



Freezing Assets

The mechanics behind cross-border injunctions

Virtual Round Table Series
Disputes Working Group 2019

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Many modern organisations, regardless of size, own assets in multiple locations across the world. The advent of technology, together with accessible international markets, means dealing with clients across borders is easier than ever before. As a result of this trend, businesses may have money in foreign bank accounts, stock in foreign warehouses, or significant tangible assets such as offices, vehicles or land.

In the event of a commercial dispute with one of those companies, a creditor may find it necessary to freeze some of those assets, in order to satisfy a monetary claim against the debtor.

The cross-border injunctions required to do this are notoriously difficult to execute effectively, due to the intricacies of the various local laws of countries in which assets are located. Extra complexity is added, because of the need for accurate discovery, alongside secrecy and speed of execution, in order to prevent a debtor dispersing those assets.

Injunctions are dealt with differently depending on the asset. Real estate assets are often subject to specific requirements, such as presenting a court order granting an embargo before the official register of deeds. This effectively creates a lien on the property in question. More mobile assets, such as vehicles, are easier to hide and are usually dealt with by a court officer, who may be able to physically transfer the assets into the hands of a guardian. Highly liquid assets, such as cash in bank accounts, often require special

treatment and may be subject to specialised legislation, such as the Mareva Injunction Order (MIO), which compels a bank to immediately freeze those accounts.

If the debt in dispute is large enough, it may be necessary for a creditor to require injunctions to be brought on multiple assets in multiple locations, which is incredibly complex without the correct legal advice in each location. Any delay to the process, or erroneous filing, could delay the process to the extent that assets are no longer discoverable and, therefore, an injunction is unenforceable.

Any unjustified attempt to freeze assets, will also incur compensation, meaning that not only does the legal process need to be quick, it also needs to be accurate. To that end, any tools that can aid discovery of assets are very useful.

The European Union has something called the European Account Preservation Order, which allows creditors to freeze debtor bank accounts in any EU member state. They are useful because they can be processed without the debtor's awareness. Elsewhere Anton Pillar Orders and Norwich Pharmacal Orders are particularly useful in offshore jurisdictions. They allow for the seizure of documentation and the forced divulgence of beneficial ownership by third parties, such as banks or internet service providers, that hold assets for anonymous clients. Networks of treaties between certain countries, such as the Inter-American Conven-

tion on Execution of Preventive Measures, make it more likely that domestic courts will recognise foreign judgments.

If the process of securing multiple cross-border injunctions via the civil law courts is proving too challenging, a creditor may attempt to turn to the criminal courts. If the actions of a debtor are proven to be criminal (e.g. fraudulent), the greater powers of law enforcement agencies can be put to work. Dovetailing with a criminal investigation can be a powerful way to reach the intended goal for a creditor.

This feature examines the injunction process from the perspective of 10 legal experts in the area of commercial dispute resolution. They detail the process in their jurisdiction, looking at the injunctions available and the tools used to aid discovery of assets.

We include expert examination from Austria, Germany, The Netherlands, USA, United Kingdom, Cayman Islands, Turkey, Spain, Turks & Caicos Islands and the Dominican Republic. Readers with an interest in a particular jurisdiction can dip into the content for the specifics they require.



The View from IR

Ross Nicholls Business Development Director

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.



SPAIN

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Roger has more than 15 years' experience as a lawyer. He has developed his career in top Spanish law firms, providing legal advice to both Spanish and International companies operating in a wide range of areas such as life sciences, retailing, construction, real estate, engineering, chemical industries, automotive and pharma.

His command of English, French and Italian, along with Spanish and Catalan, has allowed him to build up a substantial international practice, managing relevant international clients' interests in Spain, including ongoing legal advice and / or managing of court cases and restructuring processes on their behalf.



NETHERLANDS

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John Wolfs, is a thoroughbred entrepreneur and founder of Wolfs Advocaten. He has worked as an attorney for 26 years, initially for leading firms in Washington DC and Rotterdam, before founding Wolfs Advocaten in Maastricht 16 years ago.

The strategic geographical situation of the city of Maastricht as well as his Maastricht roots, brought him back to the city.

John is well known for his creativity, specialist (sector) knowledge and the top quality service he provides. He is direct, proactive, constructive and able to analyse situations quickly. He is also pragmatic. John Wolfs often lectures in the field of (international) transport and customs law, (international) commercial law and insurance law. In his private time, John enjoys playing squash and running. He has completed marathons in New York, San Francisco and Amsterdam.



AUSTRIA

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Klaus Oblin specialises in commercial and civil law-related disputes. He also acts as counsel and arbitrator in arbitrations under the rules of bodies such as the International Chamber of Commerce (ICC), the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), Swiss Rules and UNCITRAL.

He regularly provides advice with regard to various matters of commercial, contract and construction law and the establishment of businesses.

Klaus established OBLIN Rechtsanwalte in 2004 and before that he worked for Freshfields Bruckhaus Deringer and Vienna McDougal Love Eckis Smith & Boehmer.

He is a member of the ICC, International Centre for Dispute Resolution (ICDR) Austrian Arbitration Association (ArbAut), German Institution of Arbitration (DIS) and the International Bar Association (IBA).



ENGLAND

Frankie Tierney

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Frankie specialises in commercial and complex litigation for both businesses and individuals.

This includes contract disputes, property ownership disputes, commercial landlord and tenant disputes. She also handles intellectual property disputes, professional negligence claims, shareholder disputes and 'unfair prejudice' claims in the company courts.

In a recent case, Frankie acted successfully for a high end hotel & leisure group in a breach of contract/ negligence claim against a leading provider which had supplied and installed a specialist WiFi cordless telephone system without proper security measures being applied. This resulted in the client's system being hacked and significant sums incurred in phone charges.

Frankie serves as immediate past president of the Surrey Chamber of Commerce and is a keen hockey player. She is also heavily involved in hockey administration at county and regional level. She plays golf, and also enjoys hill walking, reading, and, most importantly, chocolate.



