of (at least) the fifth category (which means a fine of at least €81,000); and
- there must be a reasonable expectation that the suspect will in fact be sentenced to the payment of a fine and or that further criminal proceedings will lead to confiscation of criminal proceeds as set out in article 36e of the Dutch Criminal Code.

Or:

- there has to be a suspect of a felony;
- that felony must be punishable by a fine of (at least) the fourth category (which means a fine of at least €20,250); and
- there must be a reasonable expectation that the suspect will in fact be sentenced to reimbursement of the damage incurred by the victim.

For the interlocutory seizure or freezing of suspected proceeds of crime in accordance with article 94a of the Dutch Code of Criminal Procedures the authorisation of the investigating judge is a precondition. However, in accordance with article 103 in combination with article 126, section 3 and article 126b of the Dutch Code of Criminal Procedures, the authorisation of the investigating judge given to a prosecutor to open a criminal financial investigation also entails the authorisation to issue freezing orders concerning the proceeds of criminal offences relating to that criminal financial investigation.

## 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 investigation to identify, trace and freeze illicit proceeds is not automatically initiated. When a crime is detected the prosecutor may elect to initiate an investigation into the proceeds of the crime in addition to the investigation into the origins and the perpetrator of the crime. The decision whether to start such an investigation will to a large extent depend on whether there exists a reasonable expectation to find proceeds related to the crime and whether the expectation reasonably exists that in the case of a conviction the proceeds will be confiscated by the court.

However, there are specialised intelligence units that deal solely with tracing and investigating finance-based crimes such as money laundering and fraud. The Financial Intelligence Unit (FIU) is the organisation in the Netherlands where institutions that have a reporting obligation regarding unusual financial transactions (such as banks, auditors, lawyers, etc) can (or must) report these kinds of transactions, after which the FIU will investigate and analyse the information provided to see whether the transactions can be linked to criminal offences.

In addition, there also exists an investigation unit called the FIOD, which is a specialised investigation unit for the Dutch Internal Revenue Services, which also deals mainly with crimes relating to fiscal fraud and further financial economic-related crimes such as money laundering, insider trading, pyramid schemes, etc. If these specialised agencies detect a crime, usually an investigation into the proceeds of the crime will be initiated.

## 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 instrumentalities and proceeds of crime are, as explained in question 21, subject to seizure or freezing orders made on the basis of article 94 of the Dutch Code of Criminal Procedures. In the case of a

conviction the court can impose additional measures on the goods that have been subject to a seizure or freezing order on the basis of article 94 of the Dutch Criminal Code. In accordance with articles 33, 33a and 36a of the Dutch Criminal Code, in the case of a conviction the court can rule that the instrumentalities of crime (if seized) are to be removed from society or forfeited to the state.

The proceeds of crime can, as explained above, also be subject to seizure or freezing orders made on the basis of article 94a of the Dutch Code of Criminal Procedures. Confiscation of the proceeds of crime may take place in accordance with article 36e of the Dutch Criminal Code. This article makes it possible to confiscate proceeds of crime in cases where there has been a conviction.

## 24 Confiscation procedure

**Describe how confiscation works in practice.**

In the case of confiscation of the instrumentalities of crime the goods that have been subject to seizure or a freezing order on the basis of article 94 of the Dutch Code of Criminal Procedures may be confiscated by the court, either because they pose a threat to society or because they were used in, obtained by or made for use in the criminal offence. Consequently, the goods that pose a threat to society will be destroyed, whereas other goods that contain any value will be made subject to forfeiture to the state.

If a suspect is convicted of a crime from which it is probable that he or she has obtained illegal proceeds the prosecutor may start additional proceedings with the sole purpose of confiscating these proceeds, as set out in article 36e of the Dutch Criminal Code.

In order to confiscate the goods and assets that were subject to an interlocutory seizure or freezing order under article 94a of the Dutch Code of Criminal Procedures, there has to be a conviction where:

- a fine has been imposed;
- in the case of a further confiscation procedure the conviction entails the confiscation of assets that have been obtained by a criminal offence; or
- the conviction also poses the obligation to reimburse the damages incurred by a victim within the meaning of article 36f of the Dutch Criminal Code.

In accordance with articles 577b and 574 of the Dutch Code of Criminal Procedures a verdict in an article 36e procedure may also serve as a writ of execution to capitalise any susceptible property. This capital in turn may be used for the above-mentioned three goals.

## 25 Agencies

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

The responsible agency for tracing and confiscating the proceeds of crime is the prosecutor's office in the district in which the investigation into the underlying criminal offences has taken place.

In addition, prosecutor's offices in the Netherlands have a specialised department called the Criminal Assets Deprivation Bureau of the Prosecution Service. The Public Prosecution Service seeks to deprive convicted criminals of illegal profit obtained as a result of committing offences.

## 26 Secondary proceeds

**Is confiscation of secondary proceeds possible?**

Under Dutch criminal law all possessions can be confiscated in order to safeguard the payment of a fine or in order to safeguard the deprivation of the illicit proceeds related to the crime for which a person was convicted or certain related crimes. Secondary proceeds fall within the scope of these provisions.

## 27 Third-party ownership

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

Property of a third party can be subject to an interlocutory freezing order on the grounds of both articles 94 and 94a of the Dutch Code of Criminal Procedures.

Freezing of property of a third party on the basis of article 94 of the Dutch Code of Criminal Procedures is possible as long as the conditions set out in this article are met. Whether the subject of the freezing order belongs to the suspect or to a third party is irrelevant. Seizure is possible, as explained above (see question 21) because of the origins of the property.

In the case of a conviction that indicates the property of a third party as either instrumentalities of crime or proceeds of crime the property can be confiscated in accordance with articles 33, 33a and 36a of the Dutch Criminal Code.

Freezing of property belonging to a third party on the basis of article 94a of the Dutch Code of Criminal Procedures is possible if there are reasonable grounds to assume that the property seemingly belonging to a third party actually belongs to the suspect and the structure of ownership seemingly exists to frustrate confiscation of the property. In addition to this objective of concealment the third party needs to be aware that his or her ownership of the property exists for this reason only.

## 28 Expenses

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

There is no provision in the Dutch legal system concerning the recovery of costs made in order to trace and confiscate assets.

## 29 Value-based confiscation

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

Value-based confiscation is possible on the basis of article 94a of the Dutch Code of Criminal Procedures. Value-based confiscation entails the confiscation of assets whose value is equivalent to the probable proceeds of the offence. It can be applied to any asset of the suspect, regardless of whether it is clear at the moment of confiscation that it has been obtained by means 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?

In the case of a conviction the court can, in accordance with articles 33 and 33a of the Dutch Criminal Code, declare forfeit to the state the proceeds of crime. In accordance with article 36e of the Dutch Criminal Code it can seize the proceeds of crime. In both cases the burden of proof is on the prosecutor to prove that the suspect is in fact guilty of committing a crime, that there have been illicit proceeds for the suspect of a crime and to what extent.

In addition, in accordance with article 36e, subsection 3, of the Dutch Criminal Code it is possible if there has been a conviction for a crime committed by the suspect to seize proceeds and assets that are obtained by means of other criminal offences. For 'other criminal offences' a conviction is not necessary, but the burden of proof is on the prosecutor to provide sufficient indications that these other criminal offences have been committed and that the suspect has obtained proceeds by committing these offences.

In the case of confiscation on the basis of article 36e, subsection 3, the burden of proof will shift partially from the prosecutor to the convicted criminal as a presumption may be made by the court that expenses paid or assets obtained in a period leading up to six years prior to the committed crime were obtained through criminal offences. If such a presumption is made, it can only be rebutted by the suspect by means of making a legitimate origin of those assets or those expenses plausible.

## 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 Dutch law it is possible, under certain restrictions, for the victim of a crime to accept the role of civil injured party in the criminal procedure and to claim compensation of his or her civil damages in the criminal proceedings. The basis for this claim can be found in article

51f of the Dutch Code of Criminal Procedures. If convicted, the court can force the defendant to pay for the damages incurred by the victim of the crime.

In accordance with article 94a, section 3, of the Dutch Code of Criminal Procedures it is possible for the prosecutor's office to seize or freeze property of a suspect of a crime in order to safeguard that, in the case of a conviction, the suspect will be able to pay for damage caused to the victim and imposed on him or her in accordance with article 36f of the Dutch Criminal Code. The freezing of property is possible during the investigation phase of a crime so as to ensure that the suspect is not able to cover up his or her assets, in order to ensure that the victim will obtain suitable compensation for the damage in the case of a conviction.

## 32 Confiscation of profits

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

Under Dutch law the secondary proceeds that are revenues obtained from the primary proceeds of the criminal offence are also considered to be proceeds illicitly obtained and are therefore also subject to seizure and 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.

It is possible to confiscate goods without a conviction. There are several possibilities that render the same outcome.

Article 116 of the Dutch Code of Criminal Procedures presents the possibility for the prosecutor to decide on the proceeds of crime that are subject to a freezing order as set out in article 94 of the Dutch Code of Criminal Procedures. If the proceeds belong to a person who resigns his or her ownership to these goods, the prosecutor can forfeit or seize these goods on the basis of article 116, section 2, of the Dutch Code of Criminal Procedures.

In addition, the prosecutor can present the suspect of criminal offences a transaction offer. This offer can among other things entail that the suspect will waive his or her proprietary claim to the goods that are subject to a freezing order for the sake of not having the case brought to court. Such a transaction is made possible under article 74 of the Dutch Criminal Code.

Article 74, section 2, of the Dutch Criminal Code includes a limited list of conditions that can be imposed in the case of a transaction, one of which is the reimbursement by the suspect of the damage caused by the criminal offence.

The other possibility is that the prosecutor and the suspect reach a settlement as to the amount of the proceeds that could be confiscated by the prosecutor in order to keep the confiscation procedure from being brought to court. Such a settlement is made possible under article 511c of the Dutch Code of Criminal Procedures.

In both cases the prosecutor and the suspect reach an outcome without the interference of a criminal court. As stated, the agreement can also entail the confiscation of goods that are already subject to a freezing order.

## 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 prosecutor's office is responsible for any goods that are subject to investigation. In principle the management of the confiscated goods is handled by the investigation team of the police, as long as the prosecutor's office has not taken a decision on the confiscated goods.

In the case of money that is subject to confiscation the investigation team retains this until the moment the prosecutor has made a decision to deposit the money. As from that moment the prosecutor appoints a specialised service department of the prosecutor's office as custodian.

In accordance with article 116, section 2, of the Dutch Code of Criminal Procedures it is also possible to appoint a third party with

temporary custodianship. Custodianship of a third party, however, is only possible in the case of a seizure or freezing of goods on the basis of article 94 of the Dutch Criminal Code. The conditions by which a third-party custodian is bound are defined in a custodian agreement.

### 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 Netherlands as a member state of the EU is bound by several framework and Council decisions concerning asset recovery. The EU is facilitating the direct execution of confiscation orders regarding proceeds of crime by establishing simplified procedures for recognition among EU countries and rules for dividing confiscated property between the country issuing the confiscation order and the one executing it. In accordance with EU Council Decision 2007/845/JBZ, special contact points for the recovery of criminal assets have to be established, in particular to exchange information and best practice more effectively. In the Netherlands, the Criminal Assets Deprivation Bureau has been designated as a contact point and an Asset Recovery Office (ARO) has been established for the purpose of asset tracking and the execution of freezing and confiscation orders. Requests for mutual legal assistance can be submitted to the ARO and advice can be received on international aspects of cases. The ARO also executes incoming requests for the confiscation and recovery of criminal proceeds from abroad.

Requests for mutual legal assistance to foreign countries that are not EU member states are either governed by a bilateral treaty or, in the absence thereof, requests for mutual legal assistance are governed by article 552i (et seq) of the Dutch Code for Criminal Procedures.

In addition, EU directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union of 3 April 2014 sets out the minimum rules to be applied in the EU, with the aim of establishing a single common minimum standard.

The Commission implementation reports on Framework Decisions 2003/577/JHA, 2005/212/JHA and 2006/783/JHA show that existing regimes for extended confiscation and for the mutual recognition of freezing and confiscation orders are not fully effective. Confiscation is hindered by differences between member states' law. The Directive aims to amend and expand the provisions of Framework Decisions 2001/500/JHA and 2005/212/JHA. Those Framework Decisions are to be partially replaced for the member states bound by this Directive.

The EU member states are to take 'the necessary measures' by 4 October 2016 to implement the directive. These measures include enabling:

- the detection and tracing of property that is to be frozen or confiscated;
- the freezing of property (including that held by third parties) with a view to later confiscation; and
- the confiscation of proceeds, instrumentalities, or property corresponding to the value of such instrumentalities or proceeds once a final criminal conviction has been obtained.

### 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.



**Daan Folgering**

**daanfolgering@legalexperience.nl**

Pettelaarpark 107  
5216 PR 's-Hertogenbosch  
Netherlands

Tel: +31 73 700 36 00  
Fax: +31 73 700 36 01  
www.lxa.nl

**DE ROOS  
& PEN**

**Niels van der Laan**

**vanderlaan@deroosenpen.nl**

Keizersgracht 332  
1016 EZ Amsterdam  
Netherlands

Tel: +31 20 627 5411  
Fax: +31 20 622 6577  
www.deroosenpen.nl



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

The following treaties are applicable for asset recovery:

- the European Convention on Mutual Assistance in Criminal Matters 1959;
- the UN Convention against Transnational Organized Crime 2000;
- the UN Convention for the Suppression of the Financing of Terrorism 1999;
- the UN Convention against Corruption 2003;
- the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005;
- the European Criminal Law Convention on Corruption 1999; and
- the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

In addition, the Netherlands, as an EU member state, is bound to the following EU instruments that deal with asset recovery:

- the Convention on the Fight against Corruption Involving Officials of the European Community or Officials of the Member States of the European Union, Brussels, 26 May 1997;
- EU Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime of 26 June 2001;

- EU Framework Decision 2003/577/JHA on the Execution in the European Union of Orders Freezing Property or Evidence of 22 July 2003;
- EU Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property of 24 February 2005;
- EU Framework Decision 2006/783/JHA on the Application of the Principle of Mutual Recognition to Confiscation Orders of 6 October 2006;
- EU Council Decision 2007/845/JBZ concerning cooperation between Asset Recovery Offices of the Member States of 6 December 2007; and
- EU Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union of 3 April 2014.

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

The Dutch judicial system is not familiar with the concept of private prosecutors.

# Nigeria

Babajide O Ogundipe and Cyprian Nonso Egbuna

Sofunde, Osakwe, Ogundipe & Belgore

## Civil asset recovery

### 1 Legislation

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

The key pieces of legislation to be considered are:

- the Economic and Financial Crimes Commission Act 2004 (EFCC Act);
- the Corrupt Practices and Other Related Offences Act 2000;
- the Criminal Code Act, Laws of the Federation of Nigeria (LFN) 2007;
- the Criminal Procedure Act, LFN 2007;
- the Money Laundering (Prohibition) Act 2011;
- the Companies and Allied Matters Act 1990;
- the Investment and Securities Act 2007;
- the Evidence Act 2011;
- the Constitution of the Federal Republic of Nigeria 1999; and
- the Asset Management Corporation of Nigeria Act 2010.

### 2 Parallel proceedings

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

There 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.

### 3 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.

### 4 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.

### 5 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.

### 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 facts 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 or in contravention of a law or in consequence of an impropriety or of 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 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 in Nigeria 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.

## 8 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, there appears to be no process through which information and evidence may be obtained, other than through the use of subpoena powers of the High Court, within the context of ongoing actions.

## 9 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.

## 10 Interim relief

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

A plaintiff 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 Nigerian courts will grant injunctions, following principles developed in the English case of *Mareva Compania Naviera SA v International Bulkcarriers SA* (1975) 2 Lloyd's Rep 509. The Supreme Court has ruled that such injunctions may be granted where it appears likely that:

- 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 they 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.

## 11 Right to silence

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

Yes. Under the Evidence Act where a defendant appears as a witness he or she is not bound to answer any question if the answer to it would, in the opinion of the court, expose the defendant or the wife or husband of the defendant to any possibility of criminal charge, or to any penalty or forfeiture that the judge regards as reasonably likely to be preferred or sued for.

## 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 in Nigeria 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 plaintiff 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 basically provide that where a plaintiff 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 under which the property of the judgment debtor may be seized and sold, the attachment of debts in the hands of third parties, 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 Processes Act, laws of the various states and the Judgment 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 enforcement of judgment 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 plaintiff 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, moveable 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 which 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 in Nigeria. 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 EFCC Act 2004 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, they must make a full disclosure of their 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 commission. 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 commission shall apply to the court for an interim forfeiture order.

Where a person is arrested for an offence under the EFCC Act, the commission 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 commission under the act, the commission 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 moveable or immovable, within or outside Nigeria, belonging to this person or in their 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 2004 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 which may be imposed, order the forfeiture of any property which 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 commission 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.

## 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 through third parties may also be confiscated if such properties were 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 2004, a court may order any person convicted of an offence before it to pay to the prosecutor such reasonable costs as the court may deem fit. Such costs may include the costs of asset tracing and confiscation.

## 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 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 in Nigeria is on the party making an assertion. However, where a person is accused of an offence, the burden of

## Update and trends

Attempts to recover assets from public officials accused of having misappropriated funds while in office has been a major focus of the Nigerian government under President Mohammad Buhari, who took office in May 2015. The Economic and Financial Crimes Commission (EFCC), which spearheads this effort claims to have made significant recoveries from past public office holders who served under the Goodluck Jonathan presidency. The most notable is the exposure of misappropriation of funds in excess of US\$15 billion by the office of the National Security Adviser under the Jonathan Government. The misappropriated funds were earmarked for the purchase of arms in the campaign against the insurgent Boko Haram group in the north-east of Nigeria.

In order to give further impetus to the fight against corruption in Nigeria, the National Assembly is presently debating a bill, submitted by the government, which proposes to amend the EFCC Act by inserting, among others, provisions for the establishment of an operations review committee, witness protection, compensation of victims of financial crimes and disqualification of convicted persons from holding or continuing to hold public office. Media reports, however, suggest that some of the proposed reforms are opposed by the EFCC leadership.

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 which 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?

Nigeria has no statutory provisions regulating this. However, there might be circumstances in which a civil claimant may be able to establish the right to recover damages from confiscated property.

## 32 Confiscation of profits

### Is it possible to recover the financial advantage or profit obtained though 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 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 he or she is satisfied that such property has been obtained in connection with the giving or taking of gratification 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.

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 commission 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 by Nigeria 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 by Nigeria 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 13 December 2000, ratified 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 laid down, 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**  
**Cyprian Nonso Egbuna**

**boogundipe@sooblaw.com**  
**cnegbuna@sooblaw.com**

7th Floor, St Nicholas House  
Catholic Mission Street  
PO Box 80367  
Lafaji Lagos  
Nigeria

Tel: +234 1 462 2501/2502  
Fax: +234 1 462 2501  
www.sooblaw.com

# Portugal

Rogério Alves and Rodrigo Varela Martins

Rogério Alves & Associados – Sociedade de Advogados, RL

## Civil asset recovery

### 1 Legislation

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

Rules applicable to attachments and seizures must be considered within a civil recovery proceeding when investigating a debtor's assets. These rules are set out in articles 397 to 402 (attachment) and in book IV (namely chapters III and IV concerning enforcement proceedings) of the Portuguese Code of Civil Procedure (CCP). Regulations on the protection of individual rights concerning the processing of personal data and on the free transfer and access to such data are set forth in the Portuguese Data Protection Act (Law 67/98 and subsequent amendments) and must also be taken into account.

### 2 Parallel proceedings

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

Civil action for restitution and damages may be filed simultaneously to criminal proceedings. A civil lawsuit may be brought before a civil court but also within the scope of a criminal proceeding if the claimant requires its appointment as a 'civil party'. In this latter case, since the claim for restitution and damages is based on a criminal offence, the claim must be filed before the criminal court in charge of the respective criminal proceedings, except if:

- charges are not brought within eight months following the criminal inquiry;
- the criminal proceedings are closed or temporarily restricted;
- the criminal proceedings are dependent on a previous criminal complaint or private prosecution; and
- if there is no known damage at the time of the public prosecution or if it is not known to its full extent.

In all these cases civil action will progress in parallel with the criminal proceedings concerning the same subject matter.

### 3 Forum

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

Civil recovery proceedings are governed by the principle of territoriality. The territorial jurisdiction of Portuguese courts is determined notably (but not exclusively) by the following criteria set out in the CCP:

- forum rei sitae, when the claim is related to real estate, the territorial jurisdiction is determined by the respective geographic location of such asset;
- when the claim is related to the fulfilment of any obligations arising out of contracts, the jurisdiction lies either in the courts of the place where those obligations should have been fulfilled or in the courts of the defendant's place of residence;
- when the claim is based on non-contractual liability or strict liability the territorial jurisdiction belongs to the courts where the relevant events took place; and

- for the enforcement or execution of moveable goods or property the jurisdiction lies in the court of the place where such goods or property are located.

