



# GUIDE TO TRACING ASSETS AROUND THE WORLD





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**We are delighted to present the TerraLex 2018 Guide to Tracing Assets Around the World, an invaluable guide.**

The ability to trace assets across the world is becoming increasingly relevant to the business sphere as businesses continue to become progressively more global. As individuals and companies continue to move assets away from countries in which they are subject to dispute it is important that parties are able to trace assets across jurisdictions.

This Guide draws together contributions from tracing experts across a number of territories.

We hope you will find the Guide a useful resource for getting to grips with the framework in asset tracing law in each of these territories, safe in the knowledge that if further specialist advice is needed, it's only a call or email away.

We are grateful to all who have taken part in and contributed to this project. The world's second largest law firm network, with over 150 leading independent law firms spanning more than 100 jurisdictions, TerraLex provides truly global business law support. The strength of the network is built around not only the quality of its member firms and lawyers (all 19,000 of them) but also the depth of relationships – network members all know each other well, sharing best practice at regular meetings held all over the world throughout the year.

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## Asset tracing, an overview

Tracing is the process by which the original owner of property can identify assets physically retained or registered in the name of another party, because of some kind of misappropriation or misuse of property. Australian courts provide a number of remedies to recover money or personal property that is wrongly in the hands of a third party. These include money had and received, a declaration of constructive trust, a declaration of equitable lien, an account of profits and damages.

These remedies will often be supported by freezing orders (previously known as *Mareva* injunctions) or search orders (previously known as *Anton Piller* orders) to ensure misappropriated property is not lost or dissipated pending determination of the ownership dispute in the courts. Both types of interim orders can be obtained quickly (sometimes, within a day) if a court is satisfied it is appropriate.

### 1. Is any information about assets publicly available?

There are multiple sources of information about a person's or company's assets, available for members of the public to access for a fee including:

- **land title searches** – ownership of land is required to be registered under various state title regimes. Various information brokers can provide searches of these registers.
- **Australian Securities & Investments Commission** – all public companies and other disclosing entities (but not private companies) are required to prepare and lodge annual financial reports, which may include some details of the entity's assets.
- **Personal Property Securities Register** – information may also be available on the PPSR, which is the national register for all security interests attached to personal property.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

Although discovery is generally limited between parties to proceedings, third parties may be subject to discovery obligations where the identity of the wrongdoer is unknown: *Norwich Pharmacal Co v Customs and Excise*

*Cmrs* [1974] AC 133. Typically, this will involve the identity of trustees or the nature and location of trust property.

An alternative method for obtaining information about a third party's assets is through a search order against the wrongdoer. This may provide an applicant with enough information to use against disclosed third parties.

#### As against the wrongdoer

The most useful action against a wrongdoer is to obtain a search order. This permits an applicant to enter premises to inspect, remove or make copies of documents. Documents include electronic files, and an applicant may seize or make copies of a respondent's computers or hard-drives to obtain information. Furthermore, a search order can also compel the wrongdoer to disclose the persons with whom they have had dealings. This may assist in tracing a particular asset to a third party. A person who breaches the terms of a search order, or impedes its due execution, is guilty of contempt of court.

In addition, freezing orders may also include ancillary orders requiring a respondent to disclose the nature, value and location of assets.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Yes. Freezing orders can be obtained on an interim basis to prevent the loss or dissipation of misappropriated funds pending the outcome of a final hearing. Freezing orders made on an ex-parte basis (given the urgency of the application and the need to obtain an order before assets are dissipated) are generally only made for a very short duration, no more than a few days. The application is then brought back before the court, in the presence of the respondent, for the court to determine whether or not to extend the interim freezing orders, after hearing from the respondent.

### 4. What are the requirements for obtaining a freezing injunction (if available)?

To obtain a freezing order, the applicant must show:

- there is an arguable case against the wrongdoer
- there is a real risk the wrongdoer or third party is about to leave the jurisdiction or dissipate the asset/s

- the balance of convenience between the injustice an applicant may suffer with the potential prejudice to the alleged wrongdoer or party subject to the order, favours the granting of the order, and
- where an order is sought against a third party, the applicant will also need to show the third party holds, is using, or is otherwise in possession of the asset.

As a condition of the making of a freezing order, the Court will normally require appropriate undertakings to be given by the applicant to the Court, including an undertaking as to damages.

## 5. What assets can be frozen and do they have to be within the jurisdiction?

The types of assets to which freezing orders may apply are broad. It includes all forms of real and personal property, including choses in action. A freezing order can be framed by reference to specific assets or a maximum sum. However, the value of the assets covered by a freezing order should not exceed the likely maximum amount of the applicant's claim, including interest and costs. Freezing orders usually do not extend to dealings with assets for living expenses, reasonable legal expenses, business expenses and existing contractual obligations.

Further, an Australian court may grant freezing orders against assets located outside Australia (a transitional freezing order), provided the court is satisfied there is a case to be answered within its jurisdiction. An order of this nature is typically requested where the respondent has no or limited assets within Australia.

## 6. What about a search order?

To assist in locating the misappropriated property or funds and to establish the need for other interim or final orders, an applicant may seek an *Anton Piller* or search order. This allows an applicant to enter the respondent's premises to inspect, remove or make copies of documents, and to force disclosure of the persons with whom the respondent has had dealings.

To obtain a search order, an applicant needs to demonstrate:

- a strong prima facie case
- the damage suffered by the applicant is serious

- there is clear evidence of possession by the respondent of incriminating documents or things, and
- there is a real possibility the respondent might, if he or she became aware of the application, destroy the material.

## 7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?

Australian authorities indicate it is permissible for a court to freeze assets owned by a party in Australia pending judgment to be delivered by a foreign court. It has been held by the High Court that this is within the inherent power of an Australian court under the Foreign Judgments Act 1991 (Cth): see *TBK v BCBC Singapore Pte Ltd* (2015) 89 ALJR 975.

A search order cannot be made by an Australian court in relation to proceedings outside of its jurisdiction. But, if an Australian court has jurisdiction over a respondent, it can make a search order that extends to foreign premises.

## 8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?

Not directly. Australia is not a party to any reciprocal recognition regime dealing with freezing orders, such as the Brussels Convention. As such, an applicant needs to separately rely on an Australian court's inherent jurisdiction to grant a freezing order in respect of a pending foreign judgment that can be registered under the Foreign Judgments Act. Further, in the event a foreign judgment is obtained and registered in Australia, the court also has the power to grant a freezing order, if appropriate.

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## Asset tracing, an overview

As a jurisdiction, the Bahamas has limited Pre-Action/Pre-Judgment asset tracing tools. Public searches of the Registry of Records and the Companies Registry can confirm the ownership of assets such as real property, and shareholdings in companies with which the wrongdoer is known or suspected to be affiliated, or through which the wrongdoer is suspected of having funnelled funds. A limitation of searching the Companies Registry lies in the fact that more often than not, the shares are held in the names of nominees, and therefore a search may not disclose the name of the beneficial owner.

Post-Judgment, there are more tools available to assist in identifying assets as discussed below in point 3.

### 1. Is any information about assets publicly available?

Information is publicly available on the ownership of real property, and the share ownership in companies. In respect of the latter, it is subject to the aforementioned limitation concerning shares being held in the names of nominees.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

There is provision under Order 39 rule 1 of the Rules of the Supreme Court whereby the Court in relation to any cause or matter, and in the interest of justice, may require a deposition to be taken from any person.

#### As against the wrongdoer

Pre-Action/Pre-Judgment, there is no means to compel a party to identify his assets; save where injunctive relief is obtained, and such disclosure is necessary to enable that injunction to be policed.

Post-Judgment, an Order for Examination can be conducted against a person and any officer of a Company to compel them to disclose their assets. Insolvency proceedings can also be used to gain control of the affairs of a wrongdoer by way of appointment of a Trustee in Bankruptcy, Receiver, or Liquidator, who can identify, gather, and realise any available assets.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Yes. Order 29 rule 2 of the Rules of the Supreme Court expressly provide for interim preservation Orders in respect of any property forming the subject matter of an Action.

### 4. What are the requirements for obtaining a freezing injunction (if available)?

To obtain a freezing injunction a party must have a cause of action against the wrongdoer.

There must be a risk that the assets will be transferred or dissipated so as to prevent the enforcement of any judgment that may be obtained.

A freezing order can be made in respect of an asset held by or under the control of the wrongdoer including assets held by an innocent third party for or on behalf of the wrongdoer, such as a bank with whom the wrongdoer maintains an account. However, innocent third parties are entitled to vary the Order as need be, and typically are awarded their costs on an indemnity basis, subject only to the qualification that such costs were reasonably incurred.

An undertaking in damages must be given to compensate the wrongdoer in the event the court finds that the freezing injunction ought not to have been granted.

### 5. What assets can be frozen and do they have to be within the jurisdiction?

Any assets in the possession of or under the control of a wrongdoer can be frozen. They must be within the jurisdiction.

### 6. What about a search order?

A Search Order can only be made in respect of and enforced against premises within the jurisdiction.

**7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?**

Yes. However there must be a subsisting cause of action within the jurisdiction and the court must have territorial jurisdiction over the wrongdoers. The court will not grant a “free-standing” injunction, ie where there is no substantive cause of action within the jurisdiction against the Defendant.

**8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?**

The Reciprocal Enforcement of Judgements Act allows enforcement of Judgments and Orders which have been made in specified countries.

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## Asset tracing, an overview

Brazilian courts offer applicants some tools to track respondents' assets. The attachment of assets can be made online through different court systems ("Info-Jud", "Rena-Jud" or "Bacen-Jud").

The "Info-Jud" is a computer program that allows the court, or duly authorized persons, to access tax returns of individuals or legal entities. The program allows the court to obtain information on existing assets of taxpayers which can be used as a guarantee in execution lawsuits.

The "Rena-Jud" is a computer program that permits access to the records of the National Traffic Department enabling the court to order the attachment of vehicles as a guarantee in execution lawsuits. The attachment will not permit the registration of change of ownership of vehicles if a sale is made by the debtor.

The "Bacen-Jud" is a computer program that allows the court to have access to the debtor's bank accounts and investments and to attach the funds as a guarantee in execution lawsuits.

### 1. Is any information about assets publicly available?

Yes. Some information is publicly available, such as real estate ownership records, vehicles ownership records, share participations, etc. Such information is available at the Real Estate Registers, the National Traffic Department and the Register of Commerce.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

In addition to the requests to Real Estate Registers, the National Traffic Department and the Register of Commerce, the applicant may request that the court have access to the respondent's assets through the above mentioned court systems.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Yes. A blocking injunction can be obtained from the court preventing the respondent from disposing of the assets until the final judgment of the execution lawsuit.

### 4. What are the requirements for obtaining a freezing injunction (if available)?

Two legal prerequisites are necessary to obtain a freezing injunction: a likelihood of the existence of the alleged applicant's right and a justified concern of harm to the applicant's right if there is a lapse of time before the final decision is issued by the court. Such requirements must be evidenced in anticipation to the granting of the freezing injunction.

### 5. What assets can be frozen and do they have to be within the jurisdiction?

A freezing injunction may apply to all classes of assets (ie real estate, bank accounts, investments, shares, etc), within or outside the respondent's jurisdiction. However, the Code of Civil Procedure forbids the seizure of some assets, such as life insurance policies, tools and utensils used for professional activities, clothing, etc.

### 6. What about a search order?

The court can issue a search and seizure order whenever the respondent tries to hide assets or there is a reasonable risk that the respondent may dispose of the assets.

### 7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?

Yes. Whenever the injunction order cannot be issued online the court must issue an order for the attachment of assets as guarantee in the execution lawsuit. Orders addressed to a foreign jurisdiction are made through rogatory letters.

### 8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?

Yes, provided that the foreign court decision or arbitration award has been previously recognized by the Brazilian Higher Court of Justice ("Superior Tribunal de Justiça – STJ"), according to the procedure established in the Code of Civil Procedure.

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## Asset tracing, an overview

Canada is comprised of nine common law provinces, one civil law province and three territories, each of which has its own governing law in relation to real and personal property. While there are similarities between Canada's various jurisdictions, some important distinctions exist.

Pre-judgment relief is available in limited circumstances to prevent disposition of assets before judgment is obtained. In addition, post-judgment remedies are available to identify assets and enforce judgments obtained within the province or those obtained in other jurisdictions. In general, Canadian courts will assist claimants who obtain judgment from courts or tribunals in foreign jurisdictions with enforcing their judgment.

If impugned assets can be traced to a third party, a claimant may seek to recover that property provided that the third party knew that it was assisting a fraud, knew it had received proceeds of fraud, or if the proceeds of the fraud may be traced directly to that third party.

Tracing assets is exceptionally difficult and time-consuming. A claimant trying to trace the assets must have sufficient information to identify and locate the assets. The claimant must also be able to demonstrate that the assets it seeks are the very same assets it asserts a right to, or a substitute for them.

### 1. Is any information about assets publicly available?

There are numerous sources of information on assets in Canada. These include:

- land property offices which hold records for real property ownership
- personal property security registration systems which contain registrations on certain limited forms of personal property
- public companies are required to publicly file quarterly and annual reports, which disclose some asset information
- court records can be searched for active litigation, executions and court orders.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

A "Norwich Pharmacal" order is used to compel a third party to provide the claimant with information where the claimant believes that it has been wronged and needs the third party's information and/or documents to determine the circumstances of the wrongdoing and location of funds. In practice, it can assist a claimant in confirming the existence of debtor bank accounts and obtaining banking information to trace account transfers.

In considering whether to grant such an order, a court will consider the following factors:

- whether the party requesting the order has provided evidence sufficient to raise a bona fide claim
- whether the party requesting the order has established a relationship with the third party from whom the information is sought such that it establishes that the third party is somehow involved in the acts complained of
- whether the third party is the only practicable source of the information available
- whether the third party can be indemnified for any costs it may incur because of the disclosure, and
- whether the interests of justice favour the obtaining of the disclosure.

There are also separate procedural court rules in some provinces in Canada which permit the Court to order production of records from a third party within an existing court proceeding.

A Bankers Trust gives the court the power to require a bank to disclose documents and correspondence relating to the account of one of the bank's customers who is prima facie guilty of fraud.

#### As against the wrongdoer

Prior to judgment, an applicant may apply to the court for a *Mareva* or 'freezing' injunction, which prevents a party from disposing of, or dealing with, its assets pending the outcome of the claim.

An applicant may also seek an *Anton Piller* or search order prior to judgment, which can lead to the seizure of evidence that may assist in identifying assets, their locations and their holders.

If a creditor obtains an order against a debtor, it may conduct a judgment debtor examination to gather information about the debtor's financial circumstances and assets.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Freezing orders can be obtained on an interim basis to prevent the dissipation of assets.

- The *Mareva* injunction prevents a defendant from dealing with its assets by way of a court ordered "freeze" of identified assets, which, in effect, preserves the assets for execution (or at least provides security) prior to judgment.
- A *Mareva* injunction is *in personam*, meaning it compels a defendant to act in a particular way.
- A *Mareva* is a court-ordered protective measure used to ensure that defendants do not render themselves judgment proof pending trial.

In the Province of Quebec, *Mareva* injunctions are also available but the most common recourse for a creditor is to request a writ of seizure from the Court before judgment against the debtor or a third party (garnishment) in order to place the assets under judicial custody.

In some common law provinces an applicant may seek an interim pre-judgment attachment order (which targets property that belongs to the defendant). It can take many forms including garnishment or the court taking control of the assets in question. Generally, the applicant must demonstrate that:

- there is a reasonable likelihood that the claim will be established, and
- there are reasonable grounds for believing that the defendant is dealing, or is likely to deal, with its exigible property otherwise than for the purpose of meeting its reasonable and ordinary business or living expenses, and in a manner that would be likely to seriously hinder the applicant in the enforcement of a judgment against the defendant.

Some provinces have enacted legislation to seize and preserve assets of an absconding debtor (a debtor departing from the jurisdiction to avoid creditors).

There are also civil procedure rules permitting the interim preservation of the subject property (real and personal) if

it is relevant to an issue in the proceedings. Preservation orders ensure that the defendant does not dispose of the disputed property prior to the conclusion of the trial.

### 4. What are the requirements for obtaining a freezing injunction (if available)?

In order to obtain a *Mareva* injunction without notice a claimant must:

- make full and frank disclosure of all material matters within its knowledge
- give particulars of the claim against the defendant, including noting the points that could be fairly made against it by the defendant
- demonstrate a strong prima facie case for its claim
- give grounds for believing that the respondent has assets within the jurisdiction and prove a real risk of dissipation of those assets, and
- give an undertaking as to damages.

