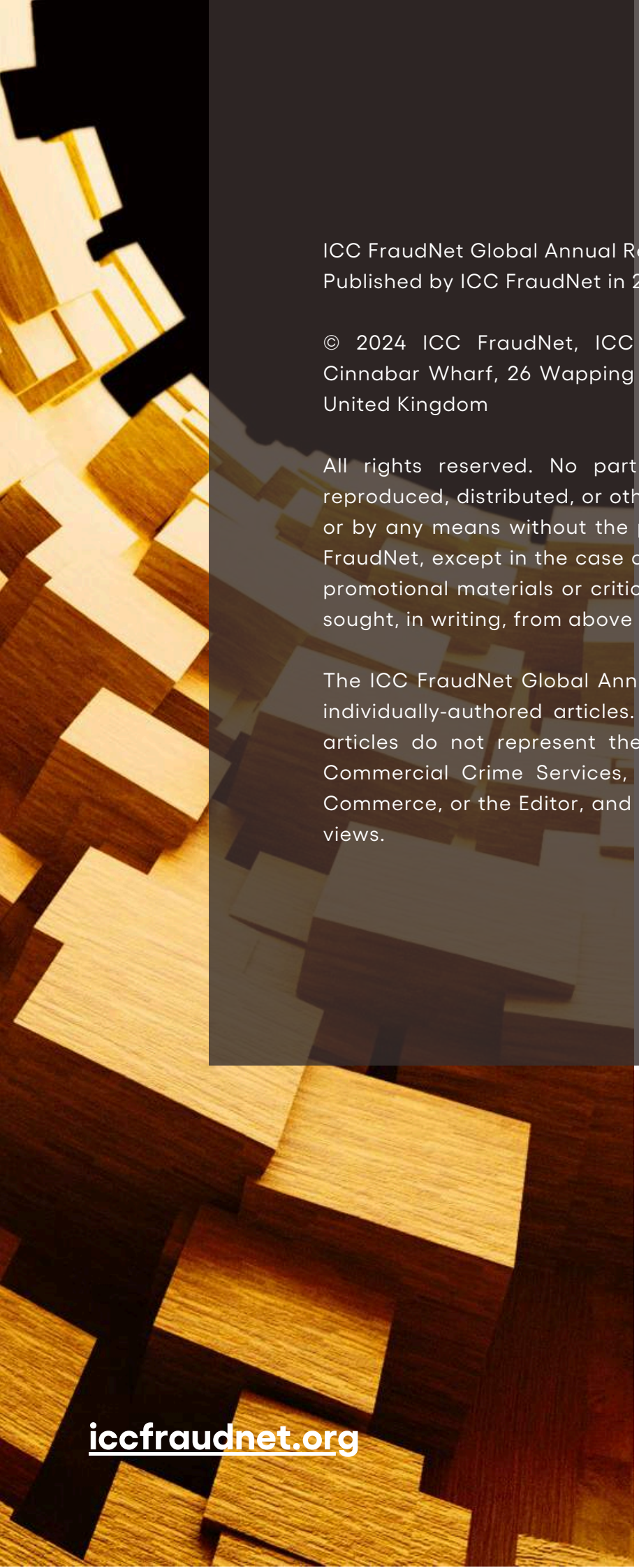
ICC FraudNet
Global Annual Report 2024

FRAUD FRONTIERS: EMERGING THREATS & INNOVATIVE SOLUTIONS IN FRAUD & ASSET RECOVERY

EDITED BY
DR DOMINIC THOMAS-JAMES

ICC FraudNet



ICC FraudNet Global Annual Report 2024
Published by ICC FraudNet in 2024 on www.iccfraudnet.org

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ICC FraudNet

About ICC FraudNet

ICC FraudNet was founded in 2004 by several leading asset recovery lawyers in collaboration with ICC Commercial Crime Services, the anti-crime arm of the Paris based International Chamber of Commerce.

ICC FraudNet is an international network of independent lawyers who are the leading civil asset recovery specialists in their country. Using sophisticated investigation and forensic tools and cutting-edge civil procedures, ICC FraudNet members have recovered billions of dollars for victims of some of the world's largest and most sophisticated global frauds involving insurance, commodities, banking, grand corruption, crypto and bankruptcy & insolvency.

ICC Commercial Crime Services
ICC FraudNet
Cinnabar Wharf
26 Wapping High Street
London, E1W 1NG
United Kingdom

www.iccfraudnet.org
www.icc-ccs.org

iccfraudnet.org

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Acknowledgments

The Editor wishes to acknowledge the following individuals who have been of great support and valued assistance in the publication of the fourth ICC FraudNet Global Annual Report. First, special thanks go to Peter Lowe, Executive Secretary of ICC FraudNet who has provided steadfast support and ongoing enthusiasm for this initiative from its conception. The Editor wishes to pay tribute to Peter's incredible contribution and service to the network as Executive Secretary. His ability to bring together so many likeminded colleagues from across the globe, over many decades, is a unique contribution to this field and has been, and continues to be, so valued by all in this network. On the Report, his guidance has been particularly valued throughout this fourth edition of the publication.

Thanks also go to outgoing Co-Executive Directors, Kate McMahon and Rodrigo Callejas, as well as to incoming Co-Executive Directors Danny Ong and Aimee Prieto; for their continued support in the preparation of this report.

Finally, to the authors of the 2024 Global Annual Report: your thought leadership and unique perspectives herein make this publication the valued research and practical resource that it is; both for those within ICC FraudNet and the Report's global readership. Many Members and Strategic Partners have worked with co-authors and other professional collaborators in the research, preparation and writing of papers, and this has contributed significantly to the originality and practical nature of the insights provided.

The Editor wishes also to acknowledge and thank the authors' staff and colleagues for their support and liaison which has helped enormously. Gratitude also to ICC FraudNet's Director of Marketing and Communications, Priya Jethwa, for her promotional efforts and assistance in the preparation of the Report and ensuring that the publication has global reach through ICC FraudNet's online and other networks.

Thanks also goes to ICC Commercial Crime Services and the entire ICC FraudNet staff for their support of this initiative.

Executive Secretary's Foreword

Peter Lowe

August 2024

Peter Lowe

So much has happened over the past twenty years since ICC FraudNet was first founded. In 2004 we were just a tiny handful of international lawyers on a mission to assist victims of fraud recover their assets. Despite starting from small beginnings, the network grew rapidly and has had a truly incredible journey.

In two decades ICC FraudNet has become the leading and best-known global network in its field with more than one hundred members in every corner of the world. Reaching this twentieth anniversary is an important landmark in the history of the network and a celebration of all that we have achieved.
The success of the network can not only be measured by the huge sums that it has recovered and restored to its victims, but also in the sheer calibre and talent of the members and Strategic Partners that it has attracted to its ranks.

ICC FraudNet has also become the leading thought leader in its field as this latest Global Annual Report testifies. Here you can find a wide range of fascinating and diverse articles on a whole gamut of emerging threats and innovative solutions - from artificial intelligence to ransomware attacks and Ponzi's to Fake President frauds.

Can I pay tribute to all those who have been on the networks journey over the past 20 years especially our founder members who have been with us from the outset. We would not though have achieved what we have without the support of our wonderful Strategic Partners, Grant Thornton, BDO, FRA, Mintz Group, V2, Greylist Trace, Highgate, 4 New Square and Drumcliffe and owe them a huge debt of gratitude.
I would also like to thank all our Advisory Board members and committee members and Executive Directors both past and present, whose tireless energy and commitment never fails to impress me. You have done so much to make the network what it has become!

Special thanks also to Danny Ong and Aimee Prieto our current Co-Executive Directors for all their support and wisdom, especially as they now have the task of charting the direction of the network into the future.

Finally, this Global Annual Report would not be what it is without the incredible amount of work that our Director of Publications, Dr Dominic Thomas-James has devoted to it and the assistance provided by Priya Jethwa, our Director of Marketing and Communications in finalising it and promoting it. I can't thank you both enough for all the work you have put in to making this report the undoubted success I am sure it will become.

I have no doubt that ICC FraudNet faces a bright and exciting future as it moves into its third decade, and it could not be better served and resourced.
Floreat FraudNet!

Peter Lowe
Executive Secretary, ICC FraudNet

Editor's Summary

Dr Dominic Thomas-James

August 2024

Dr Dominic Thomas-James

The Fourth Edition of the ICC FraudNet Global Annual Report takes as its theme Fraud Frontiers: Emerging Threats and Innovative Solutions in Fraud and Asset Recovery. It builds on the network's growing body of original scholarly and practitioner contributions in previous Reports since 2021 and provides unique cutting-edge perspectives from the world's leading fraud and asset recovery lawyers' network.

Fraud is said to be, at least in the UK, the crime we are all most likely to fall victim to. This was indeed the backdrop to the inaugural Global Fraud Summit held in London in March 2024. In an age where education about fraud risks is, or should be, highly prominent – this stark reality about its prevalence reminds us of the challenge in understanding fraud risks, the characteristics and methods of perpetrators, how to mitigate against fraud risks, and ultimately how to best navigate the complex world of asset recovery.

With continuing conflicts and global tensions, as well as economic and political uncertainties, the backdrop to the 2024 Report is one beset by great volatility. As we saw with the global Covid-19 health pandemic, the relationship between such volatile circumstances and fraud continues to expand in scope and effect. The 2024 Report therefore comes at an important time, making a contribution to learning and knowledge which, it is hoped, shall be of great import as practitioners navigate these complex tides.

The 2024 Report comprises some 25 original papers authored by 42 authors from some 20 jurisdictions. Many of the network have been, or are actively, involved in some of the highest profile and complex fraud and asset recovery cases. Their experience and insights make for highly instructive and informative reading.

The individually-authored papers in this Report aim to provide practically-relevant perspectives and therefore be of use and interest to the wider FraudNet and ICC networks, Strategic Partners, professional collaborators and colleagues, as well as current and future clients. In committing this contribution to the field, the Report seeks to provide greater understanding of emerging fraud and asset recovery challenges, as well as leading insights on best practices drawn from experience. It hopes to also offer solutions and innovations to tackle fraud and the challenges of asset recovery in different jurisdictions, and to help shape understanding and build knowledge in this increasingly complex, transnational subject matter.

The Report addresses important themes including, but not limited to: the process of securing assets in fraud-based arbitrations; sanctions compliance and complexities of sanctions frameworks; the law and practice relating to secrecy orders; jurisdiction-specific insight on enforcement of foreign judgments; developments in anti-money laundering and counterterrorism financing standards; analyses of cybercrime and ransomware attacks; the role of law enforcement in asset tracing investigations; cryptocurrency fraud and virtual assets in asset recovery; use of artificial intelligence in investigations; as well as the widening scope of fraud legislation relevant to corporations. The report also offers expert perspectives on recent cases and the impact these are likely to have in the field.

As with previous Global Annual Reports, the 2024 Report demonstrates the breadth of expertise in the ICC FraudNet network, as well as its international scope and reach. Contributing to the debate in the above topics is, perhaps, more important than ever given the transnational nature of fraud, its impact and its aftermath. We hope that readers of the 2024 Global Annual Report find those insights provided by FraudNet members, strategic partners and their professional collaborators to be insightful. It is hoped that the Report, much like its previous editions, continues to serve as a useful research and practice resource on a variety of interrelated subjects within this field.

Dr Dominic Thomas-James
Consultant and Director of Publications
ICC FraudNet Global Annual Report 2024

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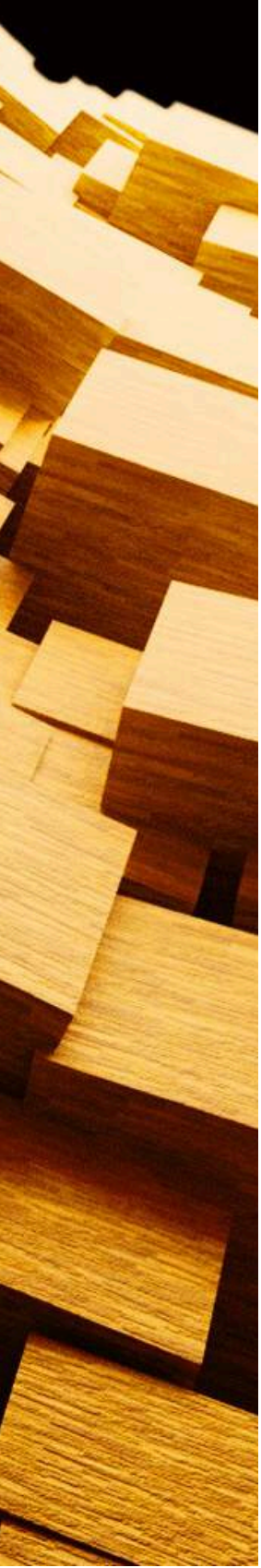

AUTHORS

NADA ABDELSATER-ABUSAMRA | ASAS Law
nada.abdelsater@asaslaw.com

Nada Abdelsater is an international corporate and finance lawyer admitted to the Courts of New York and Beirut. She is the founding managing partner of ASAS Law, a Lebanese law firm with activities across the Middle East and extending to Europe, USA and commonwealth countries. Nada also has a strong practice in international cross border transactions, litigation, and arbitration including notably white-collar crimes, as well as complex commercial litigation, confiscation, freezing orders, multi-faceted investigation processes and asset recovery proceedings, as well as cross border enforcement of judgements and arbitral awards. Nada handles complex transactions including financial engineering, M&A, oil and gas, PPP, corporate and financial transactions and corporate governance restructuring. Nada is continuously recognized as a leading corporate lawyer by Chambers Global, Who's Who Legal, IFLR, Legal 500 and other prestigious international legal guides. Nada is the recipient of the Corporate Governance Rising Star Award from Yale University. She holds a Masters in Law from Harvard Law School. She also holds a Lebanese and French Master Law degree from University Saint Joseph in Beirut, a Bachelor of Science from the American University of Beirut and has completed the M.A coursework in International Affairs at the Lebanese American University.

SEAN ANDERSON | Mintz Group
SAnderson@mintzgroup.com

Sean Anderson is a director at the Mintz Group, heads the Mexico City office and works closely with the Mintz Group's Washington D.C. office. He works in our Latin American practice and has experience conducting complex litigation, integrity due diligence and asset tracing investigations. Sean has conducted numerous investigations throughout Latin America, with a particular emphasis on the infrastructure, energy and financial services sectors. Recently, he undertook comprehensive pre-deal investigations into companies in Honduras, Guatemala and Mexico, which uncovered ties to organized crime, large-scale tax fraud and money-laundering. Sean has also led internal investigations into contract fraud and bribery at a large mining company and undisclosed conflicts of interest leading to multimillion-dollar distressed loans at a multinational financial institution. He also manages cryptocurrency-related investigations on behalf of clients involved in multimillion-dollar lawsuits. Sean is fluent in English, Spanish and proficient in French.

RÉKA BALI | Forgó Damjanovic & Partners
balir@fdlaw.hu

Réka Bali is an attorney-at-law at Forgó, Damjanovic and Partners Law Firm. She is specialised in litigation and commercial law. She works on several complex litigation cases which require comprehensive approach and deep understanding both of law and practice in the area of commercial relations. She has extensive experience in fake president fraud cases.

BOBBY BANSON | Robert Smith Law Group
bobby@robertsmithlawgroup.com

Bobby Banson is Founding Partner, Robert Smith Law Group – a boutique law firm in the Central Business District of Accra, Ghana. He heads the firm's practice in Alternative Dispute Resolution, Investment Advice and Corporate Governance. He has acted as Counsel in both Domestic and International Arbitration matters. He has provided legal services to several multinational Companies doing business across the West African sub region; particularly in due diligence of prospective investment opportunities. He has wide practice experience including Corporate, Investment, Real Estate and Dispute Resolution. He was educated at Adisadel College, the Kwame Nkrumah University of Science and Technology (KNUST), Kumasi-Ghana for his LLB before proceeding to the Ghana School of Law in Accra-Ghana for his Professional Qualification in Law (BL) where he graduated first in the Law of Taxation. He has an LLM in International Business Law from the University of Brussels, a Certificate in Oil & Gas Contracting, a Certificate in Advanced Studies in Arbitration, and a Diploma in Financial Management. He has attended courses at Harvard University, as well as the Africa International Legal Awareness (AILA) Conferences. As a Fellow of the Chartered Institute of Arbitrators (FCIARB), he has spoken at various conferences organized by CIArb. across the globe and AILA, and participated extensively in SOAS conferences on Arbitration in Africa. He teaches Civil Procedure at the Ghana School of Law and has published several legal articles. He is the author of the book "Civil Litigation in the High Court of Ghana".

JOANNA BOGDAŃSKA | KW Kruk and Partners
Joanna.bogdanska@legalkw.pl

Joanna Bogdańska is an Attorney at law, and Partner at KW Kruk and Partners Law Firm, Poland. Joanna provides comprehensive legal advice and represents clients in the field of broadly understood economic crime, corruption and fraud leading to exposing business entities to losses. Joanna participates in conducting audits, including due diligence of business partners, individual transactions and adopted procedures and solutions in terms of compliance thereof with the law. Additionally, Joanna specializes in transaction advisory, with particular focus on mergers and acquisitions. Advises in complex restructuring projects of companies, including mergers, transformations and divisions.

NICHOLAS BROOMFIELD | 4 New Square
n.broomfield@4newsquare.com

Nick has a broad commercial practice that includes: the law of trusts, property and restitution; commercial, financial and banking disputes; insurance and professional liability claims; and civil fraud. He is regularly instructed in claims involving the misappropriation of trust property, fiduciary duties, questions of unjust enrichment, allegations fraud and asset tracing and recovery. Nick is an experienced trial and appellate advocate with a reputation for his excellent legal analysis and he is often instructed in high-profile, complex, litigation either on his own or as part of a larger counsel team. His notable cases include appearing as junior counsel in the Supreme Court for the successful parties in both *Re North East Property Buyers* and *Matthew v Sedman* and in the Court of Appeal for the successful parties in both *Mortgage Express v Lambert* and *Kuznetsov v Amazon Services Europe Sarl.* Nick is ranked in the legal directories as a leading junior in the fields of Professional Negligence (Chambers & Partners, Legal 500 and Who's Who Legal) and Insurance and Reinsurance (Legal 500), where he has been described in recent years as: *"a star of litigation"*, "*exceptionally bright, tactically astute, very easy to work with [and] great with clients*", "*ferociously bright as well as very hard-working"*, *"[having] excellent analysis and strategic insight"* and "*absolutely unflappable, an extremely calming presence for the clients and legal team. Thinking three or four stages into the future, he can see the chess pieces moving ahead of him.*"

DIANE BUGEJA | Camilleri Preziosi Advocates
diane.bugeja@camilleripreziosi.com

Diane Bugeja practices primarily in financial services law, financial regulation and anti-money laundering regulation, providing advice to local and overseas clients on the impact of the current and forthcoming regulatory regime on their business models. Diane also advises clients on the regulatory aspects of a wide range of transactions, including licensing-related matters, capital markets initiatives and on-going liaison with regulatory authorities more broadly. Diane joined the firm as an Associate in 2016 and was promoted to Senior Associate in January 2017. She was previously a risk and regulatory consultant at a Big Four audit firm, working in Malta and in London, and subsequently joined the enforcement departments of the UK and Maltese financial services regulators. Diane successfully completed her PhD in Law in 2017 at King's College London. She is a visiting lecturer at the University of Malta and is regularly invited to speak at conferences and deliver seminars on various aspects of financial services law and financial crime.

IAN CASEWELL | Mintz Group
ICasewell@mintzgroup.com

Ian Casewell is a partner who heads the Mintz Group's London office and co-heads the firm's global disputes practice. He specialises in providing investigative support to large-scale disputes and fraud matters, and has been helping creditors enforce judgments in hundreds of cases over the past 20 years. Working for individuals, companies and governments, his cases are invariably multi-layered and cross-

border. Ian and his team have particular expertise in areas they have found crucial to asset tracing and recovery, including: Banking, Offshore Structures, Shipping, Real Estate, Private Aircraft and Internet Forensics. Ian has worked in corporate investigations for two decades. He previously worked at Europol, where he ran international investigations into organised crime. In addition to his operational work, Ian was lead analyst for all computer crime-related activities within the European Union relating to Europol. In this role he was responsible for the establishment of an EU-wide strategic intelligence group comprised of members of the EU's computer crime units, producing the first EU-wide strategic assessment on computer-related crime within the Union. It was published and disseminated to all Member States. Ian also has experience working at the U.K. Government's Asset Recovery Agency and West Mercia Constabulary, where he was engaged in crime pattern analysis and the support of criminal investigations.

TYLA LEE COERTZEN | Primerio
t.leecoertzen@primerio.international

Tyla has assisted the Primerio team in various matters and has experience in matters relating to commercial and competition law, litigation, white-collar crime and regulatory work. Tyla completed her studies at the University of Pretoria and the University of the Witwatersrand. In addition to her practice areas, Tyla is a contributor to *Africanantitrust* and *Africanantifraud* and regularly assists the Primerio team with various advocacy initiatives.

MARK CULLEN | 4 New Square
m.cullen@4newsquare.com

Mark Cullen is a leading junior specialising in civil fraud, offshore and commercial work. As well as being called to the Bar of England and Wales, he has been admitted as an Attorney at Law in the Cayman Islands and as a Barrister of the Eastern Caribbean Supreme Court (British Virgin Islands).

MICHAEL-JAMES CURRIE | Primerio
m.currie@primerio.international

Michael-James Currie is Director of Primerio. Michael's expertise includes complex commercial litigation (including cross border) and dispute resolution before the superior courts including arbitration. Michael is an active member of the ICC's Fraudnet, the world's leading asset recovery group, Michael-James is well versed with the anti-corruption laws in Southern Africa as well as the UK Bribery Act and the Foreign Corrupt Practices Act. Michael-James' practice in this area includes conducting internal investigations, compliance, litigation and asset recovery. Mike currently serves as the International Bar Association Anti-Corruption Committee's regional representative for Africa.

NICK DUNNE | Walkers
nick.dunne@walkersglobal.com

Nick Dunne joined Walkers' Cayman Islands office in 2008 and is a Partner in the firm's top-tier Insolvency & Dispute Resolution Group. His practice focuses on major and complex international and cross-border commercial disputes and arbitrations with a particular interest in fraud and asset recovery. Nick frequently appears before the Grand Court and the Cayman Islands Court of Appeal, and also has experience of appeals to the Judicial Committee of the Privy Council. Nick has also been listed as a recommended lawyer in the leading independent legal directories, including Chambers Global, Legal 500 and Who's Who Legal.

MEREDITH FITZPATRICK | Forensic Risk Alliance
mfitzpatrick@forensicrisk.com

Meredith Fitzpatrick is the Director of Cryptocurrency Investigations and Compliance in the Washington, DC office of Forensic Risk Alliance. Prior to joining Forensic Risk Alliance, Meredith was a Special Agent in the Federal Bureau of Investigation (FBI) where she investigated cryptocurrency money laundering and cyber matters. She is a subject matter expert in the investigation of cryptocurrency enabled money laundering and computer intrusion incidents, including Russian state-sponsored computer intrusions, non-compliant cryptocurrency exchanges, financially motivated cryptocurrency fraud schemes, cryptocurrency market manipulation, ransomware and darknet marketplaces. At the FBI she was an early member of the FBI's Virtual Currency Response Team, where she provided subject matter expertise for the FBI's largest and most high-profile cryptocurrency money laundering cases and provided hands-on cryptocurrency tracing training to FBI agents, prosecutors, and law enforcement partners. Prior to becoming an FBI agent, she was a software engineer in the US intelligence community.

WILLIAM FOTHERBY | Meredith Connell
William.fotherby@mc.co.nz

William Fotherby is a Partner at Meredith Connell in New Zealand. He is a trusted advisor to a wide range of public-and private-sector clients. He acts in cases involving suspected fraud and whistleblowing, money laundering and sanctions, contractual disputes, breaches of directors' duties, and employment obligations. He has acted for national governments, financial institutions, large multinational companies, and high-net-worth individuals. William has made hundreds of appearances, at every level of the New Zealand court system. He holds a Master of Laws degree from the University of Cambridge, with first-class honours. He previously worked as an attorney in the London office of an American law firm, in one of the world's best white-collar-crime practices. In 2017, William was admitted to the English Bar and is a member of Middle Temple. In 2023, he was admitted to the bar of the Pitcairn Islands. He is a former editor-in-chief of the Auckland University Law Review.

OLIVER FREDRICKSON | Edmonds Marshall McMahon
oliverfredrickson@emmlegal.com

Oliver joined Edmonds Marshall McMahon in November 2023. Oliver was admitted as a Barrister and Solicitor of the High Court of New Zealand in 2020 and then completed a two-year judicial clerkship for the Chief District Court Judge in New Zealand. He then moved to New York and obtained a Master of Laws (Highest Honours) from Columbia University, finishing in the top 2% of his graduating class. Oliver has a keen interest in both criminal and commercial disputes. In New Zealand, he has acted as junior counsel on cases spanning the full spectrum of criminal offending and at all levels of the New Zealand courts. Since arriving in London, Oliver has worked on a range of commercial matters, including representing a Respondent in the largest proceedings ever brought before the UK Takeover Panel. Beyond his practice, Oliver also enjoys academic legal writing. He has published 16 academic articles on a variety of topics in domestic and international legal journals. In December 2023, Oliver was awarded the Cleary Memorial Prize, an annual award given to a New Zealand barrister or solicitor who shows the most future promise in the legal profession.

SERENA K. GHANIMEH | ASAS Law
serena.ghanimeh@asaslaw.com

Serena Ghanimeh is partner at ASAS LAW, a Lebanese law firm with activities across the Middle East and extending to Europe, USA and commonwealth countries. Her practice focuses on contracts, corporate law, and international maritime law. She also handles criminal white-collar litigation, construction arbitration and AI. Serena is ranked by Chambers Global as a top corporate lawyer. She holds a Master of French and Lebanese Law degree from Saint Joseph University, Beirut. She is fluent in English, French, Arabic and Spanish.

JOHN GREENFIELD | Carey Olsen
john.greenfield@careyolsen.com

John Greenfield is a Consultant in the dispute resolution and litigation group in Guernsey where he was previously senior partner. John undertakes the complete range of major litigation and advocacy work including asset tracing, multijurisdictional disputes and commercial and trust litigation. John has been counsel in many major litigation cases before the Royal Court of Guernsey and the Guernsey Court of Appeal and is one of the few Guernsey advocates to have appeared as counsel in the Privy Council. John was a member of the Committee that completely overhauled Guernsey's civil procedure in 2008 and is now part of the new review Committee in 2021. He has been the Guernsey member of the UK Fraud Advisory Panel since 2001.

CRAIG HESCHUK | Greylist Trace
craig.heschuk@greylisttrace.com

Craig Heschuk is Executive Vice President at Greylist Trace. Craig is a legal and management professional with 30 years' experience in commercial project development. He was admitted to the Canadian Bar Association in 1990. His career spans dozens of countries starting in the early 1990's when he was advising a major Canadian energy company on international projects. His subsequent experience includes 17 years living abroad with his family in Abu Dhabi, Singapore, Doha and Quito. His career has centered on corporate/commercial work, mainly in the development of major infrastructure projects in the energy, real estate and manufacturing sectors. Most notably he has acted as General Counsel to companies involved in upstream oil & gas development in South East Asia and utility-scale solar and wind power projects in Europe and elsewhere.

DAVID JONES | Carey Olsen
david.jones@careyolsen.com

David Jones is a Partner and head of the restructuring and insolvency team in Guernsey. He advises on complex restructurings and formal insolvencies in contentious, non-contentious and multijurisdictional matters. David has been involved in many of the largest insolvencies involving Guernsey entities, ranging from investment funds to global retailers. He is able to assist lenders in respect of the taking and enforcement of all forms of security. He regularly advises the boards of distressed entities and has extensive experience acting for office holders on all aspects of their appointments including the tracing and recovery of assets. David is a member of the Insolvency Lawyers Association and R3 and sits on the young members Committee of INSOL International. David lectures on INSOL's Foundation Certificate in International Insolvency and is part of the working group tasked with updating and revising Guernsey's insolvency laws. He has also been appointed as a member of Guernsey's first ever Insolvency Rules Committee (IRC).

HIROYUKI KANAE | Anderson Mori & Tomotsune
hiroyuki.kanae@amt-law.com

Hiroyuki Kanae focuses on corporate law, including mergers and acquisitions (domestic and international), corporate reorganizations, joint ventures, labor and employment law (including dispute settlements), corporate governance, IP license agreements, and real estate transactions. He also advises on commercial litigation matters, including domestic and cross-border litigations involving major Japanese and foreign companies. He represents major Japanese manufacturing companies, foreign financial institutions and high tech companies, as well as private equity funds. He has been advising on the global development projects mainly for the major Japanese companies investing in North America, Europe and Asia pacific regions and has more than 30 year experiences in the cross-border M&A. In recent years, he has completed M&As and joint ventures not only in Europe and the North America but also in Asian and pacific rim developing countries by collaborating with rich overseas networks in the areas of semi-conductor, high tech, nano-tech,

aviation and space, pharmaceutical, medical equipment and software industries. Through experience of a member of the audit and supervisory board of a major logistic company that has been seeking the global strategy, he advises on the real need of management strategy foreseeing the post-merger integration.

MARTIN KENNEY | Martin Kenney & Co (MKS)
mkenney@mksolicitors.com

Martin Kenney is one of the world's leading asset recovery lawyers, specialising in multi-jurisdictional economic crime and international serious fraud. He has acted for international banks, insurance companies, individual investors, and other private and governmental institutions. Based in the British Virgin Islands (BVI), Martin is founder and Head of Firm at Martin Kenney & Co (MKS). The firm's work lies at the intersection of cross-border insolvency, creditors 'rights and complex commercial litigation – *WIRED* has styled MKS as among "the world's sharpest fraudbusters". Leading a team of lawyers, investigators and forensic accountants, Martin is widely regarded as a ground-breaker in the use of pre-emptive remedies, multi-disciplinary teams and professional litigation funding in response to global economic crime, uprooting bank secrets and freezing hidden assets in multiple jurisdictions. He is a practising solicitor advocate of the senior courts of England & Wales and the Eastern Caribbean at the BVI and at St Vincent & the Grenadines, and a licensed foreign legal consultant in the state of New York. He is also a Visiting Professor at the University of Central Lancashire School of Justice, and ranked among the world's leading asset recovery lawyers by Chambers and Partners, plus is a Who's Who Legal "global elite" Thought Leader.

MATTHIAS KLEINSASSER | Winstead
mkleinsasser@winstead.com

Matthias Kleinsasser, Of Counsel, is a member of Winstead's Business Litigation, White-Collar Defense, and Business Restructuring/Bankruptcy practice groups. He regularly represents officers, directors, and other clients involved in private securities litigation, as well as in investigations brought by regulatory agencies such as the Securities and Exchange Commission and the FDIC. Matthias diligently represents clients in almost any kind of contested matter, be it a state court receivership, class action, AAA arbitration, inverse condemnation suite, or other dispute. He also frequently advises firm transactional clients with respect to contract negotiations and business disputes, particularly in the technology and healthcare fields. Matthias has significant fraudulent transfer litigation experience. He has advised foreign clients on asset recovery procedures under US law, as well as represented debtors, creditors, and trustees in virtually all aspects of business bankruptcy proceedings, including contested asset sales and debtor-in-possession financing.

KATE MCMAHON | Edmonds Marshall McMahon
katemcmahon@emmlegal.com

Kate McMahon is a founding Partner of Edmonds Marshall McMahon, the UK's premier private prosecution firm, specialising in high value fraud. She specialises in serious, international fraud, asset recovery, large scale investigations and perverting the course of justice proceedings. She is typically instructed by corporates, hedge funds and HNW's in commercial fraud matters. Prior to founding Edmonds Marshall McMahon, Kate prosecuted for the Serious Fraud Office (SFO) where she worked as a senior lawyer on some of the UK's largest criminal prosecutions, including the "Innospec" case. This was the first global settlement in the UK and involved systemic corruption by a UK/USA company in Iraq and Indonesia. The case resulted in a US$12.7 million fine in the UK and a US$14.1 million fine in the USA and successful prosecutions of the Company Directors and employees. Kate has also prosecuted a number of high-profile, high-value international "boiler room" frauds operating across a number of countries, involving thousands of victims. Kate also has significant experience in the area of confiscation and has also successfully conducted many large-scale fraud trials, including the famous "transit thefts" of pharmaceuticals in transit from EU factories to wholesale dealers in the UK. Kate is known for her incisive analysis and strategic vision, having had conduct of large fraud, corruption and trademark cases. She is highly regarded by her clients and has a reputation for being extremely determined and driven in all her cases. She has been described as an "outstanding prosecutor" who provides "intellectual leadership". She is praised for her "high intelligence, tactical acumen and great client care skills."

PAUL MITCHELL KC | 4 New Square
P.Mitchell@4newsquare.com

Paul Mitchell KC has a broad commercial practice, with significant expertise in claims involving the negligence or fraud of lawyers and company directors (frequently in the context of private or family wealth); obtaining injunctive relief; claims involving the alleged abuse of the legal process such as malicious prosecution; claims involving sanctions; claims against KCs; and claims with a Russian, Italian or French element.

HIDETAKA MIYAKE | Anderson Mori & Tomotsune
hidetaka.miyake@amt-law.com

Hidetaka Miyake is a partner at Anderson Mori & Tomotsune, and one of the leading lawyers in the fields of government investigations and crisis management in Japan. By leveraging his background as a former public prosecutor, a former senior investigator at the Securities and Exchange Surveillance Commission and a former forensic senior manager of a Big Four accounting firm, he focuses on handling internal or independent investigations for listed companies to address complex accounting frauds. He also handles crisis management for financial institutions and criminal defense for non-Japanese clients. Since joining Anderson

Mori & Tomotsune in 2017, he has been involved in accounting fraud investigations for more than 12 Japanese listed companies.

PETER MIZZI | Camilleri Preziosi Advocates
peter.mizzi@camilleripreziosi.com

Peter Mizzi works as an advisor at Camilleri Preziosi advising primarily in financial crime and regulatory matters. He has over three years of experience in issues relating to anti-money laundering, terrorist financing, bribery and corruption, fraud, and sanctions. He regularly advises financial institutions and other corporates with their policies relating to financial crime and conducts reviews of client files. Peter also delivers trainings on anti-money laundering and terrorist financing. He has also assisted regulators on the development and implementation of regulations on financial crime issues. Peter holds an International Diploma in Anti-Money Laundering from the International Compliance Association (ICA) as well as a Bachelor of Science degree in Business Administration with International Business from the University of London. Before joining Camilleri Preziosi, Peter worked at a Big Four audit firm in Malta as a senior compliance associate and was extensively involved in one of the largest local remediation projects.

YEHIA MOKHTAR | Mintz Group
ymokhtar@mintzgroup.com

Yehia is VP, Head of Product based in Texas. Yehia works closely on developing the Mintz Group's technology strategies and solutions. Yehia previously focused on investigations in the Middle East, including his native Egypt. He has several years' experience conducting due diligence investigations, business intelligence research, and political and reputational risk assessments. Yehia received a B.A. in International Political Economy and Political Science from the University of Texas at Dallas and speaks Arabic and French.

DINO MURATBEGOVIC | Meredith Connell
dino.muratbegovic@mc.co.nz

Dino Muratbegovic is an Associate at Meredith Connell in New Zealand. His work focuses on arbitration and litigation in a broad range of civil matters, acting for both government and private-sector clients. He is also an intermediate Crown prosecutor, who prosecutes criminal matters under the Crown warrant. Dino began his legal career as a judges' clerk at the Auckland High Court, where he worked on both civil and criminal cases. He then spent three and a half years serving as a Crown prosecutor in South Auckland, where he prosecuted serious crime. Part of his role also involved working on regulatory prosecutions and professional disciplinary matters. Dino left to undertake a Master of Laws (First Class) at the University of Cambridge, before working at a commercial litigation boutique in London. Dino has appeared as sole counsel in the District Court and High Court of New Zealand. He has also appeared as junior counsel in the Court of Appeal.

DANNY ONG | Setia Law
danny.ong@setialaw.com

Danny Ong is Managing Director of Setia Law and specialises in complex international commercial and financial disputes and investigations, as well as cross-border restructuring and insolvency. Danny has led multiple high-stakes cross-border disputes and investigations, across a multitude of industries over the last two decades. He is regularly called upon by financial institutions, private investment funds, and state-owned enterprises, to act in mandates involving complex investments, market misconduct, and distressed situations. He is also known for his expertise in international enforcement, fraud, and financial crime and is recognised amongst the Global Elite as one of 40 Global Thought Leaders in the asset recovery field. With extensive experience in multi-jurisdictional headline restructurings and insolvencies, Danny is recognised as a "standout" in the market. His portfolio includes acting for debtors in the Eagle Hospitality REIT restructuring, and acting for the liquidators of 45 Lehman entities across Asia (ex-Japan), MF Global Singapore, Dynamic Oil Trading (of the OW Bunker Group), and BSI Bank. More recently, Danny has been a pioneer in disputes and managing crises in the blockchain and digital assets space, having led the team that successfully prosecuted the first cryptocurrency claim before the Singapore International Commercial Court, and advising distressed cryptocurrency investment platforms. Danny combines technical excellence with sharp commercial sensibility and creativity in tackling novel legal questions. He is spoken of by clients as "an excellent litigator" and "an outstanding lawyer" who is "adept at tackling unique and challenging issues" and "combining a deep and broad knowledge of the law with a pleasant manner and an ability to switch gears and become a powerful advocate and highly effective cross-examiner". Danny graduated from the National University of Singapore and is admitted to the Singapore Bar as well as the Rolls of Solicitors of the High Courts of Hong Kong and England and Wales.

JOHN OXENHAM | Primerio
j.oxenham@primerio.international

John Oxenham is Co-founding Principal Director of Primerio, John has practised in the global investigations, regulatory, commercial litigation and antitrust fields locally and across the African region for over 20 years. He has been recognized as a leader in his field for many of these. Recently, John represented Business at the OECD as the first regional representative from Africa. John has acted in many of the leading precedent setting global investigation matters. John is the sole South African representative for FraudNet the ICC's Commercial Crime Division.

DC PAGE | V2 Global
dcpage@v2-global.com

As the Managing Partner of *V2 Global*, DC directs worldwide operations. His experience spans a career including US Customs (Homeland Security), Kroll Associates and CEO of Verasys. His focus includes multi-jurisdictional inquiries involving asset tracing, litigation support, anti-money laundering and investigations

for multi-national corporations. With his customs background, DC and his team have assisted many multi-nationals and sovereigns with asset tracking and recovery investigations. Complex cross-border inquiries require the integration of multi-dimensional investigators capable of private-public sector liaison. DC has perfected and replicated such inquiries around the world creating value for corporations and at the same time, results for governments.

SAAMAN POURGHADIRI | 4 New Square
S.Pourghadiri@4newsquare.com

Saaman is a barrister at 4 New Square Chambers. He has a diverse domestic and international practice and is ranked in the leading legal directories in five areas, including: commercial disputes; civil fraud; professional negligence; and banking and financial services.

BARRY ROBINSON | BDO
brobinson@bdo.ie

Barry Robinson leads BDO's Forensic Services team in Ireland and has specialised in the area of forensic accounting and investigations since 2001. He joined BDO in 2019 and is one of Ireland's most experienced forensic accountants. He has worked on some of the most complex and high-profile forensic cases in Ireland. He has given evidence in Court and provided his expert opinions at mediations. Barry has written and assisted in the preparation of expert reports for use in legal proceedings in a number of jurisdictions, including the Commercial Court in Ireland, the High Court in Northern Ireland, the UK Royal Courts of Justice and the High Court in the Netherlands. He has attended as an Expert at a large number of complex commercial mediations and has presented his findings at mediation. He has led a number of complex investigations into allegations of misappropriation of assets, false accounting, financial statement fraud and breaches of company law, policies and procedures. He is the co-author of the Chapter on "Corporate Investigations" in the book "White Collar Crime in Ireland: Law and Policy" edited by Dr. Joe McGrath and published by Clarus Press. He is a Guest Lecturer on the Honourable Society of King's Inns Advanced Diploma in Regulatory, Corporate & White-Collar Crime and speaks at conferences and events on the topic of fraud and financial crime. He is a Council member of the Irish Commercial Mediation Association, a position he has held since 2016. He holds a Masters Degree (MSc) in Forensic Accounting and Chartered Accountants Ireland's Diploma in Forensic Accounting. He also holds a Bachelor of Science Degree (BSc) in Accounting with French. He is a Fellow of Chartered Accountants Ireland.

DONALD ANDERSSON SÁEZ SAMANIEGO | MDU Legal
dsaez.mdu@gmail.com

Donald Andersson Sáez Samaniego is an academic and attorney admitted by the Supreme Court of the Republic of Panama. He holds a Bachelor of Laws and Political Sciences with high honors (Cum Laude Charter) from the University of

Panama, and a Master of Laws (International Law, emphasis on Private International Law) at the Complutense University of Madrid, and a Postgraduate Degree in Higher Teaching at the University of the Isthmus. Also, he has a Bachelor in criminalistic and forensics sciences. He is an Associate Lawyer at MDU Legal, and his practice focuses on International Law; Civil law; Commercial law; Insolvency/Bankruptcy (national and crossborder); Corporate law; Assets Recovery and Litigation. Mr. Sáez Samaniego, as expert in Panamanian Law, has served clients in numerous juri sdictions including Switzerland; England; Austria; Singapore; Peru, US, BVI; Brazil; Costa Rica. He has advised several multinational companies.

NICOLE SANDELLS KC | 4 New Square
N.Sandells@4newsquare.com

Nicole's practice in recent years has focused heavily on financial and property law, civil fraud, restitution, trusts, probate and equitable remedies alongside her mainstream professional indemnity work. She has significant experience of unjust enrichment, subrogation, breach of trust and fiduciary duty claims. She is never happier than when finding novel answers to tricky problems. Nicole is described as *'a mega-brain, with encyclopaedic legal knowledge and the ability to cut through complex legal issues with ease' and* '*a master tactician who is exceptionally bright and has a fantastic ability to condense significant evidential information*' (Legal 500). She has also been described as *"exceptionally bright and a ferocious advocate. She gives tactical advice and is a pleasure to work with. Clients speak extremely highly of her." "If you want someone to think outside of the box and really come up with an innovative position, then she's an excellent choice." (Chambers & Partners).* Her practice has given her the opportunity to argue a number of interesting legal points in the English Court of Appeal and Supreme Court as well as in the Eastern Caribbean Supreme Court and the Privy Council, including *Mortgage Express v Filby* (subrogation, unjust enrichment, restitution), *Lloyds TSB Bank plc v Markandan & Uddin* (commercial breach of trust), *Re North East Property Buyers* (overriding interests, trusts), *Mortgage Express v Lambert* (overriding interests, subrogation), *Swynson v Lowick Rose* (subrogation and unjust enrichment) and *In the matter of Stanford International Bank* (unfair prejudice and unjust enrichment in Ponzi schemes). Most of those were, she says, good examples of the kinds of claims advocated in this article.

