

THE ASSET TRACING
AND RECOVERY
REVIEW

SEVENTH EDITION

Editor
Robert Hunter

THE LAWREVIEWS

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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 six. 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

Robert Hunter Consultants

August 2019

AUSTRIA

*Valerie Hohenberg and Claudia Brewi*¹

I OVERVIEW

As new and innovative ways to channel illegally obtained assets constantly develop, asset tracing and recovery becomes an increasingly difficult task. The Austrian legal system² already provides for helpful and effective remedies to this regard. Nevertheless, new laws and regulations have been established in the past years to prevent fraudulent acts and connected money laundering in an even more efficient way.

At present, Austrian criminal law broadly penalises, inter alia, criminal fraud,³ breach of trust,⁴ fraudulent insolvency⁵ and untenable representation of fundamental information concerning certain corporations,⁶ often accompanied by money laundering.⁷ It must be noted that one is criminally liable for fraud if he attempts to enrich himself or a third party by deception of facts, thereby creating a mistaken impression in the mind of the deceived party which leads that party to undertake an act, permit an act to be taken or fail to take an act, resulting in financial losses to him or a third party.⁸ Under Austrian civil law, one can base legal claims either on criminal offences or on civil fraud.⁹

Moreover, in order to successfully retrieve assets which have been obtained through these fraudulent acts, the Austrian Criminal Procedure Code, Austrian Civil Procedure Code and the Austrian Enforcement Code provide for preliminary measures warranting, for example, an asset freeze and correctives in order to obtain sufficient evidence for criminal and civil claims. As the Austrian criminal law provides for faster and more efficient measures with respect to the securing of assets and collection of evidence, it provides for the factual and circumstantial basis for subsequent civil proceedings to claim for compensation.

1 Valerie Hohenberg is a partner and Claudia Brewi is an associate at Wolf Theiss.

2 The Austrian legal system is based on codified principles of civil law. Judicial precedents are not binding but are strongly taken into consideration by courts and the parties in dispute.

3 Sections 146 and 147 Austrian Criminal Code.

4 Section 153 Austrian Criminal Code.

5 Section 156 Austrian Criminal Code.

6 Section 163a Austrian Criminal Code.

7 Section 165 Austrian Criminal Code.

8 *Kirchbacher/Sadoghi in Höpfell/Ratz*, Vienna Commentary Austrian Criminal Code Section 146, Rn 15.

9 Section 870 Austrian Civil Code.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Civil remedies

Introduction to Austrian civil proceedings

In general, minor cases (valued up to €15,000) are heard before the District Courts in the first instance, with the Regional Courts acting as the appellate courts. Major cases (valued higher than €15,000) are heard before the Regional Courts in the first instance, and appeals are decided by the Courts of Appeal in second instance.¹⁰ Civil proceedings can consist of a maximum of three stages with a Court of Appeal or the Austrian Supreme Court acting as the third instance.¹¹ In addition, there is a special District Court for Commercial Matters and the Commercial Court of Vienna on the regional level.¹² Both dealing with all upcoming commercial matters (e.g., shareholder disputes, business acquisitions and disputes between businesses).

With respect to the duration of civil proceedings in Austria, it can be said that, as in most jurisdictions, the complexity of the case is the decisive factor. In Austria there is no general time limitation with respect to the closing of civil proceedings and obtaining of an enforceable decision. However, in the international context, Austria holds a good rank regarding the overall duration of civil disputes. As a rule, courts of first instance require one year to decide on a facile case and up to three years in complex cases. Appellate proceedings may take between six months and one year. The Supreme Court usually renders its judgment within one year.

When initiating civil proceedings, the claimant must pay a court fee depending on the amount in dispute, falling due at the time of filing the claim. In principle, the parties must bear their own legal costs during the ongoing proceedings, however, the losing party must reimburse the costs of the winning party in the end. It is important to note that the winning party is only entitled to reimbursement of attorneys' fees on the basis of the Austrian Act on Attorneys' Tariffs.

In Austria, contingency fees that entitle an attorney to a certain percentage of the amount obtained by the claimant and the *quota litis* (an agreement by which the creditor of a sum difficult to recover, promises part of it to the person who undertakes to recover it) are prohibited.

Damages

In general, if a person suffered financial damage due to fraudulent behaviour, a damages claim can be filed with the competent civil court against the damaging party or damaging parties. Under Austrian procedural law, it is possible to initiate civil proceedings concerning the same subject matter against different persons based on different legal grounds at the same or different venues or time. Consequently, the damaged party might only start proceedings against one person at the beginning.¹³ It is possible that individual claims may be decided differently in the judgment (given jointly) in respect of all persons involved.¹⁴

10 Sections 2-3 and 49-50 Austrian Law on Court Jurisdiction.

11 Section 2-4 Austrian Law on Court Jurisdiction.

12 Section 51 Austrian Law on Court Jurisdiction.

13 The respective limitation periods have to be considered in this context.

14 *Rechberger* in *Rechberger/Simotta*, Overview of the Austrian Civil Procedure Law, Rn 384.

