# THE ASSET TRACING AND RECOVERY REVIEW

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**Chapter 22**

# UNITED STATES

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## I OVERVIEW

This chapter focuses on asset tracing and recovery, which arises in various contexts, including fraud, insolvency and enforcement of judgments. Victims of fraud in the United States can look to both law enforcement and private actions for compensation for the wrongs they suffered. Cross-border fraud victims, both US citizens and non-citizens, may look to the United States courts if the fraudulent conduct – or the fraudster – has a sufficient connection to the United States.

As the world's largest economy, the United States, unsurprisingly, is home to many of the world's largest companies, financial institutions, investment firms, accounting firms and law firms. Cities like New York, Washington DC, Miami, Chicago, Los Angeles, Houston and San Francisco, for example, host a number of these business institutions, which generate or facilitate substantial international and domestic financial transactions. As might be expected, many international business and financial transactions have portions or components that touch the United States in one way or another. For example, virtually all US dollar-based transactions go through the US correspondent banking system, most often in New York. As a result, these transactions often fall within the jurisdiction of the United States courts.

The United States is a common-law jurisdiction with a dual-court system: federal courts and state courts in each state. Both federal and state courts offer an independent and skilled judiciary, broad discovery and effective mechanisms for enforcing judgments. Unlike a number of other jurisdictions, there are no general bank secrecy laws. This, coupled with the US approach to broad discovery, provides fraud victims with a number of tools to uncover the structure and modality of the fraud, follow transactions and trace the movement of money, and discover the location of assets.

As detailed below, there are a number of causes of action that fraud victims can raise to seek recovery or compensation from either the fraudsters themselves or those that aided and abetted the fraud. In general, these claims can be brought in either state or federal courts, though in some instances a federal statute may require a federal court venue. The substantive claims available, when coupled with the jurisdictional reach of the US courts, and the broad discovery those courts allow, provide a fraud victim with ample opportunity to develop a meritorious claim. Importantly, the United States legal system will provide both provisional and final remedies, such as attaching and seizing assets, freezing accounts and offering other types of equitable and injunctive relief.

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The United States authorities and the United States courts will assist foreign courts, arbitral tribunals, foreign authorities, and foreign civil parties, even if the plenary proceeding is occurring elsewhere. Parties to foreign cases may obtain US discovery and provisional remedies that secure US assets pending the outcome of the foreign proceeding. Likewise, US courts will often help enforce foreign judgments or arbitral awards. Accordingly, fraud victims and others seeking to trace and recover assets – regardless of whether the plenary action is in the United States – can avail themselves of the US legal system to help their effort.

## II LEGAL RIGHTS AND REMEDIES

### i Civil and criminal remedies

#### *Racketeer Influenced and Corrupt Organizations Act*

The Racketeer Influenced and Corrupt Organizations Act (RICO) provides criminal and civil remedies for victims of organised crime and other criminal schemes.[2] RICO claims must meet stringent technical requirements that are beyond the scope of this chapter. However, a civil RICO action need not be based on a prior criminal conviction. Accordingly, a plaintiff in a civil RICO case can establish a claim by a preponderance of the evidence, rather than the higher 'beyond a reasonable doubt' standard that applies in the criminal context. While civil RICO actions hold obvious appeal for plaintiffs, as they offer the chance to recover treble damages, costs, and attorneys' fees, litigants should be cautioned that courts are sceptical of attempts to shoehorn ordinary business disputes into RICO.[3] RICO applies to long-term patterns of criminal activity, not to 'every fraudulent commercial transaction'.[4] Many courts require a plaintiff in a civil RICO action to file a RICO case statement that will be treated as an extension of the complaint.[5] The RICO case statement requires that the pattern of racketeering activity be described in detail.

Under RICO, defendants who engage in a pattern of racketeering activity or collection of unlawful debts, and who participate in an enterprise that affects interstate or foreign commerce, can be held liable to those who suffer damage to their business or property. 'Racketeering activity' includes a variety of violations of state and federal laws enumerated in 18 USC Section 1961(1). An 'enterprise' includes any individual, partnership, corporation, association or other legal entity, and any group of individuals associated in fact although not a legal entity.[6] To be liable under RICO, a person must be related to the alleged enterprise in one of the four ways enumerated in the statute, 28 USC Section 1962.[7]

Courts have held that RICO does not apply to conduct outside the United States.[8] There is no bright-line test for determining whether a RICO claim is impermissibly extraterritorial. The US Supreme Court recognised that this question is fact-intensive. In *RJR Nabisco Inc v. The European Community*,[9] the Court held that to bring a civil RICO action, a plaintiff must 'allege and prove a domestic injury to business or property and [RICO] does not allow

2 See 8 USC Sections 1961–1968.

3 See, e.g., *McDonald v. Schencker*, 18 F.3d 491, 499 (7th Cir. 1994).

4 *Calcasieu Marin Nat'l Bank v. Grant*, 943 F.2d 1453, 1463 (5th Cir. 1991).

5 *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 n.3 (1st Cir. 1991).

6 See *Boyle v. United States*, 556 U.S. 938, 944–45 (2009).

7 See 28 USC Section 1962.

8 See, e.g., *Norex Petroleum Ltd v. Access Industries Inc*, 631 F.3d 29 (2d Cir 2010).

9 See *RJR Nabisco Inc. v. European Community*, 136 S.Ct. 2090 (2016).

recovery for foreign injuries.'[10] In this case, the European Community brought a civil RICO action against US tobacco companies alleging money laundering schemes and other criminal acts in association with various international organised crime groups. Through the alleged scheme, smugglers trafficked illegal drugs into Europe. The proceeds of the drug sales were used to pay for large shipments of RJR cigarettes into Europe. The Court found that these acts violated RICO, and that RICO's predicate acts applied extraterritorially, but it dismissed the case because the injury was not domestic. To be considered sufficiently domestic, a foreign RICO enterprise 'must engage in, or affect in some significant way, commerce directly involving the United States. Enterprises whose activities lack that anchor to US commerce cannot sustain a RICO violation.'[11]

The Court did, however, recognise that 'disputes may arise as to whether a particular alleged injury is 'foreign' or 'domestic",[12] leaving RICO's extraterritorial application an area for further litigation. Lower courts have begun to grapple with the thorny issue of whether foreign plaintiffs have sufficiently alleged domestic injury. For example, the Second Circuit Court of Appeals found that using a US bank account to facilitate property theft outside of the US does not, by itself, constitute a 'domestic injury'.[13] The Third Circuit Court of Appeals found that a plaintiff who lived and provided services (and otherwise acted) in China who alleged loss of goodwill and prospective US clients had not articulated an injury sufficiently domestic to support a RICO claim.

The message is clear: to recover under RICO, a foreign entity will have to show that it suffered an injury to its business or property in the US.

### *Common-law claims*

Various common-law claims are available to fraud victims to recover stolen assets from the perpetrator and those who assisted the perpetrator or benefited from the fraud. The types of claims one brings under common law depend on the type of fraud and the evidence in the victims' possession at the time they filed the complaint. Common-law claims are creatures of state law. However, while there are some differences from state to state, the elements are quite similar across US jurisdictions.

### *Fraud*

The elements of a common law fraud claim are (1) a misrepresentation or a material omission of fact (2) which was false and known to be false by the defendant (scienter), (3) made for the purpose of inducing the other party to rely upon it (intent to defraud), (4) justifiable reliance of victim on the misrepresentation or material omission, and (5) injury.[14] Though these may vary slightly from jurisdiction to jurisdiction, the elements will be quite similar across the states.[15] Under federal and state law, fraud must be pleaded with particularity, though there is usually an exception for information that would be solely within the wrongdoer's knowledge (i.e., intent).[16]

10 ibid. at 2111.