DANIEL SAOUL KC | 4 New Square
d.saoul@4newsquare.com

Daniel Saoul KC is a leading silk specialising in commercial dispute resolution, civil fraud, banking and finance and related areas of work. He has extensive experience of cross-border fraud cases, both in the English Courts as well as in the British Virgin Islands, Cayman Islands and other offshore jurisdictions.

KELLIE SHERWILL | Carey Olsen
kellie.sherwill@careyolsen.com

Kellie Sherwill is an advocate and associate in the dispute resolution and litigation team at Carey Olsen in Guernsey. She advises local and international clients on a wide range of contentious and non-contentious disputes, with a particular focus on commercial dispute resolution, contentious and semi-contentious trust matters and banking and financial services litigation. Kellie was a awarded a distinction in the ICA Compliance Diploma and has a keen interest in compliance, corporate governance and financial crime including regulatory investigations and fraud and asset tracing claims. Kellie was called as a barrister of England and Wales in 2016, following which she worked in the Nottingham Legal Advice Centre offering independent legal advice and representation in tribunals to clients. Prior to joining Carey Olsen, Kellie worked for the dispute resolution team of another large offshore law firm in Guernsey. Kellie is a member of The Honourable Society of the Middle Temple, the Guernsey Bar, the Guernsey International Legal Association, ARIES and a STEP affiliate member.

DR ALEXANDER STEIN | Dolus Advisors
alexanderstein@dolusadvisors.com

Alexander Stein is the Founder and Managing Principal of Dolus Advisors, a bespoke consultancy based in New York that advises senior leaders and corporate directors in complex institutional matters with psychological and psycho-social underpinnings. Trained and licensed as a clinical psychoanalyst, he is an expert in human decision-making and behavior and specializes in situations involving leadership, executive succession, ethical governance, and risk. An internationally regarded authority in the psychodynamics of fraud and abuses of power, Dr Stein is frequently engaged in multijurisdictional serious fraud and corruption matters. A related practice area focuses on developing and implementing psycho-socially sophisticated cybersecurity and misconduct risk mitigation programs. And another assists technology innovators and investors in ensuring systems assuming autonomous decision-making functions in human affairs have fidelity to human thought and intention and are ethically and socially responsible by design and in practice. He is a Specialist Collaborator in the Center for Human Centered Cybersecurity (HCC) of The National Institute of Standards and Technology (NIST), and sits on the advisory boards of several technology, cybersecurity, and social mission organizations. Dr Stein is a widely published and cited thought leader and is currently a regular contributor to the *Forbes Leadership Strategy Channel* focusing on the psychology of decision-making and unintended consequences in organizations and society. He is a frequent podcast and webinar guest, on-camera commentator, and keynote speaker and panelist at conferences and corporate events internationally.

STANLEY TAN | Setia Law
stanley.tan@setialaw.com

Stanley Tan is an Associate at Setia Law. Stanley has acted in a broad range of cross-border disputes and investigations where he specialises in the prosecution of claims involving multi-jurisdictional fraud, and the tracing and recovery of digital assets. His experience and familiarity with cryptocurrency and emerging technologies often sees him working together with experts and industry leaders on complex briefs and dealing with novel issues of law. Stanley aspires to develop a specialist advocacy practice that focuses on digital technology, Web 3.0, and disputes in cyberspace. Stanley graduated from the National University of Singapore with First Class Honours. He was awarded the Outstanding Undergraduate Researcher Prize for his research relating to the loss or destruction of evidence. He was also placed on the Directors' List while studying at the Centre for Transnational Legal Studies in London. He represented his university in the Willem C Vis International Commercial Arbitration Moot (Vienna), and was also a finalist in the Dentons Rodyk Moots and a semi-finalist in the Advocacy Cup.

ANDREW TENNANT | Gentium UK
andrew.tennant@gentiumuk.com

Andrew Tennant is an internationally recognised expert in International Money Laundering, consulting on methodologies and typologies undertaken by organised criminal groups in laundering funds. Andrew was a UK-based Law Enforcement officer for over twenty years where he dealt with serious and complex criminality, financial crime, money laundering, fraud, narcotics offences and trafficking-related matters. Andrew has worked internationally alongside Law Enforcement, Customs Teams and the regulated sector in the global fight on illicit financial flows. He has worked for an extended period through the Eastern Caribbean, Bermuda and Latin America. Andrew is the CEO of the company Gentium UK limited who specialise in financial training, legislative writings, regulatory guidance and live investigations. Their global footprint reaches across all continents. Gentium UK Limited are also specialists in the provision of support around crypto currency, be that training and accreditation, track and trace work, civil and criminal prosecutions, forensic support and storage and realisation. Gentium UK hold the contract for storage and realisation of all recovered crypto currency in a number of Countries including the UK and across the Caribbean / American region.

DR DOMINIC THOMAS-JAMES | ICC FraudNet
dominicthomasjames@cantab.net

Dr Dominic Thomas-James is Consultant and Director of Publications for ICC FraudNet. He is a Research Associate at Fitzwilliam College, University of Cambridge and is a Global Justice Fellow at Yale University. He is Tutor in International Relations and International Development at the University of Cambridge Institute of Continuing Education and lectures in International Relations at the Department of Politics and International Studies at the University of Cambridge. Dr Thomas-James is a Barrister at Goldsmith Chambers, London and

is a qualified civil and commercial mediator accredited by the ADR Group. He has consulted to various intergovernmental and international organisations, and is a Senior Organiser of the annual Cambridge International Symposium on Economic Crime at Jesus College, Cambridge. Dr Thomas-James earned his Ph.D and M.Phil from Queens' College, Cambridge and his LL.B from King's College London, before being called to the Bar of England and Wales by the Inner Temple. He is author of the book *Offshore Financial Centres and the Law: Suspect Wealth in British Overseas Territories* (2021, Routledge) – a #1 Amazon New Release in Comparative Law and a Top-50 Amazon Bestseller in International Economic Development – as well as numerous other book chapters, edited texts and journal articles. He sits on the editorial boards of the *Company Lawyer*, the *Journal of Money Laundering Control* and the *Journal of Financial Crime*.

JOE WIELEBINSKI

After 40 years of practice, Joe recently retired from the practice of law but remains active in a variety of legal matters. For more than 30 years, his practice has concentrated on bankruptcy, creditors' rights and financial restructuring, and he is active throughout the United States in a variety of complex restructuring, insolvency and bankruptcy matters and related litigations. Joe has represented numerous victims in matters involving complex financial fraud, theft, money laundering and other white-collar crimes. He has also served as a Federal District Court receiver at the request of the SEC in cases involving national and cross-border fraud schemes. Consistently ranked by Chambers USA as a "Leader in Their Field" since 2005, Joe is a frequent speaker and a prolific author on a broad range of topics involving corporate reorganization, insolvency, financial restructuring, fraud, asset recovery and cross-border insolvencies. Joe is the Executive Director Emeritus of ICC-FraudNet and member of its Advisory Board. He is a member of the International Bar Association, International Association for Asset Recovery, American Bankruptcy Institute and Turnaround Management Association.

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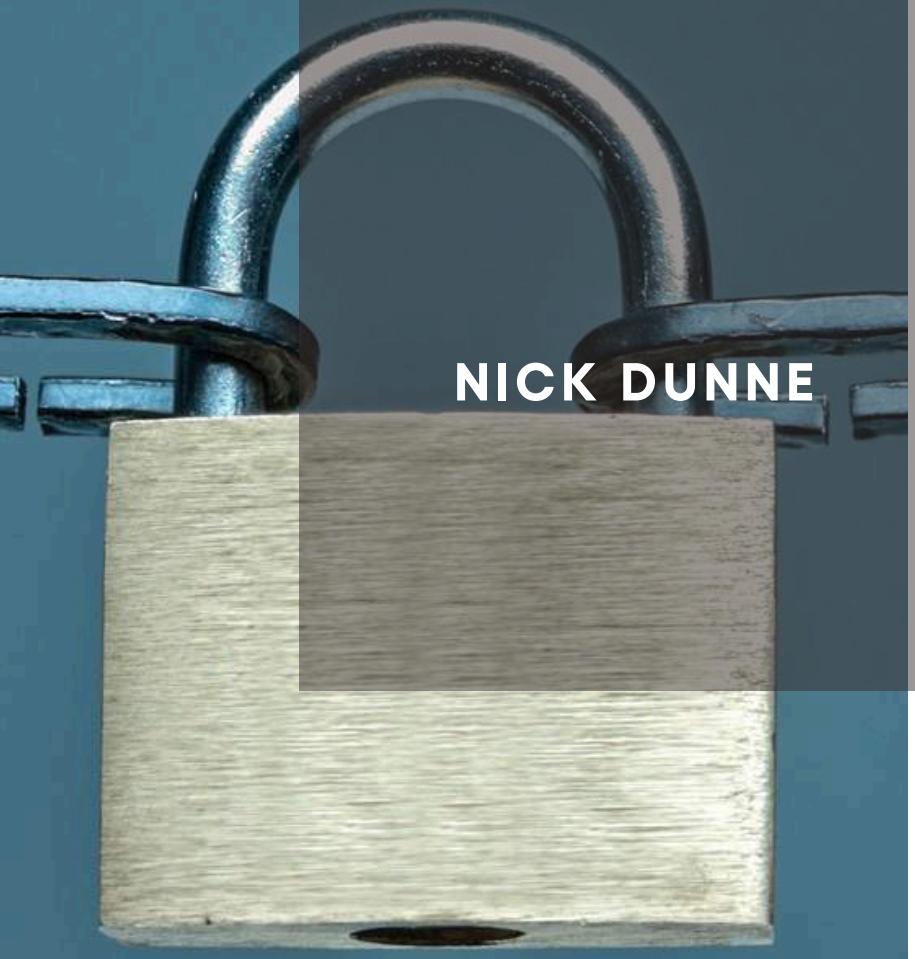
Securing Assets in Fraud-Based Arbitrations



NICK DUNNE

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SECURING ASSETS IN FRAUD-BASED ARBITRATIONS

NICK DUNNE

WALKERS (CAYMAN) LLP

For a number of years, there has been a trend in many business relationships away from court-based dispute resolution and towards arbitration. The reasons underpinning that shift are complex and sometimes inconsistent between different industries, but commonly cited advantages of the arbitral process include flexibility, simplicity, and privacy. All of those are entirely proper commercial considerations.

However, fraud by its very nature is often parasitic upon trends in the legitimate business world, feeding upon them to establish credibility with its victims, and there is no reason to believe that the use of arbitration is any different: actions against fraudsters, and the recovery of stolen assets, are unlikely to remain within the exclusive purview of the courts.

Under the more cynical eye of the asset recovery lawyer, arbitration provisions may take on a rather different complexion, offering clear opportunities to stack the deck in favour of the fraudster. The ability to not only choose the venue for any dispute, but tailor make the rules under which it will be heard could be of real interest to the prospective investment fraudster. A public action before the Grand Court of the Cayman Islands, with wide ranging discovery and exposure to directly enforceable "loser pays" costs rules might seem a rather less attractive proposition than a private arbitration, behind closed doors in some far-flung location, before a tribunal selected (at least in part) by the wrongdoer and exercising limited jurisdiction.

Whilst the interaction between fraud and arbitration is a far broader subject than the scope of this note, one particular concern from an asset recovery perspective will always be the availability of prompt interim relief in order to secure assets. That concern is particularly acute in the context of arbitration given that arbitral awards are not directly effective against third parties, first requiring recognition (where assets are located outside the jurisdiction which is the seat of an arbitration) and then enforcement by a local court. In the context of fraud, the delay between the grant of relief from an arbitral tribunal and obtaining an enforcement order could be fatal, affording a final opportunity for the wrongdoer to place funds out of reach. As such, seeking interim relief directly from Court, where possible, may be a tactically preferable course of action.

In the recent case of Minsheng Vocational Education Company Limited v Leed Education Holding and others (Unreported, 28 March 2024) the Cayman Islands Court of Appeal grappled with the difficult issue of the circumstances in which it was appropriate to seek interim relief from a court in connection with a dispute subject to arbitration without first going to the arbitral tribunal. The Grand Court having granted an injunction against the appellants, they then sought to set that order aside on the primary basis that relief ought to have been sought either from the tribunal, an emergency arbitrator, or the court supervising the arbitration, rather than the Grand Court, notwithstanding that the assets concerned were located in the Cayman Islands.

The Cayman Islands courts have long adopted a pro-arbitration stance, and the power to grant relief in support of foreign arbitrations, including to "secure the amount in dispute" and to "grant an interim injunction or any other interim measure" is enshrined within the Arbitration Act. However, the case put to the Court of Appeal was that the court should adopt an extremely cautious approach to requests for interim relief, to the extent that it should always refuse to make an order unless the applicant had first sought one either from the tribunal or the courts in the seat of the arbitration.

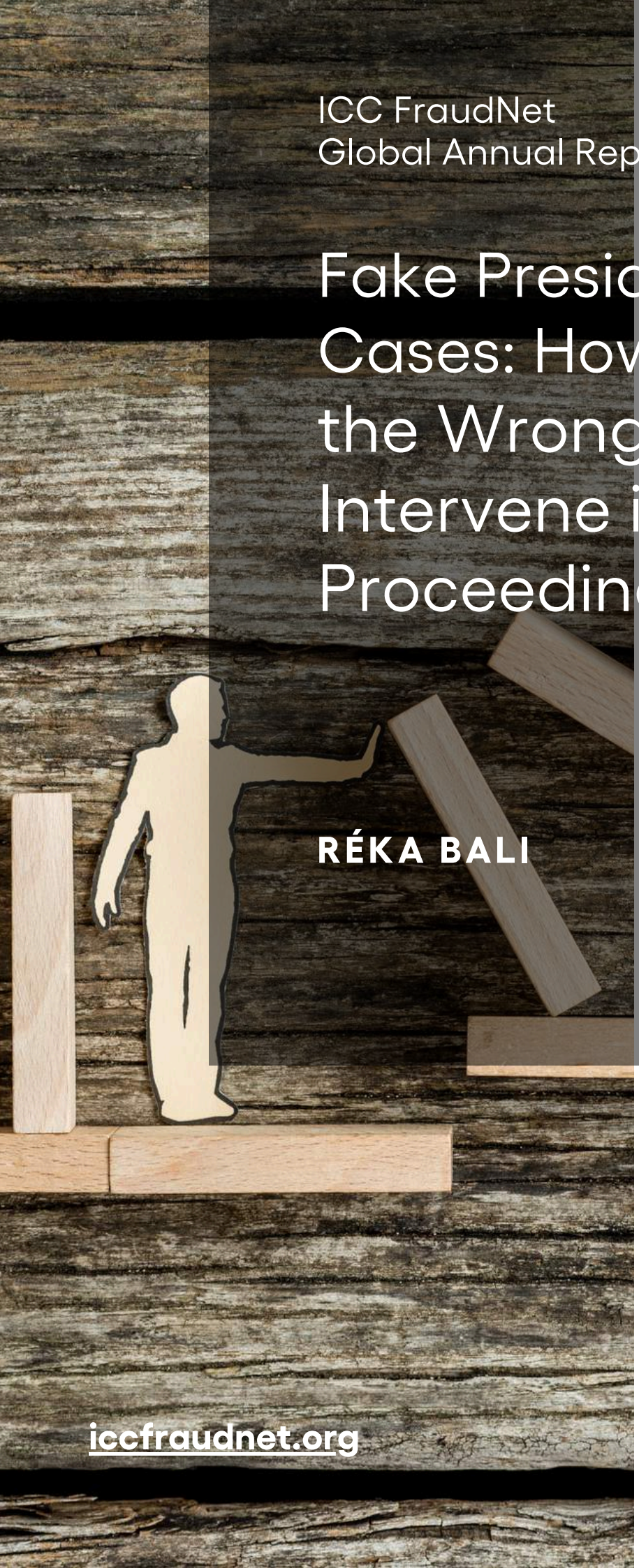
That approach would (at the very least) significantly extend the timeframe for obtaining an effective order, and fortunately was rejected by the Court of Appeal. Whilst they were content to accept that the existence of an arbitration clause was a relevant consideration, and that care was needed to avoid usurping the power of the tribunal, that did not mean that relief could only be sought from the Grand Court once an application had been made elsewhere.

One significant distinguishing feature of seeking injunctive relief from the courts versus a tribunal or emergency arbitrator is the ability to apply to the former *ex parte*, whereas almost all emergency arbitrator mechanisms exclude *ex parte* relief. If a party was required first to seek approval from a tribunal or emergency arbitrator that would put a wrongdoer on notice of the steps being taken some time before any order was made, severely impairing its practical utility.

Whilst it was incumbent upon the party applying to explain why an application had not been made to the tribunal, the Grand Court could still properly act where it was appropriate to do so in order to facilitate the arbitration, for example in cases of urgency, or where the tribunal or foreign court lacked the jurisdiction to grant the relevant interim measures. Furthermore, even where the relevant arbitral rules provided for reference to emergency

arbitration before a tribunal was constituted, a party seeking interim relief would be able to elect whether to go down that route or apply to court. Notably, most arbitral institutions' rules preserve the right of parties to go to the courts in the seat of the arbitration and foreign courts (where assets are located) to seek interim relief: the Grand Court's decision clarifies the nature of that right in a helpful way.

In emphasising the concurrent nature of the respective jurisdictions of the arbitral tribunal and the court, the decision in Minsheng has arrived at a pragmatic solution that provides significant reassurance to any party attempting to combat fraud through arbitration. Effective protection from the court in support of the arbitral process is available where the factual scenario demands it, and the ability for wrongdoers to misuse arbitration in order to buy time on jurisdictional grounds within which to dissipate assets is significantly circumscribed.



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Fake President Fraud Cases: How Can the Wronged Party Intervene in Insolvency Proceedings?

RÉKA BALI

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FAKE PRESIDENT FRAUD CASES: HOW CAN THE WRONGED PARTY INTERVENE IN INSOLVENCY PROCEEDINGS?

RÉKA BALI

FORGÓ DAMJANOVIC & PARTNERS

Introduction

In a previous paper, we have already discussed the criminal law aspects of "fake president fraud" cases, where the perpetrator extorts money from the victim by deceiving them and presenting themselves as the agent of the victim's contractual partner.[1] In this current paper, we focus on the civil law aspects: in particular, the role of the wronged party in insolvency (liquidation) proceedings. Therefore, we examine the possibilities of commencing liquidation proceedings, and the rights and options of the wronged party as a creditor in them. Are liquidation proceedings an effective way to recover the lost funds? How can the wronged party benefit from them?

1. Ordering liquidation proceedings within a criminal investigation

In fraud cases, the first step is to notify the police and commence investigations concerning the lost funds. However, there may be situations where no criminal proceedings are initiated in a particular country, because, for example, there is only a minor connection with that country and the prosecution takes place in other countries. Even in these cases, it is possible for the Hungarian law enforcement authorities to order compulsory striking off

[1] Gábor Damjanovic and Réka Bali: „Who is the Victim and Who is the Fraudster? Reviewing the Procedural Position of the Victim in Fake President Fraud Cases, and How to Reframe it", ICC FraudNet Global Annual Report 2022

from the company registry, if the company is operating illegally (for example, not being available at the registered office, not filing financial reports etc., which is quite common in companies involved in fraud). All in all, this procedure can be a useful tool to commence civil proceedings against the Hungarian company concerned, even if a criminal prosecution is not instigated.

In this compulsory striking-off procedure, the Company Registry Court publishes an invitation for potential creditors to report their claims against the debtor company. If claims are reported, the court orders liquidation proceedings instead and terminates the striking-off procedure. However, it is important to note that there is a minimum amount in place: both the company's assets and the creditors' claims have to amount to at least 400,000 Hungarian Forints (approx. EUR 1000) for the court to order liquidation proceedings.

Since the lost funds of the wronged party in fake president fraud cases typically amount to a much higher sum, we are of the opinion that commencing liquidation proceedings in the above-mentioned way should not be an issue. Therefore, the compulsory striking-off, and then liquidation proceedings, can be a useful tool in helping the wronged party trace the funds by providing more information on the Hungarian company concerned.

2. The options for creditors in liquidation proceedings to retrieve the lost funds

2.1. Obtaining information: conversing with the liquidator, Know Your Customer ('KYC')/Anti-Money Laundering ('AML') and the General Data Protection Regulation ('GDPR')

Upon commencement of the liquidation proceedings, the court will appoint a liquidator. The liquidator has full administrative authority and right of disposal over the assets of the debtor, and only the liquidator is authorized to make any legal statements in the debtor's name. The liquidator is the person in charge of registering the creditors' claims, selling the debtor's assets and potentially concluding a composition agreement with the creditors. The liquidator has an obligation to assess the debtor's assets, and therefore, to achieve this, is entitled to seek out the bank of the debtor to obtain payment history documents, details on parties that received payments from the debtor, and other information that could lead us closer to the wronged party's lost funds.

In our view, it is often possible to seek out the liquidator and commence a conversation about the debtor company, as the creditor has the right to gather information on the debtor. Since the liquidator has access to all files on the previous transactions of the company, their insight can be incredibly helpful in trying to trace the lost funds. If they are cooperative, we as creditors might be able to obtain all necessary documents from them.

In case we as creditors would like to support the work of the liquidator in order to gain detailed information about the debtor company, the following legal bases can be used rather effectively to this aim. Firstly, referring to the bank's KYC or AML obligations, and secondly, to the data subject's rights under GDPR.

In Hungary, as in many countries, businesses are typically required to conduct an identification and verification procedure within their KYC or AML obligations. Moreover,

banks (as special businesses) are also required to follow a specific procedure when an unusually large transaction takes place on the accounts managed with them.

Under the Hungarian AML Act, "*the service provider (including the bank) shall record the following data in the course of the client due diligence procedure and request the provision of information on the source of funds and the presentation of documents thereon, in order to verify this information:*

- *in case of a business relationship, the type, subject and duration of the contract,*
- *the circumstances of performance (place, time, method),*
- *the risk level of the client, and*
- *information on the purpose of the business relationship and its intended nature."*

Therefore, the bank where the debtor keeps its accounts has a legal obligation to ask the debtor about the source of the suspicious funds, and keep records of this client due diligence procedure. As an out-of-the-box solution, we recommend trying to obtain details (i.e., to what accounts were the extorted funds forwarded to, on what legal basis, who is the beneficiary of that account, which country they reside in etc.) by asking the debtor's bank for the documents stored based on its KYC or AML obligations.

If we can identify a natural, living person whose personal data might be concerned, we might also refer to the wronged party's rights under the GDPR. Under Article 15, "*the data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data (...).*" Therefore, GDPR can be a legal basis for asking either the debtor company (in case the liquidator is not open to disclosing information informally), or its bank to provide the documents that qualify as personal data ("*any information relating to an identified or identifiable natural person*") of the concerned individual.

After obtaining the relevant information, the wronged party, naturally, would like to take practical steps to retrieve the lost funds. Hungarian insolvency law provides the creditor with the following option to achieve that goal.

2.2. Challenging certain transactions

In certain cases, creditors have the right to bring action in court to challenge suspicious transactions of the debtor. This can be a helpful tool too, even if the liquidator is not cooperative in sharing information on the debtor's payment history. In order for the creditors to be able to challenge it, the transaction in question has to qualify as any of the following:

- **Fraudulent transaction**: contract resulting in the debtor's assets diminishing, if the debtor's intention was to defraud the creditors;
- **Undervalued transaction**: contract aiming at transferring the debtor's assets without any consideration, or if the consideration constituted unreasonable and extensive benefits to a third party;

- **Preferential transaction**: contract with the intent to give preference and privileges to one creditor, such as, amongst others, the amendment of an existing contract to their benefit, or the provision of security to a creditor who did not have any security before.

Although the transactions concerning the lost funds would most certainly qualify as one of the above, challenging them is not guaranteed to be successful. Since perpetrators most likely only used the Hungarian company as a so-called 'money mule', and transferred the funds right away, the chance of finding and seizing our assets by challenging transactions are, unfortunately, quite low. In fact, the most likely possibility is that the company under liquidation does not have any assets to fulfil the creditors' claims and, therefore, the liquidation proceedings cannot fulfil their intended purpose at all.

Nevertheless, gaining information on the transaction history is a positive step forward in and of itself. Even though liquidation proceedings might not be effective in recovering the funds, the information obtained through them, from the liquidator or other actors (such as the company's bank) can help, for example, advance the international criminal proceedings in tracing the lost assets.

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Sanctions Compliance: Rethinking Risk Assessments in a Regulatory Environment Dominated By AML/CFT

DIANE BUGEJA & PETER MIZZI

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SANCTIONS COMPLIANCE: RETHINKING RISK ASSESSMENTS IN A REGULATORY ENVIRONMENT DOMINATED BY AML/CFT

DIANE BUGEJA & PETER MIZZI

CAMILLERI PREZIOSI ADVOCATES

Abstract

In this article, Diane Bugeja, Senior Associate, and Peter Mizzi, Compliance and AML Advisor, at Camilleri Preziosi Advocates, explore the shifting regulatory focus on sanctions compliance. The article discusses challenges in navigating the complexities of sanctions regimes and the need to rethink sanctions risk assessments.

Introduction

While Anti-Money Laundering/Combatting the Funding of Terrorism ('AML/CFT') compliance has traditionally dominated the regulatory landscape, the evolving nature of geopolitical developments requires a re-evaluation of sanctions compliance frameworks. The imposition of targeted financial sanctions has emerged as a powerful tool for governments to address national security concerns, combat terrorism, and deter illicit activities. Consequently, financial institutions are increasingly required to adhere to comprehensive sanctions regimes, in addition to stringent AML/CFT regulations.

Recent geopolitical events have heightened the focus on sanctions, bringing them closer to home. For instance, the conflict between Russia and Ukraine has led to the imposition of sanctions by Western countries targeting Russian individuals, entities, and sectors of the

economy. Similarly, ongoing tensions in the Middle East have prompted the use of sanctions to address concerns related to terrorism, human rights abuses, and regional instability.

Despite the increasing importance of sanctions, sanctions risk assessments and the implementation of mitigating measures still tend to lag behind those of AML/CFT more generally.

Rethinking Sanctions Risk Assessments

Financial institutions that operate in an increasingly globalized environment face challenges in navigating the complexity and scope of modern sanctions regimes amidst the ever-increasing load of regulatory obligations. Fragmented regulatory frameworks across jurisdictions combined with the dynamic nature of sanctions regimes, characterized by frequent updates to sanctions lists and geopolitical developments, pose significant compliance challenges.

One of the primary challenges in sanctions compliance is conducting effective risk assessments that combat the evasion of sanctions. To address these challenges, organizations must adopt a comprehensive risk assessment framework tailored to the unique complexities of sanctions compliance. By conducting a comprehensive assessment of these factors, financial institutions can enhance their understanding of sanctions risks and implement effective compliance measures to mitigate them.

In response to the evolving regulatory environment, there is a growing recognition of a lack of focus on sanctions risk assessments. Rethinking sanctions compliance requires a shift towards a more comprehensive, integrated, and dynamic approach to risk assessments. Such an approach requires the alignment of sanctions compliance with broader risk management frameworks, leveraging advanced technologies for screening, enhancing collaboration between regulatory authorities and financial institutions, and increasing awareness of unfolding geopolitical developments.

In an attempt to create a common understanding among financial institutions regarding steps for compliance with restrictive measures, the European Banking Authority ('EBA') recently consulted on guidelines[1] for internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures (the 'Guidelines').

The Guidelines detail the process by which financial institutions should conduct a sanctions risk assessment to understand the extent to which each area of their business is exposed to sanctions as well as vulnerable to non-implementation of sanctions and circumvention of sanctions.

In principle, a thorough sanctions risk assessment contains the four primary risk pillars—customer, geographic, product, service and transaction, and delivery channel risks used in an AML/CFT business risk assessment. However, a sanctions risk assessment approaches these pillars from a different perspective.

[1] EBA/CP/2023/42

Firstly, financial institutions need to ascertain which restrictive measures regimes apply to their operations and gain a comprehensive understanding of the specific regulations and sanctions imposed by relevant authorities. Additionally, they must assess the likelihood of non-implementation of these measures and evaluate the likelihood of circumvention of restrictive measures. Moreover, financial institutions must analyse the potential impact of any breaches of restrictive measures, considering the legal, financial, and reputational consequences of non-compliance.

Specific Risk Factors

In terms of specific risk factors, assessing the geographical risk involves a detailed examination of the jurisdictions and territories where the financial institution operates, identifying areas exposed to restrictive measures and assessing the origin and destination of transactions. This assessment should also consider the development of other geopolitical events, that may affect all four primary risk pillars. By way of example, increasing tensions between China and Taiwan, can complicate the regulatory landscape and thus it is vital that financial institutions prepare for an eventuality should China become sanctioned.
Customer risk delves into the relationships between customers, beneficial owners, and shareholders, particularly those linked to countries subject to restrictive measures. This analysis includes evaluating the number, types, and complexity of customers, as well as their activities and associations with industries or sectors susceptible to economic sanctions. The risk associated with products and services is centred around an understanding of the nature of the institution's offerings and the extent to which they may expose the organization to breaches or circumvention of restrictive measures. Lastly, the delivery channel risk assessment examines the vulnerabilities introduced by the use of intermediaries, agents, or correspondent banking relationships, which may limit visibility or increase dependence on third-party screening processes. Additionally, it considers how these channels may amplify geographic risks, especially if they operate in, or are based in, countries subject to restrictive measures or known for circumventing them.

Key Areas of Convergence between Sanctions and AML/CFT

While distinct regulatory frameworks, data gathered for the purposes of complying with AML/CFT obligations may also prove valuable for correctly implementing sanctions and restrictive measures.

Primarily, these two frameworks converge in the understanding and assessment of risk. Indeed, the imposition of sanctions may heighten the risk of money laundering and terrorist financing, particularly in jurisdictions subject to sanctions or with close ties to sanctioned individuals or entities. As such, financial institutions must reassess their jurisdictional and client risk assessments in light of evolving sanctions regimes. Beneficial ownership transparency is another key aspect in that sanctions and restrictive measures may lead to attempts by beneficial owners targeted by the same, to distance themselves from the entities or legal arrangements they own. The use of complex corporate structures, nominee arrangements and bearer shares to conceal beneficial ownership presents challenges for both sanctions compliance and AML/CFT. Financial institutions must enhance their due

diligence procedures to identify and verify beneficial owners, particularly in high-risk jurisdictions or industries.

Lastly, transaction monitoring and reporting play a crucial role in detecting suspicious activity related to both sanctions violations and money laundering/terrorist financing. It is public knowledge that transactional activity passed through countries such as Turkey, United Arab Emirates, Kazakhstan and Serbia (sometimes referred to as circumvention hubs) in an effort to circumvent Russian sanctions[2]. This is even more pertinent seeing that proceeds emanating from the circumvention of sanctions is deemed a predicate offence in terms of money laundering/terrorism financing and would trigger reporting obligations.

Conclusion

In conclusion, as sanctions become increasingly integral to regulatory compliance, financial institutions must prioritise robust risk assessments and align them with AML/CFT measures. By adopting a holistic, integrated, and dynamic approach to sanctions risk assessments, financial institutions can effectively navigate the complexities of sanctions compliance and mitigate regulatory risks and contribute to the fight against financial crime whilst above all contributing to global security and stability.

[2] See for example the latest EU guidance on this matter: Guidance for EU operators: Implementing enhanced due diligence to shield against Russia sanctions circumvention - guidance-eu-operators-russia-sanctions-circumvention_en.pdf (europa.eu)

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Outside The Courts: Exploring The Use of Non-Trial Resolutions in Complex Multinational Cases of Bribery and Corruption

JOHN OXENHAM,
MICHAEL-JAMES CURRIE &
TYLA LEE COERTZEN

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OUTSIDE THE COURTS: EXPLORING THE USE OF NON-TRIAL RESOLUTIONS IN COMPLEX MULTINATIONAL CASES OF BRIBERY AND CORRUPTION

JOHN OXENHAM, MICHAEL-JAMES CURRIE & TYLA LEE COERTZEN

PRIMERIO

In our previous contribution to ICC FraudNet's Global Annual Report, we unpacked the use of freezing orders as a civil remedy available to victims of fraud in cross border schemes in order to detect, locate and recover assets. In this contribution, we provide an overview of an out-of-court solution to complex multinational cases of bribery and corruption, as well as a synopsis of recent updates in the development of South Africa's non-trial resolution ('NTR') regime (often referred to as deferred prosecution agreements).

NTRs are becoming an increasingly popular solution to the recovery of assets that are the subject of complex multinational cases of bribery and corruption, and the establishment of formal regimes across a number of developing countries are becoming more prominent. In this regard, it is generally accepted that NTR regimes, together with other tools such as whistle-blower regimes, can provide a significant opportunity to jurisdictions who lack the skill, capacity, resources (and sometimes political will) to resolve cases involving losses of assets through corruption and bribery. NTRs do not rule out the possibility of prosecution and imprisonment, and are rather a mechanism used to resolve matters before trial. They are used to encourage companies engaged in wrongdoing to cooperate with law enforcement and proffer evidence that can be used to effectively prosecute individuals engaged in the wrongdoing.

The increased use of NTRs have followed a study[1] conducted by the Organisation for Economic Co-Operation and Development (the 'OECD') which described that in countries which belong to the OECD Convention on Combating of Foreign Public Officials in International Business Transactions, there were 695 out of a total of 890 foreign bribery cases since 1999 which were resolved through the use of NTRs.

The study led to the OECD releasing its 2021 OECD Anti-Bribery Recommendation[2] which recommends the use of a "*variety of forms of resolutions when resolving criminal, administrative, and civil cases with both legal and natural persons, including NTRs*." The OECD Recommendation further describes NTRs as "*mechanisms developed and used to resolve matters without a full court or administrative proceeding, based on a negotiated agreement with a natural or legal person and a prosecuting or other authority*."

There are a number of obvious benefits to the use of NTRs both to prosecuting authorities and to individuals and/or firms implicated in financial crimes. Notably, NTRs assist in reducing government resources being spent on lengthy investigations and prosecutions and allow for the NTR to be conducted simultaneously in multiple jurisdictions, where the matter in question spans over a number of jurisdictions (which also assists companies from being placed at risk of double jeopardy). Additionally, NTRs assist in providing companies with a framework allowing them to cooperate with enforcement agencies, lower their exposure to bad publicity and reputational harm, and motivate the investment in effective anti-corruption compliance measures. It further provides certainty, and the ability to benefit from reduced sanctions for wrongdoing in return for full cooperation and disclosure of wrongful conduct.

South Africa in particular has an imminent opportunity to improve its enforcement of anti-corruption matters in line with best practice. Following the conclusion of the Zondo Commission in 2022, there has been limited enforcement action taken by the South African National Prosecuting Authority (the 'NPA'), which is largely due to the difficulty the NPA faces in prosecuting complex cross border cases, a lack of financial resources as well as the lack of skills and expertise possessed by the NPA. However, despite the challenges that might be faced by South Africa in implementing NTRs, the use of NTRs was a key recommendation included by Chief Justice Zondo in the Zondo Commission of Inquiry into allegations of state capture.[3]

In this regard, the NPA has recently developed a new policy directive, namely the Corporate Alternative Resolution Directive,[4] which is specifically targeted at corporations

[1] OECD 'Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Resolutions by
Parties to the Anti-Bribery Convention', accessible at:
ttps://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf

[2] OECD "The Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions", accessible at
https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378
(hereafter, the "OECD Recommendation").

[3] Part VI Vol IV of the State Capture Commission Reports explicitly recommends that *"government introduce legislation for
the introduction of deferred prosecution agreements…"*. Deferred prosecution agreements are the most common
form of NTR framework that the South African legislature may consider implementing in South Africa.

[4] Accessible at:

for the use of NTRs in anti-corruption enforcement. The NPA's NTR framework is expected to assist in expediting the recovery of funds that were obtained through corrupt means.

There have been a number of cases of corruption related to South Africa in which NTRs have either been successfully concluded or discussed, including, *inter alia*:

1. In 2016, Hitachi Ltd., a global engineering company, reached a settlement with the United States Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) over bribery allegations related to contracts with South Africa's state-owned utility, Eskom. Hitachi agreed to pay a total of USD19 million to settle the charges of violating the Foreign Corrupt Practices Act (FCPA). This settlement resolved the allegations without going to trial. Although not a solely South African case, Eskom did not take them to court and settled with the resolution.[5]

2. Siemens AG reached a global settlement in 2008 with various authorities, including the U.S. Department of Justice and the Securities and Exchange Commission, over allegations of widespread bribery and corruption in several countries, including South Africa. Siemens agreed to pay substantial fines and penalties to resolve the charges.[6] While not exclusively focused on South Africa, this settlement encompassed bribery allegations involving South African contracts.

3. Alstom SA, a French multinational company operating in the power generation and rail transport sectors, reached a global settlement in 2014 with authorities in multiple countries, including the United States and Switzerland, over bribery allegations. The settlement involved payments of fines and penalties related to corrupt practices, including those in South Africa.[7]

4. In one of South Africa's largest corruption and money laundering scandals, involving the collapse of VBS Mutual Bank in 2018, several individuals and entities were implicated in fraudulent activities resulting in the looting of millions of rand from the bank. While some of the accused are facing criminal trials, there have been discussions about potential plea agreements or settlements for some of the defendants.[8]

5. In December 2020, the South African Special Investigating Unit ('SIU') negotiated and concluded a settlement with ABB South Africa in which it

https://www.npa.gov.za/sites/default/files/uploads/Annexure%20A%20PART%2051%20Corporate%20ADRM_0.pdf.

[5] See https://www.sec.gov/litigation/litreleases/lr-23365.

[6] See https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html.

[7] See https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery

[8] See https://www.dailymaverick.co.za/article/2024-02-03-vbs-mutual-bank-scandal-six-years-on-the-r2bn-fraud-the-r500m
settlement-and-the-plight-of-victims/.

was agreed that ABB would repay ZAR1,57 billion to Eskom as a result of overpayments pertaining to contracts unlawfully awarded in Eskom's Kusile project.[9]

6. In 2022, EOH, the SIU and the Department of Water and Sanitation concluded a settlement agreement, following EOH having reported wrongdoing conducted by it to the South African National Treasury, the Financial Intelligence Centre and the State Information Technology Agency in relation to contracts with the South African Department of Water and Sanitation. The wrongdoing was uncovered by EOH through a forensic investigation and related to misconduct taking place over the period 2012 to 2018. The settlement amounted to a total of c. R 177 million to be paid by EOH.[10]

The United States Department of Justice ('US DOJ') recently took the lead in investigating and prosecuting the software giant, SAP, for conduct relating to bribery. As a result, SAP entered into a three-year deferred prosecution agreement with the US DOJ for violating the FCPA in South Africa. SAP was accused of conspiring to contravene the anti-bribery provisions of the FCPA concerning their illicit plan to offer bribes to both South African and Indonesian officials to ultimately obtain 'valuable government business.' SAP agreed to pay over R2 billion to South Africa.

NTRs are embodied by the 'carrot and stick' analogy, which is used to describe how NTRs will only be effective in countries which are capable and able to carry out enforcement actions. This is a risk faced by the NPA in South Africa as, in order for an NTR regime to be effective, corporations who are at risk of being prosecuted must see a real risk in not entering into an NTR, and thereby must have an incentive to enter into an NTR. Thus, a poorly constructed NTR framework can significantly undermine the deterrence of corporate crime and have a negative impact on the public's perception on the criminal justice system.

Currently, the South African Criminal Procedure Act 51 of 1977 caters for one type of NTR, namely, the guilty plea. The guilty plea is the most common form of NTR and involve negotiations between the relevant prosecuting authority and defendant from which guilt must be admitted. The NTR entered into by Siemens AG described above is an example of a guilty plea.

A more recent NTR entered into by Glencore International AG and Glencore Ltd in 2022 with the US DOJ and the UK Serious Fraud Office also envisaged a guilty plea. In the Glencore cases, the corporation was charged with several charges of bribery related to its oil connections in, *inter alia*, Cameroon, Equatorial Guinea, Ivory Coast, Nigeria and South Sudan. Glencore was inflicted in a scheme of making and concealing corrupt payments and bribes through intermediaries for the benefit of foreign officials across a number of jurisdictions. The Glencore guilty plea entered into with the DOJ resulted in the payment

[9] See https://new.abb.com/news/detail/71991/abb-reaches-settlement-with-eskom-and-south-africas-siu.
[10]See: https://www.eoh.co.za/eoh-the-special-investigating-unit-and-the-department-of-water-and-sanitation-conclude-settlement-agreement/.

of a fine of over USD 1 billion as well as agreements to appoint independent compliance monitors to ensure adherence to internal controls. The Glencore group also committed to the creation of an Ethics and Compliance Program as well as the implementation of a number of measures to reduce the risks of any similar wrongdoing taking place in future.

So, what does this mean for asset recovery in South Africa? In the context of complex cross border economic crimes, the recovery or repatriation of funds to South Africa is a central tenet of concluding a successful NTR. The importance of concluding similar NTRs with multiple agencies across several jurisdiction presents a complex and dynamic environment in which to advise both companies implicated in wrongdoing as well as victims who may have a greater role in the terms upon which NTRs are concluded.