With regard to interim measures (ie, attachment, temporary seizure of moveable or immovable property), proceedings should be brought before the court competent to decide the merits of the main proceedings, or in its absence, the court of the place where the interim measure should be executed.

### 4 Limitation

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

In general, the statute of limitations is 20 years including contract liability claims. Nevertheless, there are several exceptions to this general rule including (but not limited to) the following:

- With non-contractual liability and strict liability the general limitation period is three years, starting from the date when the unlawful action is known by the claimant. However, this period may be extended according to a longer criminal statute of limitation if such action may, in theory, be considered to have occurred simultaneously to a criminal offence.
- When the claim is based on rents due by lessees, interest, dividends from companies, alimonies and any periodically renewable benefits, the statute of limitations is five years, starting from the date when the right could have been exercised.

In certain cases – for example, issuing a formal demand letter or starting a lawsuit – the statute of limitations period may be suspended (the time of suspension is not counted when assessing if the statute of limitations has expired) or interrupted (a certain fact or action may interrupt the statute of limitation period). In these cases, a new period for the statute of limitation starts from the action or fact causing the interruption.

### 5 Jurisdiction

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

Civil courts have residual jurisdiction for all lawsuits when other categories of courts are not duly competent (administrative and tax courts, criminal courts, maritime courts, arbitral tribunals, foreign courts, etc).

A defendant may challenge the court's jurisdiction by raising objections, namely defences intended for having the proceedings declared null and void, set aside or suspended. To be admitted, such defences (aimed at proving lack of jurisdiction of the court on material and territorial grounds) can be raised by any party before any merits claim, but the lack of jurisdiction may also be declared unilaterally by the court.

### 6 Admissibility of evidence

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

As a general rule each party has the burden of submitting and proving those facts upon which his or her claim or defence is based (article 342 of the Civil Code). Everything that remains uncontested by the other party is considered proven, and only contested facts are subject to the

assessing of evidence. If a fact is contested by the counterparty, the presenting party must describe the evidence upon which it intends to rely to prove that fact. If necessary, the court will then render an order for the taking of such evidence and freely evaluate the outcome.

Pursuant to the approval of the new Portuguese Criminal Procedure Code (CPC) (in force as of September 2013), all evidence should be presented by the parties with their written petitions and must be presented before the trial hearing. In principle, after that, the proper moment to present any other evidence or to modify any evidence previously presented will be at a pretrial hearing, typically held between the judge and the opposing parties to establish the main facts under dispute and to organise (and, if possible, schedule) the next steps of the proceedings.

The only exceptions to this rule are:

- up to 20 days before trial the parties can alter or increase (in light of the legally established limit) their list of witnesses. Should this be the case, the counterparty will have five days to amend his or her own list of witnesses accordingly. It is noteworthy that, contrary to what occurs with written witness statements or within the pretrial hearing, any and all witnesses resulting from these subsequent amendments will necessarily have to be brought before the court by the appointing party, as it will not be possible to request that the court summons them for this purpose;
- in addition, up to 20 days before the trial, the parties can file documents that were not presented along with any written statement they refer to at the risk of a penalty (except when they prove that they were not able to present them at the proper moment);
- after that, and even during trial, the parties can only present documents that could not have been presented earlier and that only became necessary due to a recent and subsequent event. This was already possible within the previous Civil Procedure Code, but the rule was seldom used, as the courts freely admitted the presentation of documents at any time upon payment of a fine;
- reports from lawyers, experts or technicians can be presented at any time of the proceedings before first-instance courts;
- judicial inspections of the place where the facts that are disputed occurred, or of the matters or persons subject to discussion, may also occur at any stage of the proceedings and, especially when suggested by the court, may also be requested and conducted during trial; and
- in addition, at any time of the proceedings the court itself can summon a witness to testify if it is led to believe that a certain person, who was not called by the parties, may be aware of facts relevant for the court's judgment of the case.

## 7 Publicly available information

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

There are several sources of information available to creditors who aim to discover the assets of their debtors, namely:

- the Land Registry Office, an electronic archive that allows all entries made in the registry concerning real estate or land properties to be identified in relation to the identity of a certain individual or entity in order to determine their ownership or encumbrances in place regarding such property. Also any information regarding the sale, purchase or transfer of real property must be reported to the tax authorities and may be consulted before tax offices or through the Finance Portal (a Ministry of Finance website);
- the Companies Registry Office, an electronic archive that records the most relevant corporate information about a company (deed of incorporation, by-laws, shareholder structure, financial statements, etc) and any amendments thereto;
- the Vehicles Registry Office, where all relevant information concerning a certain vehicle (car, ship or aircraft) and its owner is recorded;
- the PEPEX, an online platform with data regarding collections that could not be carried out due to lack of seizable assets, which allows a creditor to carry out a preliminary check of the debtor's assets and equity position. To access PEPEX the creditor must hold a judicial enforcement order or an extrajudicial enforcement title for an outstanding debt equal or less than €10,000 or otherwise secured by virtue of a lien or mortgage; and

- under certain conditions, creditors may also proceed to an inquiry with the Bank of Portugal website regarding the list of credit liabilities of certain individuals or entities as well as collecting information concerning the restriction on the use of bank cheques.

## 8 Cooperation with law enforcement agencies

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

In civil law, the burden of proof relies exclusively on the parties. In the course of the proceedings and also during trial, the court, at its own discretion or upon request made by the interested party, may order public bodies (including law enforcement and regulatory agencies) to produce or deliver documents deemed necessary to the court's final decision.

## 9 Third-party disclosure

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

See question 8. It should be noted that banking information is governed by strict regulations that generally prevent any disclosure even to the interested party (eg, if it is not the bank account's owner) with the exception of criminal investigations, tax assessments and anti-money laundering compliance. These matters are subject to additional regulations and therefore should be assessed on a case-by-case basis.

## 10 Interim relief

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

To prevent the dissipation of assets by suspects of involvement in fraud (or where there is a material risk of dissipation of assets) Portuguese law provides for protective attachments, which consist of a request for the court to issue an order regarding a debtor's property or rights (eg, bank accounts, real estate property, shares, credits over a third party, etc). The effect of the court's order depends on the nature of the assets in question:

- the attachment of real property is registered at the competent Land Registry Office as a charge in favour of the claimant;
- the attachment of personal assets is done by seizing the assets and placing them in the custody of an enforcement agent appointed by the court on behalf of the claimant; and
- the attachment of defendant's rights is done by notification to the third-party debtor, which must place the credit at the disposal of the enforcement agent.

With respect to the substantive requirements of protective attachments, they are represented by the concepts of *fumus boni juris* and *periculum in mora*. The former is preliminary evidence of the existence of the right that the requested attachment is aimed at protecting; the latter is evidence of serious and effective risk that could compromise the asset recovery in a main lawsuit.

Even if instrumental to a full trial, protective attachments may also be granted during the trial stage and even after a merit judgment on cause, provided that both the above substantive requirements are met.

In terms of proceedings, it should be noted that the attachment order can be issued *ex parte* if prior knowledge by the defendant could compromise the successful execution of the order. Such being the case, the defendant is entitled to raise his or her defence 10 days after the attachment order and such order will therefore be subject to confirmation, amendment or revocation by the court. Otherwise, the court may decide on the application for protective attachment after a hearing where all parties are entitled to present their allegations.

With regard to interim relief for obtaining information, the CCP provides that, upon request by a party, the court can order pretrial depositions (and even, under certain circumstances, prior to filing the lawsuit) in case there is a serious risk that their deposition during trial is impossible or extremely difficult.



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

The right to silence applies only to criminal proceedings.

**12 Non-compliance with court orders****How do courts punish failure to comply with court orders?**

Intentional non-compliance with court orders is punished, under certain conditions, as a criminal offence under article 348 of the Portuguese Criminal Code (PCC), provided that the interested parties file a criminal complaint. The penalty incurred is imprisonment for up to two years or alternatively a fine of up to 240 days' wages.

With respect to the civil procedure for ensuring the enforcement of court orders, such matters are regulated in the CCP; for further information see question 19.

Also, if duly requested by the interested party, the court may impose daily penalties to ensure the enforcement of a court order. Such penalties involve ordering a debtor to perform his or her obligations within a certain period of time that, if expired, may lead to applicable interest per day of delay.

**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 proceedings is mainly governed by EC regulations (with respect to EU countries) and the international conventions ratified by Portugal.

With respect to all EU countries, requests by Portuguese courts for the taking of evidence in a foreign state are governed by EC Regulation No. 1206/2001. The main provisions of this regulation set out that:

- 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 competent foreign court shall comply with such a requirement unless this procedure is incompatible with the applicable law;
- requests shall be transmitted directly from the requesting court to the competent court of the foreign state;
- the presence and participation in the foreign state of the relevant parties and of representatives of the requesting court can be allowed; and
- the direct taking of evidence by the requesting court can take place under certain conditions (eg, if video-conferencing is available to take testimonies).

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). In accordance with the 1970 Convention, requests to obtain evidence shall be made in writing and shall be sent to the central authority of the foreign state appointed for that purpose. The main terms and conditions are in line with those set forth in the EC regulations referred to above.

In the absence of any treaty, Portuguese law will be applicable and provides that letters rogatory are issued by Portuguese courts to foreign court authorities for the execution of orders on obtaining evidence. In the case of testimonial evidence, a notification is directly served on the person whose testimony needs to be taken.

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

For EU countries or non-EU countries that are parties to the 1970 Convention, see question 13.

In the absence of any treaty, Portuguese law provides that letters rogatory of foreign authorities shall be analysed by the public prosecutor for public interest reasons prior to their execution. If granted, the competent court shall be responsible for ensuring compliance except if the execution of such letters rogatory does not require the

intervention of a Portuguese court, being therefore executed without its intervention.

As far as the enforcement of foreign judgments is concerned, no decision on private rights issued by a foreign court or arbitrator is valid and enforceable in Portugal, regardless of the nationality of the parties involved, unless it has been reviewed and confirmed by a Portuguese court.

The court responsible for the recognition of foreign decisions is the Court of Appeals.

Within such proceedings, the law demands the competent court to verify that:

- the foreign decision is authentic and proper;
- it does not contain decisions in conflict with Portuguese public policy; and
- if the situation could have been resolved under Portuguese law – in accordance with the rules on conflict of laws – that the foreign decision does not infringe Portuguese law.

The Portuguese confirmation system generally results in a formal review. As a rule, the Court of Appeals examines the regularity of a foreign decision and does not review its merits. However, a review of the foreign decision's merits may occur in at least two situations:

- when the foreign decision may be deemed in conflict with Portuguese public policy; and
- when the parties submit a document that is sufficient to modify the decision of the foreign court.

Under the PCC, the general rule is that both parties can appeal any decision or order of the Court of Appeals during the recognition process.

Once the foreign decision recognition procedure is final the foreign decision may be executed in Portugal.

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

Civil recovery proceedings are based on the debtor's failure to comply with his or her obligation towards the creditor. Such non-performance may be total or partial with regard to quality or time limits.

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

The main remedies are restitution through a recovery action (where possible) or damages through action in contract.

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

There are certain circumstances in which a creditor can obtain judgment against the debtor in the debtor's absence. Thus, if the defendant fails to appear and challenge the plaintiff's claim, the court, upon verifying if the defendant has been properly subpoenaed, may decide against him or her by default.

**18 Post-judgment relief****What post-judgment relief is available to successful claimants?**

As explained in question 10, the creditor may request a protective attachment even after a judgment on the merits provided that both substantive requirements mentioned in question 10 are fulfilled.

**19 Enforcement****What methods of enforcement are available?**

Book IV of the CCP sets out a complex procedure for the enforcement of a court decision.

The ordinary way to start the enforcement is seizure, which may be substituted with an equivalent amount of money by the execution court upon request of the defendant.

The defendant always has the right to challenge the injunction (by raising substantive or formal objections in legally prescribed terms), thus starting a dispute before the execution court.

The seizure is carried out by an enforcement agent appointed by the plaintiff who, under the functional control of the execution court, carries out the specific tasks of the enforcement agent and other duties that are attributed to him or her by law (including summoning testimonies, notifications and publications).

All of the debtor's assets which can be seized can be subject to enforcement. In cases specially provided for by law, third-party assets can be seized if the enforcement has been brought against that third party.

Seizure is limited to the assets necessary for the payment of the debt in question and the foreseeable costs of the enforcement. Seizure is subject to the following conditions:

- only objects and rights which can be evaluated in pecuniary terms can be seized;
- assets which are not traded cannot be seized;
- there are also legal limits to seizure that render some assets unable to be seized either totally, partially or only under certain conditions (eg, inalienable objects or rights, assets in public ownership, etc); and
- except for the debtor's main commodities, all fixed assets, moveable assets, purchase rights and expectations, bonuses or income, bank deposits, jointly owned assets and shares in companies and commercial establishments can be subject to an enforcement proceeding (even assets of a third-party subject for pledge or mortgage for another person's debt or assets whose transfer by the defendant were revoked by fraud).

## 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?**

During the proceedings both parties are required to make payments on account for costs (calculated by reference to the amount in dispute) and are also responsible for the payment of their own expenses and their own lawyers' fees.

When the court renders its decision, it determines the total amount of costs (generally calculated by reference to the amount in dispute) and the proportion of costs to be borne by each party if they are both held partially responsible. If there is only one losing party it shall bear the full amount of the costs. At the end of the proceedings the winning party may request from the losing party the payment of the judicial costs incurred by the former by sending a statement of its costs including the amounts paid for legal tax, expenses, lawyer and enforcement agent fees. The winning party may request the payment of the expenses and lawyers' fees, but in the latter case limited to 50 per cent of the amount of court fees paid by all the parties.

Third-party funding has not been implemented in Portugal. However, the principle of contractual freedom provides that legal costs may be paid by a third party, but such party's right to recover those costs is limited to the agreement reached with the party in the proceedings. In other words, the third party is not entitled to recover such costs within the proceedings, because only the parties to the proceedings are bound by the court order.

An arrangement whereby the lawyer's fees exclusively depend on the outcome of the dispute is forbidden under the Portuguese Bar Association Code.

## Criminal asset recovery

### 21 Interim measures

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

The CPC foresees two kinds of provisional measures dubbed as 'patrimonial guarantee measures': the precautionary attachment and the 'economic surety'.

Precautionary attachment is an interim measure aimed at freezing the proceeds of a crime (and the means used for the practice of such crime) in view of a future confiscation or protecting and satisfying the credits of the state or of the victim of a crime, or both, by freezing or

seizing the defendant's assets (or of third parties liable for compensation arising out of a convicting sentence) in order to prevent their dissipation (in analogy with the protective attachment provided for civil purposes). This measure can only be ordered by the court upon request by the public prosecutor and is immediately revoked if the defendant posts an 'economic surety'. Precautionary attachment orders suspend or prohibit any civil recovery proceedings related to the assets subject to attachment.

'Economic surety' is aimed at guaranteeing the enforcement of any confiscation penalty imposed by the court or any compensation due to a victim of a crime. This surety may be posted by any form of a patrimonial guarantee: deposit, pledge, mortgage or bank guarantee.

Pursuant to article 178 of the CPC, provisional seizure, carried out by the Asset Recovery Office (ARO) on behalf of judicial authorities (see question 22) is also available in respect of legal persons suspected of committing a criminal offence. The following can be seized:

- objects used or intended to be used in the undertaking of a crime or representing the proceeds, profit or prior compensation;
- all objects left by the offender at the scene of the crime; and
- any other object that might serve as proof.

Seizure of goods or objects is authorised, ordered and validated by judicial authorities.

### 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 a criminal offence is detected, a criminal investigation is automatically initiated aimed at identifying and punishing its authors as well as at identifying, tracing, freezing and later confiscating the proceeds of such crime (in the scope of the criminal enquiry).

Law 45/2011 set up the ARO, whose mission consists of identifying, tracing and seizing property or proceeds related to crimes, both at internal and international level, ensuring cooperation with asset recovery offices set up by other states, as well as carrying out any other duties set forth by law. The ARO carries out the financial or patrimonial investigation above by decision of the public prosecutor:

- where the means used for the practice of a crime, or the property or proceeds of a crime, are related to crimes punishable with a custodial penalty of three years or more; and
- where the estimated value of the means used for the practice of a crime, or the property or proceeds of a crime, is higher than €100,000.

### 23 Confiscation – legal framework

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

With respect to confiscation upon conviction, article 109 of the CPC provides for 'confiscation of instruments and proceeds'. Pursuant thereto, objects that were used or intended to be used in the undertaking of an offence, or that represent the proceeds of an offence, shall be confiscated, if 'by their nature' or the circumstances of the case they constitute a threat to personal safety, morals or public policy, or pose a serious risk of being used to undertake further criminal offences.

Article 111 provides for the 'confiscation of proceeds'. Pursuant thereto, the following proceeds shall be confiscated:

- any compensation given or promised to the offender for himself or herself or another;
- any assets, rights or advantages of any nature directly obtained by the offender through a criminal offence for himself or herself or another; and
- any assets or rights obtained through a transaction or an exchange with the things or rights obtained directly through a criminal offence. This enables confiscation of assets that the offender obtained by selling, converting, etc, namely, the proceeds of an offence.

Confiscation upon conviction is ordered in the course of the criminal proceedings against the alleged offender (ie, criminal trial).

If the objects belong to a third party, confiscation is ordered when their owners have concurred in a blamable way in their use or production, or have taken advantage of the fact; or if the objects have been acquired (knowing their origin) after the fulfilment of the act. Nevertheless confiscation shall not proceed in the following circumstances:

- if at the time of the undertaking of the offence, the object did not belong to an offender or a third party who was involved in the offence or was aware thereof; or
- if at the time of the undertaking of the offence, the object belonged to an offender or a third party who was involved in the offence or was aware thereof, but at the time of the confiscation order, it belonged to a bona fide third party.

If the compensation, rights, assets or advantages cannot be confiscated 'in kind', confiscation will be replaced by payment to the state of their respective value. The Portuguese authorities confirm that this applies where confiscation is unavailable because the proceeds of a crime, which belong or belonged to a bona fide third party, were destroyed or could not be found. In addition, value-based confiscation can always be ordered. It then involves confiscation of assets whose value is equivalent to the proceeds of the criminal offence committed.

A special form of confiscation was introduced by Law 5/2002 in relation to a compulsory list of crimes (drug trafficking, money laundering, passive and active corruption, embezzlement, trading in influence, etc) according to which, in the case of conviction, and for the purposes of a confiscation order, any difference between the value of the convict's estate and the value proportionate to his or her lawful income is construed as proceeds arising from a criminal activity.

For the purposes of this law, the convicted person's estate means:

- property owned by the convicted person, or property under his or her control or to his or her benefit, at the moment when he or she acquires the status of defendant or subsequently;
- property transferred to third parties during the five-year period prior to his or her acquiring the status of defendant or convicted person, against a trivial compensation or gratuitously; and
- property received by the defendant or convicted person during the five-year period prior to his or her acquiring the status of defendant, even if the disposal thereof remains unknown.

Furthermore, any interests, financial gains or other benefits derived from property complying with the requirements set out in article 111 of the CPC are always considered proceeds of criminal activities.

Finally, with regard to the calculation of the benefit figure, experts within the AMO (see question 35) have discretionary powers to carry out such calculation under the common principles of asset valuation and their reports on such matter may be challenged by the convicted person under the general terms of law. Apart from the rule described in the previous paragraph, Law 5/2002 sets out that, in the case of conviction for criminal offences provided for therein (money laundering, passive and active corruption, embezzlement, trading in influence, etc), the difference between the felon's property and the property or income lawfully obtained is deemed to be an unlawful benefit or proceed of the respective crime.

## 24 Confiscation procedure

### Describe how confiscation works in practice.

The confiscation procedure often starts at a pretrial stage by freezing the proceeds and means used for the practice of a crime through provisional seizure (see question 21) in such a way that at the moment of the final judgment of confiscation all relevant assets are already under the control of the judicial authorities.

Also, as explained in question 23, confiscation is ordered upon conviction and is executed when the convicting sentence becomes *res judicata*.

Upon confiscation a concise adversarial proceeding can take place, on request of the public prosecutor, the defendant and the interested third party, in the event of dispute about the execution of confiscation. If a dispute arises concerning the ownership of the confiscated assets (eg, by a bona fide third party claiming to be its owner), the case may be remitted to the civil court in order to determine legitimate ownership.

In the absence of any dispute on the execution of confiscation, Portuguese law provides for the sale of confiscated assets, unless

specific provisions provide for a different destination of such assets or their destruction is ordered in case the sale is not deemed convenient. Money derived from the sale is generally passed to the state or any participant civil party, if existent.

## 25 Agencies

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

The ARO, a specialised asset recovery department of the criminal police, is responsible for tracing and confiscating the proceeds of crime. See question 22.