11 ibid. at 2105.

12 ibid. at 2011.

13 *Bascunan v. Elsaca*, 874 F.3d 806, 814 (2d Cir. 2017).

14 *Pasternack v. Lap. Corp. of Am. Holdings*, 27 N.Y.3d 817, 827 (2016).

15 See, e.g., *AREI II Cases*, 216 Cal. App 4th 1004, 1021–22 (Cal. Ct. App. 2013).

16 F.R.C.P. 9(b).

There are two ways to measure fraud damages:

*a* the out-of-pocket rule, which compensates for the actual pecuniary loss sustained as a direct result of the wrong; and

*b* the benefit-of-the bargain rule, which compensates the victim for what they would have had had the fraud not been committed.[17]

The out-of-pocket rule is prevalent in New York. California agrees, though it applies the harsher benefit-of-the bargain rule when the fraud has been perpetrated by a fiduciary.[18] Punitive damages may be recovered in certain circumstances, like when the fraud is gross, wanton, wilful or involves morally culpable conduct.[19]

The limitations periods for fraud claims vary across the 50 states, but in most cases will be tolled for discovery.

*Aiding and abetting fraud*

As against those that assisted the perpetrator, the victim can bring an aiding and abetting claim. Necessary for a claim of aiding and abetting common-law fraud are:

*a* the existence of a fraud;

*b* the defendant's knowledge of the fraud; and

*c* the defendant's substantial assistance in advancing the fraud's commission.[20]

Like fraud, aiding and abetting fraud must be pleaded with particularity. Damages for aiding and abetting fraud are similar to those for fraud.

*Civil conspiracy*

Conspiracy is a concept closely allied with aiding and abetting and is available in some jurisdictions. A conspiracy generally requires an agreement and an overt act causing damage. Aiding and abetting requires no agreement, but simply assistance. The common basis for liability for both conspiracy and aiding and abetting, however, is concerted wrongful action.[21] While this tort exists in California, in New York, for example, there is no right of action for civil conspiracy.[22]

*Conversion*

Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are:

*a* the plaintiff's ownership or right to possession of the property at the time of the conversion;

*b* the defendant's conversion by a wrongful act or disposition of property rights; and

*c* damages.

17 *Lama Holding Co. v. Smith Barney Inc*., 88 N.Y. 2d 413, 421 (1996); *Auble v. Pacific Gas & Elec. Co*., 55 F. Supp. 2d 1019 (N.D. Cal. 1999).

18 *Fragale v. Faulkner*, 110 Cal. App. 4th 229, 235–239 (Cal. Ct. App. 2003).

19 *Giblin v. Murphy*, 73 N.Y.2d 769, 772 (N.Y. 1988).

20 *Lerner v. Fleet Bank*, N.A., 459 F.3d 273, 292 (2d Cir. 2006); *Fiol v. Doellstedt*, 50 Cal. App. 4th 1318, 1325–26 (1997).

21 *Janken v. GM Hughes Electronics*, 46 Cal. App. 4th 55, 78 (1996).

22 *Niagara Mohawk Power Corp. v. Testone*, 272 A.D.2d 910, 911 (4th Dept 2000).

It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his or her own use.[23] Although it is most often applied to chattel, it may be used in the case of stolen money if that money is specifically identifiable.[24]

The measure of damages in a conversion action is the value of the property at the time of the conversion.[25] Appreciation in the value of the property may be allowed if proper to make the plaintiff whole.[26] Punitive damages are available to redress egregious conduct.

The statute of limitations for conversion is generally three years, though it certainly can differ across US states and territories.

*Unjust enrichment and money had and received*

These are equitable claims available to a party when another has unfairly benefited at such party's expense. The elements for a claim of unjust enrichment are:

*a* receipt of a benefit;

*b* retention of the benefit at the expense of another; and

*c* under principles of equity and good conscience, the defendant should not be permitted to keep the money.[27]

A claim for money had and received has similar elements.[28] Unjust enrichment and money had and received are often asserted as catch-all claims or when conduct does not fall squarely within a cause of action listed above but a wrong has clearly been committed and needs to be redressed. Punitive damages are generally not available for these claims.

The statute of limitations for these claims varies; in California it is three years, and it is six years in New York.

*Duty-based claims*

If it can be established that the defendant has a duty to the plaintiff (e.g., fiduciary duty, duty of care), other claims can be brought including breach of fiduciary duty, aiding abetting breach of fiduciary duty, negligence, and gross negligence, among others. For most of these claims, the elements are a breach of a duty and a resulting injury. For negligence there must also be causation, namely, the breach was the proximate cause of the aggrieved party's damages.[29]

23 *Oakdale Village Group v. Fong*, 43 Cal. App. 4th 539, 543–544 (1996).

24 *770 Owners Corp. v. Spitzer,* 2009 WL 30187233 (N.Y. Sup. Sept. 21, 2009); *Home Servs. Network v. German*, 2012 Cal. App. Unpub. LEXIS 1272, at *17 (Ct. App. Feb 22, 2012).

25 *Long Playing Sessions, Inc. v. Deluxe Laboratories, Inc.*, 129 A.D.2d 539, 540 (1st Dep't 1987).

26 *Matter of Rothko's Estate*, 43 N.Y.2d 305 (1977).

27 *Prakashpalan v. Engstrom, Lipscomb & Lack*, 223 Cal. App. 4th 1105, 1132 (2014). *Whitman Realty Group, Inc. v. Galano*, 838 N.Y.S.2d 585, 588 (2d Dep't 2007)).

28 *Matter of Estate of Witbeck*, 245 A.D.2d 848, 850 (3rd Dep't. 1997); see also *Board of Educ. of Cold Spring Harbor Cent. School Dist. v. Rettaliata*, 78 N.Y.2d 128, 138 (N.Y. 1991).

29 *Thomas v. U.S. Soccer Federation, Inc.*, 236 A.D.2d 600, 601-02 (2d Dep't 1997); *Kush v. City of Buffalo*, 59 N.Y.2d 26, 32–33 (1983).

***Statutory claims***

*Fraudulent conveyance*

Most states have adopted the Uniform Fraudulent Transfer Act (UFTA) and have incorporated the provisions of the act into their local statutes.[30] The purpose of the Act is to prevent debtors from putting assets outside of the reach of creditors and allows creditors to retrieve the property fraudulently transferred from third parties.[31] Under the UFTA, when transfers are made without fair consideration that render the debtor insolvent or undercapitalised, they are considered constructively fraudulent and can be unwound. Alternatively, the aggrieved creditor must demonstrate 'intent to defraud hinder, delay either present or future creditors.' Because intent is difficult to prove, fraudulent intent is often demonstrated with badges of fraud, namely, circumstances that are associated with fraud. Among such circumstances are:

*a* a close relationship between the parties;
*b* a questionable transfer not in the usual course of business;
*c* inadequacy of the consideration;
*d* the transferor's knowledge of the creditor's claim and the inability to pay it; and
*e* retention of control of the property by the transferor after the conveyance.[32]

A transfer made with actual intent to defraud may be unwound regardless of whether fair consideration was provided. In most jurisdictions, the statute of limitations for this claim is four years.