To initiate civil proceedings, the basic prerequisites of a damage claim have to be established, which are (1) damage, (2) unlawful conduct, (3) causal link and (4) fault.¹⁵ The claim can be based on a contractual or non-contractual tortious misconduct, or both. The damaged party generally bears the burden of proof with respect to damages claims.

Moreover, the Austrian Civil Code provides for a rule which allows basing damages claims on criminal offences.¹⁶ Against this background, a damages claim may not only be filed against the direct perpetrator, but also against the assisting or directing perpetrator. Furthermore, if the damages result from a criminal act, the burden of proof with respect to the causal link and fault is put on the damaging party.¹⁷

The amount of awarded damages generally depends on the degree of guilt, thus, whether the damaging party acted with slight negligence, gross negligence or intentionally. In general, the damage must be compensated *in natura*: placing the claimant in the same position as if no damage occurred.¹⁸ Therefore, Austrian courts compare the (financial) situation of the damaged party with the hypothetical (financial) situation which excludes the damaging act. In case of gross negligence and intention, the claimant is entitled to receive additional compensation for lost profits.¹⁹ With respect to acts of fraud and money laundering, lost profits will always be reimbursed due to the fact that intentional behaviour is provided. It should be noted that a legal remedy of punitive damages does not exist in Austria.

In order to preserve one's right to claim damages which result from the damaging act on which the claim is based, a declaration case can be filed if the damages have not yet occurred, but are likely to occur in the future, or in case the amount of damages is still unclear, as not all facts and circumstances are yet revealed.²⁰

Annulment

In cases of civil fraud in which a contract has been concluded, the damaged party is also entitled to file for an annulment of the contract.²¹ The claim must outline (1) the unlawful and intentional misleading of the fraudulent party and that the fraudulent party was acting intentionally, at least with *dolus eventualis*, regarding the causation of a misrepresentation to the other party, (2) that the damaged party believed in the misrepresentation and (3) the causal link between the misrepresentation and the conclusion of the contract.²²

Restitution of benefits and physical objects

Austrian civil law provides for remedies of restitution of benefits and physical objects. In case the damaged party transferred an object to the fraudulent party, it can claim the restitution of the object as original owner from anyone who is currently in possession of it and lacks

15 Section 1295 et seq. Austrian Civil Code.

16 Section 1311 Austrian Civil Code in connection with Section 146 (Fraud) Austrian Criminal Code or Section 165 Austrian Criminal Code.

17 *Reischauer* in *Rummel*, Commentary on the Austrian Civil Code, Section 1311 Austrian Civil Code, Rn 8, 17; Austrian Supreme Court of 2 September 1999, 2 Ob 76/97h.

18 Section 1323 Austrian Civil Code.

19 Section 1324 Austrian Civil Code.

20 Section 228 Austrian Civil Procedure Code.

21 Section 870 Austrian Civil Code.

22 *Rummel* in *Rummel/Lukas*, Commentary on the Austrian Civil Code, Section 870 Austrian Civil Code, Rn 3 et seq.

a proper chain of ownership.²³ Another option would be to file an *actio publicana*, which requires the damaged party to prove a stronger/more legitimate possession than the current possessor.²⁴ However, if the possessor obtained the object based on a valid title and/or in good faith, the damaged party may not succeed with his claim but rather has to claim damages from the fraudulent person.

In addition, the damaged party can also base its claims on the provision of unjust enrichment.²⁵ This again would entitle the damaged party to receive back its loss *in natura*. Should that not be possible or feasible, the damaged party again has the right to receive a monetary substitute.

Criminal remedies

Introduction to Austrian criminal proceedings

Criminal proceedings, in contrast to civil proceedings, do not consist of two civilian opponents, but rather generally take place between the state represented by the public prosecutor and the accused. The public prosecutor²⁶ is responsible for leading the investigation proceedings and giving orders to the investigating police department. Investigations can be initiated when the criminal investigation department or the public prosecutor's office becomes aware that a crime has presumably been committed or based on a private/anonymous presentation of facts and circumstances. Notably, public prosecutors are bound to investigate all potential criminal offence that come to their knowledge *ex officio*. Therefore, it lies within the sole discretion of the public prosecutor whether investigations shall be continued or dismissed or if an indictment is being filed with the criminal courts in order to initiate criminal proceedings.