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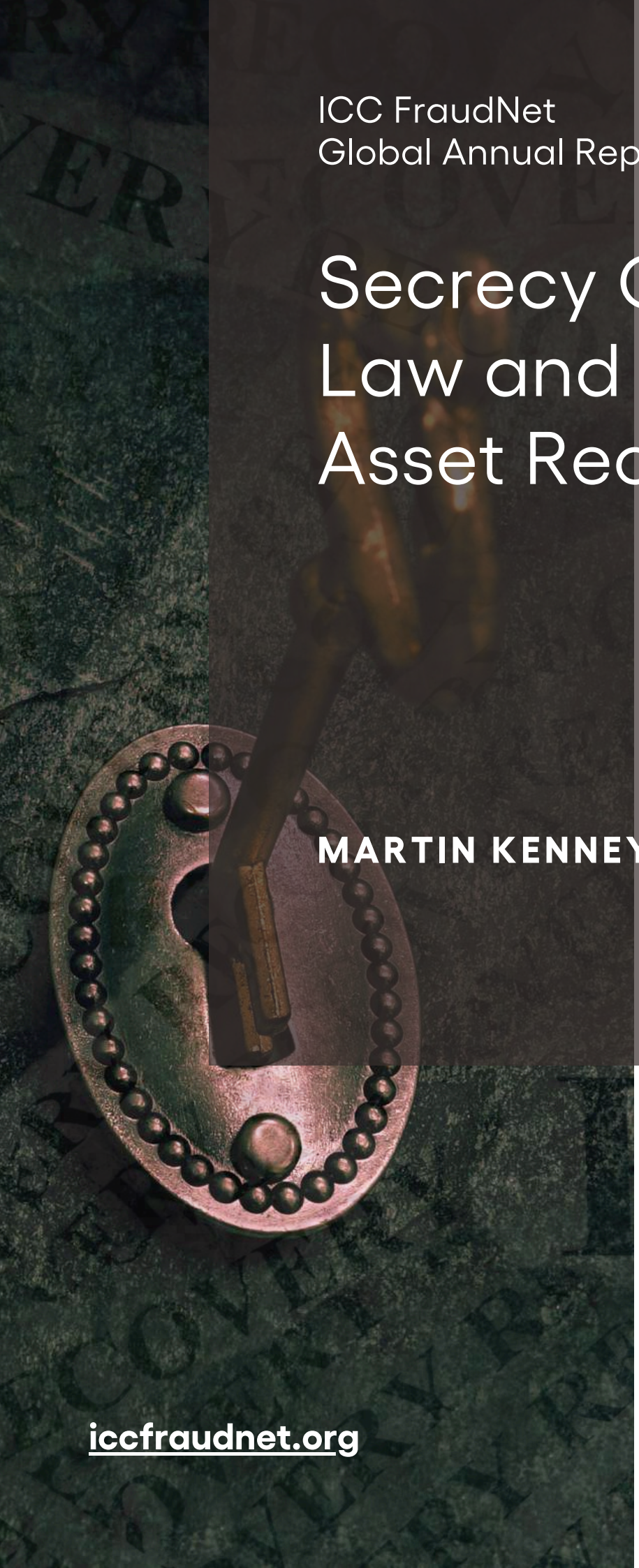
Secrecy Orders - Law and Practice in Asset Recovery

MARTIN KENNEY



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SECRECY ORDERS – LAW AND PRACTICE IN ASSET RECOVERY

MARTIN KENNEY

MARTIN KENNEY & CO SOLICITORS (MKS) [*]

Secrecy orders – anonymisation orders, sealing orders, and gagging injunctions – are legal instruments used to protect sensitive information from disclosure to the public and to the underlying targets of an asset recovery investigation in response to fraud or corruption. Anonymisation orders conceal the identities of the parties to a proceeding (by labelling them with an anonymous case caption like "A v C"). Sealing orders make certain court documents or portions of the court record inaccessible to the public. Gagging injunctions restrict the parties, lawyers, or witnesses from talking about the case details outside of court.

These legal instruments are of crucial importance to resolve concealed asset insolvency and asset recovery cases. The purpose of asset recovery in fraud and insolvency cases is to locate and recover the *fructus sceleris* (fruits of fraud). Secrecy orders can be indispensable in achieving both objectives.

Disappointingly, there is too little learning published about secrecy orders both in case law and legal treatises. For example, *Gee on Commercial Injunctions* (7th Ed, Sweet & Maxwell) is the leading treatise on injunctive relief in English law. Of the 1,121 pages to be found in this learned book, only two pages are devoted to secrecy orders. The writer believes this can be ascribed to the idiom: "*once the horse has bolted, it is too late to close the barn door".* Meaning that once a set of sealing orders are lifted – most usually after a

[*] Martin Kenney BA, LLB, LLM. Head of Firm at Martin Kenney & Co (MKS), founding member of ICC FraudNet. Admitted to practice in England and Wales (Solicitor Advocate), the BVI (Legal Practitioner), St Vincent & the Grenadines (Barrister & Solicitor); British Columbia (non-practising Barrister & Solicitor) and New York (Legal Consultant).

fraudster's concealed assets have been uprooted and frozen – it is too late for an effective challenge to be made against them. Without a contest, there will be a dearth of case law.

This article summarises the legal framework applicable to secrecy orders in the United States and in England & Wales. This article then examines the utility of secrecy orders in asset recovery matters through analysis of illustrative cases.

SECRECY ORDERS IN THE UNITED STATES

US courts adopt a strong presumption in favour of public access in cases concerning right of access to judicial records and documents under the First Amendment to the United States Constitution. Courts have recognised a "general right to inspect and copy public records and documents, including judicial records and documents".[1] The purpose of the presumption is to promote accountability, integrity, and honesty in the justice system.[2]

This right of public access is a qualified one. In right of access claims, courts apply a two-part test. The first prong is the "experience and logic" test. [3] The second prong is the balancing test, which weighs the rights of access against the interests of the parties restricting access.[4]

Applying the "experience and logic" test, courts will determine whether the type of judicial record was historically "open to the press and general public", and whether public access plays "a significant positive role in the functioning of the particular process in question".[5] Pleadings, for instance, would clearly presumptively be open to public access under the "experience and logic" test. Settlement agreements, by contrast, would not.

Applying the balancing test, courts consider a non-exhaustive set of factors to weigh the legitimate interests of those seeking access against those seeking to restrict access. Factors include the prospective harm to privacy interests; likelihood of injury consequent on public access; and whether records are sought for illegitimate purposes.[6]

The risk of asset flight is directly relevant to this balancing test. In *Fed. Trade Com'n v. USA Beverages, Inc*, the court sealed an entire docket where the defendant had already dissipated some assets, and the remaining assets could be readily concealed and dissipated.[7] Courts have granted requests for sealing orders where there is good cause to believe evidence will be tampered with, or where there has been a demonstrable disregard for the law.[8] Courts have also granted sealing and gagging orders to promote successful outcomes in fraud investigations.[9] This means that a subpoena for the disclosure of bank records

[1] *United States v. Nixon*, 418 U.S. 683 (1974).
[2] *U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001).
[3] *Press-Enter. Co. v. Superior Ct.*, 478 U.S. 1 (1986).
[4] *Press-Enter. Co. v. Superior Ct.*, 478 U.S. 1 (1986).
[5] *Press-Enter. Co. v. Superior Ct.*, 478 U.S. 1, 8-9 (1986).
[6] *Gubarev v. Buzzfeed, Inc*., 365 F. Supp. 3d 1250, 1256 (S.D. Fla. 2019); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006).
[7] *Fed. Trade Com'n v. USA Beverages, Inc.*, No. 05-61682, 2005 WL 3676636 (S.D. Fla. Nov. 4, 2005).
[8] *In re Kolomoisky*, 2006 WL 2404332, at *4 (S.D.N.Y. 2006); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc*., 263 F. 3d 1304, 1309 (11th Cir. 2001).
[9] *In re Transbrasil S.A. Linhas Aereas*, 644 F. App'x 959 (11th Cir. 2016).

might be served on a fraudster's bank – with an injunction prohibiting the bank from tipping-off its customer. This can uproot bank secrets in secrecy to manage the risk of evasive action being taken by the customer who poses an asset flight risk.

When US courts grant secrecy orders, they do so within limits. Under the First Amendment, a denial of access must be necessitated by a compelling government interest, and narrowly tailored to serve that interest.[10] A narrowly tailored secrecy order would be one that only lasts as long as is necessary and only limits access to the necessary documents or portions of documents.

SECRECY ORDERS IN ENGLAND & WALES

Under English law, by default, the principle of open access to justice governs. Parties are named in proceedings, hearings are conducted in open court, and non-parties are presumed to have access to claim forms, court orders, and judgments.[11] Non-parties may further, on application and subject to the permission of the court, obtain records of other court documents or communications.[12] As in the US, this principle operates as a rebuttable presumption.

The power of English courts to grant sealing and gagging relief derives from the court's inherent power to make orders necessary to enable the court to act effectively.[13] The public access to court information principle is a derivative of the more fundamental principle that requires the effective administration of justice. Where the principles conflict, English courts will grant secrecy orders.

An example of this is where a defendant has a track record of fraud or asset concealment activities – expecting them to respect the judicial process and honour a judgment as the Marquess of Queensbury might would seem to be foolhardy. Courts treat of themselves more seriously than that. Viscount Haldane in *Scott (otherwise Morgan) and Another v Scott* stated that a secrecy order could be granted where the effect of public access would be to destroy the subject matter of a case and thereby prevent justice being done.[14]

When English courts grant secrecy orders, they do so within limits. Secrecy orders must be proportionate. To ensure proportionality, courts may limit the duration and scope of secrecy orders. English courts have demonstrated a reluctance to expand the scope of exceptions to the open justice principle. A clear demonstration of this proposition is the approach of English courts to super-injunctions.

A super-injunction is an interim non-disclosure order that prohibits reporting the fact of proceedings. Practice Guidance issue by Lord Neuberger (MR, Head of Civil Justice)

[10] *Rushford v. New Yorker Magazine, Inc*., 846 F.2d 249, 253 (4th Cir. 1988).
[11] Civil Procedure Rules, r 5.4B-D; 39.
[12] Civil Procedure Rules, r 5.4C.
[13] *R v. Connolly* [1964] AC 1254 at 1301. "There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such a jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A Court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."
[14] *Scott (otherwise Morgan) and Another v Scott* [1913] AC 417.

indicates that interim non-disclosure orders could be granted in specific categories of cases, including following Norwich Pharmacal disclosure applications.[15] Courts grant super-injunctions sparingly. In *Global Torch Limited v Apex Global Management Limited & others*, Lord Justice Maurice Kay stated that "[o]utside the area of statutory or other established exceptions, the open justice principle has universal application except where it is strictly necessary to depart from it in the interests of justice."[16]

In practice, parties typically seek to obtain secrecy orders alongside other forms of pre-emptive or *ex parte* relief. For instance, prior to seeking Norwich Pharmacal relief, a party might first seek to obtain an order pursuant to Civil Procedure Rules (CPR) 5.4C(4), which would prevent non-parties from obtaining documents relevant to the proceedings; and to seal the court's file. Moreover, a bank may be enjoined from tipping-off its customer regarding the fact of a disclosure application. The result of this process would be that the applicant may obtain information from the bank without the bank informing third parties, and without an order being published.

SECRECY ORDERS IN ASSET RECOVERY

Secrecy orders are essential components of the asset recovery lawyer's toolkit. They offer an opportunity to pursue asset recovery investigation and execution objectives with limited risk of further asset dissipation. Secrecy is particularly important in complex fraud matters with sophisticated counterparties.

In practice secrecy orders are most useful when requested in anticipation of requesting other forms of pre-emptive asset discovery or preservation relief. For instance, in complex fraud matters, a claimant might first apply for sealing and gagging relief, then apply for Banker's Trust and Norwich Pharmacal disclosure orders, or a Mareva Injunction.[17]

A gagging injunction has three principal advantages. First, it prevents the target of discovery from alerting the underlying obligor or malefactors. Second, it limits the risk of reputational damage to alleged wrongdoers. Third, it ensures against frustration of the asset recovery process, thereby promoting public confidence in the administration of justice.

The utility of secrecy orders is best demonstrated through an illustrative case study. *Fed. Trade Com'n (FTC) v. USA Beverages, Inc*, a US District Court case involving the sealing of a case file and docket, is instructive.[18]

In that case, the US Federal Trade Commission (FTC) filed a complaint against USA Beverages, a Florida and New Mexico corporation, alleging that USA Beverages operated a business opportunity scam in violation of FTC Act, 15 U.S.C. 45(a), which prohibits for unfair or deceptive acts affecting commerce.

[15] Practice Guidance (Interim Non-disclosure Orders) (Sen Cts) [2012] 1 WLR.
[16] *Global Torch Limited v Apex Global Management Limited & others* [2013] EWCA Civ 819.
[17] Peter Maynard, *Judicial Secrecy and Suspension of Adversarial Proceedings: Super Injunctions, Sealing and Gagging as Effective Tools in Asset Tracing and Recovery*, www.maynardlaw.com [last accessed 03.10.2024].
[18] *Fed. Trade Com'n v. USA Beverages, Inc.*, No. 05-61682, 2005 WL 3676636 (S.D. Fla. Nov. 4, 2005).

The FTC moved on an *ex parte* basis for an order sealing the file and docket. The FTC relied on the heightened risk of asset flight in that case. The defendant had already transferred funds from its US bank account to accounts in Costa Rica. The remaining assets could be readily concealed and dissipated if the underlying wrongdoers were to learn of the existence of the FTC's asset recovery inquiry.

The Court applied the high standard established by the Supreme Court in *Press-Enterprise*. *Press-Enterprise* permits an exception to the presumption of open access where a denial of access is necessitated by a compelling government interest, and the denial of access is narrowly tailored to serve that interest.[19]

The Court granted an order to seal the file and docket, finding that preventing asset dissipation in the instant case constituted a compelling government interest, and that sealing the file and docket was necessary to satisfy this interest. To ensure that the order was narrowly tailored, the Court limited the duration of the sealing order, requiring that the seal be lifted two business days after the Court's ruling the plaintiff's motion for a temporary restraining order freezing assets.

In many cases, the duration of secrecy orders may need to extend over many months or even up to two years in duration. This is particularly the case in multi-jurisdictional high value fraud matters where as many as eight or ten consecutive or concurrent secret document disclosure applications may need to be pursued across several national frontiers. In this juridical setting, comity can serve to help to obtain and extend the duration of secrecy orders. If a court in country A grants secrecy relief, courts in countries B, C, D and E are liable to take notice and show curial deference and respect to the orders granted by country A — grounded on a *prima facie* finding of the presence of an asset flight risk presented by an underlying malefactor who has laundered and concealed substantial sums of value illicitly taken by deceit.

CONCLUSION

Secrecy orders are an underused tool in the asset recovery toolkit. Sealing orders, gagging injunctions and anonymisation orders mitigate the risk of counterparties, or bad actors, being put on notice of a concealed asset recovery strategy. Particularly in complex fraud cases with sophisticated counterparties, secrecy orders can prevent asset dissipation before assets can be found and frozen.

[19] *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508-10 (1984)

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Ponzi-Schemes - Clawing Back "Profits" Made by Early Investors

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STANLEY TAN

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PONZI-SCHEMES – CLAWING BACK "PROFITS" MADE BY EARLY INVESTORS

DANNY ONG & STANLEY TAN

SETIA LAW LLC

Abstract

Pursuing asset recovery in the aftermath of a Ponzi scheme poses significant challenges. Liquidators and courts in various jurisdictions have grappled with issues arising from the pursuit of claims not only against perpetrators of the fraud, but also against investors who fortuitously profited from the scheme prior to its collapse. One such insolvency clawback action against 'winning' investors has arisen, for the first time, in Singapore. In this article, Danny Ong and Stanley Tan of Setia Law LLC consider the decision of the Singapore Court in *Envy Asset Management Pte Ltd (in liquidation) and others v CH Biovest Pte Ltd* [2024] SGHC 46, the approach adopted by the Court, and its implications.

Introduction

In 2021, news broke of the collapse of an alleged Ponzi scheme in Singapore, involving hundreds of investors who placed approximately S$1.5 billion with a group of companies known as the Envy Group, on the premise that profits would be generated on their investments via Nickel trading. In the fallout of Singapore's largest alleged Ponzi scheme to date, the Singapore Court was tasked with determining in *Envy Asset Management Pte Ltd (in liquidation) and others v CH Biovest Pte Ltd* [2024] SGHC 46 ('*EAM v Biovest*'), whether an early investor, Biovest, could be made to pay back some S$2.3m of profits it had received from Envy Asset Management Pte Ltd (in liquidation) ('EAM'), an Envy Group company at the heart of the scheme.

The decision in *EAM v Biovest*

EAM v Biovest was an action brought by the Liquidators of EAM, seeking to claw back profits paid out to Biovest on the basis of insolvency avoidance provisions under Singapore's insolvency law. As a test case brought against a single 'winning' investor, the action in *EAM v Biovest* set the stage for determination of two important issues: First, could avoidance provisions be a viable tool to achieve a 'redistribution' of losses in the aftermath of a collapsed fraudulent scheme? Secondly, if so, could similar claims against dozens of other 'winners' be pursued economically and efficiently?

While the use of avoidance provisions in the context of a collapsed scheme was emphatically endorsed, the Court's approach in *EAM v Biovest* may have put a considerable dent in the EAM Liquidators' ambitions for a swift route towards recovery against numerous winners in similar positions as Biovest.

The action in *EAM v Biovest* was premised on section 73B of the Conveyancing and Law of Property Act 1886 ('CLPA') and section 224 of the Insolvency, Restructuring and Dissolution Act 2018 ('IRDA'), which provide as follows:

- **section 73B of the CLPA** – under this section, every conveyance of property made with the intent to defraud creditors shall be voidable, unless the property was disposed of "*for **valuable consideration** and in good faith or upon **good consideration** and in good faith to any person not having, at the time of disposition, notice of the intent to defraud creditors*";[1] and

- **section 224 of the IRDA** – under this section, if a company being wound up entered into an undervalue transaction with any person within 3 years before the commencement of the winding up, the Court can unwind the transaction. An undervalue transaction is defined under section 224(3) as either (i) a gift by the company to a person on terms that provide for the company to receive "***no consideration***" or (ii) a transaction where the **consideration** given by the person to the company **is significantly less** than the value of the consideration provided by the company.

Applying the above provisions, the Singapore Court ordered that the sum of S$2.3m in profits paid to Biovest be clawed back, on the basis that no consideration was given by Biovest for its receipt of these sums.[2]

In reaching this conclusion, the Court reasoned that because EAM was only obliged under the specific terms of the contract to pay Biovest if the value of the nickel purchased by EAM appreciated, and because no nickel was ever purchased by EAM, EAM's payment of

[1] Section 73B of the CLPA has been repealed, but remained in force in respect of the transactions in question as they took place prior to such repeal.
[2] *EAM v Biovest* at [199].

the S$2.3m to Biovest was an "*extra-contractual payment*" which Biovest gave no consideration for.[3]

The decision saw the Court apply an ordinary contractual analysis to the payments and the claims. More notable, however, was the Court's rejection of the Liquidators' argument in favour of a general proposition that no consideration can *ever* be given for profits paid out in a Ponzi Scheme.

In support of the argument that such a general proposition should exist under Singapore Law, EAM's liquidators relied on a line of cases in the United States of America ('USA')[4] and Canada[5] that put forward a general proposition that payments made to investors in a Ponzi scheme are voidable if they exceed the investor's initial investment. The reasoning in these cases was that an investor's initial investment sum can never be valuable consideration for the supposed profits paid out to the investor because these supposed profits are not consideration for the investor's initial investment, but instead, comprise the principal sums invested by other victims of the Ponzi scheme that were paid to keep the fraud alive.

After considering the above cases, as well as a contrary line of cases which adopted a more fact-specific inquiry in determining the existence of consideration in a Ponzi scheme,[6] the Singapore court declined to lay down a general proposition that no valuable consideration can ever be provided for profits paid out in a Ponzi scheme on the basis of "*precedent, principle, and policy*":

- **Precedent** – after noting that there were previous cases from the Court of Appeal (the highest court in Singapore) that have held that the question of whether consideration was provided must be analyzed using the principles of contract law, and cannot be looked at with the benefit of hindsight, the Singapore Court stated that it would not be appropriate to adopt a different analysis unique to Ponzi schemes.[7]

- **Principle** – the Singapore Court also held it would be contrary to Parliament's intention if payouts from Ponzi schemes were treated differently under the CLPA and the IRDA from other conveyances of property because Parliament did not expressly provide for that. It was also observed by the Singapore Court that Ponzi schemes are not always easy to define with certainty, and such a general proposition might also result in unfairness if it were applied in cases where the Ponzi scheme was only partial or only arose subsequently, especially since that could result in legitimate profits being clawed back alongside illegitimate ones.[8]

[3] *EAM v Biovest* at [131].
[4] *In Re Independent Clearing House Co* 77 BR 843 (1987); *Donell v Kowell* 533 F.3d 762 (9th Cir, 2008).
[5] *Den Haag Capital, LLC v Margaret Correia* 2010 ONSC 5339; Boale, Wood & Company Ltd v Whitmore 2017 BCSC 1917.
[6] *Re Titan Investments Ltd Partnership* (2005) 383 AR 323 (QB); *McIntosh v Fisk* [2017] 1 NZLR 863.
[7] *EAM v Biovest* at [159].
[8] *EAM v Biovest* at [160]-[162].

- **Policy** – the Singapore Court was also of the view that the laying down of a general proposition that investors in Ponzi schemes can never recover their supposed profits was an issue for Parliament, and not the courts.[9]

EAM v Biovest makes clear that under Singapore Law, and contrary to the approach taken in some foreign jurisdictions, a general proposition that no consideration can ever be provided in a Ponzi scheme does not exist. Each case involving a Ponzi scheme must be considered on its facts in determining whether consideration exists and whether the profits paid out to early investors can be clawed back.

Implications

The EAM Liquidators' success in *EAM v Biovest* was therefore only partial – while they did succeed in the individual clawback claim against Biovest, the Court's rejection of the general proposition advocated for by the Liquidators represents a significant setback to any attempt to achieve economical and efficient recovery against the entire group or class of 'winning' investors.

The fact-sensitive approach adopted by the Court in *EAM v Biovest* means that any further action by the EAM Liquidators would need to be pursued piecemeal against individual 'winning' investors, and success in those further cases is far from assured. Of particular relevance is the fact that the action in *EAM v Biovest* proceeded on the basis of a set of facts agreed between EAM and Biovest regarding the investment and EAM's lack of genuine profit – it stands to reason that other 'winners', of which many were in attendance on watching brief, now have motivation to contest many significant aspects of the EAM Liquidators' factual case as to the intended terms of their investment contracts, and the nature of the profits that were paid out.

Beyond arguments that the terms of each individual contract should be interpreted differently in light of differing context or circumstances, other potentially viable arguments are easily imaginable, including variation of the investment terms by agreement or conduct, or arguments premised on some other form of consideration such as forbearance to sue or a promise to invest additional principal. These disputes might well ultimately fail, but the very threat of opposition on these fronts is likely to give the EAM Liquidators significant cause for hesitation in considering their next steps.

The difficulty of securing asset recovery and redistribution in large-scale investor fraud claims is not new, but the practical concerns are very real. The liquidation of Bernie Madoff's eponymous Ponzi scheme entity, Bernard L. Madoff Investment Securities LLC, is closing in on its 15th year. Close to US$15bn has been recovered (against the size of the fraud which has been estimated at US$64bn) through dozens of avoidance actions, claims

[9] *EAM v Biovest* at [164].

and settlements, at a reported cost of some US$2.3bn and over a decade and a half of time spent.[10]

The scale of the Envy Group scheme certainly pales in comparison, but the decision in *EAM v Biovest*, which effectively shuts the door on a summary determination of the EAM Liquidators' potential future claims against other 'winning' investors, has nonetheless raised the prospect of a costly and arduous multi-year process of securing individual recoveries.

The solution to this arguably unsatisfactory prospect might well lie, as the Court seemed to suggest, with legislative or regulatory intervention. The successes achieved in the US by the Securities Investor Protection Corporation, and the Securities Investment Protection Act which constituted it, demonstrate that specifically legislated asset recovery mechanisms and investor protection measures can be an effective panacea to the difficult task of unwinding the effects of large-scale investment frauds and collapses.

Nonetheless, with no similar regime on the cards in Singapore, the EAM Liquidators will have to look elsewhere. Valuable lessons might well be taken from the example of the Courtenay House liquidation in Australia, involving the collapse of Australia's largest known Ponzi scheme, where investors were classed and representative claimants appointed, to enable group representation in various insolvency proceedings concerning the estate.

Conclusion

It is clear that *EAM v Biovest* is only a firing of the first salvo in what looks to be a long and complex liquidation process, and future decisions rendered by the Court in the course of the liquidation will likely see a considerable buildup of Singapore's jurisprudence in relation to asset recovery in the fallout of large-scale investor fraud.

[10] See, "The Madoff Recovery Initiative", <https://www.madofftrustee.com/infographics-34.html> accessed on 4 April 2024.

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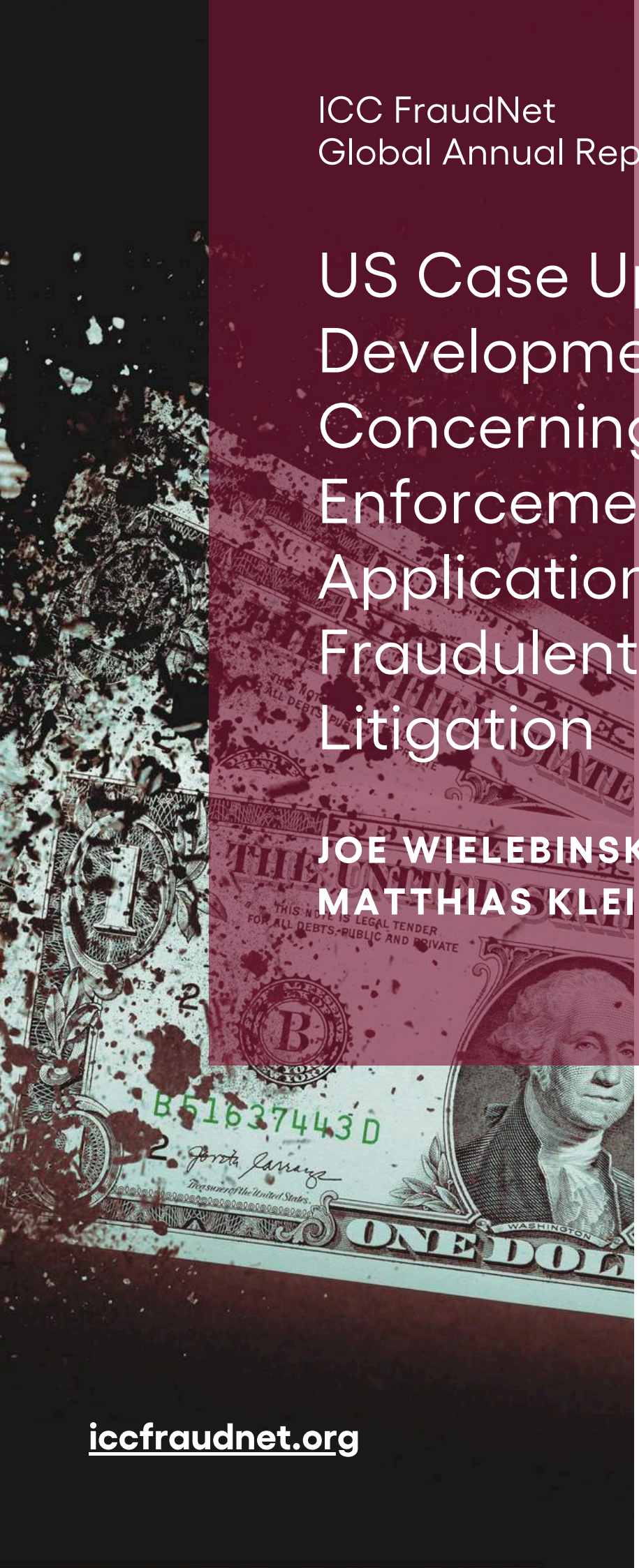
US Case Updates: Developments Concerning Judgment Enforcement, Discovery Applications, and Fraudulent Transfer Litigation

JOE WIELEBINSKI & MATTHIAS KLEINSASSER



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U.S. Case Updates: Developments Concerning Judgment Enforcement, Discovery Applications, and Fraudulent Transfer Litigation

Joe Wielebinski &
Matthias Kleinsasser

Introduction

This article provides an overview and analysis of recent cases concerning three issues: (1) enforcement of foreign-country judgments in the United States, (2) discovery applications under 28 U.S.C. § 1782, and (3) U.S. fraudulent transfer litigation in Ponzi scheme cases. The first case, *Dynaresource de Mexico S.A. de C.V. v. Goldgroup Res., Inc.*, held that a foreign-country judgment may only be enforced in Texas under the Uniform Foreign Currency Money Judgments Recognition Act if the judgment debtor has minimum contacts with Texas. The second case, *Venequip, S.A. v. Caterpillar, Inc.*, held that the existence of a forum-selection clause mandating that legal proceedings take place in another country is relevant to assessing whether an application for discovery under 28 U.S.C. § 1782 should be granted or denied. The third case, *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC*, underscores that the Ponzi scheme presumption, under which all transfers from a Ponzi scheme are deemed to have been made with actual fraudulent intent, remains good law in U.S. federal courts.

1. Enforcing foreign-country judgments: *Dynaresource de Mexico S.A. de C.V. v. Goldgroup Res., Inc.*, 667 S.W.3d 918 (Tex. App.—2023, no pet.).

In *Dynaresource*, the Dallas Court of Appeal, a Texas intermediate appellate court, ruled that a foreign-country money judgment may be enforced in Texas only if a Texas court would have personal jurisdiction over the judgment debtor. The applicant, Dynaresource, sought to domesticate a Mexican judgment against Goldgroup Resources Inc. in Dallas County, Texas, using the application procedure outlined in the Uniform Foreign Currency Money Judgments Recognition Act (UFCMJRA) as adopted in Texas. Goldgroup resisted the application on the basis that Goldgroup had no nexus with Texas, and, therefore, was not subject to personal jurisdiction there. The most recent version of the UFCMJRA (which is the version adopted in Texas) provides that recognition of a foreign-country judgment may not be denied for lack of personal jurisdiction if certain criteria are met (e.g., if the judgment debtor was personally served with process in the foreign country or if the judgment debtor entered a general appearance in the foreign proceeding). Therefore, Dynaresource argued, inquiry as to whether Goldgroup was subject to personal jurisdiction in Texas was irrelevant under the UFCMJRA recognition process. The district court disagreed and granted Goldgroup's special appearance.[1]

On appeal, the intermediate appellate court also sided with Goldgroup, stating: "As a threshold matter, it is antithetical to our system of justice to be able to file a suit for recognition of a judgment when the purported judgment debtor has no ties to the state in which recognition is sought, either through assets to attach or seize by enforcement or personal jurisdiction over the judgment debtor." *Dynaresource*, 667 S.W.3d at 926. The appellate court interpreted the provision of the UFCMJRA relied on by Dynaresource as foreclosing denial of an application on the basis that personal jurisdiction was lacking *in the country that issued the judgment* if the statutory criteria are met. This provision of the UFCMJRA does not, however, mean that a judgment may be domesticated in Texas if the debtor has no ties to Texas.

Because neither party disputed that Goldgroup had no Texas connections, the *Dynaresource* court was not required to analyze what contacts with Texas would be sufficient to establish personal jurisdiction in the judgment enforcement context. A physical presence (e.g., corporate domicile) would almost certainly suffice. Whether merely having assets in Texas would be sufficient is a closer call, but most Texas courts would probably find jurisdiction to be appropriate, at least on an *in rem* basis.

It may be puzzling to some non-U.S. attorneys why a judgment creditor might try to domesticate a judgment in a state in which the judgment debtor has no assets or physical presence. Why this occurred in *Dynaresource* is not clear. But it is not uncommon for judgment creditors to attempt to domesticate a foreign-country judgment in one U.S. state and then proceed with domestication in other states based on the principle that judgments from sister states must be given full faith and credit under the U.S. Constitution. In such

[1] The special appearance process is a means by which U.S. courts assess whether a defendant should be subject to personal jurisdiction in a U.S. state or federal court. If personal jurisdiction is lacking, the special appearance is granted and the claims against the defendant are dismissed without prejudice to re-filing in an appropriate jurisdiction.

case, the judgment creditor might gain an advantage by domesticating the judgment in a state in which the judgment debtor is effectively an outsider before turning around and enforcing the domesticated judgment in states in which the judgment debtor has assets. This gamesmanship does not work in every state. Some states will grant full faith and credit to a foreign-country judgment that has been domesticated in any U.S. state. Others (including Texas) require the judgment creditor to submit a new domestication application under the UFCMJRA or other applicable law. *Compare Reading & Bates Constr. Co. v. Baker Energy Res. Corp.*, 976 S.W.2d 702 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (requiring judgment creditor to file a new application to domesticate a foreign-country judgment, despite domestication having been achieved in Louisiana), *with Alta Secs. Comm'n v. Ryckman*, 2015 Del. Super LEXIS 237 (Del. Super. Ct. 2015) (holding that full faith and credit must be given to Canadian judgment that had been domesticated in Arizona, even though Delaware law would not permit the Canadian judgment to be domesticated directly in Delaware).

It remains to be seen whether other states will follow the Dallas Court of Appeals' holding that a foreign-country judgment can be enforced only where personal jurisdiction can be obtained over the judgment debtor. When seeking to enforce a foreign-country judgment, a party would be wise to obtain the services of a qualified attorney who regularly practices in the jurisdiction in question.

2. The effect of a forum-selection clause on Section 1782 applications: *Venequip, S.A. v. Caterpillar, Inc.*, 2022 U.S. Dist. LEXIS 48443 (N.D. Ill. Mar. 18, 2022), *aff'd* 83 F.4th 1048 (7th Cir. 2023).

Most U.S. asset-recovery attorneys are well-familiar with a discovery application under Section 1782 of Title 28 of the United States Code – frequently referred to as a "1782 application." Upon request of a foreign or international tribunal, or upon application of an interested person, Section 1782 permits (but does not require) a U.S. federal district court to order document production and testimony from a person located in the court's district for use in a foreign proceeding or tribunal.

In reviewing these discretionary applications, the U.S. Supreme Court has instructed federal district courts to consider four factors: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or court to U.S. assistance; (3) whether the discovery request conceals an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country or the United States; and (4) whether the discovery requested is unduly intrusive or burdensome. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004). Importantly, Section 1782 does not require that the foreign proceeding be "pending" or "imminent," only that the proceeding be "within reasonable contemplation."[2] *Intel*, 542 U.S. at 259. Discovery is regularly sought under Section 1782 from non-parties to the foreign proceeding, making the statute a potent discovery tool. *Venequip*, 2022 U.S. Dist. LEXIS 48443, at *5-6.

[2] The foreign tribunal or proceeding may not, however, be a private arbitration tribunal or proceeding. *See ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022).

Venequip involved a dispute between Venequip, S.A., a Venezuelan entity, and Caterpillar S.A.R.L. ("CAT"), a Swiss subsidiary of equipment manufacturer Caterpillar, Inc. Venequip and CAT enjoyed a productive business relationship for many years, under which Venequip distributed Caterpillar equipment in Venezuela. The agreements governing their business relationship contained a forum-selection clause requiring any dispute be resolved in Swiss courts. After CAT terminated the business relationship, Venequip filed suit for breach of contract in Geneva, Switzerland, as required by the forum-selection clause. Venequip subsequently submitted at least nine Section 1782 applications in federal districts across the United States, including one in the Northern District of Illinois seeking information from Caterpillar.

The district court thoroughly reviewed the *Intel* factors and denied Venequip's application. The forum-selection clause formed an integral part of the court's analysis. The court noted that the parties agreed that discovery in the United States is more far robust than discovery in Switzerland. Therefore, the court concluded that while Swiss courts probably would not consider evidence obtained by the Section 1782 application null and void, they likely would view the evidence with skepticism and potentially decline to admit it into evidence. The fact that Venequip agreed in its contractual documents with CAT to litigation in Switzerland, while not dispositive of the issue, suggested that U.S. courts should weigh permitting robust discovery carefully.

Although case law recognizes that the third *Intel* factor does not require exhaustion of remedies, discoverability, or admissibility in the foreign forum . . . that principle does not eliminate the importance of the parties' forum-selection and choice-of-law agreement. And, in conjunction with the second [*Intel*] factor, it does counsel in favor of proceeding cautiously before overwhelming a foreign tribunal with "assistance" that it may not want or appreciate.

Venequip is not the first time U.S. courts have considered a forum-selection clause in deciding whether to grant a Section 1782 application. *See, e.g., Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 595 (7th Cir. 2011) (stating that courts should "watch out for . . . a forum-selection clause in a contract, which might indicate the parties' preference for a court system that doesn't contemplate the level of compulsory process available in America"); *see also Al-Ghanim v. IAP Worldwide Servs., Inc.*, 2012 U.S. Dist. LEXIS 200515, *11 M.D. Fla. Jan. 18, 2012) (weighing forum-selection clause in denying Section 1782 application). This does not mean that the fact that discovery may be available in the U.S. but not in the foreign jurisdiction is a *per se* bar to a Section 1782 application. On the contrary, the U.S. Supreme Court clearly rejected this "foreign discoverability" prerequisite in *Intel*. *See Intel*, 542 U.S. at 259-62. Nevertheless, *Venequip* makes clear that practitioners should carefully weigh the existence of a forum-selection clause and the discovery and evidentiary requirements of the foreign jurisdiction in deciding whether to file a Section 1782 application.

3. The Ponzi scheme presumption remains alive and well in U.S. federal courts: *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC*, 654 B.R. 653 (Bankr. S.D.N.Y. 2023):

Applicable U.S. law recognizes two basic causes of action for fraudulent transfer: (1) actual fraudulent transfers and (2) constructive fraudulent transfers. The first category are transfers made with actual intent to hinder, delay, or defraud a creditor. The second category are transfers that deplete the assets of an insolvent or financially troubled debtor, regardless of whether they are made with fraudulent intent.[3]

Fraudulent transfer litigation is a standard part of a receivership or bankruptcy involving a Ponzi scheme – *i.e.*, a fraudulent scheme in which prior investors receive distributions funded out of new investor money to cover up the absence of a legitimate business. In jurisdictions recognizing the so-called Ponzi scheme presumption, when a trustee or receiver establishes that a business is a Ponzi scheme, the trustee or receiver has satisfied as a matter of law that any distributions out of the scheme were made with actual intent to hinder, delay, and defraud creditors. The reasoning behind applying this presumption is that distributions in a Ponzi scheme, by definition, are fraudulently made using new investor money. Applying the presumption therefore permits the trustee or receiver to avoid having to spend resources proving that every transfer was made with the acquired actual fraudulent intent. Once the scheme is established, actual fraudulent intent is presumed and the burden shifts to the recipient of the transfer to establish an affirmative defense.[4]

A few years ago, some commentators began questioning whether the Ponzi scheme presumption would remain good law after the Supreme Court of Minnesota rejected the presumption in *Finn v. Alliance Bank*, 860 N.W.2d 638 (Minn. 2015). That opinion, however, has proved to be an outlier, and the presumption remains alive and well in most federal courts. Most recently, the presumption was applied by the U.S. Bankruptcy Court for the Southern District of New York in *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC*, 654 B.R. 653 (Bankr. S.D.N.Y. 2023). The court argued that the presumption can be applied on the basis of efficiency, stating: "All the Ponzi scheme presumption does is save the Trustee and the courts time and resource by presuming that each transfer was made with actual fraudulent intent." *Id.* at 676. For now at least, the Ponzi scheme presumption remains a potent tool in the arsenal of a trustee or receiver tasked with recovering assets from the beneficiaries of a Ponzi scheme.

[3] Often, both types of fraudulent transfer claims are alleged. Whether the transferor was insolvent is a factor to consider in assessing not only whether a constructive fraudulent transfer occurred, but whether actual intent to hinder, delay, or defraud was present for purposes of an actual fraudulent transfer claim.

[4] Note, however, that the Ponzi scheme presumption generally applies only to Ponzi schemes (which, by definition, have no legitimate business), and not necessarily to other types of fraudulent schemes. *See, e.g.*, *Yaquinto v. CBS Radio, Inc. (In re Tex. E&P Operating, Inc.)*, 2022 Bankr. LEXIS 1932, at *35-39 (Bankr. N.D. Tex. Jul. 13, 2022).

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Appointing a Receiver to a Trust in New Zealand

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APPOINTING A RECEIVER TO A TRUST IN NEW ZEALAND

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MEREDITH CONNELL

Introduction

Most receiverships arise out of a contractual right of appointment. A company may give this right as security for funds lent. This species of receivership is actually a relative newcomer within the genus, having evolved as a means to evade the obligations imposed on a mortgagee in possession.[1] By contrast, the equitable remedy of receivership arose around the sixteenth century. It is one equity's oldest;[2] but it is exercised rarely today.

The Court may appoint a receiver[3] to a variety of legal entities including companies and incorporated societies.[4] This note tracks the development of the New Zealand High Court's jurisdiction to appoint a receiver to a trust and its recent codification, with an eye to how this jurisdiction might be helpful, particularly in cases of fraud.

Two broad categories

Unlike the English courts, the New Zealand High Court has no general statutory jurisdiction to appoint a receiver. It has relied on its inherent equitable jurisdiction to do so when

[1] Blanchard and Gedye *Private Receivers of Companies in New Zealand* (3rd ed, Lexis Nexis, Auckland, 2008) at
2.02.
[2] *Hopkins v Worcester & Birmingham Canal* Proprietors (1868) LR 6 Eq 437, 447
[3] Strictly, a receiver and manager.
[4] *Te Runanganui o Ngati Kahungunu Inc v Scott* [1995] 1 NZLR 250.

necessary. Consistently with this history and English case law, you can roughly divide cases into two categories.

The first is when an applicant seeks to appoint a receiver as a pre-judgment remedy. These are cases where the Court identified a need to protect property or income, usually pending substantive determination by the Court.[5] In such a case, the receiver is an officer of—and answerable to—the Court.[6]

The second category is often referred to as appointment by way of equitable execution: reserved for cases where execution of a judgment at law would be hampered by the unusual nature of the defendant's property. The Court could appoint a receiver over that unusual property if to do so allowed the plaintiff to recover the debt owed. This note does not look at this second category, save to record that some modern cases in the House of Lords,[7] Privy Council,[8] and Irish Supreme Court,[9] have sought to clear away technical limits linked to the remedy's equitable history that previously may have made it less attractive.

The jurisdiction to appoint a receiver to a trust

For a brief time in 1980s New Zealand, the court-appointed receiver came into vogue as a means to investigate the affairs of related companies effectively. One well-known example is *Rea v Chix Products (California)*.[10] Receivers applied for appointment to the subsidiaries (over which their appointing bank did not hold a debenture) on the ground that the affairs of the parent and subsidiary poultry companies were intertwined and it would be impossible to disentangle or determine ownership of assets otherwise. The Court concluded that there was sufficient evidence of: (a) debts being owed by the subsidiaries to the parents and (b) property that needed preservation until investigation of those debts could be completed. It thus made the appointment, but on a limited basis consistent with the application's background. A slew of similar cases involving subsidiary companies followed shortly afterwards,[11] before interest in the remedy appeared to decline following several unsuccessful applications.

Interest regrew in 2012, when the Court considered a similar type of application against a trust, in *Bank of New Zealand v Rowley*.[12] A bank had lent money to Rowley's tax and accounting business based on representations about the value of the business's accounts receivable. Rowley operated the business via a trust of which he was a trustee and

[5] For a very early case see *Skip v Harwood* (1747) 380K. 564 referring to 'a discretionary power exercised by this
Court with as great utility to the subject as any sort of authority that belongs to them, and is provisional only for the
more speedy getting in of a party's estate, and securing it for the benefit of such person who shall appear to be entitled, and does not at all affect the right.'
[6] See *Rea v Omana Ranch Limited* [2013] 1 NZLR 587 at [11].
[7] *Masri v Consolidated Contractors International (UK) Ltd (No.2)* [2008] EWCA Civ 303, [2009] QB 450.
[8] *Fonu v Merrill Lynch Bank and Trust Company (Cayman) Ltd & Ors (Cayman Islands)* [2011] UKPC 17
[9] *ACC Loan Management v Mark Rickard and Gerard Rickard* [2019] IESC 29.
[10] *Rea v Chix Products (California) Ltd* (1986) 3 NZCLC 99,852.
[11] *Bullen v Tourcorp Developments Limited* (1988) 4 NZCLC 64,661; *Steel v Matatoki International Limited* (1988) 4
NZCLC 64,710; *Elders Rural Finance NZ Limited v Galloway* 26/5/88, Anderson J, HC Tauranga CP69/88.
[12] *Bank of New Zealand v Rowley* [2012] NZHC 3540.

beneficiary, alongside members of his family. Criminal proceedings showed the business to be a fraud; Rowley and a business partner were imprisoned and bankrupted.