TURKS & CAICOS ISLANDS

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Stephen heads the Litigation & Dispute Resolution practice group in the Turks and Caicos Islands (TCI) office. He has appeared in many of the TCI's recent headline cases involving disputes in the tourism and hospitality, banking, real estate, insurance and construction/building sectors.

In addition to litigation and dispute resolution, Stephen works on admiralty and shipping, banking and finance, corporate and commercial, intellectual property, employment and labour and property and development matters with members of his office and with attorneys at the firm's other offices.

Stephen is sought after in TCI for his expertise with complex corporate and commercial disputes. He has worked on multi-jurisdictional claims, multi-party actions, contract breaches, and insolvencies and liquidations involving local and international parties. He has many years of experience with debt recovery, enforcement of security and judgments, taxation of costs, and receivership appointments. He has assisted clients with shareholder disputes, board room power struggles, and corporate reorganisations and restructurings.



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Chris engages in a diverse Commercial and Corporate Law practice.

He has represented national and local banking institutions, large corporations and small businesses, debtors and creditors in all phases of Bankruptcy and Collection matters.

Chris has experience handling large and small Chapter 11 cases on behalf of Secured Lenders, Debtors, the Creditors' Committee and the Trustee. He has represented numerous large and small companies in issues ranging from start up through dissolution, employment law issues, collection, real estate litigation, real estate acquisition, commercial lease documentation, mergers and acquisitions, and shareholder disputes.

He has experience handling commercial and residential foreclosures and has negotiated and prepared documents for corporate mergers and acquisitions, real estate transactions, wind down, forbearance agreements, condominium documents, commercial leases, non-profit 501 (c) (3) documents, employment agreements, shareholder agreements, buy sell agreements and close corporation agreements.

In addition to his Bankruptcy and Corporate Law experience, Chris has a niche practice in Entertainment Law.



DOMINICAN REPUBLIC

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González Tapia is managing partner at Gonzalez Tapia Abogados in the Dominican Republic.

He began his practice at the firm Messina & Messina (currently Biaggi & Messina), as Associate Attorney. Later in his career he became partner of the firm. In 2009, he decided, along with a team of prepared and recognised professionals, to found the firm González & Coiscou. After acquiring vast practical experience in management and administration, he decided to embark on his next business undertaking in 2014, opening his own law firm - Gonzalez Tapia Abogados.

He has more than 23 years of experience in the practice of Litigation and Corporate and Business Law, representing several clients in major court and arbitration cases as well as in international negotiations.

González took joint responsibility for the negotiation team in the privatisation of five international airports in the Dominican Republic and was the lead attorney in the multimillionaire litigation of a Swiss corporation, well-known in the Dominican Republic and other foreign jurisdictions as Spain, Panama and the United States



GERMANY

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Jana is one of the founding partners at AQUAN Rechtsanwälte. Prior to joining the firm, she spent two years as an attorney at law in a team run by Urs Breitsprecher.

Jana obtained her first state exam at the University of Münster, Germany in 2011 and her second state exam at the higher regional court of Düsseldorf in 2016. She received her Doctorate in Law (Dr. jur.) in 2015 at the University of Münster, after she completed five years of working experience as a research assistant at the Centre for European Private Law at the University of Münster. Jana began practicing law as a qualified Attorney at Law (Rechtsanwältin) in 2016.

She has significant international experience, working on a range of cross-border M&A transactions. Further to this, she has spent considerable periods abroad, completing research studies in Paris, France for her doctoral thesis and a legal clerkship in Iceland at the German Embassy.

Her legal expertise is focused on company law, M&A, trade law, litigation and contract and she represents clients in Germany and beyond. These clients range from family-owned businesses, through to private equity firms and start-ups.



CAYMAN ISLANDS

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Cherry Bridges is a Barrister-at-Law and Attorney-at-Law and the Partner in charge of the Litigation Department at Ritch & Conolly. Cherry was educated in England but has lived in Malaysia, Sarawak, Hong Kong and the Cayman Islands.

Upon completion of her Law Degree and Bar Finals, she was called to the Bar of England and Wales in 1982 and completed her pupillage at 1 Essex Court, Temple, London and at Temple Chambers, Hong Kong.

She was called to the Bar of Hong Kong in 1983 and worked as a Barrister-at-Law in private practice at Temple Chambers, Hong Kong from 1983 to 1986 before she relocated to the Cayman Islands and was admitted as an attorney-at-law in the Cayman Islands in 1987.

She has 34 years' experience acting in a wide range of civil commercial litigation with particular expertise in litigation relating to trusts, insurance, commercial disputes, tracing actions, enforcement of judgments, companies and liquidations of banks, hedge funds and private companies.

She has acted in numerous and significant cross border matters for clients from all over the world, including the United States of America, Canada, Mexico, the Dominican Republic, Uruguay, the United Kingdom, France, Germany, Switzerland, Spain, Russia, Norway, Hong Kong and Singapore.



TURKEY

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Cemil founded his own law firm, Ozalp, in 2012. He provides a large variety of services for Middle-Eastern and European investors, including consultation for companies and individuals alike, in both international and local disputes.

The Ozalp legal team is experienced in corporate and commercial disputes, M&A, litigation, bankruptcy, debt collection, debt settlement, debt acquisition, debt management, transportation, finance, energy, construction and public procurement. The firm also has experts readily available who work exclusively in the fields of criminal law and tax law.

Ozalp is also a pro bono lawyer for the Trust Law Organization, which is the Thomson Reuters Foundation's global pro bono legal programme.

SESSION ONE – INJUNCTIONS

What injunctions are available in your jurisdiction in order to freeze assets. What is the legal process for enforcement and what expertise is required?

Dominican Republic - Pablo Gonzalez Tapia (PGT) In the Dominican Republic, in general terms, asset freezing is a procedure that you have to undertake before a judge, usually the Chief Justice of the First Instance Court of the jurisdiction where the assets are placed. Creditor has to show that the credit is in danger of collection, or that the debtor has been hesitant to pay. It is also useful to demonstrate that there is a danger the debtor could dissipate the assets. The presentation is usually done ex-parte, meaning that the other side doesn't know that creditor is looking for an injunction.