*California Penal Code Section 496*

California Penal Code Section 496(c) provides a private right of action for 'any person who has been injured' by a wrongdoer's knowing receipt of stolen property. A prevailing plaintiff can recover three times the amount of actual damages, costs of suit and reasonable attorney's fees. In *Bell v. Feibush*,[33] the California Court of Appeals reiterated the availability of treble damages to an injured party and held that a criminal conviction under Section 496 for receipt of stolen property was not a prerequisite to recovery of treble damages. The court also held that an act constituting theft also included theft by false pretences. The statute of limitations for this claim is three years.

**ii Defences to fraud claims**

As detailed above, fraud claims are brought in the US pursuant to state law and follow the common law developed by the courts. You may bring a fraud action in federal or state court, and unless there is statutory cause of action, the applicable state common law will still be followed.

Although the specific elements of fraud claims identified above may vary slightly from state to state, the principles required for the claim are largely the same. Succeeding on a fraud claim is fact intensive and requires extensive proof. There are both threshold and merit defences to a fraud claim in the US.

30 See, e.g., Cal. Civ. Code Sections 3439–3439.12; N.Y. Debtor & Creditor Law, Article 10 Sections 271–280.
31 *Is v. Reserva*, 2010 Cal. App. Unpub. LEXIS 8273, at *17–19 (Ct. App. Oct. 20, 2010).
32 *Wall Street Assocs. v. Brodsky*, 257 A.D.2d 526, 529 (1st Dept. 1999).
33 212 Cal App. 4th 1041 (2013).

The threshold defences include asserting that the claim is time barred or that the plaintiff has failed to meet the pleading burden. The time within which a fraud claim must be brought varies for each state. In California, for example, a fraud claim must be brought within three years.[34] Most states, however, recognise an equitable tolling of this time limitation based on when the plaintiff could have or should have discovered the fraud, often referred to as the 'discovery rule'.[35] In that instance the limitations period does not begin to run until the reasonable discovery of the fraud. Proving when the fraud could have been discovered is often a very fact intensive inquiry in and of itself. Some states, like New York, have the discovery rule built into the statute, stating that an action for fraud must be commenced within 'the greater of six years from the date the cause of action accrued or two years from the time the plaintiff discovered the fraud, or could with reasonable diligence have discovered it'.[36]

A claim for fraud can also be defeated if the plaintiff does not satisfy the heightened pleading standard required under both federal and state law. Generally, federal law requires that claims be set forth with a short and plain statement demonstrating that the plaintiff is entitled to relief. But a party bringing a fraud claim 'must state with particularity the circumstances constituting fraud'.[37] This heightened standard is followed by the states as well.[38] This means that fraud cannot be pleaded generally, but that the facts constituting the fraud must be specifically alleged, and every element of the cause of action for fraud must be alleged factually and with particularity.[39] This requirement necessitates pleading facts that 'show how, when, where, to whom, and by what means the representations were tendered'.[40]

If the fraud claim survives the threshold defences, the specifically plead elements can be attacked on the merits. The court may apply various standards in its analysis based on the underlying facts of the claim. For example, when determining whether the plaintiff's reliance on the material misrepresentation was justified, courts are likely to consider the sophistication of the plaintiff.[41] This element also tends to shift the focus of the analysis from the defendant's acts and forces the plaintiff to show that they acted reasonably and prudently under the circumstances. A defendant may also seek to prove that the statement was true or that their own sophistication was such that they did not appreciate that it was false. Simply pleading that a party intentionally misled the defendant would not be sufficient. The plaintiff

34 Cal. Civ. Proc. Section 338(d).

35 See *Creditors Collection Serv. v. Castaldi*, 45 Cal. Rptr. 2d 511 (Cal. Ct. App. 1995).

36 New York Civil Practice Law & Rules (CPLR) 213(8).

37 Fed. R. Civ. P. 8 and 9(b).

38 See *Tenet Healthsystem Desert, Inc. v. Blue Cross of California*, 199 Cal. Rptr. 3d 901, 915 (Cal. Ct. App. 2016); *see also* CPLR 3016(b) (For a cause of action based on fraud in New York, the circumstances constituting the wrong shall be stated in detail.).

39 *Committee on Children's Television, Inc. v. General Foods Corp*., 35 Cal.3d 197, 216 (1983).

40 *Lazar v. Superior Court,* 909 P.2d 981 (1996). There can be an even higher pleading standard for a fraud claim against a corporate defendant where the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written'. ibid.

41 *Basis Yield Alpha Fund Master v. Stanley*, 136 A.D.3d 136, 141 (1st Dept 2015); *DDJ Mgt., LLC v. Rhone Group L.L.C.*, 15 N.Y.3d 147, 154 (2010).

must show that the party knew the representation was false.[42] Finally, a defendant may also seek to show that any damages suffered by the plaintiff cannot be directly linked to the material misrepresentation.[43]

## III SEIZURE AND EVIDENCE

### i Securing assets and proceeds

#### *Prejudgment restraint of assets*

Many US jurisdictions provide a mechanism to secure assets pending the outcome of a litigation, though the procedure to do so varies somewhat across the states. Termed a pre-judgment attachment, it is effectively an order of a court placing a lien on the defendants' property within the state and temporarily restraining a defendant from dissipating assets.[44] This increases the likelihood of enforcing the plaintiff's eventual judgment.

Though US law does not provide for a worldwide asset freeze like a *Mareva* injunction,[45] a federal court may use Federal Rule of Civil Procedure 64 to issue injunctive relief, including the freezing of assets, by incorporating the procedures of the state in which the property is located, provided that said state allows for prejudgment attachment.[46]

It is important to note that prejudgment attachment is considered a drastic remedy, and a significant showing must be made before it is granted (as further discussed below). Even if such a showing is made, however, a court may still in its discretion deny it.[47]

In New York, the provisions outlining the procedure to obtain a prejudgment attachment are set forth in Article 62 of the Civil Practice Law & Rules (CPLR). To obtain an order of attachment,[48] the plaintiff must demonstrate:

*a* that it is seeking a money judgment;[49]

*b* probability of success in the merits (similar to what is required for injunctive relief);[50] satisfaction of one of the following five elements of CPLR 6201:[51]

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42 *Hauspie v. Stonington Partners, Inc.*, 945 A.2d 584, 588 (Del 2008).

43 See *Connaughton v. Chipotle Mexican Grill, Inc.,* 135 A.D.3d 535, 538 (1st Dept. 2016).

44 A pre-judgment attachment, rather than an injunction, is the proper remedy to prevent defendant from dissipating assets when those assets are not the subject of the lawsuit. *Polish Am. Resource Corp. v. Byrczek,* 270 A.D.2d 96 (1st Dept. 2000) ('[I]t was error to grant injunctive relief preventing defendant from disposing of personally owned stock that has no apparent relationship to the action on the ground that otherwise a likely judgment in favour of plaintiff will be uncollectible. An attachment, not an injunction, is the appropriate remedy for securing a potential judgment with property that is not the subject of the action.').

45 *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308 (1999).

46 Fed. R. Civ. P. 64 ('At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.); *United States ex rel. Rahman v. Oncology Assocs.*, 198 F.3d 489, 501 (4th Cir. 1999).

47 *Siegel*, N.Y. Prac. Section 317; *J.V.W. Inv. Ltd. v. Kelleher*, 837 N.Y.S.2d 650, 651 (1st Dep't 2007).

48 CPLR 6212.

49 *Siegel*, N.Y. Prac.Section 314.

50 *Trump v. Cheng*, 862 N.Y.S.2d 812 (Sup. Ct. N.Y. Co. 2005) (Trump failed to show a probability of success on the merits of his cause of action for breach of fiduciary duty where defendant's affidavit refuted the conclusory allegations of Trump's affidavit and the allegations of the complaint).

