THE ASSET TRACING AND RECOVERY REVIEW

NINTH 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. 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.

Modern times pose fresh challenges for everyone involved in fraud, from those who commit it to those who suffer from it. As Warren Buffet famously said, 'only when the tide goes out do you discover who has been swimming naked'. The coronavirus pandemic has offered the global economy another opportunity to prove him right. Not only are new frauds being discovered, but the growing recession will challenge the budgets of victims, regulators and criminal enforcement bodies to bring those responsible to justice and to retrieve the proceeds. Remote interpersonal dealings are increasing the distance between business counterparties in a way that the internet did, and the growth of cryptocurrency transactions continues to do.

It is not possible to predict the trajectory of these developments. While it is now a cliché to speak of the 'new normal', nobody can be actually sure what that normal will be. Some even dispute that it is useful to speak of a normal at all. Nassim Taleb has argued that the financial world is more frequently and radically affected by extreme and unpredictable occurrences (which he calls 'Sigma' or 'Black Swan' events) than we acknowledge. According to Taleb, we live in 'extremistan' and not 'mediocristan'. He has suggested that it is part of our makeup to blind ourselves to the influence of what we cannot predict.

Taleb may be right. For my part, I rather think that he is. But amid all the unpredictability, there are nevertheless some certainties. Society depends upon trust, and there will always be some people who abuse it. So some people will always commit fraud. Globalisation has ensured that major fraud will usually have an international element. Fraud lawyers will therefore have to be internationally minded.

Perhaps the growing international and technical complexity of fraud will continue to outstrip the ability of any one person to understand or remedy it. One of the heartening things about the legal profession over the past 25 years or so, however, is the growth of an international community of lawyers specialising in fraud and asset tracing work who share knowledge and experience with each other about the events in their fields. This book continues to be a useful contribution to that community.

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 review 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 2021

Chapter 16

LUXEMBOURG

François Kremer and Ariel Devillers[1]

I OVERVIEW

Luxembourg is a civil law jurisdiction and has experience in fraud cases. Its entities are often involved in international groups of companies, making Luxembourg vulnerable to company fraud and other fraudulent schemes that make use of complex legal setups. Its mature banking and funds industry also attracts white-collar crime. Some major international frauds, such as the *Madoff* scandal, have hit the Grand Duchy, and many fraud cases have been tried before the courts in Luxembourg.

II LEGAL RIGHTS AND REMEDIES

Claimants will have to rely on a wide range of criminal and civil remedies to conduct successful proceedings for recovery or compensation. Although the Criminal Code (CrimC) and other statutes regulate certain peculiar cases of fraud, there is, strictly speaking, no specific compensation for fraud victims other than restitution of victims' defrauded property and the common civil liability rules to recover damages.

i Civil and criminal remedies

Civil remedies

A fraud victim will usually pursue compensation through a liability suit for the recovery of damages that have been caused by an act of wrongdoing. A claimant will be required to establish an act of wrongdoing (or fault), damages and causality.

Fraud victims can use contractual liability and tort[2] to allege, inter alia, breaches of contract, contractual fraud[3] and serious misconduct. In some cases, an abuse of right[4] may also support a fraud claim.

If a fraud was carried out by the directors of a company in which the victim is a shareholder, the claimant may choose to base its liability suit on the provisions for directors'

1 François Kremer is a partner and Ariel Devillers is a counsel at Arendt & Medernach.

2 Article 1134 or 1382 and 1183 of the Civil Code (CC). A fraud victim cannot bring both a claim for tort and a claim for breach of contract simultaneously. It can, however, make a primary and a separate secondary claim (conditional upon the first claim being dismissed).

3 Article 1116 CC.

4 Article 6-1 CC.

liability of the amended Law of 10 August 1915 on commercial companies (LCC) if it can show corporate mismanagement, or a violation of the LCC, accounting rules or the company's articles of incorporation. In most cases, the company will have to file suit.

A claimant is only entitled to lawful, certain, direct and personal damages. Punitive and symbolic damages are generally excluded. If a suit is based on a breach of contract, the alleged damages should also have been foreseeable at the time of conclusion of the contract.

