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# International Fraud & Asset Tracing 2022

Italy: Law & Practice  
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## Law and Practice

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## CONTENTS

<b>1. Fraud Claims</b>	<b>p.3</b>	<b>3. Corporate Entities, Ultimate Beneficial Owners and Shareholders</b>	<b>p.13</b>
1.1 General Characteristics of Fraud Claims	p.3	3.1 Imposing Liability for Fraud on to a Corporate Entity	p.13
1.2 Causes of Action after Receipt of a Bribe	p.5	3.2 Claims against Ultimate Beneficial Owners	p.14
1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts	p.5	3.3 Shareholders' Claims against Fraudulent Directors	p.15
1.4 Limitation Periods	p.6	<b>4. Overseas Parties in Fraud Claims</b>	<b>p.15</b>
1.5 Proprietary Claims against Property	p.6	4.1 Joining Overseas Parties to Fraud Claims	p.15
1.6 Rules of Pre-action Conduct	p.7	<b>5. Enforcement</b>	<b>p.16</b>
1.7 Prevention of Defendants Dissipating or Secreting Assets	p.7	5.1 Methods of Enforcement	p.16
<b>2. Procedures and Trials</b>	<b>p.9</b>	<b>6. Privileges</b>	<b>p.18</b>
2.1 Disclosure of Defendants' Assets	p.9	6.1 Invoking the Privilege against Self-incrimination	p.18
2.2 Preserving Evidence	p.9	6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure	p.18
2.3 Obtaining Disclosure of Documents and Evidence from Third Parties	p.10	<b>7. Special Rules and Laws</b>	<b>p.18</b>
2.4 Procedural Orders	p.11	7.1 Rules for Claiming Punitive or Exemplary Damages	p.18
2.5 Criminal Redress	p.12	7.2 Laws to Protect "Banking Secrecy"	p.19
2.6 Judgment without Trial	p.12	7.3 Crypto-assets	p.19
2.7 Rules for Pleading Fraud	p.12		
2.8 Claims against "Unknown" Fraudsters	p.13		
2.9 Compelling Witnesses to Give Evidence	p.13		

## 1. FRAUD CLAIMS

### 1.1 General Characteristics of Fraud Claims

Fraud claims in Italy can give rise to implications from both a criminal and civil law perspective.

#### Criminal Law

##### *Fraud*

Fraud is regulated by Article 640 of the Italian Criminal Code (hereinafter I.CR.C) as an offence whereby the offender, using trickery or deception, misleads the damaged party, with the aim to procure an unfair advantage to himself/herself or others, together with a detriment to the damaged party.

Fraud requires the offender to misrepresent reality giving the appearance of non-existing circumstances. Typically, the fraudster re-enforces its actions, with astute schemes, manoeuvres and (often) with accompanying documents which have been either counterfeited or created to simulate or conceal this reality, at first, gaining the trust of the victim to then mislead him/her and make him/her fall into a mistake. For the fraud to be criminally relevant it has to cause a reduction in the assets of the victims, or other damage to them.

Victims of fraud claims can also include the government (or governmental entities) and fraud may also target the obtainment of public funds, in which case the conduct of the fraudsters is sanctioned more severely, and claims may be brought directly by public prosecutors.

Among fraud claims in business transactions, particular significance in Italian case law has been given to the concept of “contractual fraud”, where the fraudster, using deceit, misrepresentations and/or otherwise altering real circumstances, induces the victim to enter into a contract that he/she would have never signed otherwise,

thereby obtaining an unfair profit. In such cases, the offence is committed through the initial intention to defraud the victims, regardless of any concrete damages visited on them.

##### *Misappropriation*

Different from fraud, misappropriation (Article 646, I.CR.C.) is regarded as when the offender is not using deception or schemes to defraud the victim, but already has lawful availability of money or assets of the victim (due, for instance, to a valid contract actually in place or due to any commercial relation between the two parties).

In misappropriation claims, the offender takes ownership of money or other mobile assets, even if only for a short period of time and even in cases where the money or assets are later returned to their legitimate owner.

As in fraud claims, when misappropriation involves public servants and officials, the offence is sanctioned more severely, as the statutory provisions are intended to protect both the assets of the victim and the interests of public administration.

##### *Making of corrupt payments*

In transactions involving public servants and officials, corruption practices (eg, bribery) may have an impact on how these transactions are entered into and/or performed. These offences most often fall into one of the following categories:

- corruption where money or another benefit is sought to perform statutory duties or to omit/delay their execution (Articles 318 and 319 of the I.CR.C.), where the public function is systematically leaning towards private interests;
- corruption where the main purpose targeted by the corruptor is to illegitimately facilitate or penalise a party in a civil, criminal or

administrative proceeding (Article 319-quater, I.C.R.C.);

- abuse of power by public servants and officials forcing (Article 317, I.C.R.C.) or inducing (Article 319-quater, I.C.R.C.) someone to unlawfully give or promise money or any other advantage.

### *Corruption within companies' organisations*

While the above provisions govern corruption of public servants and officials, other statutory provisions (Article 2635 of the Italian Civil Code, hereinafter I.C.C.) punish corruption practices within companies' organisations, mainly targeting directors, general managers, statutory auditors and other management functions.

These functions are sanctioned for soliciting or receiving, for the benefit of themselves or others, money or other advantages (or accepting the promise thereof) to perform or omit an act in breach of their company's duties.

Sanctions also apply in the event corruption is not successful and where it remains at the stage of a mere attempt.

### *Conspiracy and criminal association*

When criminal actions are brought by two (or more) persons, all of them are sanctioned for the same offence (please see **1.3 Claims against Parties who Assist or Facilitate Fraudulent Acts**). More severe sanctions are imposed against promoters and organisers, as well as when conspiracy involves more than five individuals (Article 112, I.C.R.C.).

