
THE ASSET TRACING AND RECOVERY REVIEW

THIRD EDITION

EDITOR
ROBERT HUNTER

LAW BUSINESS RESEARCH

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This article was first published in The Asset Tracing and Recovery Review - Edition 3
(published in September 2015 – editor Robert Hunter)

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THE ASSET
TRACING AND
RECOVERY
REVIEW

Third Edition

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LAW BUSINESS RESEARCH LTD

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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www.TheLawReviews.co.uk

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Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-909830-69-1

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

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ACKNOWLEDGEMENTS

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

ADVOKATFIRMAN VINGE KB

ALLEN & OVERY LLP

ALLENS

ARENDT & MEDERNACH

BAKER & MCKENZIE LLP

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LAWFIRM POUL SCHMITH

LENNOX PATON

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LMPP ADVOCATES AND COUNSELLORS AT LAW

METIS RECHTSANWÄLTE LLP

Acknowledgements

MICHAEL KYPRIANOU & CO LLC

MOURANT OZANNES

ROGÉRIO ALVES & ASSOCIADOS – SOCIEDADE DE ADVOGADOS RL

ROJS, PELJHAN, PRELESNIK & PARTNERS O.P., D.O.O.

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EDITOR'S PREFACE

'Fraud' is a word that people find easier to use than to define. Partly for this reason, it is difficult for lawyers to summarise the way in which their particular jurisdictions deal with it. Some of the sources of their laws will be domestic and will have evolved over time. Others will be recent international conventions where regard must be had to the decisions of other jurisdictions.

But these difficulties aside, the problems that 'fraud' generates pose unique challenges for the legal system of any country. First, there will be forensic issues: to what lengths should the court go to discover what actually happened? Here different jurisdictions place different priorities on what their courts are for. Some treat the court process as an almost sacrosanct search for truth. The courts of my own jurisdiction tend towards this end of the spectrum. Others regard it as a means of resolving disputes efficiently and providing certainty for the litigants. Often courts in this category allow no witness evidence and no procedure for disclosure of documents, regarding both as disproportionately burdensome for any benefit they might provide.

Second, there is the question of whether the court should mark conduct that is 'fraudulent' as particularly abhorrent, in civil proceedings. All will criminalise fraudulent behaviour, but not all will penalise fraudulent conduct by enhancing the victim's compensation or by depriving the fraudster of arguments that might have been available to them if they had been careless, rather than dishonest.

Third, there is the question of innocent parties: to what extent should victims of fraud be given enhanced rights over 'victims' of ordinary commercial default? In some jurisdictions it is said that victims of fraud part with their assets – at least to some extent – involuntarily while commercial counterparties take risks with their eyes open. Hence, victims of fraud can, in some circumstances, be allowed to retrieve assets from an insolvency before ordinary trade counterparties or 'general creditors' do so.

Lawyers have been mulling over the rights and wrongs of solutions to the problems that fraud presents for centuries. They will never stop doing so. The internationalisation of fraud in the past 40 years or so, however, has meant that they argue about these problems not only with lawyers of their own country, but also with lawyers from other jurisdictions.

Rarely nowadays will a fraudster leave the proceeds of fraud in the jurisdiction in which they were stolen. The 1980s and early 1990s saw quite pronounced attempts by fraudsters to 'arbitrage' the various attitudes and priorities of different jurisdictions to retain what they had taken. Perhaps the highest-profile example of this was the use of jurisdictions in which banking secrecy was a priority as a conduit to which the proceeds of fraud would be transmitted. Another well-known strategy was the use of corporate devices and trusts as a means of sheltering assets from those who deserved to retrieve them.

A number of factors have served to make this more difficult. The growth of international conventions for the harmonisation of laws and enforcement of judgments is clearly one. Perhaps more notable, however, has been the international impetus to curb money laundering through criminal sanctions. These have, however, been first steps, albeit comparatively successful ones. There is still a huge amount to be done.