The terms of the bank's loan did not give it the right to appoint receivers over the trust assets. The bank nonetheless invited the Court in its inherent jurisdiction to appoint a receiver to them to allow for investigation, tracing and recovery of assets that Rowley had fraudulently moved through the trust. Justice Dobson concluded that the case was an appropriate one to exercise the Court's inherent jurisdiction, and appointed receivers to the relevant trust on terms designed to allow them to investigate the trust's affairs but not allow the bank any advantage over any other person with a claim to trust assets.[13]

The next year, in *Official Assignee v Smith*, the Court appointed a receiver in circumstances where the Official Assignee could not prove the trust in question had conducted dishonest activities, but could demonstrate the trust had been established as a vehicle to receive funds fraudulently obtained and that there was a risk of dissipation.[14] The Court gave the receivers the power to identify, follow, trace and realise assets.[15]

Section 138 of the Trusts Act

At the time of *Rowley and Smith*, New Zealand's Law Commission was finalizing a project to introduce a new trusts law. It seems that *Rowley*, at least, was at the front of the Law Commission's mind when it proposed that the new law codify the jurisdiction to appoint a receiver to a trust.[16] This provision is now found at s 138 of the Trusts Act 2019:

138 Court may appoint receiver for trust

(1) The court may, on an application by an interested person or on its own motion, appoint a receiver to administer a trust.

(2) The court must be satisfied that the appointment of a receiver to administer the trust is—

(a) reasonably necessary in the circumstances of the trust; and
(b) just and equitable.

(3) Only a person qualified to be a trustee may be appointed under subsection (1).

(4) When appointing a receiver under this section, the court (having regard to the terms of the trust and the interests of justice) must determine—
(a) the extent of the duties and powers of the receiver; and
(b) the duration of the receivership; and

[13] See the orders made at [33].
[14] *Official Assignee in Bankruptcy of the Property of Michael Owen Perkins v Smith* [2013] NZHC 3217.
[15] At [34].
[16] Law Commission, *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 16.30.

(c) the principles that the receiver is to apply in determining priorities; and

(d) whether the receiver is to be paid from the trust assets.

(5) If a court determines under subsection (4) that a receiver has a power in relation to a trust, the trustee of the trust cannot exercise that power for the duration of the receivership

In the course of its project, the Law Commission noted that receivership had the potential to be a useful process in the context of trust assets (although that potential was not well known). A receiver could: "take charge of the fund, deal with and if necessary realise some assets, conduct a managed distribution, and if appropriate, hand back the fund to the trustees".[17] Interestingly, it also recorded that the proposal to provide a statutory basis for receivership was supported predominantly by New Zealand's Inland Revenue – likely a reflection of the extent to which trusts are used in New Zealand as a form of asset protection from creditors.[18] And it is notable that the Law Commission rejected a proposal that only a creditor of a trust be able to apply: [19] hence s 138 allows an application by any "interested person".

Recent case law

Since the enactment of the Trusts Act there have been a number of cases in which applicants have sought to use this section. The majority of these cases have however concerned applications made in relation to what might loosely be described as family trusts,[20] or against the background of relationship property disputes.[21] Most commonly, applications have been brought on the basis that a trustee is unwilling or unable to properly perform their duties, to the degree that appointing a receiver is necessary to preserve the assets of the trust.[22] The applicants have either been co-trustees themselves, or discretionary beneficiaries of the trust in question. None has yet involved allegations of fraud.[23]

These cases do nevertheless contain some helpful observations, which suggest that a victim of fraud could also successfully utilise s 138 in an appropriate case. They confirm:

(a) the new provision was not intended to fundamentally change the basis for the exercise of the inherent jurisdiction and may, if anything, provide the court with the flexibility to appoint a receiver in a wider range of situations;[24]

[17] Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012) at 8.69.
[18] Ibid.
[19] Law Commission, *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 16.30.
[20] See *Reaney v Reaney* [2021] NZHC 784; *Re Cameron* [2022] NZHC 2495; *PH Trustee Ltd v HJ* [2024] NZHC
603.
[21] *Armani v Armani* [2021] NZHC 3145.
[22] This was, in effect, the stated justification in each of the cases outlined at footnote 20 above.
[23] One did involve an application by a creditor of a trust, but this was ultimately determined on the basis of the court's
inherent jurisdiction, rather than under s 138; see *Body Corporate 81012 v Memelink* [2022] NZHC 1244.
[24] *Armani v Armani*, at [82]; *PH Trustee Ltd v HJ*, at [12].

(b) on a purposive construction, there is nothing to suggest the legislature intended the term "interested person" to be construed narrowly;[25]

(c) this term must "encompass a fellow trustee, a creditor or a beneficiary, whether final or discretionary, depending on the circumstances."[26]

On that basis, given that creditors have expressly been recognised as interested persons, we think a victim of fraud who could, to some degree, trace their funds into trust assets may also have standing to bring an application under s 138, whether or not they were a creditor of the trust itself.

Once standing is established, under s 138(2), the Court must also be satisfied that the appointment of a receiver is "reasonably necessary in the circumstances of the trust" and that this is "just and equitable."

On their face, the words "reasonably necessary in the circumstances of the trust" could be read as suggesting that the court's focus should be on whether the appointment of a receiver is necessary from the perspective of the trust or its beneficiaries, as opposed to a third party, like a victim of fraud who might be able to trace their funds into trust assets.

However, again, the decided cases suggest this phrase will be interpreted broadly. In *Armani v Armani*, Justice Walker said as follows:

> [84] The phrase "reasonably necessary" is one of beguiling simplicity. It is a commonly used phrase in legislation. It appears in two sections of the Act. But, what is "necessary" tends to be of fluid rather than fixed character. It can mean "convenient" or "expedient". At the other end of the spectrum, something "necessary" may be entirely "indispensable, vital, essential; requisite". Thus, its meaning is nuanced; it wholly depends on context.
>
> [85] The word "reasonable" is defined in the Oxford English Dictionary to mean "[w]ithin the limits of what it would be rational or sensible to expect; not extravagant or excessive" or "in accordance with reason; not irrational, absurd, or ridiculous". Here it qualifies the "necessity," connoting less essentiality, but also links to the circumstances of the particular trust.
>
> [86] My view is that the ordinary meaning of "reasonable necessity" does not precisely equate with a measure of "last resort" but neither is it widely different. There is nothing in the Law Commission report pointing to an intention to alter the approach under the inherent jurisdiction but there is some flexibility in the express connection with the "circumstances of the trust". In its context, reasonably necessary means something more than expedient or desirable, falling closer to "required" or essential to achieve a particular outcome or purpose, but is not necessarily restricted to

[25] *Armani v Armani*, at [79].
[26] Ibid, at [79].

> measures of a last resort. Even so, the availability of alternative, less drastic remedies will be a factor going to the "just and equitable" requirement.
>
> (footnotes omitted)

There is no reason to think that, in an appropriate case, preserving trust assets for the benefit of a victim of fraud who could trace their funds into those assets could not be an acceptable outcome or purpose. The fact that asset preservation and recovery was a key driver in the enactment of this provision tends to support this interpretation.

Conclusions

This note has tracked the development of the jurisdiction to appoint a receiver to a trust in New Zealand. In codifying the power, the drafters of s 138 sought to put the inherent jurisdiction on a statutory basis, while maintaining its flexibility to respond to particular circumstances. The section is a helpful outline of the Court's jurisdiction to appoint receivers outside a contractual power of appointment, and logically should inform the jurisdiction outside the trust context by analogy. It may also serve as helpful evidence of the bounds of the jurisdiction for other common law courts in similar cases. In New Zealand, it is a remedy appropriate to cases of fraud, particularly to allow asset investigation and recovery: no small thing, given this country has one of the highest rates of discretionary trusts in the world. This conclusion flows from its history as an equitable remedy and the fact its renaissance in New Zealand sprung from a number of fraud cases—which then coincided with the project that led to the drafting of s 138. Although the new provision has not yet been used for this purpose, it appears to us to be well suited to the task.

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Enforcement of Foreign Judgments in Panama

DONALD SÁEZ SAMANIEGO

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ENFORCEMENT OF FOREIGN JUDGMENTS IN PANAMA

DONALD SÁEZ SAMANIEGO

MDU LEGAL

Introduction

In this paper, the author addresses the legal requirements that must be observed, with the objective of achieving the recognition and execution of a foreign judgment in the Republic of Panama. Furthermore, the paper briefly describes the *exequatur* procedure.

Globalization has meant that cross-border legal relationships tend to be more frequent. In that sense, cross-border legal relations often means that one country is called upon to hear and decide a judicial process, but the effects of that decisions may need recognition in another country outside the jurisdiction of the Court that has issued the resolution. Hence, a judicial decision issued in one country can impact extraterritorially in various countries, and it becomes pertinent to know certain rules so that the effects of a foreign judicial resolution can be recognized and thus have its effects in the Republic of Panama. In effect, we are referring to the process of recognition and execution of sentences, traditionally known as "*exequatur"*.

1. Requirements:

Unless there are special treaties regarding the recognition of foreign resolutions or sentences, in order to be recognized and have legal effects in the Republic of Panama, the essential requirements referred to in article 1419 of the Judicial Code[1] must be observed, in accordance with Articles 155 and 156 of the Code of Private International Law of Panama (Law No. 61 of October 8, 2015)[2]. These regulations, essentially, mention the

[1] The Judicial Code of Panama can be consulted at: https://vlex.com.pa/vid/codigo-judicial-58511374
[2] Official Gazette of Panama 27885-A of October 8, 2015, available at: https://www.gacetaoficial.gob.pa/pdfTemp/27885_A/GacetaNo_27885a_20151008.pdf

requirements to recognize and execute a foreign judgment in Panamanian territory, among which are the following:

a) That the sentence has been issued as a result of the exercise of a personal claim:

This means that the sentence that has been issued must be directly linked to the person against whom its execution is requested.

b) That the sentence has not been issued in absentia:

As part of the recognized fundamental rights inherent to a rule of law, the claim that gives rise to the judgment that is sought to be recognized, must have been communicated to the claimant, in order to guarantee that the claimant has been able to effectively defend himself during the process, meaning, the fact that he has been able to file (and have been decided on) all available legal remedies or resources.

c) *That the obligation declared in the sentence is legal in Panama;*

This requirement coincides with what is stated in article 7 of the Code of Private International Law, when it indicates:

"Article 7. The legal effects of a foreign act or law will not be recognized, in whole or in part, when its application violates or violates international public order.
Foreign law not applied will be replaced by domestic law."

In view of this, those sentences that have been based on foreign laws contrary to Panamanian law or public order are not recognized in Panama, a criterion that has been established recurrently by the Supreme Court of Justice.

d) That the copy of the sentence is authentic and that it is final, that is, that it does not admit further legal resources:

This requirement suggests that whoever attempts to request the declaration of recognition or non-recognition must provide an authenticated copy of the ruling, which means that, for these purposes, the apostille or legalization procedure must be completed.

e) Reciprocal denial of recognition:

Notwithstanding compliance with the above requirements, the Courts of Panama may deny recognition when there is sufficient evidence that the sentences of the Panamanian courts are not recognized in the country from which the sentence whose recognition is requested comes. However, it should be noted that this is not common in Panamanian justice.

2. Procedure:

The request for *exequatur* for whoever intends to declare recognition or non-recognition of a foreign judgment in the Republic of Panama, must be submitted to the Fourth Chamber of General Matters of the Supreme Court of Justice, unless exists a special treaty that grants the attribution or competition to another entity.

Once the Chamber receives the request for *exequatur*, it must inform the party that must comply with the sentence and the Attorney General of the Nation. If the parties agree that the sentence should be recognized and executed, the Court must decide. However, if there are disagreements and there are facts to prove, the Court grants a period of time to provide and present evidence, as well as for final arguments, to then proceed to issue a ruling.

If the Fourth Chamber of the Supreme Court declares that the sentence is recognized and enforceable in Panama, the applicant may appear before the Judge who is legally responsible for hearing ordinarily the matter in question (civil, commercial, family, etc.), and ask for their help to execute the sentence.

3. Processes that do not require *exequatur* to be recognized in Panama[3]:

In accordance with the provisions of article 139 of the Code of Private International Law, in accordance with article 225 of Law No. 12 of 2016 and its reforms (*which establishes the regime of insolvency proceedings)*[4], the Fourth Superior Court of the First Judicial District[5] (for Insolvency matters) is competent to hear the recognition of foreign insolvency processes.

"Article 139. The recognition of foreign bankruptcy will produce its effects **without exequatur** when no bankruptcy process has been declared in the territory of the Republic of Panama regarding the foreign bankrupt and provided that said bankrupt has assets in Panama. The nomination of the foreign trustee, as well as the conservatory measures, will not be subject to any exequatur process. However, the nomination of the foreign trustee must be recorded by a foreign resolution or decision duly apostilled and translated into the Spanish language, indicating his powers, which must be validated before the civil or commercial judge, as the case may be, before whom he must take possession of the position and obtain authorization for the execution of its powers." (Our emphasis).

[3] If you want to know more about the requirements for the recognition of a foreign insolvency process, you might consult the following article, also written by the author, and published in the Global Annual Report 2022 – ICC FraudNet: https://fraudnet.simplecrmdemo.com /wp-content/uploads/2023/06/ICC_FraudNet_Global_Annual_Report_2022.pdf [accessed February 29, 2024].

[4] Available at the Official Gazette's website: https://www.gacetaoficial.gob.pa/pdfTemp/28036_B/56238.pdf, [accessed February 29, 2024].

"Article 225. Request for recognition of a foreign process. The foreign representative **may request before the Fourth Superior Court of the First Judicial District** the recognition of the foreign process in which he has been appointed…" (Our emphasis).

However, and bearing in mind that the Fourth Superior Court of the First Judicial District, to date, has not been implemented, the recognitions are the responsibility of the Civil Circuit Courts to hear, provisionally, in accordance with article 262 of Law No. 12 of 2016:

> " **Article 262 (transitional).** While the Superior Courts and Circuit Courts of Insolvency referred to in Chapter I of the Preliminary Title are created, **the Civil Jurisdiction Courts will continue to hear the insolvency processes as before**.

It will be up to the Supreme Court of Justice, through the Agreement Chamber, to determine the creation and nomenclature of these Courts and Tribunals, permanently or temporarily, justified based on the needs of the service." (Our emphasis).

Finally, another process that does not require the *exequatur procedure* before the Fourth General Business Chamber of the Supreme Court, is related to succession proceedings initiated abroad. In the event that there are assets pending adjudication in Panama, the demand for recognition of the foreign judgment must be requested before the ordinary justice system (read Municipal Civil Courts or Civil Circuit Courts), who are in charge of adjudicating the assets subject to the Panamanian jurisdiction:

"**Article 1523.** When the order declaring heirs or the adjudication resolution has been issued by a foreign court and the deceased has left assets in the country, the edicts will be set and published and the procedure established in articles 1510 et seq. will be followed."

4. Conclusion:

Through the recognition of foreign judgments, you can request that their effects be executed in the Republic of Panama. This mechanism is useful, because it avoids the time and expense of having to file a process in each linked jurisdiction, while at the same time dissipating the risk of obtaining a multiplicity of criteria or contradictory rulings. This mechanism is based on good faith, reciprocity, and international judicial assistance and cooperation between countries.

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Current Legal Regime for Money Laundering in Ghana: An analysis

BOBBY BANSON

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CURRENT LEGAL REGIME FOR MONEY LAUNDERING IN GHANA – AN ANALYSIS

BOBBY BANSON

ROBERT SMITH LAW GROUP

Money Laundering is a phenomenon which has gained much traction in Ghana in recent times. In 2020, the Parliament of Ghana passed a law, the pre-amble of which states: "AN ACT to consolidate the laws relating to the prohibition of money laundering, provide for the establishment of the Financial Intelligence Centre and for related matters." In this article, the Author will discuss the essential provisions of the element of money laundering as spelt out in this new law. The Author also discusses are the courts have interpreted and applied some of the salient provisions in this law. This article discusses some of the shortfalls in the application of the law and concludes with recommendations to to enable a seamless prosecution and adjudication of money laundering cases by these law enforcement agencies.

1. INTRODUCTION

The offence of money laundering, as provided under **Section 1 of the Anti-Money Laundering Act, 2020 (Act 1044)**, is committed where a party is involved in acts such as being in possession or control of money obtained through unlawful activity.
Sections 1(2) and (3) of the Act provides respectively:

1(2) *A person commits an offence of money laundering if the person knows or ought to have known that a property is, or forms part of, the proceeds of unlawful activity and the person*

(a) converts, conceals, disguises or transfers the property for the purpose of

(i) concealing or disguising the illicit origin of the property; or
(ii) assisting any person who is involved in the commission of the unlawful activity to evade the legal consequences of the unlawful activity;

(b) conceals or disguises the true nature, source, location, disposition, movement or ownership of, or rights to, the property; or

(c) acquires, uses or takes possession of the property knowing or suspecting at the time of receipt of the property that the property is, or forms part of the proceeds of unlawful activity.

(3) *Where a person under investigation for money laundering is in possession or control of property which the person cannot account for and which is disproportionate to the income of that person from known sources, that person shall be deemed to have committed an offence under subsection (2).*

2. AGENCIES WITH JURISDICTION TO INVESTIGATE MONEY LAUNDERING

The offence of money laundering is considered a serious offence in Ghana. As such, special agencies have been given the mandate of handling issues involving money laundering. These agencies include the Economic and Organised Crime Office which derives its power from section 3 of the EOCO Act 2010 (Act 804) and as part of its functions, to investigate and on the authority of the Attorney-General prosecute serious offences which involves *inter alia* money laundering.

Section 3 of the EOCO act provides as follows;

The functions of the Office are to

(a) investigate and on the authority of the Attorney-General prosecute serious offences that involve

(ii) money laundering

Also, under section 7 of the Anti-Money Laundering(AML) Act 2020 (Act 1044), the Financial Intelligence Centre has as part of its objects to assist in the combat of money laundering.

Section 7 of the AML Act provides as follows;

The objects of the centre are to:

(a) assist in the identification of proceeds of unlawful activity;
(b) assist in the combat of
(i) money laundering

Other institutions such as the Special Prosecutor and the Police Service as part of their general mandate, can handle cases involving money laundering.

Section 1 of the Police Service Act, 1970 (Act 350) provides as follows;

1. Functions of the Service

(1) The Police Service as provided for by Article 190 of the Constitution, shall prevent and detect crime, apprehend offenders, and maintain public order and the safety of persons and property.

In light of the above-mentioned provision, Amadu JSC in paragraph 21 of his judgment in the case of ***In Republic vs. High Court Financial and Economic Crime Division (Court 2), Accra; Ex Parte Malik Ibrahim (2023) JELR 11234 (SC)*** stated as follows;

> "…This point is important because the impression must not be given that the Ghana Police Service has no mandate to investigate money laundering if in the course of their duties of investigating crimes in general evidence leading to the possible commission of money laundering emerges."

3. APPRAISAL OF ANTI MONEY LAUNDERING REGIME

While there have been successes at prosecuting and adjudicating cases involving money laundering in Ghana, the processes have not been without hitches.
This paper seeks to undertake an in-depth analysis of selected money laundering concluded cases in order to establish systematic, structural, procedural, institutional and administrative failures in investigations, prosecution and adjudication of cases by selected Law Enforcement Agencies.

The following cases were looked at in preparation of this analysis:

- The Executive Director, Economic and Organised Crime Office, Accra vs. Investment Strategies Enterprise, and Daniel Addo (2013) JELR 66608
- The Republic vs. High Court (Financial Division 2), Accra (2017) JELR 65773 (SC)
- Republic vs. High Court Financial and Economic Crime Division (Court 2), Malik Ibrahim 2023 JELR 11234 (SC)

3.1 *The Executive Director Economic & Organised Crime Office Accra vs. Investment Strategies Enterprise and Daniel Addo (2013) JELR 66608*

This case involved a motion for an order to release and unfreeze bank accounts of the respondents and applicants. The facts are that the respondents/applicants were notified per a letter dated December 4, 2012, sent to them by the applicant/respondent ('EOCO') that the respondents/applicants' bank accounts with Fidelity Bank (Gh) Ltd. at the East Legon branch in Accra had been frozen.

According to the respondents/applicants, they were not informed of the basis for the freezing, nor were they invited to volunteer any statements. However, upon receipt of that letter, the second respondents/applicants went to the Office of EOCO and provided all the necessary documentation and information to facilitate and assist in any investigation as to the source of the funds.

It was the case of the respondents/applicants up until the time of this suit that the EOCO had failed to prefer charges against the respondent or applicants or confront them with any substantial evidence in any offence, even after the request for Mutual Legal Assistance made to the United States Embassy in Ghana by the EOCO. Further, the respondents/applicants argued that the continued denial by the respondents/applicants of the use of the funds in their accounts amounts to an infringement of their rights as enshrined in **Article 18 of the 1992 Constitution.**

Counsel for the Applicant/Respondent stated that they were expecting the American Embassy here in Ghana to furnish them with any helpful information when they had completed their investigations and admitted that the E.O.C.O. requested 4 weeks from the Embassy to assist them (the E.O.C.O.) to complete their investigations, which had long elapsed. Nevertheless, the E.O.C.O. had been conscious of their time spent investigating the matter and had not gone to sleep. The court held that 9 months since the accounts were frozen was a reasonable period within which the E.O.C.O. ought to have determined whether the transaction in question, which was the subject matter of the application, indeed triggered a reasonable suspicion. The court per Mensah J held that:

> *In the instant case, I hold the respectful view that 9 months since the accounts were frozen, is a reasonable period within which the E.O.C.O ought to have determined whether the transaction in question, which is the subject matter of the instant application indeed triggered a reasonable suspicion. It cannot be justified under any circumstance that since the 15th November, 2012 when the E.O.C.O froze the Respondents/Applicants' accounts and had it confirmed by the court per its order on 04/12/12 the accounts remain frozen. I think that the continued freezing of the accounts without any provable facts or evidence that the Respondents/Applicants are indeed engaged in money laundering or some other serious offence sins against Article 18(1) of the 1992 Constitution which provides that every person has the right to own property either alone or in association with others.*

3.2 Republic v. High Court (Financial Division 2), Accra (2017) JELR 65773 (SC)

In this case, the applicants sought an order of certiorari directed at the High Court (Financial Division 2), Accra, to quashed the ruling of August 3, 2016 in Suit No. FTRM/87/15, which

instituted **Financial Intelligence Centre v. Kofi Appianin Ennin and 3 others.** The background is that the interested party herein (the Financial Intelligence Centre) applied to the High Court, Financial Division 2, Accra, with two ex-parte applications for the freezing of the accounts of the applicants. The freezing orders were granted by the High Court on June 16 and 25, 2015, respectively. The applicants sought to set aside the orders made by the High Court, Financial Division 2, Accra, on the grounds that per the legislation setting up the Financial Intelligence Centre, and upon an application of the decision of the Supreme Court in **The Republic v. High Court (Financial Division), Accra Ex-Parte Xenon Investment Co. Limited,** it would be in excess of the jurisdiction of the Court to keep the accounts of the applicants beyond the statutory one-year period specified in the **Anti-Money Laundering Amendment Act, 2014 (Act 874).**

The case of the applicants was that **Section 23A of Act 849** only allows or permits the freezing of accounts for one year and that non-observance and compliance with the said statutory provisions by the learned trial judge exceeded her jurisdiction. Counsel for the interested party was of the view that **Section 23A of Act 849** permits extensions of freezing orders beyond the statutory one-year period, provided prosecution has commenced. The court granted the application and noted that for a state apparatus, like the [Financial Intelligence Centre], with all the resources, facilities, and other institutions of state responsible for intelligence available to them and taking into account the international cooperation that they receive, one year is more than enough to enable them to complete investigations into any offence under Act 874. The Court per **Dotse JSC** held that:

> *As a matter of fact, when one further considers article 11 of the Constitution 1992, then it is fair to conclude that this Anti Money Laundering Amendment Law, Act 874 is subject and subordinate to the Constitution. As a result, this Law cannot permit the deprivation of properties such as monies and other assets for indefinite periods of time without recourse to the constitutional guarantees of preservation of property rights in chapter five of the Constitution 1992 especially articles 18 (1) and (2) of the Constitution 1992. It is therefore clear that, funds, assets etc. cannot continue to be frozen under section 23A of Act 874 under any circumstances whatsoever beyond the one-year period. This is even so if investigations have not been completed. Similarly, it should be noted that, prosecution is different from investigations and the two cannot be used inter changeably.*

However, the court noted that there might be genuine instances where the interested party and other investigative bodies may not have completed their work during the one-year period that the law permits in **Section 23A of Act 874.** on the call for reforms, the court stated that;

> *It is our considered view that in circumstances like this, there is the need for urgent reforms in the law. This will allow for the Investigative bodies to apply to the Court giving very good and solid reasons why the time should be extended for the freezing of accounts. In instances of this nature, clear example must be given of the efforts made during the one-year period and the need for extension of time. The Attorney-General is hereby urged as a matter of urgency to make proposals for legislative reforms in this regard.*

3.3 Republic vs. High Court Financial and Economic Crime Division (Court 2), Accra; Ex Parte Malik Ibrahim (2023) JELR 11234 (SC)

In this case, the key question for determination was whether the High Court, Financial and Economic Division 2, Accra, acted in conformity with the statute that set the limits of authority of the Economic and Organised Crime Office (EOCO), the interested party, when it confirmed a freezing order over the assets of the applicant. The facts are that the applicant, Malik Ibrahim, and Alhaji Zakaria Ibrahim are siblings. Alhaji Zakaria Ibrahim was the owner, Chief Executive Officer, and Chairman of Pacific Oil Ghana Limited (POGL). Until his resignation from POGL in July 2021, the applicant was said to be the Vice Chairman of the company and in charge of all operations, as well as supervising the various fuel outlets of the company across the country. The applicant, however, denied being in charge of all fuel outlets across the country and stated that his role was limited to filling stations at Amasaman and its environs. Some differences arose between the two brothers when the CEO received information that the applicant had applied for and been issued a licence to operate his own petroleum products distribution company. The CEO appeared to form the opinion that his brother must have gotten the capital to establish his own petroleum company through dishonest dealings with POGL. The CEO petitioned EOCO for assistance, requesting that EOCO conduct a general investigation into the activities and transactions of POGL, claiming that the company had detected that generated revenues did not match sales from the various fuel outlets of the company. EOCO subsequently froze the accounts and assets of the applicant.

The case of the applicant was that the High Court did not have jurisdiction to entertain and proceed to grant the EOCO's application for confirmation of the freezing of his assets because the EOCO did not have the authority to investigate an allegation of stealing money belonging to a wholly private entity such as POGL. EOCO contends that Act 804 vests it with the power to investigate serious offences, and stealing is one of such serious offences. EOCO further sought to come within the "participation in an organised criminal group" provided in the Act as authority to investigate this case. The Supreme court per **Amadu Jsc** stated that;

> *Under Section 3(a) of the Act, the investigative function of EOCO, when a matter concerns financial or economic loss, is limited to complaints alleging financial or economic loss to the state or a state institution or an entity in which the State has an interest … This subsection does not apply in this case and the Interested Party has not claimed authority to investigate the Applicant herein under this provision.*

The Court further stated that;

> *The charge of money laundering in this case is premised on the alleged stealing in that it is alleged by the Interested Party that the Applicant stole money belonging to POGL and then laundered it by acquiring properties with the stolen money to conceal its source, which is the definition of money laundering. Since the money laundering in this case cannot be divorced from the stealing, then our view is that unless the Interested Party's mandate covers*

the case of stealing on the facts, the fact that there is an ancillary offence that it has mandate to investigate would not confer authority on the Interested Party.

In conclusion, the court held that the Interested Party (EOCO) plainly acted ultra vires its statutory mandate and the High Court ought to have set aside its order confirming the freezing of the assets of the Applicant.

4. FAILURES BY LAW ENFORCEMENT AGENCIES IN THE INVESTIGATION, PROSECUTION, AND ADJUDICATION OF MONEY LAUNDERING CASES.

a. A critical issue identified in the analysed cases is the potential for abuse of extensive powers granted to specialised anti-money laundering agencies. These agencies are established by the state with broad mandates. They often exhibit a tendency to overstep their legal boundaries, assuming authorities that are not explicitly or implicitly authorised by law. Judge Dotse, JSC, aptly highlighted this concern in the case of **The Republic vs. High Court (Financial Division 2), Accra (2017)**, when he said:

> *We have perused in their entirety the provisions of Act 874 (repealed, now Act 1044), and we are convinced that it is a very comprehensive law with very wide and enormous powers at the disposal of the Chief Executive of the Interested Party and his office. For example, if one considers in detail the provisions of sections 5 and 6 thereof, which deal with the objects of the centre as well as the functions thereof, it is clear that these wide and enormous powers have to be exercised strictly within the restrictions imposed by the law.*

Similarly, the case of **Ex Parte Malik Ibrahim** further exemplifies this issue, where the Economic and Organized Crime Office (EOCO) attempted to assert jurisdiction over financial crimes against a private entity, exceeding its legally defined scope of intervention in cases involving the state or institutions with state interest.

b. Secondly, investigations by specialised anti-money laundering agencies often take a significant amount of time. In most cases, investigations are not concluded within a year of freezing an account. This raises concerns about how efficient and effective these investigations are. It appears that these agencies sometimes struggle to gather enough evidence to substantiate charges against suspects. Also, delays and a lack of cooperation from other agencies or institutions when asked for information or assistance also slow down investigations. This was seen in the case of **Executive Director Economic and Organised Crime Office Accra vs. Investment Strategies Enterprise and Daniel Addo**.

c. The courts have also narrowly applied the provisions that empower such institutions to freeze the account upon reasonable suspicion. In the case of The **Republic vs. High Court (Financial Division 2), Accra**, the court rejected the argument to construe investigation and prosecution as the same when counsel for the interested party was of the opinion that the prosecution of the 1 Applicant for narcotic-related offences entitled

the High Court to extend the freezing orders beyond the statutory 12-month period. The court stated that to investigate and to prosecute are entirely different things or scenarios, and one cannot be substituted for the other.

d. It is important to note, however, that legislation prohibiting money laundering has seen significant improvement over time. For instance, considering older cases such as the case of **The Republic vs. High Court (Financial Division 2), Accra**, reveals that there appeared to be a gap in legislation relating to the offence of money laundering prior to the passing of the Anti-Money Laundering Act of 2020. The previous enactment did not make provision for applications for extensions to be made by such agencies if, for any good reason, they were unable to conduct an investigation within one year. However, the new **Anti-Money Laundering Act, 2020, Act 1044**, has remedied this by including a provision on applications for extensions.

5. RECOMMENDATIONS

To enhance the effectiveness of anti-money laundering efforts, specialized agencies should implement internal protocols that expedite the investigation and prosecution of such cases. This necessitates time-bound processes for evidence collection and inter-agency collaboration, with an unwavering commitment to adhering to established timelines.

It is recommended that, although the court is there to ensure that affairs of specialized agencies are handled in such a way that, they do not become veritable instruments of harassment and oppression of citizens, specialized agencies must know their legal authority and operate within them. They should not knowingly act outside the scope of their authority. This is crucial for fair trials, efficient prosecutions, and building public trust in the system.

6. CONCLUSION

Seeing as there has been significant improvement in the progression of anti-money laundering prosecution in Ghana over time, it is evident that it is possible to further strengthen the anti-money laundering regime to enable a seamless prosecution and adjudication of money laundering cases by these law enforcement agencies, whether through the passing of legislation or through the reinforcement of these specialized law enforcement agencies.

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Poland's Sanctions against Russia and Belarus

JOANNA BOGDANSKA

iccfraudnet.org

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POLAND'S SANCTIONS AGAINST RUSSIA AND BELARUS

JOANNA BOGDAŃSKA

KW KRUK AND PARTNERS

Introduction

In this paper, Joanna Bogdańska offers current perspectives from Poland on its legal frameworks relating to sanctions, with particular reference to the impact and scope of the Polish Sanctions Act. The aim of the article is to present Polish solutions that expand the sanctions list and introduce restrictions on additional products. The author also discusses the practical aspects and approach to respecting sanctions in Poland.

Poland's sanctions against Russia and Belarus represent a critical component of the international response to the Ukraine conflict. While they are part of a broader European Union ('EU') strategy, Poland's measures reflect its unique position and historical experiences. The combination of EU-wide and national sanctions aims, at least in theory, to maximize economic and political pressure on Russia and Belarus, contributing to the international effort to restore peace and stability in the region. The coordination between national and EU sanctions ensures a comprehensive and multifaceted approach to countering aggression and supporting Ukraine.

As a rule, Poland, as a member of the EU, applies all sanctions imposed by EU regulations. At the same time, Poland also decided to introduce its own solutions, largely based on EU ones.

The Polish Sanctions Act creates a national sanctions list, i.e. a list of persons and entities subject to sanctions, and establishes a new restrictive measure in the form of excluding sanctioned entities from public procurement procedures. International sanctions were additionally supplemented with an immediate ban on the import of coal from Russia or Belarus.

Polish list of Sanctioned Entities

The decision on entry on the list is made by the Minister of Interior and Administration[1]. The decision may be made towards people directly or indirectly supporting aggression of the Russian Federation against Ukraine launched on February 24, 2022; serious violation of human rights or repression of civil society and democratic position and activities that constitute another serious threat to democracy or the rule of law in the Russian Federation or Belarus.

The decision on entry may also apply to persons and entities directly related to the above-mentioned persons or entities, in particular due to personal, organizational, economic or financial connections, or who are likely to use their financial and economic resources or funds for this purpose.

The following sanctions apply to persons entered on the sanctions list:

- freezing all funds and economic resources owned, held or under their control;
- prohibition on making funds or economic resources available directly or indirectly;
- prohibition of intentional and conscious participation in activities aimed at circumventing prohibitions.

Exclusion from Public Procurement Proceedings

The Polish Sanction Act also introduces bans on participation in public tenders organized on the basis of the Polish Public Procurement Act. This prohibition applies to:

- contractors and competition participants appearing on the EU's sanctions lists adopted against Russia and Belarus (Regulation 765/2006 and Regulation 269/2014);
- contractors and participants of competitions appearing on the sanction list of the Ministry of Interior and Administration;
- contractors and participants of competitions whose real beneficiary is a person appearing on one of these sanction lists;
- contractors and competition participants whose parent company is an entity appearing on one of these sanction lists.

Prohibition of Import of Coal

The Polish Sanctions Act prohibits the import of coal from Russia or Belarus to Poland and prohibits its movement through the territory of Poland between third countries or its import into Poland from the territory of another EU member state. Importers of coal are obliged to reliably document its origin (statement of coal origin) and the date of introduction or

[1] List of sanctioned entities is available here: https://www.gov.pl/web/mswia/lista-osob-i-podmiotow-objetych-sankcjami (accessed 17 May 2024)

movement into the territory of Poland. This information forms the documentation that importers are obliged to present to the competent control authorities upon request. Under the Polish Sanctions Act, each coal trade transaction must be accompanied by a declaration from the seller regarding its origin and the date of introduction into the territory of Poland or the date of purchase from a Polish mine. It is the responsibility of the parties to the transaction to store issued and received declarations and their copies for a period of 5 years from the date of their issuance.

The Polish Sanctions Act, by encouraging entrepreneurs to thoroughly verify their contractors, directly involves them in the implementation of the common economic policy of the EU. At the same time, entities banned from importing or transiting coal and coke to Poland will be entitled to compensation for actual damages.

Liability for Failure to Comply with Restrictive Measures

A parallel regime of administrative and criminal liability is provided for violations of the provisions of the Polish Sanctions Act and sanctions regulations of the EU.

In terms of fines imposed in administrative procedure, the Polish Sanctions Act provides the following:

- for failure to fulfil obligations or violation of prohibitions regarding freezing and failure to make funds available to sanctioned persons - up to PLN 20 million;
- for applying for a public contract or admission to a competition or participation in the above-mentioned procedures contrary to exclusion - up to PLN 20 million;
- for violation of the ban on importing or moving coal from Russia or Belarus into the territory of Poland - up to PLN 20 million;
- for failure to fulfil obligations regarding documentation of the origin of coal or providing purchasers with declarations regarding the origin of coal - up to PLN 10 million.

Moreover, the Polish Sanctions Act provides for criminal liability of natural persons for:

- violation of sanctions adopted by the EU against Russia and Belarus, among others, regarding the prohibition of supplying or purchasing the products and technologies specified therein;
- participation in activities whose purpose or effect is to violate EU sanctions as above;
- violation of the coal embargo under the Act.

All of the above acts are punishable by imprisonment for a period of not less than 3 years.

The Institution of Compulsory Administration

However, the most frequently used measure in Poland is the establishment of compulsory management in sanctioned companies. Its introduction to companies from the list is

intended to enable disposal of financial resources, funds or economic resources or taking over for the State Treasury the ownership of financial resources, funds or economic resources.

In accordance with the Polish Sanctions Act, the main purpose of this institution is to:

- maintaining jobs in this enterprise or;
- maintaining the provision of public utility services or performing other public tasks within the scope of the enterprise's activities, or;
- protection of the economic interest of the state.

However, it is expected that the establishment of this compulsory management may also aim to take over the ownership of such a company. Such takeover is to be carried out against compensation corresponding to the market value of the financial resources, funds or economic resources subject to takeover, determined on the basis of a current valuation prepared by an independent external entity with a recognized position on the market.

As of today, the government has decided to introduce compulsory management in several companies that are sanctioned or clearly associated with sanctioned entities. At this moment, however, the government has not decided to take over any of the properties.

Assessment of the impact of the Polish Sanctions Act on Operations in Poland

Based on a report prepared by EY in February 2024[2], 74 percent surveyed enterprises declare that they have taken additional actions in the context of sanction risk management. Despite this, a third of them (31%) was exposed to the risk of unintentional violation of sanctions, and a sixth (16%) admits that they have violated them**.**

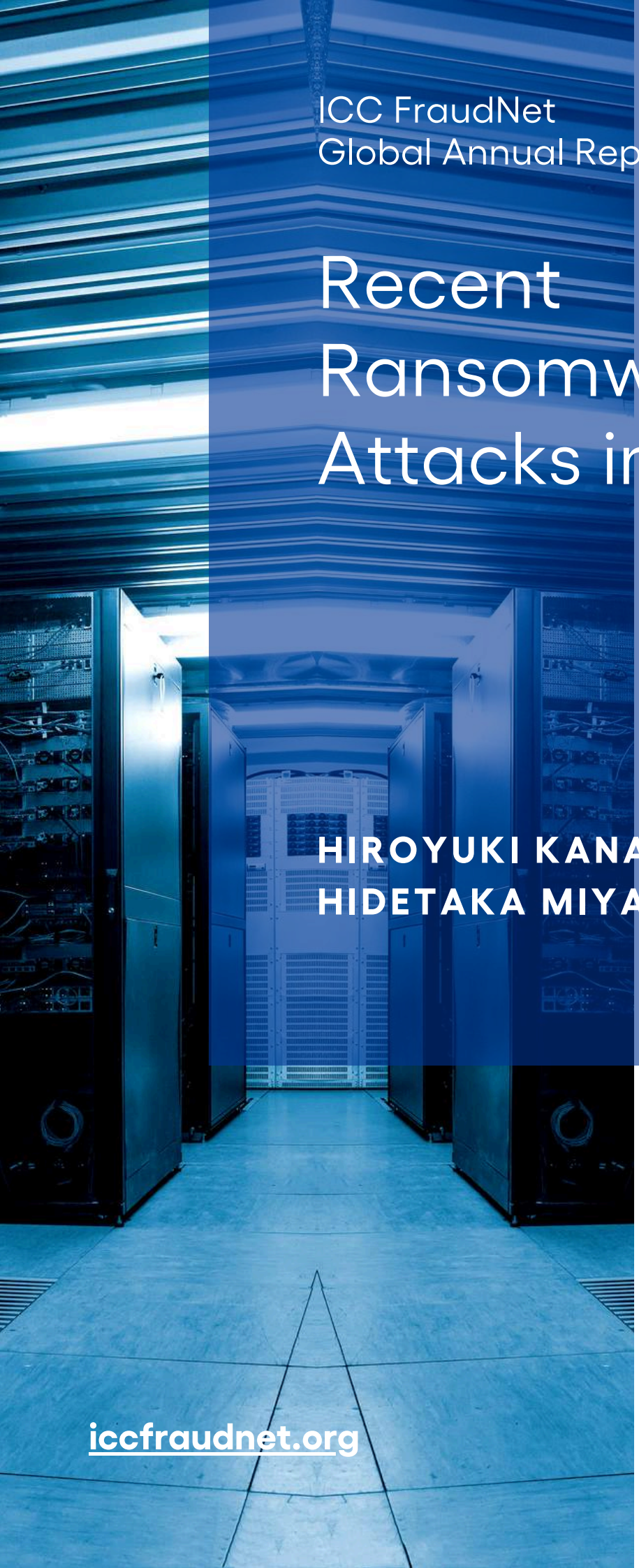
Further, out of over two hundred companies surveyed, in 2022 as many as 47 percent imported or exported goods or services to Russia and Belarus. According to the same data, although after the outbreak of the war, exports to Russia dropped by 33%. At the same time, exports increased by 57% in the countries of the Eurasian Economic Community and Turkey. On the one hand it might be the result of looking for other markets. However, a large part of this turnover – which is the conclusion of EY analysts – can be re-exported from Asian countries to Russia without sanctions. Trading volume increasing by 400% to countries with such small markets as Kyrgyzstan or Armenia must raise suspicions.

Future of the Polish Sanctions Act

Those in power also seem to notice the lack of effectiveness of the introduced regulations. Work is currently underway on the amendment of the Polish Sanctions Act, which is not only intended to take into account subsequent packages of EU sanctions, but above all is intended to introduce a coherent national system of penalizing violations and circumvention of EU sanctions.

[2]Risk related to economic sanctions – EY study: https://www.ey.com/pl_pl/forensic-integrity-services/ryzyko-zwiazane-z-sankcjami-gospodarczymi-badanie-ey (accessed 17 May 2024).

We await with interest the changes and mechanisms that will be used to tighten the sanctions system.



