

THE ASSET TRACING  
AND RECOVERY  
REVIEW

SIXTH EDITION

Editor  
Robert Hunter

THE LAWREVIEWS

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AND RECOVERY  
REVIEW

SIXTH EDITION

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# PREFACE

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

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

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

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

Lawyers have been mulling over the rights and wrongs of solutions to the problems that fraud presents for centuries. They will never stop doing so. The internationalisation of fraud in the past 40 years or so, however, has meant that they argue about these problems not only with lawyers of their own country, but also with lawyers from other jurisdictions. Rarely nowadays will a fraudster leave the proceeds of fraud in the jurisdiction in which they were stolen. The 1980s and early 1990s saw quite pronounced attempts by fraudsters to ‘arbitrage’ the various attitudes and priorities of different jurisdictions to retain what they had taken. Perhaps the highest-profile example of this was the use of jurisdictions in which banking secrecy was a priority as a conduit to which the proceeds of fraud would be transmitted. Another well-known strategy was the use of corporate devices and trusts as a means of sheltering assets from those who deserved to retrieve them.

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

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

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

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

**Robert Hunter**

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# CHINA

*Ronghua (Andy) Liao*<sup>1</sup>

## I OVERVIEW

China's legal system has gradually improved to accommodate the country's continued economic development, and it serves an increasingly active role in handling cross-border crime. While no specialised legislation has been enacted to address fraudulent conduct, there are various provisions under laws and regulations that provide remedies for fraud victims to trace and recover assets.

At a basic level, fraud victims may seek criminal and civil remedies in China.<sup>2</sup> Fraudulent conduct can consist in various criminal offences, such as illegal fundraising, fraud and embezzlement. Victims generally report their cases to the public security bureau (the major criminal investigation agency), which has relatively broad powers and can take quick action against the perpetrators of fraud and the assets in their possession. However, the public security bureau will often characterise as civil fraud those cases that occur during normal business transactions or that do not involve numerous victims, and will advise victims to seek civil remedies in such cases. Furthermore, although criminal punishment does require the compensation of victims, priority is given to stopping the criminal conduct and imposing punishment. Thus, victims may not be fully compensated through criminal proceedings and may have to seek recovery through civil proceedings.

Victims may establish their civil claims based on a number of laws depending on the particulars of each case, such as the General Provisions of the Civil Law, the Tort Liability Law, the Contract Law, the Company Law, and various financial laws and regulations. Victims can apply for property or conduct preservation measures (which are similar to freezing and restraint orders or injunctions) before or after filing a civil litigation or arbitration case, pending the outcome of a final judgment or award, which is often crucial for a successful recovery.

The Chinese legal system also features a regime enabling foreign victims to trace and recover assets in China while pursuing criminal or civil remedies in other jurisdictions. The regime includes recognition and enforcement of foreign judgments and arbitral awards, and freezing, confiscating or returning the proceeds of fraud through criminal judicial mutual assistance mechanisms, among other measures. That said, in practice, there are various obstacles for victims trying to take advantage of this regime. For example, interim measures or injunctions granted during litigation or arbitration proceedings in other jurisdictions are generally not enforceable in China. Also, China adopts foreign currency control policies

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1 Ronghua (Andy) Liao is a partner at Han Kun Law Offices. The author acknowledges the contribution of his colleagues, including Haiqing (Shirley) Liao, Chunyao (Alan) Lin and Junxin (Sam) Ye.

2 For the purposes of this article only, references to the People's Republic of China (China) do not include the Hong Kong Special Administrative Region, the Macau Special Administration Region or Taiwan.

and transferring money into or out of China must be done in accordance with the relevant laws and regulations. In the absence of clear implementing rules, banks may be reluctant to execute an order for the return of the proceeds of fraud. In general, successful asset recoveries in China must be well planned and structured by assessing all potential legal remedies.

## II LEGAL RIGHTS AND REMEDIES

### i Civil and criminal remedies

#### *Civil remedies*

There are numerous civil remedies available to the victims of fraud under Chinese law. The General Principles of the Civil Law defines fraudulent conduct as that which purposely represents false information to the victim, or disguising any fact so as to induce the victim into making a false declaration of will.<sup>3</sup> Recourse for victims of a fraud to trace and recover assets includes those generally available under contract law, tort law, trust law and company law.

#### *Contract law*

Where a victim of fraud is induced to enter into a contract against his or her will, courts or arbitral tribunals will generally find the contract to be revocable at the option of the victim.<sup>4</sup> The legal effect of revocation is that the parties to a contract will be restored to the status quo ante, the assets acquired through performance of the contract will be returned to their original owners and any future obligations under the contract will no longer be binding. Monetary compensation may be available where specific assets cannot be physically or legally returned.<sup>5</sup>

In addition to revoking the contract, victims are also allowed to request perpetrators of fraud to undertake liability for breach of contract and compensate for the losses incurred by the victim, including resale losses, production losses and operating losses, among others. This may provide more effective remedy to the victims compared with the revocation approach.