51 CPLR 6201 is 'strictly construed in favor of those against whom it may be employed.' *Grafstein v. Schwartz,* 100 A.D.3d 699 (2012).

- the defendant is a nondomiciliary residing outside of New York, or is a foreign corporation not qualified to do business in New York (this is the most commonly used criterion and for foreign defendants and corporations and provides *quasi in rem* jurisdiction; the relationship between the litigation, defendant and New York must be sufficient to make it fair for defendant to defend the lawsuit there);
- the defendant resides or is domiciled in New York but cannot be served personally (difficult to satisfy because of the various methods for personal service available under New York law);
- the defendant, with intent to defraud its creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favour, has assigned, disposed of, encumbered or secreted property, or removed it from New York or is about to do so (to determine a defendant's intent, courts look at the various factors[52] including: the defendant's financial position, conduct; history of paying creditors, statements made demonstrating intent to dispose of assets, timing of transfers in relation to the litigation, and other misrepresentations concerning finances);
- the action is by a victim of crime suing the perpetrator; or
- the action is based on a judgment or order of a court of any other US court entitled to full faith and credit in New York or on a money judgment from a foreign court; and

*c* the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.

Such applications may be brought *ex parte* or on notice. If brought *ex parte*, the plaintiff must move to confirm within a certain amount of time after the levy. After the court renders its decision on an application for an order of attachment (which, under New York law must be done within 20 days[53]) the plaintiff delivers it to the sheriff, who carries out the levy. Physical seizure is uncommon; the defendant, after being served with the order and all the required papers, typically holds the property on the sheriff's behalf.

Most jurisdictions require the plaintiff to post a bond. The bond acts as security against costs and damages that may be sustained if the defendant wins on the merits, as well as attorney's fees.[54] The statute sets forth a minimum, but courts typically require a bond equal to or greater than the amount to be attached.

***Post-judgment restraint of assets***

After the plaintiff obtains a judgment (whether locally or in a foreign court), enforcement against the debtor's assets is fairly straightforward. Classically, this is done by writ of execution, which directs a sheriff or marshal to levy on any non-exempt personal or real property in which the judgment debtor has an interest in that jurisdiction, and subsequently sell the property for the benefit of the judgment creditor.[55] Delivery of the write of execution to the sheriff automatically creates a lien on the judgment debtor's personal property.[56] For real

52 *Societe Generale Alsacienne De Banque, Zurich v. Flemingdon Dev. Corp.*, 118 A.D.2d 769, 773 (2d Dept. 1986).

53 CPLR 2219(a).

54 CPLR 6212.

55 See generally CPLR Article 52, Fed. R. Civ. P. 69.

56 CPLR 5202; *U.S. SEC v. Universal Express, Inc.*, 2008 WL 1944803, at *5 (S.D.N.Y. Apr. 30, 2008).

property, the county clerk in which the property is located must docket the judgment. For property in the possession of third parties, such as bank accounts, the sheriff delivers the writ of execution to the garnishee.

For an added layer of protection, as soon as judgment is entered, the plaintiff can serve a restraining notice on anyone the plaintiff believes may have relevant information about the judgment debtor's assets, income, or financial affairs.[57] Upon service, the restraining notice prevents the recipient from transferring, selling, assigning, or interfering with the restrained property.[58]

Another method of post-judgment enforcement is a turnover order.[59] The order, obtained by motion in the underlying case, compels the judgment debtor to turn over property to the judgment creditor. A plaintiff can also obtain a turnover judgment against a third party, compelling such third party to turn over the debtor's property in its possession. However, a turnover judgment must be obtained through a separate summary proceeding. Turnover orders are used in cases where the property is not readily accessible, or if it is located outside of the state. Otherwise, it is easier to rely on the writ of execution.

### ii Obtaining evidence

The US approach to discovery is a broad one. Under both federal and state law, a party to a US action is largely permitted to seek discovery from parties to the litigation and from third parties as long as the information sought is relevant to the claims in the litigation. Under federal law, this means that:

> *Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defence and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.*[60]

The scope under state law is similar, for example, New York law directs the 'full disclosure of all matter material and necessary in the prosecution or defence of an action, regardless of the burden of proof'.[61]

Civil procedure also provides the mechanisms through which the discovery may be sought. If a litigant is seeking discovery from another party to the litigation, they may serve document requests, interrogatories, or notice a deposition.[62] None of these procedures requires leave of the court, and the information received through this disclosure does not become part of the official court record unless it is later offered into evidence. The recipient of the discovery requests may object to certain disclosures on the grounds that the material is irrelevant, overly burdensome to obtain, or protected by a privilege.

57 CPLR 5222.

58 CPLR 5222(b); *CSX Transp., Inc. v. Island Rail Terminal, Inc.*, 879 F.3d 462, 465 (2d Cir. 2018).

59 CPLR 5225–5227.

60 Fed. R. Civ. P. 26(b)(1).

61 CPLR 3101(a).

62 CPLR 3107–3117, 3120, 3130–33.

Seeking discovery, both documentary and testimonial, from third parties within the US is also possible through the court's subpoena powers. A party's attorney may issue a subpoena without leave of court.[63] A subpoena issued from a federal court may be served on a party anywhere in the US.[64] A subpoena issued from a state court can be served on a party anywhere within the state, and many states have adopted the Uniform Interstate Depositions and Discovery Act that permits a party to obtain discovery outside of the state.[65] Like a party to the action, a third party may object to the subpoena on the same grounds, although courts tend to lower the bar on issues of burden and proportionality when it comes to third parties.

A party may also obtain evidence in the United States in aid of a foreign proceeding as discussed in Section V(ii) below.

## IV FRAUD IN SPECIFIC CONTEXTS

### i Banking and money laundering

Bank fraud and money laundering are crimes in the United States. Depending on the nature of a crime, an investigation could be commenced by federal authorities, state authorities, or both. Recent legislation – the Anti-Money Laundering Act of 2020 (AMLA) – is designed to help ferret out money-laundering activity. Some of the AMLA's key features are its expanded rewards and protections for whistle-blowers, its establishment of a federal 'beneficial ownership' registry to shine light on those who directly or indirectly control shell companies, and its introduction of new Bank Secrecy Act violations and increased penalties. The whistle-blower provisions are also meant to spur internal compliance officers of financial institutions to use information they obtain in their official capacities to pursue whistle-blower rewards. The discretion to file criminal charges for money laundering, of course, remains with law enforcement authorities; however, the AMLA's measures will presumably lead to the increased exposure of money laundering schemes in the US and the prosecution of those involved therein.

Criminal penalties for bank fraud and money laundering are provided by statute and may be imposed by a court if the defendant is convicted of the crimes. Penalties may include fines, incarceration, probation and community service. They often do not involve any recovery for victims. Even in cases in which restitution to the victims is available, restitution may not fully compensate the victims for their losses.

As a result, victims of banking fraud or money laundering may seek recourse through a civil lawsuit. In the US, civil claims may proceed in conjunction with, or in the absence of, criminal charges. The burden of proof is lower in civil litigation, meaning that a civil claim may succeed even if criminal charges do not result in a conviction.

### ii Insolvency

It is unsurprising that attempts to misappropriate assets often end in an insolvency. No wonder some of the most massive frauds in history have resulted in some of the biggest bankruptcy proceedings in history – like *Madoff*[66] and *Enron*,[67] for example.

63 CPLR 23.

64 Fed. R. Civ. P. 45.

65 Cal. Civ. Proc. Code Section 2029.300; N.Y.C.P.L.R Section 3119.

66 *In re Bernard L. Madoff Inv. Sec. LLC*, 08-0789 (Bankr. S.D.N.Y.).