Other civil law remedies can be used to recover fraud amounts. A victim can, for example, initiate a *de in rem verso* action (unjust enrichment) to claim restitution and compensation. It will have to demonstrate, inter alia, that it cannot rely upon any other remedy to recover the amounts sought.[5]

Another option is to claim recovery of undue payments[6] if the fraud involved any form of payment.[7] Interest and other amounts yielded in this respect may also be claimed back if the payee acted in bad faith.

One last remedy is to have a contract voided based on contractual fraud or on the legal *maxim fraus omnia corrumpit*, in which case restitution may be claimed.

Criminal liability

Under Luxembourg law, both natural persons and legal entities can be held criminally accountable, and there are a number of fraud schemes that are considered offences according to the CrimC and other statutes.

Abuse of trust and swindle are commonly employed. Abuse of trust[8] can serve to establish a fraud claim if the fraud was performed by dissipating or misappropriating certain things that were given through the abusing of trust. If a fraudster cheated someone out of his or her property while employing fraudulent means, he or she may be accused of swindle.[9]

As concerns corporate finance, Article 1500-3 LCC considers that anyone who caused payments, subscriptions, share acquisitions, bonds subscriptions or acquisitions of any other kind of corporate title through fraudulent means is guilty of swindle.

The offence of misuse of corporate assets, which is the act of directors misusing the corporate estate in their personal interest, is a specific form of abuse of trust.[10] According to Luxembourg case law, it should be established, inter alia, that the directors knowingly used the assets or the credit of the company for personal gain contrary to the corporate interest.[11]

Directors can also be criminally liable for committing an abuse of power or a misuse of their votes where they use their influence to the detriment of the corporate interest for personal profit.[12]

Fraud victims might also wish to direct their claims against the persons who were directly or indirectly involved in the fraud by filing a complaint for aiding and abetting.[13]

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5 Olivier Poelmans, *Droit des obligations au Luxembourg*, p. 324 et seq., Nos. 256–261.

6 Article 1376 CC.

7 Undue means that no prior claim was mature, or that, if a prior claim did exist, the payer paid anyone but his or her creditor, or that the payee received a payment from anyone but his or her own debtor.

8 Article 491 CrimC.

9 Article 496 et seq. CrimC.

10 Article 171-1 LCC.

11 David Giabbani, 'L'abus de bien sociaux: état de la jurisprudence', *JurisNews Droit pénal & procédure pénale*, Vol. 1 – No. 3/2012.

12 Article 171-1 LCC.

13 Article 66 CrimC.

Concealing things obtained through a criminal offence is also considered a fraud,[14] and victims can rely on this offence to claim compensation from the persons who aided the fraudster by concealing the product of the fraud.

Compensation for victims will occur through the standard rules on civil liability (i.e., recovery of damages). The wrongdoing will be shown by demonstrating the criminal offence. Compensation can either be sought before the criminal courts by becoming a civil party to criminal proceedings, or by requesting damages from the civil courts through civil proceedings. In the latter case, a claimant's civil action can only progress once the criminal proceedings are concluded. A victim can always fall back on the civil courts for compensation if it began by filing a claim for damages with the criminal courts, but once the victim has initiated proceedings for the recovery of damages before the civil courts it can no longer become a civil party to the criminal proceedings.[15]

ii Defences to fraud claims

A number of defences can serve to resist fraud claims in court. It will generally be argued that the conditions required for a successful fraud claim have not been established.

A fraudster will usually try to have a suit dismissed on allegations that certain formal requirements for bringing a lawsuit have not been met or are defective. Often, defendants will try to argue that the claimant has no standing or authority to sue. In this particular context:

a case law considers that shareholders are not creditors of a company and that they cannot therefore resort to creditor remedies (such as the derivative claim or the *actio pauliana*);

b defrauded shareholders are only allowed to act individually against directors if they can show that they suffered strictly personal damages that have not been sustained by a company as a whole (i.e., by all the shareholders);

c directors that have been discharged for the financial year during which the alleged misconduct occurred are usually immune to liability claims from the company;

d a mutual fund (an investment fund organised as a contractual vehicle) has no legal personality, meaning that proceedings can only be brought by (and against) its management company acting in such capacity; and

e according to current case law, a claimant cannot bring a contractual claim against a defendant with whom it has no direct contractual relationship unless it can show that it is indirectly linked to the defendant via a group of contracts through which property is transferred.[16]

A defendant to a fraud claim can make the suit disappear entirely by arguing that the limitation period has expired. Liability claims are normally covered by the common 30-year statute of limitation,[17] but the commercial 10-year limitation period may apply[18] where the relevant acts are commercial in nature or hybrid commercial–civil acts.