Victims of fraud may also seek a remedy where no formal contract has been established, such as for damage suffered during negotiations and in concluding the contract.<sup>6</sup> In this case, damages are not typically calculated based on the benefits that a victim would have obtained had the contract been performed and the representations had been truthful. Rather, damages are restricted to the victim's losses in reliance, which generally includes the direct cost of disbursements, such as transportation and communications fees. The victim may be entitled to compensation in the case of certain indirect losses, such as the loss of transaction opportunities. Such losses, however, are typically difficult to prove in practice.

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3 Opinions of the Supreme People's Court on Issues Concerning the Implementation of the General Principles of the Civil Law (for Trial Implementation), Art. 68 (Sup. People's Ct., Fa Ban Fa [1988] No. 6; promulgated 2 Apr. 1988) 1988 Sup. People's Ct. Gaz. 2.

4 Contract Law of the People's Republic of China, Art. 54 (as adopted by Nat'l People's Cong., Pres. Order No. 15; promulgated 15 Mar. 1999, effective 1 Oct. 1999) (the Contract Law).

5 Contract Law, Art. 58.

6 Contract Law, Art. 42.

### *Tort law*

There is no precise concept of the tort of deception in China. However, this does not mean that victims of fraud cannot obtain a remedy under tort law. Based on general tort liability, the victim of a fraud is certainly able to bring tort claims for damages or restitution against the perpetrators of fraud and those who abet them.

Unlike remedies under the Contract Law, persons may be held jointly and severally liable under tort law where they aid, counsel, direct or join in committing a fraudulent act or help to transfer the proceeds of fraud, although the tortfeasors are not in privity of contract with the victims.

### *The Company Law*

The Company Law provides that each of a company's directors, supervisors and senior management personnel has a loyalty and due diligence duty to the company.<sup>7</sup> The duty of loyalty and due diligence is yet to be well developed, but it is generally regarded as similar to the fiduciary duty under the common law system. Duty of care, a concept similar to fiduciary duty, can also be seen in the Trust Law.<sup>8</sup>

Where there is a fiduciary relationship between the victim and the perpetrator of the fraud, the victim may claim damages in respect of the damage suffered or the profits the perpetrator or fiduciary has obtained. If the victim chooses to claim for profits, it is not necessary to show that a loss has been suffered. A typical example of this kind of claim is where company directors or executives negotiate and receive commissions for transactions between the company and other parties. Under the Company Law, directors and executives are obligated to return such commissions to the company.<sup>9</sup> This kind of claim has an advantage over other claims under contract law and tort law, which can only be successful if the victim proves the occurrence of losses.

In some cases, frauds involve abuse of the independent legal person status of corporations and the limited liability of shareholders. Specifically, the perpetrator of a fraud may be a corporate shareholder who uses the corporate form to commit a fraud and then relies upon the limited liability afforded to shareholders as a defence against direct or indirect liability for the fraud. Seeking to pierce the corporate veil under the Company Law is an appropriate approach in such circumstances, since it allows courts to hold controlling shareholders jointly liable for the obligations of the corporation.<sup>10</sup> The core element to support piercing the corporate veil is to show that the controlling shareholder did not treat the corporation as an independent entity; for example, where the property and business of the corporation has been commingled with those of the controlling shareholder. However, in judicial practice it is often difficult for victims to succeed in piercing the corporate veil, except in the context of one-person corporations where the sole shareholder, rather than the victim, is obligated to prove that the corporation's assets are independent of the sole shareholder's assets.<sup>11</sup>

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7 Company Law of the People's Republic of China (2013 Revision)], Arts. 147, 148 (as revised and adopted by Standing Comm. Nat'l People's Cong., Pres. Order No. 8; promulgated 28 Dec. 2013, effective 1 Mar. 2014) (the Company Law).

8 Trust Law of the People's Republic of China, Art. 25 (Standing Comm. Nat'l People's Cong., Pres. Order No. 50; promulgated 28 Apr. 2001, effective 1 Oct. 2001).

9 Company Law, Art. 148.

10 Company Law, Art. 20.

11 Company Law, Art. 63.

In practice, it is not unusual for the shareholders or actual controllers of a company to intentionally deregister the company to evade debts that the company owes to its creditors. Under the Company Law, creditors may make a special claim against the directors, controlling shareholders and the actual controllers of a company that has been deregistered under a false liquidation report.<sup>12</sup> Under such circumstances, all the directors, controlling shareholders and the actual controllers may be held jointly and severally liable for the debts of the deregistered company.

### ***Criminal remedies***

In addition to civil remedies, law enforcement authorities can charge the perpetrator of the fraud with criminal offences, such as fraud, contract fraud and illegal fundraising, under the Criminal Law. Victims should consider the following procedural and substantive matters to successfully resolve their cases.

#### *Procedure for cases involving civil and criminal liability*

In a civil case where the facts may constitute criminal fraud, courts will dismiss the fraud claim or suspend the enforcement of the civil judgment supporting the fraud claim and then transfer the relevant case materials to the public security bureau or procuratorate, which will review the materials and conclude whether to file criminal charges. If the procuratorate does not intend to file criminal charges or the court holds that the case does not constitute a crime, the victim has the right to re-initiate his or her suit based on the fraud claims or to request the court to resume the enforcement of the civil judgment.