In addition, Article 416 of the I.C.R.C. punishes actions within the scope of promoting, constituting, organising, directing or participating in an association composed of three or more persons, planned for the purpose of committing a certain number of offences, in such a way as to concretely endanger public order.

The punishment of those responsible for the offence of criminal conspiracy is separate and entirely independent from the actual commission of individual offences. In brief, a criminal association is a crime in itself, even if it does not commit any offence to third parties. Sanctions upon promoters, constitutors, organisers or leaders are more severe than those provided for mere participants.

### **Civil and Commercial Law**

Misrepresentations, false statements, trickery and deceit may also have serious consequences from a civil law perspective and, in particular, may negatively affect the contractual undertakings between parties at many stages, from negotiation to performance of an agreement.

Articles 1137, 1175 and 1176 of the I.C.C. impose on any negotiating party the obligation to act fairly and in good faith throughout the negotiation and performance of a contract. As a result, many types of conduct are considered unlawful, triggering civil liability, such as providing incorrect information to the other party.

In addition, if an agreement has been entered into using trickery and deception intended to mislead the other party, under Articles 1439 and 1440 of the I.C.C., the agreement may be cancelled (in case the deceit has been so material that, without it, the other party would not have entered the relevant contract), with the right for the other party to seek compensation for the damages suffered, as well as restitution of any amount paid. If the deceptions were not so material, but still able to impact the terms and conditions of the contract, the agreement remains valid, but the other party may seek damages to restore the contractual balance.

Other provisions protect from misrepresentation in other areas or corporate laws, such as, for instance, misrepresentation in financial

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statements, corporate communications and/or accounting documents, where offences are sanctioned under criminal law.

Additional consequences derive from misappropriation, misrepresentation, disguises and other concealment of assets, as well as dissipation occurring within bankruptcy proceedings, where there is greater need to protect the interests of creditors who may be deprived of resources and guarantees to satisfy their claims.

## 1.2 Causes of Action after Receipt of a Bribe

Under Italian law, bribery constitutes a criminal offence in cases where it involves public servants and officials, as well as in cases where it involves agents of a company (see **1.1 General Characteristics of Fraud Claims**).

Thus, both the offender who has received a bribe as well as the party paying, giving or promising the bribe are subject to the same criminal sanctions, including imprisonment.

In any of these cases, the offender can be prosecuted directly by the State. However, the victim of a bribing scheme may still have an interest in reporting offences to competent authorities, thus facilitating the discovery of the crime as well as allowing the performance of investigation activities aimed at uncovering the offence (and the offenders), and the collection of all relevant evidence. The prompt involvement of public prosecution offices may also facilitate the recovery of sums and/or assets which have been involved in the bribery.

A claimant may also have the right to initiate a civil claim towards the offender (as well as anyone who received the bribe) to recover any damage caused by the latter, under the principles of tort liability of people committing unlawful actions provoking undue damages to others

(Article 2043, I.C.C.). Indemnification may be obtained either by starting civil proceedings, or by asking for indemnification in a criminal trial related to the suffered offence (see **2.5 Criminal Redress**).

In case the offender is an agent of a company, the latter may also bring actions for mismanagement and breach of fiduciary duties, forcing the removal of the offender from the company's organisation as well as entitling the company to recover damages suffered (including reputational damages).

## 1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

According to Article 110 of the I.C.R.C., when several persons take part in the same offence, all of them may be sanctioned for the relevant offence, without distinguishing between author, co-author, instigator, facilitator, etc.

Thus, each co-operator is not only liable for the actions performed by him, but also for those committed by the other parties, if aimed to achieve the agreed purpose.

In the event the commission of an offence is unintentionally facilitated by someone, the latter may be liable for negligent misconduct (occurring in the relevant circumstances) and/or for breach of professional duties.

A typical statutory provision concerning assistance and facilitation of the fraudulent acts of another is established under Article 648 of the I.C.R.C., which punishes (with imprisonment of up to eight years) anyone who, in order to secure a profit for himself or others, acquires, receives or conceals money or assets resulting from any offence. This provision punishes conduct which is not criminal in itself, but that may have criminal relevance if the offender is aware (or has reason to be aware) that money or goods he/she has

acquired, received or concealed derive from a crime.

Similarly, money laundering provisions (Article 648-bis, I.C.R.C.) are intended to prevent co-operation which may help the author of the crime to hide and disguise the unlawful origin of said money, goods and profits.

In the event a civil action is initiated against two or more persons involved in the same offence (see **1.2 Causes of Action after Receipt of a Bribe**), they are deemed as jointly and severally liable to indemnify the claimant (Article 2055, I.C.C.).

### 1.4 Limitation Periods

For criminal actions, in accordance with Article 157 of the I.C.R.C., each crime has its own limitation period depending on the importance of the offence and is determined proportionally to the maximum sanction prescribed by law, with a minimum of six years for the most serious crimes and four years for others. For instance, for generic frauds under Article 640 of the I.C.R.C., whose offenders are subject to imprisonment for up to five years, the limitation period is six years.

For civil actions, Article 2946 of the I.C.C. establishes a general period of limitation of ten years, which starts from the moment in which the relevant right may be exercised. Special limitation periods are established, for instance, for:

- indemnification claims deriving from a tort (five years);
- claims over corporate matters (five years);
- revocatory actions for frauds incurred by creditors (five years).

Statutory limitation periods may be subject to suspension and interruption.

### 1.5 Proprietary Claims against Property

In cases where a claimant seeks the recovery of property misappropriated or induced by fraud to transfer, some remedies are available to retrieve property and/or equivalent sums.

#### Criminal Proceedings

In cases where a person is the victim of a fraudulent act, all those properties and assets which have been used to commit a crime, as well as all those proceeds representing the profit from or the result of the crime, are subject to confiscation (Article 240, I.C.R.C.), so that they can be used to restore the rights of the claimant.