14 Article 505 CrimC.

15 Georges Ravarani, *La responsabilité civile des personnes privées et publiques*, 3rd edition 2014, No. 1390, p. 1298.

16 Pascal Ancel, *Contrats et obligations conventionnelles en droit luxembourgeois*, e-pub, No. 1049 et seq.

17 Article 2262 CC.

18 Article 189 ComC.

A five-year statute of limitation applies to liability suits against directors.[19] The Court of Appeal has, however, held that the common limitation period of 30 years applies to a compensation claim where fraud or a criminal offence was committed by the directors.[20]

Under Luxembourg criminal law, offences are categorised according to their sentencing tariffs, and frauds are either crimes or felonies. Where the fraud is a crime, it can no longer be prosecuted if 10 years have passed since the fraud was committed.[21] If the fraud is a felony, it should be prosecuted within five years.[22]

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Third-party attachments

A fraud victim can resort to a third-party attachment to attach or secure the assets owed by a third party to the fraudster.

Third-party attachment proceedings are a two-stage process.

During the first phase (which is often referred to as the conservatory phase), a creditor attaches the assets of his or her debtor that are held or owed by a third party (often a bank).

During the second (or enforcement) stage, the creditor gets the attachment validated in court so that it can obtain payment on the attached assets from the third-party debtor in lieu of his or her own debtor.

Attachment proceedings are ancillary in nature, and are merely a conservatory action during the first phase that aims to put the attachment in place. The first phase is completed by having three separate notices served by a bailiff on the debtor and the third-party debtor.

The claimant might, however, have to go through the process of applying for an attachment leave from the president of the district court (on an *ex parte* basis) before initiating the attachment if no judgment or title has been obtained against the fraudster. It is worth noting in this respect that case law considers that an alleged claim for damages is not sufficient to obtain such an authorisation.[23]

Once the deed of attachment is served on the third-party debtor, the attached assets are frozen, meaning that the third party is prohibited (under the penalty of personal civil liability) to remit any funds or assets to the fraudster.

The objective of the enforcement phase is to get the attachment validated in court so that the claimant is able to be paid on the attached assets. To succeed, the claimant must show that it has an enforceable money judgment against the defendant. If the claimant did not have an enforceable money judgment during the conservatory phase, it should endeavour to obtain one. This means, in practice and depending on the case, that:

a the claimant should ask for a money judgment against the defendant during the validation proceedings if the district court before which the validation proceedings are being conducted has jurisdiction over the claim;

b the claimant should sue its defendant before any other competent jurisdiction in Luxembourg or abroad (if Luxembourg has no international jurisdiction); or

19 Article 157 LCC.

20 Court of Appeal, 5 November 2013, No. 539/13 V, JTL 2014, No. 33, p. 78.

21 Article 637 of the Code of Criminal Procedure (CCP).

22 Article 638 CCP.

23 Court of Appeal, 7 November 2012, BIJ 2/2014, p. 46.

c if the claimant already has a foreign judgment, that it should make sure that the judgment is recognised and rendered enforceable in Luxembourg (see below).

European account preservation order

As of 18 January 2017, it is possible in cross-border situations within the European Union (other than Denmark) to apply for a European account preservation order (EAPO) in accordance with Regulation (EU) No. 655/2014.

The procedure and effects are broadly similar to the third-party attachment procedure described above, with the exceptions that:

a only cash may be preserved through an EAPO;

b leave from the court (the EAPO itself) is required to attach, which, if sought in Luxembourg, would have to be delivered by the justice of the peace or the president of the district court, depending on whether the claim exceeds €15,000, according to Article 685-5 NCCP;

c a creditor must show urgency to obtain an EAPO;[24]

d where no judgment has yet been obtained, a creditor will normally have to provide security to obtain an EAPO unless specifically exempted;[25]

e an EAPO can freeze an account only up to the claimed amount;

f banks are very swiftly required to make a declaration concerning the preservation of funds; and

g the debtor will be informed of the preservation measure at a later stage only once the concerned judicial authority, having rendered the EAPO, has received the declaration concerning the preservation of funds by the bank or banks.