## 26 Secondary proceeds

### Is confiscation of secondary proceeds possible?

The direct or indirect proceeds of a criminal offence can be confiscated in certain circumstances, as explained in question 23. However, the burden to prove all transfers and modifications deriving from the original proceeds of a criminal offence lies with the public prosecution.

## 27 Third-party ownership

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

As a general principle, confiscation cannot take place when the assets are owned by a person extraneous to the crime (eg, a bona fide third party). As explained in question 23, confiscation will be ordered only if such third party knows their origin or has concurred through his or her conduct in making the undertaking of the crime easier or has taken advantage of the fact.

According to Portuguese case law, the only subject who may be considered extraneous to a crime is the one who did not have any direct or indirect (eg, due to lack of vigilance) negligent link to the undertaking of the crime. Therefore, only in very limited situations has case law ruled that close relatives may be considered extraneous to the crime and, accordingly, has prevented confiscation.

## 28 Expenses

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

All costs arising out of criminal proceedings in the case of conviction are generally attributed to and enforced against the defendant, including the costs related to the tracing and confiscation of assets. In addition, the provisional seizure mentioned in question 21 may be used to secure credits of the state against the defendant in order to prevent dissipation of its assets.

## 29 Value-based confiscation

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

As explained in question 23, value-based confiscation is possible, which involves confiscation of any asset of the convicted person, regardless of its origin and date of acquisition, whose value is equivalent to the proceeds of the criminal offence committed. The proceeds of the crime are assessed by the judgment court (which may resort to experts for such purpose) while the value of the assets seized is determined by the public prosecution with the assistance of an expert from the Asset Management Office (see question 34).

## 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 accordance with constitutional principles (namely the presumption of innocence, which provides that a defendant cannot be considered guilty until final conviction) the burden of proof lies with the public prosecution, either in proving beyond reasonable doubt the defendant's guilt in relation to a certain criminal offence or in proving that specific assets are proceeds of such criminal offence and, as such, must be confiscated.



### Update and trends

While already provided for in the CCP, e-auctioning within enforcement proceedings only became fully operational in 2016 upon the approval of Ministerial Order 12624/2015, which appointed the Solicitors and Enforcement Agents Chamber to manage the corresponding platform. The most relevant changes implemented have been the elimination of sale through expression of interest submitted in sealed letter as well as the waiver of a court order to schedule the auction date.

Upon enactment of Law 13/2016, tax enforcement proceedings may not target the attachment of the debtor's family home except if its rateable value falls within the Property Transfer Tax maximum rate applicable to the acquisition of urban property destined to be permanent dwelling. In such case, proceedings aimed at selling the property through auction may only take place at least one year after the expiry of the payment period concerning the earliest tax debt.

In so far as the criminalisation of unlawful enrichment (currently the subject of public debate) does not go further, the burden of proof cannot be reversed within criminal proceedings in any circumstance whatsoever.

### 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?**

All individuals or entities that have sustained damage arising out of a criminal offence can be appointed as civil parties in criminal proceedings (as explained in question 2) and may, at pretrial stage, request an interim measure aimed at protecting and satisfying their credits, by freezing the defendant's assets to prevent them from being dissipated (see question 21).

Furthermore, the law provides that such measure is converted into garnishment when a decision ruling on the payment of compensation becomes *res judicata*. The enforcement of the assets seized takes place in accordance with the provisions set forth in the CCP. Monies derived from the sale of such assets shall be paid firstly to the civil party, as compensation for damage (and refund of the costs he or she incurred in the proceeding), and subsequently to the state (to settle fines and other legal costs).

### 32 Confiscation of profits

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

All direct and indirect proceeds of a criminal offence, and even the entire assets of a convicted person (even if unconnected with the offence), may be confiscated under certain circumstances (see question 23).

### 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.**

As an additional penalty, confiscation can only be ordered upon conviction ruled by the court. Before a convicting sentence, it is possible to attain provisional seizure or a precautionary attachment to ensure the future enforcement of any confiscation penalty (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?**

After being seized (or recovered in the scope of national proceedings or in international legal cooperation activity), assets are managed by a specialised asset management unit of the Institute for Financial and

Justice Infrastructure Management: the Asset Management Office (AMO). When carrying out its management powers, the AMO shall:

- protect, preserve and manage property recovered or placed in custody of the state;
- determine the sale, allocation to public service or destruction of property, without prejudice to the enforcement of the relevant EU law provisions; and
- carry out the examination, the description and the registration of the asset's evaluation, for the purpose of establishing the value of a possible compensation.

Immoveable property is preserved and managed by the AMO and may not be disposed of until the relevant decision has become final (but the AMO may carry out the anticipated sale or the allocation of the managed immoveable property, whenever that property is in serious risk of devaluation or may affect public health and security and does not constitute relevant evidence). Moveable assets (vehicles, telephones, etc), on the other hand, may be allocated to public service.

### 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.**

In the absence of international conventions providing otherwise, and except for urgent cases, requests for international legal assistance issued by Portuguese judicial authorities are sent through the Ministry of Justice and the enforcement documents are returned to Portuguese authorities by the same route. In urgent cases, requests for assistance can be sent directly to the authorities of the requested state with jurisdiction to act on them. Enforcement documents are then returned through the same procedure.

As an EU member state, Portugal has adopted a special legal framework for legal assistance concerning provisional measures in relation to the recovery of assets within the EU (Law 25/2009). Under such legal framework, any Portuguese court with jurisdiction to order a provisional measure (eg, attachment) also has power to issue a freezing order applicable to assets located in the territory of another member state. The freezing order is sent to the judicial authority of the enforcing state by the public prosecutor of the court issuing it or by the investigating magistrate and will be accompanied by a request for transfer of evidence to Portugal or for enforcement of an asset confiscation decision. A certificate instructing the above-mentioned freezing order contains instructions to hold the asset or evidence until one of those requests (transfer of evidence or enforcement) is received by the enforcing state.

### 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 stated in question 35, there are two regimes in Portugal: a general regime under ordinary law and the specific and simplified regime applicable within the EU.

Under the general regime, except if international conventions provide otherwise, requests for assistance issued by foreign judicial authorities are sent to the Portuguese judicial authorities through diplomatic channels and the enforcement documents are returned by the same route. In urgent cases, requests for assistance can be sent directly to the Portuguese authorities with jurisdiction to act on them. In the case of assistance concerning provisional measures, notably attachments, foreign authorities can ask Portuguese authorities for assistance with the freezing of assets that appear to be the proceeds of a criminal offence (and of any asset whose value is equivalent to the proceeds of such offence) with a view to future confiscation. This request may be refused if, for example, the underlying facts do not constitute an offence under Portuguese law or if the respective assets cannot be confiscated under Portuguese law.

With regard to the special regime applicable within the EU, applications for freezing orders and subsequent enforcement are decided by the public prosecutor with territorial jurisdiction and, upon previously examining the regularity of the application, are immediately



enforced (through the ARO). However, the ARO may refuse to enforce the freezing order under certain circumstances (eg, if the underlying facts do not constitute an offence under Portuguese law, if the enforcement infringes the double jeopardy rule, etc) or defer such order in several other situations (eg, when there is a risk that such a decision may undermine a criminal investigation in progress in Portugal, when the assets or items of evidence have already been attached or subject to freezing in the context of a domestic criminal proceeding, etc). If the public prosecutor decides to defer the enforcement he or she must inform the judicial authority of the issuing state of the reasons for the deferral and, if possible, the foreseeable duration.

### 37 Treaties

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

Within the context of the EU, the Council of Europe and the United Nations, Portugal is a signatory to several international conventions, whose provisions are available at [www.gddc.pt/siii/tratados](http://www.gddc.pt/siii/tratados). The main international conventions are as follows.

#### European Union

- Convention on the Fight against Corruption Involving Officials of the European Community or Officials of the Member States of the European Union, Brussels, 26 May 1997;
- EU Framework Decision 2003/577/JHA on the Execution in the European Union of Orders Freezing Property or Evidence of 22 July 2003; and
- EU Framework Decision 2006/783/JHA on the Application of the Principle of Mutual Recognition to Confiscation Orders of 6 October 2006.

#### Council of Europe

- Criminal Law Convention on Corruption, Strasbourg, 27 January 1999; and
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism, Warsaw, 16 May 2005.

#### International

- The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 17 December 1997;
- the UN Convention against Transnational Organized Crime, New York, 15 November 2000; and
- the UN International Convention against Corruption, New York, 31 October 2003.

### 38 Private prosecutions

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

Private individuals or entities are not entitled to prosecute within the Portuguese legal system since criminal action (notably asset recovery powers) is exclusively conducted by public prosecutors.



**Rogério Alves**  
**Rodrigo Varela Martins**

**[ra@raassociados.pt](mailto:ra@raassociados.pt)**  
**[rvm@raassociados.pt](mailto:rvm@raassociados.pt)**

Avenida Álvares Cabral 61-4º  
1250-017 Lisbon  
Portugal

Tel: +351 21 391 1040  
Fax: +351 21 391 1041  
[www.raassociados.pt](http://www.raassociados.pt)

# Qatar

Fouad El Haddad

Lalive in Qatar

## Civil asset recovery

### 1 Legislation

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

There is no specific legislation in Qatar dealing with private investigations. Any investigation would normally be carried out by the judicial authorities (public prosecution, courts, the Ministry of the Interior or the Ministry of Justice).

### 2 Parallel proceedings

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

Civil proceedings cannot be conducted in parallel with, or after the commencement of, interrelated criminal proceedings. Civil asset recovery proceedings can only be conducted following the rendering of a final judgment of the competent court. However, this will not prevent a claimant from filing requests for interim reliefs (ie, interlocutory injunction) (see article 25 of the Criminal Procedures Law).

In the event civil and criminal proceedings are commenced at the same time the civil court should stay the civil proceedings pending the outcome of the criminal proceedings.

### 3 Forum

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

All civil claims of this nature shall be heard by the competent civil court. Civil claims of value not exceeding 100,000 riyals must be filed at a district civil court. Any civil claims exceeding said amount must be filed at a court of first instance (see article 22 and 24 of the Commercial and Civil Procedures Law).

### 4 Limitation

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

The statute of limitation for civil actions is time-barred after three years from the date on which the victim becomes aware of the damage and of the identity of the party that is liable for such damage, or 15 years from the date of occurrence of the unlawful act, whichever is earlier. If the suit of liability for unlawful acts arises from a crime, such suit shall not be time-barred so long as the penal case remains outstanding, even if the dates as set forth in the preceding clause have expired (see article 219 of the Civil Code).

### 5 Jurisdiction

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

Civil courts hold jurisdiction to any civil law disputes arising in Qatar, unless parties have contractually agreed to settle their dispute through an alternative dispute resolution mechanism (ie, mediation, arbitration or court of different jurisdiction) (see article 4 of the Commercial and Civil Procedures Law).

A defendant or respondent may challenge local jurisdiction on the basis that the dispute relates to events that occurred (or to assets located) outside Qatar, or that the dispute arises out of a contractual relationship with a foreign party, choice of a foreign applicable law or a foreign jurisdiction.

### 6 Admissibility of evidence

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

Pieces of evidence are witness statements and documents. Documentary evidence is divided into two types: official and unofficial.

Official documents are issued and signed by a public authority (which has a capacity to issue such documents).

Unofficial documents are issued by individuals who confirm its contents by their signature.

Courts have wide discretion concerning the acceptance of witness statements or the accuracy of information of the documentary evidence presented (see article 234 of the Commercial and Civil Procedures Law).

### 7 Publicly available information

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

In Qatar, it is difficult to obtain information on assets from public sources on certain asset categories such as land, real estate or vehicles. Related information could be obtained by reviewing the public registers at the Ministry of Justice.

It should be noted, however, that an interested party does not have an automatic right to this information. The Ministry of Justice will have wide discretion as to whether the requested information can be released and may refuse to release it depending on the parties involved. It may also request approval from the owners of the assets before disclosing any interrelated information to third parties.

### 8 Cooperation with law enforcement agencies

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

If an interested party wishes to use information or evidence from law enforcement in civil proceedings, it could request the law enforcement agency for voluntary cooperation or seek a court order for the release of the requested information by the law enforcement agency.

### 9 Third-party disclosure

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

If an interested party wishes to get access to information or evidence from a third party it would have to ask the third party for its voluntary cooperation, or seek to obtain a court order for the production of the requested information by the third party. It should be noted that Qatari banks are bound to observe banking secrecy.

**10 Interim relief**

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

A claimant is entitled to request the court to freeze the assets of a defendant or, in some instances, order a travel ban by way of precautionary measures, subject to providing justification for such relief. Whether such relief is granted depends on the merits of the case presented.

**11 Right to silence**

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

Defendants have a right to remain silent and not to answer questions addressed to them by the court. They must, however, explain the reasons behind their silent position not to testify (see article 311 of the Civil and Commercial Procedures Law). In addition, where a defendant does not actively defend his or her case or fails to attend hearings, he or she runs the risk of a 'judgment by default' being issued against him or her.

**12 Non-compliance with court orders**

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

In civil proceedings, any person failing to comply with a court order may be subject to imprisonment for 24 hours or a fine of 500 riyals. These court decisions are irrevocable (see article 60 of the Civil and Commercial Procedures Law).

**13 Obtaining evidence from other jurisdictions**

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

Evidence from foreign jurisdictions may be obtained through requests for international legal assistance in civil or criminal matters. Competent authorities are the Ministry of Justice (for civil law matters) and the public prosecution (attorney general's office for criminal law matters). Requests for international legal assistance are usually processed through 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?**

The civil court, subject to obtaining a request from the competent authority of a foreign jurisdiction, should be able to provide information related to the civil asset recovery. The sharing of such information may not be granted if it is contrary to the public policy of the state of Qatar.

**15 Causes of action**

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

There is no specific cause of action in relation to civil asset recovery cases. Therefore, a claimant will need to rely on general means to revoke a contract under the Civil Code of Qatar (ie, mistake, misrepresentation, duress, undue influence or fraud). Claiming to recover the assets on the basis of any of the mentioned means would entitle the claimant to seek the return of the ownership of these assets.

**16 Remedies**

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

In civil recovery actions, a claimant may seek compensation for damages for loss suffered as a direct result of the illicit act or omission.

**17 Judgment without full trial**

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

Where a defendant fails to attend the hearings, a Qatari court may render a judgment by default. This is, however, not automatic and will

depend on the reasons for absence of the defendant or the merits of the case.

**18 Post-judgment relief**

**What post-judgment relief is available to successful claimants?**

Potential post-judgment relief relies largely on the claims submitted. Qatari courts often issue freezing orders. They may also appoint a receiver and issue disclosure orders as they see fit.

**19 Enforcement**

**What methods of enforcement are available?**

The civil court may send its judgment for enforcement to the relevant judicial and law enforcement authorities (the Ministry of Justice, Financial Information Unit or police force).

**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 no funding arrangements available to parties contemplating or involved in litigation before Qatari courts. There is certain guidance stipulated under the Commercial and Civil Procedures Law for the determination of court expenses. Courts have a level of discretion for hearings and other ancillary expenses. These expenses can be waived on a request presented by any of the parties involved in litigation and subject to them justifying appropriate reasons with supporting documents before the courts. That said, for expenses relating to the legal representation of the parties before the courts, it is left between the parties and their lawyers to enter into a fee arrangement, which will most probably be based on the merits and the value of the case under litigation and other relevant factors.

**Criminal asset recovery****21 Interim measures**

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

If the public prosecutor (who would normally investigate all criminal matters before they are referred to the criminal court) considers that there are justifiable grounds, he or she can take whatever action he or she might consider necessary in order to investigate the crime or prevent the crime from continuing. This may include provisional measures like a travel ban or the freezing of properties or proceeds from criminal activities. The most common example is the freezing of assets in bank accounts pending the criminal investigation and subsequent court 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?**

There are no automatic triggers. Any criminal complaint will first be investigated by the competent authorities. The public prosecution usually conducts the criminal investigation in conjunction with other governmental or judicial authorities as the case may be (ie, the Ministry of Interior, State Security Bureau or Qatar Financial Information Unit (QFIU)). For example, if the matter involves fraud with bank assets, the public prosecutor might seek guidance from the Qatar Central Bank or the QFIU in cases of money laundering and financing of terrorism.

Usually, the public prosecutor will appoint an expert to assist him or her in determining the technical issues or whether a crime has been committed.

**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 public prosecution has wide judicial powers. For example, if, during the criminal investigation, it is seeking to freeze funds deposited at a bank in Qatar, it will issue an order that will be communicated to the banks. Confiscation of assets requires a court order.

If the matter is before the criminal court the latter would issue a court order. In the event of money laundering or terrorism financing, the seizure and confiscation office (which is a department within the public prosecution) is responsible for searching for and tracking these types of assets and gathering all necessary relevant information with the help of the QFIU.

One of the main functions and powers given to the QFIU, as a public body, is to receive, request, analyse and disseminate information concerning the suspected proceeds of a crime, potential money laundering or potential operations financing terrorism.

**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?**

Investigations will normally be carried out by the judicial and law enforcement authorities, including the QFIU and the seizure and confiscation office in the event of money laundering and terrorism financing.

**26 Secondary proceeds**

**Is confiscation of secondary proceeds possible?**

In theory, yes, the seizure and confiscation office should have broad powers to track dirty assets, even in the event of secondary proceeds.

**27 Third-party ownership**

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

Yes.

**28 Expenses**

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

Yes.

**29 Value-based confiscation**

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

No.

**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 general principle is that a person accused of committing a crime is innocent until proven guilty in court. Therefore, the public prosecution must present evidence that proves beyond any doubt that the accused person committed the crime in order for a conviction order to be issued.

**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, but this would have to be approved by the civil enforcement court.

**32 Confiscation of profits**

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

Yes.

**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. A confiscation order can only be issued following a judgment issued by a competent court which holds jurisdiction, and such judgment is final and cannot be appealed.

**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?**

Assets frozen are usually managed by a receiver appointed by the public prosecutor or the court. Such a receiver is entitled to claim the management costs relating to the frozen assets. The public prosecutor has wide discretion to approve the receiver's claims and any other costs relevant to the criminal proceedings.

**LALIVE**  
IN QATAR LLC

Fouad El Haddad

fhaddad@laliveinqatar.com

QFC Tower 1

Tel: +974 4496 7247

PO Box 23495

Fax: +974 4496 7244

West Bay Area, Doha

www.laliveinqatar.com

Qatar



**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 public prosecution would need to request mutual legal assistance (MLA) from the relevant authority responsible for providing MLA in the foreign jurisdiction.

Furthermore, depending on the location of the assets, the public prosecution might also rely on a bilateral treaty or multilateral convention or even requests from the foreign jurisdiction for legal assistance concerning provisional measures under the principle of reciprocity. Qatar is a state member of the United Nations Convention against Corruption (the Convention) and ratified it in 2007.

**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 public prosecution is the authority that receives any MLA requests concerning provisional measures in relation to the recovery of assets. Requests for provisional measures shall be undertaken in conformity with the applicable procedural rules of the state of Qatar. The processing of any such requests may also depend on reciprocity.

If the request is worded in general terms, the most appropriate measures provided by law shall be applicable.

Should the requested measures not be provided for under the Criminal Procedures Law of Qatar, the public prosecution may substitute them for measures that have effects corresponding most closely to those requested.

The public prosecution or the competent authority may, of its own motion or based on the request of the public prosecution, request additional information from the competent foreign authority if such information is necessary to execute or facilitate the execution of the request.

The public prosecutor may delay the referral of the request to the competent authorities responsible for the execution of the request if the measure or order sought is likely to substantially interfere with an ongoing investigation or a pending case. The requesting authority shall immediately be informed of such delay.

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

To the best of our knowledge, Qatar is not a signatory of any international conventions relating to asset recovery. However, Qatar is a member of the United Nations Convention against Corruption. That said, if the assets to be recovered were obtained through means that can be covered under the Convention, then the asset recovery mechanisms stated in the Convention will be applicable.

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

No.