Whereas minor cases with a maximum punishment of one year of imprisonment or a monetary fine are decided by the districts courts, major cases are decided by the regional courts in first instance. The composition of the tribunal at the regional courts depends on the seriousness of the crime.²⁷ In criminal proceedings, there is only one stage of appeal in front of a Higher Regional Court or the Austrian Supreme Court.

The duration of criminal proceedings again depends on the complexity of the case, especially with respect to possible witnesses and expert opinions. The latest statistic available states that investigations together with criminal proceedings in front of the district courts as first instance may take 18 days on average.²⁸ For regional courts that figure increases to an average of 33 days. However, in practice, cross border white-collar crimes connected to money laundering will lead to longer investigation proceedings in order to collect all the necessary evidence (also through mutual judicial assistance) for the main proceedings.

The costs for criminal proceedings are advanced by the state. However, with respect to attorneys' fees, the accused must pay for his or her costs upfront. If the accused is being

23 Section 366 Austrian Civil Code.

24 Section 372 Austrian Civil Code.

25 In particular, Section 1431 and 877, 879 Austrian Civil Code.

26 With respect to major white-collar crimes and corruption, a special unit at the public prosecutor's office has been established already in 2011 – the Central Public Prosecutor's Office for the Prosecution of Business Crimes and Corruption (German acronym: WKStA).

27 Sections 31 and 32 Austrian Criminal Procedure Code.

28 See: <https://www.justiz.gv.at/web2013/home/justiz/daten-und-fakten/verfahrensdauer-1e7.de.html>, as per 12 July 2019.

acquitted, attorneys' fees will be partially reimbursed. If the criminal proceeding ends with a conviction, the convicted must bear, as a rule, the costs of the trial in form of a lump sum, the costs of an expert, as well as the attorneys' fee of the private party and his or her own costs.²⁹

Victims' rights

The rights of victims of a criminal offence in the investigation and subsequent criminal proceedings are of high importance in Austria. Therefore, the Austrian Criminal Procedure Code sets forth numerous provisions to protect and strengthen the position of a victim of crime. These victim's rights consist in general of (1) the right for inspection and copy of the criminal file, (2) being informed on the procedural progress, (3) taking part in the criminal proceedings and having the right to question the accused and witnesses, and (4) requesting continuance of proceedings closed by the public prosecutor.³⁰

It should be noted that any person directing or contributing to a crime is as criminally liable as the immediate perpetrator,³¹ and thus, the victim's rights are also granted against these persons.

Private party joinder / damages

Victims of a criminal defence can further join the proceedings as a private party claiming damages against the accused.³² The private party joinder must be filed at court before closing of the criminal proceeding. By this time, the exact amount claimed must also be stated. As the private party is not responsible for paying fees associated with the proceedings (experts, court fee, evidence taking), the cost exposure for the damaged party decreases essentially. Notably, a private party joinder leads to the interruption of the limitation period with respect to civil proceedings.

A private party is entitled to request (1) the taking of evidence,³³ (2) perpetuation of the criminal charges, in case the public prosecutor steps down,³⁴ (3) following the criminal proceedings and presenting an opening and closing speech and (4) appeal against the decision of the court on the private party joinder.³⁵

In case of a conviction, the court is obliged to decide on the civil claims of the private party as well. The damages can be awarded or declined; if the court is of the opinion that the claim is not sufficiently proven, based on the results of the criminal proceedings, it can also relegate the claim to the competence of a civil court. In case of an acquittal the court must always relegate the claim to the competence of a civil court. In this context, it should be noted that civil courts are not bound to the verdicts of criminal courts by law; however, the Austrian Supreme Court set forth that civil courts have to acknowledge the findings of the criminal courts regarding the verdict itself and the findings of the necessary facts and circumstances resulting in the verdict of the specific crime.³⁶

29 Sections 389 and 381 Austrian Criminal Procedure Code.

30 Section 66 et seq. Austrian Criminal Procedure Code.

31 Section 12 Austrian Criminal Code.

32 Section 67 Austrian Criminal Procedure Code.

33 Section 55 Austrian Criminal Procedure Code.

34 Section 72 Austrian Criminal Procedure Code.

35 Section 366 Austrian Criminal Procedure Code.

36 Legal Opinion of the Austrian Supreme Court No. RS0074219; *Klicka in Fasching/Konecny* 3 III/2 Commentary on Austrian Civil Procedure Law, Section 411 Austrian Civil Procedure Code, Rn 29.

Criminal liability of companies

On 1 January 2006, the Austrian Corporate Liability Act went into force (VbVG). It applies to public and private law entities (limited liability companies, stock companies) and business partnerships and penalises any acts against the Austrian Criminal Code.³⁷ Corporate groups do not fall under the scope of the VbVG, but the parent companies can be held indirectly liable for acts of their subsidiaries due to their possible influence through principal decisions, their monitoring duty and corporate policies.