An EAPO does not allow a claimant to obtain payment on the preserved bank account. The latter is subject to national proceedings, meaning that if preservation is effected in Luxembourg, a claimant will have to put in a place a national third-party attachment on the same bank account or accounts to enforce on the monies.

An EAPO may, however, be useful where the creditor has no information about its debtor's bank account, as it can make a request for the obtaining of account information under certain circumstances.[26]

Seizure

An examining magistrate is empowered in the context of a criminal investigation to seize the instrumentalities of a fraud as well as the proceeds of a fraud.[27] This includes the authority to order a third party to grant access to an automated data processing system.[28]

24 Article 7(1) of Regulation (EU) No. 655/2014, in a way very similar to the risk of the dissipation criterion applicable in some jurisdictions.

25 Article 12 of Regulation (EU) No. 655/2014.

26 Article 14 of Regulation (EU) No. 655/2014.

27 Article 66(1) CCP.

28 Article 66(4) CCP.

Confiscation

The general system of confiscation under Luxembourg law is conviction-based.[29] Article 32 CrimC specifies that confiscation always applies to crimes, but that its application to felonies is optional.

Under the general system, courts can resort to extended confiscation, meaning that the proceeds and instrumentalities of the offence as well as their respective products can be forfeited.

Confiscated property belonging to a fraud victim is automatically restituted.[30] The victim can also claim restitution of substituted property.

A more extensive confiscation regime applies to certain offences such as money laundering,[31] which also authorises third-party confiscation, value confiscation and non-conviction based confiscation.

ii Obtaining evidence

Civil

The process of obtaining evidence to support legal proceedings in Luxembourg differs to a great extent from that of most common law jurisdictions. There is, for example, no discovery procedure.

The general *ratione legis* behind the Luxembourg rules on obtaining evidence is that fishing expeditions are prohibited, and parties should normally refrain from bringing lawsuits if they do not have enough evidence to support them.[32] The law[33] requires parties to prove their allegations, and judges will not be allowed to order certain investigative measures where they are intended to make up for parties' lack of evidence.[34]

Pretrial remedies

Article 350 NCCP allows an applicant to request pretrial investigative measures to obtain evidence regarding facts on which the outcome of a lawsuit could depend, either through summary *inter partes* proceedings or by issuing an *ex parte* application (in cases of exceptional circumstances).[35]

Article 350 can only be relied upon if no proceedings have been commenced on the merits and the documents are effectively located in Luxembourg. An applicant will be allowed to request lawful investigative measures or the production of evidence if it has legitimate cause, and the applicant will have to show that the outcome of the lawsuit depends on the facts at issue. There is, however, no requirement to show urgency.

To avoid fishing expeditions, case law has also added that where an applicant is seeking to obtain evidence from its adversary or a third party, it should establish that the requested

29 Article 31 CrimC.

30 Article 31(4) CrimC.

31 Article 31(3) CrimC.

32 Court of Appeal, 21 June 2017, No. 111/17 - VII - REF.

33 Article 55 of the New Code of Civil Procedure (NCCP) and Article 1315 CC.

34 Article 351 NCCP.

35 Thierry Hoscheit, *Le droit judiciaire privé au Grand-Duché de Luxembourg*, Paul Bauler, 2nd edition 2019, No. 716, p. 430.

documents do (or are likely to) exist, and should include a detailed description of those documents in its application.[36] The Court of Appeal[37] recently confirmed that Article 350 NCCP cannot serve to obtain documents located outside of Luxembourg.

Article 933(1) NCCP can also support a request for pretrial evidence, but is rarely used in practice since it requires showing an imminent loss of evidence.

Obtaining evidence during trial

Parties can also request to obtain evidence while proceedings are ongoing.

Articles 284 to 288 NCCP are the basis for requesting a court order during trial against parties or third parties to communicate evidence that is in their possession. To succeed, four requirements need to be satisfied according to case law.[38] The required evidence:

a needs to be identified with precision;
b should be likely to exist;
c should presumably be in possession of the identified party; and
d should be relevant to the outcome of the lawsuit.