Under civil law in the Province of Quebec, a seizure before judgment follows similar rules. However, the creditor must, shortly after the seizure, institute a claim against the debtor to have its claim recognized by a final judgment. The petitioner of a seizure before judgment is not required to make an undertaking as to damages but may be held liable if it performs a seizure before judgment in bad faith.

### 5. What assets can be frozen and do they have to be within the jurisdiction?

A *Mareva* freezing order (or seizures before judgment in Quebec) may apply to various classes of real and personal property.

Generally speaking, Canadian courts can grant a *Mareva* injunction even where the assets are entirely outside of the jurisdiction. Whether or not that injunctive order is of any effect in the other jurisdiction is a question of that foreign jurisdiction's domestic law.

### 6. What about a search order?

An *Anton Piller* order is a remedy authorizing a party to enter the premises of a respondent to seize and preserve evidence. Courts will only grant an *Anton Piller* order in the clearest of cases. The following test must be met:

- the claimant must demonstrate a strong prima facie case
- the damage to the claimant, potential or actual, arising from the defendant's alleged misconduct must be very serious

- there must be convincing evidence that the defendant has in its possession incriminating documents or items, and
- it must be shown that there is a real possibility that the defendant may destroy of such material before the discovery process can take place.

## 7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?

Although it is rare in Canada, certain Canadian courts have assumed jurisdiction to grant a free-standing injunction in aid of foreign proceedings when there is no underlying cause of action within Canada.

## 8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?

Canadian courts may recognize and enforce a freezing order granted by a foreign court. There are various relevant considerations to determine whether an order will be enforced in Canada, including whether the terms of the foreign order: 1) are clear and specific (including its territorial scope); 2) adhere to principles of public policy, natural justice and comity; and 3) could have been made by a Canadian court in the first instance.

Other considerations may include whether the enforcement is the least burdensome remedy for the Canadian justice system, whether the Canadian litigant will be exposed to unforeseen obligations, and whether any third parties will be affected by the order.

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## Asset tracing, an overview

There are very limited pre-judgment asset-tracing tools available in the Cayman Islands, although the Courts will provide interim relief, mutual assistance and recognition of foreign proceedings.

### 1. Is any information about assets publicly available?

Ownership of real property can be identified through the Lands Registry which is publicly searchable, as are registries of Cayman-registered shipping, aircraft and motor vehicles. Information regarding beneficial interests in companies and trusts is not publicly available however.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

*Norwich Pharmacal and Bankers Trust* orders can be obtained against third parties but will require some prior knowledge of the assets held.

#### As against the wrongdoer

There is no means to compel a party to identify his assets prior to the entry of judgment, other than for the purposes of ensuring compliance with any injunctive relief.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Order 29 rule 2 of the Grand Court Rules permits the Court to make an order for the detention, custody or preservation of any property which is the subject of litigation.

If the assets are held in the name of a company, it may also be possible to petition the Court to appoint provisional liquidators to prevent dissipation of the assets.

### 4. What are the requirements for obtaining a freezing injunction (if available)?

A freezing (or *Mareva*) order can be obtained if the Plaintiff can demonstrate a cause of action against the wrongdoer, and a risk that the assets in question will be transferred or dissipated so that they will be unavailable to satisfy any judgment obtained.

The freezing order may be obtained in respect of assets held by the wrongdoer or a third party, the test being whether they would be available to satisfy a judgment obtained against the wrongdoer.

The Plaintiff must ordinarily give an undertaking to meet the costs of any Respondent to the order, and any damages the Respondent may incur if the Court subsequently finds the order should not have been made. In some cases the undertaking must be secured by some form of financial surety.

### 5. What assets can be frozen and do they have to be within the jurisdiction?

Any asset within the jurisdiction of the Court may be subject to a freezing order.

### 6. What about a search order?

A search (or *Anton Piller*) order can be obtained, allowing the Plaintiff to carry out a search of any premises under the control of the Defendant within the jurisdiction. The order does not allow the Plaintiff to force entry, but if the Defendant refuses he is guilty of contempt.

### 7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?

Freezing injunctions and search orders may be obtained in support of proceedings in other jurisdictions.

### 8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?

The Cayman Courts will generally recognise and allow enforcement of foreign judgments and orders (including freezing injunctions) by means of commencing new proceedings based on the foreign judgment.

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## Asset tracing, an overview

In Mainland China the registration information of companies is publicly available. It may also be possible to obtain the ownership details for real property if an interested party files an application with the relevant government agencies. Any further asset tracing will usually be limited to the litigants to the civil case. In order to preserve a respondent's assets during litigation proceedings, the People's Court can grant a freezing injunction either before or during the trial. After the trial, in the enforcement proceedings, a search order can be granted by the People's Court if the respondent refuses to fulfil his obligations and conceals his assets on purpose. Nevertheless, assets can only be frozen or traced within the jurisdiction of Mainland China in most civil cases.

### 1. Is any information about assets publicly available?

Companies incorporated in Mainland China are required to submit their registration information when established. Such information is available online via the National Enterprise Credit Information Publicity System (in Chinese only).

As for real estate, the Chinese real estate registration agency provides information upon an application by a relevant interested party. The ownership of unregistered housing or land use rights will be determined in accordance with approval documents and other relevant evidence.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

Except for the public system mentioned above, asset disclosure in a civil case is usually limited to the litigants. However, it is possible to trace the assets belonging to a third party under certain circumstances.

In civil enforcement proceedings, the respondent is obliged to declare his financial condition. If the personal property of the respondent is in the possession of a third party, or if other property rights of the respondent are registered under the name of a third party, such situations will be reported by the respondent. Therefore, the third party will be identified as the asset holder.

Moreover, a third party may also be disclosed as an asset holder in the case of subrogation; where the third party acts like an independent respondent. If a respondent is unable to settle the debts but still has claims due from a third party, the People's Court may deliver a ruling of mandatory enforcement against the third party. Under such circumstances, the third party will disclose his assets (in the same way as a respondent would).

#### As against the wrongdoer

Under Civil Procedural Law, the respondent must report the current status of his property and his property status for the previous year. If the respondent refuses to report or makes a false report, the People's Court will impose a fine or detention on the respondent. Moreover, the People's Court can also enquire about the respondent's assets, such as bank deposits, debentures, shares, unit trusts, etc from the relevant organizations (eg banks and credit unions).

If the respondent conceals his assets intentionally in the enforcement proceedings, the People's Court has the right to issue a search order to trace his assets.

Moreover, a "wrongdoer" may also refer to someone who is blacklisted as a dishonest person subject to enforcement in Mainland China. Such person, according to Supreme People's Court, will be unable to travel by plane, sleeper train or high-speed trains etc. He will also no longer be able to consume any other luxuries either.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Yes, steps can be taken to protect the assets on an interim basis.

Preservation is an interim measure for cases where the behaviour of the respondent may make enforcement of a judgment difficult. Under the Civil Procedure Law, the People's Court may rule on preservation before or during the trial.

However, in practice, the People's Court adopts a stricter attitude towards pre-trial preservation. The courts in Beijing, for example, have rarely ruled in favour of pre-trial preservation.

#### 4. What are the requirements for obtaining a freezing injunction (if available)?

The requirements for obtaining a freezing injunction depend on the stage of the proceedings.

As regards a freezing injunction granted in a preservation ruling before or during the trial, the requirements are:

- the action of the respondent may make enforcement of a judgment difficult
- there must be a ruling of the People's Court or an application by an interested party, and
- (i) if the freezing injunction is granted before the trial, the interested party must provide a guarantee/deposit; or (ii) if the freezing injunction is granted during the trial, the People's Court has discretion to decide whether the interested party shall provide a guarantee.

A freezing injunction may also be granted during enforcement proceedings if the respondent does not comply with his obligations. The property frozen by the People's Court will not exceed the scope of respondent's obligations.

#### 5. What assets can be frozen and do they have to be within the jurisdiction?

The People's Court may seal up, distrain or freeze movable property possessed by the wrongdoer and immovable property or other property rights registered in the name of the wrongdoer.

In circumstances where the assets are held by a third party, if such third party confirms in writing that the property belongs to the wrongdoer, or if the third party is actually holding the assets for the respondent's benefits, then the People's Court may seal up, distrain or freeze the assets held by him.

The People's Court cannot freeze certain types of assets, including but not limited to clothing, household goods, and other necessities required for the respondent's daily life.

The People's Court hardly issues any freezing injunctions relating to overseas assets in a civil case. A freezing injunction in a criminal case might be issued and enforced under certain treaties on judicial assistance.

#### 6. What about a search order?

Where a respondent does not perform his obligations under a judgment and conceals property on purpose, the People's Court has a right to issue a search order and conduct a search on the respondent and his residence (or the place where the properties are concealed).

The search order must be issued within the jurisdiction.

#### 7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?

A freezing injunction or search order cannot be obtained in support of ongoing proceedings outside of the jurisdiction due to the principle of judicial sovereignty. In principle, only a judgment or ruling made by a foreign court which has come into legal effect may be ratified and enforced by the People's Court.

However, there is one exception. According to Law of the People's Republic of China on the Special Procedure for Maritime Litigation, the People's Court has the power to grant a freezing injunction relating to the preservation of maritime claims in support of an ongoing trial or arbitration outside of the jurisdiction.

#### 8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?

If the freezing injunction is an interim method to preserve the assets during proceedings, the freezing injunction will not be enforceable in most circumstances (as explained above).

If the freezing injunction is a part of a final judgment or ruling made by a foreign court, or a final arbitration award made by a foreign tribunal, which has been recognized by the competent People's Court (in accordance with a relevant international treaty or the principle of reciprocity between China and the foreign country) the freezing injunction will be enforceable in China. Furthermore, the enforcement of the freezing injunction must also comply with the basic principle of sovereignty, security and public interest. Otherwise, the judgment or ruling made by the foreign court shall not be recognized or enforced in mainland China.

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## Asset tracing, an overview

The French courts have effective tools for the anticipated freezing of assets to ensure enforcement procedures of res judicata rulings: these are interim freezing injunctions which may be applied either via a preservation order or a judicial lien (section L. 511-1 of the French Code on the enforcement of civil procedures).

### 1. Is any information about assets publicly available?

Pursuant to French commercial law, corporations are bound to fulfil their transparency obligations (*section L. 232-21 et alinea of the French Commercial Code*) and must file their accounts on an annual basis at Companies House (RCS), which are then publicly available. This procedure is compulsory regardless of the company's form ie limited liability companies, partnerships, joint stock companies and the regulated professions are required to publish their accounts. Corporations whose registered office is located abroad and which have several entities in France also are within the scope of this obligation.

The information so obtained is however limited to the value of the various items on the balance sheet. Other than Limited Liability Companies – for which a review of the by-laws enables identification of the partners and the ensuing identification of the shares likely to come under the freezing injunction – subsidiaries and shares are mentioned only in tax returns and access is not available to the public.

Independent contractors – other than sole proprietorships – do not enter the scope of this obligation.

Land registration services centralize information relevant to real estate, in particular regarding the identity of successive owners of real property and the estate of such individuals. Access to this information may be granted by applying to the relevant authorities.

Information on the financial assets of private individuals or corporations (*current accounts, savings accounts, securities trading accounts*) are not available to the public. An application to access must be filed with the FICOBA (the National Centralized Bank Accounts Register) via a Bailiff provided one has an enforcement order (*see 3 below*).

The services of a private detective may be hired to prove the existence of real estate or movable property belonging to the debtor and for which attachment may subsequently be requested.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

The French law requires each individual to help the judicial system unfold the truth. Failure to comply with this requirement gives rise to a periodic payment by way of a penalty or a civil fine (*section 10 of the French Civil Code*). More specifically, procedural law provides that further to a party's petition, a judge may order the submission of exhibits, regardless of whether they are held by a third party or the opposite party (*section 11 of the French Civil Procedure Code*). A petition may be filed either during the proceedings (*section 138 of the French Civil Procedure Code*) or on the basis of legitimate grounds, prior to trial, by means of a petition or an urgent proceeding (*section 145 of the French Civil Procedure Code*).

The judge may order the service of a process or the submission of an exhibit as per the conditions and guarantees fixed by him and if required can order a periodic payment by way of a penalty.

#### As against third parties

The third party may lodge an appeal against the ruling requiring him to submit exhibits (*section 141 of the French Civil Procedure Code*).

The third party may refuse to comply with instructions if he can substantiate legitimate grounds which prevent him from doing so eg respect for privacy, professional secrecy or to a certain degree, business secrecy.

#### As against the wrongdoer

Parties cannot oppose the ruling ordering them to submit exhibits as this ruling comes within the scope of the disposal of assets of businesses in receivership (*section 537 of the French Civil Procedure Code*).

Substantive law is unclear as regards the possibility for a party to claim legitimate grounds preventing him/her from submitting an exhibit.

The FICOBA (the French National Centralized Bank Accounts Register held by banking institutions) contains a list of all bank accounts opened in France (*including savings accounts and securities trading accounts*). It indicates all opening transactions and amendments to and closing of

an account throughout the account's lifetime and for a period of 10 years following closure. Access to this register is restricted but available either to the judge or any person bearing a copy of an enforceable judgement with authority to access the bank details of individuals who have been condemned and perform a garnishment order.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Interim freezing injunctions may be divided into two categories: (i) preservation orders which freeze the asset, and (ii) a judicial or statutory lien which when perfected enables the applicant to be registered on the asset and afforded certain rights.

The aim of preservation orders is to freeze assets: dissipation, transfer or movement of the asset by the respondent is prohibited. A petition has to be filed with the competent court to obtain such an order (see section 5 below).

The preservation order may then give rise to legal proceedings with a view to obtaining an execution lien against the owner of the frozen asset to allow for garnishing of the frozen asset.

Judicial liens are intended to protect those applicants who broadly speaking do not have an enforcement order from the risk that the respondent might implement an insolvency procedure during trial. They may take the form of either an interim mortgage by order of the court for real estate assets, or an interim pledge by order of the court for businesses, shares, and securities. The assets encumbered by a judicial lien are disposable. This type of lien is binding on third parties as from the date of publication (section L531-1 et alinea of the French Enforcement Procedure Code).

The lien may also be created by the legislator and be termed a statutory lien: by effect of law, it benefits the applicant and is fully binding on third parties eg a security interest is a statutory lien.

### 4. What are the requirements for obtaining a freezing injunction (if available)?

The applicant must satisfy several conditions (section L511-1 et al of the French Enforcement Procedure Code) ie he must:

- have a substantive claim. In this respect, the certainty of the claim need not be substantiated;
- prove the existence of circumstances likely to jeopardize the collection of the claim eg fear that the respondent will dissipate the assets to avoid having to refund them.

Prior legal authorization is required when the applicant has neither an enforcement order nor a binding court ruling, (section L511-2 et al of the French Enforcement Procedure Code). It is possible to have a court ruling delivered by a foreign court (see section 8 below).

No prior formal notice is required.

### 5. What assets can be frozen and do they have to be within the jurisdiction?

The assets contained in the freezing injunction belong to the respondent even if they are held by third parties (eg respondent's customers or a bank). Whilst some assets are covered by freezing injunctions or judicial liens, others are subject to an exclusive form of protection:

- movables, tangibles and intangibles belonging to the respondent are subject to a freezing injunction (section L521-1 et al of the French Enforcement Procedure Code);
- real estate and businesses are subject to a judicial lien (section L531-1 et al of the French Enforcement Procedure Code);
- sums of money, tangible furniture, boats and ships as well as intangible rights are subject to a specific regime.

French law provides a list of exempt property in section L. 112-2 of the French Enforcement Procedure Code. This list is aimed more particularly at goods essential to everyday living and work, objects which are indispensable to the disabled or intended for the treatment of the ill.

As a rule, freezing injunctions delivered by the French courts only refer to assets located on French territory, unless of course the foreign jurisdiction involved imputes an extraterritorial effect, in which case a foreign judgement which goes through a process of *exequatur* must be sought abroad.

However, in relations between EU Member States, it is deemed of little significance if the assets are not located in France. In effect, freezing injunctions have the full benefit of *ipso jure* recognition, free movement and allow one to dispense with intermediary formalities on two conditions: firstly, the judge of the Member State which has ordered the freezing of the assets must have jurisdiction to rule on the merits and secondly, the respondent must be informed in advance (regulation n°1215/2012 Brussels 1 bis).