Where the evidence in a civil fraud case may relate to a suspected crime or contain indicia of a suspected crime, the court will continue to hear the fraud claim or execute a civil judgment supporting the fraud claim and refer the evidence to the public security bureau or the procuratorate.

#### *Order for return and recovery of assets in criminal proceedings*

In criminal proceedings, law enforcement authorities will often have seized, sealed or frozen the assets illegally obtained by the perpetrator. If the ownership of the assets is clear, victims may be allowed to recover the assets at an early stage after duly performing the relevant formalities. Where the ownership of the assets is unclear, the assets will be returned to the victims *pro rata* after the criminal judgment or ruling becomes legally binding, less any amounts that individual victims have already recovered.<sup>13</sup>

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12 Provisions II of the Supreme People's Court on Issues Concerning the Application of the Company Law of the People's Republic of China (2014 Revision), Art. 19 (Sup. People's Ct., Si Fa [2014] No. 2; promulgated 20 Feb. 2014, effective 1 Mar. 2014) 2014 Sup. People's Ct. Gaz. 6.

13 Criminal Law of the People's Republic of China, Art. 64 (as revised and adopted by Standing Comm. Nat'l People's Cong., Pres. Order. No. 80; promulgated and effective 4 Nov. 2017) (the Criminal Law); Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China, Art. 360 (Sup. People's Ct., Fa Shi [2012] No. 21; promulgated 20 Dec. 2012, effective 1 Jan. 2013), 2013 Sup. People's Ct. Gaz. 6, 7.

## ii Defences to fraud claims

### *Statute of limitations*

Chinese civil law generally supports the argument that a wrongdoer should not be subject to civil liability claimed by a claimant after the expiry of a statute of limitations, which may vary with the nature of the claims.<sup>14</sup> For example, a claim for rescission of a contract because of fraud must be brought within one year of the date on which the victim becomes aware or should have become aware of the fraud and, in any event, within five years of the date the fraud was committed.<sup>15</sup> The statute of limitations for fraud claims based in tort or relating to breaches of fiduciary duty and piercing the corporate veil is three years from the time the victim became aware or should have been aware of the fraud and in no event more than 20 years from when the fraud was committed.<sup>16</sup>

For all claims except those otherwise stipulated by law, such as termination or revocation of a contract, limitation periods are generally allowed to be suspended, or renewed, when some specific requirements have been satisfied.<sup>17</sup> Courts do not recognise the advance waiver by parties of the statute of limitations.<sup>18</sup>

## III SEIZURE AND EVIDENCE

### i Securing assets and proceeds

When seeking civil remedies by initiating civil litigation or arbitration in China, the victims of fraud may apply to the competent Chinese court for preservation of the perpetrator's assets.<sup>19</sup> Asset preservation is a legal proceeding by which claimants may seal or freeze assets of the counterparty for a limited period. After a final judgment or arbitral award is rendered, claimants may then apply for enforcement against the subject assets.

### *Grant of a preservation order*

When granting a preservation order, Chinese courts consider only whether the claimant's interests in the later judgment or arbitration award may be jeopardised because of the defendant's action or any other reasons.<sup>20</sup> Moreover, courts normally will not require the claimant to produce evidence to prove that the claimant's interests may be jeopardised. Rather, this condition may be easily met by a statement made in the application. Therefore, when seeking preservation of a perpetrator's assets, claimants need not show the *prima facie* case for their legal rights; however, courts may require claimants to produce some evidence preliminarily to show their legal standing.

14 General Provisions of the Civil Law of the People's Republic of China, Art. 192 (Nat'l People's Cong., Pres. Order 66; promulgated 15 Mar. 2017, effective 1 Oct. 2017).

15 Id., Art. 152.

16 Id., Art. 188.

17 Id., Arts. 188, 194, 195 and 199.

18 Id., Art. 197.

19 Civil Procedure Law of the People's Republic of China, Art. 100 (as revised and adopted by Standing Comm., Nat'l People's Cong., Pres. Order No. 71; promulgated 27 June 2017, effective 1 July 2017) (the Civil Procedure Law).

20 Id.

### ***Provision of security***

Generally, Chinese courts will require claimants to provide security for an asset preservation application.<sup>21</sup> The form of security traditionally includes cash, real property and guaranties provided by designated security companies. In recent years, it has become more and more common for the courts to accept guaranties provided by insurance companies, which are more popular among claimants because of their lower cost.

### ***Procedures, periods and durations***

Normally an asset preservation application shall be submitted along with a case admission file. Since a case admission file already includes a statement of claims and supporting evidence, a claimant normally needs only to submit an additional application for asset preservation. In about one week after a court has accepted the application, the court will inform the claimant of its intention to grant the order and require the claimant to provide security or require the claimant to provide additional materials (e.g., the defendant's asset information) before the order can be granted. Courts rarely dismiss an asset preservation application outright. After the order is granted by a ruling, the court may take another week (depending on the type and location of the assets to be preserved) to effectively preserve the subject assets. Bank deposits may be frozen for a period of one year, and all other assets may be preserved for up to three years, commencing from the date of enforcement. The preservation period can be renewed by an application before its expiration if the lawsuit is still pending or the final ruling or judgment has not been satisfied at the end of the period.