If creditor manages to prove the case, the embargo order is provided and with that order creditor is entitled to freeze. Usually, a creditor would ask the judge to freeze not only mobile assets but also real estate assets.

Real estate assets are frozen under a so-called 'judicial mortgage'. That's distinct from a normal embargo, which is usually applied to mobile assets and bank accounts. Presenting the judicial mortgage order before the register of deeds, means you can put a lien on the real estate properties.

With regard to mobile assets, a creditor would have two options, at the moment of the embargo. Firstly, you can leave the mobile assets in the hands of the debtor, without transporting them to another location. The court officer conducting the embargo would just go to the place where they are, and either leave them in the hands of the debtor or appoint a guardian of those assets. Sometimes a creditor is entitled to move the asset, which is very rare in practice, because the law commands that if the assets remain in the hands of the debtor or the guardian, they are legally responsible for the safety of those assets.

Another option is to freeze the debtor's bank accounts. This can be done with a judicial order, but in the Dominican Republic we

do also have a special kind of injunction or embargo, which only requires proof of the credit, i.e., an invoice or contract clearly showing you are owed money. With that document, a creditor is entitled to go to every bank in the Dominican Republic, or to any person that owes money to your debtor and freeze that money in the debtor's hands.

Once you have frozen the assets, you are required to appoint the normal Court, in order to validate the procedure. You have to present your case before the judge within either 10 days or 60 days, based on the type of embargo that you have placed. The judge will rule the case on its merits, but the assets remain frozen throughout the procedure.

If a debtor wants to release the assets, they would be required to post a bond in order to take back control.

Netherlands - John Wolfs (JW) The Netherlands, together with Belgium, has a very particular position within the European Union.

This is because, it is not only possible to arrange for an asset arrest after having obtained a judgment, but it's also possible to arrange for a so-called conservatory arrest. This means that assets can be frozen from the moment that one intends to start a proceeding, even before the proceeding has begun.

It is, however, obligatory to start a proceeding within one month at the latest, in order to obtain permission to arrange a conservatory arrest. You need to go to the President of the District Court and explain the claim you have against the opponents. You are also required to name the assets, or possible assets, to be included in the conservatory arrest.

Those assets can include real estate, shares, claims on third parties (debtors) cars, computers, TVs, jewellery and money. If the

money is in a bank account, it is possible to arrange for a third party conservatory arrest, administered by the bank.

Implementing a conservatory arrest, means that it is not possible for the debtor to do anything with those assets. As an example, a conservatory arrest on a house means that the house cannot be sold, unless the one who seeks the conservatory arrest approves.

This might happen if security is provided by the debtor, for 130 per cent of the claim. The extra 30 per cent is used to cover interest, judicial costs and so on, because it may take a year or more before a proceeding has ended.

The bailiff is the executor of the conservatory arrest and can execute this with third parties, or at the real estate registry, from that moment the conservatory arrest is in place. Once a judgment is obtained, the conservatory arrest changes into an executionary arrest.

Ohio - Chris Niekamp (CN) In Ohio, as in other states, you can file for a temporary restraining order and a preliminary injunction at the outset of your case.

Generally, if you are seeking to enjoin a person or a bank, you would name that party to the lawsuit and get some sort of service over that party. You can attempt to walk through the motion and do it ex-parte with the judge if there is some injury to be had, or if you are concerned that assets will be transferred fraudulently. In that instance, you can put forth a case that there is a real emergency.

The judge will usually require some kind of notice to the other side, so as not to surprise them, especially if you've been communicating with them. If the circumstances are right, and you can show irreparable harm and likelihood of success on the merits, then the judge may grant a temporary restraining order.

The Court will generally set the matter for a hearing within 10 days to consider a preliminary injunction, which is a little more lasting until you get to trial. At that point you can attempt to freeze assets until you have a trial on the merits.

Another tactic that we use in Ohio is the appointment of a receiver. Sometimes we go in and seek an emergency motion to appoint a receiver over a company that is in the process of liquidating assets, so that the receiver can take control of the assets and collect any assets for the benefit of the creditor.

I do this regularly on behalf of banks.

Turks & Caicos Islands - Stephen Wilson, QC (SW) The Turks and Caicos Islands, perhaps not surprisingly as a British overseas territory, very much follows the law in England and Wales.

In terms of orders available to freeze assets, there is the classic Mareva Injunction, or freezing order as they tend to be called these days.

That's usually an application made ex-parte, without any notice, in order to secure assets stopping them from being dissipated in order to frustrate an eventual judgment.

Unlike the procedure Chris has just described in Ohio, there is no need in the Turks and Caicos Islands to name banks or other third parties who might be affected by the order, but the order would nevertheless be served on those institutions.

The Mareva injunction is thought of as a nuclear weapon, but in circumstances where there is less likelihood of an immediate dissipation of assets, such as when dealing with real estate, there's an ability to apply for what's called an Inhibition, which is then registered on title and prevents the owner of real estate from transferring it without the Court's approval.

There are also orders allowing for the preservation of property that is the subject matter of a dispute. In those cases, in which a winding up order might be made, we have something similar to what Chris described as the appointment of a receiver.

In such a case, we would seek the appointment of the provisional liquidator, who would hold the ring and protect the assets of the company that was the subject of a winding up petition.

Finally, if the asset that is owned by the defendant, is a ship, we can arrest the vessel if it's in Turks and Caicos Islands' waters.

Cayman Islands - Cherry Bridges (CB) The Cayman Courts have a wide discretion to grant Mareva Injunction Orders (MIOs), in order to prevent assets from being disposed of within a jurisdiction, removed from a jurisdiction, or otherwise dealt with either in the Cayman Islands, or worldwide. They can be free standing injunctions in support of foreign legal proceedings (where there are no extant proceedings in the Cayman Islands). The party applying for the MIO (the plaintiff) may apply for it at any stage of a case, without notice, including before proceedings have been issued, if urgent.

Since MIOs are usually made ex-parte (without notice) the plaintiff must give full and frank disclosure of all material facts and matters in the affidavit evidence on the ex-parte application. Failure to do so, will result in the discharge of the MIO at the stage of the inter partes hearing, if contested. The court usually requires the plaintiff to give an undertaking to pay damages to the counterparty who may later be found to have suffered an unjustifiable loss, if it is subsequently determined that the MIO should not have been granted in the first place. The Court may also require security to fortify the undertaking as to damages and to meet the costs of third parties.

