The Asset Tracing and Recovery Review

Fourth Edition

Editor
Robert Hunter

Law Business Research

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EDITOR'S 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 fraudster 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.

Fourth, there is the question of who has the right to seek compensation or inflict punishment. Civil proceedings for fraud are often beset with issues relating to 'title to sue'. Criminal ones vary with regard to the extent the prosecutor can seek compensation for the

victims and also the extent to which the victim can be the prosecutor him or herself. The right of a victim to bring private prosecutions for fraud is often overlooked in my own jurisdiction, but it can be a powerful weapon in the hands of a victim who wants both justice and redress.

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. 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 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.

The work keeps getting better with every successive edition. 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

two. I have come across a number of the authors in practice and they are unquestionably the leaders in their fields. I hope that other readers will find the work as useful and impressive as I do.

Robert Hunter
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Chapter 28

SERBIA

Tomislav Šunjka[1]

I OVERVIEW

Serbia is a country of transition in every sense of the word: its economic, social, political and judicial systems are all experiencing reform. The legislation is constantly changing with the aim of improving it and harmonising it with international legal standards and EU regulations. In these changes, unfortunately, concessions are often made to tailor to the current aims and interests of the political parties in power. Regardless of the imperfections and political concessions during changes to the existing legislation and the enactment of new legal regulations, Serbia nevertheless adheres to a civilised and recognised civil law legal system, combined with common law legal standards in the newly enacted legal regulations.

Serbia is a jurisdiction where assets come in the form of cash primarily due to investments in various projects, privatisation processes, real estate investment etc., which means that money that would eventually be subject to asset tracking in Serbia changes its form and becomes a different asset: for example, real estate, shares in a company, or equipment or similar. On the other hand, money constantly goes to offshore centres or centres with preferential tax regimes, in particular the Netherlands, Switzerland and Cyprus, and known offshore centres such as Monaco, Delaware, the Netherlands Antilles, the British Virgin Islands and Hong Kong. The money is mainly transferred in a legal manner as acquired dividends, capital gains, the return of loans and credits and similar. The financial system, despite its imperfections, is transparent to a reasonable extent, and there are corresponding provisions to prevent money laundering. The courts, police, prosecution and other state authorities generally wish to cooperate in asset recovery cases, except where doing so is in contradiction with the legal system or interferes with investigations and criminal proceedings.

1 Tomislav Šunjka is the founder of Law Office of Tomislav Šunjka.

Victims of fraud, dishonesty or criminal offences can be confident in the Serbian jurisdiction and authorities, and can initiate proceedings, and can submit various requests, including requests for compensation and damages. In civil proceedings, victims can have standing and an active role and void legal affairs through a lawsuit actio pauliana to initiate court disputes for restitution of property (asset recovery claims). There are advantages to the system in the sense that each legal entity has its own tax number (PIB), and that through their tax number account numbers can be checked, as well as the names of the banks where these accounts are held. Victims of fraud can obtain other evidence and information from public registries or before the court in a special proceeding.

In criminal proceedings, victims of fraud have a passive role, because the public prosecutor has the active role and standing. However, in a criminal proceeding, victims have the right to question witnesses and defendants, put objections and present evidence. In some cases, if and when the public prosecutor withdraws the prosecution of the defendants, victims have the right to assume the prosecution of those indicted by the public prosecutor and to directly press charges.[2] Victims have the right and obligation to make their property claims in a criminal proceeding (i.e., request for asset recovery, compensation or both). The criminal court shall render a decision on the request by itself, or shall instruct the victim to file his or her request directly in the civil proceeding.

The laws and their parts and provisions that can be applied in asset recovery cases are as follows:

a the Law on Civil Procedure;
b the Law of Contracts and Torts;
c the Criminal Procedure Code;
d the Law on Seizure and Confiscation of the Proceeds from Crime;
e the Criminal Code;
f the Law on the Liability of Legal Persons for Criminal Offences;
g the Law on Mutual Legal Assistance in Criminal Matters;
h the Law on Enforcement and Security;
i the Law on Business Companies;
j the Law on the Serbian Business Registers Agency;
k regulations on tax identification numbers;
l the Law on Banks;
m the Legal Profession Act;
n the Law on Free Access to Information of Public Importance;
o the Law on the Prevention of Money Laundering and the Financing of Terrorism;
p the Law on Resolving Conflict of Laws with Regulations of other Countries;
q the Law on Insolvency;
r the Law on Foreigners; and
s the Law on Whistleblower Protection.