## 6. What about a search order?

A preparatory inquiry may be instructed at the parties' request or by the judge with a view to substantiating facts and their accuracy in the event of a legal issue or litigation. A preparatory inquiry may take place either during trial or outside trial via a petition or an urgent proceeding (preparatory inquiry *in futurum*). In the latter case, the applicant must argue the legitimacy of preserving or establishing evidence which may help resolve possible litigation.

## 7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?

With regard to freezing injunctions, when a foreign judgement enforced in France goes through the specific process of *exequatur*, it is possible to garnish the assets on the basis of this judgement without seeking the prior authorization of the judge handling the enforcement. However, substantive law is uncertain about the issue when the foreign judgement does not go through the specific process of *exequatur* and it is widely viewed that such a judgement has not yet become fully binding pursuant to the terms of section L. 511-2 C. of the French Enforcement Procedure Code as this would infer allowing one to perform the injunction without any prior court authorization.

Regarding the preparatory inquiry, it has ease of implementation within the EU. Regulation CE n° 1206/2001 of 28 May 2001 aims at speeding up the forwarding and processing of requests for the taking of evidence.

In particular, the regulation allows for direct enforcement of the taking of evidence by the judge in charge of an inquiry on the territory of another Member State, provided prior authorization has been granted by the central body in the State of enforcement. This regulation applies to civil and commercial matters when a court in a given Member State requests the competent court of another Member State to take evidence or to proceed directly with the taking of evidence in another Member State (section 1er of the regulation).

## 8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?

French law has agreed to acknowledge foreign freezing injunctions, provided the foreign judgement goes through the process of *exequatur*. French Case law admits the injunction if it derives from adversarial proceeding and if it does not contravene international public order (*Civil Court 1st chamber 30 June 2004, n°01-03.248*).

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## Asset tracing, an overview

In Germany, an applicant does not have many options to obtain knowledge pertaining to a respondent's assets. There are only a few registers available to the public. The means available to German civil courts are not comparable to those available to courts in other jurisdictions; in particular, there are no freezing injunctions or the like.

### 1. Is any information about assets publicly available?

Real estate and its owner(s) are recorded in a land registry. There is not a single central land registry, but every German District Court maintains the register for its area of responsibility (over 600). It is not possible to conduct a search in all of the German land registries. The creditor has to know the location of the property and has to show a legitimate interest for the search.

Annual financial statements and other important public announcements are published in the German Federal Gazette which is publicly available ([www.bundesanzeiger.de](http://www.bundesanzeiger.de)).

German Public Limited Companies ("*Aktiengesellschaft*" / "*AG*") have to publish their annual financial statement from which one can gather basic information on assets.

German Private Limited Companies ("*Gesellschaft mit beschränkter Haftung*" / "*GmbH*") have to publish a list of their shareholders in the commercial register as well as their annual financial statement.

Both German Limited Partnerships ("*Kommanditgesellschaft*" / "*KG*") and German General Partnerships ("*Offene Handelsgesellschaft*" / "*OHG*") have to publish their shareholders in the commercial register. Depending on the size of the company, they may have to publish their annual financial statement.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

As soon as an applicant obtains a (provisionally enforceable) judgement against the respondent, the applicant can notify potential third parties (such as major

banks or the last known employer) that an attachment is imminent and that the third party is not to make payment to the respondent. If the respective addressee has nothing to do with the main respondent, there will be at least a negative notification in writing (process of elimination).

As soon as the applicant obtains an attachment order, he can request information about the claim from the third party; it is, however, necessary to know the name of the third party.

#### As against the wrongdoer

According to section 802c German Code of Civil Procedure, for the purpose of enforcing a monetary claim, the respondent is obliged to provide information on his financial circumstances and the assets he owns to the court-appointed enforcement officer.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

According to section 916 para. 1 German Code of Civil Procedure a pre-judgment seizure is the available remedy to secure compulsory enforcement against movable or immovable property for a monetary claim.

Under German law, there is no global freezing injunction with regard to a temporally or locally unlimited seizure. However, if a foreign court has jurisdiction on the relevant matter, it is possible to obtain a freezing injunction abroad and for it be acknowledged and enforced in Germany.

### 4. What are the requirements for obtaining a freezing injunction (if available)?

There are no freezing injunctions under German law.

To obtain a pre-judgment seizure, the applicant has to assert a claim against the respondent. Further, the applicant has to assert circumstances which raise concern that without issuance of a pre-judgment seizure enforcement of the judgment would be frustrated or be significantly more difficult.

**5. What assets can be frozen and do they have to be within the jurisdiction?**

As regards a pre-judgment seizure: any movable or immovable assets are covered.

A German court has jurisdiction for pre-judgment seizure if the respective asset is located in the court's district or the court has jurisdiction over the main dispute.

**6. What about a search order?**

The German civil law does not provide for a search order or comparable means.

If there is a reasonable suspicion of a crime connected with the civil claim (eg fraud or bribery), the applicant may press criminal charges against the respondent and, therewith, involve the prosecution department which has powerful means to trace assets.

**7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?**

As long as German courts have jurisdiction for the seizure/ attachment order, it does not matter on which (foreign) legal basis the main dispute is founded; ie there may be a claim under foreign law, but if the asset to be attached falls within German jurisdiction, the German courts may grant an attachment order.

**8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?**

Yes, but not directly. At first, a German court has to acknowledge the freezing injunction by way of exequatur. This process depends on the requirements of bilateral treaties between the respective countries.

The German court will examine if the freezing injunction unreasonably puts the respondent at a disadvantage and if a certain level of respondent protection is maintained, eg a certain amount has to remain unaffected in order to bear the expenses of living.

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# The Hong Kong Special Administrative Region of the People's Republic of China

Zhong Lun Law Firm



## Asset tracing, an overview

Like most other common law jurisdictions, it is possible in Hong Kong to apply to the Court for a Mareva injunction which restrains the respondent from dissipating his assets by freezing them until judgment or further order. The Mareva injunction is popular amongst applicants in Hong Kong given the right fact pattern, and there are tens of applications heard every week in the High Court of Hong Kong.

### 1. Is any information about assets publicly available?

Hong Kong-incorporated public companies and guarantee companies are required to submit their financial statements, directors' report and auditor's report annually to the Companies Registry which, upon submission, will become publicly available for search.

Hong Kong private companies which have a share capital are not required to submit their financial statements.

Registered non-Hong Kong companies may be required to submit their published accounts for registration depending on whether they are so required by the law of the place of incorporation, or other laws or rules to which they are subject.

The Land Registry holds a central record of property ownership in Hong Kong and it is possible to search for the name of the registered owner of a particular address if such address is available. However, there is no public registry enabling search for properties owned by a particular corporate entity or individual, although some private service providers in towns may have maintained their own databases of reasonable referential value.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

"Norwich Pharmacal Orders" – they may be applied for before any action is started for the purpose of discovering the identity of wrongdoers so that they may be named as respondents and for getting other types of information where appropriate.

Non-party Disclosure Orders – on the application of a party to an action in which a claim is made, the Court may order a

non-party (who appears to the Court to be likely to have or to have had in its possession, custody or power any relevant documents) to disclose or produce for inspection relevant documents if the Court is satisfied that it is necessary for fairly disposing of the cause or matter or for saving costs.

Bank Records Orders – on the application of any party to any proceedings, the court may order for production of banker's records under s21 of the Evidence Ordinance.

This power for inspection is exercised with great caution and it must be shown that there is a probability that the account will contain materials germane to an issue to be tried between the parties.

#### As against the wrongdoer

The Hong Kong law allows a pre-action discovery application against a person who is likely to be a party to a later action and who is likely to have or to have had in its possession, custody or power any "directly relevant" documents to disclose or produce for inspection such documents. The Court will only make the order if it is necessary for fairly disposing of the cause or matter or for saving costs.

When making application to the Hong Kong court for a freezing injunction, the applicant may ask the court to include an order that the respondent discloses all the assets it owns. Breach of the order may lead to contempt proceedings or a committal order, and a sentence of imprisonment may be imposed on individuals in cases of willful failure to comply with the disclosure requirements.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Yes. A Mareva Injunction can be obtained which prevents a party from disposing of or dealing with its assets pending the outcome of a final judgment of a claim or further order.

### 4. What are the requirements for obtaining a freezing injunction (if available)?

In all ex parte applications, the applicant must give full and frank disclosure to the court. Material non-disclosure is a ground to discharge an injunction made upon an ex parte application.

In addition, for a Mareva injunction over assets within Hong Kong, the applicant must also prove that:

- the applicant has a “good arguable case” on its claim against the respondent;
- the respondent has assets within Hong Kong;
- there is a real risk of the respondent dissipating or removing its assets, which would have the effect that the applicant’s judgment would be unsatisfied; and
- the balance of convenience is in favour of granting the injunction.

For a worldwide Mareva injunction, instead of having assets within Hong Kong and a real risk of dissipation or removal of those assets, the applicant has to show that the respondent has sufficient assets outside Hong Kong to satisfy the judgment; and there is a real risk that the respondent may take steps designed so as to dispose of or conceal such foreign assets and to render the judgment nugatory by the time that it is given.

As with the other forms of interlocutory injunction, the applicant seeking the Mareva injunction will likely be required to provide an undertaking in damages if the uncertainty is resolved in the respondent’s favour at the trial.

## **5. What assets can be frozen and do they have to be within the jurisdiction?**

A freezing order can apply to all asset classes including but not limited to property, bank accounts, shares, account receivables, chattels, whether in the respondent’s own name or not, and whether solely or jointly owned. Whether the injunction covers assets outside the jurisdiction depends on the actual wording of the order of the court.

Usually a freezing order will allow the respondent to spend specific sums of money per week towards his ordinary living expenses, towards his ordinary and proper business expenses, and on legal advice and representation. A freezing order usually also does not prohibit the respondent from dealing with or disposing of any of his assets in the ordinary and proper course of business.

A party subject to a freezing order can be compelled to disclose information relating to any interest in any trusts whether as a beneficiary or otherwise. In general, the court has the power to make whatever ancillary orders are necessary to make the freezing order effective.

The injunction will not automatically be enforced worldwide; the applicant will still need to commence separate local proceedings to enforce the injunction in those jurisdictions where assets are located.

## **6. What about a search order?**

The Hong Kong courts have inherent jurisdiction to make *Anton Piller* Orders ordering a respondent to allow the identified persons to enter his premises and to search for, examine and remove or copy specified articles. The respondent will be in breach of the order if he withholds his consent and may be held to be in contempt of court.

The procedure for obtaining a search order is similar to that which applies in relation to obtaining a freezing order. The applicant must demonstrate an extremely strong prima facie case, and that the potential or actual damage to the applicant’s interests must be very serious. There must be clear evidence that the respondent has, in his possession, incriminating documents or things, and that there is a real possibility that he may dispose of or destroy such material before any inter partes application can be made, and there must be proportionality between the perceived threat to the plaintiff’s rights and the remedy granted. The courts have wide discretionary powers.

## **7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?**

Yes. The Hong Kong courts have jurisdiction to grant a freezing injunction or search order in aid of substantive or pending foreign proceedings which include arbitrations.

## 8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?

Not automatically. Under s21M of the High Court Ordinance, the court has jurisdiction to grant interim (injunctive) relief in the absence of substantive proceedings. The court needs to be satisfied that the conditions for the injunction would have been satisfied if the substantive proceedings were pending before the Hong Kong court. This would involve the consideration of the usual requirements such as a good arguable case, risk of dissipation and balance of convenience.

Second, the court will consider the question of convenience, and ask itself whether the making of the order would interfere with the management of the case in the primary court or give rise to disharmony or confusion and/or risks of conflicting, inconsistent or overlapping orders, whether it is the policy of the primary court not to make worldwide freezing/disclosure orders, and, whether, in a case where jurisdiction was resisted and disobedience was to be expected, the court would be making an order which it could not enforce. In short, the Hong Kong court would make a separate exercise of judgment rather than simply accepting the decision of the foreign court.

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## Asset tracing, an overview

Although available in both criminal and civil cases, in practice the Hungarian courts are rather reluctant to grant freezing orders in relation to civil law proceedings. Freezing orders therefore currently tend to be used either in criminal investigations or as a tool to assist in the future enforcement of an outstanding debt or monetary claim. In the latter case, assets are typically frozen by the court with the court executor subsequently enforcing against such frozen assets. There are currently limited examples of cases where a court has issued a freezing order in connection with a civil law matter in order to trace and freeze assets against an alleged wrongdoer.

### 1. Is any information about assets publicly available?

Companies: all companies registered in Hungary are obliged to publish their annual reports. These are publicly available and provide a comprehensive picture of the companies' assets.

Private individuals: shareholders/owners and executive officers are included in the Company Registry. Thus, potential company interests may be identified through a name search in the Company Registry.

The Land Registry holds a central record of property ownership in Hungary. It is possible to search for properties and withdraw information regarding each and all property, but it is not possible to search by the owner's name.

Credit Security Registry (*Hitelbiztosítéki nyilvántartás*) holds a record of registered charges and is publicly available.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

Besides the publicly available information sources described above, once a security injunction is granted and it can be presumed that any movable property of the affected party is held by a third party, the court executor may call upon the third party to make a declaration regarding the assets (possession, title, claims regarding the assets). However, the court executor may only seize the assets subject to an injunction if there is no dispute that such assets are owned by the party subject to the order. If a third party does dispute that the relevant assets are owned

by a party affected by the order, the applicant may initiate a special proceeding, requesting the court to oblige such third party to accept and co-operate with the seizure of/enforcement over the relevant assets. The applicant may also initiate proceedings if a third party holds/owns the asset in bad faith or obtained such assets by way of fraud.

In criminal proceedings, the assets that constitute evidence or are subject to seizure or confiscation pursuant to the provisions of the Hungarian Criminal Code may be traced from anybody regardless of whether or not such third party holds/owns such assets in good faith.

#### As against the wrongdoer

Besides the publicly available information sources described above, application can be made to the court for a temporary (freezing) injunction or security injunction (see below). Once a security injunction is granted, the court executor may obtain information for the identification of the judgment debtor, and other particulars such as permanent or habitual residence, head office, place of business, place of employment (or self-employment), income and any property that can be seized (movable or immovable property, payment account, deposit, securities, partnership share or other interest in a business association etc).

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Yes. There are two regimes available to protect and preserve assets on an interim basis.

- A temporary (freezing) injunction can be obtained which prevents a party from disposing of or dealing with its assets *pending the outcome of a final judgment of a claim*.
- A security injunction can be obtained to ensure the successful enforcement of a decision by pledge of security for money claims or sequestration of specific things.

### 4. What are the requirements for obtaining a freezing injunction (if available)?

In order to obtain a temporary (freezing) injunction, the applicants must:

- have filed their statement of claim with the relevant court or arbitral tribunal;

- demonstrate that their chances of successfully enforcing the future court decision will diminish significantly; and
- substantiate (by public documents or by private documents with full probative force) that they do have an existing claim, that such claim is for a quantifiable amount and that the claim has fallen due.

In order to obtain a security injunction,

- the applicants must substantiate that any delay jeopardizes the subsequent enforcement of the decision; and
- the claim must be based on a decision for which a certificate of enforcement could be issued however (i) the resolution is not yet definitive or not subject to preliminary enforcement, or (ii) the resolution is already definitive, but the deadline for performance has not yet expired.

## 5. What assets can be frozen and do they have to be within the jurisdiction?

A temporary injunction can apply to all asset classes and may be ordered over all or specified assets owned by the respondent whether within or outside the jurisdiction.

A security injunction can apply to all asset classes but with certain limitations (specified amount of monthly salary, certain social benefits, personal items, items necessary for education and exercising of profession, etc).

## 6. What about a search order?

Search measures are available in criminal proceedings and in enforcement proceedings. Depending on what stage the proceedings have reached, the police, the public prosecutor or the judge may issue a search order.

In court enforcement proceedings, the court executor may inspect and search the respondent's residence and other premises, any property and assets or documents on his business activities. However, frisking is not allowed in the course of execution.

## 7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?

Temporary (freezing) injunctions cannot be obtained in support of proceedings outside of the jurisdiction as the jurisdictional basis of ordering such measures is that the respective Hungarian court must have jurisdiction over the underlying dispute.

A security injunction may be obtained in support of a claim which is both subject to Council Regulation 44/2001/EC and the underlying claim was filed with another Member State of the EU or if the underlying claim is based on a court decision which must be recognized in Hungary under Council Regulation 44/2001/EC.