MIOs are usually personally served on the defendant. A breach of an MIO constitutes a civil contempt, punishable by a fine, seizure of assets and/or imprisonment. Importantly, the MIO may apply to third parties (such as a bank) which may also face sanctions for any breach.

To prevent the destruction of relevant evidence, a plaintiff may also apply for an Anton Piller Order to search premises and seize evidence without prior warning.

Turkey - Cemil Baha (CEB) In Turkey, the preventive legal actions are divided into two types as a quick and effective solution which are provisional injunction and provisional attachment.

In general, if the claimant is in a position as follows:

- If action is not taken, the acquisition of the right would be become substantially difficult or completely impossible

- if there is a concern about loss or a serious damage, in the event that the decision is not taken, because of the delay
- If the borrower does not have a specific residence
- If the borrower prepares to hide or to smuggle his/her property or if s/he escapes or if s/he makes fraudulent transactions that violate the rights of the creditor in order to not fulfil the commitment

A decision for the injunction may be ordered by the court. It may be decided that the movant may deposit collateral to meet the potential losses of the third party. It is usually at the discretion of this court; the general rate is approved at rates ranging from 10 per cent to 20 per cent of the value of the dispute. The amount of the guarantee may vary depending on whether the measure is changed or removed. If the request is based on an official document, further evidence or other circumstances, the court may decide not to receive a guarantee, provided that it clearly indicates its justification.

The provisional injunctions decided without any explanation of the counter party can be appealed. Unless otherwise decided, the objection shall not stop the execution of the decision.

Turkey is a party to the United Nations Convention on Contracts for International Sale of Goods (CISG) and this contract does not have exactly this kind of a measure. However, this situation does not prevent the provisional injunction and provisional attachment decisions made by the local court.

In case there is a foreign country court order, which is not yet to be completed the recognition and enforcement procedure, even that order can be subject to the same conditions as mentioned above.

Austria - Klaus Oblin (KO) The main precondition for a party to ask the court for an injunction under Austrian law is that it can demonstrate that the enforcement of specific claims would be endangered if no interim measure was granted. When assessing the presence of endangerment, judges consider the behaviour and recent actions of the debtor as well as any specific circumstances of the case at hand.



Dr. Jana Schott pictured at the 2018 IR Annual Conference in London

Preliminary injunctions may be granted for securing pecuniary and non-pecuniary claims as well as disputed legal relations. The possible interim measures granted are stipulated by law and comprise judicial custody of physical assets, forced administration of real estates or prohibition of the sale or attachment of assets

Preliminary injunctions are granted or dismissed in expedited proceedings. The court may even refrain from hearing the opposing party, if the purpose of the preliminary measure was otherwise impeded. In practice, courts often allow opponent to submit a written statement, but set a very tight deadline. A lower standard of proof applies, so that parties only have to present plausible proof for their allegations.

Spain - Roger Canals (RC) Our system regarding interim measures is similar to The Netherlands or Belgium. We have a system of conservatory arrests when you submit a claim to a court. If we are claiming for an amount of money, you are entitled to at least try an interim measure ending in a conservatory arrest. Any assets you include will be frozen until the procedure is ended, if it is successful

In general terms, Spanish courts are reluctant to recognise or grant these kind of measures, unless you can prove a very strong claim against a debtor. Often, such interim measures are refused when demanded, because the court prefers to convene the parties in a hearing where the issue will be discussed. The award is more likely, after review, if you show a clear right.

The other route arises from enforcement of foreign court judgments. The first thing to do with a foreign court judgment is to go through a recognition process within the Spanish court. If the court has recognised the foreign judgment, then you can seize the assets of the debtor if they are located in Spain. The Spanish government has a good system of public information regarding the seizure of assets. The court issues a general order to banks and real estate registers to locate the assets, then once you have the foreign judgment, you can seize the assets easily.

Germany - Jana Schott (JS) In German law there are several preliminary injunctions at one's disposal in order to secure claims, even before main proceedings may be started or completed.

Firstly, there is the preliminary proceeding in accordance to Sec. 916 et seq. ZPO (German Civil Procedure Code) which literally translates to 'arrest' or 'seizure'. It is admissible when securing the enforcement of a monetary claim or a claim that may be converted into a monetary claim. The request must be submitted at the local court that also covers the main proceeding regarding the claim. The request should contain the title of the claim stating the amount of money or the monetary value and name the reason for the proceeding.

Secondly, there is the preliminary proceeding in accordance with Sec. 935 et seq. ZPO. This injunction aims at safeguarding individual claims that are not currently directed at money. The injunction is also admissible for

the purpose of regulating a condition in relation to a disputed legal relationship. Under certain circumstances, the court may issue a performance order. This order is an exception to the principle in German law, that claims should be secured first before issuing any performance orders, as this order already provides a performance benefit. The performance order is thus an exception concerning interim proceedings because it already includes what would otherwise be received through the main proceeding.

Judgments in main proceedings that are performance-oriented may be declared provisionally enforceable by the court in accordance with Sec. 709 ZPO against the deposit of a security. If a monetary claim is to be enforced through the judgement, it is sufficient if the amount of the security is stated in a certain proportion to the amount of the enforced monetary claim. This offers the possibility of enforcing a judgment which is not yet legally binding because of possible appeals.

Enforcement, in the case of refusal of performance by the debtor after a judgment, or foreclosure is in general dependent on three conditions: the title (e.g. the judgment, order or ruling), the clause (an enforceable duplicate of the title) and the delivery of the aforementioned to the debtor (the debtor must know about the title in order to take counter measures). The court bailiff may then visit the debtor and seize and secure assets.

A judicial officer may also issue an attachment and transfer order (so called "Pfändungs- und Überweisungsbeschluss") at the creditor's request according to Sec. 829 ZPO that effectively leads to the garnishment of the bank account. Even before this attachment is made there is the possibility of advance attachment in accordance with Sec. 845 ZPO.