2 Article 50 of the Criminal Procedure Code.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Compensatory remedies, both in civil and criminal proceedings, can be sought against all of each of the following: the person who committed the fraud; the persons who assisted the perpetrator to commit the fraud; and third parties who may receive or help transmit the proceeds of fraud.

Civil procedure

The civil procedure in Serbia is regulated by the Law on Civil Procedure. A civil procedure is initiated by filing a lawsuit before the competent court.[3] The main stages of the proceeding are its initiation by the filing of a lawsuit by the plaintiff; preparation of the main hearing; and the main hearing, in which parties bring their legal opinions before the court, exchange and explain arguments, and present and dispute evidence presented by other parties. After the court has considered all evidence proposed by the parties, it shall close the main hearing and render its decision. Civil proceedings last approximately three years.

Damages in civil proceedings

The Law of Contracts and Torts prescribes that damages[4] may be the diminution of someone's property (simple loss – *damnum emergens*) or the prevention of its increase (profit lost – *lucrum cessans*).

The provisions of Article 18 of the Law are important to point out considering that, in carrying out their obligations, parties shall be bound to act with the care required in legal transactions of the kind that obligation relations involve (the care of a good businessperson, or respectively the care of a good head of a house).

In carrying out obligations relating to his or her professional activity, a party to obligation relations shall be bound to act with increased care, according to professional rules and usage (the standard of care of a good expert).[5]

Damage arising from a breach of contract and damage that arises from a tort must also be distinguished from one another. The basic difference between these two types of damage liability lies in the presence or the absence of a prior obligation. In the first case, the liability comes from the existence of a certain legal arrangement, and in the second case, the liability comes from a certain tort.

In criminal proceedings, liability may be subjective (on the grounds of fault for damages), and damages in court proceedings may be awarded only if the connection between the action or failure to act by the offender and damages caused by the offender is established. Only in that case shall the court award damages to the injured party.

Once the judgment of the court in a criminal proceeding is rendered, the court in the civil proceeding is obliged to apply the judgment rendered in the criminal proceeding with respect to the liability for the commission of a criminal offence.[6]

3 Article 191 of the Law on Civil Procedure.

4 Article 155 of the Law of Contracts and Torts.

5 Article 18, Paragraph 2, Ibid.

6 Article 13 of the Law on Civil Procedure.

The Law on Contract and Torts prescribes that liability in civil court proceedings for damages may be subjective liability on the grounds of fault for damages, and objective liability on the ground of equity and liability of enterprises and other legal entities.

Refuting (contesting) a debtor's legal actions in respect to asset recovery

The Law of Contracts and Torts prescribes rules for refuting a debtor's actions by the lawsuit (or claim) (*actio pauliana*), which represents an institute of civil law.

Article 280 of the aforementioned Law provides that any plaintiff or creditor (person who requests asset recovery) whose claim is due for payment, regardless of the date of its taking place, shall be entitled to refute a legal act taken by their debtor that causes harm to them.

The Law prescribes that the debtor's disposal of property may be refuted in the case of disposal on the debt side, if at the time of effecting the disposal the debtor was aware or could have been aware that such action would do harm to his or her creditors; or a gratuitous disposal and a legal act equal to it: the debtor shall be considered to have been aware that the disposal undertaken would do harm to creditors, so that in refuting such acts there shall be no requirement that the third person was aware, or was supposed to be aware, of the fact.

Refuting of debtors' actions can be achieved by submitting a lawsuit before the competent court or by objection.

A lawsuit to refute must be submitted against a third person being a party to the legal act (acquirer of the debtor's property) or to whose benefit the act to be refuted was undertaken. If a third person has transferred, by a transaction on the debit side, the benefit acquired through the disposal to be refuted, the lawsuit may be initiated against the acquirer only if the latter was aware that the acquisition of his or her predecessor was prone to be refuted, but if such benefit was transferred by a gratuitous transaction, the lawsuit may be initiated against the acquirer even if he or she was not aware of the fact.[7]

A defendant may avoid the refuting by performing the debtor's obligation.

A lawsuit to refute a debtor's actions must be initiated within a year in the case of a disposal on the debit side, while in the case of a gratuitous disposal of the debtor, a lawsuit must be initiated within a three-year time limit.[8]

Rules on enforcement proceedings

The enforcement procedure is regulated by the Law on Enforcement and Security.