The liability requirements are, in general, that a decision maker or ordinary employee committed a criminal offence,³⁸ and that it was either committed to the benefit of the company or by a breach of corporate duties.³⁹ The law provides for financial penalties (with a maximum fine of €1.8 million in total), but also alternative measures by giving orders, for example, an order to compensate damages, being put on probation or charitable activities.

Against this background it has to be noted that both individuals and corporations can be criminally liable for the same misconduct. A corporation can only be liable for criminal acts of an individual.⁴⁰ However, the corporate liability for a criminal act and the individual liability of a person for the same act do not exclude each other.⁴¹

ii Defences to fraud claims

Statute of limitation

In general, the statute of limitation is 30 years in civil matters.⁴² The following limitation periods should be considered in particular:

- a* damages: only three years from knowledge of the damage and the damaging party;⁴³
- b* damages or annulment connected to civil fraud: 30 years from concluding the contract;⁴⁴ and
- c* unjust enrichment: 30 years from performance.⁴⁵

Moreover, the liability for criminal offences is subject to a statute of limitation. The time limitation commences with completion of the offence or with cessation of the criminalised conduct. The statute of limitation depends on the possible punishment for a certain crime and can be between one year and 20 years (there is no statute of limitation for offences punishable by imprisonment between ten and twenty years or by imprisonment for life).⁴⁶

37 Section 1 Austrian Corporate Liability Act.

38 Section 2 Austrian Corporate Liability Act.

39 Section 3 Austrian Corporate Liability Act.

40 Section 1 Austrian Corporate Liability Act.

41 Section 3 paragraph 4 Austrian Corporate Liability Act.

42 Section 1478 Austrian Civil Code.

43 Section 1489 Austrian Civil Code.

44 *Rummel* in *Rummel/Lukas*, Commentary on the Austrian Civil Code, Section 870 Austrian Civil Code, Rn 12.

45 *Lurger* in *Kletečka/Schauer*, Commentary on the Austrian Civil Code -ON1.05, Sections 1431-1437, Rn 18.

46 Section 57 Austrian Criminal Code.

Lack of competence or proof of unjustified allegations

Lack of competence in the addressed jurisdiction is another common defence argument, as the provisions in the Austrian Civil Procedure Code as well as the Austrian Criminal Procedure Code provide for various, however non-uniform, points of connection regarding the jurisdiction and competence of a court or public prosecution, for example, citizenship, location of assets and place of the criminal act.

Moreover, every defendant and accused has the right to proof that certain prerequisites of a claim or criminal offence are not met. As already set out, in civil law the general rule applies that every party has the burden of proof with respect to their raised allegations and arguments. In criminal law the general rule of *in dubio pro reo* applies.

III SEIZURE AND EVIDENCE

It should be noted that asset tracing is neither a claim nor a remedy. However, it is a tool to identify assets, collect evidence and subsequently be able to assess possible legal measures and their chances of success. The overall goal is the recovery of deprived assets and consequently the denial of these assets to the persons who obtained them through fraudulent acts.

i Securing assets and proceeds

Preliminary injunctions (civil proceedings)

To secure monetary claims, one can request the issuance of a preliminary injunction at the civil courts. This can either take place in the course of pending civil proceedings in the respective matter or before filing a claim.⁴⁷ The subjective endangerment must be successfully argued. If the damaged party already holds an enforceable decision, a request to secure these monetary claims can be filed without proving the subjective endangerment.

Following the Austrian courts, a subjective endangerment is established in cases where it is obvious that without a preliminary injunction the damaging party will damage, destroy, hide or move away assets in order to hinder the claimant from pursuing its claim.⁴⁸ In general, the latest behaviour of the defendant, as well as the specific circumstances of the case, are decisive.

The court can order the following preliminary measures with respect to the object at stake:⁴⁹ (1) movable assets and money: judicial custody and administration; judicial prohibition of sale or pledging; judicial order to refrain third parties from moving assets, (2) immovable assets: judicial custody and administration; judicial prohibition of sale or pledging; judicial order prohibiting any registrations in the land registry, and (3) receivables: issuance of a garnishment order.

Preservation order (criminal proceedings)

To secure potential civil claims of a private party, the public prosecutor can order the securing of assets, including monies on bank accounts. The public prosecutor is entitled to order an asset freeze in order to (1) secure evidence, (2) secure civil claims, and (3) secure a proprietary

47 Section 378 Austrian Enforcement Act.

48 Section 379, paragraph 2 Austrian Enforcement Act.

49 Section 379, paragraph 3 Austrian Enforcement Act.

order that might be issued by the court at the end of the proceedings (e.g., confiscation or forfeiture).⁵⁰ With regard to money on a bank account, the public prosecutor orders the prohibition to issue, pledge or dispose the assets.