England - Frankie Tierney (FT) The process utilised in the civil courts differs in Scotland and Northern Ireland so it is important to recognise there is not a standard UK-wide court system – albeit the legal principles on which they operate are pretty much the same.

A civil freezing injunction is dealt with in the High Court and can be applied for without having to give any notice to the other party. It is not given lightly; so you generally have to show that there is a real risk of assets

being dissipated or removed from the reach of the court. If there are no court proceedings already underway; you have to start them at the same time. You therefore prepare the court documents as you would normally, but include an application for a freezing injunction which is backed up by a witness statement. That has to set out what information you have obtained about the assets held by the other party; the value of the claim you are bringing and demonstrate why you say there is a high risk that once the other party becomes aware of the court proceedings; assets will be disposed of.

If the injunction is granted; notice is given by you to the banks where you know the other party holds accounts so that they can freeze access to them. This is normally done just before the court documents are served on the other party. This all has to be done literally within hours of the injunction being granted. The injunction forbids the other party from disposing of any assets (e.g. property, stocks, share cash etc) and requires them to provide you with full details of the assets they have and to provide bank statements etc.

Breaching a freezing injunction, or assisting someone to breach it, is a contempt of court and can result in a prison sentence. Because of the impact such orders have on businesses and individuals, a high court judge will only grant them in very serious cases.

More limited injunctions can be obtained if you just want to prevent the disposal of a particular asset that is the subject of a court claim.

There is an Injunction process by which the high court will authorise a party to enter the premises of another to search and seize property. These are highly specialised orders made only in exceptional cases and are subject to strict rules. They are mainly restricted to situations whereby data/information/pirated or bootlegged products will potentially be destroyed if prior warning of a claim is given.

The sting in the tail is that a condition of getting an injunction is that undertakings (legally binding promises) must be given to the court by the party seeking the injunction. This means that if you lose the primary case, or the court later finds the injunction has caused loss, you will be ordered to pay compensation.

Securing the seizure of assets that are mobile; e.g. a ship or airplane; to ensure they are not moved out of the jurisdiction; also involves specialist court applications.

U.S - Ohio - CN Just one additional thought. I have real concerns about cryptocurrency and the use of Bitcoins, as debtors are finding ways to elude the banking system. I was interested to know if any members have dealt with that issue and whether they've had any success with debtors that are transacting business with cryptocurrencies.

Netherlands - JW Yes, I've been requested on behalf of a foreign client to research the possibilities of setting up a company dealing in cryptocurrencies.

We work together closely with one of the top law firms in The Netherlands, and even they are very reluctant to offer advice. So what one sees, is that, here in The Netherlands, it is quite difficult to not only obtain advice, but also to arrest and attach cryptocurrencies.



IR Annual Conference 2017 in Berlin

What tools or treaties exist to aid discovery of assets, the successful granting of orders and recovery?

Netherlands - JW Well, if we examine treaties, we must, of course, refer to the European Union Treaty in which there is a free exchange of judgments between the member states.

This free exchange between the member states makes it much easier to execute a possible favourable judgment against an opponent. Most people in the EU are aware of the regulation EU number 655 2014, applicable from January 18 2017, and providing for a European account preservation order.

It lets a court in one EU country freeze funds in the bank account of a debtor in another EU country. It is a procedure that may be used in cross-border cases, where the court carrying out the procedure, or the country of domicile of the creditor, are in different member states than the one in which the debtor account is maintained. That makes it easier to recover debts, and acts as an alternative to existing legal procedures.

It does not apply in all EU countries, though, for instance Denmark and the UK.

Spain - RC When you are enforcing an EU judgment in Spain, the procedure is pretty straight forward. It could take just a month to achieve an asset seizure.

The important point here, is the fact that the debtor is not aware of the enforcement procedure until he or she receive the seizing order from the court. This means there is literally no time to conceal any assets or to default the creditor.

Things change when you have to enforce a judgment outside the EU. In such a case, you have to go through a process within the court in order to achieve the recognition of the foreign judgment. Then the first difficulty is to serve the procedure to the debtor.

It is awfully common that debtors are hidden or assets are concealed within the company under other names. If the debtor becomes aware of the enforcement procedure, then the concealing behaviour increases.

In order to tackle such behaviour, the Spanish government passed a modification to the

criminal code in 2015, by which the felony for concealment of assets was considerably tightened.

Austria - KO As of 18 January 2017, creditors domiciled within the EU can also apply for a European Account Preservation Order (EAPO) in order to secure claims. This interim measure is available before and after proceedings have been initiated or a judgment has been granted. The EAPO is directed at the seizure of bank accounts within the EU and is available for all kinds of pecuniary claims including claims relating to tort, delict and civil claims for damages or restitution that are based on an act giving rise to criminal proceedings.

Generally, the opposing party is neither informed about the creditor's application nor heard prior to the granting of the EAPO. The claimant has to provide sufficient evidence for the endangerment of the enforcement of the claim. If the creditor has not yet obtained a judgment, the competent court will have to decide within ten working days after the application has been filed. An EAPO issued in an EU Member State is automatically recognised in all other participating EU Member States.

England - FT Foreign judgments (where there are reciprocal arrangements or treaties in place) can be registered in the high court and once registered all the normal enforcement processes available to a creditor can be used against assets of the debtor held within the jurisdiction of England & Wales.

Separate registration would be needed to deal with assets in Scotland or Northern Ireland but the process is not that complicated.

Enforcement of a judgment is not court led in the sense that it is for the judgment creditor to make applications to use the enforcement options.

If you know what assets are held by the debtor there are various means by which those particular assets can be seized – e.g. bank accounts, vehicles, etc.

Property (buildings/land) can be made subject to a charging order for the value of the debt, but such orders sit behind any mortgages/charges already registered against the title. If the debt is significant it is also possible to then upgrade the charging order by applying for an order for sale.

If you don't know what the debtor has by way of assets, an application can be made for the debtor to attend the court and provide information about what assets they have. The debtor gets two chances to attend the court and if they fail to appear, the court will regard that as a contempt of court and order their arrest. They would be released once they had provided the information.