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Global Annual Report 2024

Recent Ransomware Attacks in Japan

HIROYUKI KANAE &
HIDETAKA MIYAKE

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RECENT RANSOMWARE ATTACKS IN JAPAN

HIROYUKI KANAE &
HIDETAKA MIYAKE

ANDERSON MORI & TOMOTSUNE

1. Introduction

According to Trend Micro's survey[1], the number of cases of ransomware attacks in Japan reached 63 in 2023, the highest number ever recorded. In addition, the cumulative amount of damage to companies victimized by ransomware over the past three years averaged 176.89 million yen.

The ransomware attack on the Port of Nagoya Unified Terminal System in July 2023 halted container loading and unloading operations by trailer trucks at the Port of Nagoya for three days. The loading and unloading of container vessels at the port of Nagoya also came to a halt. As for the cause as known at this stage, a vulnerability in the remote connection equipment has been confirmed, and it is believed that unauthorized access was identified.

In addition, in June 2023, unauthorized access, encryption of information in the system, and sending of threatening letters were made against Ajirogikai Uji Hospital, a social welfare institution.

A well-known large scale ransomware attack was carried out against the Osaka Acute and Comprehensive Medical Center in October 2022. In this incident in Osaka, the general information system, including the electronic medical records it contained, became unusable, resulting in major disruptions to emergency care, outpatient care, scheduled

[1] See: https://www.trendmicro.com/ja_jp/jp-security/23/l/securitytrend-20231220-01.html

surgeries, and other medical functions. In this case, it took more than six weeks to remove the damage to the hospital's computers and restart the electronic medical record system. In total, more than 2,000 servers and terminals were initialized and cleanly installed, vulnerabilities were remedied, and measures to respond to cyber-attacks in the future were implemented. It took a total of three months and billions of yen to complete the clean-up project.

Cyber-attacks are not limited to general business companies, but also target organizations that play a humanitarian role in maintaining society's critical infrastructure, such as infrastructure facilities at ports and hospital systems, etc. The trend of cyber-attacks targeting vulnerable parts of computer systems continues unabated.

2. Analysis of the Cause of a Ransomware Attack: A Case Study

Regarding the large-scale cyber-attack on the Osaka Acute and Comprehensive Medical Center in October 2022, the hospital is a medical institution with 831 general beds and 34 psychiatric beds, making a total of 865 beds. It is a key hospital in the southern part of Osaka City, with the characteristics of a core disaster base hospital and a regional medical support hospital. In addition, the hospital has 36 departments, more than 300 doctors including resident physicians, 1,024 nursing staff and, as of 2021 statistics, the hospital supported local medical care with a total of 223,000 inpatients and 295,000 outpatients per year. The hospital system as a cornerstone of social infrastructure has had a tremendous impact on the local community. As a reflection of the magnitude of the impact of the cyber-attack on such a large hospital, the hospital conducted an investigation and disclosed an information security incident investigation report on March 28, 2023, to determine the cause of this type of incident and to summarize and publish measures to prevent recurrence.

According to this report, the causes of the incidents were analyzed in three categories: organizational, human, and technical incidences.

(1) Organizational Factors:

a. Lack of IT governance

The lack of organizational IT governance at hospitals using systems and equipment, starting with a lack of understanding of information assets, inconsistent security policies in contracts, unclear delineation of responsibilities, and division of roles in vulnerability management.

b. Issues Related to Contracts

There was a lack of risk management at the contracting stage with IT vendors. In order to solve this problem, the report concluded that it will be necessary to implement preventive measures from the following perspectives:

(i) Procurement based on a common security policy;
(ii) Confirmation of documents based on guidelines at the time of contracting (confirmation of the division of responsibilities and roles);

(iii) Undertaking of thorough information asset management through information sharing with the medical information department;
(iv) Confirmation of a project management system in the case of contracts that include maintenance by multiple vendors; and
(v) Confirmation of maintenance methods in the case of a contract that includes maintenance.

(2) Human Factors:

The hospital's information system personnel did not have a high level of security awareness, and none of them had experience in incident response. On the other hand, the vendor's on-site personnel also had low levels of security awareness and experience, as did the hospital's system personnel, resulting in a lack of day-to-day cooperation between the hospital and the vendors in terms of security. This situation led to the advancement of vulnerabilities in the hospital's overall system, as well as confusion in the emergency response in the event of a cyber-attack. One of the reasons behind the creation of this situation was that actors within the hospital as well as the external system vendors became less and less security conscious and lax, misled by a false "closed network myth" that security was not a problem because the medical institution was a closed network.

(3) Technical Factors:

The intrusion route was a supply chain attack carried out via a food service center, an outside vendor that had a contract with the hospital. The food service center had not updated the firmware of the firewall that served as the intrusion route, and it was confirmed that the IDs and passwords of the devices in question had been improperly divulged. In addition, the hospital had enabled communications from the information system at the food service center to be constantly connected through its own firewall, the operational status of which was subsequently not properly maintained, allowing a cyber-attack on the food service center to spread directly to the hospital's internal system. Until now, medical institutions have tended not to consider the importance of security based on the mistaken perception that the internal system of a medical institution is secure because it is a closed network that is not connected to the outside world, with vulnerabilities left unchecked and security settings left unimproved over the years. These substandard practices also contributed to the incident in the present case. In this case, if the initial settings of Windows had been changed appropriately, it is highly possible that the incident could have been prevented from spreading without a large-scale deployment of external intrusion. In particular, the factors that allowed the lateral spread of the system vulnerability include the following:

(i) All users were given administrator privileges, which allowed the intruder to take advantage of this setup and to uninstall the antivirus software.

(ii) Windows passwords were shared by all servers and terminals, and if one password was stolen, all other servers (terminals) could be hijacked.

(iii) There was no account lockout setting, and numerous password attempts were made through brute force and dictionary attacks, resulting in successful logon attempts.

(iv) The electronic medical record system server was not configured with antivirus software and was easily intruded and invaded by ransomware.

As described above, cyber-attacks are carried out by a combination of one or more of the three factors (i.e., organizational, human, and technical factors) by agents in search of system vulnerabilities. To establish a defense system, efforts are required to identify the above three factors and eliminate all of the defective factors.

3. Future Prospects

The cyber-attack on the Osaka Medical Center for Acute & Comprehensive Care showed that even hospital facilities equipped with state-of-the-art medical technology and staff are always at risk of vulnerability. The cyber-attack on Handa Hospital in Tokushima Prefecture in October 2021 was the first time that ransomware attacks against hospitals became widely known in Japanese society. The hospital, a relatively small public hospital with 160 beds, experienced a two-month malfunction due to a cyber-attack that disabled the use of electronic medical records. The hospital had only one IT system staff on duty, and a vulnerability in the VPN connection with the electronic medical records was exploited, allowing the cyber-attack. As with the Osaka Acute and General Medical Center, the reason for the cyber-attack was the use of out-of-support software, failure to update Windows, failure to set firewalls, and failure to disable the lockout function, among other basic tasks. Failure to perform such basic tasks may have been due to budget shortfalls, indifference to IT systems, and the aforementioned safety myth that electronic medical record systems are closed networks within medical institutions. It must be said that unless indifference to IT systems is eliminated throughout Japan, there will be room for further ransomware attacks and other forms of cyberattacks in all industries.

4. Concluding Remarks

On February 20, 2024, it was reported [2]that several Law Enforcement Agencies collaboratively put a stop to one of the ransomware groups, LockBit[3], which has been operating as a Ransomware-as-a-Service (RaaS) and has been involved in security incidents targeting many companies and organizations worldwide over the past several years. In the case of LockBit, 20% of the ransom taken goes to the developer, and the remaining 80% goes to the RaaS user, thereby amplifying the incentive for the user. The

[2] See: https://www.wired.com/story/lockbit-ransomware-takedown-website-nca-fbi/
https://www.npr.org/2024/02/20/1232698867/global-law-enforcement-effort-cracks-down-on-lockbit-ransomware-group
and https://www.europol.europa.eu/media-press/newsroom/news/new-measures-issued-against-lockbit
and https://www.ncsc.gov.uk/news/ncsc-statement-on-law-enforcement-disruption-of-lockbit-ransomware-operation

[3] See: https://www.trendmicro.com/en_us/research/24/d/operation-cronos-aftermath.html

ransomware attack on the container system at the Port of Nagoya, mentioned at the beginning of this report, is also said to be a LockBit attack.

The LockBit detection was the result of a joint investigation by the National Crime Agency in the United Kingdom, Europol, FBI, Tokyo Metropolitan Police Agency, and others. However, since this type of ransomware attack group cannot be expected to be entirely wiped out, companies and organizations that do not have a sound defense system in place for the secure use of their IT systems will continue to be targets of attack.

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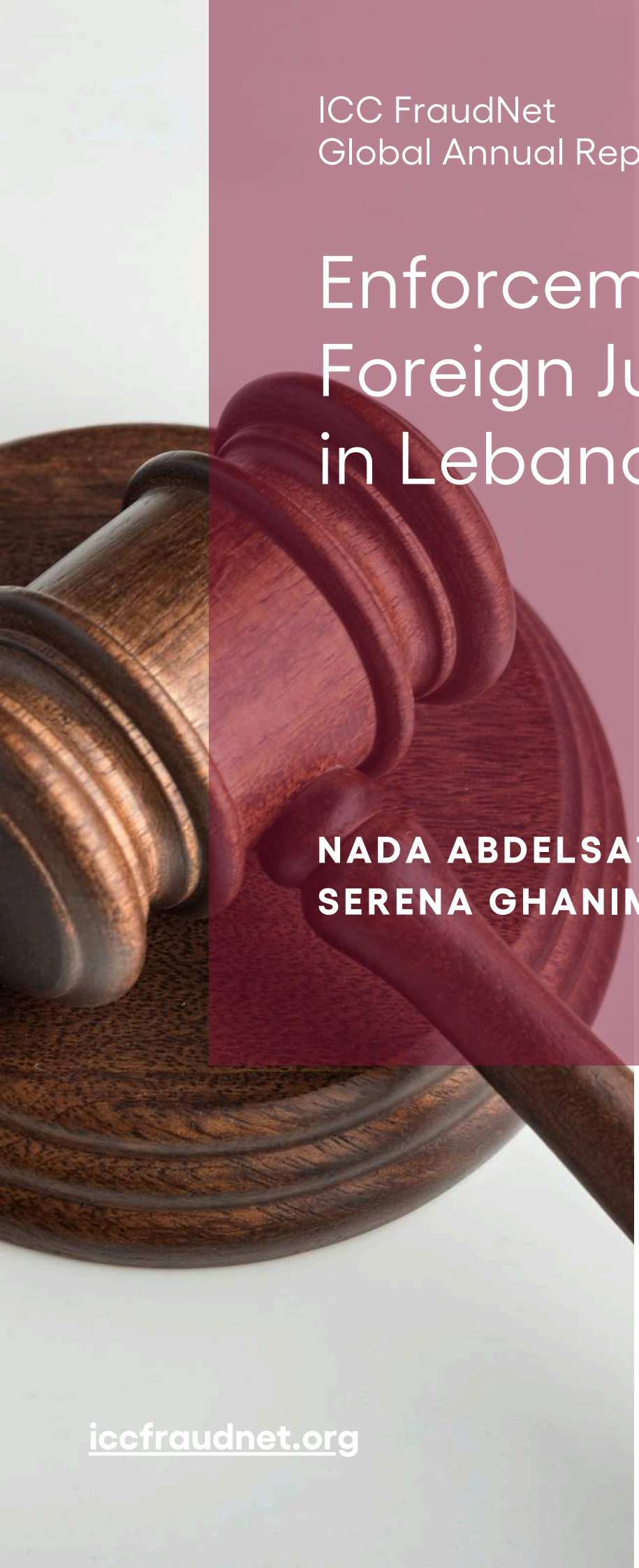
Enforcement of Foreign Judgments in Lebanon



NADA ABDELSATER &
SERENA GHANIMEH

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ENFORCEMENT OF FOREIGN JUDGMENTS IN LEBANON

NADA ABDELSATER &
SERENA K. GHANIMEH

ASAS LAW

Abstract

Enforcement of any judgment in Lebanon, be it foreign or local is currently facing serious challenges due to the on-going unprecedented Lebanese financial, economic, political and judiciary crisis. At some points, the courts completely stopped functioning. At other times, the judiciary "posed" the actual enforcement by freezing public auction sales in the context of recovery. So far this year, only three "execution judges" out of six in Beirut issued decisions to sell debtors' assets by public auction; however, the proceedings are still ongoing and the actual sale didn't materialize yet.

This article sets forth the legal environment for enforcement of foreign judgements without taking into account the current quasi-paralysis of the judiciary, as this is a factual reality which the authors hope will come to an end. For there is no justice if there is no recovery and enforcement.

Indeed, in any country, enforcement of foreign judgements is key in asset recovery. Even the best judgment is of little use if it cannot be enforced. In this article, Nada Abdelsater and Serena Ghanimeh of ASAS Law, provide a high-level outline of foreign judgement enforcements in Lebanon with the view of shedding some light on relevant questions and processes to be considered when developing the right legal and strategic approaches to enable efficient recovery.

Brief Legal Overview

The first step in the enforcement process of a foreign judgment in Lebanon is granting the said judgment exequatur by the competent Lebanese court. The conditions for granting exequatur are outlined in the Lebanese Code of Civil Procedure ('LCCP'). In the asset recovery world, speed and surprise are of the essence. Few know that even prior to completing its exequatur, the foreign judgment may be used before the Lebanese courts, to obtain conservatory measures such as legal guardianship, provisional seizures and other.

In this context, we note that various conventions and international treaties relating to enforcement of foreign judgments are ratified or signed by Lebanon, for example:

- The Judicial Convention between Lebanon and Italy, signed on 10 July 1970 and ratified by law dated 17 May 1972.
- The Convention for the Mutual Judicial Assistance and Enforcement of Judgments and Extradition Between Lebanon and Tunisia, signed on 28 March 1964 and ratified by law dated 30 December 1968.
- The Convention Concerning the Enforcement of Judgments Between Lebanon and Kuwait, signed on 25 July 1963 and ratified by law dated 13 March 1964.
- The Judicial Agreement between Lebanon and Jordan, signed on 31 August 1953 and ratified by the law dated 6 April 1954.
- The Judicial Agreement between Lebanon and Syria, signed on 25 February 1951 and ratified by law dated 27 October 1951.
- The Arab Agreement for Judicial Cooperation, signed by members of the League of Arab States on 18 February 1953 – Lebanon signed but did not ratify.
- Finally, Lebanon also recognizes foreign arbitral awards in accordance with the terms of the relevant conventions to which Lebanon has acceded; for example Lebanon is member to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards.

Res Judicata

Put briefly, the LCCP has set conditions that must be met so that foreign judgments may be enforced. Generally speaking, foreign judgments that have not acquired "authority of a final and irrevocable judgment" (*res judicata*) and enforceability in the originating country, may not be enforced in Lebanon. If interim/temporary decisions and *ex parte* decisions have become enforceable in the originating foreign country, Lebanese courts would grant such decisions exequatur.

Steps and Condition for Enforcing Foreign Judgments

As mentioned above, the process of enforcing a foreign judgment in Lebanon usually starts by seeking the "exequatur" decision from the relevant Lebanese court. The foreign judgment must comply with the following cumulative conditions set out by Article 1014 LCCP:

- The foreign judgment must have been issued by competent judges in accordance with the law of the foreign originating country, provided that their competence is not strictly determined based on the nationality of the claimant.
- The foreign judgment must have already acquired "authority of a final and irrevocable judgment" (*res judicata*) and enforceability in the foreign country. However, Lebanese courts may grant exequatur to interim/ temporary decisions and ex parte decisions if they have become enforceable in the foreign country.
- The condemned must have been notified of the lawsuit which entailed the foreign judgment and its rights of defence must have been ensured.
- The foreign judgment is rendered by a state permitting the enforcement of Lebanese judgments on its territory after due examination or exequatur (the principle of reciprocity).
- The foreign judgment does not violate the public order.

The application to request exequatur for a foreign judgment is made *ex parte*, to the President of the competent Civil Court of Appeal depending on the domicile or the location of the respondent or the place of the assets to be seized. Otherwise, the President of the civil Court of Appeal of Beirut would be competent.

Another condition is for the exequatur request to be filed by a lawyer admitted to practise in Lebanon; the following documents must be submitted with the exequatur request:

- a certified copy of the foreign judgment satisfying all validity conditions according to the originating foreign country;
- the documents proving that the foreign judgment has acquired enforceability according to the originating foreign country (*res judicata*);
- a certified copy of the complaint filed against the party that did not attend the trial, and the document evidencing the notification of the trial papers if the award was rendered in absentia;
- a certified and legalised translation of all above documents in compliance with the Lebanese law;
- a valid power of attorney in the name of the lawyer filing the exequatur request.

Once the exequatur is obtained, the enforcement of the foreign judgment follows the same rules as domestic judgments. The typical compulsory enforcement measure is the "executory seizure" of the debtor's assets placing them under court custody and eventually selling them in public auction under the authority of the court.

Proceedings and Timeframe

The exequatur request is usually transferred to the President of the Court of Appeal. The President will issue a decision either granting or rejecting the exequatur request; in some cases, the judge would issue an interim decision requesting, for example, further information and documents. The decision denying exequatur is subject to challenge before the Court of Appeal within a period of 15 days. The decision granting the exequatur is subject to appeal within a period of 30 days as from its notification to the debtor/defendant.

In general, the debtor will be notified of the exequatur decision and the enforcement proceedings at the same time. This would be the time when the debtor would generally appeal the said exequatur decision and try to stop enforcement of the foreign judgment. Indeed, practically speaking, and because the exequatur decision is granted *ex parte*, the creditor will initiate the enforcement proceedings before notification to the debtor.

We outline these separately as they will usually run in parallel before separate courts. With respect to the exequatur appeal proceedings before the court of appeal, these are subject to the general rules applicable to appeals. The appeal decision is usually rendered within a few months[1]; however, some proceedings extend much longer. Moreover, the appeal decision itself is subject to the general rules applicable to challenging appeal decisions (cassation, retrial and third-party objection). These challenges would further extend the proceedings and timeframe needed to enforce the foreign judgment.

As for enforcement, the seizure order may be obtained in one day[2]; however, the actual attachment and foreclosure proceedings which would result in the realisation of the debt, are much longer and vary on a case by case basis. In some cases, debtors would come forward and pay the debt within the five-day period set by the Executive Bureau, whilst others would use every potential delay and challenge all possible proceedings; as such, the enforcement proceedings could extend for several months and even years.

In asset recovery, it is crucial not to alert the debtor; as such, the most efficient option to enforce a foreign judgment is to start by obtaining an *ex parte* provisional seizure on the identified assets, which has the advantage of surprising the debtor as the decision is rendered without prior notification.

Asset Tracing - How to identify Assets in Lebanon?

Most assets may be identified following various methods depending on the type of the person's assets (be it a natural person or a legal entity), as further detailed below. However,

[1] All estimated timeframes mentioned in this article are estimates that would apply in normal times. At the date of drafting this article Lebanon is still living a severe economic crisis which consequences are affecting the progress of affairs in the judicial sector and public administrations.
[2] *Idem*.

restrictions apply regarding bank accounts (as outlined in the Lebanese Banking Secrecy Law, dated 3 September 1956).

A) Shares

Companies in Lebanon are registered at the relevant commercial registry depending on their legal type or the location of their respective headquarter. The information available in the registry is accessible to the public. In general, the process of gathering information starts by filing a request to obtain a "comprehensive certificate"; this document provides information such as the name of the shareholders, their shareholding, the name of the directors, lawyers, auditors, the address of the company and a record of all judicial attachments on the company. Moreover, the commercial registry has a website where some information is accessible electronically. However, unlike the real estate registry, the commercial registry does not offer an official search on a "per-person" basis enabling the identification of the various shares/parts held by a specific individual or entity in different companies in Lebanon. However, it should be noted that access to the portal of the Commercial Registry of Beirut is currently discontinued as a result of the economic crisis which affected the good order of the administrations and their services.

This said, it is helpful to note that information on companies and individuals holding interests in companies may be obtained from private search companies for a fee depending on the type of requested reports. In certain cases, the process could include appointing asset recovery lawyers having the requisite knowledge and experience with the various available investigating and tracing options. They are best fitted to advise their clients on the most efficient asset tracing strategy to identify the assets of the target.

B) Bank Accounts

In Lebanon, bank accounts and banking information are protected by a special protection layer based on the Law on Banking Secrecy, dated 3 September 1956. There are two levels of protection. Except under special circumstances, a) the banks in Lebanon are subject to "professional secrecy" and b) monies deposited with banks in Lebanon may not be seized. Any violation of the banking secrecy obligation is subject to criminal sanctions involving imprisonment.

In general, banks systematically refrain from giving banking information, even when summoned by the Lebanese Administration or by a Lebanese court order. This said, few exceptions apply to this banking secrecy. For example, such exceptions are outlined in the Banking Secrecy Law and in the Law on Fighting Money Laundering and Terrorist Financing, dated 24 November 2015. Moreover, the Law for the Exchange of Information for Tax Purposes No 55, dated 27 October 2016 allows the communication of fiscal information under international mutual assistance conventions.

According to the Banking Secrecy Law, the banking secrecy is lifted in the following cases:

- when the concerned client, his/her heirs or legatees provide a written authorisation allowing the disclosure of information; or
- if the bank's client is declared bankrupt; or
- if there is a lawsuit involving banks and their clients concerning banking operations.

Moreover, immunity from seizure may be bypassed when it can be proven that it was authorized by the account holder.

Law No 44 on Fighting Money Laundering and Terrorist Financing also provides for cases where the banking secrecy may be lifted in events involving money-laundering. In the event of suspicious transactions, it would eventually be for the Special Investigation Commission (SIC) to receive and analyse the suspicious transaction reports, conduct financial investigations, lift banking secrecy, freeze accounts and/or transactions and forward information to concerned judicial authorities. This is the playground of specialized asset recovery lawyers' expertise in banking asset tracing. This said and further to the ongoing economic and financial crisis in Lebanon, funds deposited with Lebanese banks in a foreign currency are "blocked" and cannot be transferred outside Lebanon or cashed in Lebanon or in any other country in bank notes. Moreover, these funds lost between 80 to 90% of their value. As such, little interest is currently turned towards such assets.

C) Real Estate Assets

Lebanon has a real estate registry department or 'c*adastre*' corresponding to regions or departments where real estate properties are registered. The rights pertaining to land or real estate properties are created by registration with the said register. The real estate registry is public and the information therein can be accessed by any person. It also has s a website where some information is accessible electronically to the public; however, since the escalation of the crisis, the access to the portal is irregular.

The process of identifying the assets owned by an individual or a legal entity starts by submitting a request to the General Directorate of Land Registry and Cadastre in Beirut. The search result takes the form of a list showing the properties owned by the target person (the information outlined on the list is limited to the location of the plot and the number of shares owned by the Target). This document is typically issued within few days[3].

Once the properties are identified, further investigation may be undertaken to gather additional information on each identified plot. In general, such enquiry is made with the relevant real estate registry department and "private" real estate experts. An initial start would be to obtain a real estate certificate which provides further details concerning the property, including the names of the owner(s) and their respective shares, the property description and records of the securities attached thereto such as seizure, mortgage, lawsuits etc.

[3] *Idem*

Conclusion

In conclusion, Lebanon is a country that recognizes and enforces foreign judgments and is member to various conventions and international treaties relating to enforcement of foreign judgments and arbitral awards. Asset tracing or unveiling “hidden assets” may prove to be particularly useful if the right legal approaches and strategies are put in place prior to embarking on the actual enforcement. However, the current situation of the Lebanese judiciary poses challenges as to the speed and efficiency of legal proceedings including notably enforcement and recovery; this is particularly true when it comes to recovering cash foreign currency debts.

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Ramilos Ltd v Buyanovsky – Where are we on Norwich Pharmacal orders in aid of Foreign Proceedings?

DAVID JONES, JOHN GREENFIELD & KELLIE SHERWILL

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RAMILOS LTD V BUYANOVSKY – WHERE ARE WE ON NORWICH PHARMACAL ORDERS IN AID OF FOREIGN PROCEEDINGS?

DAVID JONES, JOHN GREENFIELD & KELLIE SHERWILL

CAREY OLSEN

What is a Norwich Pharmacal order and what is its important, especially in fraud and asset tracing cases?

A Norwich Pharmacal order ('NPO') is a legal equitable remedy established by the English courts in 1974 in the landmark case of *Norwich Pharmacal Co v Customs and Excise Commissioners*[1].

The order compels a third party involved in wrongful acts, albeit usually innocently, to disclose certain documents or information to the applicant. For the order to be granted, the Court must be satisfied that:

(i) the respondent third party is likely to have the relevant documents or information being sought;
(ii) there is a good arguable case that there has been wrongdoing;
(iii) the respondent is involved in the wrongdoing, even if they are an innocent party;
(iv) the order is necessary in the interests of justice; and
(v) that the third party is not a 'mere witness' who could be called as witness in the action and made to produce evidence or information in that way instead.

[1] *Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133*

NPOs are an essential tool in case relating to fraud and asset tracing, as they can assist the applicant in locating where the proceeds of wrongdoing may have ended up. In most of these cases, the assets are often held by an innocent third party, for example a bank or financial entity, and this third party will not be a party to the proceedings against the fraudsters.

In recent years, the Royal Court of Guernsey has acknowledged that it has the jurisdiction to make NPOs in aid of foreign proceedings. This is important for an offshore jurisdiction such as Guernsey, where funds are often innocently deposited or structured within the finance system.

Obtaining evidence for use in overseas proceeding

Even where the court would be prepared to exercise its discretion to grant the order, it had been the case that a NPO cannot be used to obtain evidence for use in overseas proceedings.

In England and Wales, this position arose due to *The Evidence (Proceedings in Other Jurisdictions) Act 1975* (the **1975 Act**) which provides circumstances where the English courts may assist foreign courts in obtaining evidence required for use in overseas proceedings. However in *Omar v Omar*[2] it became clear that it was indeed accepted by the English court that NPO relief would be available in aid of actual or contemplated foreign proceedings.

Ramilos case

The case of *Ramilos*[3] considered the interplay between the common law jurisdiction of NPOs and the statutory mechanism that is available for the obtaining of evidence for use in foreign proceedings.

The applicant sought a NPO against the respondent in order to ascertain the necessary information to bring an action against another. The order was refused for the following reasons:

(i) The extent of the disclosure sought was too wide.
(ii) Even if the applicant had a good arguable case, it was unlikely that it could be pursued in England and instead foreign proceedings were likely.
(iii) The relief sought was excluded by the statutory regime of the 1975 Act (including proceedings which are being contemplated).

It was decided that the Court did not therefore have jurisdiction to grant a NPO in support of foreign proceedings as an alternative.

[2] Omar (Mohamed) v Omar (Chiiko Aikawa) [1995] 1 W.L.R 1428
[3] *Ramilos Trading Limited v Valentin Mikhaylovich Buyanovsky [2016] EWHC 3175*

How the Guernsey courts treat *Ramilos*

Ramilos is authority that shows that NPO relief cannot circumvent the 1975 Act. Whilst the 1975 Act has been extended to Guernsey, some doubt existed as to the impact of the *Ramilos* decision and the availability of NPO relief in the Guernsey courts. The Guernsey Court of Appeal previously held that the Guernsey courts have the power to grant NPOs in aid of proceedings in other countries where "*necessary and appropriate to assist in achieving justice*". This conclusion was due at least in part to the importance of financial services to Guernsey and concern that it should not become "*a safe haven for those wishing to evade their financial liabilities*".

In Guernsey, an NPO provides a very quick alternative, especially where there is a list of assets being moved (or at risk of being moved) by the wrongdoers / fraudsters at a moment's notice. The first step is to seek an *ex parte* hearing before the Royal Court which can be heard within days. If the NPO is approved by the Court, an order will be made immediately and then served on the respondent who has the documents and / or information.

It would then be usual for the Court to set a "return date" (probably two to three weeks after the order has been granted) at which the respondent can attend before the Court to make any appropriate submissions about the relief granted in the order (e.g. that it does not have any documents and / or information, wishes to be paid for the cost of providing the documents and / or information, etc).

The writers were recently involved in an application for a NPO before the Royal Court and had the opportunity to ventilate reasons why the Royal Court ought to grant the relief despite the *Ramilos* judgment. Those arguments were as follows:

The necessity point

1. It must be clear that the information being sought from the respondent is required, giving sufficient precision and explanation.
2. The respondent must also be likely to hold relevant information.
3. The applicants must be able to show that it is entitled to this information in order to formally identify the breach and the "wrongdoers".

Timing / Gagging Order

1. Where it can be shown that there is an urgency for the documents and / or information to be provided, the Court will strongly take this into consideration.
2. If alternative relief could be sought in another jurisdiction (even if the other jurisdiction is more appropriate) but an argument can be made that there would be a likely delay in the relief sought being granted, the Court will consider granting the order if it is "*necessary and appropriate to assist in achieving justice*".
3. The Court is likely to grant an ancillary gagging order to ensure that any further order made by the Court is not rendered futile due to the "wrongdoers" being notified of the NPO and seeking to dissipate or move assets.

Just and convenient

1. There must be a clear link between the respondent and the information.
2. It must be just and convenient for the respondent to provide the information. This will often include the applicant having provided an undertaking for any cost or inconvenience should the respondent be ordered to disclose the information sought (and the non-disclosure of such orders).
3. As an injunction is a discretionary remedy the court must be satisfied that it is just and convenient that the injunction be granted and that damages would not be an adequate remedy. In all the circumstances it would be just and convenient that the Application be granted.
4. The "balance of convenience" is often considered as being important.

We are pleased to report that the application was successful with the conclusion that the NPO jurisdiction remains alive and a key tool in the fraud prevention toolkit in Guernsey.

How have other offshore jurisdictions approaches to NPOs evolved?

The Cayman Islands

The Cayman Islands' Court of Appeal considered the decision of *Ramilos* in the case of *Essar*[4] and noted that the Cayman Islands has essentially the same statutory regime as England and Wales. However, they rejected the argument that the statutory regime prevented the court from granting Norwich Pharmacal relief. The Court of Appeal found that both orders differed significantly in that a statutory evidence order only concerns the giving of evidence, whilst a NPO concerns the equitable relief of discovery. They also held that so long as the Norwich Pharmacal jurisdiction is properly confined, then there is no overlap with the statutory regime.

The Cayman Islands' Court of Appeal went further still in finding that Norwich Pharmacal relief is an equitable remedy designed to prevent an abuse, and that a fundamental aspect of it is to allow the applicant to work out if a claim can be brought, and if so, in which jurisdiction. This shows that where an applicant is dealing with a party attempting to dissipate assets, a NPO will provide prompt and critical aid in enabling them to 'follow the money'.

The British Virgin Islands

The British Virgin Islands High Court made similar findings in *Q v R*[5], although through different reasoning, and held that it was highly unlikely the BVI House of Assembly had intended the legislation relating to disclosure of evidence to restrict the availability of Norwich Pharmacal relief and that the availability of this relief was "*highly desirable in an offshore financial centre such as the BVI*". This sentiment was echoed in the Guernsey case

[4] *Essar Global Fund Limited (2) Essar Capital Limited (2) v Arcelormittal USA LLC CICA (Civil) Appeal No 15 of 2019*
[5] *KS v ZZ BVHICM 2020/0016*

of *Equatorial Guinea*[6] where the judge held that NPOs in support of foreign proceedings were vital to ensure that Guernsey might not become a "*safe haven for those wishing to evade their financial liabilities*".

The Eastern Caribbean Supreme Court (Virgin Islands) (Amendment) Act 2020 was enacted in the BVI after *Essar*. It confirms that where the High Court has a common law power to make an order for the provision of documents and information under a NPO, the BVI court may make such an order even though proceedings will be commenced in another country or there is a parallel statutory power to make such an order.

Jersey

In *New Media Holding Co v Capita Fiduciary Group Limited*[7], the Royal Court of Jersey gave a clear steer that in appropriate circumstances, where "*convenient in the interests of justice*", a NPO could be granted in support of proceedings elsewhere, endorsing the view expressed in an earlier judgment that it is policy in Jersey to ensure "commercial facilities available in Jersey" are not "*used to launder money or mask criminal activities here or anywhere else*".

The Evidence (Proceedings in Other Jurisdictions) Act 1975 extends to Jersey only in relation to criminal proceedings. Jersey has its own legislation on the taking of evidence in foreign proceedings, *the Service of Process and Taking of Evidence (Jersey) Law 1960.* As a result, the Jersey courts will likely be willing to grant NPOs in support of foreign proceedings in appropriate circumstances, and to feel unconstrained by the more restrictive English approach.

So where does this leave NPOs in aid of foreign proceedings?

We consider that NPOs remain a vital tool available to applicants, especially within the arena of combatting fraud, money laundering and recovering assets through tracing. Various jurisdictions have granted them in support of foreign proceedings and some, such as Guernsey and the Cayman Islands, have distinguished themselves from the outcome in the *Ramilos* case by demonstrating in judgments that they consider it to be completely separate from the relief available under any statutory regimes.

It is important for applicants wishing to use an NPO to seek information from third parties to consider:

1. Whether the law in the particular jurisdiction involved and the particular circumstances of the case are likely to make an NPO available in support of proceedings in another jurisdiction.
2. Not to overstep the boundaries of the NPO jurisdiction by seeking wide-ranging material amounting to evidence rather than information.

[6] *Systems Design Limited et al v The President of the States of Equatorial Guinea et al [2005] Judgment 17/2005*
[7] New Media Holding Co v Capita Fiduciary Group Limited [2010] JLR 272

3. Whether the individual they seek information from is innocently ‘mixed up’ in wrongdoing.
4. Whether there is some viable alternative means of obtaining the information, such as under relevant legislation for the provision of evidence in support of overseas proceedings.
5. Where there is doubt about the availability of an NPO in support of foreign proceedings, strategy is key. Specialist advice is needed on potential routes to the information.

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Collateral use of Material in Civil Proceedings – WFZ V The British Broadcasting Corporation [2024] EWHC 376 (KB)

KATE MCMAHON &
OLIVER FREDRICKSON

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COLLATERAL USE OF MATERIAL IN CIVIL PROCEEDINGS – *WFZ V THE BRITISH BROADCASTING CORPORATION [2024] EWHC 376 (KB)*


KATE MCMAHON & OLIVER FREDRICKSON

EDMONDS MARSHALL MCMAHON

The Civil Procedure Rules 1998 ("**CPR**") govern when material obtained through the course of civil proceedings may be used for a collateral purpose. This article focuses on two common categories of material – disclosed documents and witness statements – and reviews how courts exercise their discretion to allow such material to be used for a collateral purpose. It concludes with an analysis of a recent case, *WFZ v The British Broadcasting* Corporation [2024] EWHC 376 (KB).

A. THE INTERSECTION BETWEEN CPR 31.22 (DISCLOSED DOCUMENTS) AND CPR 32.12 (WITNESS STATEMENTS)

Before the enactment of the CPR, the common law implied an undertaking, owed to the court, not to use disclosed documents for a purpose other than for the proceedings in which they were disclosed (see: *Alterskye v Scott* [1948] 1 All E.R. 469). The same applied to witness statements (see: *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 1 W.L.R 756).

Now, the CPR provides a "full code" for the collateral use of disclosed material and witness statements (see: *SmithKline Beecham plc v Generics (UK) Ltd (CA)* [2003] EWCA Civ 1109 at 28-29). Relevantly, CPR rr 31.22 and 32.12, read:

"Subsequent use of disclosed documents

31.22–(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where:

(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
(b) the court gives permission; or
(c) the party who disclosed the document and the person to whom the document belongs agree.

….

Use of witness statements for other purposes

32.12–(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.

(2) Paragraph (1) does not apply if and to the extent that:
(a) the witness gives consent in writing to some other use of it;
(b) the court gives permission for some other use; or
(c) the witness statement has been put in evidence at a hearing held in public."

These two provisions have similar policy grounds. The primary policy consideration motivating CPR 31.22 is that parties to civil proceedings should have confidence that documents disclosed to the other party, often private and confidential, will not be used for the purposes other than the litigation. This "promotes compliance" and leads to "a greater willingness to, and a greater frankness in providing disclosure" (see: *Tchenguiz v Serious Fraud Office* [2014] EWCA 1409 at [56] and the unreported decision of *Langstone v Willers* (25 January 2013, Mark Cawson QC)).

Similarly, CPR 32.12 is necessary because litigants and witnesses must have some reassurance that evidence provided for use in court proceedings will not be used for purposes other than those proceedings.

Because of their similar policy justifications and statutory language, courts frequently draw an analogy between these provisions when determining whether "give permission" for collateral use under rr 31.22 or 32.12 (see for example: *Rawlinson and Hunter Trustees SA v Serious Fraud Office [2015] EWHC (Comm)* at [42]). However, as the following paragraphs explain, courts have resisted amalgamating the two assessments entirely, and there remains a subtle but significant difference between the two.

1. The approach under CPR 31.22

It is often said that there must be "special circumstances" before a court will permit collateral use of disclosed documents under CPR 31.22(b), a phrase which derives from the following passage by Lord Oliver in *Crest Homes Plc v Marks* [1987] AC 829:

> *"The court will not release or modify the implied undertaking given on discovery, save in special circumstances where the release or modification will not occasion injustice to the person giving discovery."*

More recently, Jackson LJ added that these special circumstances must "constitute a cogent reason for permitting collateral use." (See: *Tchenguiz v Serious Fraud Office* [2014] EWCA Civ 1409). This is a highly fact-sensitive assessment and the burden lies "firmly on the applicant" to demonstrate that such cogent reasons exist (see: *Rawlinson and Hunter Trustees SA v Serious Fraud Office* [2015] EWHC (Comm) at [18]).

Ultimately, the Court will undertake a balancing exercise, weighing matters such as: the proper administration of justice; the desire to preserve privacy; the need to protect confidential information; the nature of the documents at issue; and the purpose for which they are sought. However, as the CPR makes clear, the "most important consideration must be the interest of justice" (See: *SmithKline Beecham plc v Generics (UK) Ltd (CA)* [2003] EWCA Civ 1109 per Aldous LJ).

2. The approach under CPR 32.12

Unlike CPR 31.22, there is "little direct guidance available from the authorities" on the court's exercise of its discretion to allow collateral use of witness statements under r 32.12(2)(b). As noted above, courts have often encouraged analogy with the approach taken to disclosed documents but, at the same time, have caution that the considerations are "similar, but not identical" (see *Hollywood Realisations Trust Ltd v Lexington Insurance Co & Ors* [2003] EWHC 996 (Comm); and *Langstone v Willers* (25 January 2013, Mark Cawson QC)).

In *Langstone v Willers*, Mark Cawson QC, sitting as a Deputy Judge of the High Court, commented that, "as a matter of principle … at least **some good reason** does need to be demonstrated, before the Court should depart from the default position" (*Langstone v Willers (25 January 2013, Mark Cawson QC* at [45])). From this decision alone, it was unclear whether the "some good reason" intentionally imposed a different – perhaps lower – standard than the "cogent reason" required under CPR31.22. However, a recent High Court case has also adopted the "good reason" test, suggesting that it is indeed the correct standard for applications under CPR 32.12.

B. *WFZ V THE BRITISH BROADCASTING CORPORATION [2024] EWHC 376 (KB)*

In *WFZ v The British Broadcasting Corporation [2024] EWHC 376 (KB)* ("**WFZ**"), the High Court explored the intersection between rr 31.22 and 32.12 and offered helpful commentary on the application of CPR 32.12(2)(b).

WFZ was a unique case in which the claimant, WFZ, sought permission to use a witness statement prepared by a journalist for the BBC (which was the defendant in civil proceedings in which WFZ was the claimant) for the collateral purpose of making representations to the Police/CPS in a parallel criminal investigation. Collins-Rice J's ultimate decision was grounded heavily on the particular facts of the case, so it is first necessary to rehearse them in some detail.

1. Facts

WFZ is a high-profile public figure whose identity remains suppressed. In 2022, he was arrested on suspicion of serious sexual offending against multiple complainants. During this period, the BBC conducted a news investigation with a view to publish an exposé

report. As part of this investigation, a BBC journalist spoke with several individuals, including the complainants.

On 5 June 2023, the BBC wrote a letter to WFZ outlining the complainants' allegations and informing WFZ that the exposé would name him. WFZ promptly sought interim injunctive relief restraining publication of his identity pending the hearing of his claim for final relief. In its opposition to WFZ's application, the BBC journalist provided a witness statement dated 9 June 2023 ("**the Witness Statement**"). The Witness Statement contained information about how the journalist became aware of the allegations made against WFZ through discussions with the complainants.

By August 2023, charging decisions had still not been made. On 17 August 2023, WFZ informed the BBC that he intended to use the Witness Statement in representations to the Police and/or CPS. The BBC advised that it did not provide consent for the Witness Statement to be used for this purpose.

The Police contacted the BBC in September 2023 and requested that it disclose material gathered during its investigation, including the Witness Statement. The BBC refused, relying on its editorial guidelines to decline to released "untransmitted journalistic material" without a court order. On 3 November 2023, the Police confirmed that it intended to obtain a production order pursuant to Schedule 1 to PACE for this material, but did not provide a timeline for doing so. WFZ applied to the High Court for permission to give the Witness Statement to the police/CPS.

2. Arguments

WFZ drew a distinction between witness statements and disclosed documents, noting that the BBC was not compelled to provide the Witness Statement. Rather, it was an entirely "voluntary act", made in opposition to his claim for injunctive relief (at [24]). On this basis, WFZ argued that he was not seeking permission for collateral use of compelled material, but rather "permission to use material properly in his own hands for a purpose which was entirely consistent with the injunction he obtained" (at [25]).

The BBC viewed the case through an entirely different paradigm. It argued that the Witness Statement was "journalistic material" and that the Court should instead apply the legal test within the PACE regime. Under Schedule 1 to PACE, a judge may make a production order on a police application requiring journalistic material to be disclosed if certain specified conditions are met. The BBC argued that this was the appropriate test. The BBC said that Parliament had already struck a balance between the public interests by enacting the PACE regime.

3. Decision

Collins Rice J was satisfied that the Witness Statement contained material which engaged "the interests of journalism and at least potentially the legal protections for journalism" (at [37]). As a result, WFZ's application was not just a request for permission for collateral use of material obtained in the course of civil proceedings, it was *also* request for the exercise of legal compulsion over unpublished journalism (at [40]).

Collins Rice J accepted that the PACE regime provided the appropriate forum, as it builds in "careful protections" for journalism, suspects, complainants, and potential witnesses (at [59]). However, her Ladyship refused to apply the PACE test to WFZ's application – as suggested by the BBC – because she had not been informed of the Police/CPS case against WFZ. Instead, Collins Rice J simply assessed whether WFZ had discharged his burden of showing a "good reason" to depart from the default rule. On the unique facts of this case, the answer was no.