I have specialised in fraud litigation – virtually exclusively – since the late 1980s. My chosen area has brought me into contact with talented lawyers all over the world. I remain as fascinated as I was at the outset by the different solutions that different countries have to the problems fraud creates. I am sometimes jealous and sometimes frustrated when I hear of the remedies for fraud that other jurisdictions offer or lack. When I talk to lawyers who enquire about my own jurisdiction, I frequently see them experiencing the same reactions too. The comparison is more than a matter of mere academic interest. Every month brings some study by the government or private sector tolling the cost of fraud to the taxpayer or to society in general. My own interest goes beyond ordinary 'balance sheet' issues. When I deal with fraudsters, particularly habitual or predatory ones, I still retain the same appalled fascination that I experienced when I encountered my first fraudster and I share none of the sneaking admiration for them that I sometimes see in the media; they are selfish, cruel and immature people who not only steal from their victims, but also humiliate them.

No book sufficiently brief to be useful could ever contain all the laws of any one jurisdiction relating to fraud. The challenge, unfortunately, for a contributor to a book like this lies as much in what to exclude as what to say. This guide contains contributions from eminent practitioners the world over, who have, on the basis of their experience, set out what they regard as critical within their own jurisdictions. Each chapter is similarly structured for ease of reference with similar headings to enable the reader to compare remedies with those in other jurisdictions, and each contributor has been subject to a strict word limit. Despite there being a huge amount more that each would have been perfectly justified in including, I still believe this book to be an enormous achievement.

Once again, we have some of the foremost experts in the area from an impressive array of jurisdictions contributing. I have often thought that true expertise was not in explaining a mass of details but in summarising them in a meaningful and useful way. That is exactly the skill that a work like this requires and I believe that this edition will continue the high standard of the previous two. I have come across a number of the authors in practice and they are unquestionably the leaders in their fields. I hope that other readers will find the work as useful and impressive as I do.

Robert Hunter

Herbert Smith Freehills LLP

London

September 2015

Chapter 12

HONG KONG

Randall Arthur and Calvin Koo¹

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, among other things, 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 and/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

¹ Randall Arthur is a partner and Calvin Koo is an associate at Kobre & Kim.

Data (Privacy) Ordinance, and each may affect 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, Organized Crime and Triad Bureau and the Joint Financial Intelligence Unit) or the Independent Commission Against Corruption (ICAC) 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., parent of a minor). Legislation relevant to fraud-related criminal asset recovery includes the Organized and Serious Crimes Ordinance, which provides for 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 of 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 the fraud

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

- a* Fraud, which generally involves some manner of deceit practised by the defendant, may take several forms, such as fraudulent misrepresentation, deceit, 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.
- b* 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.

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.

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

Against persons who assisted in the commission of fraud

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

- a Conspiracy, whereby there is an agreement between the conspirator and the fraudster, with intent to injure the plaintiff, acts carried out pursuant to that agreement and intention, and damage to the victim.⁷
- b Dishonest assistance, whereby the defendant dishonestly assists with another's underlying breach of trust or fiduciary duty, with resulting loss.⁸

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 which 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

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.

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 e.g., 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.

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, the evidence 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 the fraud

Criminal claims related to fraud typically arise under one of the following ordinances:

- a* Theft Ordinance, which covers the dishonest appropriation of property belonging to another, including through fraud, obtaining property by deception, and obtaining a pecuniary advantage by deception.¹² Where goods have been stolen and a person is convicted of any offence with reference to the theft, the court may order restitution.¹³
- b* Crimes Ordinance, which consolidates a number of penal enactments and includes the making of fraudulent entries in bank books.¹⁴ The Criminal Procedure Ordinance provides for restitution where any person is convicted of an indictable offence (i.e., more serious offences) such as this.¹⁵

Against persons who assisted in the commission of fraud

Criminal claims against persons who assist in fraud include:

- a* Conspiracy, which the Crimes Ordinance identifies as a person agreeing with any other person that a course of conduct shall be pursued which, if carried out as intended, amounts to or involves the commission of an offence, is a statutory violation as well as a common law violation.¹⁶ The agreement itself is the crime.
- b* Aiders, abettors and accessories, which the Criminal Procedure 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.¹⁷

Against third parties who may receive or help transmit the proceeds of fraud

The Organized and Serious Crimes Ordinance, among other things, creates offences relating to the proceeds of crime. For example, a person who knows, or has reasonable grounds to believe, that property in whole or in part directly or indirectly represents a

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 Theft Ordinance, Cap 210, Sections 16A-18D.