It is not, however, a particularly effective means of getting information, and if the debtor drags out the process, it can be months between making the application and the debtor finally attending court.

Cayman Islands - CB The Cayman Islands has a panoply of tools to aid in the discovery of assets. These include the Confidential Information Disclosure Law, Anton Piller Orders, Bankers' Books Orders, Disclosure Orders, Letters of Request, and pretrial depositions. It goes beyond the scope of this discussion to expand upon all of these, but some of the more important are described below.

The Confidential Information Disclosure Law, 2016, may be used as a shield to protect sources of confidential information from legal action. The original version of this law provided that the trading and misuse of confidential information was (with various exceptions) a criminal offence either if committed in the Cayman Islands, or worldwide if it relates to Caymanian subject matter. The new CIDL Law removed this criminal offence for breach of confidence, and expands the circumstances in which disclosure can be made. It provides

a clearer list of circumstances in which disclosure is permitted and a list of authorities to which confidential information can be disclosed.

Anton Piller orders are available in the Cayman Islands Orders to prevent the destruction or dissipation of documents. A plaintiff may obtain such an order pre-action and ex parte in exceptional cases, and, if necessary, seize evidence in the defendant's possession without warning. The test for obtaining such an order is difficult to satisfy, and the party applying for the order must give undertakings, inter alia, to provide damages if it is determined at a later date that the order should not have been made.

Section 8 of the Evidence Law (2019 Revision) allows a Cayman Islands court to order that an applicant be permitted to inspect and take copies of a 'bankers' book'. Norwich Pharmacal Orders are available against third parties before suit, who are involved in arguable wrongdoing, whether intentionally or otherwise. They are applied for against registered agents holding details of the actual owners or ultimate beneficial owners of the entities in question.

Turkey - CEB In the context of legal disputes, in Turkey, the tools are divided into two types as a quick and effective solution which are provisional injunction and provisional attachment.

A decision for the injunction may be taken against the dispute in cases when the protection of the rights of the claimant is obligatory, the judge may decide before the hearing. The requesting party has to prove his/her rightness approximately.

The provisional injunction on the basis of the note is not affected by the allegation of falsity about the note and the note holder may request new measures to protect his/her rights when necessary.

The court may decide on any measure that would eliminate the drawback or prevent loss, such as protecting the goods or rights subject to the measure, or safe-keeping or not doing something.

The provisional injunction decision can take several forms such as the failure to return the bank guarantee letters, failure to return the charge of the letter, the suspension of payment of receivables, the prevention of delivery of goods, the suspension

of a navigation of the ship, the prevention of the transfer of real estate to the third persons, blocking bank accounts, the suspension of transfer of copyrights.

In the case of a provisional attachment, the creditor of a due pecuniary debt levies the movable and immovable property and receivables and other rights of the debtor into third-party custody.

Because of the undue debts, the provisional attachment is only requested if the borrower does not have a specific residence, or if the borrower prepares to hide or to smuggle their property, or if they make fraudulent transactions that violate the rights of the creditor.

The creditor is obliged to provide evidence to the court that convinces them about the reasons for the debt and attachment. The court is free to listen to both sides, and it is possible to appeal this decision.

If the creditor requesting a provisional attachment is wrong, they are liable for all damages and the collateral to be paid to the debtor and the third party. If there is only one court decision, no collateral is required.

Turks & Caicos Islands - SW We don't have mutual recognition and enforcement of judgments with anybody, including the UK, which means it's difficult to enforce orders and judgments in the Turks and Caicos Islands, and vice versa.

We do have a mutual legal assistance treaty with the US, which allows US authorities to approach the court here and obtain information and to freeze assets in this jurisdiction. This also enables us to be able to obtain similar assistance from the US.

With regard to banking secrecy laws and the protection of confidential information generally, our Confidential Relations Ordinance was such that we had very tight confidentiality provisions which meant that in civil litigation it was very difficult to obtain confidential information including discovery from a bank regarding somebody's bank account, unless that person consented to the release of that information. Part X of the Companies Ordinance (Cap. 16.08) provides for a process whereby a person intending or being required to give in evidence in, or in connection with, any proceeding being tried, inquired into or determined by any

court, tribunal or other authority (whether within or without the Islands) of any confidential information within the meaning of Part X, may before so doing apply to the Supreme Court for directions.

U.S - Ohio - CN There is no Federal treaty to recognise foreign judgments, so a foreign judgment would have to be entered into state-by-state, based upon the laws of recognition or Res Judicata.

You have to basically file a new complaint and likely attach the judgment and show that the issues already decided in the foreign jurisdiction are subject to a fair and full trial. The court would determine under its laws whether to recognise those issues as already having been decided.

Another option might be arbitration, where the Federal court may recognise the arbitration award if it complied with the US Federal Arbitration Act.

Dominican Republic - PGT As far as the Dominican Republic goes, we are party to a convention called the Inter-American Convention on Execution of Preventive Measures.

This is an old treaty in place since 1979, but it is seldom use in practice. Under the treaty, any party member is entitled to make a request to the Dominican Republic to issue a temporary preventive measure.

This treaty has the significance that it deals with foreign claims dealing with labour, civil and commercial matters. The Dominican Republic has a very large numbers of treaties based on mutual traditional systems, but most of them have to do with persecution based on a criminal infringement. For civil, labour and commercial matters, this is the only convention in place.

We do have also banking secrecy laws, but from the civil perspective, a creditor is not harmed by the banking secrecy laws; in other words, this is not an obstacle to freeze bank accounts. Under our enforcement procedures, a creditor can place an embargo with a bank, without knowing exactly whether the debtor has an account with that bank. It would be the bank's obligation, after the embargo is placed, to let know the creditor whether the intended debtor has any money in the bank.

With regard to companies, we have the problem of piercing the corporate veil, because we recognise that the company has a legal authority. In that case, in order to locate the assets of a debtor company, we will be required by the court to pierce the corporate veil. There's a lot of very new legislation in the Dominican Republic, with very complicated procedures around piercing the corporate veil.

You would need to determine that there's a fraud, and that the debtor and is using different companies to conceal assets. Where location of assets is concerned, the debtor will

try to locate measures to seize the assets in the same place that the assets are located.