67 *In re Enron Corp.*, No. 01-16034 (AJG) (Bankr. S.D.N.Y.).

Once a fraudster files for bankruptcy, an automatic stay is in place preventing the victim from suing the wrongdoer and relegating him or her to the status of creditor among other similarly situated victims.[68] In cases of fraud, most bankruptcy proceedings are liquidations under Chapter 7 (rather than reorganisations under Chapter 11) and a trustee is assigned to marshal the assets and distribute the proceeds to creditors equitably and in priority order. For example, secured creditors are usually paid first, and equity holders of the debtor are usually paid last.[69] Liquidations are administered under the US Bankruptcy Code, Chapter 11 USC Section 101 et seq. However, if the bankrupt is a brokerage, the Securities Investor Protection Corporation (SIPC) plays a role.[70] In such instances, for example, *Bernard L Madoff Investment Securities* and *Lehman Brothers*, SIPC advances brokerage customers up to US$500,000 to compensate them for their loss.[71] The provisions of the Securities Investor Protection Act (SIPA) also add a special layer of protective provisions. For example, under SIPA, customers are compensated for their losses before other creditors.[72]

The primary reason insolvency is considered an important asset recovery tool is the trustee's strong-arm powers. A trustee may use claw-back provisions of the Bankruptcy Code and the UFTA (discussed above) to unwind the debtor's transactions. For example, under Chapter 11 USC Section 547, the trustee may claw back any transfers the debtor made within 90 days of the bankruptcy as 'preferences', and if those transfers were made to the debtor's insiders that period is extended to one year. The trustee also can unwind transactions from the debtor to any party within two years of the bankruptcy if the debtor made those transfers with the intent to defraud his or her creditors.[73] In Ponzi scheme cases, intent to defraud is presumed.[74] The trustee also has the ability to recover misappropriated assets from further transferees down the line; provided, however, such transferees are not bona fide purchasers for value.[75] Claw-back provisions under the UFTA are also available, and provide for a four-year reach-back period.[76]

In SIPA cases, a trustee's efforts are financed by SIPC so that the failed brokerage's customers can recoup all of the recovered property. In bankruptcy cases, however, the trustee's efforts often need to be financed. If there are sufficient assets available to claw back, the trustee has a few options. He or she may:

*a* proceed on a contingency basis and be paid from the recoveries;
*b* obtain financing from a litigation funder; or
*c* the creditors or other stakeholders can finance the trustee's efforts.

In this way, it is possible for a creditor or group of creditors to obtain some level of control in the recoveries.

68 11. USC Section 362; *In re Granite Partners, L.P.,* 194 BR 318, 325 (Bankr. S.D.N.Y. 1996) ('[T]he automatic stay prevents creditors or shareholders from asserting the claim notwithstanding that outside of bankruptcy, they have the right to do so.').

69 11 USC Section 506, 507; *Matter of Lifschultz Fast Frgt.,* 132 F.3d 339, 343 (7th Cir. 1997) ('Equity holders come last in bankruptcy, which generally means they get nothing at liquidation.').

70 15 USC Sections 78aaa et seq.

71 15 USC Section 78fff-3(a).

72 15 USC Section 78fff-2(c)(1).

73 11 USC Section 548.

74 *Picard v. Merkin (In re Bernard L. Madoff Inv. Sec. LLC)*, 440 B.R. 243, 255 (Bankr. S.D.N.Y. 2010).

75 11 USC Section 550.

76 See discussion regarding UFTA, *supra*.

### iii Arbitration

The validity of an arbitration clause is generally governed by the Federal Arbitration Act (FAA), which strongly favours the validity of an agreement to arbitrate.[77] Where the agreement to arbitrate and the applicable rules are silent on the question of arbitrability, the question is properly raised before the courts.[78] However, even in the fraud context, valid contractual provisions will be enforced, including arbitration clauses. Indeed, as a matter of substantive federal law, an arbitration provision is severable from the remainder of a contract and will remain enforceable even if the balance of the contract is not.[79]

Where parties provide, or incorporate rules providing, that the question of arbitrability will be decided by the arbitral tribunal, that tribunal will have exclusive jurisdiction to determine its own jurisdiction.[80] The arbitral tribunal's ruling on these issues will be final and may be refused only on the grounds set forth in Article V of the New York Convention:

> *1. Recognition and enforcement of an arbitral award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*
> *(a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*
> *(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*
> *(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*
> *(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or*
> *(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*

77 9 USC Sections 1 et seq. *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 402 (1967) ('The FAA embodies a liberal federal policy favoring arbitration agreements.').

78 See, e.g., *U.S. Nutraceuticals, LLC v. Cyanotech Corp*., 769 F.3d 1308, 1311 (11th Cir. 2014) ('[T]he question of arbitrability is undeniably an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.').

79 9 USC Section 2. *See also Rent-A-Center, West, Inc., v. Jackson*, 561 U.S. 63, 70–71 (2010). An exception to this is where there is a claim to fraud in the inducement, as discussed below.

80 See, e.g., *Henry Schein, Inc. v. Archer & White Sales, Inc*., 139 S. Ct. 524, 526, 529 (2019) (holding that once a court determines that a valid arbitration clause exists and that the question of arbitrability has been delegated to an arbitrator 'a court possesses no power to decide the arbitrability issues . . . even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless').

> *2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*
> *(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*
> *(b) The recognition or enforcement of the award would be contrary to the public policy of that country.*[81]

Consistent with Article 1(a) of the New York Convention, if it can be proven that the underlying agreement to arbitrate is invalid, then the arbitral award will not be enforced, even if the tribunal otherwise held it had jurisdiction to proceed. However, this finding takes place at the enforcement stage of arbitral proceedings, namely, once the tribunal has rendered an award.

Another factor to consider, consistent with the Article 2(a) and (b) of the New York Convention, is whether otherwise valid arbitration proceedings are themselves fraudulent. An increasingly common occurrence in arbitration-related fraud is the proliferation of sham contractual disputes, pursuant to which the parties file an arbitration claiming breach of contract and either settle the case (with the approval of an agreed award by the tribunal) or take the case to judgment and then proceed through enforcement through the courts. By transferring money in this way, ill-received funds are effectively laundered through the legal system, taking advantage of the confidential nature of arbitration and the limited scrutiny of arbitration awards, as well as the almost extreme legitimacy conferred by recognition and enforcement under the New York Convention, which epitomises the policy of broad deference to arbitral awards.

The use of arbitration proceedings to launder money or engage in related fraudulent transfers of money poses a difficult problem for fraud practitioners, given the limited inquiry into arbitral proceedings permitted by the New York Convention and the inherently private and confidential nature of arbitration. This is rendered even more difficult by the fact that, in many cases, the arbitrators may not even be aware that they were involved in a sham proceeding.

When corruption issues arise in an arbitration proceeding, either through a sua sponte investigation by the court or through the presentation of a corruption defence or defence of enforcement, a party can look at whether an arbitrator has a duty to disclose corrupt or illicit acts or whether such disclosure can be compelled, either based on their own applicable professional conduct standards or applicable anti-money laundering statutes. When considering this issue, it should be kept in mind that an arbitrator may be subject to several different legal obligations and duties, some of which may be in conflict. Once identified, parties may utilise traditional means to obtain evidence, as discussed above and below, to oppose enforcement of a corrupt arbitration award, and also to seek evidence that may assist with asset-tracing and recovery efforts.