# Serbia

**Tomislav Šunjka**

**Law Office of Tomislav Šunjka**

## Civil asset recovery

### 1 Legislation

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

There is specific legislation regulating private investigation, but the rights of private investigators are very limited, for example, private investigators cannot use technical operational measures as used by the police, such as recording, monitoring telephone conversations and the interception of other electronic communications and similar. Likewise, the provisions of the law on advocacy authorise attorneys to address different institutions that are non-public registry, and a legal presumption is that those institutions must provide information to lawyers. In practice the cases are different. Other specific laws contain certain provisions relating to matters of asset recovery such as:

- the Civil Procedure Code (Official Herald of RS, No. 72/2011, 49/2013 – decision of CC, 74/2013 – decision of CC and 55/2014);
- the Law on Contracts and Torts (Official Herald of SFRY, No. 29/78, 39/85, 45/89 – decision of CC and 57/89, Official Herald of SRY, No. 31/93 and Official Herald of SCG, No. 1/2003 – Constitution Charter);
- the Criminal Procedure Code (Official Herald of RS, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014);
- the Law on Confiscation of Assets derived by criminal offence (Official Herald of RS, No. 32/2013);
- the Criminal Code (Official Herald of RS, No. 85/2005, 88/2005 – correction, 107/2005 – correction, 72/2009, 111/2009 and 121/2012, 104/2013 and 108/2014);
- the Law on Liability of Legal Persons for Criminal Offences (Official Herald of RS, No. 97/2008);
- the Law on International Legal Aid in Criminal Matters (Official Herald of RS, No. 20/2009);
- the Law on Enforcement and Security (Official Herald of RS, No. 106/2015);
- Company Law (Official Herald of RS, No. 36/2011, 99/2011, 83/2014 – law as amended 5/2015);
- the Law on Agency for Business Registration (Official Herald of RS, No. 55/2004, 111/2009 and 99/2011);
- Regulations on tax identification numbers (Official Herald of RS, No. 57/2003, 68/2003, 32/2009 and 48/2010);
- the Law on Banks (Official Herald of RS, No. 107/2005, 91/2010 and 14/2015);
- the Law on Advocacy (Official Herald of RS, No. 31/2011 and 24/2012 – decision of CC);
- the Law on Open Accesses to Information of Public Importance (Official Herald of RS, No. 120/2004, 54/2007, 104/2009 and 36/2010);
- the Law on Prevention of Money Laundering and the Financing of Terrorism (Official Herald of RS, No. 20/2009, 72/2009, 91/2010 and 139/2014);
- the Law on Resolving Conflict of Laws with Regulations of Other Countries (Official Herald of SFRY, No. 43/82 and 72/82 – correction, Official Herald of FRY, No. 46/96 and Official Herald of RS, No. 46/2006 and Official Herald of RS, No. 46/2006 – other law as amended);

- the Law on Insolvency (Official Herald of RS, No. 104/2009, 99/2011 – other law, 71/2012 – decision of CC and 83/2014); and
- the Law on Foreign Persons in the Republic of Serbia (Official Herald of RS, No. 97/2008).

### 2 Parallel proceedings

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

There are no limitations for parallel progression of civil and criminal proceedings. Elements of civil legal liability are certainly wider than the elements of the 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 damages 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, but the realisation of the request and claim shall instruct the civil proceeding.

### 3 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, whether natural persons or a legal entity. Likewise, it depends on the amount of claim whether a basic civil court of general jurisdiction or a High Court of general jurisdiction is deemed competent.

### 4 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 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.

### 5 Jurisdiction

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

The commercial courts have jurisdiction in commercial and business matters between legal entities or entrepreneurs.

The 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.

## 6 Admissibility of evidence

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

The 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 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. Public registers are the registers of companies (business register), intellectual property, civil registry, real estate cadastre, mortgage registers, registers of pledges on moveable property and rights (pledges), etc. There are registers where data are public and cannot be accessed directly but through authorised persons without any special procedure, such as the register of shares, where all data can be accessed through an authorised broker. Likewise, there is a register of addresses and ID numbers of natural persons, and a vehicle register, which is managed by the police, who will present those data at the request of the authorities.

## 8 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 makes 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.

## 9 Third-party disclosure

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

In general, pursuant to articles 241 and 242, documents of which they are in possession may be requested from the defendant and from a third party. Such decisions can be enforceable. The court may fine a person who does not present the document at the court's request.

### Bank secrecy in the legal system of the Republic of Serbia

In the Serbian legal system, bank secrecy rules are regulated by the Law on banks (Official Herald of RS, No. 107/2005 and 91/2010). The Serbian Law on Banks defines bank secrets under article 46 and prescribes that bank secrets shall be considered as business secrets and that the following shall be considered as bank secrets: data that are known to a bank and refer 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 which the bank has become aware of in the course of performing business activities with clients.

Likewise, 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 Serbian 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 are disclosed:

- 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 the authority responsible for 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 which 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 of the Republic of Serbia 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, type and timeliness in fulfilling the obligations of individuals and legal entities that are the clients of the bank;
- to a competent authority with regard to performing the supervision of payment system operations of legal entities and individuals conducting their activities, in compliance with payment system regulation;
- to tax administration pursuant to regulations that regulate activities within its field of competence; to the authority competent for the supervision of foreign currency operations; or
- upon the request of the organisation for deposit insurance, in compliance with the law that governs deposit insurance; to 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 represent 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.

## 10 Interim relief

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

#### Temporary measures and preliminary measures in criminal and civil proceedings in the Republic of Serbia

Temporary measures in legislation of the Republic of Serbia are regulated both in criminal and civil proceedings by the Serbian 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 (as we have previously stated 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 set for imposing such measure 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, hiding, or otherwise making unavailable his or her property or means. It is considered that 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 already has been an unsuccessful enforcement procedure 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 moveable property and possible confiscation of that property;

- prohibition on the disposal or mortgage of immoveable 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 to collect a claim and dispose of it;
- an order to a bank or other financial institution, in which the debtor has an account, to deny payment of an amount which is determined by the temporary measure;
- a 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 set for imposing such measure 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 otherwise 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 use of force or infliction of irreparable damage.

Under this temporary measure the following measures may be imposed:

- a prohibition on the disposal and pledge of moveable property which 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;
- a prohibition on the disposal or mortgage of immoveable property concerning the claim, and the registration of such prohibition in the public registry;
- a prohibition on taking actions that could harm the creditor, and a prohibition to make changes to the property which is the subject of the claim;
- prohibition to debtor's debtor to hand over property that is the subject of the claim;
- a 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;
- an order to the debtor to perform certain actions necessary to preserve the moveable or immoveable 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 damages, under the provisions of the law governing the enforcement and security, for damages 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 proceeding, such measure must be justified by filing a lawsuit, or commencing other legal proceeding within the period set by the court.

#### Preliminary measures

Preliminary measures in Serbian legislation are regulated both in criminal and civil proceedings by the Serbian Law on Enforcement and Security or enforcement law (Official Herald of RS, No. 106/2015).

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 securing, satisfaction of the claim will be impossible or made significantly more difficult.

For presumed risk, a risk shall be deemed to exist if the motion for security is based on one of the following decisions:

- a payment order issued on the basis of a bill of exchange or cheque against which timely objection has been made;
- a judgment issued in a criminal matter accepting a claim, 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 which has been appealed.

Settlement is made before a court or body deciding on the administrative procedure that is 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 moveable property listed in the Register of Pledge;
- seizure of monetary claims of the enforcement debtor and the acquisition of a lien on it;
- order for the organisation of enforced payment to order the banks in which the enforcement debtor has bank accounts that the funds in the amount of the secured claim be transferred to 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 Pledge and registration of seizure of shares in the Company Register;
- seizure of a claim that an enforcement debtor has towards a third person, which claim consists of the debtor's right to be handed over a certain immoveable or moveable property, or to be delivered a certain amount of moveable property, and acquisition of a lien on such claim of the enforcement debtor; or
- registration of prior notice – mortgage on immoveable property owned by the enforcement debtor, or on claim of the enforcement debtor registered on immoveable 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 which is secured with interest and costs, the preliminary measure and its duration.

#### 11 Right to silence

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

There is no specific statute about a right of silence.

A party may refuse to present a document if as a result of this document a party has obtained some information in confidence:

- as representative of a party;
- as a religious confession;
- as legal counsel, doctor or member of other profession, where there is a duty to keep and protect the confidentiality of information obtained through performing a profession or activity; or
- particularly if they were to bring disgrace or significant material damage or criminal prosecution upon themselves or their lineal relatives to any degree and lateral relatives by disclosure of documentation.

If a party who is obliged to present a document to the court denies possession of the document, the court may order the party to prove such statement.

Taking into account all circumstances, the court shall assess the significance of the fact that the party holding the document is not complying with the court's order to present such document or denies that the document is in their possession, contrary to the conviction of the court.

#### 12 Non-compliance with court orders

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

Pursuant to articles 241 and 242, 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 the 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 the Republic of Serbia has concluded 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 in 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 Serbian Civil Procedure Code, Serbian courts are obliged to seek 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.

The courts provide legal aid to foreign courts in compliance with the 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 Serbian 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 in 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 sub-estimate 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 judgment owing to non-appearance by the claimant, and adopts the claim. 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 10.

### 19 Enforcement

#### What methods of enforcement are available?

The enforcement procedure is regulated by Law on Enforcement and Security/Enforcement (Official Herald of RS, No. 106/2015).

In the Republic of Serbia 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, bill of exchange or cheques, business book excerpts, bank guarantees, etc).

By 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 the 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, moveable and immoveable property), while the means by which enforcement proceedings may be conducted are enforcement actions used to enforce a claim in accordance with the law (for example, sale of chattels, sale of immoveable 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 after 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 a decision on enforcement by objecting within eight days from the 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 an enforcement decision by appealing within eight days from the receipt of decision on enforcement.

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 it in 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 enforcement of domestic executive titles. Also, an enforcement creditor may initiate an enforcement procedure before a competent court in the Republic of 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

### Update and trends

Practice and legislation in Serbia have to change so that there is institutional cooperation within a regulated legal framework, which is the basis of the relationship between the courts, prosecutors' offices, the police and victims of fraud for the exchange of data and evidence, etc. Such institutional relationship would lead to generally improved results in proceedings in the interest of the victims of fraud and asset recovery in Serbia.

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 are not active on the Serbian legal market. It should be pointed out that besides 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 amount of the fee 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 answer 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, 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; causing false bankruptcy; causing damage to the creditor); unauthorised production, possession and distribution of narcotics; and crimes against public order, against official duty (such as the criminal offence of abuse of official position), against 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.**

Serbian legislation prescribes certain rules on tracing of assets that have derived from the committing of a criminal offence.

The Serbian Law on Confiscation of Assets derived by Criminal Offence (Official Herald of RS, No. 32/2013) prescribes the rules and conditions, procedures and authorities responsible for detection, seizure and management of assets of natural and legal persons which derive from and by 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 Serbian Criminal Code (Official Herald of RS, No. 85/2005, 88/2005 – correction, 107/2005 – correction, 72/2009, 111/2009 and 121/2012, 104/2013 and 108/2014) also prescribes rules on confiscation of objects and seizure of property gained by committing a criminal offence.

Article 87 of the aforementioned Criminal Code regulates the security measure of confiscation of objects and prescribes that objects that were used or intended to be used for 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 seizure of property gained by a criminal offence, the law 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 gain acquired by a criminal offence as determined in a criminal proceeding.

If in criminal proceedings a claim on the property of the injured party (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 injured party (victim).

Under the Criminal Procedure Code of Serbia 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 governing Enforcement and Security, in order to secure the claim of the injured party (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 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 investigation judge, the judge for the previous proceedings or the president of a panel of judges who preside over the main hearing, depending on the stage of the criminal proceeding.

The assets and funds obtained from the sale of assets will become the property of the Republic 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 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 the Interior 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 defender 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 which are to be confiscated are obtained directly from the 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 procedure is the state costs until the end of the case. In the final and binding court decision after sentencing and fining, the court will make a resolution of 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 to investigate 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). The assets (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?**

According to the law, the state establishes and founds a Directorate for the Management of Seized Assets (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 derived by Criminal Offence:

- 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 which derived from committing a criminal offence, and assets gained by 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 the renting or leasing of seized assets. The Directorate 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.**

The rogatory rules in criminal proceedings in the Republic of Serbia are set out in the Law on International Legal Aid in Criminal Matters (Official Herald of RS, No. 20/2009).

The aforementioned 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.



**Tomislav Šunjka**

**tomislav.sunjka@sunjkalawoffice.com**

Sremska 4  
Vojvodina  
21000 Novi Sad  
Serbia

Tel: +381 21 4721 788  
Fax: +381 21 6617 541  
www.sunjkalawoffice.com

Other forms of mutual legal assistance include:

- the performance of court process activities, such as summoning and sending documents, interrogation of the accused, trial witnesses and expert witnesses, investigation, search of premises and persons, seizure;
- the implementation of measures such as surveillance and recording of telephone and other conversations or communications and optical recording entities, controlled delivery, providing simulated business services, concluding simulated legal affairs, use of undercover investigators, computer searches and processing;
- the exchange of information and delivery of documents and items related to criminal proceedings in the requesting state, the submission of data without request, the use of audio and video conferencing, the establishment of joint investigation teams; and
- 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 the 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 the proceedings instituted before the administrative authorities for an offence punishable under the law of the requesting state or of the requested state.

International legal assistance is also provided at the request of the International Court of Justice, the International Criminal Court, European Court of Human Rights and other international institutions established by an international treaty ratified by the Republic of Serbia.

The authorities responsible for providing international legal assistance are the domestic courts and Public Prosecutor's offices.

A request for providing international legal assistance must be submitted in the form of the request.

### 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 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 of the Federal Republic of Serbia – International Agreements, No. 7/2002);
- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on Financing Terrorism (Official Gazette of the Republic of Serbia, International Agreements, No. 19-09);
- the International Convention for the Suppression of the Financing of Terrorism (Official Gazette of the Federal Republic of Serbia – International Agreements, No. 7/2002); and
- Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters (Official Gazette of the Federal Republic of Serbia – International Agreements, No. 10/2001).

### 38 Private prosecutions

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

Not applicable.



# Switzerland

Marc Henzlin, Sandrine Giroud and H  lo  se Rordorf

Lalive

## Civil asset recovery

### 1 Legislation

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

There is no specific Swiss legislation regulating private investigation. Certain cantons (eg, Geneva, Neuch  tel and Thurgau) have enacted specific cantonal regulations regarding private investigators.

The general rules regarding the gathering of information and evidence can be found in the Swiss Code of Civil Procedure (SCCP). There is no discovery process under Swiss civil procedural law. Additional rules pertaining to asset recovery can be found in the following statutes:

- the Swiss Code of Criminal Procedure (SCCrP);
- the Swiss Code of Obligations (CO);
- the Swiss Civil Code (CC);
- the Swiss Criminal Code (SCC);
- the Swiss Debt Enforcement and Bankruptcy Act (DEBA);
- the Swiss Federal Act on Banks and Saving Banks (Banks Act);
- the Swiss Data Protection Act;
- the Swiss Act on Freedom of Information in the Administration; and
- the Swiss Private International Law Act (PILA).

### 2 Parallel proceedings

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

Civil proceedings can be conducted in parallel with, in advance of, or within criminal proceedings. Swiss 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 SCCP). The 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. Indeed, the two proceedings are subject to different sets of rules, and findings made in the context of criminal proceedings cannot be incorporated as such without reservation in 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 SCCrP).

### 3 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 SCCrP) (see question 2).

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 SCCP). Swiss 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 SCCP).

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 found at the place where the measure is to be enforced (article 13 SCCP). The same is also provided in the context of international proceedings (article 10 PILA). As to attachment proceedings in support of a monetary claim, they are regulated specifically by the DEBA (see question 10).

### 4 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 CO). Some specific contractual claims become time-barred after five years such as claims for rent, interest on capital and all other periodic payments, claims in connection with delivery of foodstuffs, as well as claims in connection with 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 CO). A few contractual claims become time-barred after one year such as a customer's claims for defects in a contract for work (article 371(1) CO).

In general, the limitation period commences as soon as the debt is due (article 130 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 proceedings are initiated by the creditor (article 135 CO). The effect of such interruption is that a new limitation period commences as of the date of the interruption (article 137 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. It is important to note that 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 CO).

There is, however, no statutory limitation regarding the enforcement of a judgment (Swiss or foreign).

### 5 Jurisdiction

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

The 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 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 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 SCCP). This decision is subject to either appeal (article 308 SCCP) or objection (article 319 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 allow a substantial saving of time or cost. The interim decision can be challenged separately, but cannot later be challenged as part of the final judgment (article 237 SCCP).

## 6 Admissibility of evidence

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

Under Swiss civil procedural rules, each party is entitled to have the court accept the evidence that he or she offers in the required form and time frame (article 152 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 SCCP). Documentary evidence comprises audio recordings, films, electronic files and the like (article 177 SCCP).

Illegally obtained evidence is only considered by the court if there is an overriding interest in finding the truth (article 152(2) SCCP).

## 7 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 enforcement, 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 include all debt collection proceedings filed against a debtor, and can be consulted by anyone showing a *prima facie* legitimate interest and upon request;
- there also exists 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 SCCP); a copy thereof will be provided upon 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, among others, in the context of criminal proceedings (see question 21).

## 8 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 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. Swiss courts are, moreover, obliged to provide mutual assistance to each other (article 194 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 SCCP).

As mentioned above (see question 7), 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 against the same adverse party, if granted the right to access the criminal file, can use such information in the context of civil proceedings.

## 9 Third-party disclosure

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

Parties and third parties have a duty to cooperate in the taking of evidence. In particular, they have the duty to make a truthful deposition or statement as a party or a witness; 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 SCCP).

In certain cases, third parties may, however, refuse to cooperate. Third parties 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 SCCP). In other specific cases, third parties only have a qualified right to refuse to cooperate, which must be justified (article 166 SCCP). This relates, for instance, to cases where in establishing facts, third parties would expose themselves or a close associate, as specified by law, to criminal prosecution or civil liability, or where a third party is bound by professional secrecy (eg, lawyers and clerics). If a third party refuses to cooperate without justification, the court may impose a disciplinary fine of up to 1,000 Swiss francs; threaten sanctions under article 292 SCC (see question 12); order the use of compulsory measures; or charge the third party the costs caused by the refusal (article 167 SCCP). There is, however, no such sanction as contempt of court under Swiss law.

Furthermore, the 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) SCCP). This provision could apply for instance to bankers who are otherwise bound by banking secrecy (article 47 Banks Act).

## 10 Interim relief

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

Swiss law distinguishes between non-monetary and monetary claims. While 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.

Swiss courts can order any interim measure suitable to prevent imminent harm in support of a non-monetary claim (article 262 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 moveable 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 SCCP). Moreover, while pretrial discovery is alien to Swiss civil procedure, the SCCP allows the taking of evidence before the initiation of legal proceedings exclusively in cases where evidence is at risk or where the applicant has a justified interest (article 158 SCCP).

In the context of a monetary claim, assets could be frozen by way of attachment proceedings (article 272 et seq DEBA). Such attachment is granted *ex parte* and must thereafter be validated. In support of its application, the applicant must *prima facie*:

- show a claim against the debtor;
- identify assets of the debtor 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).

## 11 Right to silence

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

Under Swiss civil procedural rules (article 163 SCCP), both the defendant and the plaintiff have a right to refuse to cooperate if:

- the taking of evidence would expose a close associate (ie, a spouse, child or other kin) to criminal prosecution or civil liability; or
- if they are bound by statutory secrecy obligations under criminal liability (eg, if they are a member of the clergy or a lawyer (article 321 SCC)).

Other confidants entrusted with legally protected secrets may refuse to cooperate if they credibly demonstrate that the interest in keeping the secret outweighs the interest in finding the truth (article 163(2) SCCP). This typically applies to banking secrecy and the persons bound by it.

If a party refuses to cooperate without valid reasons, this will be taken into consideration by the court when appraising the evidence (article 164 SCCP).

## 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:

- issue a threat of criminal penalty under article 292 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 moveable item or vacating immovable property; or
- order performance by a third party (article 343 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 SCC is a criminal offence and gives rise to a fine.

Swiss 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 the 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 relating to 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 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) PILA).

It is noteworthy that 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 SCC).

## 15 Causes of action

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

Under Swiss 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 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 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 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 DEBA).

## 16 Remedies

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

The remedies available under Swiss law generally depend on the cause of action.

In the context of a contract, the plaintiff may request that the defendant be ordered to perform the contract in accordance with its precise terms (specific performance) (article 107(2) CO). Instead of asking for specific performance, the plaintiff may also choose to claim damages (article 97 CO). Other remedies are available for specific contracts (eg, contracts for work). Similarly, the remedy available for tort-based actions is damages.

Swiss law provides for restitution in the event of unjust enrichment (article 62 et seq 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 CC).



Swiss 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 principals in mind, but with those of the agent's (article 423(1) CO). An account of profits is also foreseen in relation to profits realised by the infringement of personality rights (article 28a(3) CC).

## 17 Judgment without full trial

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

In certain circumstances, Swiss 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 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 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 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 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 10).

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 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 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, for instance, the issuance of a threat of a criminal penalty under article 292 SCC or performance by a third party (article 343 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* DEBA) and their auctioning (article 125 *et seq* DEBA). The seizure of a real estate property will be automatically registered in the land register (article 101 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?

Swiss law does not prohibit litigation funding arrangements. While a rather limited phenomenon in practice, funding of civil litigation may be available through specialised litigation financing companies. Swiss law further allows lawyers and their clients to negotiate fee arrangements to a certain degree. While purely 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 based on cantonal

tariffs (article 95 *et seq* SCCP), to the unsuccessful party (article 106 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, the 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 SCCP). In practice, the party costs awarded by the courts to the successful party do not cover the full costs of the litigation, which usually acts as a barrier for wanton proceedings. Swiss 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* SCCrP).