Germany - JS German law does not recognise asset tracing. However, the debtor's asset information is to be submitted to the bailiff within the framework of an enforcement carried out by the creditor against the debtor. This serves to provide the creditor with knowledge regarding the assets belonging to the debtor in order to be able to successfully enforce them.

In accordance with Sec. 802c et seq. ZPO, the creditor may entrust the court bailiff directly with the acceptance of asset information. This information may open up further enforcement possibilities for the creditor. If the debtor refuses to submit the asset information, or if he fulfils his obligation but the enforcement of the listed assets is unlikely to result in full satisfaction for the creditor, the court bailiff is authorised pursuant to Sec. 802l ZPO to obtain further information about the debtor from third parties at the creditor's request.

The creditor may obtain information about the debtor's bank accounts from the Federal Central Tax Office, ask the statutory pension insurance institution for the debtor's employment relationships that are subject to social insurance contributions, or ask the Federal Motor Transport Authority about vehicles registered in the debtor's name. If the debtor does not attend the meeting to submit the asset information, without excuse or refuses to provide the information without a reason, the local court issues a detention order at the creditor's request (Sec. 802g ZPO). The arrest serves only to enforce the disclosure of the property information. After the information has been submitted, the debtor is released

from custody. The term of the detention may not exceed six months (Sec. 802j (1) ZPO).

Orders by courts outside of the EU may be enforced if they have the same legal quality as a German order, which requires an exequatur proceeding. As an EU member, Germany profits from EU regulations and treaties governing cross-border litigations. These regulations simplify the service of documents and the enforcement of judgments. The EU regulation 655/2014, for example, intends to give creditors the possibility to ensure, even before main proceedings or at any stage of the litigation, that a following court decision on the main action may also be enforced. It allows a temporary attachment of an account of an EU member without warning the debtor, which is uncommon in German law.



John Wolfs pictured at the 2019 IR 'Dealmakers' Conference in Rome

What extra powers does a criminal prosecution provide in your jurisdiction, as opposed to a conventional civil procedure?

Turks & Caicos Islands - SW The criminal authorities here in the Turks & Caicos Islands have far wider powers than a natural person, or a party to civil litigation. Under our Confidential Relations Ordinance and Part X of the Companies Ordinance, a police officer in the course of an investigation of a criminal offence can obtain confidential information that a party to litigation is unable to obtain without applying to the court.

Moreover, in terms of the freezing of assets, the Proceeds of Crime Ordinance will provide a number of options to prosecuting authorities. This includes restraint orders in the course of the investigation of a criminal offense and in civil recovery proceedings, prosecuting authorities have the ability to apply for a property freezing order.

Police officers also have the ability to seize cash if they have suspicions regarding where it has come from, regardless of whether or not it is part of the recoverable money from illicit activity.

In terms of speed and cooperation, it very much depends. I have mixed experience with the Financial Crimes Unit here, in terms of their willingness to act, however there is a three-year ongoing major prosecution, which is worth highlighting. It involves allegedly corrupt politicians and outside assistance from the United Kingdom. Restraint orders, property preservation orders and production orders were being obtained in large numbers, so we saw the process at its most powerful during the investigation of those offences.

Spain - RC In 2015, the Spanish Criminal Code was strengthened with regard to fraud deterrence, with a new regulation on the felony of concealment of assets.

Before this came in, you committed concealment if you knew you had a judgment condemning you to pay any sum of money, and then you hid or concealed assets while not paying your creditors.

Now the test is whether you are reasonably aware that your creditors are persecuting you in court and, in spite of this, you conceal assets. This is a very big difference.

Criminal courts in Spain can seize assets, if they have a clear perception that a fraud has been committed. These measures can be adopted by criminal courts at any stage of the criminal procedure, but usually they are only adopted once the court has gone through a previous investigation on the concealment. It's very unusual for these kind of measures to be granted immediately when you file a complaint.

Germany - JS Prosecution of crimes regarding assets, e.g. fraud or breach of trust, are mainly aimed at punitive measures, rather than balancing the scales through enforcement via civil proceedings.

Banking secrecy may be disregarded in criminal procedures. The right to refuse testimony only exists regarding professional secrets according to the German Criminal Procedure Code, which does not include banking secrecy. For this reason, bank employees and credit institutions do not have the right to refuse testimony in criminal proceedings - in contrast to civil proceedings - and are obliged to testify in front of the public prosecutor.

However, they do not have to obtain the desired knowledge before testifying, as there is no obligation to inquire. Within the framework of the witness examination, the owners, organs and employees of the credit institutions are obliged pursuant to Sec. 161a StPO to appear in front of the public prosecutor on summons and to give evidence on the matter as far as their knowledge of it may allow. An exception to the rule exists when a bank employee is accused of aiding and abetting a tax evasion committed by a customer. As an accused they may refuse testimony. The

public prosecutor may confiscate business documents and data carriers of the credit institution.

Regarding monetary compensation, civil proceedings will be faster. This is the case in particular with the judicial dunning procedure, if the debtor does not object to the dunning notice or lodges an appeal against the enforcement order.

On the other hand, criminal proceedings offer good opportunities for recognition (see above).

If criminal proceedings are already pending, civil claims may be asserted in the same proceedings within the framework of so-called "Adhäsionsverfahren" for reasons of procedural economy.

Turkey - CEB The movable, immovable, rights and receivables of a person can be confiscated under Turkish law, in the case of strong suspicion based on concrete evidence that a crime has been committed, or assets have been obtained as a result of a crime. These may be bank accounts as well as vehicles, real estate, company shares and other things. The details are regulated in the Criminal Procedure Code.

The crime element in question does not need to be in the hands of the suspect or accused, but, if necessary, a report is often taken from bodies such as the Banking Regulation and Supervision Agency, Capital Markets Board or the Financial Crimes Investigation Board, in order to take attachment decisions.

The attachment decision regarding the immovable assets, is processed in the land registry, and the movables is annotated to the register office and it is enforced. The decision to confiscate any account in the bank or other financial institutions is usually enforced by immediately notifying the bank or financial institution related to the means of technical communication.