Courts have discretion over confiscation measures, except for some cases where they are mandatory, such as, for instance, when targeting property that represents the converted proceeds of the fraud and/or the telematic and electronic devices used to commit a fraud. In relation to some particular offences (eg, frauds against the State, to obtain public funds, abuse of a weak position of the defrauded, computer fraud, corruption, or within companies' organisations), when it is not possible to directly confiscate assets used for the offence or the relevant proceeds, courts may still order confiscation "per equivalent", targeting other properties of the offender for a corresponding value.

Confiscation is allowed for assets belonging to the offender, to those who have assisted or facilitated the criminal conduct or to those who, despite not being directly involved, have indirectly taken advantage of it.

#### Civil Proceedings

If transfer of ownership is induced through fraud to transfer, the contract is cancellable (Article 1439, I.C.C.) as described in **section 1.1**, and consequently, the offended person may request the restitution of assets unlawfully acquired by

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the fraudster, as well as all the relevant interests, gains and proceeds (Article 2033, I.C.C.).

Similarly, whenever assets are subject to misappropriation, the claimant has the chance to claw back his/her property from the defendant through an action for recovery (Article 948, I.C.C.), aimed to ascertain the ownership of the property and request its restitution.

Where assets have been transferred to a third party, the defendant has to obtain return of the assets directly from that third party, failing which the claimant is entitled to obtain indemnification for an equivalent value, in addition to any other damage suffered.

## **Bona Fide Third Party**

Confiscation and the aforementioned civil actions face certain limitations when clashing with the interests of a bona fide third party.

If the third party is not aware of the origins of the assets, nor of the unlawful conduct of the offender (provided that this unawareness is irreproachable and is not the result of wilful misconduct or gross negligence) and he has not received any indirect advantage from it, the damaged party may not recover the assets from the bona fide third party, nor is it possible to bring claw-back actions or order confiscation against them. This is without prejudice to any other indemnification remedy that the damaged party may have against the offender and to the right to request expropriation or confiscation “per equivalent” of other assets of the offender.

## **1.6 Rules of Pre-action Conduct**

### **Criminal Proceedings**

For fraud claims not directly prosecuted by public officials, the offended party is required to make a complaint against the offender to be filed with a competent public prosecutor office, or any other criminal police authority. A com-

plaint must be made within three months from the date the offended party received notice of the relevant criminal act.

Certain fraud claims of higher relevance can be initiated by the public prosecutor’s office, at its own motion (for instance, frauds against the government, frauds implying considerable damage to the claimant’s property, frauds committed through threats and other offences with a higher degree of danger).

### **Civil Proceedings**

For certain civil claims, as a pre-action rule of conduct, it is necessary to file a preliminary request to access alternative dispute resolution methods to facilitate out-of-court agreements. The two main alternative dispute resolution methods available are (i) mediation before a third-party mediator, and (ii) assisted negotiation with the necessary support of the parties’ attorneys.

## **1.7 Prevention of Defendants Dissipating or Secreting Assets**

To prevent dissipation or secreting of assets, the fraud victim may have recourse to several provisional measures, under both civil and criminal law, which can be granted if two requirements are met:

- *fumus boni iuris* – arising when the substantial likelihood of success of an alleged claim is ascertained, *prima facie*, by the court;
- *periculum in mora* – arising in the presence of a well-founded fear that delays in the issuance of a certain order on the merits will probably jeopardise the claimant’s interests.

### **Criminal Proceedings**

Criminal procedural law provides instruments for an early freezing of assets involved in fraud schemes, where each instrument fulfils a different and specific purpose, as follows.

- Conservative seizure (sequestro conservativo) (Article 316, Italian Criminal Code of Proceedings, hereinafter I.C.R.C.P.) – This aims to prevent the offender disposing of the relevant assets, and avoiding paying sanctions, court fees and any other amounts due as a result of a conviction. It may be ordered by the competent court, following investigations and indictment, on money and assets belonging to the defendant and to other parties which fraudulently received ownership of said assets, as the transfer may be subject to claw-back actions.
- Preventative seizure (sequestro preventivo) (Article 321, I.C.R.C.P.) – This aims to prevent the offender (or other third party) maintaining availability of assets related to the offence, aggravating or prolonging the relevant consequences or facilitating the commission of additional ones. It may be requested even during the preliminary investigation phase, with court approval, and may concern any other asset subject to confiscation (see **1.5 Proprietary Claims against Property**).
- Probationary seizure (sequestro probatorio) (Article 253, I.C.R.C.P.) – This is ordered in relation to the assets related to the offence (including its proceeds) to avoid their concealment or destruction and ensure their availability as evidence in court.

### Civil Proceedings

Similar to the above, civil proceedings provide different types of remedies to freeze assets involved in fraud claims, as detailed as follows.

- Conservative seizure (sequestro conservativo) (Article 2905 of the I.C.C. and Article 671 of the Italian Code of Civil Proceedings (hereinafter I.C.C.P.) – This is requested on movable or immovable assets owned by the debtor, where there is a risk that the latter will be dissipating said assets, affecting the creditors' rights. It may also target assets owned

by third parties acquired by them fraudulently or in bad faith, or assets held by third parties subject to claw-back remedies.

- Judicial seizure (sequestro giudiziario) (Article 760 No 2, I.C.C.P.) – This is requested on books, records, documents and other means from which evidence is purported to be derived, to preserve existing evidence to be used in court.

### Enforcement and Sanctions

To ensure the effectiveness of the freezing order, provisions governing the enforcement of seizures may require that third parties are made aware of the existence of the freezing order (see **5. Enforcement**), for instance:

- for immovable assets, vehicles and other registered assets, through publicity in the relevant public registries;
- for other assets through foreclosure and delivery of notices to third parties having possession of those assets (eg, notice to the bank holding accounts in the name of the offender).