According to article 263(1) SCCrP, items or assets belonging to a suspect, accused or a third party may be seized, if it is expected that such items or assets will:

- have to be confiscated or will be 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.

During the 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* SCCrP). During the 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) SCCrP).

A seizure is ordered on the basis of a written warrant (a 'seizure order') containing a brief statement of grounds (article 263(2) 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 for a certain period of time. It is noteworthy that Swiss banking secrecy is lifted in the context of criminal proceedings.

The seizure of items and assets may be undertaken only if:

- it is permitted by law;
- there is reasonable suspicion that an offence has been committed;
- the aims cannot be achieved by less stringent measures; and
- the seriousness of the offence justifies the measure (article 197(1) SCCrP).

Furthermore, except in the case of a seizure ordered in relation to security for 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 Swiss law.

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 could 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 the 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) SCCrP). According to Swiss 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 the order or have been informed of the order (articles 393 and 396 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) SCCrP). It is noteworthy that the beneficial owner of assets held with a bank does not have such legitimate interest. The beneficial owner, therefore, does not have the right to file an objection against the seizure order for such right belongs to the account holder.

## 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 have to 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 Swiss law provisions against money laundering, financial intermediaries or even, since 1 January 2016, 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 that the assets:

- are the proceeds of a felony or, since 1 January 2016, a serious tax offence within the meaning of article 305-bis (1-bis) SCC (see 'Update and trends');
- are connected to an offence of money laundering or of participation or support to a criminal organisation;
- are subject to the power of disposal of a criminal organisation; or
- serve to finance terrorism (article 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 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 or not (article 23 AMLA).

According to the new provisions of the AMLA, which entered into force on 1 January 2016, financial intermediaries seize the assets only once apprised by the MROS that their report has been forwarded to the competent prosecution authority (article 10 AMLA). Previous to this information and during the analysis conducted by the MROS, financial intermediaries shall execute customer orders relating to the assets reported (article 9a 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) 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 SCC that provides for the confiscation, irrespective of the criminal liability of any person, of:

- assets that have been acquired through the commission of an offence or that were intended to be used 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 assets belonging to a criminal organisation can only be confiscated if the assets:

- are directly and immediately connected to the commission of an offence;
- are still available; and

- have not been passed on to the person harmed for the purpose of restoring the prior lawful position (article 70 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 SCC), this period applies (article 70(3) 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) SCCrP) or outside any criminal proceedings.

In the first case, the prosecutor has the competence to order the confiscation by way of any decision ending the proceedings (ie, a no-proceedings order (article 310 SCCrP); a ruling of abandonment of proceedings (article 320 SCCrP); or a summary penalty order (article 352 SCCrP)). Similarly, the court has the competence to order confiscation within its final decision (article 351(1) 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 which has been rendered (articles 322(2), 354 et seq and 399 SCCrP).

In case of separate confiscation proceedings (ie, when a decision is made on the confiscation of property or assets outside criminal proceedings (eg, because the Swiss authorities do not have jurisdiction over the offence)) (articles 376 to 378 SCCrP, see question 33), confiscation proceedings must be carried out at the place where the items or assets to be confiscated are located (article 37(1) SCCrP). The confiscation order can be challenged within 10 days by the person affected by the confiscation (articles 377(4) and 354 et seq SCCrP). Following the opposition, the court will render a decision or order, which can be further challenged within 10 days (article 393 et seq SCCrP).

Finally, both 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) 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, while the courts limit their role to the confiscation of assets. As to the competence and duties of the financial intermediaries and the MROS, see question 22.

## 26 Secondary proceeds

### Is confiscation of secondary proceeds possible?

Pursuant to Swiss case law and doctrine, the prosecutors or the 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, the 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) 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 Swiss law dealing with the recovery by the criminal authorities of the costs of tracing and confiscation of 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) 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 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. Swiss courts apply usually – 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 until the contrary is proven (article 72 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 hence are 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) SCC).

## 32 Confiscation of profits

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

Under article 70 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) SCC does not apply when the company profited directly from

the corrupt public procurement process (see question 27). 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 SCCrP). First, property or assets that will probably be confiscated in independent proceedings are seized (article 377(1) SCCrP). If the requirements for confiscation (article 69 et seq SCC) are fulfilled, the prosecutor orders their confiscation and gives the person concerned the opportunity to file observations (article 377(2) 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)).

The prosecutor or the court must also decide whether to accept the applications made by the person suffering harm for the confiscated property or assets to be used for his or her benefit (article 378 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) 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) SCCrP).

The authority must safeguard the property and assets appropriately (article 266(2) 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 seized (article 266(5) SCCrP). The investment of seized assets is further regulated by the Federal Ordinance on the Investment of Seized Assets.

In practice, the private managers of assets continue to manage them under the surveillance of the prosecutor. If taxes have to be paid or costs have been incurred, the prosecutor has to 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)).

## Update and trends

### Implementation of the Revised Financial Action Task Force Recommendations of 2012

On 1 January 2016, the provisions of the Federal Act for Implementing the Revised Financial Action Task Force (FATF) Recommendations of 2012 entered into force and introduced serious tax offences as possible predicate offences to money laundering as well as amendments to the AMLA.

The amendments of the AMLA include, among others, the following novelties:

- due diligence and reporting duties of financial intermediaries are extended and now also apply to suspicion of serious tax offences;
- due diligence and reporting duties now also apply, for the first time, to individuals outside the financial sector and to natural persons and legal entities that deal with goods commercially and in doing so accept cash; and
- upon filing of a report to the MROS, financial intermediaries no longer have to seize the assets immediately, but need to wait for the MROS' communication that the information has been forwarded to the competent prosecution authority.

### Entry into force of the Federal Act on the Freezing and Restitution of Assets of Politically Exposed Persons Obtained by Unlawful Means (Foreign Illicit Assets Act)

On 1 July 2016, the Foreign Illicit Assets Act entered into force. This act includes and expands the former Swiss Federal Act on the restitution of assets illicitly obtained by politically exposed persons (RIAA). Its key aspects are the following:

- The preventive administrative seizure of assets of PEPs for the purposes of mutual legal assistance, when:
  - the government of the state of origin has lost power or a change in power appears inexorable;
  - the level of corruption in the state of origin is notoriously high;
  - the assets are likely to have been acquired through corruption, misappropriation or other crimes; and
  - the safeguard of Switzerland's interests requires such seizure. Further to the entry into force of the seizure order, any individual or corporation holding assets of supposed PEPs or with knowledge of the existence of such assets must report them to the MROS. This communication does not exonerate financial intermediaries from their duties, among others, of reporting under the AMLA.
- 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 requirements of mutual legal assistance proceedings owing to the total or substantial collapse or failures of its national judicial system) or (and this is a novelty as compared to the RIAA), the 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. The assets frozen can further be confiscated if the PEP's assets are of illicit origin, which is presumed when the wealth of the PEP 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.

- The exclusion of third parties' rights on the assets unless such right is a right in rem or one which has been acquired in good faith in Switzerland or abroad but has then been recognised by a judgment enforceable in Switzerland.
- The introduction of targeted measures to support the state of origin in its efforts to obtain the restitution of the frozen assets, such as technical assistance or by the transmission by the MROS of information including banking information, to enable the state of origin to prepare or complete a request of mutual legal assistance.
- The restitution of the assets to the state of origin, which is made through the financing of programmes of public interest and which shall be made in order to improve the living conditions of the inhabitants or to strengthen the rule of law and thus contribute to the fight against impunity.

### Amendments to Swiss anti-corruption provisions

On 1 July 2016, several changes in Swiss anti-corruption law (private and public) entered into force.

#### *Tightening of Swiss private anti-corruption law*

New provisions on private corruption were introduced in the SCC to supplement the provisions included in the Protection against Unfair Competition Act. Until then and according to this Act, private corruption was only prosecuted if prompted by a criminal complaint of a harmed party, but could not be prosecuted ex officio. In addition, private corruption was only criminally relevant if it had the effect of distorting competition, which was traditionally difficult to establish. The changes in Swiss law aim at removing the foregoing two requirements from the legal definition of private corruption (cf. articles 322octies and 322novies SCC).

#### *Extension of Swiss public anti-corruption law to the granting of an undue advantage and receiving of the same by a third party to induce a Swiss public official to perform its duties*

Under the regime prevailing until 30 June 2016, the granting of an undue advantage to a Swiss public official to induce the latter to perform its duties – as opposed to inducing the latter to act or fail to act in breach of its duties – was a criminal offence. The receiving of such advantage was equally criminal. However, the granting of such advantage to a third party to induce a Swiss public official to perform its duties was not considered a criminal offence. Similarly, the acceptance of an undue advantage for a third party and for the same purpose was not a criminal offence. The revision of Swiss anti-corruption law, which entered into force on 1 July 2016, will remedy this situation by criminalising those conducts (see articles 322-quinquies and 322-sexies SCC).

## 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 the 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) 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) 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) IMAC).

It is noteworthy that 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) SCC).

Usually, the 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) 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 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 (see 'Update and trends').

## 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 European Convention on Mutual Assistance in Criminal Matters 1959;
- the UN 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;
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997;
- the European Criminal Law Convention on Corruption 1999;
- the UN Convention for the Suppression of the Financing of Terrorism 1999;
- the UN Convention against Transnational Organized Crime 2000; and
- the UN Convention against Corruption 2003.

### 38 Private prosecutions

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

Not applicable.

# LALIVE

Geneva Zurich

**Marc Henzelin**  
**Sandrine Giroud**  
**Héloïse Rordorf**

**mhenzelin@lalive.ch**  
**sgiroud@lalive.ch**  
**hrordorf@lalive.ch**

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.ch](http://www.lalive.ch)



# United Arab Emirates

Ibtissem Lassoued

Al Tamimi & Company

## Civil asset recovery

### 1 Legislation

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

Private investigations are prohibited in the United Arab Emirates (UAE); only the competent authorities (ie, police and Public Prosecutor) are authorised to conduct investigations. However, any of the parties in an ongoing lawsuit may request the court's authorisation to obtain relevant information, whether that is from private individuals or entities or from the government or government-related bodies.

### 2 Parallel proceedings

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

UAE Federal Law No. 35 of 1992, as amended (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 the criminal proceedings.

UAE 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.

### 3 Forum

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

The general rules of UAE law stipulate that civil proceedings are to be brought before civil courts, while criminal proceedings are to be brought before separate and distinct criminal courts. The exception to this is a claim for civil damages that are a result of a crime punishable under the 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 the criminal proceedings.

In addition to the 'onshore' courts in the UAE, it is relevant to note that the Dubai International Financial Centre (DIFC) Courts, and the Abu Dhabi Global Market (ADGM) Courts, have jurisdiction over civil proceedings in or related to the DIFC and the ADGM respectively. The DIFC Courts and the ADGM Courts operate common law systems, as opposed to the civil law system in the rest of the UAE. The laws of the DIFC Courts and the ADGM Courts contain similar provisions on interim remedies to those in common law jurisdictions such as England and Wales. However, the DIFC Courts and the ADGM Courts have no criminal jurisdiction, such matters being dealt with by the criminal courts, regardless of whether criminal conduct took place within the DIFC or the ADGM. Given the similarity of the DIFC Courts' and ADGM Courts' provisions to those of common law jurisdictions, the answers in this chapter do not include reference to the DIFC Courts or the ADGM Courts.

### 4 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 still current after the expiry of this three-year period, the claim shall not be time-barred.

In any event, however, 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, the defendant has to raise an affirmative defence that the claim is time-barred in order for the court to consider dismissing the claim for being time-barred.

### 5 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, the 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, the 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:

- 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, to a contract intended to be notarised therein, to an event that occurred therein, or to a bankruptcy declared in one of its courts;
- the action is brought by a wife, having a domicile in the UAE, against her husband who had a domicile therein;
- the action relates to the maintenance of one of the parents, a wife, 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 wife, the minor or the person under a restriction has a domicile in the UAE;
- the action relates to a personal status and the plaintiff 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, the civil courts have jurisdiction to determine preliminary issues and interim applications in original actions that are 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 with them. Furthermore, they have jurisdiction to make orders for expedited and preservative procedures to be carried out in the UAE notwithstanding that they do not have jurisdiction in the original action.

A defendant can challenge jurisdiction in a number of ways, by raising the following:

- a lack of local jurisdiction;
- the action should be transferred from one court to another to join an ongoing related case;
- nullity not connected with public order;
- lack of the court's authority by reason of the category or value of the action;
- lack of legal capacity relating to the claim; or
- the action has been previously determined.

## 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 (Civil Evidence Law) regulates the admissibility of evidence in civil proceedings. In summary:

- the facts which are 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, be they undertaken by the official within the limits of his or her capacity, or 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 (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 which are in his or her possession.

## 7 Publicly available information

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

UAE 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 has to be accessed as previously detailed in question 1.

## 8 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.

## 9 Third-party disclosure

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

A party to proceedings in the UAE may request a court order for the disclosure by third parties of information that is deemed by the court to be relevant to the proceedings.

## 10 Interim relief

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

UAE 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, for the imposition of a preservative attachment over the real estate and moveable property of his opponent.

Attachment orders may also be made over assets which 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 moveable property of, or debts owing to, his or her debtor in the hands of third parties, notwithstanding that they may be deferred, or subject to a condition. Such an attachment also covers moveable property of the debtor that is in the possession of his or her representative at law.

## 11 Right to silence

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

There is no specified right to silence in UAE law and there are no specified consequences to exercising such a right (such as the possibility of an adverse inference being drawn from such silence). However, the general rules of evidence dictate that it is the responsibility of the claimant to prove his or her claim and that of the defendant to refute it. Therefore, the defendant is not obliged to submit any documents or give evidence, as the claimant has the burden of proof. A defendant therefore has an implied right to silence. Notwithstanding this, the court may draw whatever conclusions it deems appropriate from the absence of testimony from the defendant.

## 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 and or a fine of up to 5,000 UAE dirhams.

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 and or a fine of up to 5,000 UAE dirhams.

## 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 UAE Ministry of Justice to make a request for mutual legal assistance on the basis of any relevant treaties between the UAE and the 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?

The 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 relevant treaties with the relevant foreign government, or on the basis of reciprocity.

It is worth noting that foreign court orders or judgments are not executable ipso facto in the UAE. Such proceedings must first be ratified by the UAE courts before being executable and thus enforceable, which will require compliance with the UAE law on issues such as exclusive jurisdiction and 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 sources of civil obligations are as follows:

- contract;
- unilateral acts;
- acts causing harm (torts);
- acts conferring a benefit; and
- the law (statutory causes of action).

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 UAE law, the 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, and 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 UAE law. In respect of civil asset recovery claims, successful claimants may attach the real estate and moveable 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 in the UAE is the attachment and sale through auction of any real estate or moveable property the 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 in the UAE on funding litigation by conditional fee agreements, damage-based agreements, after-the-event insurance or third-party funding. However, given the costs regime in the UAE (see next paragraph) most litigation in the UAE 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.

The 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 include only 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 in the UAE 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 (AMLSCU), which is the Financial Intelligence Unit (FIU) 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 UAE Federal Penal Code gives the court a 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 UAE 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, land department). These bodies are obliged to respond to the Public Prosecutor or risk being charged with the 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 in the UAE, 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?

The 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 UAE 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 the 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?**

UAE law does not allow 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 in the UAE 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 an order as to the confiscation 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 the anti-money laundering and counter-terrorism laws of the UAE 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?**

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 the corruptly obtained 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 UAE 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 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.**

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 country that assistance is required from, the domestic law (Federal Law No. 39 of 2006 on International Judicial Cooperation in Criminal Matters) will be applicable.

Requests for assistance under the 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.

التميمي و شريكوه  
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



**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 the domestic law (Federal Law No. 39 of 2006).

Provision is made in the 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 which 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 provision on asset recovery, such as:

- United Nations Convention against Corruption, ratified by the UAE in 2006;
- United Nations Convention on Transnational Organized Crime, ratified by the UAE in 2007; and
- Riyadh Arab Agreement for Judicial Cooperation, brought into force in the UAE by Federal Decree in 1999.

**38 Private prosecutions**

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

The UAE 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 court to the civil court.

# United Kingdom

Jonathan Tickner, Sarah Gabriel and Hannah Laming\*

Peters & Peters Solicitors LLP

## Civil asset recovery

### 1 Legislation

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

A corporate entity conducting an internal investigation should be aware of the following non-exhaustive list of relevant legislative provisions:

- the Police and Criminal Evidence Act 1984 (PACE), the Codes of Practice made pursuant to it, and in particular PACE Code of Practice C, which deals with the questioning of suspects and what documents or materials an accused is entitled to;
- the Computer Misuse Act 1990, which criminalises unauthorised access of a computer or computer network;
- the Data Protection Act 1998, which provides for criminal and civil sanctions for the misuse of personal data;
- the Regulation of Investigatory Powers Act 2000, which governs when private or state bodies may lawfully intercept communications and use other covert techniques;
- the Proceeds of Crime Act 2002, which, among other things outlines when a person in the regulated sector is required to disclose a suspicion or knowledge of money laundering; and
- the Employment Act 2002, which prescribes the circumstances in which an employee may be lawfully dismissed or disciplined.

If it is thought appropriate to enlist the services of a private investigator to obtain information about other parties or prospective parties, the investigator and those instructing must take heed at all times of the above legislation, and also the Bribery Act 2010 and common law offences such as misconduct in a public office. It is essential to ensure that an investigator is not engaging in corrupt or illicit practices, as those instructing that investigator may find themselves subject to an ensuing law enforcement investigation or equivalent. In July 2013, the Home Affairs Select Committee revealed that law firms and insurance companies were among a list of clients potentially connected to private investigators convicted of illegally obtaining information. In December 2014, the Home Office indicated that the government intended to introduce the statutory licensing of private investigation activities as soon as possible.

### 2 Parallel proceedings

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

A party to parallel criminal and civil proceedings may apply to stay concomitant civil proceedings on the ground that the continuation of the civil proceedings presents a real risk of serious prejudice in one or both sets of proceedings, which might lead to injustice (see *The Financial Services Authority v Anderson & Ors* [2010] EWHC 308 (Ch)). This is a high threshold, rarely demonstrated by the party applying for the stay. In addition, in *JSC BTA Bank v Mukhtar Ablyazov & Ors* [2016] EWHC 289 (Comm), a defendant who was subject to a worldwide freezing order and asset disclosure order was also facing criminal proceedings in Kazakhstan and elsewhere. He argued that he should not be compelled to give disclosure of documents, relying on privilege against

self-incrimination. It was recognised that there is no automatic right to privilege against self-incrimination in relation to overseas criminal proceedings, however, the court has discretion to uphold that privilege where there is a clear danger to the individual seeking to rely on it. The court dismissed the defendant's application and compelled disclosure on the basis that a 'confidentiality club', under which the claimant had given an undertaking that only its legal team would be able to look at the documents disclosed, had been established previously, negating the risk to the defendant.

### 3 Forum

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

A claim for the recovery of assets greater than £100,000 should be brought in the High Court, where it may be allocated to the Commercial Court (a specialist court in the Queen's Bench Division) or the Chancery Division. Financial claims valued at more than £50 million which relate to sophisticated financial products including project finance, derivatives and hedge fund disputes, claims that require particular expertise in the financial markets, or raising issues of general importance to the financial markets will be managed in a specialist Financial List.

On 27 July 2016, Lord Justice Briggs published a report on the future of the civil courts structure. His recommendations include:

- the creation of an online court for money claims up to £25,000 (to begin with);
- an increase in the minimum claim value threshold for commencing claims in the High Court to £250,000; and
- the county court to become the default court for enforcement of all judgments and orders of the civil courts, with enforcement procedures to be unified and digitised.

### 4 Limitation

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

Time limits for starting civil court proceedings are, in general, provided by the Limitation Act 1980. With exceptions, claims must be issued within six years from the date at which the cause of action accrued. This is the case for claims in tort and breach of contract.

Equitable claims also have a six-year limitation period, with the exception of where a trustee who held a pre-existing fiduciary relationship with the claimant (eg, a lawyer or an accountant) is sued for fraud or fraudulent breach of trust, or to recover from the trustee trust property in the possession of the trustee. In such a case no limitation period is applicable.

Although the Limitation Act does not expressly deal with restitutionary actions, the courts have accepted them to be a species of 'quasi-contract', with a corresponding six-year limitation period.

In cases of fraud, any limitation period will not begin to run until after the claimant has discovered or could, with reasonable diligence, have discovered the fraud.

Claimants have four months within which to serve a claim form that has been issued within the applicable limitation period in the jurisdiction and six months if the claim is to be served outside the jurisdiction, although an extension of time may be sought from the court.

## 5 Jurisdiction

### In what circumstances does the civil court have jurisdiction?

#### How can a defendant challenge jurisdiction?

The time to assess whether the court has jurisdiction is at the time the claim form is issued (see *Canada Trust Co v Stolzenberg (No 2)* [2002] 1 AC 1). The High Court has jurisdiction over any defendant who is domiciled in England and Wales and properly served with a claim form.