In addition, a party can request any legally admissible civil investigative measure such as witness statements, witness hearings and appraisals.[39]

Criminal

If a fraud scheme is prosecuted, an examining magistrate will be appointed to investigate and gather all the evidence of the fraud. The examining magistrate endeavours to reveal the truth, meaning that he or she examines both in favour of and against the accused.[40]

An examining magistrate is able to resort to a very large panel of investigative measures that are not available under civil law such as seizures, hearings, confrontations, surveillances and infiltrations.

The examining magistrate will usually try to trace the proceeds and instrumentalities of the fraud. To mitigate the effect of bank secrecy in this respect, the law[41] allows an examining magistrate, under certain specific circumstances, to order the following bank disclosures: information as to whether the accused holds or held an account, or controls or controlled an account, or if he or she has or held a proxy over an account; and all banking operations that have been or will be performed on the bank account of the accused during a specified time frame.

Financial institutions can be fined if they fail to comply in this respect.[42]

36 Marc Kleyr, 'La production forcée de pièces par voie de référé dans un contexte international: la pre-trial document discovery à la Luxembourgreoise', *Journaux des tribunaux* 2011, No. 13, p. 19.
37 Court of Appeal, 10 May 2017, No. 81/17 – VII – REF.
38 DC Lux, 8 May 1992, judgment No. 204/92; DC Lux, 7 July 2005, BIJ 9/2005, p. 176.
39 Article 348 NCCP.
40 Article 51 CCP.
41 Article 66-2 and 66-3 CCP.
42 Article 66-5(3) CCP.

Article 66-4 CCP also authorises an examining magistrate to generally request information and documents regarding a specific bank account or operation, but a bank could in principle choose to uphold bank secrecy and remain silent, since failure to comply is not sanctioned by a penalty.[43]

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Fraud can include acts of money laundering, and money laundering can have been carried out to conceal the proceeds of a fraud.

The offence of money laundering[44] is in essence the act of knowingly facilitating deceit as to the nature, origin, location, disposal, movement or ownership of any kind of asset obtained criminally.

The offence of money laundering needs to be based on a predicate offence that served to generate the illegal proceeds.[45]

In Luxembourg, a person can be sentenced for money laundering rather easily. According to current case law, the predicate offence needs not to have been prosecuted or dealt with in court.[46] A judge can find a person guilty of money laundering where he or she has been convinced by the evidence filed in court that a predicate offence took place.[47]

Money laundering can also be based on a predicate offence committed abroad. A fraudster does not necessarily need to have been sentenced abroad, because a Luxembourg judge is allowed to determine whether the predicate offence was committed according to the laws of the foreign jurisdiction at stake.[48]

The CrimC further incriminates accomplices to money laundering offences as well as attempts to commit money laundering.

ii Insolvency

Luxembourg law supplies remedies to fraud victims in cases of insolvency. Some remedies can be utilised when there is strictly speaking a case for insolvency (i.e., higher assets over liabilities), while other more tailored remedies can only be applied once bankruptcy has been declared by a court (meaning that the fraudster's payments have come to a halt and that it is no longer creditworthy).

These remedies are not intended to provide direct compensation to fraud victims, but are generally designed to reinforce a victim's position through clawback possibilities and bankruptcy extensions.

43 idem.

44 Article 506-1 CrimC.

45 The list of predicate offences is contained in Article 506-1 CrimC, and includes offences such as market manipulation, fraud, trafficking, insider dealing and, since the law of 23 December 2016, also tax evasion or tax fraud.

46 David Giabbani, 'L'infraction de blanchiment', *JurisNews Droit pénal des affaires*, Vol. 2 – No. 1/2013, p. 20.

47 Court of Appeal, 3 June 2009, No. 279/09 X.

48 DC Lux, 20 November 2008.

Insolvency

There are essentially two remedies available according to the CC if a debtor is insolvent: the derivative action and the *actio pauliana* (fraudulent conveyance). To have the appropriate standing to sue, a victim will have to show with both actions that its debtor is insolvent.

A derivative action[49] aims to recover assets from third parties on behalf of the insolvent debtor in order to increase its estate where that debtor is (wilfully) refraining from action. A derivative claim is, however, subject to stringent requirements.