In Serbia, the enforcement procedure is initiated by a motion of enforcement submitted by the enforcement creditor before a competent court (before first-instance courts of general jurisdiction or commercial courts considering parties in the proceeding). The enforcement procedure may be initiated by submitting a motion of enforcement based on executive titles (final and enforceable court judgments, decisions, settlements, etc.) or authentic documents[9] (invoices, bills, bills of exchange or cheques, business book excerpts, bank guarantees, etc.).

By submitting a motion of enforcement, an enforcement creditor must propose the means and object on which the enforcement proceeding shall be conducted. Objects of enforcement proceeding are things and rights on which enforcement of the claim may be

7 Article 283, Paragraph 3, Ibid.

8 Article 285, Paragraph 1 of the Law of Contracts and Torts.

9 Article 52 of the Law on Enforcement and Security.

carried out (e.g., money, funds on bank accounts, shares, moveable and immoveable property), while means by which enforcement proceedings may be conducted are enforcement actions used to enforce a claim in accordance with law (e.g., sale of chattels, sale of immoveable property, transfer of monetary claims).

The court shall decide on a motion of enforcement within eight days after the filing of a motion to the court.

Criminal procedure

The Criminal Procedure Code prescribes that criminal proceedings may be initiated by the public prosecutor, a private prosecutor or an injured party (victim of the fraud), but only the public prosecutor has authority. Private prosecutors and injured parties have limited standing in special cases.

The Criminal Procedure Code outlines the stages of a criminal proceeding:[10]

a preliminary investigation proceeding;
b investigation;
c filing of the indictment;
d main hearing; and
e judgment.

The injured party is entitled to take part in criminal proceedings, and has the right to submit a claim for damages as well as a request for securing the claim for damages by temporary measures. The injured party is also entitled to, *inter alia*:

a propose evidence in the proceeding;
b be present at the questioning of witnesses and the offender;
c be present at hearings; and
d hire a representative.

The most important right of injured parties is that they are entitled to initiate a criminal proceeding, and that afterwards, if the public prosecutor for any reason stops or withdraws the criminal proceeding against the offender, they can themselves take over the prosecution against the offender.[11]

The time frame for criminal proceedings is not strictly prescribed by law; however, it usually takes about three years for the court to render its final and enforceable decision.

Criminal responsibility of legal entities in criminal proceedings

The Law on the Liability of Legal Persons for Criminal Offences regulates the liability of legal entities for criminal offences; the criminal sanctions that may be imposed on legal entities and the rules of procedure for deciding on the liability of legal entities; and the imposition of criminal sanctions on legal entities.

Article 25 of the Law prescribes that objects that were used or were intended to be used for the committing of a criminal offence, or objects that arose from a criminal offence, may be confiscated in a criminal proceeding if they are the property of the legal entity.

10 Chapters 15 to 17 of the Criminal Procedure Code.

11 Article 52, Ibid.

Objects also may be seized, even if they are not owned by legal entities, if it is in the interest of public safety or for moral reasons; however, in that case, this does not affect the rights of third parties regarding damages.

ii Defences to fraud claims

In a civil lawsuit for damages, it is necessary to prove:

a the plaintiff's standing to sue and the defendant's standing to be sued;
b the legal basis of the claim, which can be contract, tort, a final and enforceable criminal judgment or another legal basis;
c the amount of the claim; and
d most importantly, the causal connection between the tortfeasor and the occurrence of the harmful event.

Damage, as such, must be certain; the likelihood of damage is not sufficient for adjudication.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Criminal procedure – confiscation of the offender's assets by state or government authorities

The Law on Seizure and Confiscation of the Proceeds from Crime prescribes that asset recovery is possible in criminal proceedings for the following criminal offences:

a organised crime;
b abduction;
c crimes against property (such as robbery, fraud, extortion);
d crimes against businesses, such as:
- counterfeiting of money, credit cards, or securities;
- creating, obtaining and providing other means for forgery;
- money laundering;
- smuggling;
- abuse of a position of the responsible person;
- causing false bankruptcy; and
- causing harm to the creditor;

e unauthorised production, possession and distribution of narcotics;
f crimes against public order;
g crimes against official duty (such as abuse of an official position); and
h crimes against humanity; and
g crimes against other goods protected by international law.[12]

The Law established a new organisational unit responsible for financial investigations. This unit is a specialised organisational unit of the Ministry of Interior of Serbia for detection of assets derived from criminal offences. The unit acts on the order of the court, the Public Prosecutor's Office or *ex officio*.[13]

12 Article 2 of the Law on Seizure and Confiscation of the Proceeds from Crime.
13 Article 6, Ibid.

The Criminal Code and the Criminal Procedure Code

The Criminal Code also prescribes rules on the confiscation of objects and the seizure of property gained through committing a criminal offence.