Where the defendant is not domiciled in England or Wales, whether the court will have jurisdiction will be governed by:

- the rules set down by Regulation 1215/2012 ('the Judgments Regulation') and the Brussels and Lugano Conventions (together the 'Jurisdiction Conventions');
- a binding jurisdiction agreement; or
- reference to existing common law principles (including that the defendant has submitted to the jurisdiction of the court).

The Jurisdiction Conventions collectively cover all EU states, Denmark, Iceland, Norway and Switzerland and establish a presumption that a defendant in a civil matter should be sued in the country in which he or she is domiciled. In the UK, sections 41(2) and 41A(2) of the Civil Jurisdiction and Judgments Act 1982 (CJJA) provide that an individual is domiciled in the UK if he or she is resident in the UK and the nature and circumstances of his or her residence indicate that he or she has a substantial connection with the UK. Pursuant to sections 41(6) and 41A(6) of the CJJA, an individual is presumed to be domiciled in the UK if he or she has been resident there for three months: see, for example, *Cherney v Deripaska* [2007] EWHC 965 (Comm).

A defendant may be sued in a state in which he or she is not domiciled if it is demonstrated that another jurisdiction would be more appropriate. For example, the presumption of domicile will be reversed in respect of a claim falling within the Judgments Regulation if the parties, regardless of domicile, had agreed that the courts of a specific member state was to have jurisdiction to settle any disputes arising in connection with a particular legal relationship. In such an example the agreed member state would have jurisdiction unless that agreement was null and void as to its substantive validity under the law of the member state.

In the event that the defendant wishes to dispute the court's jurisdiction, he or she must file an acknowledgment of service with the court and then, within the prescribed time, apply to the court for an order declaring that it has no jurisdiction or that it should not exercise any jurisdiction that it may have. A defendant will not be taken to have submitted to the jurisdiction simply by acknowledging service for the purposes of disputing jurisdiction or in the event that the purpose of his or her appearance before the court is to contest the validity of a freezing order entered against him or her.

**Brexit Note:** On 23 June 2016, the United Kingdom voted to leave the European Union. How this result will impact upon the continuing role of EU legislation in English law remains to be determined.

## 6 Admissibility of evidence

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

Evidence is admitted primarily through documents and written statements from witnesses (which can include the parties themselves) supplemented by oral examination and cross-examination under oath. Evidence is admissible only where it is relevant to a fact in issue in the case.

Subject to certain blanket exemptions, the general principle is that where evidence is relevant to the matters in issue, it is admissible no matter how it was obtained (see *Helliwell v Piggott-Sims* [1980] FSR 356). Where evidence is tainted, either because it breaches a party's article 8 ECHR right to privacy, or because its acquisition entailed an unlawful act, the court must balance the competing needs of having all probative evidence before it, while preserving the opposing party's right to privacy and a fair trial.

The court is empowered by the Civil Procedure Rules (CPR) to exclude evidence that would otherwise be admissible.

If a defendant has been convicted of an offence in the criminal courts of the United Kingdom, that will be taken as proof, albeit

rebuttable, that the defendant engaged in the conduct which formed the basis of the charge: see Civil Evidence Act 1968, section 11.

## 7 Publicly available information

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

Publicly available sources of information about assets include the following:

- The Land Registry: records freehold and leasehold interests in real property. The Register lists all those who hold a registerable interest in the relevant asset and the nature of their interest.
- The Driver and Vehicle Licensing Authority: holds details of the 'registered keeper' of licensed (taxed) vehicles in the UK.
- The Civil Aviation Authority maintains the UK Register of Civil Aircraft. Publicly accessible information includes the registered owner of the aircraft and details of the aircraft including year built.
- The Maritime and Coastguard Agency maintains the UK Ship Register.
- Companies House: maintains a register of the officers of limited companies and other comparable entities in the UK. Information held on the register includes filed accounts, mortgages and charges over the company's assets, and details of any insolvency proceedings. From June 2016, UK registered companies were also required to make available the details of their ultimate beneficial owner or owners.

The government has recently consulted on proposals to bring foreign companies that hold English or Welsh real estate, or that intend to bid for UK government contracts, under a similar beneficial ownership disclosure regime to that introduced in respect of domestic companies, which will apply to records kept at Companies House and the Land Registry.

## 8 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 agencies may be obtained for use in civil proceedings. A request (usually in writing) should be made to the relevant agency who will consider the request in line with written guidance and any statutory or other obligations. Material subject to public interest immunity may be redacted. The Crown Prosecution Service has published detailed guidance on its approach to requests for disclosure of materials in its possession to third parties.

Documents disclosed by the Serious Fraud Office (the SFO – the UK's primary prosecutor of serious fraud and corruption) during the course of an investigation (for example, to an individual who is interviewed as part of that investigation) may also be used in civil proceedings as disclosure by the SFO does not give rise to an implied undertaking not to use the documents for 'any other purpose': see *Standard Life Assurance Ltd and another v Topland Col Ltd and Others* [2010] EWHC 1781 (Ch).

Where the relevant agency will not voluntarily disclose the requested material, it may be sought by making an application to the High Court: see for example *Phillips v Newsgroup Newspapers Ltd and another* [2010] EWHC 2952 (Ch).

Individuals can also make a request for information to the relevant law enforcement agency pursuant to the Freedom of Information Act 2000, however, there are a number of exemptions available to such agencies enabling them to withhold information. In other circumstances an individual could make a Subject Access request pursuant to the Data Protection Act 1998 to a law enforcement agency in order to obtain information relating to themselves, although civil courts do not approve of this as a means of obtaining pre-action disclosure from a potential party to proceedings (see *Elliot v Lloyds TSB Bank PLC & Ors* [2012] EW Misc 7 (CC)).

## 9 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 potential claim, he or she may apply to the High Court for an order requiring the disclosure of that information:

- under CPR 31.17 by demonstrating 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;
- pursuant to the *Norwich Pharmacal* jurisdiction (after *Norwich Pharmacal Co v The Commissioners of Customs and Excise* [1974] AC 133). To obtain *Norwich Pharmacal* relief, 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;
- by obtaining 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; and
- 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.

## 10 Interim relief

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

The English jurisdiction offers the claimant a wide range of interim remedies. Such applications are usually made without any notice to the defendant and in such applications the applicant is subject to an onerous duty to make full and frank disclosure to the court of any matters that might influence its decision.

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 action. 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.

Should a claimant suspect that a defendant may dissipate assets in order to frustrate judgment, he or she may apply to the High Court, usually without notice, for a worldwide 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, anywhere in the world. A freezing order can affect any asset which 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 (see *JSC BTA Bank v Ablyazov* [2015] UKSC 64). It is binding on any third party who has notice of it.

A worldwide 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 may include a defendant's interest in a discretionary trust (see *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139). Similarly, 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. In rare cases the court may direct that a receiver take control of the defendant's assets and manage them pending the determination of any claim.

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* [1992] 1 WLR 231, it was held that the courts have jurisdiction (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 or is exercising power over the assets of the defendant or judgment debtor or is a potential judgment debtor.

In *Holyoake v Candy* [2016] EWHC 970 the court ordered a novel 'notification injunction' which only required the defendant to give notice to the claimant before transferring a particular asset, but did not otherwise preclude him or her from doing so. In order to obtain a notification injunction, a claimant must satisfy the same basic test that is applied when seeking a freezing order, however, the claimant need demonstrate a lower degree of 'risk of dissipation' as the remedy is less intrusive.

## 11 Right to silence

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

Defendants are not required to acknowledge service or file a defence in civil proceedings (see *V plc v C* [2001] EWCA Civ 1509), however, judgment may be entered against them by default, or if a defendant fails to advance a positive case, the claimant may seek summary judgment against him or her. While the Civil Evidence Act 1968, section 14, provides that parties to civil proceedings enjoy the benefit of the privilege against self-incrimination, and may refuse to answer any question or produce any document where to do so would expose them to criminal liability, the privilege attaches only to situations where a party is compelled to answer questions or produce documents, for example, under disclosure, tracing or search orders (where failure to comply would be punishable by contempt). The privilege has been abrogated by statute where proceedings have been brought in relation to an offence under the Theft Act 1968 or the Fraud Act 2006, although any admission given by compulsion may not be used against the defendant in criminal proceedings. The court has discretion over whether to allow a defendant to claim the privilege against self-incrimination in relation to criminal proceedings brought against him or her in a jurisdiction other than England. Privilege against self-incrimination is no defence to civil proceedings.

Defendants may also be entitled to refuse to disclose documents or information on the basis of other forms of privilege.

## 12 Non-compliance with court orders

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

A litigant or third party who deliberately acts in breach of an order of the court may be in contempt. A contemnor may be fined, have his or her assets seized and even be committed to prison, as in *JSC BTA Bank v Ablyazov* [2012] EWHC 237 (Comm). Any contempt does not excuse the requirement to comply with the original order. Part 81 of the CPR details the procedure by which the failure to comply with a judgment, order or undertaking may be enforced by contempt proceedings: either via an order for committal (with a maximum sentence of two years' imprisonment and or an unlimited fine) 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 debarring 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 (court orders which specify that a party to the proceedings must do some act by a specified date).

CPR 81.4 has extra-territorial 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 court (see *Dar Al Arkan Real Estate Development Co v Al-Refa'i* [2014] EWCA Civ 715).

The CPR provide the court with a range of sanctions to remedy procedural breaches, including making adverse costs awards against the defaulter or striking out that party's statement of case, leaving them unable to pursue or defend the claim.

Following the implementation of the Jackson Reforms in 2013, strict adherence to court orders, directions and rules has become a



priority in civil litigation; compliance is now enforced by the threat of severe sanctions against a defaulting party (see *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537).

### 13 Obtaining evidence from other jurisdictions

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

The High Court has no power directly to compel a witness in a foreign jurisdiction to give evidence, but may instead request courts in that state assist pursuant to the following:

- Council Regulation (EC) 1206/2001 (the Taking of Evidence Regulation) (where the foreign court is within an EU member state);
- the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (where the foreign state is a signatory);
- the Evidence (Proceedings in Other Jurisdictions) Act 1975 (where the court is in one of the other jurisdictions within the United Kingdom);
- bilateral convention; and
- the High Court's (rarely used) inherent jurisdiction to issue a letter of request.

The foreign court which is subject to the request may then make the necessary arrangements for the evidence in question to be obtained, in accordance with its own rules of procedure (although Regulation 1206/2001 additionally allows for a court to hear evidence from a foreign witness in accordance with the law of the member state in which that court is situated, see *Laminco GLD NA v Ageas NV, formerly Fortis NV* [2012] EUECJ C-170/11).

In *Secretary of State for Health v Servier Laboratories Ltd* [2013] EWCA Civ 1234 it was held that interlocutory orders for the provision of information and disclosure against a company domiciled outside the jurisdiction were procedural in nature and therefore governed by the law of England and Wales. Consequently there was no requirement to seek the assistance of the foreign court. (See 'Brexit Note' in question 5.)

### 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 Jurisdiction and Judgments Act 1982, section 25, provides that the High Court may grant interim relief to litigants in existing or contemplated foreign proceedings where it is not 'inexpedient' to do so. The applicant must also demonstrate a substantial connection between England and Wales and the defendant, or his or her assets.

However, in some cases an application for *Norwich Pharmacal* relief may be possible against an international bank with a branch in London, the headquarters of which are in another country, and it is envisaged that the disclosure will come from that country (see *Credit Suisse Trust v Intesa San Paolo Spa and Banca Monte Dei Pasche Di Siena* [2014] EWHC 1447 (Ch)). Furthermore, just as an applicant can seek an order for committal against a defaulting respondent during the course of a domestic claim, this sanction may equally be imposed on a respondent to an order made pursuant to section 25 (see *Kagalovsky and another v Balmore Invest Ltd and others* [2013] EWHC 3876 (QB)).

The High Court has the power under Regulation 1206/2001 and the Evidence (Proceedings in other Jurisdictions) Act 1975 to order persons within its jurisdiction to provide evidence in aid of proceedings which have commenced or are in contemplation in a court in another jurisdiction. Furthermore, it will assist parties in enforcing judgments obtained in a foreign state, either by registering the judgment for enforcement pursuant to the Administration of Justice Act 1920, the Foreign Judgments (Reciprocal Enforcement) Act 1933 or the CJA or by following the simplified procedure for enforcement of the judgment of a member state pursuant to the Judgments Regulation. Where the foregoing legislation does not apply, it may nevertheless be possible to enforce a foreign judgment pursuant to English common law rules under which fresh proceedings are commenced based upon the foreign judgment.

In addition, the English courts will enforce foreign arbitration decisions pursuant to the 1958 New York Convention and may grant

freezing relief in support of foreign arbitration or in aid of enforcement of a foreign arbitral award (see *UoM Mining Zambia Ltd v Konkola Copper Mines Plc* [2013] EWHC 260 (Comm) and *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ1040)). (See Brexit Note in question 5.)

### 15 Causes of action

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

Causes of action most common to civil asset recovery include actions in tort, equity and restitution although, depending on the circumstances, claimants may also be able to found a claim on breach of contract, fraudulent misrepresentation, breach of fiduciary duty or various statutory torts such as under the Insolvency Act 1986:

- In tort: deceit, conversion and conspiracy claims are often made.
- In equity: the beneficiary of a trust may sue a trustee in breach for the recovery of trust property. Such claims are capable of being proprietary in nature, meaning that the claimant will be able to rely on the more sophisticated rules of equitable tracing (for a recent discussion of which see *FHR European Ventures LLP and others v Mankarious and others* [2016] EWHC 359 (Ch)), which may include permitting backwards tracing (ie, following money that ostensibly left an account before the relevant monies were deposited) and tracing the value of an asset whose proceeds are paid into an overdrawn account if the claimant can establish coordination between the depletion of the trust fund and the acquisition of the asset which is the subject of the tracing claim, looking at the whole transaction (see *Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35 which is persuasive, but not binding decision of the Privy Council). Equity may also provide in personam redress against third parties who dishonestly participate in the breach or knowingly receive trust property.
- Where it can be shown that the defendant has been unjustly enriched at the claimant's expense, a restitutionary action for money had and received may be available.

In certain very limited circumstances, the court is prepared to pierce the corporate veil allowing a cause of action to be advanced against the controlling mind of a company involved in wrongdoing (see *Prest v Petrodel Resources Ltd & Ors* [2013] UKSC 34). This principle applies when a person is subject to an existing liability which he or she evades, or whose enforcement he or she frustrates by interposing a company under his or her control.

### 16 Remedies

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

The remedies available to successful claimants will depend on the nature of the claim as pleaded. For the majority of in personam claims, damages will be the available remedy.

Claims brought against a trustee in breach, or a third party on account of their dishonest assistance or knowing receipt, may entitle a claimant to an account of profits.

Where the claim is proprietary in nature a claimant may be entitled to restitution as a remedy and the restoration of the stolen property rather than damages to compensate for its loss.

Claimants will be able to claim interest on the judgment sum and may also recover their legal costs.

### 17 Judgment without full trial

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

Claimants may obtain judgment in advance of a full trial by way of an application for default judgment or for summary judgment pursuant to Parts 12 and 24 of the CPR respectively.

Following the deemed date of service, a defendant has 14 days to acknowledge service of the claimant's claim form, and then a further 14 days to file a defence (provided the defendant is served within the jurisdiction and subject, in respect of the defence, to agreed extensions of time). If the defendant fails to do either within that time the claimant

may make an administrative application for judgment to be entered in default against the defendant.

The claimant may also apply for summary judgment where it can be shown that the defendant has no real chance of successfully defending the claim and that there is no other compelling reason why the matter should proceed to full trial.

Where the claim arises as a result of a debt, the bankruptcy and winding-up procedures laid down by the Insolvency Act 1986 can provide a means of (usually partial) recovery without the necessity of a full trial.

## 18 Post-judgment relief

### What post-judgment relief is available to successful claimants?

Where a claimant suspects that, following judgment, a defendant will attempt to dissipate his or her assets he or she may apply for relief including a worldwide freezing order, a disclosure order, an order permitting the cross-examination of the defendant on his or her assets, and a receivership order. Should he or she suspect that the defendant will flee the jurisdiction to frustrate judgment the judgment debtor may obtain a passport order or a writ restraining a person from leaving the UK, which provides a power of arrest.

## 19 Enforcement

### What methods of enforcement are available?

A number of different enforcement mechanisms are available to judgment creditors. A selection of examples follows:

- A writ of control permits enforcement agents to attend the defendant's premises and seize goods to satisfy the judgment debt (see Part 3 and Schedule 12 of the Tribunals, Courts and Enforcement Act 2007).
- A charging order may be obtained against land or securities, leaving the claimant as a secured creditor (Charging Orders Act 1979, section 2). To realise the debt under a charging order, an order of sale must also be obtained (CPR 73.10C).
- If a third party holds money on the defendant's behalf, those funds can be directed to satisfy the judgment debt by way of a third-party debt order (see Part 72 CPR).
- The claimant may apply to wind up a company or make an individual bankrupt to effect a distribution of the judgment debtor's assets among creditors (see the Insolvency Act 1986).
- Where other enforcement methods have failed, the judgment creditor may apply for the appointment of a receiver by way of equitable execution, who may be appointed over the assets of the debtor including trust assets where the debtor has a legal right to call for the trust assets to be transferred to him or her to his or her order, or if he or she has de facto control of the trust assets in circumstances where no genuine discretion was exercised by the trustee over those assets (see *JSC VTB Bank v Skurikhin and others* [2015] EWHC 2131 (Comm)).
- Where the defendant has assets situated in another member state and the claim was uncontested, the judgment may be enforced by way of a European Enforcement Order (see Regulation 805/2004) or by applying to the member state concerned for a European Order for Payment (see Regulation 1896/2006). The UK is also signatory to a number of other bilateral enforcement conventions. If no legislative provisions exist, the ability to enforce a judgment depends on the law of the country concerned. (See Brexit Note in question 5.)

## 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 Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) the following funding arrangements are available:

- Conditional funding agreements (CFAs): an agreement where fees become payable by the client (stated as a percentage of the overall fees that would have been charged by the lawyer had a CFA not been in place) in a defined set of circumstances (eg, if the client

is successful in his or her claim or in defending that claim, a 'success fee' will be payable by the client in addition to normal fees). For CFAs entered into after 1 April 2013 (save for limited exceptions), this success fee is no longer recoverable from the opponent, who therefore no longer has to be notified if a CFA has been entered into.

- Damage-based agreements (DBAs): the client may agree that their lawyer will receive a percentage share of the damages recovered from the opponent if the case is successful. However, if the case is unsuccessful, the Damages Based Agreement Regulations 2013 provide that the lawyer will receive no fees as 'hybrid' or discounted DBAs are not currently permitted. No notification requirement exists for DBAs.
- After-the-event (ATE) insurance: policies can cover the client's liability to cover their opponent's costs, but may also cover the client's own disbursements and, dependent on risk, the client's own legal costs. ATE premiums are no longer recoverable from the losing party (save for limited exceptions).
- Third-party funding: involves a commercial litigation funder with no connection to the proceedings who agrees to pay some or all of the costs of the case in return for a share of any monies recovered. There is no requirement to notify opponents of the existence of a third-party funding arrangement.

LASPO introduced new provisions at CPR 3.12-3.18 for costs management, applicable to all multi-track cases (although they do not apply automatically in certain cases or to proceedings that exceed £10 million in value). Each party must file and exchange costs budgets for litigation at an early stage. This allows the court to make a costs management order that will control the amount of costs which the party can recover if successful. From 1 October 2015, a Shorter Trials Pilot Scheme has been operated in the Chancery Division and Commercial Court. Cases in this scheme are exempt from the costs management regime unless the parties agree otherwise. Fraud and dishonesty cases are not eligible for this scheme however.

Cost capping orders have also been introduced which limit a party's recoverable costs in advance. Costs capping orders will only be granted where the risk of excessive costs being incurred cannot be controlled by costs management orders or detailed assessment.

## Criminal asset recovery

### 21 Interim measures

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

The Proceeds of Crime Act 2002 (POCA) provides three distinct interim measures for the restraint of assets suspected to be the proceeds of crime.

First, the Crown Court (the superior court of record for criminal matters in England and Wales) may make a restraint order under section 41 of POCA if it is shown 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 his or her criminal conduct. There is no statutory requirement for the court to be satisfied that a suspect will dissipate his or her assets and so frustrate any later confiscation proceedings.

A restraint order has the effect of prohibiting the defendant from dealing in any way with the restrained assets unless agreed by the prosecutor or permitted by the court. The assets restrained can either be specified in the order, or include the whole of the defendant's property. To deliberately disobey the order is a contempt of court, punishable by a fine, imprisonment or both. The order is binding, not only on the defendant, but on any third party with notice of it.

