

THE ASSET TRACING
AND RECOVERY
REVIEW

EIGHTH EDITION

Editor
Robert Hunter

THE LAWREVIEWS

THE ASSET TRACING
AND RECOVERY
REVIEW

EIGHTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in September 2020
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Robert Hunter

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Hannah Higgins

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITOR

Anne Borthwick

SUBEDITOR

Martin Roach

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
© 2020 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at August 2020, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-434-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

AARNA LAW LLP

ALLEN & GLEDHILL LLP

ALLEN & OVERY LLP

ALLENS

ARENDT & MEDERNACH

BAKER MCKENZIE

BECH-BRUUN ADVOKATPARTNERSELSKAB

BOFILL ESCOBAR SILVA ABOGADOS

CMS RUSSIA

DONALD MANASSE LAW OFFICES

EDMONDS MARSHALL MCMAHON LTD

GASSER PARTNER ATTORNEYS AT LAW

HAN KUN LAW OFFICES

HOGAN LOVELLS

KIM & CHANG

KOBRE & KIM

MARVAL O'FARRELL MAIRAL

METIS RECHTSANWÄLTE PARTG MBB

MICHAEL KYPRIANOU & CO LLC

MONFRINI BITTON KLEIN

RAHMAT LIM & PARTNERS

ROBERT HUNTER CONSULTANTS

SIQUEIRA CASTRO ADVOGADOS

SQUIRE PATTON BOGGS

STEPTOE & JOHNSON LLP

STIBBE

STUDIO LEGALE PISANO

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

WOLF THEISS RECHTSANWÄLTE GMBH & CO KG

CONTENTS

PREFACE.....	vii
<i>Robert Hunter</i>	
Chapter 1 ARGENTINA.....	1
<i>Pedro Serrano Espelta and María Agustina Testa</i>	
Chapter 2 AUSTRALIA.....	16
<i>Christopher Prestwich</i>	
Chapter 3 AUSTRIA.....	32
<i>Valerie Hohenberg and Claudia Brewi</i>	
Chapter 4 BELGIUM.....	46
<i>Hans Van Bavel and Tobe Inghelbrecht</i>	
Chapter 5 BRAZIL.....	59
<i>João Daniel Rassi, André Osório Gondinbo, Emerson Soares Mendes and Pedro Luís de Almeida Camargo</i>	
Chapter 6 BRITISH VIRGIN ISLANDS.....	70
<i>Peter Tyers-Smith, Timothy P de Swardt and Merrick Ricardo Watson</i>	
Chapter 7 CANADA.....	89
<i>John J Pirie, Matthew J Latella, David Gadsden and Michael Nowina</i>	
Chapter 8 CHILE.....	108
<i>Jorge Bofill and Guillermo Chahuán</i>	
Chapter 9 CHINA.....	118
<i>Ronghua (Andy) Liao</i>	
Chapter 10 CYPRUS.....	134
<i>Menelaos Kyprianou</i>	

Contents

Chapter 11	DENMARK.....	144
	<i>Anders Hauge Gløde</i>	
Chapter 12	ENGLAND AND WALES.....	156
	<i>Robert Hunter, Jack Walsh and Ekaterina Pakerova</i>	
Chapter 13	GERMANY.....	181
	<i>Florian Wettner</i>	
Chapter 14	HONG KONG	195
	<i>Randall Arthur, Joyce Xiang and Calvin Koo</i>	
Chapter 15	INDIA	209
	<i>Sandeep Baldava and Shreyas Jayasimha</i>	
Chapter 16	ITALY	223
	<i>Roberto Pisano</i>	
Chapter 17	LIECHTENSTEIN.....	234
	<i>Thomas Nigg</i>	
Chapter 18	LUXEMBOURG.....	244
	<i>François Kremer and Ariel Devillers</i>	
Chapter 19	MALAYSIA	258
	<i>Jack Yow, Daphne Koo and Kwong Chiew Ee</i>	
Chapter 20	MEXICO	275
	<i>Juan Francisco Torres-Landa Ruffo, Luis Omar Guerrero Rodríguez, Jorge Francisco Valdés King, Jacobo Enrique Rueda Fernández and Eduardo Lobatón Guzmán</i>	
Chapter 21	MONACO.....	289
	<i>Donald Manasse</i>	
Chapter 22	NETHERLANDS.....	301
	<i>Neyah van der Aa, Thijs Geesink, Gijs Kerstjens and Rose Fernando</i>	
Chapter 23	PORTUGAL.....	315
	<i>Fernando Aguilar de Carvalho and Nair Mauricio Cordas</i>	

Contents

Chapter 24	RUSSIA	329
	<i>Sergey Yuryev</i>	
Chapter 25	SINGAPORE.....	339
	<i>Aaron Lee and Lee May Ling</i>	
Chapter 26	SOUTH KOREA	353
	<i>Michael S Kim, Robin J Baik, S Nathan Park and Chiyong Rim</i>	
Chapter 27	SPAIN.....	363
	<i>Fernando González</i>	
Chapter 28	SWITZERLAND	371
	<i>Yves Klein and Antonia Mottironi</i>	
Chapter 29	UNITED STATES	389
	<i>Steven K Davidson, Michael J Baratz, Jared R Butcher and Molly Bruder Fox</i>	
Appendix 1	ABOUT THE AUTHORS.....	417
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	441

PREFACE

As Warren Buffet famously said, ‘only when the tide goes out do you discover who has been swimming naked’. The coronavirus pandemic has offered the global economy another opportunity to prove him right. Not only are new frauds being discovered, but the growing recession will challenge the budgets of victims, regulators and criminal enforcement bodies to bring those responsible to justice and to retrieve the proceeds. Remote interpersonal dealings are increasing the distance between business counterparties in a way that the internet did, and the growth of cryptocurrency transactions continues to do.