If a fraudulent conveyance was performed by its debtor, the victim will be allowed to have the transfer annulled by initiating an actio pauliana.[50] The victim should prove, inter alia, that the transaction was performed with intent to defraud the creditors by enabling the debtor to become insolvent or aggravating its insolvency.[51] If the transfer was performed against consideration, it must be shown that the third party with whom the debtor transacted was an accomplice to the fraud.

Bankruptcy

A fraud victim has better options once a fraudster has been declared bankrupt. The downturn is that the victim will have little control over the proceedings, since only a court-appointed bankruptcy receiver is empowered in most cases to pursue claims on behalf of the bankruptcy.

Certain transactions can be declared null and void if they are challenged by the bankruptcy receiver in court and have been performed during the hardening period (or 10 days prior to that period).[52] Payment of an undue debt and transfers in lieu of payment of mature liabilities during the hardening period will be voided in this context.[53]

Any other transaction may be voided if the party with which the bankrupt entity transacted had knowledge of its cessation of payments.[54]

Fraudulent transactions (i.e., transactions that are detrimental to the bankrupt entity's creditors) can be challenged even where they occurred before the hardening period.[55] This is an application of the *actio pauliana* to bankruptcy.

A fraud victim could benefit from a personal bankruptcy order against the fraudulent directors of a company because it will expand the estate that will be available for compensation. The bankruptcy of a company may be extended to the directors[56] of a bankrupt company if they used the corporate veil to act in their personal interest, used the company's assets as if they were their own, or carried on, for personal gain, an unprofitable business that could only lead the company into bankruptcy.[57] The sanctions provided by Article 495 ComC are not applied automatically, and will depend on a case-by-case appreciation of the facts in court.[58]

Upon application of the bankruptcy receiver, directors of an insolvent company can be held personally liable for the outstanding debts of the company if the bankruptcy was

49 Article 1166 CC.

50 Article 1167 CC.

51 Court of Appeal, 3 October 2018, Pas. 39 p.190.

52 Article 445 of the Commercial Code (ComC).

53 Jean-Pierre Winandy, *Manuel de droit des sociétés*, Legitech edition 2011, p. 891 et seq.

54 Article 446 ComC.

55 Article 448 ComC.

56 Statutory directors as well as de facto directors (including immediate or ultimate shareholders).

57 Article 495 ComC.

58 Cf. André Prüm, *Les sociétés fictives dans la jurisprudence luxembourgeoise*, Pas 39, p. 349 (351).

caused by their serious misconduct, including management errors or criminal acts (fraud).[59] In this case, directors can incur full or partial, individual or joint and several liability for the outstanding amounts. The alleged misconduct must have caused the bankruptcy estate not to be able to fully cover the amounts owed to the creditors. However, an order for personal liability remains optional even where the criteria under Article 495-1 ComC have been met, meaning that a judge will only issue an order for personal liability if he or she is convinced that such a sanction is equitable in the given set of circumstances.[60]

Certain behaviours are also considered offences under the bankruptcy rules (fraudulent bankruptcy),[61] and may serve to bring a subsequent liability claim against the fraudster. The drawback is that any order for damages arising from such lawsuit will rank *pari passu* with unsecured creditors.

iii Arbitration

It would not be possible under Luxembourg law to have an arbitral tribunal find someone guilty of a criminal offence in order to sentence that person accordingly, because public prosecution is allocated to the judiciary.[62]

While Article 1225 NCCP excludes the possibility of submitting certain matters to arbitration, case law considers that a dispute is not in itself inarbitrable just because an arbitrator would have to apply rules of public policy to resolve the dispute.[63] Applying this legal precedent may theoretically mean that arbitrators would have jurisdiction to determine whether someone committed a criminal fraud in order to allocate civil damages to a victim.

There should not be any hurdle to arbitration for civil compensation if a fraud is a purely civil type of wrongdoing that does not involve any kind of criminal offence or if the fraud is already recognised in a criminal judgment.