Following the securing of assets, the public prosecutor will file an application to the court to seize these assets, as the order of the public prosecutor shall usually only be of provisional nature. The public prosecutor is not bound to any explicit deadline until such an application must be made.⁵¹ Both the public prosecutor and the criminal court will lift the order to secure or seize assets when there is no more reasonable suspicion regarding the alleged criminal offences or if the prerequisites for the order ceased to exist.

In case of a conviction, and granting of the civil claims or parts thereof, the claim will be settled from the seized assets. In such a scenario, a forfeiture of the assets is not permissible in the amount granted to the private party.⁵² However, if the court comes to a conviction but is of the opinion that the private joinder claims are not sufficiently proven and the private party is relegated to the civil courts, the private party can apply for an interim injunction in case of a lift of the asset freeze by the criminal court. As soon as the private party holds a decision granting its claims, the criminal court must cancel the forfeiture retroactively and the private party is entitled to request that the civil claim shall be settled from the assets which were first seized and then forfeited. If the accused has been acquitted, the court will most likely decide that the prerequisites for a seizure ceased to exist and will order its cancellation. In that case the private party can again apply for a subsequent interim injunction.

ii Obtaining evidence

Investigators

To trace, locate and identify assets to be seized, the involvement of professional investigators is often helpful. This does not only refer to private investigators gathering evidence and private experts to understand certain money flows, but also to attorneys. In Austria, lawyers have access to a range of registers (WIEREG, FB, GB, ZMR) and open source data. Lawyers who specialise in asset tracing and recovery can easily connect information and decide on the necessary measures to collect crucial evidence to build a case.

Production of evidence in civil proceedings

In Austrian civil proceedings of first instance evidence must be provided by the parties.⁵³ To this regard, the parties may present documents or request the questioning of witnesses strengthening their arguments and argue against evidence requests by the opposing party. The court is then entitled to decide if certain evidence is admissible or inadmissible (e.g., not submitted in due time, not required). It should be noted that the use of unlawfully obtained evidence is not generally prohibited in civil proceedings.

The production of evidence is in the sole discretion of the parties. If only one party is in the sole possession of decisive evidence, the court can order its disclosure. However, these

50 Section 110 Austrian Criminal Procedure Code.

51 Section 115 Austrian Criminal Procedure Code.

52 Legal Opinion of the Austrian Supreme Court No. RS0129916.

53 In appellate proceedings, evidence is generally not re-examined and new evidence or new allegations are not admitted during the appellate proceedings.

orders are not enforceable; the refusal of disclosure may only be considered by court in its free assessment of evidence.⁵⁴ As a result, criminal proceedings are often used as a tool to obtain the necessary evidence for civil proceeding.

Obtaining evidence in criminal proceedings

A private party joinder or presentation of facts and circumstances is a good tool to present the victim's perspective of the case to the public prosecutor (judge) and to provide additional evidence to the state or encourage the public prosecutor to produce further evidence. Especially in complex white-collar crime matters, private parties are often in the position to assess the case in greater detail and provide the public prosecutor with the background information needed to order additional evidence measures. Contrary to civil proceedings, means such as house searches or confiscation of data can be ordered to obtain evidence.⁵⁵ In cases of money laundering, the inclusion of the competent authorities should also be suggested. Against this background, a strong collaboration with the competent authorities in criminal proceedings is vital with respect to evidence production.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Section 165, paragraph 1 of the Austrian Criminal Code determines that any person who hides or conceals the origin of any assets obtained through certain criminal acts – especially by making false statements in the context of legal transactions about the origin or true nature of these assets, property or other rights attached to them, the permission to control them, their transfers, or about their whereabouts – is criminally liable for money laundering. According to paragraph 2, the same applies to any person who knowingly takes possession of, stores, invests, administers, transforms, utilises, or transfers these assets to a third person.

In order to prevent acts of money laundering in the first place, credit institutions, as well as attorneys, are obliged to follow the KYC-principal. KYC stands for 'know your customer'. It requires banks, in particular, to gather information on the identity of their client/customer and the processed transaction before entering into a business relationship (e.g., information on the ultimate beneficial owner, origin of the funds). Throughout the course of the business relationship, the bank must continually check for suspicious behaviour. In cases of suspicion of money laundering, the credit institution must render a notification of suspicion to the Austrian Financial Intelligence Unit. In 2017, 2,976 of a total 3,058 of these notifications were filed by credit institutions.⁵⁶ Moreover, one part of the collaboration with the Austrian Financial Intelligence Unit also obliges credit institutions to provide information upon request irrespective of a notification of suspicion.⁵⁷

ii Insolvency

The Austrian Criminal Code further sets forth that any person who intentionally conceals, hides, sells or damages a part of the person's assets, pretends the existence or honours a