Following these fulfilments, third parties are prevented from purchasing and/or disposing of any of the assets targeted by the conservative measure.

Serious consequences are imposed on the defendant and/or other parties who do not comply with the court's seizure orders, this constituting a crime sanctioned with imprisonment up to one year and a monetary fine (Article 388, I.C.R.C.).

### Cross-Undertaking in Damages

Pursuant to Article 669-undecies, I.C.C.P., with the order granting or confirming a provisional measure, a court may attribute, to the party that made the request, the posting of a bond (cauzione) to the claimant to secure compensation for

any loss the defendant might suffer as a result of improper provisional measures being requested, based on the outcome of the merits. If the bond is not provided, the provisional measure becomes ineffective.

## 2. PROCEDURES AND TRIALS

### 2.1 Disclosure of Defendants' Assets Civil Proceedings

In a civil proceeding, the court may order inspections of places, belongings and persons. Disclosure orders cannot force the recipient to violate professional or state secrets (Article 118, I.C.C.P.). Furthermore, a defendant may be required by the judicial officer to disclose his assets during enforcement proceedings and forced expropriation (see **5. Enforcement**).

In case the debtor does not fulfil the order of further disclosure of assets imposed by the judicial authority, or makes a false statement, he may be sanctioned with imprisonment of two months to two years and a monetary fine.

The claimant may also obtain a disclosure of the debtor's assets through research in public databases, tax registries, archives of financial relationships, records of social security institutions, for the acquisition of all information pertaining to the discovery of assets and claims to be enforced (Article 492-bis, I.C.C.P.), subject to authorisation by the court.

### Criminal Proceedings

Criminal law provides the possibility to acquire documentary evidence to disclose relevant information regarding the defendant (Article 234, I.C.R.C.P.), including digital documents and data stored abroad (Article 234-bis, I.C.R.C.P.). Documents representing the terms and the means of the offence may be acquired regardless of

the person/entity who owns them (Article 235, I.C.R.C.P.).

Evidence may be obtained by several means (ie, inspection, search, seizure, order to disclose secret documents, wiretapping) and can be researched by authorities on third parties' property, as well as by checking databases, documents, mail, information and software.

All these activities and measures are ordered by the judicial authority.

If, as a result of searching, evidence linked to the offence is found, it may be seized. Seizure may be carried out at third parties' premises, such as banks, IT providers, telecommunications companies, etc (Articles 254-bis and 255, I.C.R.C.P.). For instance, the judicial authority may proceed with the seizure from banks of documents, values, sums deposited in current accounts and anything else, even if contained in safety deposit boxes, when it has justified reasons to believe that they are pertinent to the offence, even if not registered in the name of the offender.

### 2.2 Preserving Evidence

Procedures for preserving evidence in circumstances where it is feared that important evidence might be destroyed or suppressed are established both under criminal and civil procedural law.

### Criminal Proceedings

The court may issue provisional measures and in particular probatory seizure (see **1.7 Prevention of Defendants Dissipating or Secretizing Assets**) when it is necessary to preserve evidence in circumstances and where there is a serious and actual fear that it may be destroyed or suppressed (Article 274a, I.C.R.C.P.).

Generally, investigations are conducted by public prosecutor offices and police officials (see **2.4**

**Procedural Orders**). However, the defendant may also, through an attorney, carry out parallel and additional investigations in order to adequately protect the defendant's right to defence (Article 327-bis, I.CR.C.P.), such as researching and requesting access to documents, interviewing persons in possession of relevant information, accessing public and private properties, and with the support of private investigators. In certain instances (eg, when it is necessary to access private properties), the court's authorisation is required.

### Civil Proceedings

When there is a risk that evidence may be lost or dissipated (*periculum in mora*), prior investigation proceedings can be activated, which allow a claimant to obtain the disclosure of evidence that is relevant and likely to be admissible (*fumus boni iuris*) before the start of a trial, on merits.

In such cases, the claimant may resort to one or more of the following remedies:

- Prior examination of witnesses (Article 692, I.C.C.P.), which may be required if there is a well-founded reason that one or more witnesses may not be examined when called in an ordinary trial.
- Prior technical assessment and judicial inspection (Article 696, I.C.C.P.), which may be required if there is an urgency to verify, before the start of a trial, the quality and conditions of assets and places, which would not be the same if evidence assessment was postponed until an ordinary trial starts.

Prior evidentiary proceedings may also be requested after the start of a trial, and these are in addition to the judicial seizure (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**).

### 2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

Together with the measures previously described (see **2.1 Disclosure of Defendants' Assets**), in Italy it is possible to obtain documents and evidence from third parties through disclosure orders, which may be released by courts.

#### Criminal Proceedings

In addition to general measures to disclose evidence (please see **2.2 Preserving Evidence**), additional remedies are granted to secure obtainment of evidence held by professionally qualified parties (such as attorneys, notaries, investigators, etc). These disclosures may include, upon request, acts and documents, data, information and computer programs, and anything else held by such parties by reason of their profession. However, the parties can refuse to fulfil the order if they declare that documents contain confidential information inherent to their profession. Such measures may also be invoked before the commencement of proceedings.

#### Civil Proceedings

Under Italian civil proceedings, the parties have an obligation to support their own cases by producing all the relevant evidence (Article 115, I.C.P.C.). However, a party may face some obstacles in this process in cases where important proof is held by a counterparty or a third party.

To overcome such hurdles, the court may, under Article 210, I.C.P.C. and at the request of a party, order the other party or a third person to disclose a document or any other item or asset deemed essential for the trial. Disclosure orders have the same limitations as established for civil inspection, as discussed in **2.1 Disclosure of Defendants' Assets** (namely, orders must be essential for the discovery of relevant facts, must be carried out without causing a serious prejudice to the involved party or third person, and

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the involved parties cannot be forced to violate professional or state secrets).