The law does not, however, grant arbitrators the express authority to order interim measures, and the rules of arbitration of the Luxembourg Chamber of Commerce are also silent on this issue, so it is unclear whether interim measures ordered in a Luxembourg award would have any effect.

iv Fraud's effect on evidentiary rules and legal privilege

A party can make a plea for forgery during a civil suit if it considers that a certain document filed with the court as evidence is forged.[64] The procedure is quite cumbersome and to some extent adversarial. The party making the plea should indicate why it believes the document is forged by providing evidence of specific, detailed facts that are incompatible with its content,[65] and, if the court considers that there is reason to believe that the document is forged, it will allow the applicant to prove its allegations, and will order an appraisal by three experts. If the procedure is successful, the court will strike the document of the record.

59 Article 495-1 ComC.

60 DC Lux, 21 March 2014, Judgment No. 659/14, Docket No. 140.268, 141.259, 148.246 and 148.361.

61 Article 573 to 578 ComC.

62 Article 1 CCP.

63 Court of Appeal, 9 February 2000, Pas 31, p. 301.

64 Article 310 et seq. NCC.

65 Court of Appeal, 22 June 2005, Pas 33, p. 104.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

Both the Rome I Regulation[66] and the Rome II Regulation[67] are universally applicable. Therefore, if a fraud claim has an international aspect and is brought before the courts in Luxembourg, the courts will usually resort to these Regulations to determine the applicable law (unless a claim is not caught or is specifically excluded from the scope of these Regulations).

The law applicable to contractual fraud would be determined according to the Rome I Regulation.[68]

In general, however, the law applicable to a claim for damages resulting from a fraud is determined by the Rome II Regulation, which could be:

a the law chosen by the parties (if any);
b the law of the jurisdiction where the damage occurred (*lex loci delicti*);
c the law of the jurisdiction where the fraudster and the victim habitually resided when the damage occurred; or
d the law of the jurisdiction with which the circumstances of the fraud are closely connected.

If foreign law applies to a claim brought in Luxembourg, case law considers that the applicant bears the burden to prove the substance of the foreign law. Parties will usually rely on legal opinions issued by foreign practitioners to that effect that are filed with court. Luxembourg courts would also be able to make a request for information on foreign law in accordance with the European Convention on Information on Foreign Law of 7 June 1968.

ii Collection of evidence in support of proceedings abroad

There are many laws, regulations, conventions and bilateral treaties that apply in this respect. Their application depends largely on the jurisdiction issuing a request to Luxembourg and the nature of the dispute at stake. Below is a brief description of the instruments most commonly applied.

In civil and commercial matters, if a request originates in a Member State of the European Union, foreign jurisdictions can request the taking of evidence in Luxembourg according to Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (Evidence Regulation).

Luxembourg is also a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 (Hague Evidence Convention), which would regulate requests from non-EU jurisdictions that are a party to the Hague Evidence Convention.

Both the Hague Evidence Convention and the Evidence Regulation operate in a similar manner. Luxembourg's central body that has the authority to receive letters of request under these two instruments is the Public Prosecutor's Office with the Superior Court of Justice.

66 Regulation (EC) No. 593/2008 of the Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

67 Regulation (EC) No. 864/2007 of the Parliament and of the Council of 11 July 2007 on the law applicable to noncontractual obligations.

68 Articles 10 and 12(e) Rome I Regulation.

Luxembourg has declared that it will not execute letters rogatory for a common law pretrial discovery of documents.[69]

In criminal matters, letters rogatory for both the taking of evidence and criminal seizures are governed by the amended law dated 8 August 2000 on international mutual legal assistance in criminal matters (the Mutual Assistance Law). The Mutual Assistance Law governs requests from both jurisdictions that are a party to an international agreement with Luxembourg regarding such mutual assistance[70] as those originating in non-contracting states and from international judicial authorities recognised by Luxembourg.[71]

Letters rogatory and their supporting documents should be drafted in, or translated into, French or German, and must comply with a number of formal requirements.[72] They normally need to be approved by the Public Prosecutor's Office, which will transmit the request to the competent authority. There is no remedy against an order of refusal from the state's Public Prosecutor.[73] If a request is urgent, it can be addressed directly to the competent authority for immediate performance.

The transfer of seized evidence or objects is subject to approval from the judges' chamber.[74] This approval includes a decision on lawfulness.