It is not possible to predict the trajectory of these developments. While it is now a cliché to speak of the ‘new normal’, nobody can be actually sure what that normal will be. Some even dispute that it is useful to speak of a normal at all. Nassim Taleb has argued that the financial world is more frequently and radically affected by extreme and unpredictable occurrences (which he calls ‘Sigma’ or ‘Black Swan’ events) than we acknowledge. According to Taleb, we live in ‘extremistan’ and not ‘mediocristan’. He has suggested that it is part of our makeup to blind ourselves to the influence of what we cannot predict.

Taleb may be right. For my part, I rather think that he is. But amid all the unpredictability, there are nevertheless some certainties. Society depends upon trust, and there will always be some people who abuse it. So some people will always commit fraud. Globalisation has ensured that major fraud will usually have an international element. Fraud lawyers will therefore have to be internationally minded.

Perhaps most of all, the growing international and technical complexity of fraud will continue to outstrip the ability of any one person to understand or remedy it. One of the heartening things about the legal profession over the past 25 years or so is the growth of an international community of lawyers specialising in fraud and asset tracing work who share knowledge and experience with each other about the events in their fields. This book continues to be a useful contribution to that community.

Robert Hunter

Robert Hunter Consultants

August 2020

HONG KONG

*Randall Arthur, Joyce Xiang and Calvin Koo*¹

I OVERVIEW

Hong Kong is a major international financial centre with a global network of individuals and entities utilising the region's sophisticated financial services. As such, a range of assets including liquid cash, securities, real property and tangible physical goods are all commonly held within, or routed through, Hong Kong.

The stability and success of the Hong Kong financial system, however, requires, *inter alia*, a well-functioning legal system that can reliably address any disputes, including those arising from fraud. Fortunately, Hong Kong's common law legal system and courts are well-positioned to determine such disputes, provide redress for claims sounding in fraud and facilitate asset investigation and recovery efforts. Generally, victims of fraud and dishonesty in Hong Kong may obtain compensation through civil tort claims, with requested relief in the form of damages, restitution, seizure of goods or property, injunctions, constructive trusts or account of profits. Victims of dishonest criminal activity may also be in line for compensation in connection with a criminal judgment through statutorily provided restitution.

Hong Kong law provides several avenues for discovering information germane to asset tracing and recovery. Although Hong Kong is a business and investor-friendly environment where banks and financial institutions typically strive to protect the privacy and confidentiality of their clients in accordance with local law and internal company policies, these companies do and must routinely obey court orders for disclosure. Hong Kong's sophisticated courts, however, do not issue such orders haphazardly and are frequently called upon to balance applications for disclosure against competing interests of privacy. Key legislation relevant to fraud-related civil asset recovery includes the High Court Ordinance, Evidence Ordinance, Rules of High Court and Personal Data (Privacy) Ordinance, and each may affect the admissibility of evidence and access to evidence used in asset recovery efforts.

From a criminal case perspective, individuals and entities may look to the Hong Kong police force (particularly the Commercial Crime Bureau, the Organized Crime and Triad Bureau and the Joint Financial Intelligence Unit) or the Independent Commission Against Corruption, or both, to trace and confiscate proceeds of crime. Civil parties, however, should be aware that it is extremely difficult to obtain evidence from law enforcement and regulatory agencies for use in civil proceedings, as they are subject to the Personal Data (Privacy) Ordinance. Usually, law enforcement and regulatory agencies refrain from releasing data to any person unless that person is the subject of the data or a relevant person (e.g., the parent of a minor). Legislation relevant to fraud-related criminal asset recovery includes

¹ Randall Arthur, Joyce Xiang and Calvin Koo are lawyers at Kobre & Kim.

the Organized and Serious Crimes Ordinance, which provides for the restraint of assets or charge of property to preserve it for the purpose of satisfying a confiscation order, as well as the Mutual Legal Assistance in Criminal Matters Ordinance, which regulates assistance in criminal matters between Hong Kong and places outside Hong Kong, and thus may be relevant to the confiscation of proceeds of crime that has crossed borders.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Civil actions against persons who committed a fraud

Depending on the specific circumstances of the matter, there are a few civil claims sounding in various types of tort that a victim of fraud may bring against the person who committed the fraud. These include the following, each with particular forms of relief.

Fraud

Fraud generally involves some manner of deceit practised by the defendant and may take several forms, such as fraudulent misrepresentation, deceit and fraudulent inducement and, in the context of insolvencies, fraudulent conveyance and fraudulent trading.² An action for damages is the most common relief sought for fraud, although other remedies, including those equitable in nature, may also be sought.

Breach of fiduciary duty

Breach of fiduciary duty, whereby a wrongdoer owes a duty to the victim (such as the type directors and officers owe to companies), yet acts in a manner that the wrongdoer does not honestly believe is in the victim's best interests or is for an improper purpose.³ An action for damages may be warranted for such a breach, but other remedies, including injunctive relief or an account of profits to recover any ill-gotten profits, may also be appropriate.

Unjust enrichment

Unjust enrichment, whereby someone receives a benefit at the victim's expense such that it would be unconscionable for the defendant to retain the benefit.⁴ An action for money had and received seeks restitution for unjust enrichment, although in certain circumstances the relief sought may be stylised as a repayment of a loan.