### ***Asset preservation in a Chinese arbitration proceeding***

Claimants can also apply for asset preservation in arbitration proceedings administered by a Chinese arbitration institution. Claimants usually need to submit the application to the arbitration institution and the institution will forward the application to the competent Chinese court to enter and enforce the ruling. Chinese courts treat these applications forwarded by arbitration institutions no differently from those filed directly with the court in civil litigation cases.

### ***Preservation measures before initiating a lawsuit***

In emergency cases, fraud victims may also apply for preservation of relevant assets before filing a litigation or arbitration case if, without immediate action, the victim's rights and interests will suffer irreparable harm.<sup>22</sup> In such cases, the court has to make the ruling within 48 hours and, if the application is approved, the court will enforce the preservation order immediately.<sup>23</sup> However, if the victim fails to file a litigation or arbitration case within 30 days of the preservation of assets, the court will lift the preservation measures.

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21 Civil Procedure Law, Art. 100.

22 Civil Procedure Law, Art. 101.

23 Id.



### ***Seizure of assets to secure the enforcement of a judgment or arbitration award***

A claimant, after obtaining an effective court judgment, ruling or arbitral award, can file an application to a competent court for enforcement. After the court accepts the application, the claimant can request the court to seize or preserve any of the perpetrator's identifiable assets, with no security requirement.

### ***Seizure of assets in criminal proceedings***

In criminal investigations, law enforcement authorities are empowered to seize and place under seal property and articles relevant to the crime, which generally include proceeds of the crime, tools used to commit the crime and other property and articles related to the crime.<sup>24</sup> However, the purpose of law enforcement authorities in taking these measures is primarily to obtain evidence of the crime rather than to recover the victim's losses.

#### **ii Obtaining evidence**

In criminal proceedings, law enforcement authorities have broad powers to collect evidence. Rules on the exclusion of evidence are not as well established in China as in other jurisdictions, and thus the methods used to collect admissible evidence in criminal proceedings are extensive. In civil proceedings, however, fraud victims have very limited means to collect evidence. Normally, a fraud victim and his or her attorney will take one or more of the following measures to collect evidence from perpetrators or relevant third parties.

### ***Attorney investigation orders***

Courts increasingly issue attorney investigation orders to attorneys who need to collect evidence from third parties such as banks, hospitals and company registration offices. While Chinese law does not yet provide uniform rules on the issuance of attorney investigation orders, many local courts take the position that an investigation request made by attorneys in accordance with an investigation order is equivalent to an investigation request made by court officers. Enforceability of these orders varies depending on local rules issued by the High Court of each province. For example, the Shanghai High People's Court does not provide for any legal consequences for persons who refuse to comply with an investigation order, whereas the Chongqing High Court provides that refusal to comply with an investigation order without reasonable cause is subject to coercive measures.

### ***Evidence preservation proceedings***

For evidence that could be lost or no longer be obtained in the future, victims can apply to the court to take measures to preserve the relevant evidence.<sup>25</sup> Technically, victims can apply to preserve evidence with or without a lawsuit, although courts are generally more willing to grant such applications with or during a lawsuit. Courts do not often grant evidence preservation orders, in part because the circumstances under which such orders are granted are very narrowly tailored.

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24 Provisions on the Application of Relevant Sealing and Freezing Measures in the Handling of Criminal Cases by Public Security Organs, Art. 2 (Sup. People's Ct. et al., Gong Tong Zi [2013] No. 30; promulgated and effective 1 Sept. 2013).

25 Civil Procedure Law, Art. 81.

***Facts found by effective court judgments or arbitration awards***

Under Chinese law, claimants can base claims on facts established by an effective court judgment or an arbitration award, with no need to further prove the facts.<sup>26</sup> Therefore, for example, where a fraud case follows a criminal proceeding, the fraud victim can use in his or her civil suit the facts established in the criminal judgment. The victim can also apply to review and copy the criminal fraud case file, which will allow the victim to take extensive advantage of the investigation authority's discovery work.

***Requests for production made during trial***

Chinese law does not contain provisions for discovery procedures such as document production; however, if a perpetrator refuses to produce evidence in its possession, the victim can request the perpetrator to produce the evidence during trial. If the perpetrator refuses to produce the evidence without due cause, the court may conclude that the content of the concealed evidence supports the victim's claims.<sup>27</sup>

**IV FRAUD IN SPECIFIC CONTEXTS****i Banking and money laundering*****Banks' liabilities in the context of a fraudulent transfer***