13 *Id.* at Section 30.

14 Crimes Ordinance, Cap 200, Section 85.

15 Criminal Procedure Ordinance, Cap 221, Section 84.

16 Crimes Ordinance, Cap 200, Section 159A.

17 Criminal Procedures Ordinance, Cap 221, Section 89.

person's proceeds of an indictable offence, such as those mentioned above, commits an indictable offence themselves, which is subject to a restitution order.¹⁸

Standards of proof

For criminal actions, the prosecution bears the burden of establishing the charges beyond reasonable doubt.¹⁹

ii Defences to fraud claims

Civil fraud claims must be brought within six years from 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.²⁰ 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.²¹ Such innocent third parties instead possess defences to claims against it 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 likely includes 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 the offence).²²

III SEIZURE AND EVIDENCE

i Civil actions

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

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

19 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.

20 Limitation Ordinance, Cap 347, Section 4.

21 *Id.* at Section 26.

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

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 such 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 the 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: (1) a good arguable case on the underlying merits of the action, (2) the defendant has assets within the jurisdiction, (3) a real risk that defendant will dissipate the assets, and (4) the balance of convenience is in favour of granting the application.²³ *Mareva* injunction applications may initially be made *ex parte*, but ultimately the defendant will have an opportunity to challenge and set aside the order.²⁴ 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.²⁵ A failure to make full and frank disclosure may result in the injunction being discharged.²⁶ 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.²⁷ The court may also require the plaintiff to fortify this undertaking by making a payment into court or providing some other type of security (such as a bank guarantee).²⁸ 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.²⁹

Anton Piller order

Where plaintiffs are concerned that defendants may hide or destroy evidence, plaintiffs may seek an injunction requiring the defendant to permit the plaintiff to enter the

23 Sweet & Maxwell, *Hong Kong Civil Procedure*, 2015, 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, 671; 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.

24 Sweet & Maxwell, *Hong Kong Civil Procedure*, 2015, 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, 673.

25 *Id.* at 29/1/71 Full and Frank Disclosure, Balance of Convenience, 673.

26 *Id.*

27 *Id.* at 29/1/20 Introduction, 657.

28 *Id.* at 29/1/24 Fortifying undertaking, 658.

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

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 destruction of evidence. The plaintiff must establish that (1) there is a strong *prima facie* case for a cause of action, (2) the potential or actual damage to the plaintiff must be very serious, (3) there must be clear evidence that the defendants possess the items at issue, and (4) that there is a real likelihood (more than a mere possibility) that defendants might destroy such material.³⁰ As with the *Mareva* injunction, the application may be made *ex parte* with a full and frank disclosure,³¹ but is subject to defendant's later opportunity to move to set aside the order.³²

Prohibition against debtors from 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 the debtor from leaving Hong Kong, thus ensuring the debtor cannot escape to a more judgment-proof jurisdiction.³³ 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.³⁴ 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.³⁵

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 judgment, is about to dispose of property.³⁶ In such a circumstance, the plaintiff may apply to the court for an order requiring the defendant to provide security sufficient to satisfy any judgment that may be rendered against him or her in the action.³⁷ Failing provision of such security, the court may direct any property of the defendant to be attached as security.³⁸

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

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

32 Sweet & Maxwell, *Hong Kong Civil Procedure*, 2015, 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, 684; 29/8/32 Setting aside and discharge of orders and appeals, 687.

33 Rules of High Court, Cap 4A (O.44A, r.2).

34 *Id.*

35 *Id.*

36 *Id.* at r.7.