## 8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?

If a freezing injunction was issued in a contracting state of the Lugano Convention, enforcement follows this treaty.

Freezing injunctions issued in EU member states may be enforced based on the Brussels I Regulation.

For all other cases, enforcement follows the rules of the Private International Law Decree. Even though the Hungarian Supreme Court has never addressed the issue it may be derived from the Private International Law Decree that interim measures may be recognised and thus enforced in Hungary, if:

- the court which made the decision had jurisdiction according to the Private International Law Decree to make such decision;
- the decision is final and binding according to the laws of the state of origin;
- there is reciprocity between Hungary and the state of origin (however, reciprocity is not required if the jurisdiction of the court issuing the interim measure was based on the parties' agreement); and
- no ground for denial exists.

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## Asset tracing, an overview

There are a variety of measures under Luxembourg law that can serve to request the preservation of assets, all of which operate *in rem*. Because of its rather accessible requirements, the classic third party attachment remains the mother of all preservation measures.

### 1. Is any information about assets publicly available?

The Land Registry (*cadastre*) holds a central record of all transactions and mortgages on immovable properties in Luxembourg. It is possible to make a request to the Land Registry to obtain entries regarding a certain person or company.

Companies file annual accounts with the Luxembourg Trade and Companies Register that can contain information on “attachable” assets such as holdings in affiliated companies.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

Phishing expeditions are not allowed under Luxembourg law and there are no direct judicial means to obtain information on assets from third parties or the respondent itself. Information can however be incidentally discovered through evidence requests based on a pending or contemplated dispute.

Information or indications of assets (such as bank accounts) are usually discovered through an analysis of the available documents (bank transfers, contracts, e-mails etc). As of 18 January 2017, it is possible to make a request to obtain account information together with an application for a European Account Preservation Order (EAPO) in accordance with Regulation (EU) No 655/2014.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Yes. Depending on the circumstances, the following interim remedies can be used.

- *Saisie-arrêt* (third-party attachment proceedings) is a two-stage process allowing an applicant to attach assets of the respondent held by third parties (such as bank

accounts) and to obtain payment on those assets in lieu of the respondent. Third-party attachments are conservatory during their first stage.

- The *saisie conservatoire commerciale* (commercial conservatory attachment) can be used upon *ex parte* application to freeze all or part of a respondent’s tangible assets if the applicant has a commercial claim.
- It will be possible, in cross-border situations within the European Union, to apply for an EAPO to freeze a *bank account*.
- The *saisie revendication* (attachment under a prior claim) allows a claimant to attach assets over which the applicant has a delivery or restitution claim. It is a conservatory and enforcement action initiated *ex parte*.
- Pending the outcome of a dispute, a Court can appoint a *séquestre* (receiver) through summary proceedings over assets. A receivership is solely a conservative measure and usually applies if the property is disputed.

### 4. What are the requirements for obtaining a freezing injunction (if available)?

For third party attachments, unless the applicant has a title evidencing its claim, it should go through the process of requesting a prior *ex parte* authorization from the President of the District Court by showing that its claim is *prima facie* certain, determined and due (certain, *liquide et exigible*).

In the case of a commercial conservatory attachment, an applicant should also establish an imminent threat of misappropriation.

Courts will be able to issue an EAPO if it is shown that without it, there is a real risk that the subsequent enforcement of the applicant’s claim against the respondent will be impeded or made substantially more difficult. Where the applicant has not yet obtained a judgment, court settlement or authentic instrument against the respondent, it should also establish that it is likely to succeed on the substance of the claim.

In order to obtain an attachment under a prior claim, an applicant should show that it has an apparent right to the concerned asset(s).

Receivers can be appointed in case of urgency, if it is shown that the property of the concerned asset is disputed or if the applicant can establish that a receivership is necessary or useful to protect the parties' rights.

#### **5. What assets can be frozen and do they have to be within the jurisdiction?**

A third party attachment can be made on all claims for assets, monies or property whatsoever held for or on account of or owed to the respondent. Commercial conservatory attachments and attachments under a prior claim can only affect tangible assets. EAPO's will only apply to bank accounts. All types of property can be put under receivership.

Luxembourg courts have no jurisdiction and are not empowered to allow or order preservation measures affecting assets outside of Luxembourg. The EAPO is an exception.

#### **6. What about a search order?**

To make a request for the obtaining of account information within the framework of an EAPO, the applicant will have to show that it has an enforceable judgment, court settlement or authentic instrument against the respondent and substantiate why it is assumed that the respondent holds one or more accounts with a bank in the specific Member State.

Where the judgment, court settlement or authentic instrument obtained by the applicant is not yet enforceable and the amount to be preserved is substantial, the applicant should also prove that there is an urgent need for account information.

#### **7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?**

Yes, provided that an applicant can establish that the relevant substantive requirements are met by reference to the applicable law on the merits (eg a *prima facie* certain, determined and due claim for third party attachments and commercial conservatory attachments or a right to the attached asset for an attachment under a prior claim). The EAPO is specifically designed for cross-border preservations.

#### **8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?**

Luxembourg case law is reluctant towards the direct use of foreign freezing injunctions (or similar instruments). Common law freezing injunctions or restraining orders may not be compatible with the Luxembourg law requirements for any of the remedies described above.

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## Asset tracing, an overview

Although not expressly described as such, there are numerous methods for tracing assets in Malaysia. Asset tracing is synonymous with the identification of an asset and/or its proceeds (under the Mutual Assistance in Criminal Matters Act 2002). Asset tracing can also be performed in relation to bankrupt persons and companies involved in fraudulent transactions via open and covert methods of investigation.

The framework for asset tracing in Malaysia is diverse and varied. Administrative and legal recourse is available to applicants, enabling them to not only find the asset or the holder of such asset, but also to protect and preserve such asset from being destroyed or dissipated. The Malaysian courts have wide-ranging powers in relation to assets within their jurisdiction. However for asset tracing outside of Malaysia, powers to grant interim relief are limited and largely depend on mutual assistance and recognition by foreign courts.

### 1. Is any information about assets publicly available?

Information regarding ownership of assets is generally not publicly available. The only central depository of information regarding assets (and even then only pertaining to movable property) is the Central Credit Reference Information System of the Central Bank of Malaysia. This is a computerized private database system that processes credit-related data received from participating financial institutions and synthesises the information into credit reports. These reports are only available to financial institutions and borrowers on request (subject to the approval of the Central Bank of Malaysia as well as the consent of the borrowers).

Information regarding assets located in Malaysia that are owned by a company or the shareholders of a company may be obtained for a fee via a search at the Companies Commission of Malaysia. However, information regarding beneficial interest in companies and trusts is not publicly available.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

There are many options that can be utilised to obtain information to identify the assets or the asset holders. One option which does not require legal recourse is to perform an asset search at the relevant registry (for a fee). Identification of the asset(s) is necessary before the asset holder can be identified. It is possible to search for real property, ships, aircraft, and/or motor vehicles. It is also possible to apply to the court.

#### As against third parties

A person can obtain a *Norwich Pharmacal* order by making an application for pre-action discovery and inspection of documents of other persons via an originating summons (Order 24 Rule 7A of the Rules of Court 2012). In applying for such an order, the applicant must:

- state the material facts pertaining to the intended proceedings
- state whether the person against whom the order is sought is likely to be a party in the subsequent proceedings in the High Court
- specify or describe the documents sought and show that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made, and
- identify the persons against whom the order is sought is likely to have or had the documents in his possession, custody or power.

These requirements are set out in *Infoline Sdn Bhd (sued as trustee of Tee Keong Family Trust) v Benjamin Lim Keong Hoe* [2017].

It is worth noting that the application gives statutory effect to the *Norwich Pharmacal* order but is wider in scope, as Order 24 Rule 7A of the Rules of Court 2012 also provides for discovery against third parties subsequent to the commencement of a suit (which is to be applied for via a notice of application supported by affidavit). That being said, the applicant must have prior knowledge of the particulars of the assets.

### As against the wrongdoer

There are no means of compelling a party to identify his assets prior to entry of a judgment (notwithstanding if it is necessary for complying with any injunctive or interlocutory relief).

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Yes. One step that can be taken by an applicant is to lodge a report with the relevant authorities. Movable assets in bank accounts owned by a wrongdoer, and/or third parties can be frozen by lodging a report with the Royal Malaysian Police force or Malaysian Anti-Corruption Commission. Law enforcement agencies are empowered to utilise the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 to freeze accounts believed to be involved in criminal activities. In addition, an applicant may request that a bank freezes certain of their accounts. However, in this scenario a bank cannot freeze accounts other than those of the applicant in the absence of a court order.

Another step that can be taken is to apply for an interlocutory injunction and interim preservation of property order (Order 29 Rule 2 of the Rules of Court 2012). If successful the court can make an order for the detention, custody or preservation of any property which is the subject of litigation. If the assets are held in the name of a company, it may also be possible to petition the court to appoint provisional liquidators to prevent dissipation of assets.

### 4. What are the requirements for obtaining a freezing injunction (if available)?

A freezing (or Mareva) order can be obtained by an application for an interlocutory injunction (either *inter partes* or *ex parte*) at any stage of the proceedings (Order 29 Rule 1 of the Rules of Court 2012). It is advisable to apply for a freezing injunction *ex parte* so as to avoid frustration of the order by the other side. A plaintiff must be able to demonstrate that there is a serious question to be tried (ie a prima facie case) and that the balance of convenience tilts in the plaintiff's favour (ie the plaintiff must show that there is a good arguable case). A party applying for an injunction must also give full and frank disclosure and an undertaking in damages. It also goes without saying that the plaintiff must demonstrate to the satisfaction of the Court that the

defendant has assets to which the said freezing injunction can latch on to, and that there is a risk of dissipation of the defendant's assets.

### 5. What assets can be frozen and do they have to be within the jurisdiction?

Any asset within the jurisdiction of the Malaysian courts may be subject to a freezing order. Assets beyond the court's jurisdiction may be subject to a freezing order by virtue of the principle that a Mareva injunction is equitable in nature. Indeed, as per the judgment in the case of *Metrowangsa Asset Management Sdn Bhd & Anor vs Ahmad b Hj Hassan & Ors* [2005], there was nothing "... to prevent this court from granting a worldwide Mareva (injunction) in favour of the plaintiffs".

### 6. What about a search order?

A search (or *Anton Piller*) order can be obtained, which enables the plaintiff to carry out a search of any premises under the control of the defendant within the jurisdiction. Such search order can be applied for at any time during the proceedings (*inter partes*, or *ex parte* where the application is of an urgent nature (Order 29 Rule 1 of the Rules of Court 2012)). It is advisable to apply for an *ex parte* search order to avoid the party against whom the order is made from taking steps to frustrate the order. In order to successfully apply for such an order, the applicant must show to the Court that there:

- is an extremely strong prima facie case
- would be a serious effect on the applicant if the court denies the application, and
- is clear evidence that the opposing side has the documents and would destroy/dispose of them to defeat justice.

The applicant must also give full and frank disclosure of all the known facts, must give certain undertakings and must carry out the order with certain safeguards in place. The order does not permit forced entry. Non-compliance with the order may amount to an act in contempt of court.

### 7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?

Yes, freezing injunctions and search orders may be obtained in support of proceedings in other jurisdictions.

## 8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?

The Malaysian courts will generally recognize and allow enforcement of foreign judgments and orders (including freezing injunctions) by allowing the commencement of new proceedings based on the foreign judgment or order.

Generally, one method of commencing the new proceeding is by way of a writ. Once the writ and statement of claim have been served on the defendant and the defendant has entered an appearance, the plaintiff may file an application for summary judgment, annexing a certified sealed copy of the foreign judgment or order. Such an application may be granted if no triable issue is raised by the defendant.

Alternatively, the new proceedings may be commenced by way of an originating summons supported by an affidavit which is annexed with a certified sealed copy of the foreign judgment or order. If satisfied that the judgment ought to be recognized and enforced, the Court may grant an order in terms of the originating summons.

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## Asset tracing, an overview

Asset tracing is a procedure whereby assets that have been obtained through crime can be tracked down and recovered. Asset recovery in Mauritius is governed by the Asset Recovery Act 2011. Applications can also be made for injunctions to protect, trace and recover assets in Mauritius.

### 1. Is any information about assets publicly available?

The DPP's website (Director of Public Prosecutions) gives an overview of Asset Recovery.

The Asset Recovery Act, which is available online, contains the procedure through which the State can recover assets.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

A Norwich Pharmacal Order can be applied for. The elements which have to be satisfied are whether:

- there is an element of wrong doing;
- there is an arguable case based on the wrongdoing;
- the respondent must have been involved in the wrongdoing, albeit unwillingly;
- the order is necessary in the interests of justice; and
- the applicant has given undertakings in connection with this application.

#### As against the wrongdoer

A Confiscation or Recovery Order, or a Restraining or Restriction Order can be applied for from a Judge before the Supreme Court of Mauritius in relation to a property.

Pending the determination of a main claim for recovery of assets, a claim can be made in exceptional circumstances before a Judge in Chambers for a Judicial Mortgage. This application can only be effected against immovable property.

A Property Tracking and Monitoring Order can be applied for under the Prevention of Corruption and Terrorism Act, Section 54.

- Where, for the purposes of an investigation under Section 46, the Commission –
  - needs to determine whether any property belongs to, is in the possession or under the control of, a person; or
  - has reasonable grounds for suspecting that a person has committed, is committing, or is about to commit an offence which the Commission has power to investigate, the Commission may issue a directive under subsection (2) to the Director of the Corruption Investigation Division.
- A directive under subsection (1) may direct –
  - that any document relevant to the –
    - identification, location or quantification of any property; or
    - identification or location of any document necessary for the transfer of any property, belonging to, or in the possession or under the control of, the person named in the directive be delivered forthwith to the Director of the Corruption Investigation Division;
  - that a bank, financial institution, cash dealer or member of a relevant profession or occupation forthwith produces to the Director of the Corruption Investigation Division, all information obtained by it about any business transaction conducted by or for that person with it during such period before or after the date of the order as the Judge may direct.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Most applications for asset protection, asset tracing and asset recovery in Mauritius, are made through injunctions.

The DPP is empowered to prosecute all offences in Mauritius in the name and on behalf of the State. This includes offences that fall under the Asset Recovery Act 2011. Where the DPP has declined to institute a prosecution, an applicant can, subject to an application for permission before a Judge, institute a private prosecution.

Additionally, assets can be made in a trust to protect them from future claims.

#### 4. What are the requirements for obtaining a freezing injunction (if available)?

An application has to be made before a Judge in Chambers. The applicant must show that it has a good, arguable case. A good arguable case has been described by Mustill J as

- “one which is more than barely capable of serious argument, but yet not necessarily one which the judge considers would have a better than 50% chance of success.
- The applicant must also show that there is a real risk that the respondent will dissipate assets belonging to him such that they will be unavailable to satisfy an eventual judgment in favour of the applicant; and
- That in all the circumstances of the case it is just and convenient to grant such an order.”

Additionally, the freezing order should not prejudice the rights and freedom of others that require to be respected and protected, or the public interest.

#### 5. what assets can be frozen and do they have to be within the jurisdiction?

A freezing injunction can apply to all asset classes. Article 592 of the Code de Procedure Civil defines which assets are *insaisissables* (unseizable).

According to Section 104 of the Courts Act:

104. Civil jurisdiction

(1) Subject to this Part, the Intermediate Court or a District Court shall have jurisdiction in all civil cases where the sum or matter in dispute, whether in balance of account or otherwise, does not exceed the prescribed amount, exclusive of interest and costs.

(2) The jurisdiction conferred upon the Intermediate Court or a District Court by subsection (1) shall include the power to make such orders and to issue such warrants or other process as may be necessary for the enforcement of the rights of the parties and no order made or warrant or process issued under this subsection shall be deemed invalid by reason only that it is in the nature of a mandatory injunction or other equitable remedy.

#### 6. What about a search order?

According to the procedure set out in the case of *Anton Piller KG v Manufacturing Processes Ltd*, to obtain a search and seizure order, the applicant must show:

- that he has an extremely strong *prima facie* case;
- that, if the order is not granted, he would suffer very serious loss; and
- that there is a real risk that documents in possession of the respondent would be destroyed and clear evidence to that effect.