Conversion

Conversion, whereby a fraudster has effectively misappropriated the victim's property.⁵ An action for restitution or damages, or both, is the natural remedy, and where the property has been sold, a victim may pursue an action for money had and received.⁶

2 See, e.g., LexisNexis *Halsbury's Laws of Hong Kong*, [275] Misrepresentation and fraud, [275.057] Meaning of 'Fraud', [275.137], Misrepresentation and fraud in other connections.

3 *Grand Field Group Holdings Ltd v. Chu King Fai and Ors* [2014] HKCU 1470.

4 See e.g., *Yukio Takahashi & Anor v. Cheng Zhen Shu & Ors* [2010] HKCA 594, [2010] 1 HKLRD 603.

5 LexisNexis *Halsbury's Laws of Hong Kong*, [380] Tort, [380.431] Right of possession and property, [380.433] Fraud on the part of the owner.

6 LexisNexis *Halsbury's Laws of Hong Kong*, [380] Tort, [380.450] Recovery by action.

Civil actions against persons who assisted in the commission of a fraud

There may also be civil claims against persons who assist the primary fraudster in the commission of the wrongdoing as follows.

Conspiracy

Conspiracy, whereby there is an agreement between the conspirator and the fraudster with an intent to injure the plaintiff, acts carried out pursuant to that agreement and intention, and damage to the victim.⁷

Dishonest assistance

Dishonest assistance, whereby the defendant dishonestly assists with another's underlying breach of trust or fiduciary duty, with resulting loss.⁸

Civil actions against third parties who may receive or help transmit the proceeds of fraud

Claims may also be brought against third parties that receive or handle the proceeds of fraud. In particular, plaintiffs may pursue constructive trust claims in pursuit of equitable relief against third parties who knowingly receive trust property or its traceable proceeds that were transferred in breach of trust. Claims may also be brought against third parties who knowingly assist in a trustee's breach of trust.⁹

Standards of proof

Under Hong Kong law, civil claims are adjudicated based upon the balance of probability test, which effectively is a more likely than not standard. Stronger evidence is required to establish the balance of probability for allegations that are more serious in nature because the court presumes that the more serious the allegation, the less likely it is to have occurred.¹⁰ For example, fraud is usually less likely than negligence,¹¹ so in cases alleging fraud, although the technical standard remains the same, what evidence is required to meet that standard is inherently greater. There are also strict rules in place when pleading allegations of fraud, such that the plaintiff must have an evidentiary basis before making such pleadings.

Criminal actions against persons who committed a fraud

Criminal claims related to fraud typically arise in connection to the following:

- a where goods have been stolen and a person is convicted of any offence with reference to the theft, the court may order restitution;¹² or

7 *Tempa Virginia Pido v. Compass Technology Company Limited & Anor* [2010] 2 HKLRD 537, [2010] HKCU 616.

8 *Ho Lai Ming T/A Tung Hing Transportation Co v. Chu Chik Leung & Anor* [2007] HKCU 1614; *Hecny Shipping Limited & Ors v. Huang Chun Jen Jerry also known as Huang Chun Jen & Anor* [2011] HKCU 2118.

9 See, for example, LexisNexis *Halsbury's Laws of Hong Kong*, [400] Trusts, [400.095], Knowing receipt or dealing; recipient liability, [400.098], Knowing assistance in breach of trust: accessory liability.

10 *Re H & Ors (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563; see also *A Solicitor (24/7) v. Law Society of Hong Kong* [2008] 2 HKC 1.

11 *id.*

12 *id.* at Section 30.

- b* the Criminal Procedure Ordinance provides for restitution where any person is convicted of an indictable offence (i.e., more serious offences) such as this.¹³

Criminal actions against persons who assisted in the commission of fraud

Criminal claims against persons who assist in fraud include:

- a* where the agreement itself is the crime; and
b where aiders, abettors and accessories, which the Criminal Procedures Ordinance identifies as any person who aids, abets, counsels or procures the commission by another person of any offence, are guilty of the underlying offence.¹⁴

Criminal actions against third parties who may receive or help transmit the proceeds of fraud

The Organized and Serious Crimes Ordinance, inter alia, creates offences relating to the proceeds of crime. For example, a person that knows, or has reasonable grounds to believe, that property in whole or in part directly or indirectly represents a person's proceeds of an indictable offence, such as the ones above, commits an indictable offence him or herself, which is subject to a restitution order.¹⁵

Standards of proof

For criminal actions, the prosecution bears the burden of establishing the charges beyond a reasonable doubt.¹⁶

ii Defences to fraud claims

Civil fraud claims must be brought within six years of the date on which the cause of action accrues, but in fraud matters, pursuant to the Limitation Ordinance, this clock does not begin to run until the plaintiff discovers the fraud or could, with reasonable diligence, have discovered it.¹⁷ Plaintiffs, however, cannot act against an innocent third party who purchased the property for valuable consideration and without notice of the fraud – in other words, at the time of the purchase, the third party did not know or have reason to believe that a fraud had taken place.¹⁸ Such innocent third parties instead possess defences to claims against them in connection with the property at issue, such as unjust enrichment arising from fraud, which otherwise might ensnare the blameless.

In criminal matters, for serious offences – which are likely to include matters relating to fraud – there is no formal time limit for the commencement of a prosecution (in contrast to minor summary offences, which generally have a six-month limitation period starting from the commission of an offence).¹⁹

13 Criminal Procedure Ordinance, Cap 221, Section 84.

14 Criminal Procedures Ordinance, Cap 221, Section 89.

15 Organized and Serious Crimes Ordinance, Cap 455, Section 25; Criminal Procedure Ordinance, Cap 221, Section 84.

16 See *HKSAR v. Choi Kuk Shek, Kendy and Ors* [2003] HKCU 1026; see also *A Solicitor (24/7) v. Law Society of Hong Kong* [2008] 2 HKC 1.