37 *Id.*

38 *Id.*

Appointment of 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.³⁹ The receiver may then realise and distribute such assets among victims of the fraud.⁴⁰ 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.⁴¹

Obtaining evidence

Prior to securing assets and proceeds, potential plaintiffs in civil proceedings may need more information and evidence about such 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.⁴² Parties are to serve lists of such documents within 14 days after the pleadings in the action are closed.⁴³ Outside of 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 which would otherwise be 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 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 to reveal from whom the funds were obtained, and any documentation evidencing that transfer. The plaintiff may then take this information and use it as a basis of a cause of action against a defendant he or she can now identify. In order to obtain such an order the proposed plaintiff must establish that (1) there is a *prima facie* case against the unknown alleged wrongdoer, (2) the target of the order was involved in some way in the matter, (3) the target of the

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

40 Id.

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

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

43 Id.

order must be the only practical source of information available, (4) the target will be compensated for his or her expenses in complying with the order, and (5) the public interest in disclosure outweighs privacy concerns.⁴⁴

Evidence from banks

A banker's 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.⁴⁵

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.⁴⁶ 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.

ii Criminal actions

With respect to criminal matters, law enforcement 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.⁴⁷ Prosecutors will likely 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.⁴⁸ Where such a restraint order is in place, the court may appoint a receiver to take possession of any realisable property or otherwise manage or deal with

44 Sweet & Maxwell, *Hong Kong Civil Procedure*, 2015, 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, 551–552.

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

46 Evidence Ordinance, Cap 8, Section 21.

47 Police Force Ordinance, Cap 232.

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

such property.⁴⁹ In addition, an authorised officer may also seize restrained property to prevent its removal from Hong Kong.⁵⁰

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, which has the effect of securing payment to the Hong Kong government backed by the property charged.⁵¹ Such an application may be made *ex parte*, but is subject to those affected by it applying for its discharge.⁵²

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 2012.⁵³ 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.⁵⁴

Separately, Hong Kong's Banking Ordinance addresses fraudulent activity by making fraudulent inducement to make a deposit a basis for a claim of fraud.⁵⁵

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.⁵⁶ In addition, a liquidator or trustee may challenge the validity of unfair preference transfers, which occur when an insolvent

49 Id.

50 Id.

51 Id. at Section 16.

52 Id.

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

54 Id., Organized and Serious Crimes Ordinance, Cap 455, Section 25A.

55 Banking Ordinance, Cap 155, Section 93.

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

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.⁵⁷ The applicable time period for these unfair preference transfers is two years prior to the commencement of the winding-up if the creditors are ‘associates’ (such as directors or employees), or six months for any other creditors.⁵⁸ 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 of his or her property, make material misstatements or omissions, fraudulently convey property, or otherwise act in ways designed to intentionally frustrate the insolvency process.⁵⁹

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, among other things, includes the award having been fraudulently obtained.⁶⁰

iv Fraud’s effect on evidentiary rules and legal privilege

Hong Kong law respects a 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.⁶¹

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

With respect to the 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.⁶² Second, Hong Kong courts review whether a defendant was effectively served with originating process in Hong Kong.⁶³ Third, in cases where service is not possible or applicable in Hong Kong, Hong Kong courts examine whether

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

58 Id.

59 Bankruptcy Ordinance, Cap 6, Section 129.

60 Arbitration Ordinance, Cap 509, Sections 99–102 & Schedule 2.

61 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.

62 Graeme Johnston, *The Conflict of Laws in Hong Kong*, Second Edition, Sweet & Maxwell, 2012, [3] Jurisdiction, [3.001] Overview, 67.