When disclosure orders involve a third party, the court may require its direct participation in the trial, where it may file an opposition against the disclosure order.

The court may also require a public authority to provide written information regarding acts and documents held by the public authority itself, which the court considers as necessary to be acquired within the proceeding (Article 213, I.C.P.C.).

## 2.4 Procedural Orders

Despite the due process principle embedded in the Italian Constitution, certain provisions allow for the issuance of special and provisional ex parte measures restricting, in some cases, this principle (albeit temporarily).

### Civil Proceedings

To obtain the measures referred to in **1.7 Prevention of Defendants Dissipating or Secreting Assets** and **2.2 Preserving Evidence** (ie, conservative and judicial seizure), the ordinary procedure requires the filing of an application to the competent courts. This is followed by a summary proceeding, with the participation of both claimant and defendant, at the end of which an order is issued on the provisional measure (Articles 669-sexies, paragraph 1, I.C.C.P.).

However, when there is the need to obtain an immediate order or the participation of the defendant may prejudice the application of these measures, the claimant may request an ex parte order for the issuance of the provisional measure. The court, having ascertained these needs, may immediately issue the order and postpone the debate to a hearing with the defendant, to be held as soon as possible (Articles 669-sexies,

paragraph 2, I.C.C.P.). At the hearing, the court may confirm, reform or revoke the urgent order.

### Criminal Proceedings

All the stages of criminal proceedings are separate, and distinguishing between a pre-trial phase and a trial phase is important – in the former, guarantees to the accused person are attenuated, while in the latter the due process principle must be fully observed.

Investigation is carried out at a pre-trial stage by the public prosecutor and the judicial police, at the end of which the public prosecutor assesses the evidence in his possession and proposes to the judge for preliminary investigation either the indictment of the suspect or the dismissal of the investigation.

Preliminary investigations need to be carried out without any risk of interference by the suspect or third parties who may be detrimental to investigation efforts. For this reason, investigations start without prior notice to the defendant and all the relevant acts are subject to secrecy, until notice of indictment is delivered to the defendant.

In situations requiring the presence of the defendant's attorney (eg, examination of the suspect, inspections, technical assessments, research, seizures), the public prosecutor's office shall notify to the defendant a notice of investigation indicating the alleged charges together with an invitation to exercise the right to appoint a lawyer (Article 369, I.C.R.C.P.).

Furthermore, if a provisional measure is ordered (please see **1.7 Prevention of Defendants Dissipating or Secreting Assets**), its issuance is carried out ex parte, though the suspect targeted with the provisional measure may challenge it by filing a request for review. The request for seizure is presented by the public prosecutor

to the court, which will decide on the existence of the requirements and whether to ultimately approve the measure.

## 2.5 Criminal Redress

A civil action can be exercised by the damaged party directly in a criminal trial, through the establishment of a civil party (Articles 74 et seq, I.C.R.C.P.), or in a civil case and then transferred to the criminal trial.

When a civil action regarding a crime is taken before a civil court, it may be transferred into a criminal proceeding until a judgment on the merits has been pronounced in the civil proceeding, even if it is not final. Conversely, the civil action continues in the civil proceedings if it is not transferred to the criminal proceedings, or if it has started when the incorporation in judgment of a civil party was no longer permitted.

If the victim decides to bring the action in a civil court, this proceeding will be independent of a criminal trial; however the court may still suspend the civil proceeding where another trial is pending, which may affect the outcome of the decision at hand.

The damaged party still has the option to directly act in the criminal proceeding or to initiate an autonomous civil action for obtaining compensation for damages suffered, taking into consideration that the civil proceeding, even if independent and although being subject to a less rigid burden of proof, could in some particular cases be suspended pending the rulings of the criminal court.

In the civil action the damaged party must prove the facts regarding the claims for compensation, whereas in a criminal trial the burden of proof on the elements constituting the offence lies with the public prosecutor, who has extremely effective means of seeking evidence.

It is also worth mentioning that an acquittal sentence in a criminal trial in favour of the defendant also affects the rights of the claimant, as he may be prevented from pursuing his civil claims.

## 2.6 Judgment without Trial

The parties shall have the right – but not the obligation – to take part in a trial. This considered, a judgment without trial may still occur in a trial where the defendant wilfully and knowingly fails to participate, despite being aware of its existence.

In criminal proceedings, if a defendant decides not to appear, the court first has to verify whether he has had actual knowledge of the proceedings against him. Once actual knowledge has been ascertained, the relevant trial continues even without the presence of the defendant, but he/she will continue to be represented by an attorney appointed by the court.

In civil proceedings, if the defendant decides not to take part in a proceeding (after the court has ascertained that he/she has been properly notified of the existence of the proceeding), the latter can continue without his/her participation. The defendant is kept informed about the main events of the proceeding (such as acts containing new claims, counterclaims, court orders and others), and he will have the right to join it at any moment until the hearing for closing arguments is held. If the defendant proves that the claimant's request or its servicing is void and that, consequently, he was not aware of the existence of the trial (Article 294, I.C.C.P.), the court may restore all the defendant's reliefs and deadlines which would otherwise have been forfeited.

## 2.7 Rules for Pleading Fraud

As a general rule, in civil proceedings the claimant (as the party damaged by the fraud) must fulfil the burden of proof and provide the necessary evidence to convince the court to uphold

his pleadings against the defendant. In case the relevant claim, for which an order was executed, turns out to be manifestly ungrounded, or a party acted or resisted in court with bad faith or gross negligence, the same party may be sentenced to pay damages, in addition to court and legal fees (Article 96, paragraphs 1–2, I.C.C.P.).

With regards to criminal proceedings related to fraud, the damaged party must make a complaint providing the public prosecutor and pertinent authorities any relevant detail, evidence and information in his/her possession, in order for them to promptly run investigations and support the indictment. Anyone who makes a claim intentionally accusing someone he knows to be innocent, or who fabricates evidence against them, may be prosecuted for slander (Article 368, I.C.R.C.).