By the time WFZ made this application, the Police/CPS were aware of the existence of the Witness Statement and had expressed an intention to use their statutory powers under PACE to obtain it. As a result, there was no "good reason" for pre-empting the Police/CPS and making an order under CPR 32.12. The problem with WFZ's application was, therefore, one of "timing" (at [58]). Accordingly, Collins Rice J concluded that was in the interests of justice for the criminal processes to take their course without interference.

C. FINAL COMMENTS

The decision of *WFZ* provides useful guidance on the application of CPR 32.12(2)(b). Despite acknowledging the natural analogy with collateral use of disclosed material, Collins-Rice J appears to have paved a different route for the collateral use of witness statements CPR 32.12(2)(b). At the beginning of her analysis, her Ladyship acknowledged that:

> The authorities on the collateral use of disclosed material require an applicant to demonstrate 'cogent and persuasive reasons', and indicate that a court will not give permission save in 'special circumstances' and only where 'no injustice' will be occasioned to the provider (*Crest Homes plc v Marks [1987] AC 829* at 860; *ACL Netherlands BV v Lynch [2019] EWHC 249 (Ch)* at [29]).

Nevertheless, Collins-Rice J ultimately asked whether WFZ had demonstrated a "good reason" to depart from the default rule that a witness statement may be used only for the purpose of the proceedings in which it is served. It is unclear whether her Ladyship intentionally drew a distinction between "cogent and persuasive reasons" and "good reason", but it would appear that the latter imposes a less exacting standard. Time will whether future courts agree.

More generally, this decision demonstrates the fact-specific nature of applications under CPR 32.12(2)(b) and how the presence of journalistic material can alter the court's analysis. In such cases, courts will be hesitant to grant permission under CPR 32.12(2)(b), as Parliament has specifically enacted the PACE regime to balance these competing interests. And further, if the Police/CPS have indicated that they intend to obtain the witness statement via the PACE regime, it will not be appropriate for the court to pre-empt this decision and make an order under CPR 32.12(2)(b).

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The Promise and Perils of Artificial Intelligence in Document Review and Discovery

SEAN ANDERSON, IAN CASEWELL & YEHIA MOKHTAR

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THE PROMISE AND PERILS OF ARTIFICIAL INTELLIGENCE IN DOCUMENT REVIEW AND DISCOVERY

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MINTZ GROUP

Introduction

Document review and discovery is one of the primary areas in which law firms and corporate law departments are racing to leverage generative artificial intelligence ('AI'). That opportunity is particularly promising in complex fraud and asset recovery cases, which usually involve both the analysis of copious amounts of information and a race against the clock. Artificial intelligence tools are a perfect match for these challenges.

However, firms and law departments looking to incorporate generative AI into review and discovery must figure out how best to do so. Integration strategy – always an issue when adopting new technologies – is particularly complex in the case of AI; AI's combination of superhuman analytical power and increasingly human-like, nuanced communication makes it easy to project on to it more capabilities than it has.

At Mintz Group, we leverage AI tools every day in our discovery, financial analysis and due diligence engagements. Our practical, front-line experience with what AI can and cannot do may provide a useful framework for those grappling with how best to use AI in their own organisations.

Crafting the Man-Machine Partnership

Recently, for example, we were engaged by a law firm to assist with a complex asset recovery matter for a major private equity fund that had been defrauded of $80 million by one of the fund's portfolio companies. Working closely with the team of lawyers and forensic accountants, we began by piecing together illicit financial flows. While most of those illicit financial flows took place outside of the United States, some went to Delaware-based companies with New York bank accounts. This nexus allowed us to use a provision in the U.S. legal code governing discovery in foreign investigations called a Section 1782 to compel the U.S. banks to disclose the financial transaction data.

We then worked with our AI partner, Sedra Solutions, to analyse the large amounts of disclosed transaction and other internal data we received along with the forensic data we already had. Sedra's AI tool identified patterns suggesting the principals of the private equity fund's portfolio company had used trade-based money laundering techniques to carry out the fraud. Our team then analysed open-source records to investigate the parties involved in the suspicious trades and discovered that they all attended university with one of the principals. Comparing the company's internal records to trade and customs data, we identified patterns of over-priced invoices for shipments to a network of shell companies in the Caribbean, as well as ghost shipments that never took place. Untangling the shipping transactions and shell company ownerships, we able to provide the law firm the evidence they needed to secure freezing orders against the accounts before the money could be moved out of friendly jurisdictions—allowing the private equity firm to make a substantial recovery of its lost funds and for the fraudsters to be reported to law enforcement.

AI uncovered the fraud's tell-tale connections and patterns much more quickly than could have been done with conventional analysis, enabling us to then apply other tactics to zero-in on the stolen funds before they could be moved. Too often, the discussion around AI is framed in terms of how AI will replace human judgment. It is more productive, however, to think of AI as a tool to magnify the capabilities of experienced professionals.

Uncovering the Tip of an Iceberg

A closer look at how to balance AI capabilities with the experience of human investigators was provided by another recent assignment, in which we were asked to help conduct pre-acquisition due diligence on a family-owned conglomerate in Central America, as well as on five family members involved in the business. We used AI-powered tools to generate an initial high-level assessment of possible areas of concern. This uncovered some garden-variety litigation and a few minor allegations of anticompetitive behaviour, as well as a single press report claiming that the youngest son had been arrested for owning an illegal gun while riding in a truck with three others—one of whom also had an illegal gun. Our next step was to conduct a public records investigation, in which we found some additional context related to the two business-related issues flagged by the AI platform, but nothing further about the gun charge. We knew, however, that it would be a mistake to not pursue the gun charge further, since criminal records in that jurisdiction were sparse, as they often can be in emerging markets.

We recommended to our client that our investigators make some discreet inquiries to our contacts in the region regarding the company and the family. We quickly discovered that there had long been rumours about the family's ties to organised crime, with several sources independently reporting longstanding suspicions that the family's companies might be money laundering fronts. Digging further, we tapped our network within the country's law enforcement community to secure an introduction to a prosecutor who had recently left the Attorney General's office. The source confirmed that not only was there an investigation into the family and their companies' involvement with a major criminal group, but that several company bank accounts had recently been frozen as part of an upcoming criminal prosecution. Needless to say, our client passed on the acquisition.

As with the investment fraud case, AI tools were invaluable in allowing us to quickly identify where to focus our efforts. But we knew that was only the start. Reading the AI-generated report, one could have concluded that the gun charge was an anomaly that didn't warrant derailing a deal. In fact, it was the tip of a risk-filled iceberg.

A Lesson in AI's Limitations

The problems that can stem from an over-reliance on AI were underscored when we were asked by a major publicly traded company to conduct due diligence on a finalist for the company's CFO slot. While the company had been given an AI-generated report on the candidate, it decided to pursue a more thorough investigation. We started with a clean slate, combining our own AI tools with the experience of our investigators. The AI platform we used uncovered two press reports that a woman with the candidate's name and who lived in a community where the candidate had resided had been accused of harassing her neighbours. But we discarded those reports because we knew that candidate we were investigating—who had a very common name—had moved from that community years ago. Further, her spouse's name was different than that mentioned in the articles.

We continued our research, looking into litigation in which the woman might have been a party. Although she lived and worked in a large metropolitan county, we knew from experience that the county's online court records—on which any AI report would have relied—were woefully incomplete. After sending an investigator to the county courthouse to conduct a hard-copy search, we uncovered that she had been sued by an NGO for which she had served as treasurer, alleging financial misconduct that left the organization on the verge of bankruptcy.

Unsurprisingly, the company terminated the woman's candidacy shortly thereafter. In addition to avoiding what could have been a disastrous hire, the company was vindicated in its decision to look beyond the AI-generated report it first received: Not only did the report incorrectly flag the harassment allegations, but it failed to uncover the much more serious and relevant financial misconduct allegations.

These errors underscore one of AI's biggest limitations—that it can only work with the data it has ingested. The AI platform had no way of knowing, as our human investigators did, that the CFO had moved out of that community years before, or that her spouse had a different name than that of the woman in the press reports. It was also unable to look beyond

the incomplete county court records it had been fed to uncover the financial misconduct allegations that were only accessible via a trip to the courthouse.

A Tool, Not a Comprehensive Solution

Generative AI is undoubtedly a revolutionary development—and even more so when one considers that the technology is still in its infancy. Given what it is already capable of, it is tempting to view AI as an end-to-end, comprehensive solution. The law firms and corporate law departments seeking to harness AI for discovery and diligence need to take a more measured view, using AI for the things it does best, thereby freeing human investigators to cultivate sources, visit records depositories and all the other things that only experienced professionals can do. In this way, AI technology and human experts can achieve together what neither could do alone.

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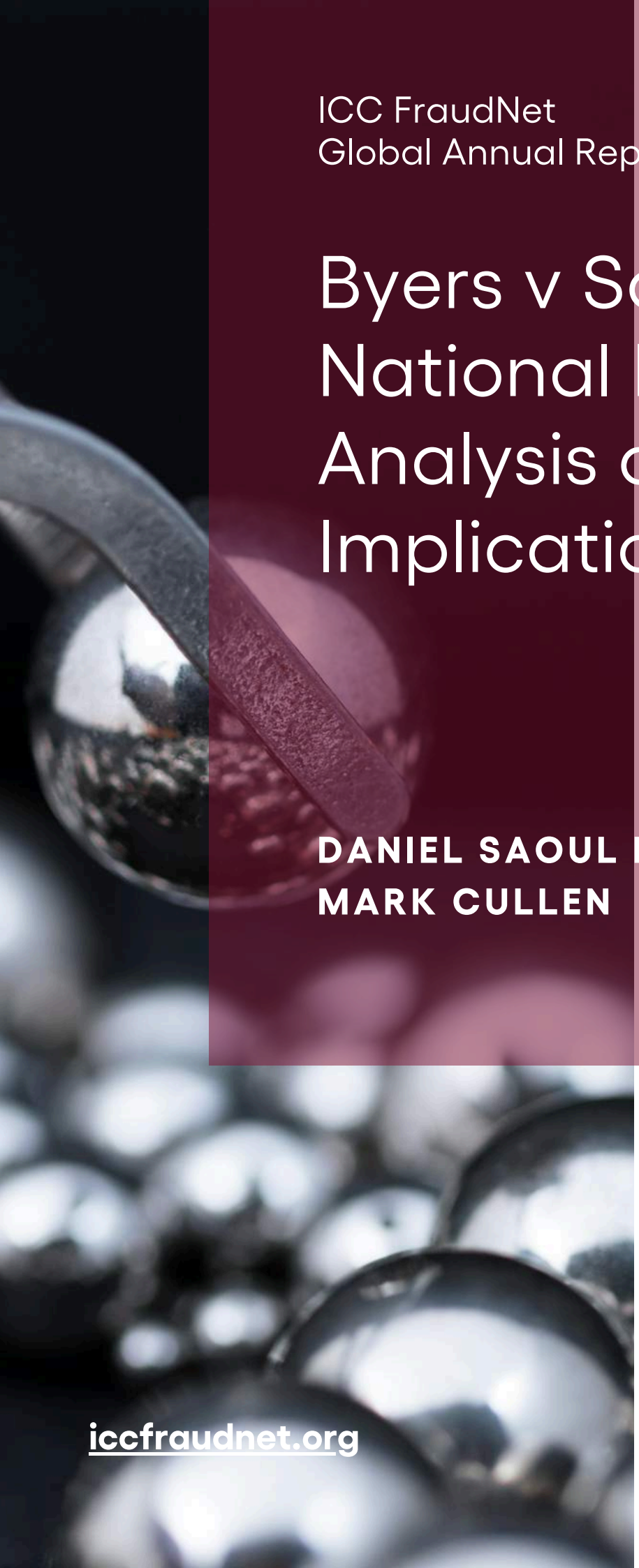
Byers v Saudi National Bank - Analysis and Implications

DANIEL SAOUL KC &
MARK CULLEN



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BYERS V SAUDI NATIONAL BANK – ANALYSIS & IMPLICATIONS

DANIEL SAOUL KC & MARK CULLEN

4 NEW SQUARE

As the dust settles on the Supreme Court's judgment in *Byers v Saudi National Bank* [2023] UKSC 51, Daniel Saoul KC and Mark Cullen analyse the key aspects of the decision and its implications for practitioners.

Lord Briggs explained that the case had "*forced the court to revisit the most basic equitable principles which underlie a claim in knowing receipt, not least because it cannot be said that the issue has ever been squarely addressed by this court or its predecessor."*

The key question was whether a claim in knowing receipt could succeed once a claimant's proprietary interest in the property in question had been extinguished or overridden. The Supreme Court unanimously held that it could not. In doing so, the Supreme Court emphasised the proprietary basis for a claim in knowing receipt. However, the Supreme Court did not deal with all aspects of the law on knowing receipt (which did not arise on the appeal) and in relation to which there remain several uncertainties. Moreover, the case is likely to give pause for thought as to how claims might in future be formulated to overcome the difficulties that arose in this particular case.

Facts

Saad Investments Company Limited ('SICL') was a Cayman Islands company and the beneficiary of various Cayman Islands trusts, which included shares in five Saudi Arabian Companies (the 'Shares'). The Shares were held on trust for SICL by Mr Al-Sanea. In breach of trust, Mr Al-Sanea transferred the Shares to a Saudi Arabian financial institution, the Samba Financial Group ('Samba'), to discharge his own debts to Samba (the 'Transfer'). Thus, there was no doubting Mr Al-Sanea's wrongdoing.

At the time of Samba's receipt of the Shares it knew Mr Al-Sanea was holding the Shares on trust for SICL. A reasonable bank in Samba's position would have appreciated that the Transfer was a breach of trust, alternatively would or ought to have made inquiries or sought advice which would have revealed the probability that the Transfer was a breach of trust, and/or recklessly failed to make such inquiries about the transfer as an honest and reasonable bank would make. Samba was therefore fixed with the knowledge required for a claim in knowing receipt to succeed.

However, the governing law of the Transfer was Saudi Arabian law, which does not recognise a distinction between legal and beneficial ownership as such. As a result, as a matter of Saudi Arabian law, the effect of the Transfer was that SICL had no continuing proprietary interest in the Shares. Instead, Samba became recognised as the sole owner of the Shares on receipt of them. Samba retained the Shares and was the sole defendant at the time of trial. Subsequently, its assets and liabilities became vested in the respondent Saudi National Bank.

The Issue Before the Supreme Court

Samba had persuaded the Courts below that the overriding of SICL's equitable beneficial interest in the Shares by the registration of Samba as their owner under Saudi Arabian law was fatal not merely to any proprietary claim by SICL but also to a personal claim in knowing receipt against Samba.

SICL disputed this contention. It argued that a claim in knowing receipt did not require a continuing equitable interest in the property in dispute and that all it required was that Samba knew that the Shares were transferred to it in breach of trust, so that it would be unconscionable for Samba to use the Shares for its own benefit. On this basis, SICL contended, a personal claim against Samba would lie, requiring it to make SICL whole to the value of the transferred Shares.

However, the Supreme Court rejected that argument and held that a claim in knowing receipt cannot succeed once the claimant's proprietary equitable interest in the property in question had been extinguished or overridden.

The Proprietary Basis for a Claim in Knowing Receipt

Turning to the reasoning for this decision, this is found primarily in the judgments of Lord Briggs and Lord Burrows, who both sought to reach their conclusions based on a ground up analysis of the relevant law. They agreed that a claim in knowing receipt was precluded when the claimant's proprietary equitable interest had been extinguished or overridden by the time when the recipient received the property. However, Lord Briggs considered that a knowing receipt claim was based on the "*vindication of an equitable proprietary right"* i.e. as ancillary to a proprietary claim and deriving from core equitable principles as to the priority of equitable proprietary interests in scenarios of potential conflict; whereas Lord Burrows categorised knowing receipt as "*an equitable proprietary wrong"* i.e. as giving rise to a claim for wrongdoing in its own right, albeit one rooted in the claimant's

proprietary interest. The distinction between these differing analyses might be thought to be as a subtle one, and as mentioned both Justices agreed on the outcome.

In circumstances where Lord Briggs and Lord Burrows had both reached the conclusion that the appeal should be dismissed but by slightly different reasoning, Lord Hodge helpfully summarised what had been agreed as determining the outcome of the appeal:

1. The transfer of trust property by a trustee to a bona fide purchaser for value without notice extinguishes or overrides the proprietary equitable interest of the cestui que trust (the trust beneficiary) even if the trustee in doing so acts in breach of trust.

2. If the bona fide purchaser for value without notice later becomes aware that the property was transferred in breach of trust, this does not resuscitate the claimant's proprietary equitable interest.

3. A claim in knowing receipt cannot succeed in the circumstances described in paragraphs 1 and 2 above, because the claimant's proprietary interest has been extinguished or overridden.

4. Importantly, this conclusion cannot be displaced by comparing the claim in knowing receipt to a claim for dishonest assistance. The latter is ancillary to the liability of the trustee and renders the assister liable as an accessory. The former is very different. A personal claim in knowing receipt against a transferee is closely linked to a proprietary claim for the return of the property. A personal claim in knowing receipt comes into play when the transferee, who is not a bona fide purchaser for value without notice, no longer has the property, such as when the transferee transfers, dissipates or destroys the property in question and thereby prevents a proprietary claim.

5. The extinction or overriding of a proprietary equitable interest by the time the recipient receives the property defeats a proprietary claim, and by extension defeats a claim for knowing receipt.

Applying that reasoning to the facts of the case, the operation of Saudi Arabian law had the effect that SICL's proprietary equitable interest was extinguished by Mr Al Sanea's transfer to Samba of the Shares and the registration of those Shares in Samba's name. That was so notwithstanding Mr Al-Sanea's breach of trust and any knowledge which Samba had that the transfer was in breach of trust.

The Boundaries of Knowing Receipt and Alternative Avenues

The Supreme Court's judgment provides welcome clarification that a claim in knowing receipt requires a continuing equitable interest in the property in dispute, as well as an interesting discussion of the equitable principles underlying the cause of action and the close connection between a claim in knowing receipt and a proprietary claim attached to trust property.

There remain though a number of related and uncertain areas of the law which the Court was not required to address, including:

a. The relationship between knowing receipt and unjust enrichment.

b. How the knowing receipt remedy, which in its traditional form depends upon there being an original trust of the relevant property and a split between legal title and beneficial ownership, works in relation to cases in which a company (or its liquidator) seeks to pursue the remedy after a transfer of the company property at the behest of directors acting in breach of fiduciary duty.

c. The precise boundaries and content of the requirement to show the "knowledge" necessary to trigger the recipient's personal liability to account or pay equitable compensation under the doctrine of knowing receipt.

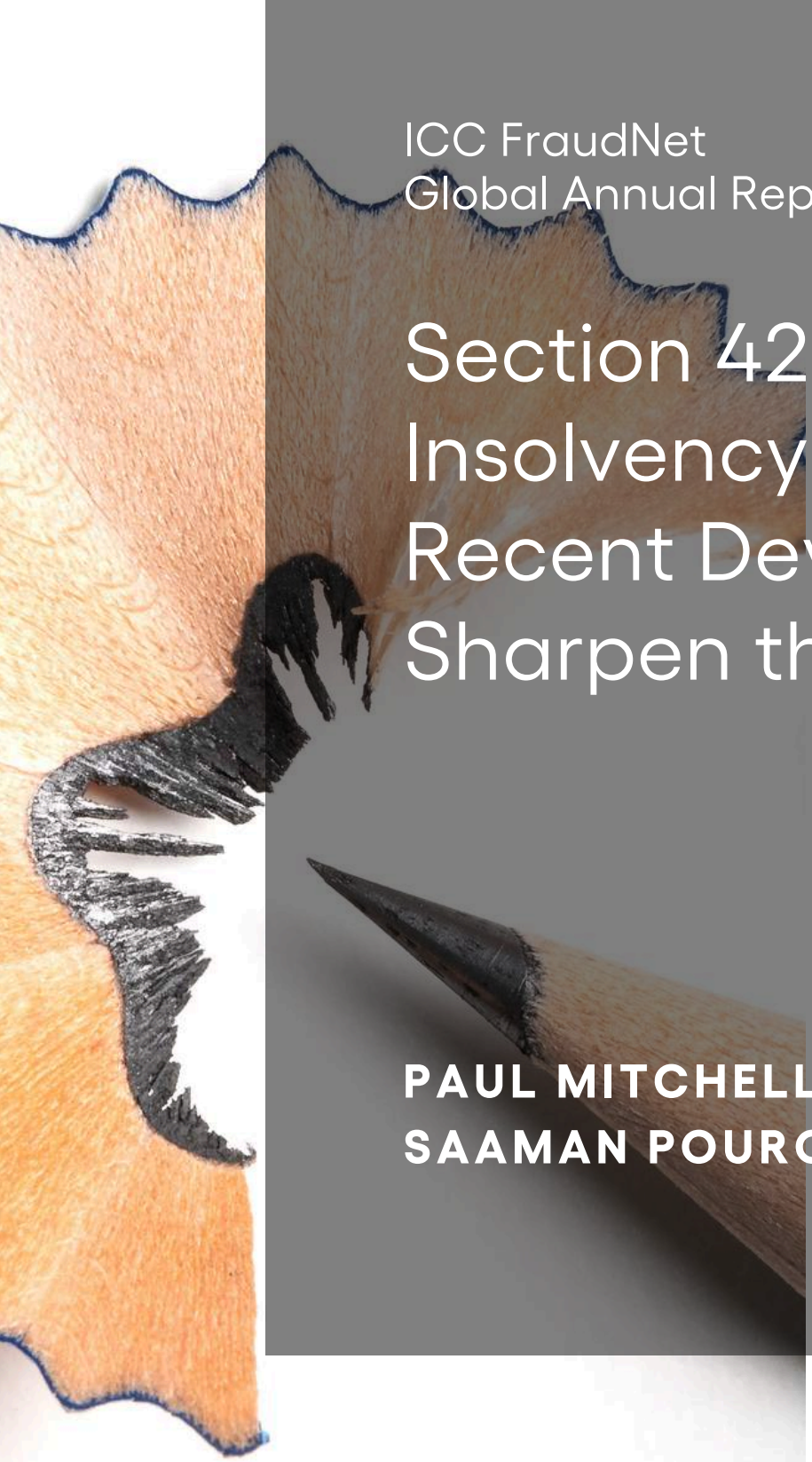
It is those areas which may now be of the greatest interest to commercial fraud practitioners, particularly in relation to claims which have at their core the misappropriation of trust assets or assets which are in some way held in a fiduciary capacity, which have been passed on by the primary wrongdoers to third parties.

Yet further, the Supreme Court was naturally not required to consider what alternative claims might be available to parties for whom claims for knowing receipt may not be available. Practitioners will however have to engage with such questions when facing factual scenarios where, for one reason or another (including potentially the extinction of a proprietary right) a claim in knowing receipt may not be available. In this regard, the confirmation of the distinction between a claim for dishonest assistance – which does not require an enduring proprietary right – and a claim in knowing receipt is useful.

Parties may also be driven to consider other remedies outside of the realm of equity: unjust enrichment (mentioned above) may be one potential avenue, as may the use of Section 423 of the Insolvency Act 1986, to unwind transactions the purpose of which was to put assets beyond the reach of creditors, and which again requires no continuing proprietary interest in the target asset – though of course both of these remedies have their own specific requirements, both in terms of the core ingredients of the cause of action as well as bearing on the circumstances in which it will be appropriate for them to be invoked in cross-border transactions, such as the one faced by the SICL. In appropriate cases there may also be tortious claims available, subject again to questions of governing law (and in some cases limitation may also be in issue).

These will no doubt be fertile areas of activity in the English Courts in the months and years to come, as claimants seek to develop ever more creative approaches to the asserting of claims for breach of trust and other similar alleged wrongdoing, in an increasingly complex and cross-border transactional environment.[1]

[1] **Disclaimer**: This article is not to be relied upon as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.



ICC FraudNet
Global Annual Report 2024

Section 423 of the Insolvency Act 1986: Recent Developments Sharpen this Useful Tool

PAUL MITCHELL KC &
SAAMAN POURGHADIRI

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SECTION 423 OF THE INSOLVENCY ACT 1986: RECENT DEVELOPMENTS SHARPEN THIS USEFUL TOOL


PAUL MITCHELL KC &
SAAMAN POURGHADIRI[1]

4 NEW SQUARE

Introduction

1. Section 423 of the UK's Insolvency Act 1986 grants the court wide powers to reverse transactions which have been entered at an undervalue. The section is of particular use in fraud claims in reversing steps taken by perpetrators with a view to evading freezing orders and/ or enforcement.

2. In a recent decision, *Invest Bank PSC v El-Husseini & Ors* [2023] EWCA Civ 555, [2023] 3 WLR 645, the Court of Appeal construed the statutory language of the section so as to capture a wider range of transactions than it had previously been appreciated might fall within the protection offered by the statute. In particular, the Court of Appeal held that s.423 can apply even when the assets transferred by the impugned transaction are not directly beneficially owned by the debtor and also even where the impugned transaction was entered into not by the debtor but by a company he owned or controlled. Thus, as the law now stands, s.423 can be used to reverse transactions effected by or at the behest of perpetrators; or by companies owned or controlled by perpetrators.

[1] The authors gratefully acknowledge the assistance of Tom Chamberlain in preparing this article.

3. The decision of the Court of Appeal has been appealed to the Supreme Court and the appeal was heard in early May 2024. Judgment is awaited. In this article, we consider the position as the Court of Appeal has left it.

The Wording of the Section

4. The section itself is titled 'transactions defrauding creditors'. Insofar as is material for present purposes, s. 423 provides:

> "(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if –
>
> > (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;
> > … or
> > (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth of the consideration provided by himself.
>
> (2) Where a person has entered into such a transaction, the Court may, if satisfied under the next subsection, make such order as it thinks fit for –
>
> > (a) restoring the position to what it would have been if the transaction had not been entered into, and
> > (b) protecting the interests of persons who are victims of the transaction.
>
> (3) In the case of a person entering into such a transaction, an order shall only be made if the Court is satisfied that it was entered into by him for the purpose-
>
> > (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
> > (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

5. What amounts to a "transaction" for the purposes of s 423(1) is defined in section 436: "a 'transaction' includes a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly".

6. The historic purpose of this section was to reinvigorate s.172 of the LPA 1925, used to avoid fraudulent conveyances; it was enacted in response to the Report of the Committee on Insolvency Law and Practice, chaired by Sir Kenneth Cork GBE, published in June 1982. The Committee wanted s.172 widened, in particular, to cover payments of money and not merely transfers of real property. In the pithy phrasing of the Cork Report, the broad principle sought to be enforced was that 'persons must be just before they are generous, and… debts must be paid before gifts can be made.'

Must the Target of an Application Under s. 423 be Insolvent?

7. In a word, No. In *Moffat v Moffat* [2020] NICh 17; [2021] B.P.I.R. 1309 the court confirmed s.423 can apply in a non-insolvency context; in *Manolete Partners Plc v Hayward & Barrett Holdings Ltd* [2021] EWHC 1481 (Ch); [2022] B.C.C. 159; [2021] B.P.I.R. 1285, the court went further, noting that claims under s.423 are not insolvency applications at all. Any person may apply for an order under s. 423 if he can show that he is a "victim" of the transaction sought to be impugned: see section 424(1)(c).

A Note on s.423's Extra-Territorial Effect

8. Extra-territoriality was not in issue in *El-Husseini.* It is, however, worth highlighting the international utility of s.423. Relief under the section can be granted by an English court even where the transaction itself was governed by foreign law; or if a trust into which money has been settled as the result of a transaction was governed by foreign law.

9. In considering the potential application of s.423 in commercial litigation generally, Flaux J in *Fortress Value Recovery Fund v Blue Skye Special Opportunities Fund* [2013] EWHC 14 (Comm) confirmed at [113] that 'it is well-established that section 423 can have extra-territorial effect':

> "the question whether there is sufficient connection with England to justify relief under section 423 is a matter which depends upon all the circumstances of the case. This is not a threshold question of jurisdiction, but a question of discretion".

10. In *Kazakhstan Kagazy plc v Zhunus* [2021] EWHC 3462 (Comm) at [231], Henshaw J set out a useful recapitulation of the law regarding the application of s. 423 in a claim with an international element, at [217] to [239]. Everything he said there was *obiter*, as he had already held the defendants liable via another route, but he demonstrated that where the defendant was sufficiently connected with England & Wales, an order could be made against him in relation to a wide range of transactions concluded abroad/ under a foreign system of law.

The facts of the Invest Bank case

11. Against that brief background, we turn to the facts of the *Invest Bank* case. The claimant bank ("**the Bank**"), established in the United Arab Emirates ('UAE'), asserted it was the creditor of Mr El-Husseini, a Lebanese businessman, as a result of judgments it had obtained against him in the UAE.

12. The Bank alleged that Mr El-Husseini had taken steps to disguise his beneficial ownership of certain assets, or to cause them to be transferred to members of his family (who were named as Second to Sixth Defendants to the action), with a view to putting them beyond the reach of or otherwise prejudicing the interests of the Bank.

13. Among the specific transactions which the Bank sought to impugn were the following:

a. Before 2017, a Jersey company called Marquee Holdings Limited ("**Marquee**") legally owned two properties at No 9 and No 18 Hyde Park Mews ("**No 9/ No 18**"). The directors of Marquee were professional directors from a Swiss professional services company called Kendris AG. The Bank asserted that the ultimate beneficial ownership of No 9 and No 18 at all material times was vested in Mr El-Husseini; he denied this.

b. In 2017, the following transactions took place:

   i. Marquee transferred No 9 to one of Mr El-Husseini's four sons.
   ii. Marquee transferred No 18 to a trust operated by Kendris of which Mr El-Husseini's wife and sons were beneficiaries. The trust subsequently sold No 18 at fair market value and then made an appointment of almost all the net sale proceeds to the wife.

14. One averment pleaded by the Bank was that since Mr El-Husseini was (so it was alleged) the beneficial owner and controller of Marquee, *therefore* the acts of Marquee were acts caused or directed by him. At first instance, Andrew Baker J rightly rejected that contention as bad in law, but the nevertheless took account of the pleaded contention in his analysis of the applicable law, as will be seen below.

Legal issues arising

15. The Bank alleged that the transactions particularised above fell within s. 423 and thus could be reversed. It obtained permission to serve its claim form out of the jurisdiction on three of Mr El-Husseini's sons. They then applied to set aside the permission to serve the claim form out of the jurisdiction on the basis (among other things) that as a matter of law, the claims against them founded on s. 423 could not succeed.

16. The argument for the three sons gave rise to two novel issues of law:

a. First, given that the transfers of No 9 and No 18 were transfers made by Marquee, how could it be said that they were transactions entered into by Mr El-Husseini? Even if he were, as alleged, the ultimate beneficial owner of Marquee, the legal person which made the transfers was not him.

b. Second (the mirror image of the first point), if Mr El-Husseini were only the indirect owner of the assets of Marquee (because he was merely the beneficial owner of the shares of Marquee), how could the Marquee transactions fall within the definition of "transactions" for the purpose of s. 423? Put another way, could the transactions fall within the section even if Mr El-Husseini had no beneficial interest in the assets which were the subject of the transaction, i.e., No 9 and No 18?

17. Andrew Baker J characterised the first issue above as this: "where an asset transferred at an undervalue is held by a company, and an individual by whom it acts in respect of

the transfer does so by virtue of his sole ownership or control of the company, is there, without more, and on the proper construction of s. 423(1), a transaction entered into by the individual, either with his company or with the transferee (or both)?"

18. On that issue, Andrew Baker J found that s.423 was not engaged where the transaction involved the acts of a company, regardless whether that company is owned and controlled by the debtor and regardless whether the company's acts were performed by the debtor acting as its agent. For a transaction to fall within the section, the debtor must have acted in a personal capacity: by the application of the company law rules of attribution, any action of his on behalf of the company was an act of the company's only.

19. On the second issue above (the relevance of a debtor only owing assets indirectly), Andrew Baker J held that a debtor could enter into a 'transaction' within the meaning of s.423 even if the assets in questions are not directly beneficially owned by him.

20. Although it is not clear from either the first instance judgement or the judgement of the Court of Appeal, it seems that as the result of his analysis the learned judge struck out those elements of the Bank's claim to relief against the three sons which were founded on the application of s.423. The Bank then appealed the order made contending that the judge had erred in his approach to the first issues; and two of Mr El-Husseini's sons cross-appealed the order made on the basis that the judge was wrong in his analysis of the second issue.

The judgment in the Court of Appeal

21. The judgment of the Court of Appeal was given by Singh LJ alone, Males and Popplewell LJJ agreeing. Singh LJ held that Andrew Baker J had erred in ending his analysis at the point of applying the company law rules of attribution: the mere fact that the acts of a natural person became acts of the company did not mean that those acts could not have legal significance in another analytical framework such as that provided by s. 423.

22. Interestingly, Singh LJ's analysis was founded on the assumption that the transaction sought to be impugned was one that a company had effected by means of the acts of one of its directors. In so doing, he expressly emphasised, at [48], that there is no difference between the position of a director and any other agent of a company: liability in tort may be attracted by directors or other agents based on what they do, and the office they hold while doing it offers no defence. He said at [52]:

> "…while the separate legal personality of a company must be respected, and while the shareholders have no ownership of the company's assets, it does not follow that the director has not done anything at all. Clearly he has as a matter of fact. The question which then arises is whether those factual acts have any legal significance"

23. In Singh LJ's judgment, the acts complained of by the Bank did – *prima facie* – disclose transactions which could fall within s. 423. As he held at [53]:

> "The language [of the statute] is very broad. The Bank's interpretation would also better serve the purpose of the legislation, which could otherwise be easily frustrated through the use of a limited company to achieve the debtor's purpose of prejudicing the interests of his creditors."

24. Accordingly, the Court of Appeal allowed the appeal against the striking out of parts of the Bank's claim and (subject to the outcome of the Supreme Court appeal), that matter will proceed to trial.

25. As to the second element of the appeal (the indirect beneficial ownership point), Singh LJ again concluded, at [60], that the language of s. 423 was "very broad… and does not appear to require the transfer of any assets, let alone assets of which the debtor is the beneficial owner". In the result, the cross-appeal of the two sons failed.

26. The interpretation arrived at by Singh LJ on this second question is surprisingly radical. It turns in large part on two propositions:

    a. That the definition of "transaction" in subsection 423(1) must be read subject to the wording of the hurdle to relief provisions contained in subsection 423(3)(b); and

    b. That the meaning of subsection 423(1) – which is materially identical to the wording of sections 238(4) and 339(3) of the Insolvency Act 1986 – is different because section 423 is not directed to reversing transactions taken before insolvency or bankruptcy but at transactions which prejudice creditors even though the debtor remains solvent.

27. Given that the Supreme Court is currently still reflecting on the correctness of the analysis of the Court of Appeal, we refrain here from venturing our own views on whether the Court of Appeal's analysis on either of the two issues was correct.

28. The key takeaways on this point for practitioners at the time of writing this article are as follows:

    a. First, the mere fact that a defendant has arranged his affairs so as to mask his beneficial ownership of assets behind a corporation does not prevent his personal actions in relation to a specific transaction from having legal significance for the purposes of analysing whether that transaction is one falling within s 423;

    b. Second, it is important to be precise in pleading the claim to relief under s. 423. Although a wise strategy is likely to be to identify precisely what is said to be "directly" beneficially owned by the debtor and identify precisely just how the impugned transaction has prejudiced the interests of the claimant, it is also currently possible to complain that a transaction by which assets "indirectly" beneficially owned by a debtor were disposed of should be reversed.

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Global Annual Report 2024

The Road to Recovery – Equitable Solutions in the Modern World

NICOLE SANDELLS KC &
NICHOLAS BROOMFIELD

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THE ROAD TO RECOVERY – EQUITABLE SOLUTIONS IN THE MODERN WORLD

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& NICHOLAS BROOMFIELD

4 NEW SQUARE

The road to recovery – equitable solutions in the modern world.

1. One of the greatest challenges facing practitioners the world over is using the civil courts to recover assets lost to theft, fraud or cyber-crime, given the ever-changing nature of "property" and the methods employed by modern bad actors. The common law has struggled to keep up. Even if you can find your property, or its proceeds, it can be hard to recover. In such cases it can be worth looking at different angles, and this article focuses on equitable routes to recovery in the English common law world – some that might not immediately spring to mind in a commercial context, and others that have been trending in recent years.

"Property": one size does not fit all

2. Consideration of the nature of "property" highlights one problem. The common law draws a firm distinction between tangible property (i.e. things that can be physically possessed or controlled) and intangible property (i.e. anything that cannot). The problem this causes is self-evident. Many well-established routes to recovery do not extend to intangible property. For example: (a) in *OBG v Allen*[1] the House of Lords concluded that the tort of conversion is solely concerned with wrongful interference with physical possession of specific tangible property; and (b) the Courts have reaffirmed that

[1] [2008] A.C. 1

"general"[2] and "particular"[3] legal liens[4] remain enforceable over tangible property only,[5] rejecting the opportunity to extend them to intangible property such as software and electronic data.[6]

3. This has the potential to lead to unsatisfactory outcomes when intangible property such as software, data[7] and even digital currency[8] is misappropriated. The availability of a legal lien, or remedies for conversion, is entirely dependent upon the media by which the property has been transferred. Tangible property such as a USB drive containing a bitcoin key can be recovered, along with the intangible property it contains. However, that may be of no use at all if the key has already been used to transfer the bitcoin; data transferred electronically – bitcoin transferred using that key – cannot be recovered. Whether it is stolen bitcoin or hacked databases, the common law is rigidly refusing opportunities to develop quickly enough. It is time to look elsewhere, and longstanding equitable principles and the evolving rules of unjust enrichment offer an encouraging alternative.

Commercial trusts and fiduciary duty

4. Often the best place to start is by looking at traditional, private-client style trusts. A broad range of tools and remedies flows from them which can be incredibly useful in fraud and cyber-crime contexts, from following and tracing, to receipt-based claims in dishonest assistance and knowing receipt. If a trust can be identified, a whole world of opportunity opens up.

5. Trusts – express, bare, purpose, constructive or resulting – arise in a wide variety of commercial circumstances.[9] Indeed, even though a theft does not give rise to a trust as such, the thief or dishonest agent can be treated *as if* he were a constructive trustee and obliged to account on that basis in order to ensure that equity provides an answer where the tort of conversion may not. The same principles apply to trusts in both traditional and commercial contexts (albeit with some tailoring).[10] Any trustee who deals with trust property otherwise than in accordance with the trust terms commits a breach. Third-

[2] General liens secure all of the creditor's indebtedness and arise only by custom or agreement, and in limited circumstances.
[3] Particular liens usually arise as a result of goods or chattels having been accepted under an obligation to receive them (a "common callings" lien) or when labour has been expended on goods (a "work done" lien).
[4] For a more detailed discussion about particular liens and their utility in modern commerce, see: *"A lien in the sand"* by Daniel Saoul KC and Nicholas Broomfield (2020) 10 JIBFL 701.
[5] The circumstances in which they arise over tangible property being strictly limited; e.g. *Sheianov v Sarner International Limited* [2020] 1 W.L.R. 3963.
[6] *Lehman Brothers International (Europe)* [2012] EWHC 2997 (Ch); *Your Response v Datateam Business Media Ltd* [2015] Q.B. 41; *St Albans D.C. v International Computers Ltd* [1996] 4 All ER 481; *Thunder Air Ltd v Hilmarsson* [2008] EWHC 355 (Ch); *Computer Associates UK Ltd v Software Incubator Ltd* [2019] Bus. L.R. 522.
[7] *Computer Associates UK Ltd v Software Incubator Ltd* [2019] Bus. L.R. 522, per Gloster LJ at [51].
[8] Which now appears to be treated as "property", albeit tentatively: *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02; *Ruscoe v Cryptopia Ltd (in liquidation)* [2020] NZHC 728; *Ion Science Limited & Anr v Persons Unknown* (unreported, 21 December 2020), per Butcher J at [11]; *AA v Persons Unknown* [2020] 4 W.L.R. 35; *Wang v Derby* [2021] EWHC 3054 (Comm) (where it was common ground that the entirely fungible character and non-identifiable status of crypto-currency did not prevent it from being the subject matter of a trust); *Fetch.AI Limited v Persons Unknown* [2021] EWHC 2254 (Comm); *Tulip Trading Limited (a Seychelles company) v Bitcoin Association for BSV* [2022] EWHC 667 (Ch).
[9] *Target Holdings Ltd v Redferns* [1996] A.C. 421, per Lord Brown Wilkinson at 436A.
[10] *AIB Group (UK) plc v Redler & Co Solicitors* [2015] A.C. 1503, per Lord Toulson at [70].

parties who intermeddle can be liable for assisting the breach or receiving the property. Intangible property can be the subject of a trust[11] so any misappropriation of intangible property or disposition in breach of trust will arm the true owner of the property with new remedies, including proprietary remedies.

6. Even breaches of fiduciary duty by fiduciaries who are not technically trustees can give rise to the same remedies as breach of trust. If the breach involves moving assets, tangible or intangible, it is treated like a breach of trust giving rise to a proprietary claim. This can be particularly useful, for example, in company cases where a director transfers assets in breach of fiduciary duty. It must be remembered, however, that breach of fiduciary duty involves the breach of a duty of loyalty – such as acting in a position of conflict[12]. There is no such thing as a negligent breach of fiduciary duty – it involves a deliberate or conscious decision to act inconsistently with the duty. This is a fundamental difference from a breach of trust, which can be negligent or even completely innocent, and is important in the context of civil fraud – a trustee who is duped may be guilty of a breach of trust, but a duped fiduciary will not have committed a breach of fiduciary duty.

7. When trust assets are dissipated in breach of trust, property does not pass to the recipient unless he is a bona fide purchaser for value without notice – equity's darling.[13] A claimant can seek an account and, relying on the remedies available to traditional beneficiaries, call on the Court[14] to assist in obtaining any documentation that will assist – including bank statements and internal records and ledgers held by the defaulting trustee. A claimant can then "follow" trust assets into the hands of the recipient if the trust assets remain unaltered[15] and have not passed to equity's darling, or "trace" the trust assets into any replacement property substituted for the original,[16] e.g. the "value" received from equity's darling. Tracing and following are a process rather than a remedy,[17] by which the claimant determines what has happened to his property, identifies the persons that have handled or received it and justifies his claim to the property or its replacement.[18] If he is following, he simply reclaims his property by way of proprietary remedy. If he is tracing, he can make a proprietary claim to the replacement property or use other remedies such as equitable subrogation.