Article 87 of the Criminal Code regulates security measures for the confiscation of objects, and prescribes that objects that were used or that were intended to be used for the committing of a criminal offence, or objects that are proceeds from a criminal offence, may be confiscated in criminal proceedings, as may objects when there is a danger that such object will be reused for the commission of a crime, etc.

Article 92 of the Criminal Code prescribes that property gained through the commission of a criminal offence shall be confiscated from the offender.

ii Obtaining evidence

Pursuant to Article 284 of the Law on Civil Procedure, it is possible to seek the securing of evidence before initiating civil proceedings as well as during the conducting of civil proceedings. The reason for securing evidence is if there is a reasonable concern that evidence will disappear, or that its later presentation will not be possible. The court shall render a separate decision and schedule a special hearing for the presentation of evidence.

The court, pursuant to Articles 241 and 242 of the Law on Civil Procedure, may request from the defendant or any third party a document that is in their possession. Such decisions are enforceable. The court may fine any person who does not present the document upon the court decision.

A party may refuse to present a document if, by this documentation, the party has obtained information in confidence as representative of a party; as religious confession; or as a legal counsel, doctor or member of another profession where there is the duty to keep and protect the confidentiality of information obtained through performing a profession or activity.

In addition, a party may refuse to present documentation if, by disclosure of such documentation, they would bring disgrace, significant material damage or a criminal prosecution upon themselves, their lineal relatives to any degree and lateral relatives.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

The Law on the Prevention of Money Laundering and the Financing of Terrorism prescribes actions and measures to be undertaken for the purpose of detection and prevention of money laundering.

Obligors and responsible persons within obligors are required to undertake actions and measures for the detection and prevention of money laundering.

Obligors of undertaking actions and measures for detection and the prevention of money laundering are, *inter alia*:

a banks;
b exchange offices;
c companies managing investment funds;
d companies managing voluntary pension funds;
e financial leasing companies;
f insurance and insurance brokerage companies;
g persons dealing with postal communications;

h broker-dealers;
i organisers of special games of chance in casinos;
j auditing companies.[14]

Obligors are also entrepreneurs and legal entities that carry out or provide the following activities:

a real estate brokerage;
b accounting services;
c tax advice;
d assistance in credit transactions;
e factoring and forfeiting;
f provision of guarantees; and
g attorneys at law and law offices.[15]

The obligor is bound to establish the identity of the customer, collect data about the customer and the transaction, and other data that are, for the purpose of the Law, relevant for the detection and prevention of money laundering, of which the most important for understanding the fraud are the following:[16]

a when opening an account or establishing other forms of business cooperation with the customer;
b in the case of any transaction (cash or non-cash) or several interrelated transactions with a total sum amounting to or exceeding €15,000 in dinar counter value; and
c in the case of any transaction (cash or non-cash) regardless of the value of the transaction if there are reasons to suspect money laundering with regard to a transaction or a customer.

Bank secrecy

In Serbia, bank secrecy rules are regulated by the Law on Banks. The Law on Banks defines 'bank secret' in Article 46, and prescribes that the following shall be considered as a bank secret: data that are known to a bank, and that refer to personal data, financial status and transactions, as well as ownership or business relations of the clients of such bank or another bank; and data on the balance and transactions of individual deposit accounts.

The Law on Banks prescribes that the following shall not be considered as a bank secret:

a public data and data accessible from other sources to interested persons with a legitimate interest;
b consolidated data on the basis of which the identity of an individual client is not disclosed;
c data on bank shareholders and the amount of their participation in the bank share capital; or
d data related to the timeliness of a client fulfilling its obligations towards the bank.

14 Article 4, Paragraph 1 of the Law on Prevention of Money Laundering and the Financing of Terrorism.
15 Article 4, Paragraph 2, Ibid.
16 Article 9, Ibid.

The Law on Banks prescribes several exceptions from the obligation to guard bank secrets. The obligation to guard bank secrets shall not apply if the data are disclosed as follows:[17]

a on the basis of a decision or request of the competent court;
b for the requirements of the Ministry of Internal Affairs, which is responsible for combating organised crime and for preventing money laundering;
c in the case of execution by the competent authority regarding property of the bank's client;
d to the authority competent for the supervision of foreign currency operations;
e upon the request of the organisation for deposit insurance; or
f to a foreign regulatory authority under the conditions stipulated in the memorandum of understanding concluded between the foreign regulatory authority and the National Bank of Serbia, etc.[18]

ii Insolvency

The rights of creditors in national and international insolvency proceedings are regulated in the Law on Insolvency.