To a certain extent, false and/or ungrounded allegations may also trigger defamation and reputational damages claims.

## **2.8 Claims against “Unknown” Fraudsters**

Under criminal law it is possible to make a complaint against unknown suspects (ie, fraudsters who have not been identified yet), indicating to competent authorities any useful circumstances which may help their identification. Following the report, however, if investigations have not led to a solution within six months, the public prosecutor may ask the court to dismiss the case or to authorise the investigations to continue. Where the fraudsters are still not identified, the charges cannot be pushed forward, and, consequently, no claim can be initiated.

## **2.9 Compelling Witnesses to Give Evidence**

Under both civil and criminal procedural laws, witnessing is a statutory duty. Once properly summoned in writing, witnesses are obliged to

appear, to comply with the instructions given by the judge in relation to the trial and to truthfully answer questions.

If an inconvenience occurs impeding the witnesses’ ability to appear, they must promptly inform the judicial authority or the party who called them, stating the justified reasons for their inability to attend. Where witnesses do not appear at the hearing without any justified reason, the court may order their forced appearance, and may also convict them or force them to pay monetary fines.

Moreover, if witnesses use fraudulent schemes to avoid attendance, they may also be sanctioned with imprisonment, in addition to monetary fines. Any breach of the duty to truthfully answer questions generates consequences of perjury and may be criminally prosecuted.

## **3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS**

### **3.1 Imposing Liability for Fraud on to a Corporate Entity**

#### **Civil Liability**

Corporate entities may be civilly liable for autonomous and unauthorised unlawful acts carried out by their directors and officers in the performance of their duties, especially when the company, directly or indirectly, benefited from those acts.

In fact, according to the principle of “organic identification”, directors and officers acting on behalf of their company carry out their activities as if they were the company itself. Thus, their civil liability towards a damaged claimant extends also to the company they represent.

In these cases, the liability of the company is additional to the liability of the director and officer, giving rise to a source of joint and several liability.

The extension of civil liability from an individual director or officer to the company may be avoided in those cases where it clearly appears that the actions carried out by directors and officers do not fall within the corporate purpose of the entity and are outside the scope of the company's interest.

### **Corporate Criminal Liability (Legislative Decree No 231/2001)**

Criminal liability constitutes an exception to the aforementioned principle, since it has a personal nature and, therefore, directly affects directors and officers, rather than the company itself.

Following the introduction of Legislative Decree No 231/2001, companies and other legal entities are subject to a particular kind of liability (which formally has an administrative nature but acts mostly like criminal liability) for offences carried out by persons having roles of representation and management within the company, as well as officers subject to the supervision or direction of directors and other such individuals.

This liability of the company is autonomous and additional to the personal criminal liability of directors and officers.

To validly claim the existence of corporate criminal liability, it is necessary that the offence is committed “in the interest or to the advantage of the organisation”, while if the offender acts solely and exclusively in the interests or for the advantage of himself or third parties, the organisation is not deemed liable.

The offences triggering liability of a company may include, for instance: offences against

public administration (ie, corruption, bribery), misrepresentation of financial information, tax fraud, money laundering, computer crimes, environmental crimes, etc. To a certain extent, the company can also be held liable if offences are perpetrated outside Italian territory.

If one of these offences is committed by a director or officer, the company itself is sanctioned with monetary fines, disqualification from carrying out certain activities and confiscation of assets.

To avoid liability, the company is required to adopt and actively implement the following:

- a so-called “Organisation, Management and Control Model” (or 231 Model), which is a manual containing principles and procedures to evaluate, monitor, prevent and manage the risk of offences being committed within the corporate organisation;
- a supervisory body, with the duty to evaluate and monitor the observation and implementation of the 231 Model.

### **3.2 Claims against Ultimate Beneficial Owners**

When a company is used as a vehicle for fraud, remedies are still available to the claimant to directly address the individuals culpable of the offence (eg, shadow directors and ultimate beneficial owners), especially for limited liability companies; whereas for partnership-like entities, members remain subject to joint and unlimited liability.

Claims targeting individuals behind the “corporate veil” usually follow a two-tier approach:

- first, actions are brought against the individuals who formally hold roles and functions within the company, such as the actual directors and managing body;

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- secondly, remedies may be sought against shadow directors and ultimate beneficial owners, to the extent evidence is found connecting these individuals to the offence being perpetrated and/or where it is discovered that they gained advantage from the offence carried out by the apparent fraudsters.

Italian case laws impose upon shadow or de facto directors the same liabilities and obligations as upon actual directors, with relevant indemnification obligations towards a company's creditors and other damaged parties, for breach of fiduciary duties.

Similarly, ultimate beneficial owners may be held liable if they actively took part in the offence (or benefited from it) and/or if they were systematically involved in the management of the company, so as to fall within the category of shadow directors.

Article 2086 of the I.C.C., as recently amended, also imposes upon owners and founders the duty to implement an organisational and management system adequate to the nature and size of the business, to detect the onset of an insolvency situation and avoid harm to creditors and other third parties.

### **3.3 Shareholders' Claims against Fraudulent Directors**

Directors are jointly and severally liable towards the company, its shareholders, creditors and other third parties for breach of their fiduciary duties and/or mismanagement.

Rules to bring a claim may vary depending on whether the party actioning the remedy is the company itself or a single shareholder, a creditor or a third party.

For companies limited by shares (Articles 2393 and 2393-bis, I.C.C.), actions brought by the

company against directors shall first be resolved by the shareholders' meeting or, alternatively, may be initiated with a resolution of the supervisory board in charge of ongoing management and accounting control. If the resolution is approved with a majority of one fifth of the share capital, the targeted directors are immediately revoked from their office. The action may be brought by minority shareholders representing at least one fifth of the share capital (or one fortieth in listed companies), or the lower percentage set forth in the by-laws.