According to section 51 of the Prevention Of Corruption Act:

- Subject to subsections (3) and (4), where, upon notification or after consultation with the FIU, the Commission has reasonable grounds to believe that –
  - a bank, financial institution or cash dealer has failed to keep a business transaction record as required under section 17 of the Financial Intelligence and Anti-Money Laundering Act 2002;
  - a bank, financial institution, cash dealer or a member of a relevant profession or occupation, has failed to report any suspicious transaction as required under section 14 of the Financial Intelligence and Anti-Money Laundering Act 2002; or
  - a bank, financial institution, cash dealer or a member of a relevant profession or occupation is in possession of documents, books or records or other information which may assist the Commission in an investigation, the Commission may apply to a Judge in Chambers for an order allowing the Commission, or any officer delegated by it, to enter premises belonging to, or in the possession or control of, the bank, financial institution, cash dealer or member of a relevant profession or occupation and to search the premises and remove therefrom any document or material.
- An application under subsection (1) shall be supported by an affidavit by the Director-General disclosing the reason why an order is sought under this section.
- No order shall be issued under subsection (1) with respect to a law practitioner unless the Judge is satisfied that, having regard to the need to protect legal professional privilege, it is in the public interest that the order be made without requiring the law practitioner to show cause why the order should not be made.

#### 7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?

If there is an ongoing case in Mauritius and the assets in question are found outside of Mauritius, the Mauritian court would not have jurisdiction over these assets.

## 8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?

Under Article 546 of the Code de Procédure Civile, an application can be made declaring a foreign judgment executory in Mauritius.

For a foreign judgment to be executory in Mauritius the applicant has to show that:

- the judgment must still be valid (ait 'une existence légale') and capable of execution in the country where it was delivered;
- it must not be contrary to any principle affecting public order in Mauritius;
- the respondent must have been regularly summoned to attend the proceedings; and
- the court which delivered the judgment must have had jurisdiction to deal with the matter submitted to it.

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## Asset tracing, an overview

According to some independent analysts, asset tracing along with recovery, represents the most problematic and difficult area of the Serbian judicial system to navigate. In the past few years, in order to improve effectiveness and efficiency, the law has changed several times. However, none of the changes have resulted in significant improvements; asset tracing is still the major issue in the debt collection proceedings.

The problematic nature of asset tracing lies not only in the fact that the vast majority of Serbian asset registers are not publicly available, but also in the fact that publicly available information is often inaccurate and cannot be trusted.

### 1. Is any information about assets publicly available?

Information concerning the bank accounts of legal persons can be found within one central registry. This type of data is easily accessible through the website of the National Bank of Serbia, without any registration formalities or fees to be paid. This is the only publicly available central register where an applicant can find precise, accurate and sufficient data on the wrongdoer's assets. This registry represents the best part and highpoint of asset tracing in Serbia. Additionally, within the aforementioned registry, an applicant can discover whether the wrongdoer's bank accounts are locked due to the collection of debt by third parties and the amount of debt to be collected. Upon a request and payment of certain fees, the National Bank of Serbia will provide additional information on the legal basis for the collection of each debt pending on the wrongdoer's bank accounts. However, this applies only for legal persons (the same information regarding the bank accounts of natural persons is not publicly available). Information regarding the bank accounts of natural persons can only be obtained by a court or a civilian enforcement officer, in the course of enforcement proceedings.

Apart from the above-mentioned register, information regarding real estate assets is publicly available and can be found on the Cadastre registry website. However, publicly available information on this registry website is often inaccurate and cannot be fully relied on. Accurate information can be obtained directly from municipality cadastre registers, which keep records of real property

located within their territory. The Serbian Cadastre Registry is divided by municipality with each having their own cadastre register. There is no single central registry collecting and maintaining information from all municipality cadastre registries. Therefore, in order to obtain the accurate information on the wrongdoer's real estate, an applicant needs to have information regarding the exact location of real estate, so it can request more information from the appropriate municipality cadastre register.

Companies are required to submit annual financial reports to the Serbian Business Registers Agency, whereby those submitted annual financial reports become publicly available through the registers' website. However, the data contained within these annual financial reports is nearly useless, as the register only indicates the existence of a company's assets (real estate, movable property, total value of such assets); detailed information regarding assets is not disclosed.

Apart from the sources referred to above, if there are enforcement proceedings under an enforceable court decision then a court or a civilian enforcement officer can request from the local authorities information on other assets. For example, information can be requested in relation to the wrongdoer's vehicles or, in case of a natural person, their social security status (which could further disclose whether the wrongdoer receives a salary, retirement fee, or any other income on a regular basis).

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

There is not much that an applicant can do independently, that is, outside of the enforcement proceedings, regarding third parties. The applicant may request from a court or a civilian enforcement officer (within the enforcement proceedings and under the enforceable court decision) to freeze all the payments from the wrongdoer's accounts, and to order third parties, specified by the applicant, to withhold payments of debts to the wrongdoer. Once the third party receives the court's or the civilian enforcement

officer's order, the amount payable to the wrongdoer by the third party is considered as seized in favour of the applicant, and thus, the third party cannot make the payment of the debt to the wrongdoer.

### **3. Can steps be taken to protect/preserve assets on an interim basis?**

In order to protect/preserve assets on an interim basis, an applicant may request from a court (prior to court proceedings being issued, at any moment during the court proceedings, or even after the decision is rendered) an interim injunction to prevent a wrongdoer from disposing of his assets in prejudice of the applicant's rights.

### **4. What are the requirements for obtaining a freezing injunction (if available)?**

As previously indicated, a freezing injunction can be sought before a trial, in the course of proceedings or even after the court decision is rendered, by the court issuing an order for a preliminary injunction. However, in order to obtain the interim injunction order, the applicant must demonstrate to the court that it has a good arguable case by submitting sufficient evidence, ie the court must be persuaded that the claim has a prima facie legal basis. This means that from the documentary evidence (rather than an in-depth analysis of the facts) the claim must have a legal basis. Furthermore, the applicant must have a cause of action, ie there must be a real risk that the applicant's claim could be prejudiced while the decision on the merits is rendered and enforced, without the requested injunction. When it comes to monetary claims, the applicant should make a case that is likely that the wrongdoer will hinder the collection of the debt by transferring, concealing or otherwise disposing of his assets, in the absence of a freezing order. As regards non-monetary claims, the applicant should make a case that it is likely that the lack of a freezing order would impair or significantly impede, or would result in irreparable damage to the assets. Evidencing the aforementioned conditions is not necessary in cases where an applicant can deposit enough funds to cover any damage that would be caused to the wrongdoer by the freezing injunction. However, the courts rarely order freezing injunctions in such cases.

### **5. What assets can be frozen and do they have to be within the jurisdiction?**

Freezing assets can be ordered only in relation to assets over which a judgment can be attached. In terms of monetary claims, a wide range of assets could be frozen such as movable, immovable assets, funds on bank accounts, claims against third parties, shares, etc. In terms of non-monetary claims, the freezing injunction has to be directly connected to the fulfilment of the claim. The freezing is limited to the value of the claim and to the specific asset which is the subject of the non-monetary claim (therefore a wider range of assets can be frozen in order to secure the collection of a debt). The freezing order must always specify the claim for which is issued, as well as assets and measures to be taken in fulfilment of the freezing order. This means that freezing orders regarding all of the wrongdoer's assets are generally not allowed.

### **6. What about a search order?**

A search order, or any other similar action, is not available under the civil procedure in the Republic of Serbia. Such orders are exclusively reserved for use in relation to criminal cases and under the restrictive conditions aimed at human rights protection.

### **7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?**

If the enforcement of a foreign court decision's regarding a wrongdoer's assets falls within the Serbian court's jurisdiction, the Serbian courts are competent to issue the freezing order.

### **8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?**

Yes, under the general rules on recognition and enforcement of foreign court decisions. Recognition and enforcement of a foreign court's decision depends on several factors. For example, whether the Serbian courts have sole jurisdiction over the case under Serbian law and whether there are any applicable multilateral or bilateral treaties etc. Generally, a freezing injunction ordered by a foreign court can be applied in Serbia. However, in each case certain conditions must be met.

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## Asset tracing, an overview

In Spain, it is generally necessary to initiate enforcement proceedings to trace the defendant's assets, although certain types of assets may be tracked by means of extrajudicial mechanisms, such as public records.

Civil enforcement proceedings can only be commenced at the request of a party. They provide an opportunity to request that the Spanish courts identify and protect the assets in order to ensure the penalty's effectiveness.

### 1. Is any information about assets publicly available?

Real property, regardless of the owners (individuals or companies), is registered with the Land Registry. Spanish civil legislation affords citizens the right to obtain ownership information and any charges or encumbrances.

Property rights in tangible movable assets such as ships, aircrafts, automobiles, real guarantees, general conditions of contracts, etc may be recorded by the Registry of Movable Assets.

Private companies must submit annual accounts to the Mercantile Register. This contains general information about administrators, legal representatives, accounts and confirmation of financial statements, a summary of company reports and a summary of the company website.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

Official records can be consulted with a view to obtaining any relevant information about the respective asset holders. In order to obtain further information about the respondent, legal proceedings should be initiated before the court.

#### As against the wrongdoer

Once the enforcement procedure has begun, an applicant must state the assets of the respondent that are subject to seizure and of which he has knowledge. Otherwise, the court will require the respondent to disclose all assets owned. This request for disclosure of the respondent's

assets is accompanied by a caution regarding the sanctions that can be imposed for serious disobedience (in the event that a list of his/her assets is not submitted).

The applicant can also request that the court carries out a judicial investigation of the estate of the enforcement debtor. In this case, the court contacts financial institutions, public registries and people referenced by the applicant and asks them to provide a list of any assets and rights of the respondent of which they are aware.

Furthermore, courts are entitled to request information from the 'Judicial Neutral Point'; a network of services that provides to judicial authorities on a centralised basis. It is very useful in cases where assets or cash accounts of a debtor may be affected by a precautionary measure, when their quality and quantity remains unknown.

The duty to cooperate should also be noted. All people and public and private institutions are obliged to cooperate in the enforcement proceedings and to submit any documents and data they have in their power and whose submission has been decided by the Court Clerk.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

It is the responsibility of the claimant to use his right to seek an injunction under the court provisions for precautionary measures he may deem necessary to ensure effective protection. These measures will avoid the disappearance of goods necessary for the payment to the creditor.

Among the available precautionary measures is the prejudgment attachment. This aims to ensure the enforcement of judgments ordering the delivery of amounts of money or yields, rents and expendable goods that can be estimated in cash by applying fixed prices. These measures are exclusively requested by the parties and cannot be agreed upon on an *ex officio* basis by the court.

#### 4. What are the requirements for obtaining a freezing injunction (if available)?

In Spain, there is no “freezing injunction” concept, even though prejudgment attachment may serve the same purpose. Precautionary measures will only be granted if the applicant justifies the following requirements:

- risk deriving from the procedural delay (*periculum in mora*): the applicant must demonstrate that there is a real risk during the course of the proceeding of situations preventing or hindering the effectiveness of the protection
- appearance of legal standing (*fumus boni iuris*): the applicant must submit arguments and documentary evidence to the court justifying a provisional and circumstantial judgment
- commonly, the applicant shall post security sufficient to compensate the damages that the adoption of the precautionary measure may cause to the estate of the defendant.

#### 5. What assets can be frozen and do they have to be within the jurisdiction?

A precautionary measure can attach to real estate, bank accounts, automobiles etc. However, the Spanish Civil Procedure Act regulates several assets that cannot be attached, such as furniture, household goods and salaries (as long as the salary does not exceed the amount stated for the minimum wage).

In Spain an executive title is enforceable throughout the country, wherever the assets are located. Spanish courts can impose precautionary measures not only regarding assets or people located in Spanish territory, but also outside such territory, provided that they are competent to deal with the merits of the case.

#### 6. What about a search order?

Search orders are not accepted in civil proceedings under the Spanish Civil Procedure Act.

#### 7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?

Freezing injunctions are not recognised in Spain, and nor are search orders. Notwithstanding any special rules in any treaties or conventions (or any European Union rules that may apply) whoever can prove to be a party to any jurisdictional proceedings being conducted in a foreign country may seek injunctions from a Spanish court,

provided that the necessary requisites set out above are met. The exception to this is where the main matter at issue solely lies within the competence of Spanish courts.

#### 8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?

Given that freezing injunctions are not recognised in Spain, their enforcement will depend on the individual circumstances of the case. If Regulation (EU) No. 1215/2012 applies, it would not be possible to apply to the Spanish courts for such measure as it is not available under the Spanish law. Nevertheless, the injunction could be adapted to a measure or an order recognised in Spanish law with equivalent effects and that pursues similar aims and interests, such as a prejudgment attachment.

Concerning precautionary measures obtained outside the European Union, in order for them to be enforced in Spain, international treaties and the legal provisions on international judicial co-operation shall apply. Under the latter, precautionary measures will only be enforced when failing to do so would violate the right to effective judicial protection (provided that the measure was issued after hearing the defendant).

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## Asset tracing, an overview

As one of the world's largest wealth management centres, Switzerland is often the target of asset recovery efforts. Complex asset recovery cases in Switzerland will generally involve criminal proceedings, bankruptcy, civil and enforcement proceedings. Indeed, since the Swiss procedural system does not provide for instruments equivalent to discovery under common law systems, an efficient way to trace and recover assets is often to involve Swiss prosecuting authorities who have wide-ranging powers not available directly to applicants and to bring a civil claim for compensation in the context of the criminal proceedings as allowed by Swiss law. Independently from criminal proceedings, applicants may also seek the attachment of assets located in Switzerland by way of a "civil attachment" provided certain conditions are fulfilled.

### 1. What steps can be taken to obtain information to identify the asset holder or the assets?

#### As against third parties

There are several publicly available sources that provide information on assets located in Switzerland. In particular:

- the commercial register provides information on companies (eg share capital, legal seat, address, corporate purpose). Each canton maintains its own commercial register, which is accessible freely. A summary version of the commercial register is available online;
- the Swiss Official Gazette of Commerce, in addition to gathering some of the information published in every cantonal commercial register, provides information on bankruptcies, composition agreements, debt enforcement, calls to creditors, lost titles, precious metal control, legal publications, balances and company notices;
- the land register records every single plot of land in Switzerland, with the exception of those in the public domain. Each canton maintains its own land register, which can be consulted upon showing a legitimate interest (eg for purposes of contractual negotiations for the purchase of a property);
- the Swiss aircraft registry records all Swiss-registered aircraft and provides detailed information regarding the owner and the holder, the type of aircraft, its year of construction, its serial number, the maximum take-off mass and the fee according to its noise level;

- the debt enforcement and bankruptcy register records include all debt collection proceedings filed against a debtor, and are available to anyone showing a prima facie legitimate interest and upon request;
- there also exists an unofficial will register that records wills and other testamentary dispositions. This register is, however, not exhaustive and only contains information that has been provided freely;
- in certain cantons (eg Vaud and Fribourg), it is possible, under specific conditions, to access information contained in a person's tax certificate; and
- judgments rendered by civil courts are in principle made accessible to the public; a copy thereof will be provided upon showing a legitimate interest and depending on the practice of the courts after the judgments have been made anonymous.

There is however no register of bank accounts in Switzerland and Swiss banking secrecy protects the privacy of banks' clients but is not absolute and can be lifted, among others, in the context of criminal proceedings.

Under Swiss civil procedure rules, taking of evidence requests (eg hearing, document productions, etc) may also be addressed to third parties through the intervention of the judge, generally upon request of a party. Third parties, like parties, have a duty to cooperate in the taking of evidence. However, they may refuse to cooperate in certain circumstances such as if they have a family link or a close personal relationship to one of the parties.

#### As against the wrongdoer

Parties have a duty to cooperate in the taking of evidence. In particular, they have the duty to make a truthful deposition or statement as a party or a witness; to produce physical records, with the exception of correspondence with lawyers provided that such correspondence concerns the professional representation of a party or third party; and to allow an examination by an expert of their person or property.

However, Swiss law does not provide for a disclosure order as it exists in certain common law jurisdictions.

If debt collection proceedings were initiated against a respondent and have not been stayed by the filing of an objection or by court judgment, an applicant may apply

for the continuation of the enforcement proceedings in which case, the debtor, once notified of the seizure of his assets, will be bound, under the threat of criminal sanctions to disclose his assets, including those not in his possession, as claims and rights against third parties, to the extent necessary to satisfy the amount to be seized.