Rights of creditors in national insolvency proceedings

Insolvency proceedings in Serbia have the following phases:

a a preliminary insolvency proceeding;
b the opening of the bankruptcy proceeding;
c the submitting of a claim of all creditors;
d the realisation and distribution of bankruptcy property and the settlement of creditors;
e the conclusion of bankruptcy proceedings; and
f a reorganisation, which can be filed concurrently with the petition for insolvency or after the opening of insolvency proceedings.

International insolvencies

International insolvencies are also regulated by the Law on Insolvency.

International insolvency exists if:

a a foreign court or another foreign authority that exercises control over or supervision of the assets or operations of the debtor or a foreign representative requires assistance in connection with a foreign proceeding;
b a court or creditor asks for help in a foreign country in connection with the bankruptcy proceedings that in Serbia are conducted in accordance with the Law on Insolvency; or
c a foreign proceeding is conducted simultaneously with the insolvency procedure in Serbia.

In the case of recognition of foreign proceedings under this Law, the laws of Serbia shall apply to assets subject to excluding rights or secured assets and rights located in the territory of Serbia, while the effects of insolvency on employment contracts are governed by the law that is applicable to the contracts themselves.

17 Article 48 of the Law on Banks.
18 Article 103 of the Law on Banks.

A foreign representative is entitled to approach a court directly in Serbia (i.e., has the right of direct access, the right to apply to commence an insolvency proceeding if conditions have been met to commence such a proceeding under the Law on Insolvency and the right to participate in a proceeding regarding the debtor).[19]

Contesting a debtor's legal actions in insolvency proceedings (asset recovery in insolvency proceedings in Serbia)

According to the provisions of the Law on Insolvency, the bankruptcy administrator, on behalf of the debtors or creditors, may contest legal transactions and other actions entered into or taken before opening the bankruptcy proceedings that are interfering with equal settlement of bankruptcy creditors, or damaging the creditors, as well as transactions and actions putting some creditors in a more favourable position over the others.[20]

In a regular settlement, a legal transaction or another action taken within six months before filing the petition initiating bankruptcy proceedings, providing security or settlement to a creditor in the manner and at the time in accordance with the substance of his or her right, may be contested if the bankruptcy debtor was insolvent at the time of taking this action, and the creditor knew or had to know of its insolvency.[21]

In an irregular settlement, a legal transaction or action providing security or settlement for one creditor that he or she was not entitled to request, or that he or she was entitled to request but not in the manner and at the time it was provided, may be contested if it was provided within 12 months before submitting the petition or initiating the bankruptcy proceeding.

In the case of intentional damaging of creditors, a legal transaction or action entered into or taken with the intent to damage one or more creditors within five years before submitting the petition for initiating bankruptcy proceedings or after that may be contested if the bankruptcy debtor's counterpart knew of the bankruptcy debtor's intent.[22]

A legal transaction or action of the bankruptcy debtor is contested by filing a claim initiating litigation. If the claim contesting a legal transaction or other legal action is duly adopted by the competent court, the contested legal transaction or action shall have no effect on the bankruptcy estate, and the contestation opponent shall be obliged to return all assets acquired from the contested transaction or other action to the bankruptcy estate.[23]

iii Arbitration

In Serbia, arbitration is not used as a method of dispute resolution in relation to fraud cases.

iv Fraud's effect on evidentiary rules and legal privilege

Use of information obtained

Serbia's legal system does not provide provisions regulating the use of information obtained by rules on disclosure.

19 Article 184 of the Law on Insolvency.

20 Article 119, Ibid.

21 Article 120 of the Law on Insolvency.

22 Article 124, Ibid.

23 Article 130 of the Law on Insolvency.

Indirectly, with regard to the legal profession in Serbia, there are no restrictions on the use of information obtained by rules on disclosure in court proceedings besides those prescribed in Article 20 of the Legal Profession Act, which regulates professional confidentiality, and which prescribes that lawyers are obliged to keep as a professional secret, and to ensure that persons employed in their law office keep as a professional secret, all information that their clients or representatives have entrusted to them and in respect to the case in which they have provided legal service, and all other information that they have obtained or gathered in preparing for, during and after representation of their clients.[24]

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

Recognition and enforcement of foreign judgments

Recognition and enforcement of foreign judgments is regulated by the Law on Resolving Conflict of Laws with Regulations of other Countries.