8. However, the tracing exercise does not always produce simple answers. The courts have long been troubled by what happens if tracing runs into an indirect substitution, or third-party interests are engaged. For example, what happens if money is paid into an overdrawn account, or a client account, or used out of order? Is that the end of the road? Historically equity preferred a narrow view of the need for a direct substitution[19] on the basis that tracing and following were concerned with *proprietary* rights. In the absence

[11] Lewin on Trusts (20th ed), paragraph 2-034; see further n10 above.
[12] See *Bristol and West Building Society v Mothew* [1998] Ch 1
[13] Lewin on Trusts (20th ed), paragraph 44-004.
[14] See Schmidt v Rosewood Trust Ltd [2003] UKPC 26, [2003] AC 709 for a beneficiary's rights.
[15] Lewin on Trusts (20th ed), paragraph 44-003.
[16] Ibid, paragraph 44-005.
[17] *Foskett v McKeown* [2001] 1 A.C. 102 at 128; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) per Lewison J at paragraph 1472.
[18] *Boscawen v Bajwa* [1996] 1 W.L.R. 328 at 334C. See further Millet LJ writing extra-judicially at (1998) L.Q.R. 399 and *Foskett* at 127.
[19] *Bishopgate Investments Ltd v Homan* [1995] Ch. 211, per Legatt LJ at 221F.

of a direct substitution the claimant could not establish a proprietary interest in the traced asset.

9. This narrow view presented significant hurdles. Two issues in particularly were capable of manipulation by clever fraudsters: (a) the inability to backwards trace ("the timing problem"), when money came into a bank account *after* the replacement property had already left, or went through overdrawn bank accounts; and (b) the payment of funds through accounts with third-party interests, such as client accounts ("the mixed funds problem"). Equity answered the challenge through *Relfo Limited v Varsani*[20] and *Brazil v Durant International*[21].

10. The mixed funds problem - the longstanding misconception that mixing monies in an account in which third-parties also have an interest *always* prevents a claimant from tracing through the account[22] - was a particular bugbear for Lord Millett. He gave the answer in two cases, *Boscawen v Bajwa*[23] and *El Ajou v Dollar Land Holdings*[24], with *Relfo* approving the *El Ajou*[25] solution. As explained in *Boscawen*, a proper application of trust principles makes the solution simple. The Court of Appeal held that a lender *could* trace through mixed funds, even where the money had been mixed with that of an innocent volunteer, because the money was impressed with a trust for a specific purpose and had been misused. Throughout its journey the money remained subject to the trust and thus a separate fund – it never truly mixed. A similar approach was applied in *El Ajou*, where the monies were the proceeds of a fraud, because, Lord Millett said, *"[e]quity's power to charge a mixed fund with the repayment of trust moneys (a power not shared by the common law) enables the claimants to follow the money, not because it is theirs, but because it is derived from a fund which is treated as if it were subject to a charge in their favour"*. *Relfo* agreed.

11. *Relfo* also tackled the timing problem. A director wrongfully paid monies from Relfo's company bank account to a third-party account. On the same day a different company, Intertrade, made a payment for the same material amount to Mr Varsani's account. Thereafter the third-party transferred Relfo's payment to Intertrade, effectively reimbursing it for the payment to Mr Varsani. The question was, it being found as a fact that the scheme was intended to divert Relfo's funds to Mr Varsani, whether Relfo could reclaim the money even though it could not be directly traced to Mr Varsani due to the timing problem. Traditionally, this would be the end of the road, but the Court of Appeal decided this was not an insurmountable problem. As Arden LJ said: *"…monies held on trust can be traced into other assets even if those other assets are passed on before the trust monies are paid to the person transferring them, provided that that person acted on the basis that he would receive reimbursement for the monies he transferred out of the trust funds. … in order to trace money into substitutes it is not necessary that the payments should occur in any particular order, let alone chronological order. "*

[20] [2014] EWCA Civ 360
[21] [2016] A.C. 297
[22] The misconception derives from *Re Diplock; Diplock v Wintle* [1948] Ch. 465 at 524.
[23] [1996] 1 W.L.R. 328
[24] [1993] 3 All ER 717
[25] *Relfo*, per Arden LJ at [63] – [64].

12. *Durant* applied the same approach. Proceedings were brought against companies controlled by the Mayor of Brazil, claiming that they were constructive trustees of bribes which had been transferred to a bank account owned by the mayor's son and then on to the companies. The defendants claimed that as 3 payments had arrived in the son's account *after* the final payment out to them, they could not be backwards traced to the companies. The Privy Council drew from principles laid down in *Agricultural Credit Corpn of Saskatchewan v Pettyjohn*[26] to confirm the availability of backwards tracing, and tracing through overdrawn accounts, applying the "reality of the transaction" touchstone which is said to derive from *Mortgage Express v Filby*[27]. As Lord Toulson said at [38]: *"The development of increasingly sophisticated and elaborate methods of money laundering, often involving a web of credits and debits between intermediaries, makes it particularly important that a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect. If the court is satisfied that the various steps are part of a coordinated scheme, it should not matter that, either as a deliberate part of the choreography or possibly because of the incidents of the banking system, a debit appears in the bank account of an intermediary before a reciprocal credit entry. The … availability of equitable remedies ought to depend on the substance of the transaction in question and not upon the strict order in which associated events occur."*

13. This, Lord Toulson concluded, was also the answer to the overdrawn bank account problem: *"The Board therefore rejects the argument that … the court can never trace the value of an asset whose proceeds are paid into an overdrawn account. But the claimant has to establish a co-ordination 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, such as to warrant the court attributing the value of the interest acquired to the misuse of the trust fund."*

14. It is clear that equity is prepared to grow and develop in a principled way which can only assist victims of "modern" frauds and cyber-crime. The Court will now be prepared to recognise that (a) timing or mixing is not an issue if the "reality" of the situation supports the claim; and (b) "property" is a more flexible concept than previously recognised, which can include, for example, a bank's right to have an overdraft repaid. This latter example leads to the use of equitable subrogation as a proprietary remedy.

Equitable Subrogation

15. Equitable subrogation has become something of a buzz-term in recent years but is often misunderstood. This is because it is a remedy, not a cause of action,[28] which can be deployed both to correct unjust enrichment (discussed below) and to support a proprietary claim in respect of a traced asset.[29] As a proprietary remedy it has a venerable history, but grew exponentially in its application after *Boscawen* until the

[26] (1991) 79 DLR (4th) 22
[27] [2004] EWCA Civ 759, an unreported but oft-cited English Court of Appeal equitable subrogation case.
[28] *Boscawen v Bajwa* [1996] 1 W.L.R. 328, per Millet LJ at 335.
[29] Adverted to in *Filby*

unjust enrichment remedy overshadowed it as a result of *Banque Financiere de la Cite v Parc (Battersea) Ltd* ("*BF*").[30]

16. The most cited definition of proprietary subrogation comes from Walton J in *Burston Finance v Speirway*[31]: *"where A's money is used to pay off the claim of B, who is a secured creditor, A is entitled to be regarded in equity as having had an assignment to him of B's rights as a secured creditor. There are other cases of subrogation where B is not secured, but the ordinary and typical example is as I have stated. It finds one of its chief uses in the situation where one person advances money on the understanding that he is to have certain security for the money he has advanced, and, for one reason or another, he does not receive the promised security. In such a case he is nevertheless to be subrogated to the rights of any other person who at the relevant time had any security over the same property and whose debts have been discharged, in whole or in part, by the money so provided by him, but of course only to the extent to which his money has, in fact, discharged their claims."*

17. However, while that is the paradigm it does not represent its limits, for example in *Filby* a breach of trust claim was made[32] seeking subrogation where the money was wrongly used to pay off an unsecured loan. A remedy was granted allowing the claimant to step into the shoes of the unsecured lender. Recalling the overdrawn bank account example above, it follows that if misappropriated money has been paid into an overdrawn account and cleared, or reduced, that overdraft then the victim can step into the shoes of the creditor and enforce the paid off overdraft against the debtor – even if the debtor is a completely innocent volunteer who knew nothing about it.[33]

18. It is therefore useful in cases where an asset in which the victim retains a proprietary interest has been transformed into some form of intangible property (e.g. a repayment covenant) or equity's darling has received the property (e.g. where his assets are used to repay a genuine creditor). Provided a proprietary interest survives the misappropriation and the asset can be traced, there are few limits to subrogation. It is, by its very nature, not limited to tangible property, and there is no principled reason why a victim cannot, for example, be subrogated to any contractual or other right of action enjoyed by a third party but into which the lost asset has flowed – including liens.

19. The real problem arises where there is no proprietary claim. In those cases, it is necessary to turn to unjust enrichment and seek either a restitutionary or a subrogation remedy.

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[30] [1999] 1 A.C. 221

[31] [1974] 1 W.L.R. 1648 at 1652B – C. Affirmed in *Cheltenham & Gloucester v Appleyard* [2004] EWCA Civ. 291, per Neuberger LJ (as he was then) at paragraphs 25 and 36 and in *Swynson Ltd v Lowick Rose LLP (in liquidation) (formerly Hurst Morrison Thompson LLP)* [2017] 2 WLR 1161 at paragraph 18.

[32] See paragraphs [13], [19] and [36] of the judgment, one of the authors, Miss Sandells, having acted for the bank and formulated the claim on the basis of a proprietary breach of trust and, in the alternative, on the unjust enrichment ground. Both were addressed, and accepted, by the Court of Appeal.

[33] *Butler v Rice* [1910] 2 Ch 277; *Filby*.

Unjust enrichment

20. The modern doctrine of unjust enrichment is a flexible tool for recovery as of right, not discretion. It is uniquely well-qualified to answer the needs of fraud victims because at its most basic it corrects normatively defective transfers of value – a good definition of transfers procured by fraud.[34] It usually corrects the defect by restoring the parties to their pre-transfer positions – a personal restitutionary remedy – but will sometimes use subrogation to achieve a form of specific performance. Three cases together provide a good overview - *BF* (which sets out the rules), *Investment Trust Companies v Revenue & Customs Commissioners* ("*ITC*")[35] (which explains the underlying principles), and *Swynson Ltd v Lowick Rose LLP (in liquidation)*[36] (which explains the interaction with subrogation).

21. Unjust enrichment can be established if the four questions posed by Lord Steyn in *BF*,[37] as explained in *ITC*[38], are answered affirmatively: (a) has the defendant benefitted or been enriched; (b) was the enrichment at the expense of the claimant; (c) was the enrichment unjust; (d) are there no defences. Defences do not usually arise independently, and will be ignored for present purposes.

Enrichment of the recipient

22. A recipient is enriched if he receives assets, or assets are put to his use, such as paying off his debt or buying him a property. The knowledge and intention of the recipient is irrelevant,[39] as is any negligence of the claimant.[40] The only issue is whether the recipient is better off than he was before.

Enrichment at the expense of the claimant

23. As *ITC* makes clear, determining "at the expense of" can be challenging. While acknowledging it is unwise to be too prescriptive, Lord Reed has expressly warned against an unprincipled development of the law based upon vague, generalised language such as "sufficient link", "proximity" and "sufficient economic connection", which beg the question "what connection, nexus or link is sufficient?"[41] The underlying principle requires a "normatively defective transfer of value" from claimant to defendant, but "transfer of value" is too vague to be the test.[42] There is no need for a "loss" in law of damages sense, but the Court is looking for a "loss" of something of economic value from which the defendant has taken a recognisable benefit. Direct dealings or transfers

[34] *Swynson Ltd v Lowick Rose LLP (in liquidation)* [2018] AC 313, per Lord Sumption at [30]
[35] [2018] AC 275
[36] [2017] 2 WLR 1161
[37] [1999] 1 A.C. 221 at 227. This formulation is now universally accepted as authoritative.
[38] as Lord Reed explained at [41], the four questions are broad headings for ease of exposition intended to ensure a structured approach to the analysis of unjust enrichment. They are not legal tests and do not dispense for the need for careful legal analysis of individual cases. See further: *Swynson Ltd v Lowick Rose Llp* [2018] AC 313 at [22].
[39] *Filby.*
[40] *Cheltenham & Gloucester Building Society v Appleyard* [2004] EWCA Civ 291, per Neuberger LJ (as he then was) at [39].
[41] *ITC* at [37] – [66]
[42] *ITC* at [43].

from claimant to defendant satisfy the test, but as explained in *ITC* at [47] there can still be a qualifying benefit where the parties have not dealt with each other, or their property, directly. This can be important in fraud cases where the intervening transaction is a sham. In such cases, where the complexity is designed to conceal the fraud, or the direct connection, it is disregarded as being more apparent than real. For the present, then, until exceptions appear, the test can be regarded as requiring a direct benefit to pass from claimant to defendant, understanding that "direct" in this sense encompasses situations where the law treats a transfer as equivalent to direct in the sense that there is no substantive or real difference.[43] Incidental or collateral benefits do not, however, satisfy the test. Co-ordinated transactions, even those which would require backward tracing such as those in *Relfo*, do.

Was it unjust?

24. When considering whether the enrichment is unjust, the simplest approach is to refer to the words of Lord Sumption in *Swynson* at [22]: *"it is necessary to remind oneself at the outset that the law of unjust enrichment is part of the law of obligations. It is not a matter of judicial discretion. As Lord Reed JSC points out in [ITC], para 39: "A claim based on unjust enrichment does not create a judicial licence to meet the perceived requirements of fairness on a case-by-case basis: legal rights arising from unjust enrichment should be determined by rules of law which are ascertainable and consistently applied.""*

25. English law does not have a universal theory to explain all the cases in which restitution is available. It recognises a number of discrete factual situations in which enrichment is treated as vitiated by some unjust factor. However, these factual situations are not, random illustrations of the court's indulgence to litigants. They have the common feature that some legal norm or some legally recognised expectation of the claimant falling short of a legal right has been disrupted or disappointed. Leaving aside cases of illegality, legal compulsion or necessity, which give rise to special considerations irrelevant to the present case, the defendant's enrichment at the claimant's expense is unjust because: *"the claimant's consent to the defendant's enrichment was impaired, qualified or absent."* As Lord Reed JSC puts it in [*ITC* at [42]], the purpose of the law of unjust enrichment is to *"correct normatively defective transfers of value, usually by restoring the parties to their pre-transfer positions. It reflects an Aristotelian conception of justice as the restoration of a balance or equilibrium which has been disrupted."*

26. Crucially in cases involving fraud or cyber-crime, the Court wants to see impaired, qualified or absent consent to the defendant having the benefit obtained at the claimant's expense. Obvious examples include mistake, duress, undue influence, unconscionable bargain, incapacity, fraud or other illegality, and breach of trust or fiduciary duty, but the categories are not closed or confined.

27. Where the four questions posed in *BP* are answered in the affirmative, the Court will usually grant a restitutionary remedy. However, where restitution is not possible, as in the case of overdrawn bank accounts or repaid loans where the lender has not been

[43] *ITC* at [50]

unjustly enriched, the Court will instead grant subrogation as a remedy for unjust enrichment, allowing the claimant to step into the creditor's shoes in exactly the same way as described above.[44]

So where does the road to recovery lead?

28. The answers to many modern commercial problems, and the key to unlocking the unique issues caused by modern fraud, therefore lie rooted in the application of well-established equitable principles and the developing law of unjust enrichment. Thus commercial lawyers may find that the road to recovery is more familiar to private client and equity lawyers, but it is a road worth travelling for the rewards it promises at journey's end.

[44] See *Swynson* at [24] - [31].

ICC FraudNet
Global Annual Report 2024

Understanding Asset Recovery and Cryptocurrency Wallets

MEREDITH FITZPATRICK

iccfraudnet.org

ICC FraudNet

UNDERSTANDING ASSET RECOVERY AND CRYPTOCURRENCY WALLETS

MEREDITH FITZPATRICK

FORENSIC RISK ALLIANCE

Introduction

Cryptocurrency presents both unique challenges and innovative solutions to the asset recovery world. There are some overarching concepts and practices in common with asset recovery in the traditional finance ('TradFi') realm, but in this article we focus on how the concept of custodial and non-custodial cryptocurrency wallets present a major departure from TradFi. Asset recovery professionals need to be well educated on this critical nuance as it can inform the rest of the recovery plan and the overall chances of success.

How far can open source blockchain tools take you?

From the outset, the way assets are traced in cryptocurrency is inherently different. Cryptocurrency is based on blockchain technology, a digital, decentralized public ledger. The tracing of crypto assets can be accomplished more easily than with fiat currencies. Open source blockchain explorers and Open Source Intelligence ('OSINT') tools allow anyone with an internet connection to learn details about cryptocurrency transactions, such as the sending and receiving of wallet addresses, transaction hash, timestamps, and amounts. This type of investigative capability is non-existent in the traditional finance world, as all transactional information is inherently private.

However, in a large-scale investigation, conducting an asset tracing investigation using only open source blockchain explorers may not be practical. Additionally, these wallet identifiers are pseudo-anonymous – the wallet identifier is visible but there is no attribution information similar to Know-Your-Customer ('KYC') information for a bank account.

This is where commercial blockchain analytic tools can greatly aid a cryptocurrency asset recovery investigation. Commercial blockchain intelligence tools layer in attribution information (such as wallet addresses that have been attributed to a cryptocurrency

exchange or cryptocurrency investment scam) and analyse behavioural spending patterns to group or "cluster" wallet addresses together that are controlled by the same entity.
Once the cryptocurrency asset tracing portion of the investigation has been completed and the address holding the cryptocurrency assets has been identified, the next pivotal variable in the recovery process will be assessing the wallet type.

What are Custodial Wallets?

There are two main wallet types in the cryptocurrency world: custodial and non-custodial. Custodial wallets are services that retain the private keys of a wallet, a long alphanumeric string that can be likened to the password of a wallet. Possessing the private key is critical to wallet's functionality, as one cannot send funds, trade, convert currencies, or achieve any other critical transaction without it.[1]

In the case of custodial wallets at crypto services, the service itself holds those private keys and are the ultimate authority on executing transactions and wallet administration. This is most commonly through a custodial account at a Virtual Asset Service Provider ('VASP'), commonly referred to as a cryptocurrency exchange. Discovering if a wallet is a custodial wallet can be achieved through OSINT methods or the use of proprietary tools to identify the crypto service the wallet is associated with. This is not only an important consideration in the recovery process but informs further tracing efforts. Once funds enter a custodial wallet, tracing cannot proceed as these services utilize different accounting methods conducted off the blockchain.

With Custodial Wallets, the Crypto Exchange Can Help with Tracing and Recovery

When a wallet is assessed to be a custodial cryptocurrency wallet, wallet providers such as the exchanges Binance, Coinbase, and Kraken will typically require the collection of a host of information about the user and their activity. This primarily includes technical data, transaction information, and KYC data outlined in the exchange's Anti-Money Laundering ('AML') policies and regulations, as well as those in the jurisdiction from which the exchange is operating.[2] Varying levels of this information will generally be retrievable through legal process to exchanges compliant with laws and regulations in their region, though this is not always the case in the use of high-risk exchanges, exchanges in unreachable jurisdictions, or immature exchanges.
Once this information is obtained, asset recovery can take place in coordination with the exchange, should the assets remain in the wallet. As the exchange is the custodian of the private keys, it can freeze funds, block access, and move funds at will.

If the user of the custodial wallet already transferred the cryptocurrency elsewhere, the custodial wallet provider can still furnish valuable wallet activity information such as transaction information. This transaction information, namely the withdrawal history, will

[1] See, for background: *CoinDesk* (9.03.2022), Wood, J., 'Custodial Wallets vs. Non-Custodial Crypto Wallets': https://www.coindesk.com/learn/custodial-wallets-vs-non-custodial-crypto-wallets/ (accessed 17 May 2024).
[2] See: *NotaBene* 'What is Anti-Money Laundering (AML) & How Does it Apply to Crypto? , available at: https://notabene.id/crypto-travel-rule-101/aml-crypto (accessed 17 May 2024).

have details of the wallet address the user sent the cryptocurrency to, the amount transferred, and when the transfer occurred.

If the user converted the assets to fiat and cashed out at the exchange, i.e. off-ramping, the custodial wallet provider can furnish valuable wallet information pertaining to that "sell" action. This information will include the details of the bank account that the fiat currency funds were transferred to as a result of the sell. The asset tracing or seizing process can then continue in the TradFi world by acquiring the records for that bank account.

Recovery from Non-custodial Wallets Requires the Private Key, or Some Creativity

Conversely, in non-custodial wallets the user retains private key control, either with a physical device like a hardware wallet or phone application like a software wallet. The user has complete autonomy over the transactional functionality of their wallet without the intermediary or middlemen in custodial wallets.[3] Custodial wallets will offer a far better chance of asset recovery compared to non-custodial, though identifying a non-custodial wallet doesn't completely render recovery impossible.

Non-custodial wallets offer unique challenges on their own simply due to the private keys remaining in the user's custody. Wallet providers such as MetaMask, Electrum, and Trezor do not collect the same KYC and technical data that the custodial wallet providers typically do, thus there is no central authority to seek any exhaustive information from.[4] In some circumstances, identifying information about the user of the wallet can be acquired via OSINT. For example, in February 2022, a hacker leaked internal messages of the Conti Ransomware group, which included wallet addresses used by the group to facilitate their criminal enterprise[5]. This provided a wealth of information on non-custodial wallets that were previously unattributed to the Conti Ransomware group.

It takes more creative and intensive investigation processes to gain direct access to non-custodial wallets. The private key is necessary for asset recovery to proceed. Without it, the next best option is finding the wallet's seed phrase.

Private keys are paired with seed phrases, an ordered list of random words that act as a password or recovery phrase in the event the user loses their long, alphanumeric private key.[6] These seed phrases are often written down somewhere, stored in a document on the same device as the wallet, or memorialized by the user in some other manner. Finding and gaining access to the seed phrase will enable control of the wallet to initiate recovery. However, the likelihood of success with this approach is low as investigators usually require access to an individual's house, property, device, or wallet itself.

[3] See: *CoinDesk,* above n1: https://www.coindesk.com/learn/custodial-wallets-vs-non-custodial-crypto-wallets/ (accessed 17 May 2024).
[4] See: Exodus, Legal Inquiries: available at: https://www.exodus.com/legal-inquiries/ (accessed 17 May 2024).
[5] See: *CoinDesk* (17.05.2022) 'Ransomware Gang Extorted 725 BTC in One Attack, On-Chain Sleuths Find', available at: https://www.coindesk.com/layer2/2022/05/17/ransomware-gang-extorted-725-btc-in-one-attack-on-chain-sleuths-find/ (accessed 17 May 2024).
[6] See: *Coinbase*, 'What is a seed phrase?', available at: https://www.coinbase.com/learn/wallet/what-is-a-seed-phrase#:~:text=A%20seed%20phrase%20is%20a,the%20safety%20of%20digital%20assets (accessed 17 May 2024).

There are examples of government agencies acquiring the private keys of a subject's non-custodial wallet though other means, e.g. finding the key(s) through an authorized search of the subject's electronic devices or residence, or the subject providing them to the government voluntarily in a custodial or non-custodial interview, and successfully seizing cryptocurrency assets that ultimately ended up in a non-custodial wallet. For example, in the Bitfinex hack case, the USG executed search warrants on online accounts controlled by the subjects and obtained access to files that contained the private keys required to access the cryptocurrency wallet that directly received the stolen funds from Bifinex[7].

Funds from Non-Custodial Wallets are Commonly Transferred to Custodial Wallets for Conversion to Fiat

If asset recovery is not feasible in the event funds are transferred to a non-custodial wallet, the best option is surveillance of these wallets. Maintaining watch over the wallet through tracing tools, block explorers, or any other method will enable the concerned parties to monitor when funds are moved and to where. As cryptocurrency isn't seamlessly integrated into society as a true fiat currency alternative, most users require a point where they can exchange between crypto and fiat to make real world application of the funds. Because of this, it is more common than not for funds to arrive at a custodial wallet, as these services are an extremely popular and accessible means to convert between crypto and cash and have liquidity necessary to affect large transfers. Once a custodial wallet is identified, the process of recovering the assets through the provider can proceed as outlined.

Outlook

The cryptocurrency industry is no longer the "wild west", and there are numerous examples of successful cryptocurrency asset tracing and seizure. That said, as the cryptocurrency userbase continues to innovate and evolve, asset recovery practitioners must keep up if they are to successfully challenge bad actors in this space.

[7] See: US DOJ: Office of Public Affairs | Two Arrested for Alleged Conspiracy to Launder $4.5 Billion in Stolen Cryptocurrency | United States Department of Justice (accessed 17 May 2024).

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Failed Investments and Schemes of Arrangements – What are an Investor's Options? A View from Ireland

BARRY ROBINSON

iccfraudnet.org

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FAILED INVESTMENTS AND SCHEMES OF ARRANGEMENTS – WHAT ARE AN INVESTOR'S OPTIONS? A VIEW FROM IRELAND

BARRY ROBINSON

BDO IRELAND

Abstract

In this article, Barry Robinson of BDO discusses financial regulation of investments, which has been the subject of a recent case in Ireland in which a company that provided unregulated loan notes entered into a Scheme of Arrangement. This was due to the Company being unable to meet its financial obligations to creditors under the terms of the loan notes. He discusses the five tests applied by the Irish courts in its deliberation of whether to approve such a Scheme of Arrangement, and the protections such a scheme gives to directors of a company in Ireland when faced with dealing with investor losses and possible liquidation. He also discuss the important role of the independent forensic accountant when investors need answers.

Introduction

In this article, Barry Robinson of BDO discusses unregulated investment products, including unregulated loan notes, and what recourse investors have when companies with which such loan notes are held are not in a position to make good on those investments. He also discusses his role as an expert accountant in a recent Commercial Court case in

Ireland, in the matter of *EFW 21 Renewable Energy Limited*[1] and the five tests the court applied when deciding on whether such a company may avail of a Scheme of Arrangement under the Companies Act 2014 as amended (CA 2014).

Unregulated loan notes

To give context to the regulation of investment products in Ireland, it is useful to have regard to the Financial Conduct Authority's rules in the UK, where financial products are regulated by the Financial Services and Markets Act 2000 (FSMA). Section 21 of the FSMA provides that a person must not, in the course of business, communicate an invitation or inducement to engage in investment activity or to engage in claims management activity unless the promotion has been made or approved by an authorised person or it is exempt. The FCA's position on loan notes is that in general, a business does not have to be regulated by the FCA to raise funds by issuing shares or debt securities (such as bonds or loan notes). However, any investment services provided by firms regarding such investments are likely to be regulated, and subject to the FA's rules.[2] In Ireland, loan notes are unregulated and are considered to be high risk.[3] Recent examples of loan note investment schemes in Ireland and the UK that have seen investors lose millions of pounds include Marvell Enterprises Ltd[4], The German Property Group GmbH / Dolphin Trust[5] and Harlequin Properties[6].

Liquidation versus Scheme of Arrangement

In many of those cases the investment vehicles went into liquidation and it was the role of the liquidator to investigate and recover any funds that could be available to investors. As an alternative, such as in the case of EFW 21 Renewable Energy Limited, one is now seeing investment vehicles incorporated in Ireland which have been unable to repay investors seeking to avail of a Scheme of Arrangement under the CA 2014. A scheme of arrangement is a statutory procedure under Chapter 1 of Part 9 of the CA 2014 whereby a company may negotiate either the rearrangement of its capital structure with its members or the rearrangement (including a compromise) of its obligations and liabilities to its creditors.

[1] 'EFW 21 Renewable Energy Limited and in the matter of a proposed Scheme of Arrangement pursuant to Part 9 Chapter 1 of the Companies Act 2014 As Amended, between EFW 21 Renewable Energy Limited and The EFW 21 Scheme Investors as therein defined ' (2023) Irish High Court, case 548. Courts Service of Ireland. Available at https://www.courts.ie/acc/alfresco/4ae91edb-6141-4e65-9221-6ae09ff3b7fa/2023_IEHC_548.pdf/pdf#view=fitH: (Accessed 25 June 2024).

[2] Consumer warning on Marvell Enterprises Ltd (2021) FCA. Available at: https://www.fca.org.uk/news/news-stories/consumer-warning-marvell-enterprises-ltd (Accessed: 25 June 2024).

[3] Houses of the Oireachtas (2021) Dáil éireann debate - Thursday, 22 Apr 2021, House of the Oireachtas. Available at: https://www.oireachtas.ie/en/debates/debate/dail/2021-04-22/3/ (Accessed: 25 June 2024).

[4] Consumer warning on Marvell Enterprises Ltd (2021) FCA. Available at: https://www.fca.org.uk/news/news-stories/consumer-warning-marvell-enterprises-ltd (Accessed: 25 June 2024).

[5] Dunne, E. (2021) Investors all at sea in unregulated schemes, The Times & The Sunday Times. Available at: https://www.thetimes.com/business-money/money/article/investors-unregulated-schemes-dolphin-davy-dh7xv2285 (Accessed: 25 June 2024).

[6] Lindsay-Smith, D. (2022) Harlequin Resorts boss jailed for 12 years following SFO investigation, Serious Fraud Office. Available at: https://www.sfo.gov.uk/2022/09/30/harlequin-resorts-boss-jailed-for-12-years-following-sfo-investigation/ (Accessed: 25 June 2024).

Importantly, from an investor perspective, whilst a Scheme of Arrangement releases a creditor from all claims against directors and officers of the scheme companies, it does not do so in respect of cases of fraud, gross negligence, or wilful misconduct. EFW 21 Renewable Energy Limited is a company incorporated in Ireland that issued unregulated loan notes to investors to invest in the building and operating of renewable energy power plants in the UK. When it was unable to pay its investors under the loan notes, it sought to avail of a Scheme of Arrangement under Irish Company law.

Adequacy of information

Under CA 2014 s452(1)(a) a scheme circular is required to be circulated to creditors, which EFW 21 Renewable Energy Limited complied with ("the Original Scheme Circular"). The scheme circular is the document which sets out the proposal under which the Company subject to the Scheme proposes to reorganise its arrangements with its creditors. In order for the Court to approve the convening of a vote on whether to approve the Scheme of Arrangement the scheme circular had to meet the requirements of s452(1)(a), and the Irish Court stated in the case of EFW 21 Renewable Energy Limited that the scheme circular *"must not be so manifestly deficient for its purpose, which is to enable creditors make informed decisions as to voting on proposals for a scheme of arrangement, that the court should refuse to make the convening order."*[7] In the case of EFW 21 Renewable Energy Limited, the Irish Courts referred to the English case of Indah Kiat [2016] EWHC 246 (Ch), which stated in that case that *"The scheme jurisdiction can only work properly and command respect internationally if parties invoking the jurisdiction exhibit the utmost candour with the court."*[8]

Appointment of an independent forensic accounting expert

In order to satisfy a group of interested parties to the Scheme, Mr. Robinson of BDO was appointed as an independent accounting expert in order for those interested parties to make an informed decision about whether or not to vote for the proposed scheme that was presented to them in the Original Scheme Circular. In the case of EFW 21 Renewable Energy Limited, the Judge in the Irish Courts noted in respect of Mr. Robinson of BDO:

> *"On 22 June 2023 Mr Robinson made a report which has been exhibited in which he stated the following:*
>
> > *"I do not believe that the scheme companies have made full and frank disclosure to the court of all material facts and matters which may be relevant to any decision that the court is asked to make. As a result of*

[7] 'EFW 21 Renewable Energy Limited and in the matter of a proposed Scheme of Arrangement pursuant to Part 9 Chapter 1 of the Companies Act 2014 As Amended, between EFW 21 Renewable Energy Limited and The EFW 21 Scheme Investors as therein defined ' (2023) Irish High Court, case 548. Courts Service of Ireland. Available at https://www.courts.ie/acc/alfresco/4ae91edb-6141-4e65-9221-6ae09ff3b7fa/2023_IEHC_548.pdf/pdf#view=fitH: (Accessed 25 June 2024).

[8] 'Indah Kiat International Finance Company B.V., Re The Companies Act 2006 [2016] EWHC 246 (Ch) (12 February 2016). Available at *http://www.bailii.org/ew/cases/EWHC/Ch/2016/246.html*(Accessed 25 June 2024).

> *not doing so, in my view the scheme companies have therefore not exhibited the utmost candour with the court. In my view it is of critical importance to those investors who invested in EFW 21 Project 1 to be provided with a clear understanding of what happened their funds, into which legal entities they were paid, and for what purpose. This would enable them to be better informed as to how they may wish to proceed."*

Notwithstanding the fact that the Scheme Companies and another financial expert rejected the initial report of Mr. Robinson, a Revised Scheme Circular was subsequently issued. Subsequent to the Revised Scheme Circular, the Irish Court was asked to grant an order to convene a meeting in accordance with CA 2014.

At the convening hearing, the Irish Courts confirmed the five tests that had to be met by a proposed scheme, in this case, the Revised Scheme Circular. These five tests are discussed below.

The five tests for a Scheme of Arrangement

The five tests set out by the Irish Court that it needed to be satisfied with in respect of a Scheme of Arrangement were as follows:

1. **Notification to interested parties**: The court had to be satisfied that sufficient steps were taken to identify and notify all interested parties.
2. **Compliance with statutory requirements and court directions:** The court had to be satisfied that the statutory requirements and all directions of the court had been complied with.
3. **Class composition**: The court needed to consider matters of class composition, ensuring that the classification of investors or creditors was appropriate and justified based on the subject matter of the scheme.
4. **Absence of coercion**: The court had to ensure that there would be no improper coercion or pressure in the context of voting at scheme meetings.
5. **Approval by an intelligent and honest person**: The onus was on any objecting party to establish that an honest, intelligent and reasonable person could not have voted for the scheme.

The Irish Court ruled in the case of EFW 21 Renewable Energy Limited that the five tests had been met. Ultimately, the creditors faced a choice as to whether the Revised Scheme Circular would result in a better financial return for them than a liquidation of the investment vehicle. Furthermore, a discretionary matter arose in the case of EFW 21 Renewable Energy Limited in which the Judge stated:

> *"The one remaining issue which needs to be considered in the context of the exercise of the court's discretion is the serious allegations which have been made*

before the convening order was made and the scheme meetings held, that investors' funds have, without their knowledge, been applied for purposes other than those authorised by the information memorandum and other documents associated with the investment. One of the investors, being the party which has, in separate proceedings, sought the appointment of inspectors pursuant to Part 13 of the Act, went so far at the convening application as to say that the companies have operated a "Ponzi scheme". This is a reference to the fact, which is not disputed, that certain monies advanced by later investors were applied to redeem or repay earlier investors in the group's other projects. The companies and their promoters deny wrongdoing. As I stated in the Convening Judgment, nothing in the findings made by this court on these applications pursuant to Part 9 of the Act precludes any remedy which might otherwise be available to such investors."

Conclusion

The case of EFW 21 Renewable Energy Limited highlighted the risky nature of unregulated loan notes. It also highlighted the difficult choices faced by investors when faced with significant potential losses and the role a forensic accountant played in seeking answers from the investment promoters regarding what happened to the funds advanced. In this case, the Irish Courts confirmed the five tests that need to be met when a Company wishes to compromise creditors under a Scheme of Arrangement and re-confirmed the rights of investors to seek other remedies that may be available to them outside of a Scheme of Arrangement.

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Fraud and Cryptocurrency or Crypto Fraud

ANDREW TENNANT &
CRAIG HESCHUK

iccfraudnet.org

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FRAUD AND CRYPTOCURRENCY OR CRYPTO FRAUD

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CRAIG HESCHUK

GENTIUM UK & GREYLIST TRACE

Introduction

Is there such thing as Crypto Fraud? We would suggest there isn't. Cryptocurrency is just another form of currency and just like any other currency that has been created through history, criminals have found a way to exploit it or to utilize it through criminal acts.
The fact Cryptocurrency has only been in existence since 2009 means it is still somewhat refreshingly new and that coupled with numerous stories of 'Mafia Coin' and 'Criminal Use' has led to the adoption of the term 'Crypto Fraud'.

That said there are aspects of Cryptocurrency-related crime that have required special attention from authorities including, notably the recent adoption of new legislation with the United Kingdom – The Economic Crime and Corporate Transparency Act 2023. This legislation provide a powerful tool to enable forfeiture of cryptocurrency and related articles.[1]

Fraud is fairly basic in its principles. Yes, there are complex structures and mechanisms in an attempt to obfuscate the suspect from the victim (the 'smoke and mirrors'), however the basic principles of Fraud are always at the start which, as investigators, we often overlook.

1 For background to this legislation, see a webinar delivered by Andrew Tennant, available at: https://youtu.be/raDsRcUhjQI?feature=shared (accessed 15 May 2024).

In 2006, the UK adopted the new Fraud Act which was a breakthrough because it broke the fundamentals of Fraud in to succinct parts which made it far easier to investigate. These elements can be summarized thus:

- A dishonest
- Act/omission
- Intent
- Gain/Loss or risk of loss

Just from this list, you can see that under UK legislation there does not even have to be a loss to secure a conviction for Fraud. If a suspect dishonestly does an act with the intention of causing a loss to a victim, the loss doesn't have to have occurred. The full offence of Fraud is committed as soon as the act is done.

With the emergence of Cryptocurrency, it's just the commodity that has changed. The gain or loss can be anything, which includes Cryptocurrency. We haven't adopted the terms '*FIAT Currency Fraud*' or '*USD Currency Fraud*', so why have we adopted the term '*Crypto Fraud*' which unnecessarily puts negative connotations towards Cryptocurrency?

But why? The negative connotations are often linked to it being favoured by criminals because of the popular misconception that cryptocurrency is untraceable, or that there isn't the capability or capacity to trace and track it, freeze it and/or recover it. Many incorrectly believe that because speed of movement anywhere in the world is instantaneous and once it's in crypto it's game over.

Breaking down the elements of Fraud

At face value it shouldn't be too hard to prove a fraud, as the list above suggests we have a limited amount of boxes to tick.

For ***dishonesty***, we have case law like *Ivey vs Genting Casinose2* leading the way in determining this. The court/jury will determine whether something is dishonest by the standards of ordinary decent people.

For an ***act/omission*** again it is straight forward to find. What did the suspect do or what didn't they do which they should have done? In the UK legislation, these are categorized into three elements: False Representation (s.2), Failing to Disclose (s.3) or Abuse of Position (s.4). All are still Frauds that carry the same sentences. Arguably, they are all false representations however, sections 3 and 4 look at any legal obligations placed on the defendant. Did the defendant have a legal obligation to disclose something and chose not to, or did the defendant hold a position of trust and abused this position in some way?

Causing a Gain or Loss is another easy element to evidence. The question that should be posed is how has the defendant 'gained'? or how has the victim 'lost'? In most cases of Fraud this is a monetary value, but this can be any form of asset including cryptocurrency.

2 [2017] UKSC 67.

The beauty of this element, is that there doesn't have to be a gain or loss to fulfill the offence. As soon as the dishonest act/omission is done with the intention to cause a gain or loss, the offence of Fraud is complete. The actual gain/loss does not have to have occurred.

If you consider a common fraud type where a suspect sends an email to an unsuspecting victim, the offence of Fraud is actually completed as soon as the suspect sends the email. It is irrelevant whether the victim falls for the scam or not. At the time of sending the email (the act), the suspect was acting dishonestly with the sole intention of making a gain or causing a loss. Offence complete.

There have been many debates on the concept of 'attempting a fraud' as an offence, however the legislation doesn't allow for this. The act/omission was either done or it wasn't.

What is Driving the Ascendance of 'Crypto Related Fraud'

Why are we seeing an increase of Frauds targeting cryptocurrency (note I have not referred to this as *'Crypto Frauds'*). It may be because law enforcement professionals are seen as being behind the curve somewhat. I find this frustrating because, being ex-law enforcement it is usually cross jurisdictional issues and bureaucracy that stem law enforcements development which criminals don't have to adhere to. Cryptocurrency is not geographical, whereas legislation is.

Another reason why we are seeing this increase of fraud is because members of the public (victims) read stories about becoming a crypto millionaire and believe that an investment of £10 will recoup £100 million in just a short term. This is commonly referred to as an 'Investment Fraud' which is one of the leading Fraud crime types. Just because it's cryptocurrency rather than stocks or shares doesn't make it a different type of fraud. In this scenario, which is often overlooked, as soon as the suspect does the act (sends an email or makes a phone call) to the victim and makes a dishonest representation of high returns on investment, the offence of fraud is complete, simply causing or exposing another to a risk of loss would be enough. Remember, the gain or loss doesn't have to have occurred!

Knowledge and spreading knowledge is paramount to reducing this fraud type. The old adages of "prevention is cheaper than the cure" and "if a deal is too good to be true, then it probably is" have never been more apparent. Preventing more victims through spreading knowledge is key with all fraud types – not just ones focusing on cryptocurrency.

Another reason for this escalation of frauds is that the fraudsters themselves have the technical capability. With the increase of coding and programming being taught in schools at earlier stages of the curriculum, the next generation are grown in to it. It's the choice of whether to use that knowledge for good or bad which is where the problem lies. But this is the same with any crime type.

Is there a Difference in Criminal Motivation for Cryptocurrency?

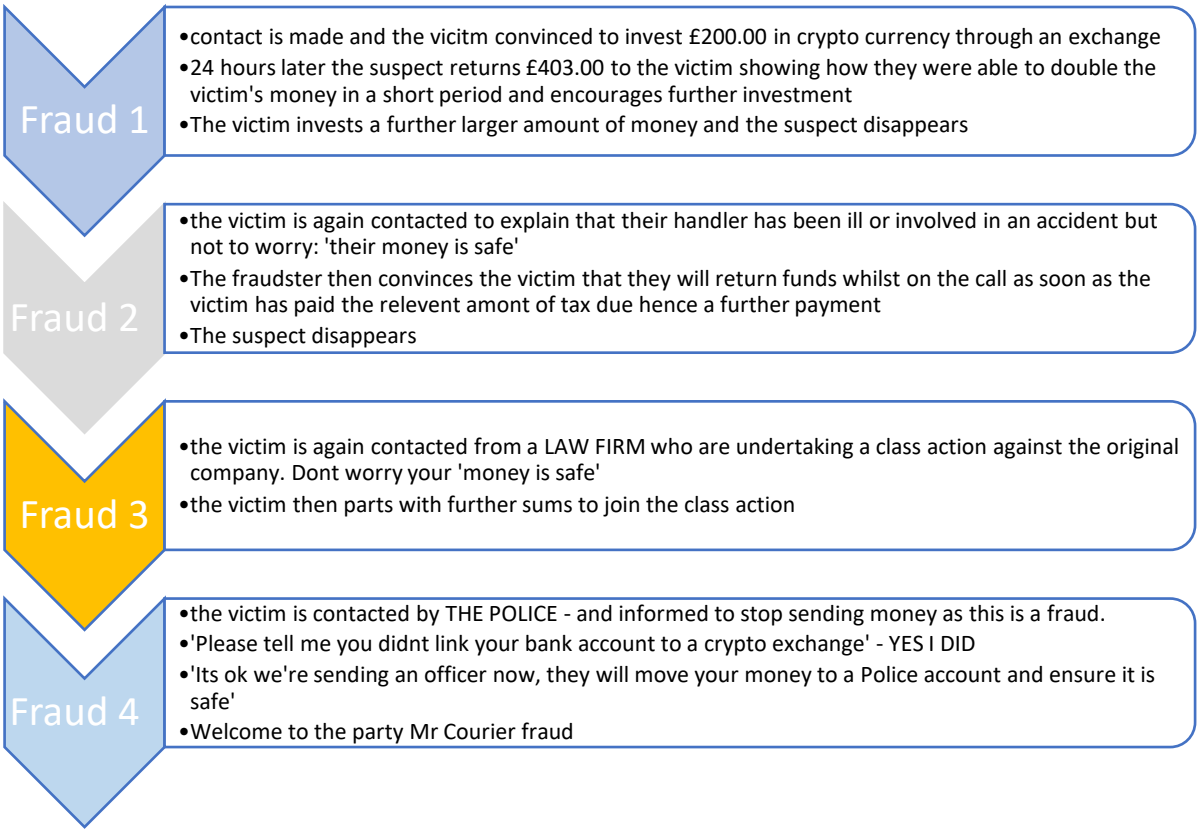
Why do criminals commit crime? On most occasions it's to gain funds to sustain a lifestyle which they cannot easily get from conventional employment. This problem has always

been here. Previously criminals would hold up a bank to get lots of money quickly but the physical element of having to be there and being caught was often the deterrent (along with incredibly long prison sentences).