54 Section 303 et seq. Austrian Civil Procedure Code.

55 Part 8 of the Austrian Criminal Procedure Code.

56 Status report on money laundering 2017, rendered by the Federal Criminal Police Office, p 14.

57 Section 41 Banking Act.

non-existing liability, or who otherwise reduces his or her assets in a bogus manner thus thwarting or discounting the satisfaction of one or more of the person's creditor⁵⁸ as well as any person whose gross negligence brings about that person's own insolvency⁵⁹ can be held criminally liable. Furthermore, preferential treatment of creditors after entering into insolvency is prohibited.⁶⁰ All of these provisions also apply to executives of legal persons or an unincorporated entity if the person acts without the consent of the debtor.⁶¹

In Austria, managing directors are obliged to file for insolvency if the requirements under the Austrian Insolvency Act are met. The law provides for 60 days from the occurrence of insolvency. If the managing director does not act within this period, creditors can claim the damages they have suffered as a result of the culpable delay of the insolvency application from him directly.⁶² Furthermore, any creditor of the insolvent person or entity may lodge its claims in the insolvency proceedings. However, legal disputes which are intended to enforce or secure claims against the debtor cannot be initiated nor continued after the opening of insolvency proceedings.⁶³ Only secured creditors and creditors with rights to assets which are in the possession of the debtor enjoy special provisions.

iii Arbitration

In the event of certain criminal acts by one of the parties, the Austrian civil procedure law allows to contest an arbitral award after it was rendered. An arbitral award can be set aside if the requirements for an action to reopen proceedings are met.⁶⁴ Civil proceedings might be reopened upon application by a party if:

- a a document on which the judgment was based was forged or falsified;
- b a witness, an expert or the opposing party has given false testimony during his or her examination, and the judgment is based on this testimony; or
- c the judgment was given as a result of an act that is punishable under one of the following criminal offences: wilful deception, embezzlement, fraud, forgery of documents, forgery of especially protected documents, forgery of public seals, indirect false certification, suppression of documents, displacement of boundary marks.⁶⁵

iv Fraud's effect on evidentiary rules and legal privilege

As outlined in Section II.i, in cases of criminal fraud the burden of proof with respect to fault and casual link is reversed. However, the effect on evidentiary rules in civil proceedings is limited to that. The evidentiary rules in criminal law are not affected; the principle of *in dubio pro reo*⁶⁶ applies consequently.

58 Section 156 Austrian Criminal Code.

59 Section 159 Austrian Criminal Code.

60 Section 158 Austrian Criminal Code.

61 Section 161 Austrian Criminal Code.

62 Section 69 Insolvency Act.

63 Section 6 Insolvency Act.

64 Section 611, paragraph 2(6) Austrian Civil Procedure Act.

65 Section 530 Austrian Civil Procedure Act

66 Article 6, paragraph 2 European Convention on Human Rights; Section 259(3) Austrian Criminal Procedure Code.

With respect to legal privilege, an Austrian lawyer is generally bound by professional secrecy obligations in all matters that have been confided to him or her and all facts that have otherwise become known in his or her capacity as a lawyer. This professional secrecy is safeguarded by various statutory provisions.⁶⁷

Under criminal procedure law an attorney-at-law is entitled to refuse to give evidence. This right may not be circumvented by the confiscation of any documents or data medium or by the examination of the attorney's employees or subcontractors. In criminal proceedings legal privilege extends to documents handed over by the client to the attorney. A verdict based on such evidence is null and void.⁶⁸ Also civil procedure law provides for the right to refuse to give evidence in civil proceedings. However, any evidence gained by violating this right can be used in these proceedings without any further consequences.⁶⁹ Nevertheless, an attorney's secrecy may be pierced by certain reporting obligations to the Federal Criminal Police Office regarding potential cases of money laundering or terrorist financing.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

With regard to civil remedies, a distinction must be made between the jurisdiction of Austrian courts and Austrian law as applicable substantive law in proceedings. The international jurisdiction of Austrian courts within the EU is regulated by the European Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).⁷⁰ As a rule, the courts of a Member State have jurisdiction for all claims against individuals or companies which are domiciled in that Member State.⁷¹ In addition, as for damages claims, the courts of the place where the harmful event occurred or may occur, have jurisdiction.⁷²

Furthermore – according to Austrian national law – a pecuniary claim may be brought before the court of the place where assets of the defendant or the claimed object is located, if Austrian courts do not have jurisdiction in any other way.⁷³ If proceedings with an international dimension are pending before Austrian courts, the Austrian International Private Law – including EU Regulations, most notably the Regulations on the law applicable to (non-)contractual obligations⁷⁴ – is applied to determine the applicable substantive law. Initially, the parties can choose the applicable substantive law.⁷⁵ If there is no choice of law, e.g. the law applicable for an obligation arising out of damages claims, generally it is the law of the country in which the damage occurred.⁷⁶

67 For example, Section 321, paragraph 1(4) Austrian Civil Procedure Code; Section 157, paragraph 1(2) Austrian Criminal Procedure Code; Section 171, paragraph 2 Austrian Federal Fiscal Code.