Banks are legally obligated to safeguard the lawful rights and interests of their clients.<sup>28</sup> Thus, banks may be found liable in the case of fraudulent bank card transactions. For example, in a case adjudicated by the Nanjing Intermediate People's Court,<sup>29</sup> the bank was required to fully compensate the depositor for failing to identify a fraudulent transaction. The court reasoned that the bank was obligated to improve its anti-fraud technology to protect client deposits, and the bank could not be relieved of this liability unless there was evidence demonstrating that the depositor mishandled his account information. This viewpoint has also been adopted in proposed judicial rules that the Supreme People's Court has recently issued for public comment.<sup>30</sup>

In accordance with relevant provisions under the Anti-Money Laundering Law,<sup>31</sup> banks require their customers to provide valid identity documents and regularly review and monitor their customers' identities. Where a fraudulent transfer wires money into a perpetrator's bank

26 Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, Art. 93 (Sup. People's Ct., Fa Shi [2015] No. 5; promulgated 30 Jan. 2015, effective 4 Feb. 2015) 2015 Sup. People's Ct. Gaz. 5, 6 (the Civil Procedure Interpretation).

27 Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings, Art. 75 (Sup. People's Ct., Fa Shi [2001] No. 33; promulgated 6 Dec. 2001, effective 1 Apr. 2002) 2002 Sup. People's Ct. Gaz. 1 (the Civil Evidence Provisions).

28 Law of the People's Republic of China on Commercial Banks, Art. 6 (as adopted and revised by Standing Comm. Nat'l People's Cong., Pres. Order No. 34; promulgated 29 Aug. 2015, effective 1 Oct. 2015).

29 Case of dispute over debit card: Song Peng v. Indus. Comm. Bank of China Co., Ltd., Xin Men Kou Branch (Nanjing Inter. People's Ct., (2016) Su 01 Min Zhong 116; publ. 2 Feb. 2016).

30 Provisions on Several Issues in Trying Cases Involving Bank Card Disputes (Draft for Comment) (Sup. People's Ct.; issued 6 June 2018 for public comment until 30 June 2018).

31 Anti-Money Laundering Law of the People's Republic of China (Standing Comm. Nat'l People's Cong., Pres. Order No. 56; promulgated 31 Oct. 2006, effective 1 Jan. 2007).

account, the receiving bank may also be subject to tort-based claims for damages by the depositor. Instances exist where banks have been held liable for negligence in reviewing and verifying identity documents in cases of fraud.

### ***Money laundering***

Money laundering is a criminal offence under the Criminal Law.<sup>32</sup> The Supreme People's Court issued a judicial interpretation in 2009 regarding the application of law in the trial of money laundering and other criminal cases, which clarifies certain elements of the establishment of the crime of money laundering.<sup>33</sup>

The People's Bank of China is the primary competent authority with respect to anti-money laundering, and promulgates rules pursuant to the Anti-money Laundering Law. Under these provisions, banks are required to implement sound internal controls and procedures to prevent money laundering and to report suspected instances of money laundering. These measures include customer identity verification, customer identity and transaction record-keeping and reporting of large-sum or suspicious transactions.

### **ii Insolvency**

The Enterprise Bankruptcy Law was passed in 2006,<sup>34</sup> and was designed to bring the bankruptcy system in line with international standards as China transitions from a plan-oriented economy to a market-oriented economy. One of the main purposes of the Enterprise Bankruptcy Law is to achieve equitable treatment and sufficient compensation for all creditors. Thus, as in many other jurisdictions, bankruptcy administrators have the power to revoke or invalidate certain transactions, recover assets in the case of fraud and demand compensation from the legal representative of the insolvent enterprise and also those directly responsible for the insolvency.

### ***Revocable transfers***

The bankruptcy administrator has the power to revoke acts relating to transfers of property for no consideration or at a patently unreasonable price, guarantees for unsecured debts, the satisfaction of debts not due and waivers of debts that occur within one year of the court's acceptance of the bankruptcy petition.<sup>35</sup> Because of this mechanism, it is not uncommon in practice that a defrauded creditor chooses to file a bankruptcy petition against the debtor when there is minimal compensation available. Nevertheless, it is notable that the courts have great discretion in deciding whether to accept bankruptcy petitions.

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32 Criminal Law, Art. 191.

33 Interpretation of the Supreme People's Court on Several Issues Concerning the Specific Application of Law in the Trial of Money Laundering and Other Criminal Cases (Sup. People's Ct., Fa Shi [2009] No. 15; promulgated 4 Nov. 2009, effective 11 Nov. 2009).

34 Enterprise Bankruptcy Law of the People's Republic of China (Standing Comm. Nat'l People's Cong., Pres. Order No. 54; promulgated 27 Aug. 2006, effective 1 June 2007).

35 Id., Art. 31.

### ***Preferential payments***

Repayments by a bankrupt debtor to certain creditors are revocable if they are made within six months of the court's acceptance of the bankruptcy petition, except for those that benefit the debtor's bankruptcy estate or are made pursuant to a court ruling or arbitral award.<sup>36</sup>

### ***Fraudulent transactions***

Bankruptcy debtor transactions are invalid where they involve concealment or dissipation of assets to evade debts, or the fabrication or recognition of false debts.<sup>37</sup> Furthermore, the persons directly responsible for the fraudulent transactions may be sentenced to incarceration or subject to a fine, or both.<sup>38</sup>

### **iii Arbitration**

The Contract Law recognises the doctrine of separability of dispute resolution clauses,<sup>39</sup> and thus the validity of a dispute resolution clause will not be affected when a contract becomes invalid, is revoked or terminated. Where a contract becomes revocable because of fraudulent conduct during its formation, any agreement to arbitrate within the contract will survive revocation.