17 Limitation Ordinance, Cap 347, Section 4.

18 *id.* at Section 26.

19 *New Chuan Kong Investment Co Ltd v. Securities and Futures Commission* [2000] 1 HKC 164; Magistrates Ordinance, Cap 227, Section 26.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

With respect to civil matters, there are several forms of interim relief available in Hong Kong to prevent the dissipation of assets by, and to seek discovery from, those alleged to be involved in fraud.

Mareva injunction

A *Mareva* injunction is a court order preventing a defendant from dealing with, moving or disposing of his or her assets. In other words, the defendant's assets are frozen such that any attempt to transfer or dissipate those assets would violate the court's order, subject to contempt-of-court penalties. The order is also binding on third parties to the extent that any third party who is served with the order and subsequently assists the defendant in moving his or her assets will also be in contempt of court. Thus, in practice, *Mareva* injunction orders are routinely served on banks at which defendants maintain accounts, which results in the banks taking immediate steps to freeze the accounts.

The *Mareva* injunction also requires the defendant to make disclosures regarding all owned assets and may, in certain circumstances, require third parties, such as banks, to disclose information relating to a defendant's assets held by them. Because of the considerable restriction such an injunction places on a defendant, there are several hurdles a plaintiff must overcome before securing such an injunction. Among these are that the plaintiff establish:

- a* a good arguable case on the underlying merits of the action;
- b* that the defendant has assets within the jurisdiction;
- c* that there is a real risk that the defendant will dissipate the assets; and
- d* that the balance of convenience is in favour of granting the application.²⁰

Mareva injunction applications may initially be made *ex parte*, but ultimately the defendant will have an opportunity to challenge and set aside an order.²¹ Where an application for a *Mareva* injunction is made *ex parte*, the plaintiff has an obligation to make full and frank disclosure to the court of all relevant material facts, including those not in his or her favour.²² A failure to make full and frank disclosure may result in the injunction being discharged.²³ Plaintiffs seeking a *Mareva* injunction must also give an undertaking to pay to the defendant any damages the defendant might suffer from the injunction should it later transpire that the injunction should not have been granted.²⁴ The court may also require the plaintiff to fortify this undertaking by making a payment into court or providing some other type of security

20 Sweet & Maxwell, *Hong Kong Civil Procedure*, 2016, Volume 1, Part A, Section 1 Rules of the High Court, Order 29 Interlocutory Injunctions, Interim Preservation of Property, Interim Payments, Etc. 1. Application for Injunction (O.29, r. 1), 29/1/65 Requirements for *Mareva* Injunction, 693; see also *Lam Sik Ying, administrator for the Estate of Lam Tim alias Stan Lam Tim, deceased v. Lam Sik Shi & Anor* [2011] HKCU 100.

21 Sweet & Maxwell, *Hong Kong Civil Procedure*, 2016, Volume 1, Part A, Section 1 Rules of the High Court, Order 29 Interlocutory Injunctions, Interim Preservation of Property, Interim Payments, Etc. 1. Application for Injunction (O.29, r.1), 29/1/72 Setting aside, 696.

22 id. at 29/1/71 Full and Frank Disclosure, Balance of Convenience, 695–696.

23 id.

24 id. at 29/1/20 Introduction, 679.

(such as a bank guarantee).²⁵ Hong Kong judges may grant a *Mareva* injunction in support of proceedings outside Hong Kong, and, in certain narrow circumstances, a worldwide *Mareva* injunction that applies to assets located both in and beyond Hong Kong.²⁶

Anton Piller order

Where a plaintiff is concerned that a defendant may hide or destroy evidence, he or she may seek an injunction requiring the defendant to permit the plaintiff to enter the defendant's premises to enable the inspection, seizure and removal of documents relating to the underlying matter. This injunction is historically known as an *Anton Piller* order, and is aimed at preventing the destruction of evidence. The plaintiff must establish that:

- a* there is a strong prima facie case for a cause of action;
- b* the potential or actual damage to the plaintiff must be very serious;
- c* there must be clear evidence that the defendant possesses the items at issue; and
- d* there is a real likelihood (more than a mere possibility) that a defendant might destroy the material.²⁷

As with the *Mareva* injunction, the application may be made *ex parte* with full and frank disclosure,²⁸ but is subject to the defendant's later opportunity to move to set aside the order.²⁹

Prohibition against debtors leaving Hong Kong

Pursuant to Order 44A of the Rules of the High Court, a plaintiff or holder of a judgment in its favour (a judgment creditor) may apply *ex parte* to the court for an order prohibiting a debtor from leaving Hong Kong, thus ensuring the debtor cannot escape to a more judgment-proof jurisdiction.³⁰ The court will grant the application only where the prohibition is reasonably and properly conducive to the enforcement of a judgment involving money or property.³¹ If the judgment amount is still to be assessed or property is to be delivered, the court will make the order only where there is probable cause for believing the debtor is about to leave Hong Kong and that enforcement will thereafter be impeded.³²

Interim attachment of property

Order 44A also provides for the interim attachment of property of a defendant where a defendant, with intent to obstruct or delay the execution of a judgment, is about to dispose of property.³³ In such a circumstance, the plaintiff may apply to the court for an order requiring

25 *id.* at 29/1/24 Fortifying undertaking, 680.