A foreign court judgment shall be equated to a decision of a Serbian court and have legal effect in Serbia only if it is recognised by a Serbian court.[25] The foreign judgment has to be final under the law of that foreign state. A foreign court judgment will not be confirmed by the Serbian court:

a if the legal matter in question is under the exclusive jurisdiction of the Serbian court;
b if, in the same case, the court or other authority of Serbia made a final decision;
c if Serbia already confirmed another foreign court judgment rendered in the same matter;[26] or
d if it is contrary to the Constitution of Serbia.

A foreign court judgment shall not be recognised if there is no reciprocity. Reciprocity exists if the foreign country in question recognises judgments of Serbian courts.

ii Collection of evidence in support of proceedings abroad

International legal assistance and aid in criminal and civil proceedings (rules of rogatory)

Civil proceedings

Rules of rogatory are the governing rules in respect of international legal assistance and aid. A letter rogatory or letter of request is a formal request from a court to a foreign court for some type of judicial assistance. The most common remedies sought by letters rogatory are service of process and taking of evidence.

In accordance with the Civil Procedure Code, Serbian courts are obliged to seek and provide legal aid to foreign courts in cases determined by international agreements and if there is reciprocity in providing legal aid.

24 Article 20 of the Legal Profession Act.

25 Article 86 of the Law on Resolving Conflict of Laws with Regulations of other Countries.

26 Article 90, Ibid.

The courts provide legal aid to foreign courts in compliance with the national laws. An action requested by a foreign court may also be done as the foreign court requires and in accordance with foreign proceeding regulations only if this is not contrary to the laws of Serbia.[27]

Unless otherwise stipulated by an international agreement, requests of a domestic court for legal aid are submitted to foreign courts through diplomatic channels.

Criminal proceedings

Rules of rogatory in criminal proceedings in Serbia are set in the Law on Mutual Legal Assistance in Criminal Matters. The Law prescribes that international legal assistance shall include:[28]

a extradition of the accused or convicted;
b takeover and transfer of criminal prosecution;
c execution of the sentence; and
d other forms of international legal assistance.

Other forms of mutual legal assistance include the performance of process activities, the implementation of measures, the exchange of information and delivery of documents and items related to criminal proceedings, and temporary handover of a prisoner for examination.

International legal assistance is also provided at the request of the International Court of Justice, the International Criminal Court, the European Court of Human Rights and other international institutions established by an international treaty ratified by Serbia.

The authorities responsible for providing international legal assistance are domestic courts and public prosecutors' offices.[29]

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

Temporary measures in criminal and civil proceedings

Temporary measures are regulated in both criminal and civil proceedings by the Law on Enforcement and Security.

There are two types of temporary measures:

Temporary measures for securing a monetary claim[30]

Temporary measures for securing monetary claims may be ordered if the enforcement creditor shows the probability of the existence of a claim and the risk that, without such temporary measure, the enforcement debtor would prevent or considerably hinder satisfaction of the claim by disposing of, hiding or otherwise making unavailable his or her property or means. It is considered that the risk exists especially:

a if the claim is to be realised abroad;
b if there is already an enforcement procedure against the same debtor for due instalment payments;
c if the paying obligations exceed the debtor's earnings; or

27 Article 177 of the Law on Civil Procedure.

28 Article 2 of the Law on Mutual Legal Assistance in Criminal Matters.

29 Article 4, Ibid.

30 Article 459 of the Law on Enforcement and Security.

d there already has been an unsuccessful enforcement procedure against the same debtor.

Temporary measures for securing a non-monetary claim[31]

Temporary measures for securing non-monetary claims may be ordered to secure a non-monetary claim if the enforcement creditor has shown the probability of the existence of the claim and a risk that otherwise satisfaction of the claim will be prevented or considerably hindered. Temporary measures may also be ordered when an enforcement creditor shows the probability that the temporary measure is necessary to prevent use of force or infliction of irreparable damage.

A decision of the court by which the temporary measure is determined must specify the duration of the temporary measure. When such a decision is made in civil proceedings before filing a lawsuit or commencing other legal proceedings, such measure must be justified by filing a lawsuit or commencing other legal proceedings within the period set by the court.