The defendant subject to such an order may draw down a limited sum for living expenses, but may not withdraw restrained funds to pay for legal expenses connected either to the restraint proceedings themselves or the underlying criminal investigation or prosecution. It is worth noting that criminal restraint orders, like civil freezing orders, do not prevent a defendant from incurring new liabilities, for example, for legal fees. Incurring a liability is not the same as diminishing the value of any of the defendant's assets (*Revell-Read v Serious Fraud Office* [2013] EWHC 1483 (Admin)). However, the lawyer in that situation runs the risk that the client is never in a position to pay those fees.

Commonly, restraint orders that cover the whole of the defendant's property also include an asset disclosure clause. In such case, the defendant must also disclose to the court and the prosecutor dealing with the restraint proceedings all property, wherever situated, in which he or she has an interest. 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 (see *R v Kenny* [2013] EWCA Crim 1).

Second, prosecutorial agencies exercising the non-conviction based forfeiture provisions in Part 5 of POCA may apply to the High Court for a property freezing order, pending the determination of any Part 5 claim. The effect of the order is to freeze property where a good arguable case exists that that property represents the proceeds of crime.

Third, a police officer who discovers and seizes cash which he or she suspects may be the proceeds of or intended for use in crime may apply to the Magistrates' Court for it to be detained pending the outcome of his or her inquiries: section 294 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.

## 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?**

Where, following a complaint, there is evidence that a crime has been committed, the police are under a duty to investigate. Other investigative bodies are subject to similar obligations, subject to certain case acceptance criteria. Investigative agencies will consider whether, in the circumstances of the case, steps should be taken to prevent the dissipation of suspected proceeds of crime by a suspect, but not all investigations into acquisitive crimes necessarily 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.**

In the UK, the principal legislative instrument for confiscating the proceeds of crime is POCA. Part 2 of POCA contains provisions for recovering from convicted defendants the benefit they have obtained from their offence. 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, the concept of 'benefit' is a deliberately wide one which can, in certain circumstances, lead to the recovery of a greater amount than that represented by the offence for which they were convicted (see 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.

Property used in the commission of any offence (sometimes known as 'the instrumentalities of crime') may be forfeited by order of the Crown Court: see section 143, Powers of Criminal Courts (Sentencing) Act 2000. The Crown Court also enjoys specific powers in relation to drugs, firearms, things for producing counterfeit goods and other similar items, provided by separate statutes including the Firearms Act 1968, Misuse of Drugs Act 1971, etc.

## 24 Confiscation procedure

**Describe how confiscation works in practice.**

When making a confiscation order against a convicted defendant under POCA, the court is called upon to make two findings:

- the benefit that the defendant has derived from the criminal conduct; and
- the amount of the defendant's realisable assets available to satisfy a confiscation order (the 'available amount').

The court will then make a confiscation order in whichever of those two figures is the lower. The order will specify the time in which the defendant is to pay, and a term of imprisonment the defendant is to serve if he or she fails to comply.

Where the available amount is lower than the total benefit the defendant derived from the relevant offence, the difference will remain effectively as an outstanding debt to the state. The prosecutor may apply to reopen confiscation proceedings where at some later date the defendant can be shown to be in possession of assets which could be used to satisfy the outstanding benefit.

In *R v Waya* [2012] UKSC 51, the Supreme Court sought to address the true purpose of UK confiscation legislation and whether decisions of the lower courts had gone too far in breaching the principles laid down in article 1 of Protocol 1 of the ECHR relating to deprivation of possessions and the conditions and principles necessary to justifiably do so. The case concerned the purchase of a flat using a proportion of the defendant's legitimate funds and funds which derived from a mortgage lender that the defendant obtained by deception. In determining the criminal benefit to the defendant, the first instance court looked at the then market value of the house and deducted the proportion of legitimate resources used by the defendant to purchase the property. The Supreme Court formed a different view, and stated categorically that POCA bestowed a discretion on courts which allowed them to 'mould a confiscation order to fit the facts and the justice of each case' and that the act should be construed strictly in a manner which avoided violation of article 1 Protocol 1 of the ECHR. The court therefore decided that judges should take a proportionate and common-sense approach and assess the true benefit to the defendant, rather than executing punitive and often disproportionate confiscation orders way in excess of the actual benefit obtained. In 2015, section 6(5) of POCA was amended to place the Supreme Court's judgment in *Waya* on a statutory footing by incorporating a provision that the court must make a confiscation order only if, or to the extent that, it would not be disproportionate to require the defendant to pay the recoverable amount.

In *R v Axworthy (Liam)* [2012] EWCA Crim 2889, the principles in *Waya* were applied and the Crown conceded that a confiscation order for £22,010, which represented the value of a Land Rover which the defendant fraudulently reported stolen and was the subject of an insurance claim, should be quashed. The fact that the vehicle had later been recovered near the defendant's flat in Ibiza meant that to make a confiscation order for the total value of the car would be disproportionate. Courts must now only grant confiscation orders which 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 (see *R v Chahal* [2015] EWCA Crim 816).

Defendants who jointly obtain a benefit through criminal conduct are each separately liable for the whole amount of that benefit, and confiscation orders have to be made against each defendant for the whole amount. However, each order can only be enforced to the extent that the sum had not been recovered in satisfaction of another confiscation order made in respect of the same joint benefit – a payment by one defendant of an amount due under the confiscation order should go to reduce the amount payable by the others (see *R v Ahmad (Shakeel)* [2014] UKSC 36).

### Benefit

To calculate the defendant's benefit from his or her criminal conduct, the court must first determine whether or not he or she has a 'criminal lifestyle', as defined by POCA, section 75. This means that he or she has:

- been convicted of one of a number of specified offences set out in Schedule 2 of 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 the defendant has benefited from that conduct.

If it is determined that the defendant does have a 'criminal lifestyle', POCA requires the court to 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. These assumptions can be displaced if they can be shown to be wrong, or that, if made, a serious risk of injustice would result: section 10, POCA.



If the defendant does not have a 'criminal lifestyle', the court must decide whether he or she has benefited from his or her particular criminal conduct and, if he or she has benefited, calculate the benefit from that conduct: section 8, POCA.

Where the benefit from the defendant's conduct has been obtained by a limited company and the company is under the defendant's control, the court may be invited to 'pierce the corporate veil' and attribute some or all of that benefit directly to the defendant: see, for example, *R v Seager* [2009] EWCA Crim 1303.

#### Available amount

Section 9 POCA provides that the available amount is the total value of the defendant's 'free property', once any priority obligations have been satisfied. A priority obligation is either a fine or order following a previous conviction, or a preferred (ie, secured) debt as defined by section 386 of the Insolvency Act 1986. It is for the defendant to prove 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 the sum of the full benefit figure (see *R v Saben* [2013] EWCA Crim 575).

'Free property' is any property in which the defendant holds an interest. It extends to all real or personal property, wherever situated, including money, things in action and intangible property. It also includes the value of any 'tainted gifts'. Tainted gifts are 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.

#### 25 Agencies

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

A raft of state agencies in the UK enjoy powers to pursue the proceeds of crime under the POCA. They include:

- the Serious Fraud Office;
- the Financial Conduct Authority;
- the Crown Prosecution Service (Proceeds of Crime Unit);
- HM Revenue & Customs; and
- the National Crime Agency.

#### 26 Secondary proceeds

##### Is confiscation of secondary proceeds possible?

A confiscation order made under POCA is not made in rem against any specific property that derives directly from the defendant's criminal conduct. Rather, once the court has determined the extent of the benefit derived by the defendant from his or her criminal conduct, any property held by him or her may be confiscated up to the value of the benefit obtained (and this is the 'true benefit' obtained by the defendant rather than a more punitive approach formerly taken by the courts). This includes any asset acquired using the proceeds of the original offence (as well as any lawfully obtained property).

Section 80 of POCA provides that if the proceeds of crime are used to obtain an asset that subsequently increases in value, the increase in value also constitutes the defendant's benefit. If, for example, a defendant buys property for £200,000 using the proceeds of crime, and the value of the asset increases to £500,000, the defendant's benefit will be the full value of the asset, namely £500,000. If the defendant in fact mixed £100,000 of the proceeds of crime with £100,000 of legitimate funds, his or her benefit would be £250,000, 50 per cent of the value of the asset at the time the confiscation order was made. It is important to remember that if the defendant has a 'criminal lifestyle' as defined by section 75 and Schedule 2 of POCA, then all property held by him or her at the date of conviction will be assumed to be his or her benefit, unless he or she can show that the assumption is wrong or to apply it would result in a risk of serious injustice.

#### 27 Third-party ownership

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

Property that has passed from the defendant to a third party may be included in the calculation of a confiscation order if determined to be a

'tainted gift', as defined by section 77 of POCA. The tainted gift provisions operate to catch property that the defendant has sought to put out of reach by placing the asset into the name of another third party. They provide that where a transaction is made in relation to an asset of the defendant, for which no or insufficient consideration is given, the value of that asset is to be included in the amount available to the defendant to satisfy any confiscation order. It does not matter about recoverability of the tainted gift by the defendant when calculating the amount of a confiscation order. Tainted gifts must be included in such an order to prevent the defendant from dissipating their assets by giving them away and claiming that these are unrecoverable (*R v Smith (Kim)* [2013] EWCA Crim 502).

Third parties who wish to challenge a finding that property held in their name is a 'tainted gift' have no locus to be heard in the Crown Court confiscation proceedings. If they wish to challenge the finding of a court as to an alleged tainted gift, this must be done at the enforcement stage: see, for example, *Backhouse v HM Revenue & Customs Prosecution Office* [2012] EWCA Civ 1000.

Section 10A POCA is applicable to third parties where there is no suggestion of a tainted gift. It states that where the court finds that there is property held by the defendant that is likely to be realised or otherwise used to satisfy a confiscation order and a third party holds or may hold an interest in the property, the court has the power to determine the extent of the defendant's interest in the property. In such a case the court must provide the third party with a reasonable opportunity to make representations to the court.

#### 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 a defendant where it considers it just and convenient to do so: section 18, Prosecution of Offences Act 1985. This may include not only costs incurred in the proceedings themselves, but also those incurred during the investigative stage: see, in a different context, *Neville (Westminster City Council) v Gardner Merchant Ltd* [1983] 5 Cr App R (S) 349.

However, POCA provides that a confiscation order will have priority over any other financial order imposed by the court (save for a compensation order, although recent case law suggests that it is disproportionate to make an order for confiscation and compensation where the loss which is the subject of the compensation order is also defined as the criminal benefit: *R v Jawad* [2013] EWCA Crim 644): section 13 POCA. Costs will therefore only be recoverable if the defendant possesses sufficient assets 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?

In short, the UK criminal confiscation regime is a value-based system. A confiscation order made under 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 benefit that the defendant has obtained from his or her offence, and then proceeds to identify any available property held 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?

POCA shifts the burden of proof onto the defendant in relation to two key matters. Where the defendant has a 'criminal lifestyle' as defined by section 75, he or she shoulders the burden of demonstrating that he or she has not benefited from his or her general criminal conduct. He or she must persuade the court, on the civil standard of proof, that the relevant assumption is either incorrect or that there would be a serious risk of injustice if it were to be applied.

The burden is also on the defendant to persuade the court that he or she does not have the available assets to satisfy the confiscation



order, as alleged. If the court is not so persuaded it must make a confiscation order for the full benefit with a sentence in default. In the case of 'hidden assets', where the court has been invited to find that the defendant enjoys the benefit of property that is not readily identifiable (usually cash, or assets held abroad), the defendant can find himself or herself in the invidious position of having to 'prove a negative'. A defendant who does not provide evidence about the available amount, or no substantive explanation regarding potential hidden assets, will likely be the subject of a hidden assets order: *R v Dhall (Harpeet Singh)* [2013] EWCA Crim 892.

The question of proportionality of confiscation orders as a result of the principles laid down in *Waya* has also affected the concept of what is considered the correct 'available amount'. A recent example of *R v Yew (Gabriel Kok)* [2013] EWCA Crim 809 allowed, on appeal, the reduction in the value of a confiscation order due to an over-inflated valuation of a property that did not take into account the defendant's wife's beneficial interest in the property. Clear evidence of the true available amount will therefore be required in all situations, otherwise the available amount will be reduced accordingly.

### 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?

POCA provides that a confiscation order will have priority over any other financial order imposed by the court, as well as debts owed by the defendant to any unsecured creditors. This will include any civil claimants who cannot establish a proprietary claim against the restrained assets: *Serious Fraud Office v Lexi Holdings plc* [2008] EWCA Crim 1443.

There are several exceptions to this (see section 13 of POCA), including where a court is contemplating making an order to compensate any party who has suffered loss as a result of the defendant's conduct pursuant to the Powers of Criminal Courts (Sentencing) Act 2000. In that case the compensation order has priority. If a defendant has the ability to pay both confiscation and compensations orders, the court can make an order for both sums to be paid separately, but see *R v Jawad* above.

### 32 Confiscation of profits

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

Financial advantage or profit obtained by a defendant though the commission of criminal offences would constitute that defendant's benefit for the purposes of POCA. In the corporate context, for example, profits flowing from contracts obtained through bribing or otherwise corrupting foreign officials have been made the subject of a confiscation order as in *R v Mabey & Johnson plc* [2009].

### 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.

Part 5 of POCA provides for a system of non-conviction based forfeiture in the UK. Under Part 5 the High Court may make an order vesting property in the state where it is persuaded on the civil standard of proof that the relevant property is 'recoverable' (ie, that it represents the proceeds of crime). Although the respondents to Part 5 proceedings are the beneficial owners of the property in question, the proceedings are effectively in rem, with POCA establishing rules for tracing recoverable property akin (but not identical) to the equitable jurisdiction of the civil courts.

In the corporate context, settlements under Part 5 of POCA have been used by the SFO to confiscate and repatriate assets obtained by companies who have engaged in overseas corruption. An example is Oxford Publishing Limited, who in July 2012 agreed with the SFO to pay over £1.9 million under Part 5 after self-reporting corrupt sales practices in Tanzania and Kenya. However, the practice of addressing corporate criminality by the use of these powers has been the subject of judicial criticism. See for example the sentencing remarks of Lord Justice Thomas in *R v Innospec Ltd* (2010).

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 agreements 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.

### 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?

Assets that have been restrained pending a criminal trial are usually managed through case-by-case negotiations and agreement between the prosecutor and the defendant's legal representatives. Where agreement cannot be reached, either party may apply to the court to vary the order. All parties (including the court) are required to act in accordance with the 'legislative steer' contained in section 69 POCA; namely to preserve as much of the restrained property as possible in order to satisfy any later confiscation order.

In some cases the Crown Court may make an order appointing a management receiver over the defendant's assets: section 48 POCA. Typical examples would include where the defendant is held on remand facing trial and has property which requires management which he or she is incapable of so doing, or where his or her assets included corporate entities (which would not be run efficiently where significant management decisions were often required to be approved by the prosecution). The management receiver is entitled to be remunerated for his or her services out of the assets in receivership, although where the restraint order has been discharged following acquittal it has been argued that those costs be met by the prosecution. Recent decision of the Supreme Court in *Crown Prosecution Service v Eastenders Group* [2014] UKSC 26 held that requiring the assets of a group of companies to be used to pay the remuneration and expenses of a receiver appointed following the making of a restraint order under the Proceeds of Crime Act 2002 section 41 would breach the European Convention on Human Rights 1950 Protocol 1 article 1, in the circumstances where it had been held that the restraint and receivership orders should never have been made. In such cases the receiver is entitled to recover his or her remuneration and expenses from the Crown Prosecution Service, on whose request the work is 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.

A restraint order made under POCA purports to freeze the assets of a defendant wherever situated. In practical terms, policing the restraint order may therefore require the assistance of the courts in another state. This may be sought by way of a mutual legal assistance (MLA) request made pursuant to either section 7 of the Crime (International Cooperation) Act 2003 or, more likely, section 74 of POCA (which makes specific provision for MLA requests in respect of restraint and confiscation matters).

Under section 74, the prosecutor may send a request for assistance to the Secretary of State for the Home Office for its onward transmission to the requested state. The UK government's Mutual Assistance Guidelines set out the information that should be contained in the letter of request, including the defendant's name, details of the relevant offence and particulars of the property in question (see 12th edition, available online).

*Perry and Others v SOCA* [2012] UKSC 35 threw doubt on the scope of Part 5 POCA and whether it allowed the UK courts to effect civil recovery orders in relation to property outside England and Wales or disclosure orders on individuals outside of the jurisdiction. However,

### Update and trends

The effect of Brexit on civil asset recovery is a topic of much discussion and speculation (see Global overview). The general consensus suggests that the principles of comity and common sense should prevail as it is unlikely to be in the interests of the UK or the remaining member states to completely abandon the current framework of mutual recognition and enforcement of judgments, along with other European laws regarding forum and jurisdiction. How those laws will be maintained or transposed following Brexit remains unclear, but it is generally believed that whatever follows is unlikely to represent a substantial departure from the current order.

Focus on controlling costs in civil litigation also remains a hot topic. In January 2016, Lord Justice Jackson, responsible for introducing the new costs regime in April 2013, indicated that the fixed costs regime may be further extended to cover all claims up to a value of £250,000. He has also outlined plans for a new format for the bill of costs used in civil litigation, which would require solicitors to go into significant detail with the use of a range of 'J-Codes' breaking down the costs of a wide range of solicitors' tasks (which in itself is feared will be expensive to implement, be complex to work with and be too prescriptive). In addition, the Civil Justice Council has announced that it will consider whether qualified one-way costs shifting should be introduced, initially for private nuisance claims, and review whether before-the-event insurance may play a role in improving access to justice.

Litigators continue to seek robust and novel ways maximising benefits for their clients. Examples of this can be seen in cases such as *JSC*

*Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139 in which the defendant was required to disclose his interest in a discretionary trust (the assets of which he could not be said to have a legal or beneficial right to, or exercise control over). In *Holyoake v Candy* [2016] EWHC 970 the court ordered a 'notification injunction', which required the defendant only to give notice to the claimant before it transferred a particular asset, but which also lowered the evidential threshold for 'risk of dissipation' to be met by the claimant.

In criminal litigation, alongside the first two Deferred Prosecution Agreements for failure to prevent bribery (section 7 of the Bribery Act 2010), discussed in the Global overview, the launch of a two-year pilot programme by the City of London Police aiming to increase and speed-up asset recovery in the UK may be symptomatic of a new focus within the UK criminal justice system on asset recovery rather than convictions for economic crime. The programme sees law enforcement (including the National Crime agency and the Metropolitan Police), law firms and asset recovery specialists working together in a public-private partnership. The private sector firms will attempt to identify, seize and recover criminal assets through civil recovery procedures, in parallel with any criminal investigations by the police. The pilot programme aims to test the belief that the lower standard of proof required for civil cases will make the process faster, giving criminals less time to move or dissipate the assets.

the Crime and Courts Act 2013 has expressly extended the power of the UK court to grant orders freezing property held outside the UK and imposing disclosure orders on individuals outside the UK where there is a 'connection' between the case and the UK.

### 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 Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (the ERO) provides that the Crown Court may make a restraint order over the assets of a defendant against whom criminal proceedings are active in a foreign state. The ERO also makes provision for a mechanism for funds to be repatriated, if confiscation proceedings are determined against the defendant. Applications for restraint orders pursuant to the ERO are made by the SFO or other equivalent body, following receipt of a letter of request by the UK Home Office from the foreign investigative or prosecutorial body.

### 37 Treaties

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

The UK is a signatory to the following (non-exhaustive) list of conventions:

- United Nations Convention against Transnational Organized Crime 2000;
- United Nations Convention against Corruption 2003;
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997;
- European Council Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime 1990; and
- European Union Convention on Mutual Assistance in Criminal Matters between 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 1986 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.



**PETERS & PETERS**

PETERS & PETERS SOLICITORS LLP

**Jonathan Tickner**  
**Sarah Gabriel**  
**Hannah Laming**

**jtickner@petersandpeters.com**  
**sgabriel@petersandpeters.com**  
**hlaming@petersandpeters.com**

15 Fetter Lane  
London EC4A 1BW  
United Kingdom

Tel: +44 20 7822 7777  
Fax: +44 20 7822 7788  
[www.petersandpeters.com](http://www.petersandpeters.com)

The number of private prosecutions brought by companies and high-net-worth individuals has grown exponentially over the past few years, possibly due to cuts in funding and the lack of resources experienced by law enforcement agencies and regulators over the same time period. Although there are some restrictions in bringing such a prosecution (eg, the private prosecution of some offences require the consent of the Director of Public Prosecutions or the Director of the SFO before being pursued), and the cost in doing so can be substantial, private prosecutions can result in a faster conclusion compared with civil proceedings and can have a significant deterrent effect.

In 2014, the largest private prosecution brought by an individual in the UK to date resulted in a sentence of eight years' imprisonment

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. It is likely that cases such as this will increase in the UK 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.