26 See, for example, *Dadourian Group Int Inc v Simms* [2006] 3 All ER 48; see also *RACP Pharmaceutical Holdings Ltd v Li Xiaobo* [2007] 3 HKCU 636.

27 *Giant Electronics Ltd v In-Tech Electronics Ltd* HCA 15823/1999.

28 *Anthony James Hatton v Dorothy Jane Furness & Ors* [2009] HKCU 249.

29 Sweet & Maxell, *Hong Kong Civil Procedure*, 2016, Volume 1, Part A, Section 1 Rules of the High Court, Order 29 Interlocutory Injunctions, Interim Preservation of Property, Interim Payments, Etc, 8. Allowance of income of property pendent lite (O.29, r.8), 29/8/20 *Anton Piller* Orders – Search and Seizure, 707; 29/8/32 Setting aside and discharge of orders and appeals, 710.

30 Rules of High Court, Cap 4A (O44A, Rule 2).

31 *id.*

32 *id.*

33 *id.* at Rule 7.

the defendant to provide security sufficient to satisfy any judgment that may be rendered against him or her in the action.³⁴ Failing provision of such security, the court may direct any property of the defendant to be attached as security.³⁵

Appointment of a receiver or provisional liquidator

Where just and convenient, the Hong Kong court may appoint a receiver to recover and protect assets that defendants obtain in connection with fraudulent activity.³⁶ The receiver may then realise and distribute the assets among victims of the fraud.³⁷ Similarly, in circumstances where fraud was perpetrated through a company that was, or has now become, insolvent by way of the fraud, the court may appoint a provisional liquidator to preserve that company's assets pending the determination of a winding-up petition against the company.³⁸

ii Obtaining evidence

Prior to securing assets and proceeds, potential plaintiffs in civil proceedings may need more information and evidence about the assets and proceeds before bringing an action. Plaintiffs seeking information on assets of a putative defendant may do well by searching public resources such as land, companies, business, trademark and vehicle registries as part of their investigative efforts.

In addition, Hong Kong's Rules of the High Court provide statutory rules on discovery and inspection of records for parties to a proceeding. In general, this encompasses documents that are or have been in the parties' possession, custody or power relating to the matters in question.³⁹ Parties are to serve lists of such documents within 14 days of the close of pleadings in the action.⁴⁰ Outside these statutory rules, the court may also, upon application, make other discovery orders. A few of these orders, briefly described below, are often key to fraud actions in particular, as they seek information from third parties who may have evidence about a wrongdoer or the wrongdoer's assets that would be otherwise unavailable.

Norwich Pharmacal order

Before an action is commenced, a proposed plaintiff may seek a *Norwich Pharmacal* order from the court to obtain documents from an innocent party that unknowingly facilitated or was caught up in the wrongdoing of others. Such orders are often employed to identify wrongdoers previously unknown to the plaintiff, obtain evidence in support of proposed proceedings against wrongdoers or identify assets belonging to wrongdoers. For example, an innocent third party (such as a bank) may hold funds derived from fraud, and a *Norwich Pharmacal* order may require that third party reveal from whom the funds were obtained, and any documentation evidencing that transfer. The plaintiff may then take this information and

34 id.

35 id.

36 Organized and Serious Crimes Ordinance, Cap 455 Sections 15–17.

37 id.

38 Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32 Section 193.

39 Rules of High Court, Cap 4A (O 24).

40 id.

use it as a basis of a cause of action against a defendant he or she can now identify. To obtain such an order, the proposed plaintiff must establish that:

- a* there is a prima facie case against the unknown alleged wrongdoer;
- b* the target of the order was involved in some way in the matter;
- c* the target of the order must be the only practical source of information available;
- d* the target will be compensated for his or her expenses in complying with the order; and
- e* the public interest in disclosure outweighs privacy concerns.⁴¹

Evidence from banks

A *Bankers Trust* order is effectively a *Norwich Pharmacal* order targeted at an innocent third-party bank to provide information that enables tracing of funds that is normally otherwise protected by the bank's duty of confidentiality.⁴²

Similarly, under the Evidence Ordinance, a party to a proceeding may apply to the court to order that a bank's books be opened to that party for the purposes of discovery in a matter.⁴³ There have been occasions where the court has allowed discovery orders to be obtained against banks as part of a *Mareva* injunction order, specifically in circumstances where the plaintiff maintains that it has a proprietary interest in the funds held in a specific account.

iii Criminal actions

With respect to criminal matters, law enforcement authorities have certain powers to gather evidence and identify, trace and freeze proceeds, while certain other actions to restrain and seize assets lie with the prosecutor.

Evidence gathering

The Hong Kong police force acts pursuant to the Police Force Ordinance with respect to evidence-gathering procedures and seizure of suspected property.⁴⁴ Prosecutors are likely to have the benefit of receiving evidence gathered by law enforcement, and in particular circumstances may pursue their own applications to the court for evidence-gathering orders.

Restraint of assets or property

Under the Organized and Serious Crimes Ordinance, a prosecutor may move for the restraint of assets or property to prohibit a defendant that has benefited from an offence specified under the Ordinance – including those arising from fraud – from dealing with any realisable property.⁴⁵ Where such a restraint order is in place, the court may appoint a receiver to take

41 Sweet & Maxell *Hong Kong Civil Procedure*, 2016, Volume 1, Part A, Section 1 Rules of the High Court, Order 24 Discovery and Inspection of Documents, 2. Discovery by parties without order (O.24, r.2), 24/2/1 Action for discovery, 571–572.