If the evidence on which a domestic arbitral award is based is proven to be false, the arbitral award may be set aside in the revocation review proceedings<sup>40</sup> or be ruled as unenforceable in the enforcement proceedings.<sup>41</sup> In contrast to the treatment of domestic arbitral awards, Chinese courts will not conduct a substantive review of foreign-related arbitral awards. Thus, fraud claims against evidence are not a statutory condition to set aside or refuse the enforcement of foreign-related arbitral awards. However, if the signatures on a contract are false or the signatories are not authorised to sign the contract without apparent agency, this will mean no agreement to arbitrate existed and will cause the arbitral award to be unenforceable.<sup>42</sup>

### **iv The effect of fraud on evidentiary rules and legal privilege**

In both civil and criminal trials, the evidence provided by one party is generally examined by the opposing party from the perspectives of authenticity, legality and relevance, although the standards of proof and evidentiary rules vary in these two different proceedings.

Evidence obtained through infringing on the lawful rights of others or by violating prohibitive provisions of law may not be used to establish the facts of a civil case.<sup>43</sup> However, acquiring evidence through deception or misrepresentation may still be admissible in civil proceedings. For example, evidence that the owner of intellectual property rights obtains while under an assumed name from a suspected infringer will generally be admissible

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36 Id., Art. 32.

37 Id., Art. 33.

38 Criminal Law, Art. 162.

39 Contract Law, Art. 57.

40 Arbitration Law of the People's Republic of China, Art. 58 (as revised and adopted by Standing Comm. Nat'l People's Cong., Pres. Order No. 76; promulgated 1 Sept. 2017, effective 1 Jan. 2018).

41 Civil Procedure Law, Art. 237.

42 Civil Procedure Law, Art. 274; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V.1.(a), 10 June 1959, 330 U.N.T.S. 3.

43 Civil Evidence Provisions, Art. 68.

into evidence. In criminal proceedings, collecting evidence through deception is generally prohibited,<sup>44</sup> with a limited exception in the case of undercover investigations, provided that no measures are used such as inducing others to commit crimes, endangering public safety or seriously threatening the personal safety of others.<sup>45</sup>

Unlike common law legal systems, the Chinese legal system does not have an exact concept of legal privilege. The Attorneys Law generally requires lawyers to keep in confidence information that comes to their knowledge during a representation, except where the information indicates that the client or others are preparing to commit or are currently committing crimes that endanger national security or public safety, or seriously jeopardise the personal safety of others.<sup>46</sup> There are no special rules regarding lawyers' duty of confidentiality in the context of fraud.

## V INTERNATIONAL ASPECTS

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

Under the Contract Law, the parties to a contract are allowed to make a choice of law only when a foreign-related civil relationship is established. Chinese law further clarifies that a civil relationship shall be recognised as foreign-related if any one of the following elements is present:<sup>47</sup>

- a* at least one party involved is foreign;
- b* at least one party's habitual residence is located outside China;
- c* the object in dispute is located outside China;
- d* the legal facts that establish, change or terminate the civil relationship take place outside China; or
- e* other circumstances that can be deemed as a foreign-related civil relationship.

Where a contractual relationship exists between the victim and the perpetrator of the fraud, and the contract contains a choice-of-law clause, Chinese courts will apply the chosen law to claims arising out of terms of the contract, regardless of whether the chosen law otherwise has a connection to the relationship. For tort claims, however, Chinese courts will instead apply *lex loci delicti*, the law of the place of common habitual residence of the parties or a separate choice of law should the parties so agree.<sup>48</sup>

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44 Criminal Procedure Law, Art. 50.

45 *Id.*, Art. 151.

46 Attorneys Law of the People's Republic of China (2017 Revision), Art. 38 (as revised and adopted by Standing Comm. Nat'l People's Cong., Pres. Order No. 76; promulgated 1 Sept. 2017, effective 1 Jan. 2018).

47 Interpretation I of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Application of Laws to Foreign-related Civil Relationships, Art. 1 (Sup. People's Ct., Fa Shi [2012] No. 24; promulgated 28 Dec. 2012, effective 7 Jan. 2013) 2013 Sup. People's Ct. Gaz. 8.

48 Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships, Art. 44 (Standing Comm. Nat'l People's Cong., Pres. Order No. 36; promulgated 28 Oct. 2010, effective 1 Apr. 2011).

In the absence of agreement as to the choice of law, Chinese courts will apply the law of the habitual residence of the party whose performance of the contractual obligations best reflects the nature of the contract or other law that has the most significant relationship with the contract,<sup>49</sup> except where the provisions of relevant international treaties apply.<sup>50</sup>

## ii Collection of evidence in support of proceedings abroad

Foreign courts and lawyers are not empowered to summon witnesses to testify or to collect evidence in China for use in foreign legal proceedings. Chinese law permits evidence to be collected from a foreign national in China at the national's embassy or consulate;<sup>51</sup> however, collection of evidence in support of proceedings abroad is mainly conducted through international conventions or bilateral treaties.