Preliminary measures in criminal and civil proceedings

Preliminary measures are regulated in both criminal and civil proceedings by the Law on Enforcement and Security. A preliminary measure shall be imposed on the basis of a decision of a domestic court on a monetary claim that has not become final or enforceable if an enforcement creditor establishes the probability that there is a risk that, without such securing, satisfaction of the claim will be impossible or made significantly more difficult.[32]

The court may order the following preliminary measures:[33]

a inventory of chattels and the registration of a lien on the moveable property listed in the register of pledge;

b seizure of monetary claims of the enforcement debtor and the acquisition of a lien on it;

c order for the organisation of an enforced payment to order the banks in which the enforcement debtor has accounts that the funds in the amount of the secured claim be transferred to deposit of the public executor;

d prohibition of the disposal of financial instruments and registration of a lien on them in the Central Securities Depository;

e registration of a lien in favour of the enforcement creditor on shares of the enforcement debtor in a limited liability company, a partnership or limited partnership listed in the register of pledge, and registration of the seizure of shares in the company register;

f seizure of the enforcement debtor's claim to hand over certain immoveable or moveable property, or for it to be delivered a certain amount of moveable property and the acquisition of a lien on the sequestered claim; and

g registration of prior notice: a mortgage on immoveable property owned by the enforcement debtor, or on a claim of the enforcement debtor registered on immoveable property.

31 Article 460, Ibid.

32 Article 439 of the Law on Enforcement and Security.

33 Article 445, Ibid.

iv Enforcement of judgments granted abroad in relation to fraud claims

If the enforcement creditor's motion to enforce is based on a foreign executive title, he or she must submit the original or a certified copy, translated into the language that is in official use in the court, together with proof of the finality and enforceability under the law of the country of the executive title.[34]

A foreign executive title previously recognised by the domestic court in accordance with the law shall be enforced in the same manner and procedure applicable to the enforcement of domestic executive titles. An enforcement creditor may also initiate an enforcement procedure before a competent court in Serbia on the basis of a foreign executive title that has not been previously recognised by the domestic court. When the motion to enforce has been filed on the basis of a foreign executive title that has not been recognised, the court shall decide on recognition of such document as a preliminary matter.[35]

v Fraud as a defence to enforcement of judgments granted abroad

The usual defence is an objection to recognition of a foreign court decision on the following grounds:

a a foreign court has not given an equal right to the entity or person from Serbia to exercise their rights and interests;

b proper delivery of the summons, pleadings and court decisions was not provided, and therefore the right to discuss before the court was denied;

c there was no adequate translator for the Serbian language; or

d the foreign court decision is contrary to the constitutional order of Serbia and is not eligible for legal domestic use.

FraudNet case

In this section, we discuss a recent fraud case. It specifically relates to a fraud and illegal and unauthorised disposal of funds in accounts at commercial banks.

Company A had opened several bank accounts in Serbia, all in accordance with a decision on the terms and manner of opening, maintaining and closing of a bank account rendered by the Governor of the National Bank of Serbia. The fraud case itself was initiated at the beginning of the week, by two unidentified persons, one of whom falsely represented himself as a representative of company A to bank X by submitting a request to open a bank account. The bank is located outside company A's seat, and company A did not have an open account with the bank.

The unidentified person who falsely represented himself as a representative of company A submitted to the employees of bank X the following documentation:

a Request to open a bank account containing the following data:

- business name of company A: this data is public (in the Business Register Agency (Agency));
- headquarters of company A: this data is public (in the Agency);
- business address of company A: this data is public (in the Agency);

34 Article 46 of the Law on Enforcement and Security.

35 Article 46 , Ibid.

- phone number of company A: on the list of authorised signatures for the persons authorised to sign transfer orders were entered phone numbers which were not phone numbers of company A;
- identification number of company A: this data is public (in the Agency); and
- company seal and signature of the company representative: data of the representative entitled for representation of the company A is public (in the Agency) while it is possible to make a company seal in any store equipped for that purpose.

b Decision on registration before the competent body (the Agency).

c Extract of company A from the Agency.

d List of authorised signatures for the persons authorised to sign transfer orders (deposit signature card): completed and signed in the bank by an unidentified person who falsely represented himself as a representative of company A.

e Verification of signatures of authorised persons (signature form): signature on signature form of the unidentified person who falsely represented himself as a representative of company A which responded to the signature on the list of authorised signatures for the persons authorised to sign transfer orders.

Considering that bank accounts are opened in a short time of no more than 24 hours, the bank opened the account on Thursday in accordance with the request of the unidentified person who falsely represented himself as a representative of company A.