42 *Bankers Trust Co v. Shapira* [1980] 1WLR 1274 CA; see also *A Co v. B Co* [2002] 2 HKC 497.

43 Evidence Ordinance, Cap 8 Section 21.

44 Police Force Ordinance, Cap 232.

45 Organized and Serious Crimes Ordinance, Cap 455, Section 15.

possession of any realisable property, or otherwise manage or deal with the property.⁴⁶ In addition, an authorised officer may also seize restrained property to prevent its removal from Hong Kong.⁴⁷

Charging order

The Organized and Serious Crimes Ordinance also allows for the prosecutor to apply to the court for a charging order on realisable property that has the effect of securing payment to the government backed by the property charged.⁴⁸ Such an application may be made *ex parte* but is subject to those affected by it applying for its discharge.⁴⁹

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Hong Kong has a specific anti-money laundering ordinance, the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institution) Ordinance, which came into effect in 2012.⁵⁰ This Ordinance works together with other ordinances, such as the Organized and Serious Crimes Ordinance, to deal with specific money laundering issues that may arise in the context of potential fraudulent activity. For example, under the Anti-Money Laundering Ordinance, financial institutions are required to conduct customer due diligence and maintain certain records, whereas the Organized and Serious Crimes Ordinance requires reporting of suspicious transactions.⁵¹

Separately, Hong Kong's Banking Ordinance addresses fraudulent activity by making fraudulent inducement to make a deposit a basis for a claim of fraud.⁵²

ii Insolvency

In the context of insolvency, a defrauded creditor has the option of issuing a winding-up petition and applying for the appointment of a provisional liquidator where a company is concerned, or presenting a bankruptcy petition where an individual is concerned. The liquidator or trustee can force the debtor to provide information on assets, and he or she can claw back fraudulently conveyed property. Specifically, where a transfer is deliberately made to place assets outside a creditor's reach, the conveyance is voidable and may be set aside, except where made in good faith for valuable consideration and without notice of intent to defraud creditors.⁵³ In addition, a liquidator or trustee may challenge the validity of unfair preference transfers, which occur when an insolvent company or bankrupt individual repays a creditor prior to the commencement of its winding up or bankruptcy, thus putting that creditor in a better position than it would otherwise be in liquidation or bankruptcy.⁵⁴ The applicable time period for these unfair preference transfers are two years prior to the commencement of the

46 id.

47 id.

48 id. at Section 16.

49 id.

50 Anti-Money Laundering and Counter-Terrorist Financing (Financial Institution) Ordinance, Cap 615.

51 id.; Organized and Serious Crimes Ordinance, Cap 455, Section 25A.

52 Banking Ordinance, Cap 155, Section 93.

53 Conveyancing and Property Ordinance, Cap 219, Section 60.

54 Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32, Section 266B.

winding up if the creditors are associates (such as directors or employees), or six months for any other creditors.⁵⁵ These powers seek to prevent fraudsters from finding a way to funnel money to themselves or associates.

Furthermore, the Bankruptcy Ordinance criminally penalises debtors that intentionally do not fully disclose or deliver to the trustee all his or her property, make material misstatements or omissions, fraudulently convey property or otherwise act in ways designed to intentionally frustrate the insolvency process.⁵⁶

iii Arbitration

Under Hong Kong's Arbitration Ordinance, unless otherwise agreed to by the parties, a party can challenge an arbitral award on the ground of serious irregularity, which, inter alia, includes the award having been fraudulently obtained.⁵⁷

iv Fraud's effect on evidentiary rules and legal privilege

Hong Kong law respects legal professional privilege, including a crime or fraud exception to the privilege, similar to other common law jurisdictions. This exception identifies communications made in furtherance of a crime as not privileged.⁵⁸

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

With respect to a conflict of law, generally Hong Kong courts evaluate four issues in determining whether personal jurisdiction over a defendant has been satisfied. First, Hong Kong courts determine whether a defendant may be deemed to have submitted to Hong Kong jurisdiction.⁵⁹ Second, Hong Kong courts review whether a defendant was effectively served with the originating process in Hong Kong.⁶⁰ Third, in cases where service is not possible or applicable in Hong Kong, the Hong Kong courts examine whether the court has jurisdiction to grant leave for service outside Hong Kong.⁶¹ Fourth, Hong Kong courts evaluate the appropriateness of exercising jurisdiction in a given circumstance (e.g., issues of *forum conveniens*).⁶²

With respect to the choice of law, Hong Kong courts apply Hong Kong law to issues of procedure. Where there is a choice of law issue as to substantive law, Hong Kong courts,

55 id.

56 Bankruptcy Ordinance, Cap 6, Section 129.

57 Arbitration Ordinance, Cap 509, Sections 99–102 and Schedule 2.

58 The Law Society of Hong Kong Hong Kong Solicitor's Guide to Professional Conduct, third edition, 2013, [8] Confidentiality, [8.01] Duty of confidentiality, commentary, Paragraph 9; see also *Secretary for Justice v. Florence Tsang Chiu Wing & Ors* [2014] 6 HKC 285.

59 Graeme Johnston, *The Conflict of Laws in Hong Kong*, second edition, Sweet & Maxwell, 2012, [3] Jurisdiction, [3.001] Overview, 67.

60 id.

61 id.