\* *The authors thank Richard Clayman and Anthony Eskander, of Peters & Peters Solicitors LLP, for their assistance.*

# United States

Carrie A Tendler, Jef Klazen and Matthew J Kokot

Kobre & Kim

## Civil asset recovery

### 1 Legislation

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

The United States is an amalgamated federal constitutional republic comprising 50 states plus the District of Columbia and various territories, each with separate and distinct legislation relevant to asset recovery. In the absence of a unified corpus of statutes, there are a few major categories of federal US legislation to consider when pursuing a civil recovery action in the US: federal securities laws, racketeering laws and insolvency laws.

There are four principal provisions of US federal securities law under which most plaintiffs file when alleging fraud regarding the sale or purchase of securities: sections 11, 12(1) and 12(2) of the Securities Act of 1934 and section 10(b) of the Securities Exchange Act of 1934 (along with the related SEC Rule 10b-5).

The US also affords victims of organised crime a private right of action under federal and state racketeering laws that focus on ongoing criminal enterprises. The federal Racketeering Influenced Corrupt Organization (RICO) Act is codified at 18 United States Code (USC) sections 1961–1968 and specifies various serious crimes that qualify as ‘racketeering activity’. A person who has committed at least two such acts within a 10-year period can be found civilly liable for racketeering if it can be shown that the underlying wrongdoing was related to an enterprise.

Foreign plaintiffs confronting complex, cross-border fraud with a significant US component (or involving US-based assets) may also want to avail themselves of chapter 15 of the US Bankruptcy Code (11 USC section 1501, et seq), which can be a useful tool for tracing and recovering assets in situations involving insolvent commercial entities due to the availability of discovery in the bankruptcy process that is not otherwise available.

### 2 Parallel proceedings

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

There are no 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, civil litigants normally should not delay in bringing the civil proceeding in anticipation of such a stay, nor should civil litigants 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.

### 3 Forum

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

Generally speaking, counsel should consider all the relevant state and federal courts in which a particular action may potentially 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.

### 4 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 USC section 77(m) (governing the limitations of securities actions).

Plaintiffs may also consider filing a civil action under the federal RICO statute (18 USC section 1962). The statute of limitations for civil RICO claims is generally four years from the date a plaintiff knew or should have known of his or her injury. See *Rotella v Wood*, 528 US 549 (2000); *Agency Holding Corporation v Malley-Duff & Associates, Inc.*, 483 US 143 (1987).



## 5 Jurisdiction

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

Jurisdiction questions in the United States can be broken down into three elements: whether the court has jurisdiction over the person; 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 location of the at-issue assets, transactions or defendants; 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.

## 6 Admissibility of evidence

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

For actions in US 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 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 Publicly available information

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

In the US, 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: lien filings, real estate records, property tax records, automobile filings, aircraft filings and business registration filings.

Generally speaking, counsel should investigate the relevant federal and state agencies charged with regulating certain asset types and work from there. It is worth noting that 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: Dunn & Bradstreet, Hoovers, Factivia (Dow Jones company that aggregates business news); and
- public records asset locators: LexisNexis KnowX, Westlaw Asset Locators including PeopleMap and Accurint.

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 that may provide counsel with a starting point for further investigation.

## 8 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 speaking, 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 possession of the government. 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 (that 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.

## 9 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 US federal action. It bears noting that a plenary or substantive action must already be pending before a US district court before employing Rule 45.

This is not, however, necessarily the case in state court. Certain US states (including New York and Texas, among others) have adopted pre-suit discovery mechanisms that permit prospective plaintiffs to obtain varying degrees of information before initiating a plenary action, provided that the prospective plaintiff can make the requisite showing (which can vary by state). In Connecticut, for example, a plaintiff 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 above.

## 10 Interim relief

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

As discussed immediately above, 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.

A temporary restraining order or preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure 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. Generally speaking, courts consider the following four elements in granting a preliminary injunction or temporary restraining order:

- whether the plaintiff 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 plaintiff is likely to prevail on the merits.

Notably, some US state jurisdictions, such as Connecticut, have a much lower threshold for prejudgment relief.

It bears noting that 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.

## 11 Right to silence

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

Yes, the prohibition against compelled self-incrimination under the Fifth Amendment to the US Constitution generally applies in the civil context, but only if the party reasonably believes that answers could be used in a criminal prosecution or could lead to other evidence that may be so used. Unlike in criminal proceedings, a party who exercises his or her Fifth Amendment privilege in the course of a civil proceeding may be subject to the adverse inference that the withheld answer would not have contradicted the opposing party's evidence. A decision on whether to invoke the Fifth Amendment in civil proceedings should therefore be weighed carefully.

## 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 (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 US 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 at 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 US 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 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 foreign proceeding may issue a letter rogatory). If successful, the breadth of discovery allowed under section 1782 is comparable to regular civil discovery in the United States.

In general, three 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 a foreign tribunal (which an increasing number of Federal Circuit courts have found to include foreign arbitrations, although the US 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.

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 US). 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 US 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: a 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 damages.

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 plaintiff must typically demonstrate that: he or she had an ownership interest in the property before the conversion; the defendant's use of the property was unauthorised and interfered with the plaintiff's use of the property; the defendant's act was contrary to the plaintiff's right of possession; and that the plaintiff was harmed because of the defendant's act.

Various US jurisdictions allow for civil conspiracy claims based 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 of the 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 plaintiff is typically entitled only to damages. In a fraud action, however, there is a host of potential remedies, including damages, recovery of property by detinue and replevin, and the potential equitable remedies of reformation, constructive trust, accounting, rescission and injunction.

Common types of remedies in civil actions are listed below. Because the list of available remedies may differ materially between jurisdictions, counsel should investigate the potential remedies in each pertinent jurisdiction before bringing an action:

- 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'. Note that 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.

Pretrial default judgments are 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 was 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.

## 19 Enforcement

### What methods of enforcement are available?

Asset recovery laws and procedures vary greatly from state to state within the US, and the precise rules differ depending on whether the party that is attempting to recover the assets is a government authority or 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 speaking, most jurisdictions also allow for attachment and garnishment.

## 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 in the US have historically been able to rely on alternate fee arrangements to pay the legal expenses and fees associated with bringing civil litigation. On the plaintiff's side, contingency fee agreements (whereby the plaintiff'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 (D&O) insurance, that 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 (including, among others, Florida) as an alternate funding mechanism for litigation that is likely to be particularly lengthy, complex or otherwise too expensive even for major law firms to fund on a contingency basis. Notably, however, certain states still subscribe to traditional notions of champerty, maintenance and barratry, and prohibit TPLF on that basis (including, most notably, Delaware, where many US corporations are organised and registered). 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 in the United States 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, than 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 very broad interim measures upon suspicion of crime. As discussed in more depth below, forfeiture proceedings provide the government broad discretion in seizing assets as well as proceeds of crime.

Interim measures are especially powerful under the provisions of money laundering and anti-terrorism statutes. Under the US Patriot Act, for instance, the US has the ability to also issue a 'pre-trial 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, the asset forfeiture specialists in the appropriate prosecutor's office have to be staffed on the matter, and that usually 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 freeze 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 proceeds from being discovered. Complementing these laws, the United States has imposed a series of reporting requirements on institutions in an effort to identify potentially criminal transactions. These requirements are central to the United States' 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 US 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 of time. 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* 2d 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. Importantly, 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 proceeds from 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.

Notably, 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 response to 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, then the court will hear additional evidence and argument before instructing the jury on how to determine whether the government sufficiently has 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 (2d Cir 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).

How the amount of forfeiture is determined depends 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, then 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?**

The US has many agencies, on the federal, state and local levels, through which it operates to trace and confiscate the proceeds of crime. Below are some major federal agencies supporting asset recovery:

- the Department of Justice (DoJ), Criminal Division, Asset Forfeiture and Money Laundering Section;
- the DoJ, Criminal Division, Office of International Affairs (OIA);
- the Department of Homeland Security, Immigration and Customs Enforcement (ICE), Homeland Security Investigations;
- the DoJ, Federal Bureau of Investigation (FBI);
- the Department of the Treasury, Financial Crimes Enforcement Network;
- the US Internal Revenue Service; and
- the US 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 sweep more broadly. 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 were on adequate notice of the cloud on title (or of other facts that would render the property forfeitable); whether they received the property in exchange



## Update and trends

As stated above, one aspect of a court's jurisdiction in the United States is jurisdiction over the person, commonly known as personal jurisdiction. Personal jurisdiction is needed for a court to exercise power over an individual or a business entity, for instance to allow legal claims to be brought against that person or entity, to order that person or entity to comply with discovery demands, or to order that person or entity to turn over assets of a judgment debtor or that were procured by fraud. Personal jurisdiction is generally derived from a defendant's contacts or presence in the forum jurisdiction, and absent personal jurisdiction a court does not ordinarily have the power to hear a case.

In this area of law, the US Supreme Court's decision in *Daimler AG v Bauman*, 134 S Ct 746 (2014), dramatically changed the landscape by limiting the circumstances under which a court can exercise a type of personal jurisdiction, known as general personal jurisdiction, over a business entity. General jurisdiction allows a court to hear a case against a defendant even when the defendant's contacts or presence in the jurisdiction are entirely unrelated to the claim being pursued. Prior to *Daimler*, courts could exercise general personal jurisdiction over a foreign company if the company engaged in such a continuous and systematic course of business in the jurisdiction as to warrant a finding that the company was present in the jurisdiction, see *Landoil Resources Corp v Alexander & Alexander Services, Inc*, 77 NY2d 28, 34 (1990), and a company could be subject to general personal jurisdiction in every US state where it had this level of business activity. Under that standard, courts would regularly exercise general personal jurisdiction over a foreign corporation on the basis that the corporation was doing business in the US jurisdiction through a local office or branch.

Where a defendant is not subject to general personal jurisdiction, he or she can ordinarily only be sued when the claim against him or her arises from his or her contacts with the forum state, for example, where fraud claims are brought against a company whose operations are almost entirely outside the jurisdiction, but who committed the fraud in question by targeting a victim within the jurisdiction. This form of personal jurisdiction is known as specific personal jurisdiction. Specific personal jurisdiction was not directly affected by the *Daimler* decision.

In *Daimler*, the Supreme Court significantly scaled back the circumstances under which a court can assert general personal jurisdiction over a foreign company by ruling 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 (internal citations and quotations omitted)). In establishing this standard, the Supreme Court identified two paradigmatic bases of general personal jurisdiction: the corporation's place of incorporation; and the corporation's principal place of business. *Daimler*, therefore, all but eliminated general personal jurisdiction as an avenue for securing jurisdiction over a foreign company except if the company is incorporated or has its principal place of business in the jurisdiction, absent certain exceptions.

In the context of judgment enforcement, the *Daimler* decision has limited the extent to which judgment creditors can use the broad post-judgment discovery powers available through US courts to obtain information about assets from companies that are neither incorporated nor headquartered in the United States, and may similarly impact a creditor's ability to obtain in personam orders against foreign companies to turn over assets of the debtor. With general personal jurisdiction no longer a viable option in most United States jurisdictions, US courts have begun relying on alternate theories to assert jurisdiction over foreign companies.

One such alternate theory is consent to jurisdiction. For example, in *Vera v Republic of Cuba*, 91 F Supp 3d 561 (SDNY 2015), a group of judgment creditors seeking to enforce their judgment against Cuba in the US District Court for the Southern District of New York (SDNY) served information subpoenas on Spanish bank Banco Bilbao Vizcaya Argentaria (BBVA) requesting information concerning assets in which Cuba may have an interest. The subpoena sought information from both BBVA's New York and international branches. BBVA complied with the requests for information about its New York branch, but refused to produce any information concerning foreign accounts, even when that information was accessible from New York, on the basis that the court lacked personal jurisdiction with respect to information concerning those accounts. In particular, BBVA argued that under *Daimler*, the fact that it operates a branch and conducts business in New York is insufficient to subject the bank as a whole to general personal jurisdiction in New York because its place of incorporation and principal place of business are in Spain.

Despite the fact that *Daimler* would appear to support BBVA's position, the court in *Vera* relied on a consent theory to nonetheless find

that it had jurisdiction over BBVA such that it could compel compliance with the full scope of the information subpoena. The court found that by operating a branch in New York and transacting business in New York, 'BBVA consented to the necessary regulatory oversight in return for permission to operate in New York, and is therefore subject to jurisdiction requiring it to comply with the appropriate Information Subpoenas' (*Vera*, 91 F Supp 3d at 571). After finding that BBVA had consented to jurisdiction, the court ruled that 'BBVA is subject to this Court's jurisdiction, such that the New York branch can be compelled to comply with the Information Subpoena'.

Importantly, although *Vera* appears to articulate a fairly permissive standard for finding that an entity transacting business in New York has consented to jurisdiction, subsequent opinions in the SDNY and the US Court of Appeals for the Second Circuit (Second Circuit) appear to have narrowed the *Vera* court's jurisdictional analysis. For example, in *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 2016 WL 1558504, at \*7 (SDNY 2016), plaintiffs relied on *Vera* to argue that certain defendants (as opposed to third parties) consented to general jurisdiction in New York by registering with the New York State Department of Financial Services. The court rejected this argument, reasoning that *Vera* did not hold that foreign banks with New York branches have consented to general jurisdiction in New York, but rather that 'foreign banks operating local branches in New York [...] have] obligations to participate as third-parties in lawsuits which involve assets under their management' (*LIBOR*, 2016 WL 1558404 at \*7 (citing *Vera*, 91 F Supp 3d at 570)). Moreover, the *LIBOR* court expressly disagreed with *Vera* to the extent that it held that foreign banks operating New York branches have consented to general personal jurisdiction. Similarly, in *Brown v Lockheed Martin Corp*, 814 F3d 619, 623 (2d Cir 2016), the Second Circuit held (without reference to *Vera*) that defendant corporation Lockheed Martin did not consent to jurisdiction in Connecticut solely on the basis of its registration to conduct business and its appointment of an agent for service of process in the state. That decision, however, was specific to Connecticut's business registration statute and expressly left open the possibility that business registration statutes in other states might be worded in such a way that they would confer jurisdiction over companies registered to do business in those states.

In light of these and other decisions, the law is still unsettled on whether a foreign company's registration to do business in a particular US state constitutes consent to general personal jurisdiction in that state. Absent a binding ruling that is directly to the contrary, judgment creditors should still attempt to rely on decisions such as *Vera*, at least when seeking to compel a third-party foreign company to comply with asset discovery requests.

As noted above, another form of jurisdiction is specific personal jurisdiction, which can provide a useful alternative to general personal jurisdiction post-*Daimler*. In the judgment enforcement context, it can be difficult to assert specific jurisdiction over third-party business entities because their jurisdiction-related contacts are usually unrelated to the underlying claim against a judgment debtor. However, a recent opinion by the SDNY illustrates that where there is a factual connection between a third party's presence in a US jurisdiction and the claim underlying the judgment, specific jurisdiction may provide a basis for a court to compel a foreign business entity to comply with discovery requests, even if general jurisdiction does not exist.

In *Gucci America, Inc v Weixing Li*, 135 F Supp 3d 87 (SDNY 2015), plaintiff Gucci served discovery requests on Bank of China seeking information related to the defendants' accounts at that bank. Although Gucci was a trademark-infringement action (alleging the counterfeiting of brand-name handbags and other products) and not a post-judgment enforcement action, the type of information requested from Bank of China was similar to what would typically be requested of a bank in the post-judgment setting.

Bank of China is an international bank, which maintains its principal place of business in China and is not incorporated or headquartered anywhere in the United States, although it has a significant global presence, including four US branches, two of which are in New York. In the *Gucci* case, Bank of China responded to the discovery requests by producing responsive documents that were in the possession of its New York branches, but refused to produce responsive documents located in any of its Chinese branches. As a result, Gucci sought a court order compelling Bank of China to comply with the discovery requests. In a pre-*Daimler* opinion, the SDNY initially granted Gucci's motion to compel and ordered Bank of China to fully comply with the discovery requests. However, this ruling was vacated on appeal to the Second Circuit because '[i]n light of *Daimler*, [Bank of China's] contacts with

the forum were insufficient to support the exercise of general personal jurisdiction' (*Gucci America, Inc v Weixing Li*, 768 F3d 122 (2d Cir 2014)). The Second Circuit remanded the case to the SDNY to consider whether, given that there was no general personal jurisdiction, there might be specific jurisdiction over Bank of China.

After the case was remanded following the appeal, the SDNY looked first to a New York's statute which allows for the exercise of specific jurisdiction over a person or entity who 'transacts any business within the state' so long as the plaintiff's 'cause of action aris[es]' from that business. See NY CPLR section 302. Given that Bank of China maintained two branches in New York, the SDNY had 'no trouble' concluding that Bank of China transacted business in New York (*Gucci*, 135 F Supp 3d at 94). The more difficult question was whether that business activity was sufficiently connected to the underlying claim.

The SDNY observed that in the usual setting, specific jurisdiction is appropriate where there is an 'articulable nexus or substantial relationship between the business transaction and the claim asserted' (Id at 93-94). But when the jurisdictional question arises in the setting of a discovery request rather than a claim or cause of action, the focus

should be on the connection between the business transacted and the discovery order at issue. In this particular case, plaintiff Gucci alleged that the defendants had transferred the proceeds of their counterfeiting operations through Bank of China's correspondent account at another bank in New York, and the plaintiff's discovery requests sought information about those transfers and about Bank of China's relationship with the correspondent bank (id at 94). Accordingly, the SDNY concluded that there was a sufficient connection between Bank of China's business activity in New York and the plaintiff's discovery requests to find that Bank of China was subject to the court's personal jurisdiction and thus could be compelled to respond to the discovery requests.

As *Vera* and *Gucci* illustrate, even though the Supreme Court has made it much more challenging to assert general personal jurisdiction over foreign companies, judgment creditors still have viable avenues for asserting personal jurisdiction – via consent and specific jurisdiction – over third parties who may be in possession of a judgment debtors' assets or have information about the debtor's assets. Thus, judgment creditors should still utilise the US's favourable post-judgment discovery and execution regime even post-*Daimler*.

for the provision of adequate consideration (ie, fair value); and 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 Department of Justice 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, has been commingled with non-forfeitable property from which it cannot be severed, has been placed beyond the court's jurisdiction, or cannot be found through the exercise of due diligence, then US 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); 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 a 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 a 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).

US 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.

## 32 Confiscation of profits

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

As discussed above, 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, while 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 proceeds of crime is 18 USC section 981(a)(1)(C), which lays out a broad list of applicable criminal offences that includes 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 questions 23 and 29.

## 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 US Marshals Service (the USMS) is the primary authority over management and disposal of seized assets in the United States. The authority of the US 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 speaking, 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 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 signatory to over 70 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 within the DoJ 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 US 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 broad 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 in the United States. However, US victims' rights legislation allows for broad 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 | DISPUTES AND INVESTIGATIONS

**Carrie A Tandler**  
**Jef Klazen**  
**Matthew J Kokot**

**carrie.tandler@kobrekim.com**  
**jef.klazen@kobrekim.com**  
**matthew.kokot@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	Executive Compensation & Employee Benefits	Pharmaceutical Antitrust
Advertising & Marketing	Financial Services Litigation	Ports & Terminals
Air Transport	Fintech	Private Antitrust Litigation
Anti-Corruption Regulation	Foreign Investment Review	Private Banking & Wealth Management
Anti-Money Laundering	Franchise	Private Client
Arbitration	Fund Management	Private Equity
Asset Recovery	Gas Regulation	Product Liability
Aviation Finance & Leasing	Government Investigations	Product Recall
Banking Regulation	Healthcare Enforcement & Litigation	Project Finance
Cartel Regulation	High-Yield Debt	Public-Private Partnerships
Class Actions	Initial Public Offerings	Public Procurement
Commercial Contracts	Insurance & Reinsurance	Real Estate
Construction	Insurance Litigation	Restructuring & Insolvency
Copyright	Intellectual Property & Antitrust	Right of Publicity
Corporate Governance	Investment Treaty Arbitration	Securities Finance
Corporate Immigration	Islamic Finance & Markets	Securities Litigation
Cybersecurity	Labour & Employment	Shareholder Activism & Engagement
Data Protection & Privacy	Legal Privilege & Professional Secrecy	Ship Finance
Debt Capital Markets	Licensing	Shipbuilding
Dispute Resolution	Life Sciences	Shipping
Distribution & Agency	Loans & Secured Financing	State Aid
Domains & Domain Names	Mediation	Structured Finance & Securitisation
Dominance	Merger Control	Tax Controversy
e-Commerce	Mergers & Acquisitions	Tax on Inbound Investment
Electricity Regulation	Mining	Telecoms & Media
Energy Disputes	Oil Regulation	Trade & Customs
Enforcement of Foreign Judgments	Outsourcing	Trademarks
Environment & Climate Regulation	Patents	Transfer Pricing
Equity Derivatives	Pensions & Retirement Plans	Vertical Agreements

Also available digitally



# Online

[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



Asset Recovery  
ISSN 2051-0489



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



Official Partner of the Latin American  
Corporate Counsel Association



Strategic Research Sponsor of the  
ABA Section of International Law