Meanwhile, unidentified persons had, in the same manner, opened a bank account for company B in another bank, bank Y.

On Friday afternoon, in bank X, where an account of company A had been opened, the unidentified person who had falsely represented himself as a representative of company B entered with a counterfeited bill allegedly issued by company A for the purpose of securing company A's duties towards company B for delivered goods, with the due date of the bill being that Friday. This counterfeited bill had been signed by the unidentified person who had falsely represented himself as a representative of company A and had previously opened an account in the name of company A with bank X as well as sealed by the forged company seal of company A.

At that point, bank X did not doubt the authenticity and validity of the bill, and immediately released the bill in accordance with the procedure for enforced collection. Considering that in Serbia, enforced collection is conducted by the National Bank of Serbia, at the request of the bank that has received the bill and on all of the bank accounts of the debtor registered under its tax identification number at the moment when the National Bank of Serbia started enforced collection, all available funds from all of the bank accounts of company A were transferred to the account of company B.

Afterwards, all of the funds that had been taken from the bank accounts of company A had been transferred to the bank account of company B with bank Y, from which account, in accordance with previously prepared transfer orders, these funds were transferred from the bank account of company B with bank Y to the various individual accounts of natural persons.

Company A found out and registered an irregularity immediately after the releasing of the bill through the enforced collection by bank X in such a manner that it could not make payment of its obligations because it did not have sufficient funds available in the accounts.

Company A was also informed at that moment that it had been placed under enforcement collection proceedings by the National Bank of Serbia at the request of company B, with whom company A had never had business relations.

The transfer of funds from the accounts of company A was stopped at the time the funds from the accounts of company A amounted to approximately more than half of the value indicated on the bill had been collected through the enforced proceeding.

Once the enforced collection and further transfer of money from the accounts of company A had been stopped, company A addressed to bank X, which had illegally opened these bank accounts, a request for reimbursement of damages and a request to close the illegally opened bank account.

Bank X responded to company A that it considered that it did not bear any material liability to company A for any damages, and refused to close the illegal account at the request of company A.

At that point, company A had the option to wait for the identification and arrest of the offenders of the crime (it had taken two years to identify said offenders) to submit a claim for damages against them in criminal proceedings or to start civil litigation proceedings against them alongside possible criminal proceedings, or to immediately initiate civil litigation proceedings against bank X for reimbursement of damages for providing services while not complying with the decision on the terms and manner of opening, maintaining and closing of a bank account and under the obvious irregularities while opening an account for company A with bank X.

Company A decided to initiate a civil litigation proceeding against bank X for reimbursement of damages on the basis of providing services while not complying with the decision on the terms and manner of opening, maintaining and closing of a bank account and obvious irregularities while opening an account for company A with bank X.

In the civil litigation proceeding, the court determined that the account of company A with bank X had been opened while not complying with the rules of procedure for opening bank accounts.

The acting court, in accordance with the provisions of Article 18 of the Law of Contracts and Torts (duty of all parties to carry out their obligations and duties with due care or, in some cases, with increased care), obliged bank X to reimburse the damages to company A and to close the bank account opened with bank X.

Company A, under this final court decision, initiated proceedings on enforced collection against bank X for the payment of damages and managed to reimburse damages with interest through enforced collection proceedings.

VI CURRENT DEVELOPMENTS

Even the most developed legal systems have insufficiently regulated areas or a lack of established practice. In Serbia, the practice and legislation must change so that institutional cooperation exists within the regulated legal framework and between, *inter alia*, the state body, courts, prosecutors, police and victims of fraud, and enables the exchange of data, collection of evidence, etc. An improved institutionalised relationship in all aspects would lead to better results in proceedings aiming to help victims of fraud recover their assets.

Appendix 1

ABOUT THE AUTHORS

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Tomislav Šunjka graduated from the Law Faculty of the University of Novi Sad in 1997. After two years of practice, Mr Tomislav Šunjka established the Law Office of Tomislav Šunjka in 2000. He has published several works on European Union law, the securities market and the role of banks in it, the European Central Bank and the European System of Central Banks, the European Convention on Human Rights and the Court in Strasbourg. He also lectures on fraud and asset recovery. Mr Tomislav Šunjka is a regional representative for Serbia on the International Bar Association's Anti-Corruption Committee, as well as an exclusive member for Serbia and ex-Yugoslavia in FraudNet (an international network of lawyers that operates under the auspices of the London-based ICC Commercial Crime Services FraudNet Network). Mr Šunjka is fluent in English and Russian.

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