China joined the Hague Evidence Convention in 1997,<sup>52</sup> under which the Ministry of Justice of China is designated as the central authority for receiving and transmitting letters of request for taking evidence from the competent authorities of other contracting states. Upon receipt, the Ministry of Justice will forward requests to the Supreme People's Court for review, which will then forward them to a lower court for execution. The Supreme People's Court issued detailed implementation rules in 2013 regarding the handling of civil judicial assistance requests generated in accordance with bilateral treaties or international conventions, including the Hague Evidence Convention.<sup>53</sup> Requests for evidence will generally be supported, so long as the execution of the request does not harm China's sovereignty, national security, the public interest, or the witness is not privileged or is obligated to refuse to give evidence. However, the process may be very time-consuming and replies typically take more than one year.

As of February 2018, China has signed bilateral treaties with approximately 65 countries for judicial assistance in criminal or civil matters, most of which cover evidence collection. The Supreme People's Court has issued special arrangements for evidence collection with respect to the Hong Kong and Macau Special Administrative Regions and Taiwan, which are regarded as separate legal jurisdictions.

In addition, there exists some cooperation for evidence collection between certain competent authorities, such as law enforcement. This assistance is based on the Interpol operating framework. Pursuant to the framework, victims of cross-border fraud may report their cases to the national central bureau of Interpol located in their home country, which

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49 Id., Art. 41.

50 E.g., United Nations Convention on Contracts for the International Sale of Goods, 11 Apr. 1980, 1489 U.N.T.S. 3.

51 Civil Procedure Law, Art. 277.

52 Hague Conference on Private International Law, Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 18 Mar. 1970.

53 Provisions of the Supreme People's Court on Handling Requests for Judicial Assistance in Service of Judicial Documents, Investigation and Taking of Evidence in Civil and Commercial Cases in accordance with International Conventions and Bilateral Treaties on Judicial Assistance (Sup. People's Ct., Fa Shi [2013] No. 11; promulgated 7 Apr. 2013, effective 2 May 2013) 2013 Sup. People's Ct. Gaz. 12; Rules for the Implementation of the Provisions on Handling Requests for Judicial Assistance in Service of Judicial Documents, Investigation and Taking of Evidence in Civil and Commercial Cases in Accordance with International Conventions and Bilateral Treaties on Judicial Assistance (for Trial Implementation) (Sup. People's Ct., Fa Fa [2013] No. 6; promulgated 7 Apr. 2013, effective 2 May 2013) 2013 Sup. People's Ct. Gaz. 12.

will then transfer the case to the relevant national central bureau with a request to take action. However, Interpol tends to focus on high-profile cases and does not publicise its working procedures. Thus, reporting to Interpol is not a standard approach and may only work in certain cases.

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

Chinese courts and public security bureaus that accept the fraud claims of a foreign victim may act to preserve the assets of the perpetrator or the proceeds of the fraud. Where the legal proceeding is initiated outside China, the foreign victim will have few direct means of preserving assets or proceeds and must instead rely upon bilateral treaties on judicial assistance. We note that most bilateral treaties relating to judicial assistance in criminal matters cover the seizure of assets and handover of illegal gains, among other matters.

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

China is not yet a signatory to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.<sup>54</sup> Under Chinese law,<sup>55</sup> bilateral treaties or the principle of reciprocity may constitute a basis for recognising and enforcing most types of foreign court judgments (excluding foreign divorce judgments).<sup>56</sup> There is no official or clear definition of reciprocity under Chinese law. The judicial practice in China is that a Chinese court may recognise or enforce a foreign judgment only if Chinese court judgments have been previously recognised or enforced in the jurisdiction in which the court is located. Thus, it is not certain in practice whether Chinese courts will accept requests for reciprocity. In fact, Chinese courts have rarely recognised foreign court judgments in the absence of a treaty. Judgments rendered by courts in the Hong Kong and Macau Special Administrative Regions and Taiwan are recognised and enforced under separate judicial arrangements.

No special rules exist on the enforcement of foreign judgments in relation to fraud claims and thus fraud claim-based judgments will comply with the same rules and procedures as other types of judgments.

### **v Fraud as a defence to enforcement of foreign judgments**

Once the preconditions for the enforcement of a foreign judgment are satisfied, a Chinese court will examine the enforceability of the foreign judgment in accordance with the Civil Procedure Law and international treaties. Generally the defences to enforcement include: (1) whether the judgment is final and effective; (2) whether the enforcement is contrary to the basic principles of Chinese law or harms China's sovereignty, security or is against public policy;<sup>57</sup>(3) whether the party has been duly served with a default judgment; and (4) whether there are parallel proceedings handled by Chinese courts between the same parties and based on the same facts, among others.

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54 Hague Conference on Private International Law, Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1 Feb. 1971.