68 Section 157 Austrian Criminal Procedure Code.

69 Section 321, paragraph 1(4) Austrian Civil Procedure Code.

70 Regulation (EU) 1215/2012 of 12 December 2012.

71 Article 4 Regulation (EU) 1215/2012 of 12 December 2012; Section 65 Austrian Law on Court Jurisdiction.

72 Article 7(2) EU Regulation 1215/2012.

73 Article 99 Austrian Law on Court Jurisdiction.

74 Regulation (EU) 593/2008 (Rome I) and Regulation (EU) 864/2007 (Rome II).

75 Article 3 Rome I; Article 14 Rome II.

76 Article 4 Rome II.

Austrian criminal law applies to all offences committed in Austria.⁷⁷ An offence is committed at any place where the perpetrator acted or should have acted or where success occurred or should have occurred, according to the perpetrator's imagination.⁷⁸ In the case of fraud, domestic jurisdiction is even given if the perpetrator acted abroad, but only if the effective loss of assets, which affects a third party, occurred in Austria.⁷⁹

ii Collection of evidence in support of proceedings abroad

Austrian courts and authorities grant judicial assistance in support of civil as well as criminal proceedings abroad. Regarding civil proceedings, the EU Evidence Regulation⁸⁰ and the Hague Evidence Convention⁸¹ determine the judicial assistance by Austrian civil courts. Within the EU,⁸² requests regarding the taking of evidence in another Member State or by a court of another Member State shall be transmitted by the requesting court directly to the court addressed.⁸³ The requested court shall execute the request without delay and, at the latest, within 90 days of receipt of the request.⁸⁴ Outside of the scope of the EU Evidence Regulation, judicial assistance is also generally granted upon request and in accordance with the Austrian Law on the taking of evidence.⁸⁵ Nevertheless, a request for judicial assistance has to be declined if the remedy would be prohibited by Austrian law.⁸⁶

The judicial assistance by Austrian authorities and courts in criminal proceedings is governed by various bilateral and multilateral treaties as well as the Austrian Act on International Cooperation in Criminal Matters. Austria is a signatory, *inter alia*, of the European Convention on Mutual Assistance in Criminal Matters, which provides for intensive cooperation in the field of investigation of crimes, prosecution of criminal suspects and procuring evidence and other multilateral treaties which aim to enhance international cooperation in criminal matters, including asset tracing and recovery, such as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

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

As fraudulently obtained assets are often funnelled or even laundered into other jurisdictions, often several, it is also vital to always bear in mind which jurisdictions allow for seizure of assets or proceeds and under which circumstances. In some jurisdictions it is necessary to link the assets directly to a crime. However, in other jurisdictions it is enough to link assets only to the person who committed a crime.

In 2017, the European Regulation to facilitate cross-border debt recovery in civil and commercial matters went into force.⁸⁷ A European Account Preservation Order (EAPO) prevents the transfer and withdrawal of funds that are held by the debtor or on his or her

77 Section 62 Austrian Criminal Code.

78 Section 67, paragraph 2 Austrian Criminal Code.

79 Austrian Supreme Court of 12 March 1981, 12 Os 11/81.

80 Regulation (EU) 1206/2001 of 28 May 2001.

81 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970.

82 With the exception of Denmark according to Article 1, paragraph 3 Regulation (EU) 1206/2001 of 28 May 2001.

83 Article 2 Regulation (EU) 1206/2001 of 28 May 2001.

84 Article 10 Regulation (EU) 1206/2001 of 28 May 2001.

85 Sections 38 and 39 Austrian Law on Court Jurisdiction.

86 Section 38, paragraph 2 Austrian Law on Court Jurisdiction.

87 Regulation (EU) No. 655/2014 of 15 May 2014.

behalf in a bank account maintained in a Member State of the European Union (except the UK and Denmark). It is designed for creditors, but also for companies or consumer, domiciled in a Member State, and who hold money claims against a debtor in another Member State.