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

International criminal seizures are also regulated by the Mutual Assistance Law, but assets or proceeds cannot be transferred to the requesting state and will remain frozen until a confiscation or restitution request is rendered enforceable.[75]

International confiscation and restitution requests are performed once they have been rendered enforceable by the criminal court.[76] If confiscation is recognised, the ownership of the confiscated assets is normally transferred to the state. Assets that are subject to an enforceable restitution request are transferred back to the fraud victim. The procedure is subject to the usual safeguards such as public policy, due process and third-party interests.[77] Confiscation and restitution requests made in conjunction with a political offence cannot be rendered enforceable according to Article 663 of the CCP.

In civil matters, a fraud victim can also opt for third-party attachments as outlined above.

iv Enforcement of judgments granted abroad in relation to fraud claims

If a fraud is recognised in an enforceable civil or commercial decision originating in a Member State of the European Union, it can be directly enforced in Luxembourg if caught by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation 1215/2012).

69 Luxembourg's declaration to the Hague Evidence Convention.

70 Inter alia, the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

71 Article 1 Mutual Assistance Law.

72 Articles 4 and 5 Mutual Assistance Law.

73 Article 3 Mutual Assistance Law.

74 Article 9(2) Mutual Assistance Law.

75 Frédéric Lugentz, Jacques Rayroud and Michel Turk, *L'entreaide pénale internationale en Suisse, en Belgique et au Grand-Duché de Luxembourg*, p. 823

76 Article 659 et seq. CCP.

77 Article 663 and 664 CCP.

Other civil or commercial judgments that are subject to an international agreement,[78] including decisions entered into in the context of insolvency proceedings in one of the Member States,[79] will have to be declared enforceable by an order of the president of the district court upon *ex parte* application.[80]

Such an enforcement order must be served on the party against which it has been issued in order to permit the defendant to appeal within one month of service, if a Luxembourg resident.

Any other civil or commercial judgment issued by a jurisdiction that has no international agreement with Luxembourg in this respect will have to be declared enforceable by the district court.[81] Common civil procedure applies in this case, meaning that the defendant is put on notice.

Criminal judgments rendered in a Member State of the European Union that include a custodial sentence are rendered enforceable by the state's Public Prosecutor in accordance with the law dated 28 February 2011 concerning the recognition of criminal judgments ordering a custodial sentence or measure in order to be enforced in another Member State of the European Union (Criminal Enforcement Law). Fraud judgments are rendered enforceable without a double incrimination assessment.[82]

v Fraud as a defence to enforcement of judgments granted abroad

Fraud is not specifically recognised as such as a means to resist the enforcement in Luxembourg of a foreign judgment. In many cases, however, courts are bound to examine the aspect of due process[83] to detect whether there is a fraud against a defendant.[84]

A defendant could also argue against the enforcement of a foreign judgment by appealing to the notion of public policy in the context of a fraud, or try to invoke the *maxim fraus omnia corrumpit*.

VI CURRENT DEVELOPMENTS

On 8 June 2021, legislative bill No. 7307 proposing changes to the NCCP was passed in Luxembourg parliament. The proposed changes will enter into force as of 16 September 2021. In the context of asset tracing, the most notable change is that the threshold of competence between the justice of the peace and the district court has been increased from €10,000 to €15,000.

78 Such as the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (Hague Enforcement Convention).

79 Article 25 of Regulation (EC) No. 1346/2000 on insolvency proceedings provides that judgments deriving directly from insolvency proceedings and that are closely linked with them shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the amended Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

80 Article 679 et seq. NCCP.

81 Court of Appeal, 23 October 1957, Pas. 17, p. 177, cited in Jean-Claude Wiwinius, *Le droit International privé au Grand-Duché de Luxembourg*, 3rd edition, No. 1619, p. 340.

82 Article 5(3)8) of the Criminal Enforcement Law.

83 For example, in compliance with Article 6(2)4 of the Criminal Enforcement Law, Article 45(1)(b) of Regulation 1215/2012 and Article 5(1) and (2) of the Hague Enforcement Convention.

84 Jean-Claude Wiwinius, *Le droit International privé au Grand-Duché de Luxembourg*, 3rd edition, No. 1611, p. 338.

On 29 June 2021, legislative bill No. 7849 was introduced to Parliament. The bill aims at implementing Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment, and replacing Council Framework Decision 2001/413/JHA in national law. It essentially foresees the introduction of another fraud-related offence in the context of non-cash payments.

Appendix 1

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