81 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

### iv Fraud's effect on evidentiary rules and legal privilege

The US Supreme Court recognises the attorney–client privilege as 'the oldest of the privileges for confidential communications known to the common law'.[82] This privilege allows a client to fully confide past wrongdoings to an attorney so that the client may benefit from the full extent of US laws and legal procedures. The US also recognises an attorney–work product privilege, which protects an attorney's mental impressions, opinions and legal conclusions.[83]

These privileges are not without exception. In particular, the crime-fraud exception to the attorney–client and the attorney–work product privilege allows the production of documents and testimony that show communications between a client and an attorney that lead or could lead to future wrongdoing, including acts of fraud. Specifically, 'the purpose of the crime-fraud exception to the attorney–client privilege [is] to assure that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime.'[84]

The attorney's knowledge that the advice given, or work product created, would be, or was, used in furtherance of a fraud is irrelevant.[85] The attorney could have been an innocent actor, but still the communication would be stripped of privilege.

The crime-fraud exception has been applied across a wide spectrum of circumstances. The test of whether the exception applies is slightly different based on the privilege. For attorney–client privilege, the court asks whether the client 'made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act', and establishes that the client actually 'carried out the crime or fraud.'[86] For the work product privilege, courts ask if 'the client consult[ed] the lawyer or use[d] the material for the purpose of committing a crime or fraud?'[87] Courts in different jurisdictions have required varied levels of proof of the underlying fraud to permit the exception. For example, a Maryland Federal Court found that communications regarding fraudulent conveyances did not per se permit the crime-fraud exception, but there must also be evidence of deception, dishonesty, misrepresentation, falsification or forgery.[88]

## V INTERNATIONAL ASPECTS

### i Conflict of law and choice of law in fraud claims

As a general matter, disputes over choice of law are governed by state law,[89] which varies from jurisdiction to jurisdiction, but largely follows the principles set forth in the Second Restatement of Conflict of Laws.

82 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

83 *Hickman v. Taylor*, 329 U.S. 496 (1947).

84 *United States v. Zolin*, 491 U.S. 554, 563 (1989).

85 *Amusement Industry, Inc. v. Stern*, 293 F.R.D. 420, 236 (S.D.N.Y. 2013); *Clark v. U.S.* 289 U.S. 1, 15 (1933).

86 *In re Sealed Case*, 223 F.3d 775, 778–79 (D.C. Cir. 2000) (citing *In re Sealed Case*, 107 F.3d 46, 49–51 (D.C.Cir. 1997)).

87 ibid.

88 *United Bank v. Buckingham*, 301 F Supp. 3d 547, 554 (D. Md. 2018).

89 A federal court exercising diversity jurisdiction must apply the choice-of-law rules of the state in which that court sits to determine the rules of decision that would apply if the suit were brought in state court. See, e.g., *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 151 (2d Cir. 2013) (citing *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 494–97 (1941).

The first step in any choice of law dispute is to determine whether a conflict of laws exists[90] – in other words, have the parties freely elected the law that will be applicable to the disputes and, if so, are they bound by those provisions? In the context of contract disputes the parties' choice of law will usually be given a high degree of deference by the courts. In the fraud context, however, this analysis is more difficult. Where a contractual agreement is marred by fraud, and the fraud is related to performance of contractual duties but not the formation of the contract itself, the choice of law adopted by the parties will usually stand. This is particularly so where the dispute resolution clause is broad in scope, referencing, for example, 'all disputes arising from or relating to' the contract.'[91] In a context where the contract itself remains valid, the fraudulent acts relating to that contract will generally fall into the scope of matters to be adjudicated in accordance with the applicable choice of law or forum selection clause. Because much financial fraud arises from funds misappropriated by parties to an otherwise valid financial services agreement (or similar instruments), a party seeking to recover assets stolen by fraud should first examine whether they are bound by a dispute resolution clause that incorporates a choice of law or choice of forum provision.

Where the contract itself is procured by fraud, and its validity is challenged, the contractual choice of law provision will be invalidated to the extent that a party can show fraudulent inducement.[92] Under these circumstances, the US state and federal courts will undertake a traditional choice of law analysis. The same is true for fraud cases where there is no applicable choice of law provision or underlying contract. And while this analysis can vary somewhat from state to state, as noted above they generally follow the standards set forth in the Second Restatement. Section 145(1) of the Restatement provides that '[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties.' Thus, courts will look to the following factors:

1. *The place where the injury occurred.*
2. *The place where the conduct causing the injury occurred.*
3. *The domicile, residence, nationality, place of incorporation and place of business of the parties.*
4. *The place where the relationship, if any of the parties, is centered.*[93]

90 See, e.g., *Fireman's Fund Ins. Co. v. Great American Ins. Co. of New York*, 822 F.3d 620, 641 (2d Cir. 2016) ('The first step in any case presenting a potential choice-of-law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved.').

91 Generally speaking, courts will find that choice-of-law provisions that explicitly apply to 'any claim arising out of or relating to' are broad enough to cover both contractual and extra-contractual claims arising from a commercial contract. See, e.g., *Turtur v. Rothschild Registry Int'l, Inc.*, 26 F.3d 304, 309 (2d Cir.1994) (holding that a choice of law clause applying New York law was sufficiently broad to encompass tort and contract claims when the agreement covered any controversy 'arising out of or relating to' that agreement).

92 See, e.g., *Gloucester Holding Corp. v. U.S. Tape and Sticky Products, LLC*, 832 A.2d 116, 124 (Del. Ch. 2003) ('Delaware courts look to the Restatement (Second) of Conflict of Laws for guidance in choice of law disputes.16 Section 145(1) of the Restatement provides that '[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties.' A claim for fraud in the inducement would seem to fit this definition. . . .').

93 Restatement (Second) of Conflict of Laws Section 145.

The weight applied to these factors is the primary distinction between the law of the states, with some states emphasising the locus of the injury (this is the majority view) and others focusing on place where the act causing the injury took place.

### ii Collection of evidence in support of proceedings abroad

A party may petition the United States federal district courts for discovery in aid of litigation before 'foreign and international tribunals' under Section 1782 of Title 28 of the US Code. While foreign litigation is generally interpreted broadly, as of June 2022, the US Supreme Court has limited the scope of Section 1782 discovery in the context of foreign arbitration, requiring a 'foreign or international tribunal' to be a governmental or intergovernmental body, not a private adjudicative body.[94]

Section 1782 requests can be initiated in one of two ways:

*a* a letter rogatory issued from a non-US tribunal may be delivered directly to the district court (usually included as part of an application prepared by a party or other interested person); or

*b* a party or other interested person may make an application, without a letter rogatory, directly to the district court. To obtain discovery under 28 USC Section 1782, an application must satisfy three threshold requirements:

- the target of the requested discovery is a person 'found' in the federal judicial district;
- eligible proceedings exist (or are within reasonable contemplation) before a foreign tribunal and the applicant's discovery request is for use in aid of those proceedings; and
- the applicant is interested in those proceedings.

Provided these three conditions are met, a district court is authorised – but not required – to order discovery.[95]

For a deposition request, a person's mere physical presence in the district can be sufficient to compel his or her deposition. For document discovery, there is a split of federal authority as to whether courts are empowered to authorise discovery of documents outside the US, even when the person from whom discovery is sought is located in the relevant federal judicial district.[96] A business is likely to be 'found' in a district for purposes of Section

94 *ZF Automotive US Inc. v. Luxshare, Ltd.*, S. Ct. 2022 WL 2111355, at *8 (13 June 2022).