62 id.

like many commonwealth jurisdictions, apply *lex causae* principles – principles that evaluate the proper applicable law to a given issue.⁶³ In fraud cases, this may require an evaluation of where particular misrepresentations or actions at issue occurred.

ii Collection of evidence in support of proceedings abroad

If a foreign proceeding has already commenced or is contemplated, plaintiffs may seek from the relevant foreign court a letter of request directed at the Hong Kong authorities, seeking assistance in obtaining evidence.⁶⁴ Assuming the foreign court issues the letter of request, local Hong Kong counsel would then make an *ex parte* application in Hong Kong attaching that letter of request and seeking an order from the Hong Kong court for the discovery sought in the letter of request. Alternatively, where putative plaintiffs seek pre-action information or disclosure from an innocent third party in Hong Kong, they may apply to the Hong Kong courts for a *Norwich Pharmacal* order in support of their contemplated proceedings abroad.⁶⁵ The general requirements for such an application are discussed in Section III.ii.

iii Obtaining evidence in civil and commercial matters between mainland China and Hong Kong

As one of the milestones to the road to enhancing mutual judicial assistance between mainland China and Hong Kong, the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the HKSAR⁶⁶ (Arrangement) came into force on 1 March 2017. The Arrangement provides a channel with greater certainty and efficiency for the courts in one jurisdiction to seek assistance from the courts in the other jurisdiction, by way of a letter of request, to obtain evidence for use in civil and commercial matters in the requesting jurisdiction. Under the Arrangement, a request for assistance has been simplified as letters of request no longer need to go through intermediary bodies.⁶⁷ It is also notable that the scope of assistance provided by the two jurisdictions is not identical (with the PRC courts having the ability to request a wider scope of assistance from the Hong Kong courts).⁶⁸

iv Civil seizure of assets or proceeds of fraud in support of the victim of fraud

Overseas plaintiffs may utilise Section 21M of the High Court Ordinance to seize assets or proceeds of fraud located in Hong Kong. Specifically, Section 21M authorises Hong Kong courts to grant various forms of interim relief in relation to proceedings that have been or are to be commenced outside Hong Kong and are capable of giving rise to a judgment that may be enforced in Hong Kong, which is generally a final and conclusive money judgment.⁶⁹ Therefore, interim relief mechanisms, such as those described in Section III.i, are available to victims of fraud provided that the requisite elements are met. For example, victims may wish

63 id. at 2.008.

64 Evidence Ordinance, Cap 8, Sections 75–77.

65 *Manufacturer's Life Ins Co of Canada v. Harvest Hero Int'l Ltd* [2002] HKCU 285 CA.

66 Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the HKSAR.

67 Articles 2 and 3 of the Arrangement.

68 Article 6 of the Arrangement.

69 High Court Ordinance, Cap 4A, Section 21M; see also *JSC BTA Bank v. Mukhtar Kabulovich Ablyazov* [2014] 5 HKC 209.

to pursue a worldwide *Mareva* injunction to freeze a defendant's assets globally. A plaintiff that successfully secures this assistance can continue pursuing foreign proceedings without having concurrent proceedings in Hong Kong.

In late 2016, the Court of Final Appeal (CFA) clarified the legal principles applicable in making an order under Section 21M of the High Court Ordinance, which enables plaintiffs to freeze assets located in Hong Kong in aid of foreign proceedings, notwithstanding that no substantive proceedings are contemplated in Hong Kong. In *Compania Sud Americana de Vapores SA v. Hin-Pro International Logistics Limited*,⁷⁰ the CFA set out a two-stage test in determining whether to grant such relief.

First stage

The starting point is to consider whether, if the proceedings that have been or are to be commenced in the foreign court result in a judgment, that judgment is one that the Hong Kong court may enforce.

Next, the court will consider the same questions as if a *Mareva* injunction were sought in support of a local proceeding, namely, whether the plaintiff has a good arguable case; and whether there is a real risk that the defendant will dissipate its assets if the *Mareva* injunction is not granted.

Second stage

If the first stage is satisfied, the court will consider whether granting such relief would be unjust or inconvenient owing to the fact that the substantive claim is being litigated in a foreign court.

In relation to the first stage, the CFA found that the Court of Appeal had misinterpreted the English case law, and held that the correct test is whether a plaintiff had a good arguable case in the foreign court, rather than to consider the strength of the substantive claim under Hong Kong law.

v Criminal seizure of assets or proceeds of fraud in support of the victim of fraud

With respect to criminal matters, the Mutual Legal Assistance in Criminal Matters Ordinance provides for the cross-border restraint and seizure of property in Hong Kong in connection with an offence committed outside Hong Kong. The Hong Kong Secretary for Justice may request an appropriate counterpart authority outside Hong Kong to make arrangements to enforce Hong Kong confiscation orders, and similarly, foreign authorities may make requests to the Secretary for Justice to enforce external confiscation orders.⁷¹ In support of the latter, the Hong Kong Department of Justice revised its Guide to Asset Recovery in Hong Kong in March 2017, setting out the procedures for restraint, confiscation and repatriation of proceeds of crime.⁷²

70 *Compania Sud Americana de Vapores SA v. Hin-Pro International Logistics Limited* [2016] HKCFA 79; (FACV 1/2016).

71 Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525, Sections 11–12.

72 Guide to Asset Recovery in the Hong Kong Special Administration Region.

vi Enforcement of judgments granted abroad in relation to fraud claims

Hong Kong law has established judgment enforcement rules with respect to judgments granted abroad. The technical process by which such enforcement occurs varies based on where the foreign judgment was granted. Judgments from 15 countries (Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Italy, Israel, Malaysia, the Netherlands, New Zealand, Singapore and Sri Lanka) can be registered in Hong Kong by statute pursuant to the Foreign Judgments (Reciprocal Enforcement) Ordinance.⁷³ Where this Ordinance is applicable, this method of judgment enforcement in Hong Kong tends to be preferable to other routes as it is simpler: essentially, all that is needed is an *ex parte* application to the court, although potential defences include a foreign court's lack of jurisdiction, improper service, procurement of a judgment by fraud, public policy concerns and concerns that the rights under judgment are not vested in the person applying for the enforcement.