## 2. Can steps be taken to protect/preserve assets on an interim basis?

The protective brief is a powerful preventive tool provided under Swiss civil procedural law available to a party fearing the filing of an *ex parte* injunction against it. It allows a party to submit in advance its position to the court. This brief will only be communicated to the opposing party if and when it effectively requests an *ex parte* injunction and shall remain in effect six months after being filed, following which it must be renewed or extended if it is to have continued effect.

## 3. What are the requirements for obtaining a freezing injunction (if available)?

Applicants may obtain provisional seizure of a respondent's assets by way of civil attachment proceedings which has the effect of freezing all of the respondent's identified assets in Switzerland.

The applicant can request a judge to order an attachment of the respondent's assets if he can establish *prima facie* (i) that he has a claim against the respondent, (ii) if he can identify assets in Switzerland which can be attached, and (iii) if there is a ground for attachment, namely:

- the respondent has no permanent domicile (neither in Switzerland nor abroad);
- the respondent is attempting to conceal assets or is planning to leave Switzerland to avoid the performance of his obligations;
- the respondent is passing through or belongs to the category of persons who visit fairs and markets and the claim, by its nature, must be fulfilled at once;
- the respondent does not live in Switzerland and no other ground for attachment of his assets is available to the applicant, provided that the claim has sufficient connection with Switzerland or that the claim is based on a recognition of debt;
- the applicant holds a provisional or definitive certificate of shortfall against the respondent; or
- the applicant holds an enforceable title against the respondent, such as a Swiss or foreign judgment, a court-approved settlement, an enforceable deed, or an

arbitral award. No prior *exequatur* is required to obtain an attachment on the basis of a foreign court decision or foreign arbitral award as the *exequatur* may be requested as a preliminary issue in the attachment proceedings.

So-called "searching attachments" or "fishing expeditions", ie, requests for attachment not identifying sufficiently the assets to be attached but rather aiming at finding out whether the respondent has any assets in Switzerland, are not allowed under Swiss law.

If debt enforcement proceedings are not already pending, an ordinary court action (at the appropriate forum in Switzerland or abroad) or debt enforcement proceedings must be initiated by the applicant to validate the attachment within 10 days from service of the minutes of the attachment order.

The applicant may be ordered to provide security in the form of a bank guarantee or cash deposit to cover the likely damages that could arise from an unjustified attachment.

## 4. What assets can be frozen and do they have to be within the jurisdiction?

- As a rule, all of the respondent's moveable and immoveable assets, negotiable securities and existing claims against third parties located in Switzerland may be attached. An attachment order applies only to assets held in Switzerland excluding those held abroad.
- Under Swiss law, future claims may be attached only if they can be sufficiently identified at the moment of the attachment application. This requires specific and detailed information on the claim (amount, date it will be credited, origin, transferor, etc), which is typically not available to the applicant. It is not sufficient to refer in the attachment application to "any (potential) future funds and/or claims". Accordingly, future claims may be attached if they are certain and enforceable. Even future claims subject to a condition precedent may be attached if the level of uncertainty is not excessive.
- Some assets of the respondent cannot be seized by law and can therefore not be attached. Such assets are in particular indispensable items which include (i) objects for the respondent's personal use; (ii) religious books and items of worship; (iii) tools and other objects essential for the respondent to exercise his/her profession; (iv) specific animals indispensable to nourish the respondent and his/her family or to maintain the respondent's business; (v) the food and fuel required by the respondent for two months subsequent to the seizure or the money or credit necessary to purchase the same; (vi) the uniform equipment and

arms, the military horse and the pay of a member of the army or civil defence and the community service equipment and pay; (vii) specific annuities; (viii) amounts received from charitable institutions in the event of illness, need, invalidity or bereavement; (ix) annuities, capital payments and other forms of compensation to victims or kin for bodily harm, damage to health or bereavement to the extent that such benefits constitute satisfaction, replacement of recovery costs or serve for the acquisition of aids; and (x) specific pension annuities or unmatured claims for benefits of pension funds.

## 5. What about a search order?

There is no search order available under Swiss law.

In particular, so-called “searching attachments” or “fishing expeditions”, ie, requests for attachment not sufficiently identifying the assets to be attached but rather aiming at finding out whether the respondent has any assets in Switzerland, are not allowed under Swiss law.

Only Swiss prosecuting authorities may issue search orders in the context of criminal or administrative proceedings.

## 6. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?

A civil attachment can be obtained in support of foreign proceedings outside Switzerland provided the conditions thereof are satisfied (see Question 4 above).

Swiss law does not provide for search orders. Accordingly, a search order in support of proceedings outside Switzerland can be obtained only within the framework of a request of mutual legal assistance for the taking of evidence under the conditions thereof. An overly broad letter of request, aiming at obtaining irrelevant information or obtaining evidence to substantiate a claim, so-called “fishing expeditions” will in principle be rejected.

## 7. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?

Yes, depending on various regimes. The applicable regime depends on where the freezing injunction was obtained.

A freezing injunction issued by an EU or EFTA state is

enforceable under the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. It foresees the enforcement of interim measures, even ex parte, provided the respondent was granted the right to be heard in the underlying proceedings within a reasonable time and prior to the application for recognition and enforcement in Switzerland.

The enforcement of a freezing injunction issued by a state other than an EU or EFTA state, eg the U.S., is subject to debate. The prevailing view seems to be that Swiss courts cannot enforce interim measures ordered by foreign courts as Swiss private international law requires that a decision be final. The Swiss Federal Supreme Court acknowledges that this view has been adopted by the majority of the doctrine but it has not yet decided on the issue, leaving the question open. In any event, even those authors considering that foreign interim measures could be enforced under Swiss law still find that enforcement would exclude ex parte interim measures.

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## Asset tracing, an overview

The English courts have powerful and effective tools to identify and preserve assets. The “freezing injunction” which can have worldwide reach is the “nuclear option” of remedies available to English courts and can, in the right circumstances, be extremely fruitful for claimants that have been victims of complex international fraud or other wrongdoing.

### 1. Is any information about assets publicly available?

Public limited companies (PLC) will publish accounts and file information with the relevant share exchange.

Larger private limited companies (Ltd) or limited liability partnerships (LLP) must file annual accounts at Companies House which are publicly available.

The Land Registry holds a central record of property ownership in England and Wales. It is possible to search for properties owned by a corporate entity. It is not generally possible to search for property owned by private individuals. There are exceptions eg for a trustee in bankruptcy or if there is an applicable court order.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

“Norwich Pharmacal Orders” – a form of court disclosure order made where the applicant does not know who to proceed against without the information from the third party respondent. The applicant needs to show that the respondent has become mixed up in or otherwise facilitated the wrongdoing (whether knowingly or innocently). Often used against banks in fraud situations.

Non-party Disclosure Orders – If substantive court proceedings have been commenced, it is possible to apply for a non-party disclosure order. An applicant needs to show that the documents are likely to support its case and are necessary to resolve the proceedings.

#### As against the wrongdoer

When making application to the English court for a freezing injunction (see below) the applicant can ask the court to include an order that the respondent discloses all the assets

owned by it anywhere in the world. Any failure to comply with these disclosure requirements can be considered contempt of court and result in a prison sentence for individuals.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Yes. A freezing injunction can be obtained which prevents a party from disposing of or dealing with its assets pending the outcome of a final judgment of a claim.

It is usual for such an injunction to require the respondent party to disclose information about his assets. It should be noted that the party seeking the injunction will be required to provide an undertaking to the court that it will not use any information obtained as a result of the injunction for the purpose of any civil or criminal proceedings (either in England and Wales or in any other jurisdiction) other than the claim in which the order is granted, except with the permission of the court.

### 4. What are the requirements for obtaining a freezing injunction (if available)?

The applicant needs to show:

- the English court has jurisdiction to hear the substantive claim and there are assets in the jurisdiction.
- there is a substantive cause of action for which the applicant has a good arguable case. The applicant must progress the substantive claim.
- it is just and convenient to grant the injunction: this is the main consideration and means the injunction would not be granted if it would cause some injustice to the respondent that outweighs the benefit to the applicant.
- there is a real risk the respondent would dissipate the assets.

The applicant will also need to provide certain undertakings to the court which would include an agreement to pay damages to the respondent if the injunction was improperly obtained or if it is decided at final trial that the injunction should not have been granted.

## 5. What assets can be frozen and do they have to be within the jurisdiction?

A freezing order can apply to all asset classes (ie not just property, but bank accounts, shares etc), whether within or outside the jurisdiction.

A party subject to a freezing order can be compelled to disclose information relating to any interest in any trusts whether as a beneficiary or otherwise. In general, the court has the power to make whatever ancillary orders are necessary to make the freezing order effective.

The court will only exercise its discretion to grant a freezing injunction extending to foreign assets in exceptional circumstances if the respondent is resident within the jurisdiction or is someone over whom the court has or would have in personam jurisdiction.

The court will only grant worldwide relief if it is just and expedient to do so. The court is mindful of disharmony or confusion or the risk of conflicting, inconsistent or overlapping orders in other jurisdictions.

The injunction will not automatically be enforced worldwide; the applicant will still need to enforce the injunction in those jurisdictions where assets are located.

In certain circumstances, for example where the responding party has limited assets in the jurisdiction, the court might make an order that further assets (or assets of a certain value) be brought into the jurisdiction.

## 6. What about a search order?

The procedure for obtaining a search order is similar to that which applies in relation to obtaining a freezing order. However, the search order will only apply to premises within the English jurisdiction and they are granted by the court only in extreme situations (for example, where there is a real risk that the defendant will destroy documents).

## 7. Can a freezing injunction or search order be obtained in support of proceedings outside of the jurisdiction?

Yes. The English courts have jurisdiction to grant a freezing injunction or search order in support of substantive proceedings that have been (or will be) served outside the jurisdiction.

## 8. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?

Yes, dependent on various regimes. The applicable regime depends on where the freezing injunction was obtained.

There are statutory regimes for freezing injunctions from the EU, EFTA and commonwealth countries. These require that in order for a freezing injunction to be enforceable, the original court must have had jurisdiction over the substantive dispute. Once this test is passed a certificate must be obtained from the original court certifying the judgment, and then served (along with a copy of the judgment, which may be required to be translated) in the UK.

If the country (or type of injunction) falls outside of one of the statutory regimes, common law is applied. Common law covers amongst other countries, the USA, Scotland and Northern Ireland (although Scotland and Northern Ireland have applicable statutes for enforcing other judgments, freezing injunctions are specifically excluded).

The common law position is similar to the statutory regimes and requires that a foreign freezing injunction is only enforceable if the original court had jurisdiction according to the rules which English law applies in such cases, which means broadly on a territorial or consensual basis. It is insufficient that the original court had jurisdiction according to its own rules.

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## Asset tracing, an overview

The California Code of Civil Procedure provides a judgment creditor with several tools which can be used to locate and levy upon assets of a judgment debtor to satisfy the judgment. While there are a number of tools available, the procedures are in fact limited by those set forth specifically in the Code and the rules must be followed strictly to obtain the requested relief. Also, California law allows for modifying a judgment to include additional parties and for domestication of judgments issued in other countries or other states within the U.S.

### 1. Is any information about assets publicly available?

Publicly held companies are required to file quarterly and annual reports in accordance with United States securities laws.

The County Recorders in each county within the State of California contain detailed records which can be searched to determine the ownership of real property.

The California Department of Motor Vehicles maintains information regarding the ownership of all vehicles, including automobiles, trucks and water-going vessels.

A private investigator can be retained to perform a search of public records, and in some cases search for bank account information, to locate assets of the judgment debtor.

### 2. What procedures exist to obtain information regarding assets of a judgment debtor?

Judgment Debtor Examination – The judgment creditor may obtain a court order for a judgment debtor examination, which will require the judgment debtor to come to court and answer questions regarding the extent and location of his/her/its assets, under oath. The judgment debtor can be required to bring documents and records which show the nature and location of the assets. If specific assets are identified and in the possession of the judgment debtor the court can issue a “turnover order” which would require the judgment debtor to deliver the assets to the judgment creditor.

Subpoenas to Non-Parties – The Code of Civil Procedure allows a judgment creditor to issue subpoenas to non-parties, directing the non-parties to produce documents and records which might show assets of the judgment debtor and also to provide oral testimony, under oath, regarding such assets.

Written Interrogatories – The judgment creditor may serve the judgment debtor with written interrogatories (questions) which the judgment debtor must answer under oath regarding the identity and location of its assets, as well as information regarding its principals and affiliates who also might be responsible for the debt.

### 3. Preservation of assets

A judgment creditor may record “abstracts of judgment” with the County Recorder in any county within the State of California. These abstracts will automatically attach to any real property held in the name of the judgment debtor, and serve as a lien (similar to a mortgage or deed of trust) against the property. Thereafter, any subsequent lender on the property, or any subsequent purchaser of the property, will take its interest subject to the rights of the judgment creditor as recorded in the abstract.

The judgment creditor may file a notice with the California Secretary of State which will serve to create a lien as against any personal property held by the judgment creditor. For instance, if the judgment creditor were to acquire automobiles, trucks, water vessels or equipment, the notice with the Secretary of State will establish a lien (similar to a security interest) against such personal property. Any subsequent lending or transfer of the personal property would be subject to the lien.

The judgment creditor may have a writ of execution issued on its judgment, and cause the writ to be levied or served on or against property held in the name of the judgment debtor, including real property, personal property and bank accounts.

#### **4. Freezing injunctions or search orders**

Generally, the California rules do not allow for freezing injunctions or orders to search private locations for assets.

#### **5. Pursuit of non-parties to satisfy the judgment**

The California procedures allow a post-judgment motion to add the name of a new party as a judgment debtor and one liable for the amount of the judgment, when circumstances warrant.

The post-judgment order can apply to the judgment debtor's successors, assigns and alter egos.

This post-judgment procedure is particularly effective to pursue shareholders or affiliate entities when the judgment debtor is a corporation.

#### **6. Domestication of foreign judgments**

The California procedures allow for the filing of an action in California to domesticate a judgment issued in a foreign country, or one issued in another state within the U.S., provided that the foreign judgment meets the criteria set forth in the Code of Civil Procedure.

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## Asset tracing, an overview

The Colorado Rules of Civil Procedure give judgment creditors several tools for identifying and locating a judgment debtor's assets in order to satisfy a civil judgment, including written discovery and live debtor's examinations. Colorado law allows for the domestication of judgments that have been issued in other states within the United States as well as foreign countries.

### 1. Is any information about assets publicly available?

If the judgment debtor is a publicly traded company, information concerning its assets may be gleaned from the disclosures it is required to file in accordance with federal securities laws.

The County Recorder's office in each county maintains real estate records which may be searched to determine the ownership of real property located within that county.

The Colorado Department of Motor Vehicles maintains records that may be searched to determine the ownership of motor vehicles registered in the state.

A judgment creditor may also retain the services of a private investigator to search public records and identify assets potentially subject to execution.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

After a final judgment is entered, a judgment creditor may file a motion for an order compelling the debtor of a judgment debtor to appear before the court and answer the judgment creditor's questions concerning the debt it owes to the judgment debtor.

The judgment creditor may also compel witnesses to testify at post-judgment enforcement hearings, and to depose witnesses without the court's prior approval or by order obtained ex parte.

#### As against the wrongdoer

After a final judgment is entered, the judgment creditor may serve written interrogatories on the judgment debtor, which the judgment debtor must answer under oath and file with the clerk of the court. If the judgment debtor does not answer the interrogatories, the judgment creditor may seek a court order requiring the judgment debtor to either answer the interrogatories or appear in court and show cause why the judgment debtor should not be held in contempt of court.

A judgment creditor also has the option of serving a subpoena on the judgment debtor for a debtor's exam. The judgment debtor does not need to serve written interrogatories before sitting the judgment debtor for this examination.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

A judgment creditor may record a transcript of judgment in any county in the state that will act as a lien against any real property that the judgment debtor owns in that county. This will prevent the judgment debtor from selling its real property without first satisfying the judgment.

The Colorado Rules of Civil Procedure allow for the appointment of a receiver to dispose of property in accordance with the judgment, or to preserve property during the pendency of appellate proceedings. Colorado case law holds that the appointment of a receiver is an extraordinary remedy and the power to appoint a receiver should be exercised cautiously.

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## Asset tracing, an overview

The Idaho Rules of Civil Procedure and Idaho Code give judgment creditors several tools for identifying and locating a judgment debtor's assets in order to satisfy a civil judgment, including written discovery and live debtor's examinations. Idaho law allows for the domestication of judgments that have been issued in other states within the United States as well as foreign countries.

### 1. Is any information about assets publicly available?

Publicly traded companies must file quarterly and annual reports to comply with federal securities laws.