95 *Intel Corp. v. Advanced Micro Devices Inc.,* 542 U.S. 241, 247 (2004); *see also Esses v. Hanania*, 101 F.3d 873, 876 (2d Cir. 1996).

96 New York's Second Circuit Court of Appeals recently allowed the use of 28 USC Section 1782 to obtain discovery of evidence located outside the United States. *In re del Valle Ruiz,* 939 F.3d 520, 533 (2d Cir. 2019). In so holding, the Second Circuit joined the Eleventh Circuit, which had previously allowed extraterritorial discovery, *see Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1199–1200 (11th Cir. 2016). *But see Kestrel v. Joy Global*, 362 F.3d 401 (7th Cir. 2004) (denying an application requesting documents held overseas by a US company's foreign subsidiary because the documents were both outside the US and outside the parent company's files).

1782 if the business would be subject to personal jurisdiction in that district by virtue of its systematic and continuous activities there, even if its headquarters or place of incorporation are located elsewhere.[97]

Another option for discovery for both domestic and foreign actions is Rule 69(2) of the Federal Rules of Civil Procedure (FRCP). FRCP Rule 69(2) allows parties in possession of a valid money judgment (foreign or domestic) to take discovery under the FRCP from 'any person' in aid of the judgment or execution. This is an extremely powerful, and straightforward tool that allows for broad discovery against any party that might have evidence relevant to the tracing and discovery of assets in the context where there is no pending foreign proceeding because the action has been concluded and a favourable judgment obtained.

### iii Seizure of assets or proceeds of fraud in support of the victim of fraud

As discussed at length above (Section III.i), the seizure of assets before a judgment against a wrongdoer may be achieved with pre-judgment attachment, provided the state in which the plaintiff is proceeding allows for this remedy. Attachment may be used as a jurisdictional predicate, namely, to obtain *quasi in rem* jurisdiction over a defendant not amenable to personal jurisdiction, but with tangible or intangible property in the state. When a court has personal jurisdiction over the defendant, attachment serves as purely a security function, namely, to ensure there are sufficient assets to satisfy any potential judgment.[98] Some states, like New York, have statutes permitting seeking prejudgment attachment as security for a potential arbitration award.[99] Interestingly, the arbitration does not need to have been commenced when the attachment is sought, but must simply be anticipated. In addition to the factors set forth in CPLR 6212(a) (laid out above), for an order of attachment in aid of arbitration to issue, the plaintiff must also establish that the award to which the plaintiff may be entitled would be rendered ineffectual without the provisional relief sought by the motion for attachment.

### iv Enforcement of judgments granted abroad in relation to fraud claims

Foreign money judgments are broadly enforceable in the United States. It is best to bring the action in a jurisdiction where the judgment creditor believes assets are located because once recognised by the US court, a foreign money judgment may be enforced with same full faith and credit as a domestic judgment issued in that jurisdiction. Thus, enforcement of the judgment and recovery of the assets can follow if the US court has jurisdiction over those assets or over the judgment debtor.

The US established the 1962 Uniform Foreign Money-Judgments Recognition Act (the 1962 Act), which was updated in 2005 as the Uniform Foreign-Country Money Judgments Recognition Act (the 2005 Act). The states have largely followed either the 1962 Act or the 2005 Act, and many have codified the uniform laws as state law.[100] New York, for example, 'has traditionally been a generous forum in which to enforce judgments for money damages

97 See, e.g., *In re Inversiones y Gasolinera Petroleos Valenzuela,* 2011 U.S. Dist. LEXIS 5201 (S.D. Fla. 19 January 2011) (Exxon is 'found' in the Southern District of Florida under Section 1782, even though its headquarters and place of incorporation are not in that district).

98 *Hotel 71 Mezz Lender LLC v. Falor,* 14 N.Y.3d 303, 311 (2010).

99 CPLR 7502(c).

100 See e.g., Article 53 of the CPLR (McKinney 2019).

rendered by foreign courts'.[101] With respect to timing, the 2005 Model Act provides that '[a] n action to recognise a foreign-country judgment must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 15 years from the date that the foreign-country judgment became effective in the foreign country.' This statute of limitations may vary under certain state laws.

For a foreign country judgment to be recognised under the Uniform Acts and state laws, it must be 'final, conclusive, and enforceable'. The Recognition Act is clear on what is meant by conclusive – a foreign judgment 'is conclusive between the parties to the extent that it grants or denies a sum of money'.[102] In New York, a judgment is not conclusive if it 'was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law'; however, 'mere divergence from American procedure does not render a foreign judgment unenforceable.'[103] The enforceability of the judgment also rests on whether the foreign court had personal jurisdiction over the defendant or jurisdiction over the subject matter.[104] This can often be demonstrated by showing service of the action or judgment in the foreign country or the defendants residence in foreign jurisdiction or participation in the foreign action.

Both the Model Acts and the state laws provide factors that permit a US court to, in its discretion, deny the enforcement of the foreign money judgment. The eight discretionary factors involve the questions of whether:

*a* notice was proper;
*b* service was proper;
*c* the judgment debtor is able to defend;
*d* fraud was present in obtaining the judgment;
*e* the enforcement of the judgment is repugnant to the public policy of the state or of the United States;
*f* the enforcement of the judgment would conflict with another final and conclusive judgment or agreement of the parties;
*g* the foreign court possessed sufficient integrity; and
*h* the enforcement of the judgment is compatible with due process.[105]

The substance of the underlying claim, such as fraud, is not a particular consideration unless it raises issues of public policy. Some jurisdictions, like New York, do specifically carve out defamation claims, recognising them only if the foreign country's laws provide equivalent protections for freedom of speech to those in New York and the US.[106]

### v Fraud as a defence to enforcement of judgments granted abroad

There are many discretionary grounds for a US court to refuse to enforce a foreign judgment. Many of these grounds relate to the fairness of the process in the foreign court. Typically, the fraud must be 'extrinsic fraud' for the court to deny recognition of the judgment. If the

101 *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.* 100 N.Y.2d 215, 221 (2003) (citations omitted)
102 CPLR 5303.
103 *Sarl Louis Feraud Int'l v. Viewfinder, Inc.,* 489 F.3d 474, 479 (2d Cir. 2007) (internal citations and quotation marks omitted).
104 CPLR 5305.
105 Uniform Foreign-Country Money Judgments Recognition Act Section 4 (2005).
106 CPLR 5304(8).

judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case, then the US court may decline to recognise the judgment.[107] Likewise, if the judgment was rendered in circumstances that raise substantial doubt about the integrity of the foreign court, the US court may decline to recognise the judgment.

'Intrinsic fraud', on the other hand, will not typically prevent the recognition of a foreign judgment. Examples of intrinsic fraud include the veracity of testimony and the authenticity of documents. These are the province of the foreign court, and a US court will not, under normal circumstances, disturb such findings in a recognition or enforcement proceeding.

Once a judgment creditor has obtained a US court's recognition of the judgment, it may invoke any enforcement remedies available under local law, assuming that assets are within the jurisdiction of the court. Presumably, if assets or proceeds of fraud are not located within the US, there would be little reason to undertake the process of recognising the foreign judgment there.

