



CORPORATE COUNSELLOR

A private-sector approach to international asset recovery in fraud cases

Published: 31/03/2017 at 04:00 AM

Newspaper section: [Business](#)

Fraud poses a major problem not only for its victims, but also for the economy as a whole. Today we are seeing more cases of large-scale and serious acts of fraud in the headlines. Indeed, given the speed at which modern communications allow transactions to take place, fraudulent statements, asset misappropriation, white-collar crime, Ponzi schemes and corruption can occur at any time and in any jurisdiction.

After fraud takes place, perpetrators may face both criminal and civil penalties. In a criminal matter where the public prosecutor is the plaintiff, an injured person is entitled to compensation for physical or mental harm, deprivation of physical liberty, damage to reputation or damage to property.

In a civil matter, the affected party can seek compensation for damages or the return of stolen assets. The ultimate goal of civil proceedings is not to obtain a criminal punishment (such as a prison term or fine), but to locate, seize and recover stolen assets for the legitimate owner.

If the stolen asset has been transferred out of Thailand to other jurisdictions, the traditional recovery approach for fraud victims -- whether individuals, businesses or government agencies -- is through criminal law channels. In Thailand, the Act on Mutual Assistance in Criminal Matters BE 2535 (1992) provides a legal framework for seeking assistance from, or providing assistance to, a foreign state in the investigation, inquiry, prosecution, forfeiture of property, and other proceedings relating to criminal matters.

Under the Act, a government agency representing a victim in seeking assistance from a foreign state must submit its request and all supporting documents to the "central authority", either the attorney-general or a designee. If the request is approved, the government agency will then contact appropriate agencies in the foreign country to investigate and initiate forfeiture proceedings of stolen assets on the victim's behalf.

However, asset recovery by the public sector is often a lengthy process given the diplomatic and bureaucratic formalities involved. Successful recovery requires swift action. Often, by the time a foreign state confirms its willingness to help, the stolen asset may have already been moved to a different country, requiring the agency representing a victim to start the process all over again.

But fraud victims can consider an alternative approach to overcome these limitations by seeking assistance via the private sector, specifically international law firms, professional service companies, or international business or legal organisations.

These organisations possess considerable experience in locating, seizing and recovering stolen assets in private fraud cases. They are also able to operate swiftly and in multiple jurisdictions, due in part to their focus on civil, rather than criminal, proceedings in local courts and their presence in many countries.

A private-sector organisation undertaking an asset recovery case will assemble an asset recovery team, led by an attorney and comprising other legal professionals, which may include investigators, forensic accountants and expert local counsel. The team begins by conducting an investigation to identify the perpetrator of the fraud, as well as tracking and locating the stolen assets.

During the course of the investigation, the team will work with civil courts in local jurisdictions to carry out a variety of legal actions, such as Anton Piller or Bankers Trust orders, gag and seal orders, search and seizure, asset freezing, and so on.

(An Anton Piller order, named for the plaintiff in a 1975 UK case involving theft of trade secrets, is a court order that provides the right to search premises and seize evidence without prior warning, in order to prevent destruction of evidence. A Bankers Trust order, based on another British case in the 1970s, is intended to identify a defendant by ordering disclosure by a third party that may have unknowingly helped the wrongdoer.)

When the perpetrator has been identified, the team will work with local courts to freeze the perpetrator's assets to prevent sale or transfer, and to initiate civil proceedings for asset liquidation and victim compensation.

Civil proceedings have been used effectively in many cross-border cases in which it was difficult to press criminal charges due to the defendants' absence or the inability to obtain evidence from a foreign state. Civil proceedings require a lower burden of proof, and allow for absent defendants to be tried so long as they have been properly served notice.

One example of a successful private-sector asset recovery organisation is FraudNet, a network of specialised lawyers and law firms in over 60 countries, founded in 2004 by the Commercial Crime Services unit of the International Chamber of Commerce.

In one notable case, FraudNet assisted a victim in tracing assets to the Cayman Islands, where they had been fraudulently disposed of by individuals from multiple jurisdictions. Working with local courts, the team was able to secure a freezing injunction of more than US\$80 million in assets and to locate and recover an additional \$10 million deposited in local financial institutions for the client.

Asset recovery by the private sector provides another option for fraud victims seeking to regain their financial assets in jurisdictions outside Thailand, and illustrates how civil proceedings can be applied to obtain favourable outcomes.

This article was prepared by Thawat Damsa-ard, partner and chief litigator in the dispute resolution group at Tilleke & Gibbins. He has served as the Thailand member of FraudNet since 2010. Please send comments to Andrew Stoutley at andrew.s@tilleke.com

About the author

Writer: Tilleke & Gibbins