Judgments from mainland China are covered by its own ordinance, the Mainland Judgments (Reciprocal Enforcement) Ordinance. This Ordinance is similar to the Foreign Judgments (Reciprocal Enforcement) Ordinance and pertains to the registration of money judgments for disputes arising out of commercial contracts (excluding employment and matrimonial contracts).⁷⁴ The judgments at issue cannot be in respect of a tax, fine or penalty, and defences include those described above with respect to the Foreign Judgments (Reciprocal Enforcement) Ordinance.⁷⁵

Where the above ordinances are not applicable, judgment creditors will need to commence substantive proceedings in Hong Kong by suing on the foreign judgment (and usually applying for summary judgment) to seek recognition of the foreign judgment and realisation of the assets. This tends to require proof that the foreign judgment is a final judgment for a fixed sum and from a competent court.⁷⁶ Defences include lack of jurisdiction, breach of natural justice, fraud and enforcement being contrary to public policy.⁷⁷

vii Fraud as a defence to enforcement of judgments granted abroad

As noted above, a judgment obtained by fraud is a defence to the Foreign Judgments (Reciprocal Enforcement) Ordinance, the Mainland Judgments (Reciprocal Enforcement) Ordinance and common law actions in Hong Kong to enforce a foreign judgment.

VI CURRENT DEVELOPMENTS

i Amended anti-money laundering ordinances

In March 2018, amendments to the Anti-Money Laundering and Anti-Terrorist Financing (Financial Institutions) Ordinance⁷⁸ came into effect, applying statutory customer due diligence and record-keeping requirements to designated non-financial businesses and professions when they engage in specified transactions, and introducing a licensing regime

73 Foreign Judgments (Reciprocal Enforcement) Ordinance, Cap 319.

74 Mainland Judgments (Reciprocal Enforcement) Ordinance, Cap 597.

75 *id.* at Section 5.

76 *id.*

77 *id.* at Section 18.

78 Anti-Money Laundering and Anti-Terrorist Financing (Financial Institutions) Ordinance (Cap 615).

for trust or company service providers.⁷⁹ The Companies Ordinance⁸⁰ was also amended to require Hong Kong-incorporated companies to maintain beneficial ownership information by way of keeping a significant controllers register for inspection upon demand by law enforcement officers.⁸¹

ii Reciprocal recognition and enforcement of judgments in civil and commercial matters between mainland China and Hong Kong

In January 2019, mainland China and Hong Kong signed the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the mainland and Hong Kong Special Administrative Region. The Arrangement furthers continuing efforts by mainland Chinese and Hong Kong courts to strengthen mechanisms to recognise and enforce judgments in civil and commercial matters. Under the Arrangement, the matters considered to be civil and commercial have expanded, but continue to exclude non-judicial, administrative and regulatory matters. The relief at issue can be monetary or non-monetary. This arrangement will take effect when both mainland China and Hong Kong complete the necessary implementing procedures.⁸²

79 Anti-Money Laundering and Counter-Terrorist Financing (Amendment) Ordinance 2018.

80 Companies Ordinance (Cap 622).

81 Companies (Amendment) Ordinance 2018.

82 Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters between the Courts of the Mainland and of the Hong Kong Special Administrative Region.

ABOUT THE AUTHORS

RANDALL ARTHUR

Kobre & Kim

Randall Arthur is a partner in the Hong Kong office of Kobre & Kim, where he concentrates on international judgment enforcement, offshore asset recovery, and insolvency litigation and disputes.

Mr Arthur represents clients in Hong Kong and other jurisdictions in complex fraud matters, with a particular emphasis on identifying and freezing assets in Hong Kong and obtaining other interim relief in aid of local and foreign proceedings. He has considerable experience in tracing, freezing and recovering assets that have been misappropriated as a result of business email compromises and cybersecurity breaches. He also advises on and projects and manages the global enforcement of large judgment and arbitration awards.

In contentious insolvency and bankruptcy proceedings, Mr Arthur acts on behalf of liquidators, receivers, creditors and trustees in, inter alia, assisting with investigations into companies' affairs, obtaining discovery orders, conducting examinations and recovering assets, including through clawbacks and third-party claims. In cross-border matters, he often represents multiple stakeholders in debtor-creditor disputes, and advises appointment-takers, directors and shareholders on insolvency administrations.

JOYCE XIANG

Kobre & Kim

Joyce Xiang is a Hong Kong-based litigator at Kobre & Kim. She counsels Asia-based clients in enforcing large-scale judgments across borders. She is qualified in Hong Kong and New York.

CALVIN KOO

Kobre & Kim

Calvin Koo is a US and Hong Kong-qualified litigator based in the Hong Kong office of Kobre & Kim. Mr Koo focuses his practice on advising clients in large-scale, cross-border judgment enforcement and asset recovery matters, as well as debtor-creditor litigation. He has represented clients across Asia in high-stakes litigation and arbitration.

KOBRE & KIM

ICBC Tower, 6th Floor

3 Garden Road

Central

Hong Kong

Tel: +852 2127 3288

randall.arthur@kobrekim.com.hk

joyce.xiang@kobrekim.com.hk

calvin.koo@kobrekim.com.hk

www.kobrekim.com

an LBR business

ISBN 978-1-83862-434-7