In the UK, Fraud doesn't have the same visceral detriment when it can be committed with a computer. The perpetrator does not have to be physically present. They can commit fraud from anywhere in the world using the internet. This narrows the risk considerably so the suspect has less chance of getting caught and if they do get caught then the sentence could be lesser.

Due to this, suspects are more likely to take the risk and they can target hundreds or thousands of victims with just one phishing email. There is also the tendency that the victim may never report the fraud to law enforcement in fear of embarrassment of reputational damage.

I have worked on numerous international based frauds where the patterns sit as follows:



We must look to educate those whom we are trying to protect against becoming a victim.

So why do criminals use Crypto and what can we do?

There are no shortage of reasons, which might include:

- Criminal groups love the anonymity of cryptocurrencies;

- The fact that value can be transferred quickly and between countries and currencies;
- The ability to use such currencies as Monero which has increased privacy attributes;
- To transfer value using a mixing service to aid obfuscation;
- The option to cash out through unregulated VASP's, ATM's, exchanges or other criminal services that don't focus on customer due diligence.

But we can fight back. Exchanges do not want bad actors on their platforms. Criminal property is criminal property. If it has derived from crime or represents that same benefit then it is criminal property and law enforcement globally have criminal and civil options available. Exchanges have the ability to hold funds, report their clients or exit a customer.

We have new civil powers being brought out in order to recover suspected criminal funds and the ability to compensate victims from civil recoveries. Jurisdictions are fighting back and ensuring that they have crypto task forces and have the capability to fight criminal groups. These jurisdictions want not only to adhere to recommendation 15[3] of the Financial Action Task Force but also to ensure that assets can be identified, seized, stored and correctly realized.

Conclusion

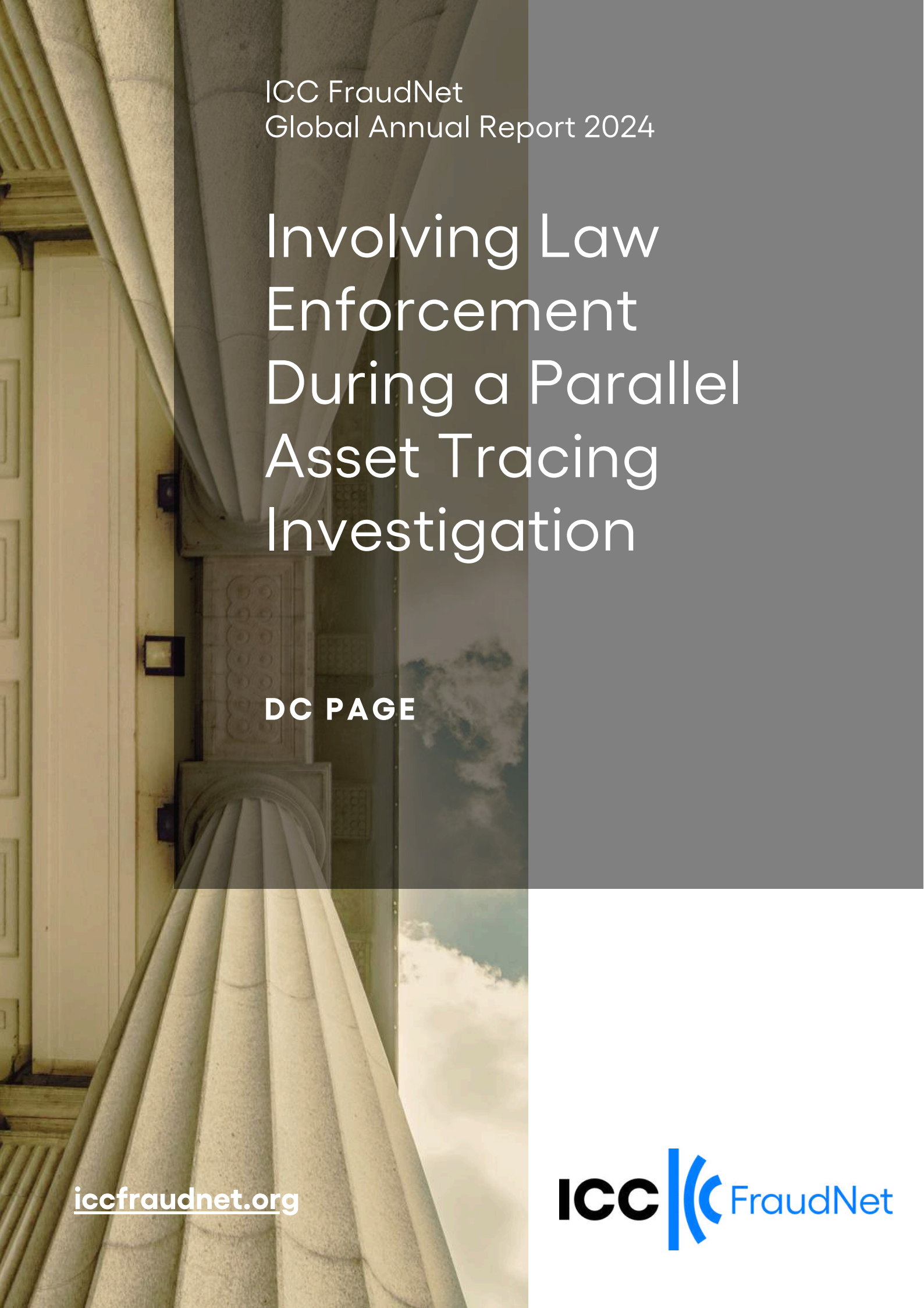
We are proud to be involved in delivering a remarkable 'cradle to grave' service in regard to cryptocurrency. This involves providing a series elements which allow for jurisdictions to take action.

3 Status of implementation of Recommendation 15 by FATF Members and Jurisdictions with Materially Important VASP Activity (fatf-gafi.org)

Recovery successes are now being highlighted through the conviction of a suspect for the offence of Money Laundering in a recent Metropolitan Police case involving 61,000 bitcoin.

Recovery sums of that magnitude highlight that cryptocurrency is a vehicle of choice for criminals. But it also highlights the success that law enforcement has had in its recovery, storage and realization. A realization that will see about $3.8 billion worth of bitcoin transferred to fiat currency and available for future compensations or for use by Government agencies.[4]

4 UK police seized £1.4bn of bitcoin from China investment fraud, court told (ft.com)



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Involving Law Enforcement During a Parallel Asset Tracing Investigation

DC PAGE

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INVOLVING LAW ENFORCEMENT DURING A PARALLEL ASSET TRACING INVESTIGATION

DC PAGE

V2 GLOBAL

Involving law enforcement or criminal prosecutors (collectively, "LE") during a parallel asset tracing investigation is generally not a question of if, but of when and how. When approached promptly and properly, LE may provide efficiencies, new intelligence or evidence, and a certain amount of weight to civil counsel in a settlement or asset recovery. The range of cooperation, however, can vary greatly depending on the case, circumstances and personalities.

The vast majority of investigators and attorneys agree that LE can be helpful in an asset tracing investigation or legal action. LE can provide critical new information or evidence, facilitate a settlement or recovery, and create efficiencies during the civil investigation or legal action. In one civil asset tracing investigation, after contacting LE, we were able to pinpoint certain affiliations that led to offshore jurisdictions where the fraudster maintained banking relationships with considerable proceeds of the crime. These relationships were not readily available to the civil investigation.

LE, however, can also become an obstacle since criminal actions always supersede any civil action or proceeding, which could result in a delay in discovery or a stay in the civil action. Moreover, LE may decide for political reasons to take over an investigation that may be sensitive or whether other types of indictment could be pursued. In one particular investigation in Central America involving the authors, a civil asset recovery team was assembled to identify stolen assets from the preceding president. LE at the US Embassy intervened to convince the host government they would investigate the crimes and recover any ill-gotten gains, at no cost. The approach de facto ended the civil investigation and did

not yield any indictments or recovery as the case eventually was not a priority for the US government.

Timing and, most importantly, how to approach and manage LE are crucial for success. With respect to timing, we must keep in mind that a criminal investigation or prosecution will take precedence and may potentially stay, thwart, or delay a civil investigation or action. The decision as to when to approach and involve LE would depend on what stage the asset tracing investigation or action is and how far along LE is in the criminal investigation or prosecution.

As a rule of thumb, if intelligence or evidence is lacking in the civil investigation or if there is a need to exercise some pressure, it may be better to have LE involved at an earlier stage. Another case where it may be advantageous to bring LE early is when dealing with a prospective client whose claim appears to be weak; LE may be able to provide relevant and valuable information about the client's claim or true motives before being engaged by the client. If the civil investigation is advanced or an action is already filed in a particular jurisdiction, bringing LE in could accelerate closure since the mere prospect of a criminal investigation or prosecution can bring an adversary to the negotiating table to settle.

At times, there is a concern that LE and the civil client may be in competition for the same assets and that, therefore, LE should not be enlisted. Generally, that would be a mistake. No matter at what stage LE is brought in, if LE seizes the assets, a client may file a third-party claim as a victim. The key is to establish a credible claim as a victim, as early as possible. Presenting a claimant as a victim to LE establishes the claim and more so facilitates the flow of information. LE is more apt to interact with a victim. In one matter, not only did LE provide updates to the claimant but gave civil investigators more access to the LE investigation. In that matter, LE asked for a delay in the civil action to not alert the fraudster of the location of certain assets that LE was about to freeze. The client complied, which gave LE the element of surprise and, most importantly, the seizure.

If a third-party claim as a victim is not available, other remedies may be available. For example, the client could obtain moiety in the form of a reward if the client provided the initial information that resulted in the LE seizure.

It should be noted that many times, the relationship between a civil action and criminal action requires a formal agreement, particularly when there are competing interests. Generally, LE prefers an informal relationship to avoid arguments of conflicts of interest. In some cases, however, a formal agreement could allow for the exchange of discovery, witness statements, disposition of assets and the like.

How to approach and manage LE is even more essential than timing. If the approach is not done properly or if the relationship is not managed well, all the benefits of having LE involved could disappear or backfire. The best way to approach LE is through an investigator who is a former LE. Utilizing a former LE officer or agent provides credibility with LE and the investigator will know and understand LE needs, requirements, and processes. Specifically, the investigator will know the evidentiary requirements, the proper arguments to formulate, and the thresholds required by the relevant agency or department.

In addition, a skilled and experienced investigator will also know when some processes, thresholds, or requirements could be waived in a well-articulated and evidenced referral.

Once LE is approached, liaising with the LE team is the next challenge. Whereas the exchange of information is the overall goal of the relationship, the exchange could be delicate and present its own challenges due to privacy and protected information concerns for both the civil asset recovery team and the LE team. For example, in the United States, LE would be prohibited from disclosing information or evidence derived from a grand jury investigation, and in certain civil proceedings, a party may be precluded from disseminating discovery information to LE or others without a subpoena or court order. In the latter, an experienced and skilled investigator, working with counsel, could find ways within the confines of the law to provide leads to LE such as the identification of certain witnesses, the location of documents and repositories, or the financial institutions where the assets may be located. LE could then re-interview those witnesses and subpoena records to develop their case, which in turn would enhance the relationship between the civil and LE teams and, therefore, boost the civil action and recovery.

In conclusion, it is an important tool in a civil matter to liaise with LE in an effort to obtain intelligence or evidence, and the upper hand. The key is to have a civil investigative team with LE experience, credibility, and a reputation that can facilitate a lawful exchange of information or evidence.

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Corporate Criminal Liability for Fraud in the UK: An Update

DR DOMINIC THOMAS-JAMES

iccfraudnet.org

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CORPORATE CRIMINAL LIABILITY FOR FRAUD IN THE UK: AN UPDATE

DR DOMINIC THOMAS-JAMES

FITZWILLIAM COLLEGE, UNIVERSITY OF CAMBRIDGE,
YALE UNIVERSITY GLOBAL JUSTICE PROGRAM,
GOLDSMITH CHAMBERS AND ICC FRAUDNET

Fraud, it is said,[1] is the crime to which we are most likely to fall victim. Awareness-raising efforts are longstanding, and in recent times one only has to look at the inaugural Global Fraud Summit convened by the United Kingdom earlier in 2024, or the recent 40th Cambridge International Symposium on Economic Crime which took integrity as its central theme, to realise that just as fraud's incidence increases, so too do those efforts aimed at understanding and raising awareness about it.

The response to economic crime and its ever-developing nature, often centres on legislative reform or the upgrade of so-called international standards. One recent development came in the form of the UK's corporate failure to prevent fraud offence, per the Economic Crime and Corporate Transparency Act of 2023. The offence is, at the time of writing, awaiting the publication of official guidance by the UK Government regarding its central component, namely, what will constitute reasonable measures in terms of a defence to criminal liability for corporates under the Act's provisions? This question is all important for companies and their advisors.

The offence itself targets corporate culture and brings fraud firmly under the corporate governance and responsibility remit. Of course, with fraud being said to be the crime we are most likely to fall victim to in the UK, and given its prevalence not least in the cyber-space; enhancing our understandings of fraud, the methods of the perpetrators and, perhaps most crucially, the profiles and motivations of the fraudsters has never been more important.

[1] See, BDO: 'Reported Fraud Doubles in 2023, BDO Report Finds', accessible at: https://www.bdo.co.uk/en-gb/news/2024/reported-fraud-doubles-in-2023-bdo-report-finds (accessed 10 May 2024)

The offence under the 2023 Act can be committed by large organisations across all sectors in circumstances where someone (i.e. an employee or agent of the organisation) commits fraud which benefits the organisation. If the organisation did not have reasonable fraud prevention measures in place, then an offence will have been committed. It is important to note that it is not a requirement for prosecutors to show that senior managers or company officials knew about the fraud, orchestrated it, or conspired to commit it. In other words, if a relevant person (i.e. employee or agent) committed a predicate fraud offence, then despite it being committed, if the company can prove that they had present within their organisation reasonable fraud preventive measures in place, they will have a defence to the corporate criminal offence of failing to prevent fraud.

It is not unreasonable to advance that the Act's deterrent effect appears geared away from deterring an individual from committing fraud or otherwise; but rather aims at deterring a company from not having reasonable measures in place at first instance; and therefore, promotes the design and implementation of such measures under threat of corporate criminal liability for non-compliance. The offence's aim, therefore, is squarely on culture, frameworks, systems and an overarching objective of accountability in the corporate world on fraud prevention.

Of course, for UK lawyers and practitioners in the economic crime space; the concept of reasonable prevention measures is familiar territory. The same underlying concept is present across numerous other areas of anti-economic crime laws – including for example the 'corporate corruption' offence, the failure to prevent bribery per section 7 of the Bribery Act 2010. Further, there is the offence in respect of failing to prevent the facilitation of tax evasion per sections 45-46 of the Criminal Finances Act 2017.

The UK Bribery Act 2010 guidance sets out six key principles[2] which should inform companies caught under the Act's purview in responding to bribery and corruption risks and thereby to comply with their obligations under this provision. The guidance, as it is drafted, tends not to prescribe actions, or restrictively classify what is, or is not, reasonable. The exercise of assessing and implementing what are to be 'reasonable' measures of course has to remain alive to the very different risk profiles which different organisations face. Therefore, guidance must be, to an extent, flexible. The guidance principles relating to bribery risks include: having proportionate procedures in place; top level commitments by senior management and officials; dynamic risk assessment measures; due diligence, communication and training and ongoing review and monitoring.

In the case of the new failure to prevent fraud offence, what constitutes "reasonable measures" remains unclear. Organisations caught by the Act are eagerly awaiting guidance to be published. Meanwhile, and based on the six-principle format of the Bribery Act guidance, companies ought to conduct immediate reviews of their systems in order to anticipate the likely scope of the guidance relating to the new fraud offence. It could be said that for those larger organisations, who might already be familiar with the requirements of having reasonable prevention measures in place, this exercise will simply involve

[2] UK Government Bribery Act 2010 Guidance; available at: https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 10 May 2024) at 20.

transplanting such procedures into the fraud landscape with the appropriate nuance applied to fraud risks. Given their size, resources and access to top-level expertise in this and related areas, it may well be a straightforward exercise, once the applicable guidance is established and analysed.

The consequence of this, of course, could be that larger organisations will simply 'add on' such measures and policies and therefore be able to easily navigate the requirements in order to prove high level commitments and adoption of reasonable measures, and therefore remain compliant with the legislation. Like so much within the compliance sector, the result might be little more than ensuring the organisation has a defence to a charge under this legislation, rather than actually having any deterrent or disruptive effect on the criminality in the first place.

As various penal philosophers and utilitarian thinkers, including Beccaria, have espoused: "it is often better to prevent crimes than punish them".[3] Clearly the corporate failure to prevent legislation, if we consider this in the context of those principles relating to failure to prevent bribery, is aimed at education, awareness, disseminating knowledge, and understanding dynamic risk. This ought to underpin a framework of reasonable prevention measures. As such, it could be argued that the offences will, in the longer-term, carry a preventive function through education. It is interesting to note that during the Bill stage of the Economic Crime and Corporate Transparency Act, there were even attempts to expand the offence to include money laundering; which was at the time voted against.

Ultimately, fraud is highly complex. Stein (2023) in an earlier edition of this report observed that fraud is a crime of relationships above all else.[4] It is right that awareness-raising through legislation aimed at cultural overhaul and strengthening of corporate cultures and systems, will carry the effect of exposing individuals to anti-fraud dialogues, policies and best practices – rather than the subject somehow being confined to vaguer, less visible contexts. Indeed, this subject is well suited within the corporate governance and responsibility sphere, as well as that of traditional compliance. The failure to prevent legislation puts companies in the spotlight in terms of viewing them as not simply victims, but rather as (potential) facilitators of fraud and misconduct. Fraud is increasing, despite us ostensibly being more aware of it and educated about its risks. There sits the elephant in the room – whether this new failure to prevent offence will actually prevent anything, other than a headache within a large company's compliance function? Given that fraud is now the crime we are most likely to fall victim to, perhaps such new corporate offences need to be accompanied by more criminological and deterrence-based research on both the increasing prevalence and scope of corporate fraud, and the dynamics and characteristics of the corporate fraudster. That's not to say there is no place for the corporate failure to prevent offences, quite the contrary; but rather there needs to be less talk of silver bullets and more work done on understanding the motivations behind predicate activity in the first place. Otherwise, there is a risk of regulating without result – particularly given all this relates to larger organisations who will doubtless and easily be able to add these new measures to their compliance toolkits.

[3] Beccaria, C. (1964) *On Crimes and Punishments*, 93 (H. Paolucci trans., 1963).
[4] See: Stein, A. (2023) 'Innovations and Strategic Applications in the Psychology of Fraud', in ICC FraudNet Global Annual Report 2023: Fraud and Asset Recovery in an Unstable World (Thomas-James, ed), *ICC Commercial Crime Services*, 196-218.

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A Brief Field Guide to Leveraging Human Factor Intelligence Analysis in Fraud and Asset Recovery Operations

DR ALEXANDER STEIN

iccfraudnet.org

ICC FraudNet

A Brief Field Guide to Leveraging Human Factor Intelligence Analysis in Fraud and Asset Recovery Operations

Dr Alexander Stein

Dolus Advisors

Abstract

Fraud cases involve more than their commercial, transactional, and legal elements. They are centrally defined by the people whose decisions and actions influence everything that happens. Each matter is constituted of a thick stew of stakeholders' motivations and desires, aims and concerns, and personal histories and circumstances. In this paper, a realistic but fictive case summary is advanced to illustrate these ideas in the context of a large-scale multi-national fraud. This forms the basis for a concise explanation of the advantages and practical utility of leveraging psychological expertise — specialist knowledge and tools in decoding the inscrutable complexities of human thought, behavior, and relationships — in asset recovery operations.

Introduction and Setting the Scene

"Who you gonna believe, me or your lying eyes?"
— Chico Marx playing the character Chicolini while impersonating
Rufus T. Firefly in "Duck Soup" (1933)

Every transaction is driven by human decision-making and action. Even the most mechanical of elements – quantifications of assets, contractual terms and conditions, legalities, and so on – are foundationally influenced by the psychologies of the parties. No

decision is made that is not directly or indirectly shaped by the myriad psychodynamics at play: a mixture of the stakeholders' motivations and desires, aims and concerns, personal histories and circumstances.

One of the confounding paradoxes of human psychology is that we are often unaware of any of this, over-indexing on the superstructural while ignoring the subatomic.

This gives rise to any number of unintended consequences. For instance, in fraud where one of the parties is operating in bad faith, or situations involving deceit, artifice, breaches of trust, and malicious manipulation where victims-to-be are lured, manipulated, or conned into unwitting participation in acts against their own interests.

Another feature of our selective myopic awareness, compounded by our reflexive bias to minimize or deny information that contradicts our preferences, is that we often become cognizant of something that's been happening only after it has happened. We encounter the outcome as a blunt-force shock, all the while blind to traveling through its unfolding, and ignorant to having been present at, or even participatory in or causal to, its inception.

With this in mind, we can consider that every crisis, a transaction gone awry for apparently quotidian commercial reasons or through the commission of a lawless act, has a life cycle – before, during, and after – even though for many there is only the after.

Thus, fraud and corruption can be perpetrated. Corrupt actors and illiberal leaders will exploit people's natural tendencies to overlook, misconstrue, minimize, or deny the presence of threat indicators by obscuring, distracting, and falsifying critical information that could otherwise have served to forewarn. Absent safeguards and controls and swept up by intense emotional reactions that override deliberative decision-making, many people will fall for well-crafted bait and find themselves deprived of dominion over their, or a company's, money or other valuable assets.

A dramatic scene in David Fincher's 2008 film *The Curious Case of Benjamin Button* vividly illustrates these ideas. The sequence cuts together a series of events occurring simultaneously but separately. We see the decisions and actions of people whose lives and choices are wholly disconnected and unknown to one another. In summary, a woman on her way to go shopping returns home to get her coat which she had forgotten and then pauses to answer a phone call she would have missed if she had not come back for her coat. A taxi is delayed by a man crossing the street who had left for work five minutes later than he normally did because he forgot to set his alarm. A dancer leaves rehearsal a minute later than planned to wait for a colleague whose shoelace had broken. Their trajectories entwine, as the film's narrator tells us, to create, "a series of intersecting lives and incidents" leading to a tragic outcome. Exploiting the properties of film to splice together multiple unfolding events in disparate locations and thereby manipulating our perceptions of time, we watch how each node in the chain intersects with every other until they inexorably aggregate toward eventual collision. But, as the narrator says, "if only one thing had happened

differently," each person would have harmlessly traveled through their day, each unaware of the other.[1]

Of course, real life is not a movie. In our daily lives, without the devices and contrivances of moviemaking, we cannot see and experience time in reverse, have a real-time birds-eye overview of multi-party actions, accurate prospective knowledge of others' intentions, or comprehensive predictive insight into every possible variable and outcome.

Nonetheless, unnoticed and invisible are not identical. And, taken as an allegory, the film sequence underscores how individual plans can be upended by the unseen and unknown actions of others.

This spotlights the topic of this brief report: explicating the importance and utility of bringing to bear specialist knowledge and expertise in navigating and decoding the complex universe of psychodynamics — the seemingly inscrutable tangle of human decisions and actions — at play and at the heart of every fraud case.

Indeed, educating the professionals dedicated to helping victims in such matters would have far-reaching benefits to individuals, institutions, and societies around the world. As one step toward that end, I offered an in-depth examination of the topic – "Innovations and Strategic Applications in the Psychology of Fraud" – in the 2023 edition of this Report where I elaborated the idea that "fraud is a crime of relationships" and presented a magnified multi-dimensional overview of psychodynamics across the entire human ecosystem of a fraud case.[2]

In this entry, I will focus singularly on the final segment of the fraud life cycle in respect of victims and the important work of asset recovery professionals.

For victims, the crisis explodes once the deed is done and the fraudsters have successfully committed their acts of bribery, corruption, dishonest breach of fiduciary or contractual duty, disbursed the *fructus sceleris* (the fruits of ill-gotten gains) into multiple sequestered repositories, absconded to some far-flung locale, and the victims have been left economically and emotionally broken.

Typically, it is at this point when asset recovery professionals become engaged and the investigation, recovery, and litigation (or settlement) phase formally begins. A case takes shape. Lawyers for creditors and victims step in, alongside investigators, forensic accountants, computer analysts, and other professionals, to discover and then examine the complex sets of facts and legal issues. They work to unravel the sophisticated methods of taking, laundering, and concealing substantial sums of value, and attempt to recover the assets stolen from claimants. The evidentiary field is often a morass of disjointed fragments and shadow data. There may at first be more questions than answers.

[1] This concise synopsis does not do justice to the brilliance, and drama, of the scene. Interested readers are encouraged to watch a video of it, publicly available here: https://www.youtube.com/watch?v=dakx97gRCx0
[2] Innovations and Strategic Applications in the Psychology of Fraud, 2023 ICC FraudNet Global Report — Fraud and Asset Recovery in an Unstable World

There exists a substantial body of literature surveying the multijurisdictional legal considerations and methodological and tactical manoeuvres available to contemporary asset recovery professionals.[3] Less documented or applied are psychologically sophisticated perspectives and tools – which I refer to as "psychodynamic intelligence analysis" – which can be actionably leveraged to additionally assist in bringing fraudsters to book and delivering justice to victims.

On examination, there are no strong reasons why this would be so, why that approach has not already entered the standard asset recovery playbook. Criminal profiling, a conceptual progenitor to psychodynamic intelligence analysis, was initially introduced in the late 19th Century and in the decades since, countless cases have regularly drawn on psychological and psychiatric expertise to provide critical evaluations of suspects and other key figures in helping to solve cases.

By the 1950's, profiling techniques advanced to become an accepted specialist branch of science and practice. In the United States, the FBI established a Criminal Investigative Analysis section, the CIA has a designated Behavioural Analysis Unit, and the UK's MI6 has an analogous version. Differences between these agencies and their mandates aside, each regularly relies on highly trained experts in mental functioning and behavior to help advance cases and bring wrong-doers to justice by examining and interpreting data that develop uniquely valuable insights and understandings of offenders and primary relationships in the case. These can include simple but meaningful demographic variables such as age, race or geographic location but also typically delve into more complex aspects of personality traits, psychopathologies, and behavioral patterns which require extensive education, knowledge, training, and professional experience to discern and understand.

Similarly, the international intelligence community employs Human Intelligence (HUMINT) as a matter of course. HUMINT, as defined by the US Naval War College (NWC) Learning Commons, is "intelligence gathered by means of interpersonal contact, a category of intelligence derived from information collected and provided by human sources."[4]

Psychodynamic Intelligence Analysis, a proprietary variant, focuses on deriving critical information *about* (not only from) individuals and their matrices of personal and professional relationships beyond hard commercial or legal facts. When properly gathered and astutely interpreted, these data sets can be developed into robust, actionable profiles of key players detailing their predispositions, vulnerabilities, blind-spots, judgment, behavioral tendencies, and decision-making and relationship patterns.

[3] See for example, 2022 ICC FraudNet Global Annual Report: The Ever-Evolving Nature of Fraud and Financial Crime: International Insights and Solutions; ICC FraudNet Global Report 2021: International Developments and Perspectives in the field of Fraud, Financial Crime and Asset Recovery; Moglia, A., Kenney, M., Stein, A. "Fraudsters at the gate: how bank leaders confront and defeat fraud and money laundering (Part 1)," J. Intl Banking Law-Regulation, 31(11)/(Part 2) November 2016/ 31(12) December 2016; Moglia, A., Kenney, M., Stein, A. "Multi-jurisdictional Concealed Asset Recovery: Managing the Risks," . Intl Banking Law-Regulation, 30(1), January 2015; The Asset Tracing and Recovery Review, 3rd Ed., Robert Hunter, editor, September 2015.

[4] See: https://usnwc.libguides.com/c.php?g=494120&p=3381553

An Illustrative Case Study

"All happy families are alike, but every unhappy family is unhappy in its own way."
— Leo Tolstoy, "Anna Karenina" (1878)

Consider the following case:[5]

A wealthy Brazilian businessman, Mr Pereira, enters into what he reasonably believes to be a legitimate transaction involving the sale of valuable assets – vast tracts of land in Mato Grosso including thousands of heads of prime cattle along with barns, slaughtering facilities, and related businesses connected with the sale and exportation of high-end beef and leather products. The sale is valued at US$1 billion.

Immediately after the deal closes, the CFO of Mr Pereira's Sao Paulo-based company frantically informs him that significant concerns have suddenly arisen regarding the buyer, Mr Salazar, a Guatemalan national who had, or so everyone thought, authentically presented himself as the CEO of a consortium of very successful agro-businesses with operations throughout Latin America with satellite entities in Africa and the United States. Worse, all of the transferred funds had been abruptly extracted. In addition, their bank was not cooperating in tracing the withdrawals, raising suspicion and concern that they were institutionally enabling the criminal action rather than upholding their fiduciary duty to the account holder. Further, it appeared all the funds were dissipated into shadow accounts around the world.

With opacity a preferred tactic both in business and personal dealings, and safeguarding his reputation in the international marketplace paramount in his mind, Mr Pereira refused to alert any authorities, mount an immediate legal campaign against his bankers, or request outside specialist assistance to bring Mr Salazar and his confederates to book and to recover the stolen funds. Instead, he demanded an internal investigation. The investigators were eventually able to determine that Mr Salazar was in fact the capo of a global network of fraudulent enterprises known to have eluded accountability for decades. His immense wealth – the fructus sceleris of many lawless transactions like the one to befall Mr Pereira – was distributed in multiple offshore accounts and also bound up in ostensibly legitimate companies and operating subsidiaries in various countries around the world.

Mr Pereira's two adult sons and his first born, a daughter, hold senior executive roles in the company. With their mother, his ex-wife, they prevailed on him to engage a prominent asset recovery and fraud litigation firm to assist in resolving the matter – to recover their stolen assets and hold Mr Salazar and his affiliates legally and financially accountable.

Having been duly instructed, the firm, through the work of its sophisticated investigations unit, discovered details of Mr Salazar and his pattern of nefarious exploits that had,

[5] This is a fictionalized mash-up loosely based on elements from several matters that have all been liberally combined, distorted, disguised, and distilled, and the details of which are unidentifiable in reference to any actual case. While this is a Frankenstein casserole concocted for illustrative purposes, its resemblance to the unbelievable yet lurid reality of many cases will be noted to all with experience in the field.

remarkably, been successfully obscured during pre-deal due diligence. They constructed an organizational map of his operations. It showed, in a strikingly uncanny parallel to Mr Pereira's business, that Mr Salazar had similarly installed his adult sons in executive positions. Startlingly, it also came to light that Mr Salazar's eldest son was having an affair with Mr Pereira's 25-year-old wife. The investigation also determined that this son, with sights on blocking his younger brother's aspirations and taking over the family empire from their father, was notorious for his aggressive business practices, once leading to the High Court in London to censure him for dishonesty and contempt of court relating to litigation he brought against a global bank. The bank won the case and was awarded more than US$400m but he continues to elude making good on that judgment.

Even within the bounds of such a concise synopsis, many elements of the case leap out as intriguing and materially important. For present purposes, I want to draw attention from the array of meaningful elements to focus on four relational systems—the first is Mr Pereira's family, the second is Mr Salazar's.

These include, as to the first:

- Mr Pereira's 25-year-old wife (who is 45 years his junior and, as has been learned, romantically involved with one of Mr Salazar's sons)
- His sons and daughter and their spouses and children
- His ex-wife
- Other nuclear and extended family members including siblings—brothers or sisters—cousins, and his very elderly mother.

The second include:

- Mr Salazar's wife
- His sons and their spouses and children
- Other nuclear and extended family members

The third and fourth, not explicitly mentioned but implicitly important, are the many professionals directly involved in each of Messrs. Pereira's and Salazar's businesses: the executives, boards, associates, front-line personnel, and vendors and contractors involved in the operations of their primary businesses as well as all those employed by and connected to the operating subsidiaries in the various identified jurisdictions and any others elsewhere as may be determined.

In addition, there are all the bankers, accountants, lawyers, property agents, drivers, household staff, nannies, tutors, and other professionals with knowledge of Messrs. Pereira's and Salazar's financial dealings, holdings, corporate structures, as well as, potentially, other information regarding details regarding their families and their many other intersecting relationships.

There will also be others who may have served as knowing or unwitting enablers and co-conspirators to any of the Pereira and Salazar families and businesses, in furtherance of executing the deception against Mr Pereira or, conversely, in abetting Mr Salazar's brazen plot.

A Concise Analysis

"Falsehood flies, and truth comes limping after it"
– Jonathan Swift (1710)

Why does this matter? How is it important and useful?

Fraud is in every case more a crime of relationships involving humiliation, breaches of trust, and abuses of power than the straightforward pursuit of financial gain.

Focusing on the ecosystems of people and the minds and behavior of the protagonists and their confederates opens important additional avenues for understanding and advancing the matter. In cases like this involving two high-net-worth family empires, one legitimate, the other lawless but both deeply dysfunctional, the significance of relationships and family dynamics is elevated by orders of magnitude.

There are many common operational, cultural, and psychodynamic denominators between legitimate family-owned and privately held companies and deliberately fraudulent enterprises (many of which operate as de facto family businesses). High-net-worth families and large-scale family businesses can at once be hotbeds for fraud and other economic crime and susceptible to bitterly contested internal disputes involving the misappropriation of substantial value.

Dynastic enterprises like Pereira's and Salazar's, however different in values and operational aims – one is a legitimate commercial concern while the other is a malevolent cartel – overlap as family businesses. As such, they combine two very different social systems — a family and a business — each with different goals, natures, and competing demands and dynamics. Volatile family dynamics — including dishonesty, deceptive practices, manipulation, undue influence, betrayals of trust, and various abuses — are played out on the stage of the business.

Key enterprise inflection points like succession — whether involving a scion's diminished capacity, approaching mortality, an attempted coup, the contemplated decision to excise an heir apparent, install a favored but incompetent relative, pit siblings in vicious competition, a child's wish to depose the parent, the introduction of nonfamily management — can unleash decades of hostility.

As we see in this case, the perpetration of a fraud opportunistically catalyzed by a major transaction, a crisis on its own terms, also sits on top of other entwining crises within both Pereira's and Salazar's families and business.

When siblings, parents, and children are also business partners, roles and responsibilities in the family enterprise can be buffeted by the toxic impact of a host of interpersonal issues, including addiction, abusive behavior, disloyalty, and seething life-long resentments, rivalries, bullying, shaming, guilt, and power plays for dominance and affection.

Disputes in such situations can be explosively contentious as wealth, ownership, employment, inheritance, power, and the ways financial resources are shared, disbursed, withheld, or weaponized, are connected to emotional issues about fairness, love, attention, sibling rivalries, and past grievances.

While the legal and financial battle is dominantly between two men and their respective business interests, this case, as with many others, also involves groups of people bound together in discord and malicious contestation. Considering their histories of love and deep attachments to shared wounds and conflicts, the parties may act against interest or even form alliances with aggressors in opposition to advocates of justice and law to protect and preserve the family system. In such situations, there is, in addition, always a heightened potential for physical and/or lethal violence (homicide or suicide).

Key Opportunities For The Asset Recovery Operation

"In theory, there is no difference between theory and practice. But in practice, there is."
— Benjamin Brewster, United States Attorney General 1881-1885

Turning now to the actionable value of these perspectives and insights to asset recovery professionals, many cases like this one are as traceable to volcanic emotional and interpersonal conflicts as to commercial and legal matters.

This situation, triggered by and structured around a large-scale multi-jurisdictional economic crime, dominantly involves, at core, issues implicating individual and social psychology, organizational dynamics, and family systems. The principal actors, their superficial presentation as successful and urbane notwithstanding, operate in a world characterized by irrationality and intense emotionality. One set of principals, the Salazars, are in addition, conniving, lawless, and amoral. This case, as are most, is a warren of dizzyingly complex psychological and psycho-social turmoil.

These cases are like iconic Matryoshka dolls — a wooden figure in which a smaller figure sits inside and which, in turn, has yet another even smaller figure nested inside of it, and so on. What's readily visible from legal and transactional perspectives is that Mr Salazar and his confederates defrauded and stole substantial value from Mr Pereira and his enterprise. But on deeper inspection, we encounter a contest between two powerful but emotionally distressed families in a situation that so happens to involve fraud.

In both families, siblings are co-working in their respective businesses while concurrently plotting against each other. One son is being unfaithful to his wife while secretly embroiling his family with the target of their nefarious crime through his illicit relationship with his father's counterpart's wife, a woman younger than her stepchildren. And what of the woefully derelict pre-deal due diligence by Pereira's team? And their bankers' failures to intervene or cooperate in redress?

As I have argued in other writings[6], all criminal activity, but particularly fraud, kleptocracy, and other illicit activity involving deception, manipulation, and abuses and breaches of trust and duty, is, in some form or another, an expression of the wrong-doer's internal life unleashed — literally perpetrated — into the world. To consider only what has been propelled out — the tangible indicia, records of acts committed, the mayhem, wreckage, and losses caused — omits a universe of data that tells, or at least points to, the story of the protagonists' minds: how they think, what drives them, what they fear, what they need, where they're vulnerable.

Returning to the idea presented at the outset in the scene from Benjamin Button — depicting how unaware we are of what's happening around us until something has happened and how many seemingly disparate interactions and events can converge to a single point profoundly affecting one individual — Pereira and Salazar were already linked, indeed, on a collision course, even before they entered into what appeared to be a large and important commercial transaction. They just didn't know it yet. The asynchrony of knowledge and power – both anticipating a financial windfall but only one with foreknowledge of impending lawless action – sat atop yet another, different layer of blindness in which their families were already bound together (recall that Mr Pereira's wife is having an illicit love affair with one of Mr Salazar's sons).

Far from being incidental histrionics, all of this is of material importance to the asset recovery professionals in deconstructing and forensically understanding the complex facts and issues at play — both evidentiary and intangible — and devising effective go-ahead strategies and legal pathways through what is for all intents and practical purposes a quasi-militarized zone of interpersonal conflicts of Shakespearean proportions.

In a chapter titled "Who Are His Co-Conspirators and Facilitators?" Martin Kenney wrote:

> *"Fraudsters' co-conspirators are knowing accomplices. However, there are also those who may assist in the primary acts of taking by deception unwittingly. These are ofttten employees, following orders, and unaware that they are party to a dishonest design. Once the wealth has been successfully taken, it then must be hidden to obscure its provenance.*
>
> *He cannot hide his fructus sceleris (the fruits of fraud) on his own. He needs the assistance of others – bankers, advisors, trustees, nominees and lawyers … It is these parties who facilitate. One of the keys to gaining an understanding of how to successfully address a wrongdoer is recognising that he needs the professional assistance of these people, and how they can be of use to him."* [7]

[6] Innovations and Strategic Applications in the Psychology of Fraud, 2023 ICC FraudNet Global Report — Fraud and Asset Recovery in an Unstable World, pp 206-7; How To Become a Malevolent Leader: A Field Guide for Aspiring Fraudsters and Tyrants, Forbes, January 27, 2021; The Psychology of Integrity and Corruption, FCPA Blog, January 25, 2017.

[7] The FraudNet World Compendium of Asset Tracing and Recovery, 1st Edition. Bernd Klose, Editor (Erich Schmidt Verlag. 2010).

Of paramount importance in any intelligence-gathering exercise is interpreting and contextualizing the relative, comparative, and stand-alone value of any parcel of information, and then converting it to a strategically actionable form.

To this end, specialist analysis of the human dimensions of the case will reveal information not discernible or apparently meaningful in discovery or through other hard-data intelligence gathering, but which is of critical utility to decoding dense clusters of issues driven by fractured relationships and irrational counter-intuitive decision-making and to prosecuting the case.

Conclusion

Every case is unique. But most involve combinations of archetypal characters and issues reasonably similar to the ones surfaced in the example constructed here.

Three-dimensional profiles of the relational ecosystems — unraveling the complex webs of relationships between and among parties beyond trails of deeds, documents, and funds — yield materially important insights and provide psychologically sophisticated forecasts. Analysis of the human-oriented dimensions of a case enables the development of planning models to, for example, identify and opportunistically capitalize on information relating to the psychodynamic and psychosocial particulars of the principal actors involved — perpetrators, victims, and other key stakeholders — and to effectively delineate, rank, and mitigate risks as well as clarifying potential benefits of various legal tactics and operational maneuvers.

Psychological expertise plays a pivotal role in multiple additional areas, including rendering sensical, actionable parcels of case-advancing information from what might otherwise appear bewildering and inexplicable to those untrained in matters psychological. Leveraging deep analyses of the matrix of human factors, in turn, helps the asset recovery team, through deft multidisciplinary collaboration, to navigate the rats' nests and sidestep the landmines of human behavior that invariably bedevil these cases.

It also enables developing pinpoint profiles and analyses of the many separate and intersecting individuals, families, organizations, and other ancillary operators who function as both witting and unwitting enablers and co-conspirators; strengthening interviewing of victims and other involved stakeholders; developing precision forecasts in complex settlement negotiations, pre-trial meetings, arbitration hearings, settlement discussions, and court proceedings; and enhancing legal and tactical decision-making.

While some fields are conservative or reluctant to adopt novel methodologies or unconventional approaches to problem-solving, asset recovery is not one of them. To the contrary, it is a practice that consistently demonstrates an appetite for innovation. In addition, asset recovery professionals appreciate that fraudsters and other corrupt actors, unrestrained by moral conventions, codes of social or civic ethics, or adherence to the rule of law, are always at some advantage, and that every permissible edge toward closing that gap is meaningful in the ferocious battle for justice.

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BDO is an international network of public accounting, tax and advisory firms which perform professional services under the name of BDO.

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ICC Commercial Crime Services
ICC FraudNet
Cinnabar Wharf
26 Wapping High Street
London
E1W 1NG
United Kingdom
Phone: +44 (0)20 7423 6960

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