The application for an EAPO can be filed at any procedural stage. The debtor is not included in the proceedings to guarantee the surprise effect (*ex parte* procedure). The application shall be filed with the court competent for the proceedings on the substance of the matter or at the court which a decision on the subject matter has already been obtained from.⁸⁸ In case the creditor has not yet obtained a judgment in the main proceedings, the court shall issue its decision on an EAPO within ten working days, otherwise five.⁸⁹ The obtained EAPO can serve for further account preservations in other Member States. Thus, the creditor must only prove once that the requirements for an order are met.⁹⁰

Another feature of the EAPO is that it assists creditors in tracing bank accounts. In case a creditor has reason to believe that the debtor holds accounts with a bank in a specific Member State, but without having any further details, he may file a request to obtain account information.⁹¹ This application requires an existing enforceable title or a risk that the enforcement would be jeopardised otherwise.

iv Enforcement of judgments granted abroad in relation to fraud claims

Enforcement proceedings in Austria are governed by the Austrian Enforcement Act. By virtue of Austria's membership in the EU, it needs to be distinguished between judgments filed by EU Member States and non-EU judgments when assessing the enforceability.

The procedure for the enforcement of EU judgments in Austria is governed by Brussels I Regulation. Within this 'Brussels Regime', a judgment rendered in a Member State of the EU is recognised in any other Member State without any special procedure.⁹² Notwithstanding, there are a number of limited grounds on which recognition can be denied (e.g., judgments contrary to the *ordre public* of Austria).⁹³ Preliminary injunctions, which are of particular importance regarding asset tracing, are also classified as judgments in the sense of these provisions.

The enforcement of foreign or non-EU judgments requires a declaration of enforceability by the competent Austrian court prior to the actual enforcement.⁹⁴ The declaration of enforceability is issued if that judgment is enforceable in the state of origin and the reciprocity with the state of origin is established by bilateral treaties or other instruments.⁹⁵ However, even if these requirements are met, the declaration of enforceability may still be refused for several reasons (e.g., if the judgment or its enforcement violates basic principles of Austrian law (*ordre public*)).⁹⁶ Once the declaration of enforceability has become effective, the foreign judgment may be considered equal to domestic enforceable titles.

88 Article 6 Regulation (EU) No. 655/2014 of 15 May 2014 .

89 Article 18 Regulation (EU) No. 655/2014 of 15 May 2014 .

90 Article 22 Regulation (EU) No. 655/2014 of 15 May 2014 .

91 Section 424 Austrian Enforcement Act; Article 14.

92 Article 36 Regulation (EU) 1215/2012 of 12 December 2012.

93 Article 45 Regulation (EU) 1215/2012 of 12 December 2012.

94 Section 403 Austrian Enforcement Act.

95 Section 406 Austrian Enforcement Act.

96 Section 408 Austrian Enforcement Act.

v Fraud as a defence to enforcement of judgments granted abroad

As discussed in Section V.iv., Austrian courts may refuse recognition or enforcement of a foreign judgment upon request of the opposing party if it is not in accordance with the Austrian *ordre public*.⁹⁷ Consequently, Brussels I Regulation provides that the enforcement of a judgment granted abroad due to fraudulent behaviour (e.g., falsification of documents) may be refused.

On national level, the person against whom enforcement is sought can also apply for the refusal of the declaration of enforceability or the enforcement contrary to the Austrian *ordre public*. In case of judgments rendered in other EU Member States, the opposing party may raise arguments against the enforcement with an application for discontinuation of the enforcement. Regarding judgments of third States, it should be noted that the opposing party is not included in the proceedings on the declaration of enforceability, but can file an appeal against such subsequently.⁹⁸

VI CURRENT DEVELOPMENTS

On 15 January 2018, the Law on Registration and Disclosure of Ultimate Beneficial Owners (WiEReG) came into force.⁹⁹ Its main purpose is the registration of beneficial owners in a registry, established especially for this purpose, to prevent assets obtained through criminal activities from being transferred unobtrusively into economic life. The WiEReG sets forth that legal entities domiciled in Austria and trusts administered in Austria must identify their beneficial owners, carry out appropriate and regular checks and report these to the registry. The establishment of the registry is part of the implementation of the Fourth European Directive on the prevention of the use of the financial system for purposes of money laundering or terrorist financing,¹⁰⁰ which obliges all European Member States to keep such a registry. Furthermore, the Fifth European Directive on the prevention of the use of the financial system for purposes of money laundering or terrorist financing¹⁰¹ is currently being implemented into Austrian law, covering the supervision of virtual currencies for the first time as well as enhancing the international collaboration between the competent authorities. As the established cryptocurrency market is likely to be misused to convert fraudulently obtained assets into a different form, the consideration of virtual currencies in money laundering matters in particular is of great significance.

97 Article 45, paragraph 1a (EU) 1215/2012 of 12 December 2012.

98 Sections 410 and 411 Austrian Enforcement Act.

99 See: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009980> (checked on 15 July 2019).

100 Directive (EU) 2015/849 of 20 May 2015.

101 Directive (EU) 2018/843 of 30 May 2018.

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