Each county has a recorder's office with detailed records that can be used to determine ownership of real property.

The Idaho Department of Motor Vehicles maintains vehicle registration records that can be searched in order to determine whether a judgment debtor owns a motor vehicle that is potentially subject to execution.

The Idaho Secretary of State maintains records of UCC filings that may be searched in order to determine whether liens have been filed against a judgment debtor's assets.

A judgment creditor may also retain the services of a private investigator to search public records and identify assets potentially subject to execution.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

If a third party owes money to a judgment debtor and is in possession of the judgment debtor's property, the judgment creditor may obtain a court order requiring the third party to answer questions under oath regarding such property and such obligation. The judgment creditor may also obtain a court order compelling the third party to turn such property over to the judgment creditor. If the third party disputes that it is in possession of the judgment debtor's property or that it is indebted to the judgment debtor, the court may issue an order prohibiting the transfer of the third party's assets until the dispute is resolved.

The Idaho Rules of Civil Procedure also allow judgment creditors to use traditional forms of discovery (including third-party subpoenas) post judgment in aid of execution.

#### As against the wrongdoer

If a writ of execution is returned unsatisfied in whole or in part, a judgment creditor may obtain a court order to compel the judgment debtor to submit to a debtor's examination, during which the judgment creditor will be made to answer questions under oath regarding the nature and location of the judgment debtor's assets. If the judgment debtor has assets that he refuses to apply toward the judgment, the court may order that such property be applied toward the judgment. If the judgment debtor is a flight risk, the court may order the sheriff to arrest the judgment debtor and bring him before the presiding judge. During such a proceeding, the court may enter an order prohibiting the judgment debtor from disposing of property that is subject to execution.

The Idaho Rules of Civil Procedure also allow judgment creditors to use traditional forms of discovery (including interrogatories) post judgment in aid of execution.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Idaho law allows judgment creditors to seek a court order barring a judgment debtor from transferring assets that are subject to execution.

A judgment creditor may record an abstract of judgment in any county in the state that will act as a lien against any real property that the judgment debtor owns in that county. This will prevent the judgment debtor from selling its real property without first satisfying the judgment.

Idaho's receivership statute allows the court that issued the judgment to appoint a receiver (1) to preserve the judgment debtor's assets during the pendency of an appeal; (2) in proceedings in aid of execution; (3) when an execution has been returned unsatisfied; or (4) when the judgment debtor refuses to apply its property in satisfaction of the judgment.

#### **4. What are the requirements for obtaining a freezing injunction (if available)?**

The statute that authorizes a freezing injunction against judgment debtors indicates the judgment creditor must show that the judgment debtor is a flight risk. If this showing is made, the judgment debtor will be brought before the judge and ordered not to transfer any assets that are subject to execution. The statute in question is over one-hundred years old and it has generated no decisions from the Idaho appellate courts.

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## Asset Tracing, an overview

Illinois law provides judgment creditors with several tools to locate and levy upon assets of a judgment debtor to satisfy judgments. While there are a number of tools available, the procedure for utilizing each tool is important, and individuals looking to locate and utilize these tools should strictly follow the procedures set out in the Illinois rules.

### 1. Is any information about assets publicly available?

Publicly held companies are required to file quarterly and annual reports in accordance with the United States securities laws. Certain regulated companies, such as banks and insurance companies, are required to file periodic reports of their assets and liabilities with Securities and Exchange Commission.

The Clerk's Office in each county within the State of Illinois maintains detailed records which can be searched to determine the ownership of real property.

The Illinois Department of Motor Vehicles maintains information regarding the ownership of motor vehicles.

Additionally, a private investigator can be retained to perform a search of public records, and in some cases search for bank account information, to locate assets of the judgment debtor.

### 2. What procedure exists to obtain information regarding assets of a judgment debtor?

**Citation to Discover Assets** – After obtaining a judgment, a judgment creditor can find out what money, property, bank accounts, receivables, and wages a judgment debtor has by issuance of citations to discover assets by the Illinois state court that issued the judgment. These are entitled to be “one stop” discovery of assets that can be addressed to the judgment debtor or third parties (such as banks, employers or other third-parties that the judgment creditor believes to owe money to the judgment debtor, or in which the judgment debtor has an ownership interest). Upon request of counsel for the judgment creditor the citation can be obtained, and the clerk will issue the citation in the Illinois action in which the judgment is entered. The judgment debtor is then required to produce records requested by the citation and to be

examined in the courthouse about his or her assets, bank accounts and income. The citation serves as a continuing lien, and restricts the judgment debtor from transferring or disposing of property. This asset freeze is only effective, however if it is served on the judgment debtor, banks or persons owing money to the judgment debtor or potential purchasers of the judgment debtor's assets. Such third-party respondents also may be required to provide records and testimony regarding the debtor's assets that can provide the basis for the entry of a turnover order or other charging order whereby the secured party can obtain payment or sale of the debtor's assets.

Similar procedures are available in a United States District Court that has issued a judgment in favor of a judgment creditor. The Federal Rules of Civil Procedure provide the judgment debtor with the option to use the citation to discover assets described above or to proceed with discovery using subpoenas requesting the production of documents or depositions.

**Nonwage Garnishment** – Nonwage garnishment is a narrower procedure that allows the judgment creditor to step into the shoes of the judgment debtor and collect debts that are owed to the debtor. The garnishment operates as an assignment of these claims from the judgment debtor to the creditor. While creditors were originally limited in their use of the garnishment tool after an execution failed, this limitation does not exist anymore. However, creditors may only reach debts that are due and owed at the time the garnishment is filed. Further, creditors must have reason to believe that the assets exist before filing a nonwage garnishment. As a result, many creditors use this tool after obtaining a citation to discover assets and the identity of third parties that may owe debts subject to turnover or garnishment.

### 3. Preservation of assets

**Certified Judgment** – A judgment creditor may file a certified judgment with the Clerk's office in any county in Illinois where the judgment debtor has real property. The certified judgment will automatically attach to any real property held in the name of the judgment debtor, and serve as a lien against the real property. This lien will give

the judgment creditor priority over subsequent lenders or purchasers of the property. Note, however, that such a lien will not attach to personal property interests in corporations, land trusts or limited liability companies that are the actual owners of real property.

**Writ of Execution** – A judgment creditor may also obtain a writ of execution issued on the judgment itself. This will allow the sheriff to levy upon the personal property or take possession of the property of the judgment debtor.

**Citation to Discover Assets** – If a judgment creditor has obtained a citation to discover assets, the citation will also act as a lien against the property of the judgment debtor. The filing date of the citation establishes the priority of the judgment creditor’s lien ahead of later-filed judgments, security interests and liens so long as it is renewed every six months until the judgment is satisfied. If the judgment creditor files the citation with the debtor’s banks, the citation will require the banks to freeze the debtor’s accounts.

**Receivership** – A judgment creditor may also obtain an order appointing a receiver to preserve, maintain, and administer any real or personal property owned by the judgment debtor.

#### 4. Freezing injunctions or search orders

Illinois law allows for prejudgment attachment under certain circumstances. Before obtaining a judgment, a plaintiff may seek the attachment or seizure by the sheriff of a defendant’s property located in Illinois if the creditor has a money claim greater than \$20 and meets certain statutory requirements. The prejudgment attachment statute requires that either the debtor is not a resident of Illinois, the debtor has left (or intends to leave) Illinois with the intention of having his or her effects removed from Illinois, or the debtor is about to remove his or her property from Illinois to the injury of the creditor.

Once obtained, the prejudgment attachment freezes some of the debtor’s assets until the court ultimately decides the case on the merits. The prejudgment attachment does not attach to specific, identifiable assets or funds. Instead, it applies to almost any property belonging to the debtor and located in the state of Illinois.

This is a risky procedure that requires the posting of a surety bond for the value of the assets to be attached. Most plaintiffs do not seek this relief because it is difficult to prove the facts necessary to obtain a freeze at an early stage of litigation. More importantly, the freeze can put a defendant out of business and impair the ultimate

recovery on the judgment or, even worse, if the lawsuit is unsuccessful or the freeze is later removed, can create liability of the plaintiff to the defendant.

A judgment creditor can also obtain an equitable attachment if the creditor cannot establish that the debtor is trying to flee the state of Illinois. Like the prejudgment attachment, the equitable attachment freezes the debtor’s assets until the court decides the case on the merits. However, the equitable attachment only attaches to specific, identifiable property in which the creditor believes he or she has a possessory right. If granted, the court will require the debtor to place the asset in escrow or turn the asset over to the court until the case is resolved.

The Uniform Fraudulent Transfer Act enacted in Illinois allows a plaintiff to seek an injunction against the transfer of the defendant’s assets with actual intent to delay, hinder or defraud its creditors or, for less than fair equivalent value if the defendant is insolvent. See 740 ILCS 160. The debtor’s intent to defraud may be proven by one or more statutory “badges of fraud” such as whether the debtor transferred substantially all of their assets, whether the debtor concealed assets, or whether the debtor concealed the transfer, that provide circumstantial evidence of fraud. In order to prove their case, the plaintiff must provide clear and convincing evidence that the debtor specifically intended to defraud the creditor.

#### 5. Pursuit of non-parties to satisfy the judgment

**Successor liability** – While the general rule in Illinois is that a corporation that purchases the assets of another corporation is not responsible for the debts or liabilities of the transferor corporation, there are some exceptions. A judgment creditor can pursue the purchasing corporation for satisfaction of an earlier judgment if 1) there is an express or implied agreement of assumption of liabilities, 2) the transaction is actually a consolidation or merger, or 3) the purchases are a mere continuation of the seller, or 4) the transaction is fraudulently done to avoid liability in violation of the Uniform Fraudulent Transfer Act.

**Corporate Veil Piercing** – Illinois law also allows creditors of an insolvent subsidiary to “pierce the corporate veil” to reach the assets of a parent corporation that has used the subsidiary as its instrumentality, ignored corporate formalities and dominated the subsidiary’s management for the benefit of the parent. This theory of liability is highly factual and often involves proof of insolvency of the subsidiary and gross misconduct by the parent corporation.

## 6. Domestication of foreign judgments

Illinois law allows for the filing of an action in Illinois to domesticate a judgment issued in a foreign country, or one issued in another state within the U.S., provided that the foreign judgment meets the criteria set forth under Illinois law.

Similar procedures are available to bring a supplementary proceeding in a United States District Court in Illinois (with respect to a judgment entered by another federal district court).

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## Asset tracing, an overview

Mississippi law provides various procedures whereby a judgment creditor may seek discovery and execution upon a judgment debtor's assets, including pre-judgment freezing injunctions to prevent the fraudulent transfer or dissipation of assets. Mississippi law also provides for post-judgment discovery from the judgment debtor and third-parties, including the use of Writs of Garnishment as an aid in asset discovery. A foreign judgment can be domesticated in Mississippi and thereafter enforced with the same asset discovery tools as are available for judgments originally issued by Mississippi courts and/or federal courts sitting in Mississippi.

### 1. Is any information about assets publically available?

The primary information publicly available concerning assets in Mississippi relates to real property. The Chancery Clerk of each Mississippi county maintains public land records, wherein ownership of real property located within that particular county may be discovered. Records maintained by Tax Assessor in each county include tax records for real property, as well records for personal property owned by businesses located within that county.

The Mississippi Department of Motor Vehicles maintains records of vehicles titled by Mississippi-based owners; however, the requesting party must show permissive use for the records to be obtained and is required to pay a small search fee.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against Third Parties?

MISS. R. CIV. PRO. 69 provides for the examination under oath of the judgment debtor "or any other person". Such examination may be conducted in open court and/or may utilize the discovery procedures found in Rule 26 – 39 of the Mississippi Rules of Civil procedure (such discovery devices including depositions, interrogatories, subpoenas for the production of documents or things, and requests for admission). Further, Writs of Garnishment are often utilized, post-judgment, as a tool to discover the judgment debtor's assets that may be held by third-parties.

#### As against the wrongdoer?

The post-judgment asset discovery procedures available to creditors under MISS. R. CIV. PRO. 69 are available both as to the judgment debtor and third-parties.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Yes. MISS. R. CIV. PRO. 64 provides that, a upon the commencement of and during the course of an action, pre-judgment remedies for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available, including attachment, replevin, claim and delivery, and sequestration.

### 4. Is a freezing injunction available? And, if so, what are the requirements for obtaining a freezing injunction?

In Mississippi, a so-called "freezing injunction" is simply injunctive relief pursuant to MISS. R. CIV. PRO. 65 that is crafted to prevent the pre-judgment dissipation of assets, upon the moving party demonstrating its entitlement to such injunctive relief. Injunctive relief requirements mandate that the moving party demonstrate (1) likelihood of success on the merits, (2) that irreparable harm could result, (3) the impact on the public interest, and (4) the possibility of substantial harm to others. Pre-judgment control of a debtor's assets may also be accomplished via appointment of a Receiver pursuant to Section 11-5-151 of the Mississippi Code.

### 5. What assets can be frozen and do they have to be within the jurisdiction?

Any assets located within Mississippi can be "frozen" via use of an injunction and/or temporary restraining order pursuant to Miss. R. Civ. Pro. 65; if properly crafted, such injunctive relief would preclude a party who is subject to the Mississippi court's jurisdiction from taking actions to dispose of assets controlled by the enjoined party that are located out-of-state.

**6. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?**

Yes. The foreign court order must, however, first be domesticated in Mississippi pursuant to the Uniform Enforcement of Foreign Judgments Act, as adopted at Section 11-7-301, et seq. of the Mississippi Code. A foreign judgment is "any judgment, decree or order of a court of the United states or of any other court which is entitled to full faith and credit in [Mississippi]".

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## Asset tracing, an overview

The Montana Rules of Civil Procedure and Montana Statutes give judgment creditors several tools for identifying and locating a judgment debtor's assets in order to satisfy a civil judgment, including written discovery and live debtor's examinations. Montana law allows for the domestication of judgments that have been issued in other states within the United States as well as foreign countries.

### 1. Is any information about assets publicly available?

Publicly traded companies must file quarterly and annual reports to comply with federal securities laws.

Each county has a recorder's office with detailed records that can be used to determine ownership of real property.

The Montana Department of Motor Vehicles maintains vehicle registration records that can be searched in order to determine whether a judgment debtor owns a motor vehicle that is potentially subject to execution.

A judgment creditor may also retain the services of a private investigator to search public records and identify assets potentially subject to execution.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

Third parties may be compelled to testify in court regarding the nature and location of a judgment debtor's assets. If a third party owes money to a judgment debtor and is in possession of the judgment debtor's property, the judgment creditor may obtain a court order requiring the third party to answer questions under oath regarding such property and such obligation. The judgment creditor may also obtain a court order compelling the third party to turn such property over to the judgment creditor. If the third party disputes that it is in possession of the judgment debtor's property or that it is indebted to the judgment debtor, the court may issue an order prohibiting the transfer of the third party's assets until the dispute is resolved.

#### As against the wrongdoer

If a writ of execution is returned unsatisfied in whole or in part, a judgment creditor may obtain a court order to compel the judgment debtor to submit to a debtor's examination, during which the judgment creditor will be made to answer questions under oath regarding the nature and location of the judgment debtor's assets. If the judgment debtor has assets that he refuses to apply toward the judgment, the court may order the judgment debtor to appear in court and explain such refusal. If the judgment debtor is a flight risk, the court may order the sheriff to arrest the judgment debtor and bring him before the presiding judge. During such a proceeding, the court may enter an order prohibiting the judgment debtor from disposing of property that is subject to execution.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Montana law allows judgment creditors to seek a court order barring a judgment debtor from transferring non-exempt assets that are subject to execution.

Montana's receivership statute allows the court that issued the judgment to appoint a receiver (1) to preserve the judgment debtor's assets during the pendency of an appeal; (2) in proceedings in aid of execution; (3) when an execution has been returned unsatisfied; or (4) when the judgment debtor refuses to apply its property in satisfaction of the judgment. However, Montana case law holds that the power to appoint a receiver should be exercised sparingly.

A judgment creditor may record a transcript of judgment in any county in the state that will act as a lien against any real property that the judgment debtor owns in that county. This will prevent the judgment debtor from selling its real property without first satisfying the judgment.

#### **4. What are the requirements for obtaining a freezing injunction (if available)?**

The statute that authorizes a freezing injunction against judgment debtors indicates that the judgment creditor must show that the judgment debtor is a flight risk. If this showing is made, the judgment debtor will be brought before the judge and ordered not to transfer any assets that are subject to execution.