63 Id.

the court has jurisdiction to grant leave for service outside of Hong Kong.⁶⁴ And fourth, Hong Kong courts evaluate the appropriateness of exercising jurisdiction in a given circumstance (e.g., issues of *forum conveniens*).⁶⁵

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, like many commonwealth jurisdictions, apply *lex causae* principles – principles that evaluate the proper applicable law to a given issue.⁶⁶ In fraud cases, this may require 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.⁶⁷ 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 Hong Kong courts for a *Norwich Pharmacal* order in support of their contemplated proceedings abroad.⁶⁸ The general requirements for such an application are discussed in Section III.ii, *supra*.

iii 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, *supra*, are available to victims of fraud provided that the requisite elements are met. For example, victims may wish to pursue a worldwide *Mareva* injunction to freeze defendant's assets globally. A plaintiff that successfully secures this assistance can continue pursuing foreign proceedings without having concurrent proceedings in Hong Kong.

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

64 Id.

65 Id.

66 Id. at 2.008.

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

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

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

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.⁷⁰

iv 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 can be registered in Hong Kong by statute pursuant to the Foreign Judgments (Reciprocal Enforcement) Ordinance – these countries are Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Italy, Israel, Malaysia, Netherlands, New Zealand, Singapore and Sri Lanka.⁷¹ 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 the judgment by fraud, public policy concerns, and 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 registration of money judgments for disputes arising out of commercial contracts (excluding employment and matrimonial contracts).⁷² 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.⁷³

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 assets. This tends to require proof that the foreign judgment is a final judgment, for a fixed sum, and from a competent court.⁷⁴ Defences include lack of jurisdiction, breach of natural justice, fraud, and where enforcement is contrary to public policy.⁷⁵

v 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, Mainland Judgments (Reciprocal Enforcement) Ordinance, and common law actions in Hong Kong to enforce a foreign judgment.

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

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

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

73 *Id.* at Section 5.

74 *Id.*

75 *Id.* at Section 18.

VI CURRENT DEVELOPMENTS

A 2015 Hong Kong Court of Appeal decision has bolstered Hong Kong's 'deliberate policy of restricting the rights of appeal' with regard to enforcement of arbitral awards.⁷⁶ In so doing, the Court of Appeal has strengthened the confidence judgment creditors should have in being able to enforce in Hong Kong judgments arising from foreign arbitral awards. In the Court of Appeal's view, courts should have a limited role in respect of enforcement of arbitration awards, thus acceding to the presumed intent of the parties engaged in arbitration to resolve a matter quickly and more cost-effectively than a traditional claim before a court.⁷⁷ While the Court of Appeal assumed without formally deciding that it retains a right to review a lower court decision that effectively upholds a judgment award by denying leave to appeal, the threshold is high and focuses on procedural unfairness rather than the underlying merits of the matter.⁷⁸ Therefore, while fraud in procuring an arbitral award may still be grounds for appeal or an application to set aside, awards that resolve claims that sound in fraud in a procedurally appropriate manner are likely to be enforced in Hong Kong.

76 廣東長虹電子有限公司 *v. Inspur Electronics (HK) Ltd.* [2015] HKCU 684 CA.

77 *Id.*

78 *Id.*

Appendix 1

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Randall Arthur is a partner at Kobre & Kim, an international litigation firm with offices in Asia, the Caribbean, US and Europe. Mr Arthur focuses his practice on insolvency litigation, international judgment enforcement and offshore asset recovery. He has extensive experience in the identification and freezing of assets in Hong Kong in aid of Hong Kong and foreign legal proceedings, often involving issues relating to complex fraud. Mr Arthur is also an accomplished authority in the contentious insolvency and bankruptcy arena where he regularly handles cross-border matters on behalf of multiple stakeholders, including liquidators, receivers, trustees, financial institutions, creditors and shareholders.

Mr Arthur is a frequent speaker and lecturer on topics related to contentious bankruptcy and insolvency, fraud and asset tracing and international judgment enforcement. He has presented at industry events such as INSOL Shanghai and Singapore as well as C5 Fraud conferences in Miami and Geneva and Asia Legal Business conferences, among others.

Mr Arthur has received numerous accolades from *Chambers Asia-Pacific* and *Legal 500*, where he is noted as being ‘an extremely competent, very knowledgeable insolvency practitioner, with considerable technical expertise’.

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