Similar remedies are provided for limited liability companies (Article 2476, I.C.C.), where actions may be promoted by each quotaholder in the interest of the company (therefore, there is no need for a majority vote in the quotaholders' meeting), with the possibility to request removal of the involved directors as a provisional measure.

In addition to this, claims against directors may be brought by creditors if the company's assets have been depleted and are not sufficient to satisfy their claims. Single shareholders and/or any third party also have the right to initiate an action to recover any direct damage that they suffered (it being different from the harm suffered by the company itself) as a result of directors' mismanagement and fraudulent conduct.

## **4. OVERSEAS PARTIES IN FRAUD CLAIMS**

### **4.1 Joining Overseas Parties to Fraud Claims**

#### **Criminal Law**

Italian jurisdiction relies on the principle of territoriality, whereby a crime committed on Italian soil is punishable under Italian laws.

A crime is deemed to be committed on Italian soil even if just a part of the criminal conduct has taken place in Italy, or if the relevant events or effects have happened, in whole or in part, in Italy (so, for instance, Italian courts have jurisdiction over international informatic frauds if the offence, committed abroad by a foreigner, has produced its effects in Italy).

In addition, to a certain extent special provisions regulate jurisdiction of Italian courts for offences committed abroad (eg, offences against Italian states, offences committed by public officials, offences committed abroad by an Italian citizen if the offender is located in Italy, offences committed abroad by a foreigner causing harm to the Italian State or Italian entities).

In addition, Italy has implemented European Union legal provisions on criminal judicial cooperation and introduced new instruments, principles and regulations concerning: mutual assistance in criminal matters between member states; conventions on extradition between member states; the institution of a European judicial network on criminal matters; the implementation of a European arrest warrant and of the European investigation order; the mutual recognition of pre-trial supervision measures; the mutual recognition of freezing orders and confiscation orders.

### Civil Law

As a general rule, Italian courts have jurisdiction over civil claims whenever the defendant is domiciled in Italy, or if they have a representative in Italy (Article 3, L 218/1995).

The parties may also conventionally decide to attribute jurisdiction to Italian courts, for example, in the case of actions based on contractual liability (Article 4, L 218/1995).

From a European perspective, Regulation 1215/2012 (Brussels I-bis), fully applicable in Italy, establishes jurisdiction between member states, as well as provides for mutual recognition and enforcement of judgments on civil and commercial matters.

Regulation 1215/2012, while confirming the jurisdiction of the country where the defendant is domiciled, is capable of attracting to Italian jurisdiction some particular matters related to international fraud claims, such as:

- for matters relating to a contract, if the relative obligation had to be performed in Italy (and particularly, if the services under the contract were provided or should have been provided in Italy);
- for matters relating to tort, when the harmful event has occurred or may occur in Italy;
- with reference to civil claims for damages or restitutions representing the result of criminal proceedings, if these proceedings have taken place in Italy;
- the enforcement in Italy of decisions taken by courts of another member state or the seeking of relevant provisional and protective measures in Italy.

## 5. ENFORCEMENT

### 5.1 Methods of Enforcement

#### Enforcement of Criminal Sanctions (Articles 656 et seq, I.CR.C.P.)

Criminal enforcement may occur only after a judgment becomes final (Article 650, I.CR.C.P.). Prior to the final decision on the merits, preventative measures may still be requested and authorised to partially anticipate the effects of the enforcement.

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Enforcement depends on the type of sanction that has been imposed by a judgment, in particular those listed here.

- **Custodial measures:** custodial sentences are enforced with the detention order issued by the public prosecutor. For custodial sentences requiring detention for a period of less than three years, the detention order is issued together with a suspension decree, allowing the offender to benefit from milder sanctions (ie, house arrest, surveillance, etc). A person convicted by detention may also request the conditional suspension of the sanction, if its duration does not exceed two years and if the convicted person has not already been sentenced by a custodial measure. For fraud claims, the conditional suspension lasts for five years, during which the offender is subject to probation. At the end of the suspension the crime is extinguished.
- **Monetary measures:** in addition to or alternatively to custodial measures, enforcement may also imply the payment of monetary fines proportionate to the committed offence. Any failure to pay will determine an automatic conversion into detention.
- **Ancillary sanctions:** courts may also impose ancillary sanctions, which may have a serious impact on the convicted from a personal, professional and reputational point of view, ie, a travel ban, and disqualification from holding public offices or executive offices of legal entities. Sanctions will also remain on the criminal records of the offender.

## Enforcement of Civil Decisions and Expropriation of Assets

Before starting enforcement, the claimant must obtain an enforceable order (ie, judgments, injunctions and other orders issued by the court) to be served to the debtor, together with a writ of execution, requiring obligations to be performed. Following receipt of notice, the debtor has ten

days to fulfil their obligation under the order, failing which, enforcement procedures can follow.

During enforcement, the claimant is supported by a judicial officer who carries out all the relevant enforcement activities by using a wide range of powers, including resorting to law enforcement officials.

The enforcement procedure mostly sought-after in fraud claims, and more generally, in monetary claims, is the expropriation of assets.

Expropriation is initiated with a foreclosure (please see **2.1 Disclosure of Defendants' Assets**), which takes different forms (which can also be accumulated) depending on the targeted assets:

- movable assets or money in possession of the debtor;
- movable assets or money of the debtor in possession of third parties;
- immovable assets.

For movable assets, foreclosures consist of an injunction addressed to the debtor whereby they are warned not to dispose of any of the foreclosed assets, together with their proceeds. A custodian may also be appointed to protect the assets throughout the expropriation process.

When movable assets or money of the debtor are held by third parties (eg, money in bank accounts, investment accounts, salaries and wages due from an employer), a notice is addressed to the third parties whereby they are warned not to transfer, dispose and/or return any of those assets, and are also required to declare the exact amount of any assets/money owed and in their possession.