55 Civil Procedure Law, Art. 281.

56 The recognition and enforcement of divorce judgments rendered by a foreign court is subject to Provisions of the Supreme People's Court on the Issues Concerning the Procedures for PRC Citizens to Apply for the Recognition of Divorce Judgments by Foreign Courts. In practice, Chinese courts have recognised many foreign divorce judgments.

57 Civil Procedure Law, Art. 282.

To our knowledge, existing Chinese laws and treaties do not expressly prohibit the recognition and enforcement of foreign judgments obtained by way of fraud. However, Chinese courts may nonetheless refuse to recognise such foreign judgments because they are contrary to basic Chinese legal principles or are against public policy.

## **VI CURRENT DEVELOPMENTS**

China's announcement of the Silk Road Economic Belt and the 21st Century Maritime Silk Road (also collectively known as the Belt and the Road Initiative) signals the country's strong desire to integrate into the world economy. A reliable and well-developed legal system is crucial to attracting foreign investment, and thus in recent years China has made progress in improving its legal system, particularly in the area of international cooperation.

### **i A Chinese court enforces a US civil judgment for the first time**

On 30 June 2017, the Wuhan Intermediate People's Court issued a verdict ordering the recognition and enforcement of a commercial judgment rendered by the Los Angeles County Superior Court in the US state of California. This marks the first time that a Chinese court has recognised and enforced a commercial judgment from a US court, which is of landmark significance and will encourage more efforts to seek enforcement of US court judgments in China. However, judgments made by Chinese courts lack binding effect, unlike those under the common law system. It is thus yet to be observed whether reciprocity between China and the United States will be widely accepted by Chinese courts. The recognition and enforcement of US court judgments will still depend on the particulars of each case.

### **ii China's approval of the 2005 Choice of Court Convention**

China approved the Hague Convention on Choice of Court Agreements on 12 September 2017.<sup>58</sup> The convention seeks to promote the recognition and enforcement of judgments among its contracting states. According to the convention, the substantial preconditions for enforcement include: the existence of an exclusive choice of court agreement, specifically, the choice of courts of one contracting state or one or more specific courts of one contracting state should be deemed to be exclusive unless otherwise provided. Contracting states currently include the European Union (including the United Kingdom), Singapore, Mexico, the United States and Ukraine. Although the convention must still be ratified by the National People's Congress before it becomes effective in China, the convention is expected to promote the use of court litigation as a dispute resolution mechanism for disputes among China and other contracting states.

### **iii Legislation on international criminal judicial assistance**

A milestone legislative event in international cooperation in dealing with criminal cases is the forthcoming Law of the People's Republic of China on International Judicial Assistance in Criminal Matters, the initial draft of which was deliberated by the Standing Committee of the

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58 Hague Conference on Private International Law, Convention on Choice of Court Agreements, 30 June 2005.



National People's Congress and issued for public comment in December 2017.<sup>59</sup> The second reading is planned for August 2018 and the law is expected to be formally promulgated and become effective following a third reading in accordance with Chinese legislative procedures.

International criminal judicial assistance is defined in the draft legislation to include the service of documents, investigation and collection of evidence, arrangement of witnesses to testify or assist in the investigation, seizure, sealing and freezing of property, the confiscation and return of illegal gains, notification of the results of criminal proceedings and other related judicial assistance. In the context of asset recovery, the draft legislation will produce the first comprehensive law to stipulate very detailed procedures and documentation requirements for the presentation, receipt and handling of requests from China or foreign countries for the attachment and return of property overseas. The Law on International Judicial Assistance in Criminal Matters is intended to fill the systemic gap that has existed in international criminal cooperation between China and other countries. Once the legislation becomes law, it will significantly promote the implementation of international conventions, especially with respect to tracking down fugitives and recovering assets overseas.

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59 Law of the People's Republic of China on International Judicial Assistance in Criminal Matters (Draft) Draft for Comment (12 Standing Comm. Nat'l People's Cong. 31; issued 29 Dec. 2017 for public comment until 27 Jan. 2018).

## ABOUT THE AUTHORS

### **RONGHUA (ANDY) LIAO**

*Han Kun Law Offices*

Ronghua (Andy) Liao is a partner in the dispute resolution practice of Han Kun Law Offices. He has served in private practice for more than 16 years, with a career path from international law firms to leading Chinese law firms. His practice focuses on domestic and international financial disputes, cross-border investment and international trade disputes and cross-border asset tracing and recovery, including enforcement of foreign court judgments or arbitration awards in China. Through his clear thinking and forward-looking analysis, he is skilled in advising on both overall planning and detail-oriented strategies in commercial dispute resolution matters. He is dedicated to protecting his clients' interests to the greatest extent, by means of his deep legal knowledge and resourceful connections.

### **HAN KUN LAW OFFICES**

33/F, HKRI Centre Two  
HKRI Taikoo Hui  
288 Shimen Road (No. 1)  
Shanghai 200041  
China  
Tel: +86 21 6080 0990  
Fax: +86 21 6080 0999  
andy.liao@hankunlaw.com  
www.hankunlaw.com



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