A judgment creditor may also obtain an injunction with respect to assets of the judgment debtor in the possession of a third party if there is a dispute over whether the property belongs to the judgment debtor. Under these circumstances, the court may order that the property not be transferred until the dispute is resolved.

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## Asset tracing, an overview

The New York Civil Practice Law and Rules (CPLR) provides a judgment creditor with several tools which can be used to locate and levy upon assets of a judgment debtor to satisfy the judgment. While there are a number of tools available, the procedures are in fact limited by those set forth specifically in the CPLR and the rules must be followed strictly to obtain the requested relief. Also, New York law allows for domestication of judgments issued in other countries or other states within the U.S.

### 1. Is any information about assets publicly available?

Publicly held companies are required to file quarterly and annual reports in accordance with United States securities laws.

The Clerk's Office in each county within the State of New York maintains detailed records which can be searched to determine the ownership of real property. Additionally, the New York City Department of Finance maintains the Automated City Register Information System (ACRIS), which provides electronic access to real property records within New York City.

The New York Department of Motor Vehicles maintains information regarding the ownership of all motor vehicles.

A private investigator can be retained to perform a search of public records, and in some cases search for bank account information, to locate assets of the judgment debtor.

### 2. What procedures exist to obtain information regarding assets of a judgment debtor?

Judgment Debtor Subpoenas – counsel for the judgment creditor may issue a subpoena for the examination of the judgment debtor, which will require the judgment debtor to appear for a deposition and answer questions regarding the extent and location of his/her/its assets, under oath. The judgment debtor can also be required to produce documents and records which show the nature and location of the assets. If specific assets are identified and in the possession of the judgment debtor, the judgment creditor can initiate a turnover proceeding or execute upon those assets, which would require the debtor to deliver the assets to the judgment creditor.

Document and Deposition Subpoenas to Non-Parties – the CPLR allows a judgment creditor to issue subpoenas to non-parties, directing the non-parties to produce documents and records which might show assets of the judgment debtor and also to provide oral testimony, under oath, regarding such assets. In connection with serving judgment enforcement subpoenas upon non-parties, counsel for the judgment creditor must certify that he/she maintains a reasonable belief that the non-party receiving the subpoena has in their possession information about the judgment debtor that will assist the judgement creditor in collecting the judgment.

Information Subpoenas – the CPLR also permits a judgment creditor to serve information subpoenas upon the judgment debtor and non-parties. In an information subpoena, the judgment creditor provides a list of written questions to the subpoenaed party to aid in judgment enforcement. The recipient of an information subpoena must then provide written answers to those questions under oath within seven days of receipt of the information subpoena. The information subpoena may be served by certified mail, rather than personal service. As with document and deposition subpoenas to non-parties, counsel for the judgment creditor must certify that he/she maintains a reasonable belief that the non-party receiving the information subpoena has in their possession information about the judgment debtor that will assist the judgment creditor in collecting the judgment.

### 3. Preservation of assets

A judgment creditor may record a "transcript of judgment" with the Clerk's Office of any county within the State of New York. These transcripts of judgment will automatically attach to any real property held in the name of the judgment debtor, and serve as a lien (similar to a mortgage or deed of trust) against any real property maintained by the judgment debtor in that county. Thereafter, any subsequent lender on the property, or any subsequent purchaser of the property, will take its interest subject to the rights of the judgment creditor as recorded in the abstract.

The judgment creditor may also obtain an order of execution issued on its judgment, which enables an enforcement officer (a sheriff or city marshal) to levy upon personal property and/or take possession of that property.

A judgment creditor may issue restraining notices to the judgment debtor or a non-party. A restraining notice prohibits the judgment debtor from selling, assigning, transferring or interfering with any property in which that judgment debtor has an interest. A restraining notice served upon a person other than the judgment debtor prohibits that non-party from selling, assigning, transferring or interfering with any property of the judgment debtor in that non-party's possession, except under certain limited circumstances.

A judgment creditor may also obtain an order appointing a receiver to preserve, maintain and administer any real or personal property owned by the judgment debtor.

#### **4. Freezing injunctions or search orders**

A restraining notice, will, in effect, "freeze" the judgment debtor's assets by prohibiting the transfer of those assets. The restraining notice requires the recipient to withhold the payment of any money owed to the judgment debtor up to twice the amount due on the judgment. Restraining notices may be served upon banks, financial institutions, and other non-parties.

#### **5. Pursuit of non-parties to satisfy the judgment**

The CPLR allows a judgment creditor to obtain an attachment where the judgment debtor has assigned, disposed of, encumbered or secreted property with the intent to hinder, delay or defraud judgment creditors.

The New York Debtor and Creditor Law also provides a cause of action against non-parties that attempt to assist the judgment debtor in avoiding its obligations under the judgment.

#### **6. Domestication of foreign judgments**

The CPLR allows for the filing of an action in New York to domesticate a judgment issued in a foreign country, or one issued in another state within the U.S., provided that the foreign judgment meets the criteria set forth in the CPLR.

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## Asset tracing, an overview

There are several methods available in North Carolina to publicly search asset ownership and otherwise discover and preserve a judgment debtor's assets, including sending written interrogatories to the judgment debtor, deposing the judgment debtor, and the issuance of court orders prohibiting transfers of judgment debtors' assets.

### 1. Is any information about assets publicly available?

Each North Carolina county maintains public land records that can be searched to determine ownership of real property within that county.

Each county also maintains public tax records that can be searched to determine ownership of vehicles. The tax records also list whether the individual or entity has paid taxes on "business assets" but the tax records do not inventory or otherwise list specific business assets.

The North Carolina Department of Motor Vehicles also maintains records of all automobiles, trucks, trailers, and vessels registered in North Carolina.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

A court may issue an order requiring a third party individual or corporation to appear and answer questions regarding the judgment debtor's property if that third party either (i) has the judgment debtor's property, or (ii) is a debtor of the judgment debtor. The court may require physical appearance to answer questions, or, in its discretion, allow the answers to be submitted by verified answer to interrogatories.

A judgment debtor may also issue subpoena to third parties regarding documents and records that relate to potential assets of the judgment debtor.

#### As against the wrongdoer

A judgment creditor may also prepare and serve on the judgment debtor written interrogatories concerning his property.

A judgment creditor may also obtain an order requiring the judgment debtor to produce and permit the inspection (including photocopying) of all tangible things, not privileged, constituting property of the judgment debtor.

If a judgment creditor is unable to locate assets upon which to execute, it is entitled to a court order requiring the judgment debtor to appear and answer questions (under oath) in person concerning his property.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Yes. A court may enter an order pursuant to N.C. Gen. Stat. § 1-358 that forbids the transfer or other disposition of the judgment debtor's property that is not exempt from judgment execution.

### 4. What are the requirements for obtaining a freezing injunction (if available)?

The only requirement for this order is the existence of a valid judgment that remains unsatisfied. Unlike traditional injunctive relief, a court issuing a freezing order pursuant to N.C. Gen. Stat. § 1-358 is not required to balance the potential of irreparable harm to the judgment debtor and the judgment creditor's likelihood of success on the merits. The judgment creditor is not required to post a bond as a pre-requisite for relief under § 1-358. All of a judgment debtor's non-exempt assets may be frozen pursuant to § 1358.

### 5. Domestication of foreign judgments

North Carolina has adopted the Uniform Enforcement of Foreign Judgments Act, which generally provides that North Carolina will "domesticate" or honour a judgment issued by another State in the United States so long as the court rendering judgment had proper jurisdiction over the respondent, the judgment was not obtained by fraud, and honouring the judgment would not offend North Carolina's public policy (eg enforcing a gambling debt).

With respect to judgments rendered by non-United States governments, North Carolina has adopted the Uniform Foreign-Country Money Judgments Recognition Act. This Act applies to a final and conclusive foreign-country judgment to the extent it grants or denies the recovery of a sum of money.

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## Asset tracing, an overview

Tennessee law provides a judgment creditor with a variety of methods to discover and execute upon a judgment debtor's assets, including pre-judgment freezing injunctions to preserve the potential transfer or dissipation of assets as well as post-judgment discovery from the judgment debtor and third-parties. Tennessee also provides for the domestication of foreign judgments in aid of execution on a judgment debtor's assets in order to satisfy the judgment.

### 1. Is any information about assets publicly available?

Counties in Tennessee maintain public land records, wherein ownership of real property located within that particular county may be discovered. Also, the Tax Assessor in each county maintains tax records for real property for individual persons, as well as tax records for real and some personal property for businesses located within that county.

The Tennessee Department of Motor Vehicles maintains records of vehicles owned; however, the requesting party must show permissive use for the records to be obtained and may be required to pay a small fee.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against Third Parties?

A judgment creditor may issue post-judgment subpoenas pursuant to TENN. R. CIV. P. 45 to a third party in order to inquire into assets owned by a judgment debtor. The subpoena may require the third-party to produce documents and submit to a deposition.

#### As against the wrongdoer?

Tennessee permits judgment creditors to participate in and issue post-judgment discovery in order to discover what assets a judgment debtor possesses that may be subject to execution. Discovery in aid of execution permits judgment creditors to propound written discovery requests, take depositions of judgment debtors, or use any other pre-trial discovery method available, with the exception of a request for a physical or mental examination of a person.

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Yes. Tennessee provides for pre-judgment attachment of property in order to secure satisfaction of a judgment ultimately to be rendered. Tenn. R. Civ. P. 64. In order to obtain a pre-judgment attachment, a judgment creditor must file an action against the judgment debtor, file an affidavit stating the nature and the amount of damages and that one of the grounds for attachment exists, post a bond, and provide notice to the judgment debtor prior to having a hearing before a judge. See TENN. CODE ANN. § 29-6-101, et seq. Also, a judgment creditor may obtain an order providing for a pre-judgment garnishment of the judgment debtor's property by largely following the same procedure required to obtain an attachment, or, in the event the judgment debtor cannot be found, a writ of sequestration against the property of the judgment debtor.

### 4. Is a freezing injunction available? And, if so, what are the requirements for obtaining a freezing injunction?

Tennessee statutes and rules provide for injunctive relief to prohibit a judgment debtor from transferring property if the judgment creditor can show (1) likelihood of success on the merits, (2) that irreparable harm could result, (3) the impact on the public interest, and (4) the possibility of substantial harm to others. Moreover, a judgment creditor may also request the appointment of a pre-judgment receiver to take control of a judgment-debtor's assets.

### 5. What assets can be frozen and do they have to be within the jurisdiction?

Attachment must be made on the judgment debtor's personal property first and is not available for real property until the judgment debtor's personal property is fully exhausted. TENN. CODE ANN. § 29-6-133.

**6. Can a freezing injunction obtained from a foreign court be enforced against assets in the jurisdiction?**

Tennessee has adopted the Uniform Enforcement of Foreign Judgments Act and will give full faith and credit to judgments issued by United States Courts or courts of a sister state, provided that the issuing court had personal jurisdiction over the parties. See TENN. CODE ANN. § 26-6-101 et seq. However, no execution may be had upon the domesticated judgment until 30 days after service of the summons on the judgment debtor.

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## Asset tracing, an overview

The Texas Civil Practice and Remedies Code and Texas Rules of Civil Procedure provide a judgment creditor with several options to help locate and levy upon a judgment debtor's assets to satisfy the judgment. Texas also provides a judgment creditor with the ability to levy against property owed to the judgment debtor from a third party, as well as domestication of judgments issued in other countries or other states within the United States.

### 1. Publicly Available Asset Information

Publicly held companies are required to file annual and quarterly reports in accordance with United States securities law.

The Texas Secretary of State's office maintains databases identifying business organizations in which the judgment debtor is involved.

Each County Clerk's Office—one located in each county within the State of Texas—records real property and liens filed in that county.

A private investigator may also be retained to perform a search to locate the judgment debtor's assets.

### 2. Existing Procedures to Obtain Information on the Judgment Debtor's Assets

#### As against third parties

The Texas Rules of Civil Procedure allow a judgment creditor to issue subpoenas to non-parties, directing the non-parties to produce documents and records which might show the judgment debtor's assets. Depositions may also be taken of non-parties to provide oral testimony, under oath, regarding such assets.

#### As against the wrongdoer

Written interrogatories and requests for production are the most commonly used tools in post-judgment discovery. The judgment creditor may serve the judgment debtor with written interrogatories (questions) which the judgment debtor must answer under oath regarding the identity and location of its assets, as well as information regarding its principals and affiliates who also might be responsible for the debt. Requests for production allow a judgment creditor to request specific documents or items

to be produced or inspected that may contain the debtor's asset information.

Alternatively, post-judgment depositions are another tool for acquiring information and allow a judgment creditor to ask questions and receive oral testimony, under oath, regarding such assets.

### 3. Preservation of Assets

#### Abstract of Judgment

A judgment creditor may record an "abstract of judgment" in each county in which the debtor has real property. Then, the judgment automatically attaches and serves as a lien against all of the debtor's non-exempt real property in the county of recordation. Thereafter, any subsequent lender on the property, or any subsequent purchaser of the property, will take its interest subject to the rights of the judgment creditor as recorded in the abstract.

#### Writ of Execution

A judgment creditor may request a writ of execution following final judgment, allowing a sheriff or constable to levy on property held in the name of the judgment debtor, including real and personal property.

#### Turnover Proceedings

A judgment creditor may also initiate turnover proceedings when the debtor's property cannot readily be attached or levied on by an abstract of judgment or writ of execution. This type of proceeding allows the court to grant injunctive relief, order a turnover of property, or appoint a receiver.

### 4. Freezing Injunctions or Search Orders

Generally, Texas law does not allow for freezing injunctions or orders to search private locations for assets.

### 5. Pursuit of Non-Parties to Satisfy the Judgment

The post-judgment garnishment is a procedure available to a judgment creditor by which the creditor can inquire into the relationship between some third party and the judgment debtor to determine if there are any funds or property owed to the judgment debtor by the third party.

If there are funds or property owed to the debtor, the judgment creditor can obtain a garnishment judgment ordering the third party to pay the debt to the judgment creditor rather than the debtor.

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## **6. Domestication of Foreign Judgments**

Texas law allows for the filing of an action in Texas to domesticate a judgment issued in a foreign country, or a judgment issued in another U.S. state, provided that the foreign judgment meets the criteria set forth in the Texas Civil Practice and Remedies Code.



## Asset tracing, an overview

The Wyoming Rules of Civil Procedure and Wyoming Statutes give judgment creditors several tools for identifying and locating a judgment debtor's assets in order to satisfy a civil judgment, including written discovery and depositions. Wyoming law allows for the domestication of judgments that have been issued in other states within the United States as well as foreign countries.

### 1. Is any information about assets publicly available?

Publicly traded companies must file quarterly and annual reports to comply with federal securities laws.

Each county has a recorder's office with detailed records that can be used to determine ownership of real property.

The Wyoming Department of Transportation maintains vehicle registration records that can be searched in order to determine the ownership of a specific vehicle.

### 2. What steps can be taken to obtain information to identify asset holders (whether third party or wrongdoer/adverse party) or the assets?

#### As against third parties

The Wyoming statutes allow a judgment creditor to utilize traditional forms of third-party discovery in aid of executing a judgment (eg subpoenas and depositions).

#### As against the wrongdoer

The Wyoming statutes allow a judgment creditor to utilize traditional forms of discovery in aid of executing a judgment against judgment debtors (eg depositions and written interrogatories). If a judgment debtor refuses to respond to post-judgment discovery requests, the judgment creditor may file a motion to compel the judgment debtor to respond

### 3. Can steps be taken to protect/preserve assets on an interim basis?

Under Wyoming law, the court may appoint the county sheriff or other suitable person as the receiver of the judgment debtor's property, and may prohibit a transfer of the judgment debtor's non-exempt property.

A judgment creditor may record an abstract of judgment in any county in the state that will act as a lien against any real property that the judgment debtor owns in that county. This will prevent the judgment debtor from selling its real property without first satisfying the judgment.

Wyoming's receivership statute allows the court that issued the judgment to appoint a receiver (1) to preserve the judgment debtor's assets during the pendency of an appeal; (2) in proceedings in aid of execution; (3) when an execution has been returned unsatisfied; or (4) when the judgment debtor refuses to apply its property in satisfaction of the judgment.

Wyoming law requires a third party in possession of a judgment debtor's assets to hold such property for the benefit of the judgment creditor if it receives post-judgment discovery requests from the judgment creditor.

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