For immovable assets, foreclosure is enforced through filing and registration in the relevant land

registry, so that the existence of the lien can be opposed to any third party.

Once assets have been frozen through foreclosure, the final steps of the enforcement process are aimed to ensure that the assets are sold or assigned. The sale of assets may take place by auction or without auction, and in the presence of intervening creditors; the distribution of the proceeds or the assignment of the assets is carried out following the implementation of a distribution plan.

## 6. PRIVILEGES

### 6.1 Invoking the Privilege against Self-incrimination

In criminal proceedings the defendant may invoke a “right to silence”, by means of which he can refuse to provide information to investigators, to public prosecutors and to courts; and he is not obliged to tell the truth either. Opting for silence may often prove inconvenient, as it can be interpreted and evaluated as evidence of guilt. In pre-trial examinations, the suspect only has the obligation to identify himself, whereas in the event of a trial the defendant is examined and cross-examined only if he so requests or expresses his consent.

Differently from criminal proceedings, in civil proceedings parties cannot take advantage of the right to silence or take the role of witness, being directly involved in the proceeding. However, parties may be subject to formal interrogation based on specific and separate questions predetermined by the counterparty in the relative requests for evidence. Questions are addressed directly by the judge, either freely or based on those requests formulated by the parties in a detailed manner – and admitted by the judge beforehand. This interrogation can also be aimed at obtaining the judicial confession of

facts unfavourable to the party to whom he is referred. If a party does not appear or refuses to answer questions without any justified reason, the court may deem the allegations confirmed.

### 6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

Lawyers must maintain the utmost confidentiality about professional activity carried out in favour of their client, as well as about information they become aware of in connection with their office.

Only limited exemptions are provided to this principle, such as in those circumstances where it is necessary to prevent the commission of particularly serious offences. Nevertheless, any authorised disclosure needs to be proportionate to the envisaged purpose.

In criminal proceedings, wiretapping of attorney-client conversations is prohibited. The seizure of any correspondence between the client and the attorney is also forbidden, unless the court has a well-founded reason to believe that it constitutes the product or the result of the crime (Article 103, I.CR.C.P.).

## 7. SPECIAL RULES AND LAWS

### 7.1 Rules for Claiming Punitive or Exemplary Damages

Punitive damages are not expressly regulated in the Italian legal system.

Nevertheless, in recent years, the Italian Supreme Court has eventually acknowledged the applicability, in some cases, of punitive damages, as they are deemed “not incompatible with Italian public policy” (Supreme Court, Plenary Session, No 16601/2017).

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As a result, foreign judgments ordering punitive damages may be acknowledged and enforced in Italy. However, there are certain conditions to be met: the punitive damages imposed by the foreign judgment must be explicitly foreseen by the law of the “country of origin”, and must also be foreseeable in their amount.

A prelude to this conclusion can be seen in other specific matters not strictly related to fraud matters, where Italian laws provide monetary fines in a measure not corresponding to the harm suffered by the damaged party, such as with infringement of patents and trademarks, environmental damages, or compensation for damages, even ex officio, for procedural liability where it appears that a party has acted or resisted in court recklessly with bad faith or gross negligence (Article 96, paragraph 3, I.C.C.P.).

## 7.2 Laws to Protect “Banking Secrecy”

The Italian legal system lacks an explicit legislative provision on banking secrecy. However, there are rules which, although not directly aimed at guaranteeing this secrecy, expand the protection of customers towards financial operators by imposing a general obligation of correctness in the performance of legal relationships and an obligation of guaranteeing the confidentiality of data known by banks in relations with actual or potential customers.

Case law is now consolidated in the belief that the choices of courts and legislators, if oriented in favour of the protection of confidentiality of certain data held by banks and financial institutions, cannot constitute an obstacle to ascertaining the correct payment of taxes and to the enforcement of other primary requirements, such as those connected to the administration of justice and the persecution of crimes.

Thus, banking details may be disclosed for several reasons, ie, in order to verify income and the consequent correct payment of taxes, or to investigate the possible commission of offences. Even in civil enforcement procedures (please see **2.1 Disclosure of Defendants’ Assets**) the claimant may obtain disclosure of information regarding any financial relationship between the debtor and banks.

## 7.3 Crypto-assets

Crypto-assets are not an official legal tender, nevertheless they may be used as a method of payment for purchasing goods and services if the seller accepts them.

Both Italian and European legislators are trying to fill the regulatory gap by defining crypto-assets and imposing relevant limits. For example, in 2017 the Italian Ministry of Economics and Finance (MEF) included service providers related to virtual currency among the recipients of anti-money laundering obligations; while in 2022 the Cryptocurrency Registry was established, by which transaction data must be transmitted quarterly to the MEF. Additionally, in 2018 the European Parliament formally recognised crypto-assets and imposed mandatory checks on customers by digital wallet service providers, in order to end anonymity (Directive 2018/843).

Prevailing jurisprudence admits: (i) probationary seizure, performed by digitally extracting evidence of relevant transactions; (ii) preventative seizure, performed either by seizing the agent’s hardware, files or the informatic data held by service providers in which assets are located. In addition, criminal provisions punishing the transfer and usage of money or assets deriving from a crime (ie, money laundering) are systematically applied to crypto-assets, even when they are used to hide, thanks to their anonymity, the illegal origin of funds.

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**LAWP – Studio legale e tributario** is a law and tax firm with over 20 years of providing assistance in corporate and commercial transactions (including M&A, financing, joint ventures) as well as in tax matters, to both private and corporate clients. It successfully operates in civil, commercial and tax law by pooling the expertise of lawyers and chartered accountants. LAWP professionals are particularly appreciated in the handling of complex issues requiring diverse skills and innovative solutions and assist national and international clients in connection

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