Kalus Oblin pictured at the 2017 IR Annual Conference in Berlin

The decision to confiscate the shares of a company is enforced by notifying the related company management and the registered trade registry office with the technical communication tools immediately. Any decisions are notified to the related company and the trade registry office.

Netherlands - JW If you have the possibility to file a criminal complaint against an opponent, then this pressurises the opponent. From a purely practical standpoint that may put some pressure on someone who is not willing to act.

Another issue is that criminal prosecution must be really criminal, so sometimes, when you want the police to investigate a matter, they will say; well it is a civil matter. You can object to that in court and usually you will win.

So what is the advantage of such a criminal investigation?

Well, the police have more powers in terms of locating assets. We have worked with the police in The Netherlands and the district attorney's office, in order to try to obtain assets from criminals.

In big insurance cases, we were able to not only trace assets but also to execute those assets on behalf of the clients. A positive thing about a crim-

inal proceeding, is that if a judgment is rendered in a criminal proceeding, you can use that judgment as a means of proof in a civil case.

It is possible for the criminal to arrange for contrary evidence, but usually that evidence has also been taken into account in the criminal proceeding, so it usually doesn't serve any purpose for the opponent to bring it in.

The last issue pertaining to criminal law in The Netherlands, is that also the police and district attorney are able to obtain and seize assets by means of a criminal conservatory arrest.

Under these rules, assets will have to be given back to the criminals, but it is possible to make a judgment that these assets will become forfeited to the state. The police may also try to find other parties who have claims against those criminals, and then you can arrange for a conservatory or executionary arrest on those assets of the criminals in order to execute judgment.

Ohio - CN US prosecutors and the FBI have most of the same powers as other countries. One of the issues in the US, is that, ethically as attorneys, we cannot threaten criminal prosecution as a way to gain advantage in a civil matter. We have to be careful with that, as demonstrated by the case of Michael Avanti, the attorney who's in big trouble for threatening Nike.

It's an example of an attempt to collect gone bad and you have to be careful in that arena.

So the reality is similar to The Netherlands, in that you have to get the FBI excited about a case, which can be difficult. We had an example here, where I had a banker who was stealing from the bank. We had our own civil case proceeding for several years, before the Federal prosecution finally kicked in and resolved it. The timing of Federal prosecutions can be slow, unless they get excited, like in the case of Michael Avanti.

The reality is that it can take years for them to prosecute a case and finally bring a trial. They do have more powers, but it's difficult to get them to act.

Austria - KO During ongoing criminal investigations, the public prosecutor is entitled to apply various coercive measures necessary for the clarification of the facts and prosecution of the suspected crime. Above all, assets may be seized and preliminary injunctions may be issued.

Dominican Republic - PGT Freezing assets on an individual basis, using a civil, commercial or labour code, is different than pursuing a criminal matter.

In criminal cases, the prosecutor has very ample powers of investigation, which means that they can investigate an agent for months without the agent knowing about that investigation, while prosecutors locate all the assets the agent has.

Usually the prosecutor will try to freeze assets if the prosecutor believe that those assets are being used for a criminal action or protect those assets for eventual dissipation during the procedure.

A prosecutor will have access to the assets and the information of the agent and eventually will go to a special judge called an instruction judge, who will evaluate the merits of the investigation and usually grant what the prosecutor wants. Suddenly, you could find that all your assets have been frozen because of this investigation that is taking place. Usually they do that in secret to avoid the agent dispersing the assets.

As I mentioned earlier, the Dominican Republic has various treaties of mutual judicial assistance on the criminal side with the countries of the region. The Dominican Republic has agreed that requests from any of those states should be considered, if they have any reason to believe that the agent that is being prosecuted also has asset in the Dominican Republic. They can request the penal authorities to freeze those assets and the Dominican Republic is required to do so.

In the practice, what usually happens, is that those local assets are being used by different parties than the agent, and those parties are entitled to prove that they have nothing to do with the person or individual that is being prosecuted in the foreign country. Usually, that's something that has to be litigated before a judge to prove that you are the owner.

The other thing worth mentioning, is that we have passed very strict legislation on money laundering, which definitely has been converted into a tool for pursuing any asset concealment. The authorities are pressing a lot on this legislation for individuals.

Debtors are reminded not to divest their assets into treaty companies or with friends and family, because the criminal authorities are able to look into this, if they believe the purpose was to defraud the tax authorities. This would basically constitute a money-laundering prosecution.

Cayman Islands - CB The additional powers available in criminal cases in the Cayman Islands primarily relate to the speed and ease by which investigators can seize evidence, the orders that they may make, cooperation available from other jurisdictions and the ability to have the proceeds of crime confiscated by the Court.

If investigators have already begun work in a foreign jurisdiction, that investigation can make a request to the Office of the Cayman Islands Director of Public Prosecutions (DPP) under the Criminal Justice (International Cooperation) Law. The DPP has the power to investigate and prosecute crime, trace criminal assets, seek orders of restraint and confiscation of property (as well as civil recovery powers). In appropriate cases there may be a very rapid response on the part of the Cayman Islands Government.

If there is a connection with the USA, the Mutual Legal Assistance (United States of America) Law applies. It covers all areas of civil and criminal law except tax, including taking testimony or statements, providing documents, records and articles of evidence, serving documents, locating persons, transferring persons in custody for testimony, executing requests for searches and seizures, immobilising criminally obtained assets, assistance in proceedings related to forfeiture, restitution and collection of fines and any other steps deemed appropriate by both countries.

Under Section 34 of the Monetary Authority Law (2018 Revision), the Cayman Islands Monetary Authority (CIMA) may, at any time by notice in writing, require a regulated or connected entity or relevant person to provide specified evidence. CIMA may also exercise similar powers following a request by an overseas regulatory authority and direct such persons to produce information.

A criminal court in the Cayman Islands will decide at sentencing whether to make a confiscation order based on evidence about the defendant's 'criminal lifestyle'. If granted, enforcement agencies will seize the defendant's assets, including those held by third parties such as banks and funds. Various orders may be made by Cayman Islands Government agencies.

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