## VI CURRENT DEVELOPMENTS

### i Discovery under Section 1782

Section 1782 of the US Code provides broad discovery for participants in a proceeding before a 'foreign or international tribunal'.[108] As of June 2022, the US Supreme Court unanimously resolved a Circuit split holding that private adjudicative bodies (i.e., private arbitrations) do not fall within the definition of 'foreign or international tribunal'.[109] The decision looked to the US Congress's intent when creating the statute, as well as other canons of statutory construction, to explain that a foreign tribunal 'is a tribunal imbued with governmental authority by one nation' and an international tribunal 'is a tribunal imbued with governmental authority by multiple nations'.[110] These definitions provided support for the Court's decision that Section 1782 can only apply to proceedings before governmental and intergovernmental tribunals, effectively ending the use of Section 1782 discovery for foreign commercial arbitrations and certain investor-state disputes. The Supreme Court left open the 'possibility that sovereigns might imbue an ad hoc arbitration panel with official authority'. It also did not address whether ICSID arbitrations, which – unlike the ad hoc investor-state arbitration between Russia and Latvia governed by the UNCITRAL Rules – are investor-state disputes brought within the self-contained legal framework of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. These open issues are likely to be the subject of litigation going forward.

### ii Digital assets

The growth of digital assets ranging from cryptocurrency to non-fungible tokens (NFTs) has inspired numerous opportunities for fraud in the United States. In 2021 alone, cryptocurrency crime had a record-breaking year with scammers receiving US$14 billion.[111] Investor-related cryptocurrency fraud is a notable example. Fraudulent crypto-trading websites, particularly

107 See, e.g., *United States v. Throckmorton*, 98 U.S. 61, 65 (1878).

108 28 USC Section 1782.

109 *ZF Automotive US Inc. v. Luxshare, Ltd.*, op. cit., footnote 94.

110 ibid. at *7.

111 'Crypto Crime Trends for 2022: Illicit Transaction Activity Reaches All-Time High in Value, All-Time Low in Share of All Cryptocurrency Activity', Chainalysis (6 January 2022).

those claiming high guaranteed returns and riskless investments, are commonly used by hackers and scammers. Rather than provide the promised high returns or risk-free investments, those behind these fraudulent websites transfer investors' cryptocurrencies to new wallets, prevent the original owners from accessing them and cut off contact with the investor. Hackers have also used social media to fraudulently convert investors' digital assets. For example, in April 2022, the Bored Ape Yacht Club's Instagram account was hacked, and hackers led followers to a link claiming that users could mint 'land'. The link compromised the digital wallets of users who clicked on it and hackers transferred at least 54 NFTs, totalling US$13.7 million, to new wallets. The current administration and US financial regulators and law enforcement have taken an interest in protecting consumers of digital assets from fraud.[112] Because digital assets are decentralised and the internet is not strictly regulated, consumer protection and regulatory enforcement are challenging, and fraud involving digital assets is likely to be addressed in both the civil and criminal context.

112 See, e.g., Fact Sheet: President Biden to Sign Executive Order on Ensuring Responsible Development of Digital Assets, The White House (9 March 2022).

**Appendix 1**

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Oren Warshavsky serves as co-leader of BakerHostetler's global fraud and international asset tracing and recovery team. He is a litigator specialising in multi-jurisdictional proceedings and complex intellectual property matters. Oren has achieved more than US$9 billion in monetary recoveries for his clients, obtained injunctive relief in numerous cases, and successfully defended clients in defeating claims asserted in federal and state courts for complex commercial matters, patent, trademark, copyright, bankruptcy, asset recovery matters and commercial disputes. He has been an integral part of the team representing the trustee of the Securities Investor Protection Act in the liquidation of Bernard L Madoff Securities. Oren has overseen and worked with teams of lawyers in the US and around the world to trace and recover assets; the recovery has been unprecedented, totalling more than US$14 billion dollars. Oren has been voted among the Top 100 attorneys in New York, and his cross-border asset-recovery accomplishments have earned him recognition in *Who's Who Legal in Asset Recovery* – one of only 36 attorneys in the United States to have achieved this honour. He has also been recognised by *Chambers USA*, *The Legal 500* (both for intellectual property and international litigation) and *Best Lawyers in America*.

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Gonzalo Zeballos serves as the leader of BakerHostetler's international litigation team. He focuses on sophisticated cross-border disputes and investigations, including cases involving complex jurisdictional and choice of law issues. Gonzalo works closely with foreign counsel around the world and has, since 2009, been involved in one of the largest and most complex fraud asset tracing and recovery cases in history. Recommended by *The Legal 500* in the area of international litigation, and listed by *Who's Who Legal* for asset recovery, he has been involved in litigation, investigations and recovery efforts in dozens of jurisdictions spanning Latin America, Central America, the Caribbean, Europe, Asia and the Middle East. Well-versed in civil and common law proceedings, as well as civil, criminal and arbitral actions, Gonzalo brings a global perspective to resolving problems for clients. Gonzalo often presents on fraud, asset tracing and recovery tools, cross-border investigations, and managing multi-jurisdictional proceedings. He has been recognised by *The Legal 500* in the area of

international litigation and *Who's Who Legal* for asset recovery. He is a sought-after speaker on matters of fraud and asset tracing in sovereign states and about how he implements creative strategies and recovery tools while executing cross-border recovery efforts.

**GEOFFREY NORTH**

*Baker & Hostetler LLP*

Geoffrey North is a partner and a member of the global fraud and international asset tracing and recovery practice team at BakerHostetler. Geoff focuses his practice on complex commercial and bankruptcy litigation and has represented clients in a wide range of complex commercial disputes, including business tort, breach of contract, creditors' rights and securities matters. Geoff also has experience in white-collar criminal matters. He regularly appears in federal and state courts and has significant experience in arbitrations before the American Arbitration Association and Financial Industry Regulatory Authority panels.

**TATIANA MARKEL**

*Baker & Hostetler LLP*

Tatiana Markel is a partner who focuses her practice on bankruptcy-related litigation, with an emphasis on cross-border investigations to trace and recover misappropriated assets. Since joining BakerHostetler in 2009, Tatiana has played a key role in the representation of Trustee Irving H Picard for the Securities Investor Protection Act liquidation of Bernard L Madoff Investment Securities LLC. She has worked to unravel the global maze of interconnected parties, including financial institutions, by litigating complex legal issues, implementing unique legal theories and using international discovery methods to recover assets for the Fund of Customer Property. Her team's efforts have led to the recovery of more than US$12 billion in assets from Madoff's decades-old Ponzi scheme – the largest financial crime in US history. Tatiana regularly speaks on topics related to international asset recovery. She has presented at the International Women's Insolvency and Restructuring Confederation, discussing asset identification and recovery in international insolvencies. Tatiana also has a strong interest in technology and cybercrime, specifically how assets can be hidden using digital platforms, and how laws are applied to evolving technology.

**MICHELLE USITALO**

*Baker & Hostetler LLP*

Michelle Usitalo is a partner and a member of the global fraud and international asset tracing and recovery practice who focuses on commercial litigation, complex business matters, bankruptcy litigation and cases involving international corporations. Michelle energetically approaches her work with clients and fully involves herself in the matters with which they are faced. In conjunction with BakerHostetler's court appointment as counsel to the Securities Investor Protection Act (SIPA) Trustee for the liquidation of Bernard L Madoff Investment Securities LLC, Michelle has been involved in many aspects of the case, including the representation of the SIPA Trustee in adversary proceedings and appeals.

**SHADE QUAILEY**

*Baker & Hostetler LLP*

Shade Quailey is an associate who applies her experience as a judicial law clerk as she builds her practice and works on teams developing legal strategies for addressing the complex issues clients face in domestic and foreign jurisdiction today.

Shade is currently a member of the BakerHostetler team serving as court-appointed counsel to the Securities Investor Protection Act (SIPA) Trustee for the liquidation of Bernard L Madoff Investment Securities LLC (BLMIS), an experience that will further enhance her knowledge of all aspects of litigation and trial preparation.

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