

## RECOVERING YOUR LOSSES FROM A FRAUDSTER POST-COVID 19: HOW NOT TO THROW GOOD MONEY AFTER BAD KEY TAKEAWAYS FROM THE WEBINAR



**Steven Philippsohn**  
Fraud-Litigation Partner  
Asserson



**Baruch Baigel**  
Head of International Arbitration  
Asserson



**Andrew Wordsworth**  
Investigator  
Raedas



**Susan Dunn**  
Co-Founder  
Harbour Litigation Funding

Recent events have increased the possibility of fraud as a result of COVID-19 and the ensuing economic recession. Similar recessions in the past have resulted in fraud claims being pursued – both because economic pressures result in fraud being committed in an attempt to avoid insolvency/recover losses and because frauds are more likely to be revealed in times of recession as opposed to economic prosperity.

*There are a number of ways to help a fraud victim recover funds.*

### Using litigation to combat fraudsters: How can the courts help?

First of all, it is important to mention that despite the caseload courts are faced with on a daily basis, and the change in the working environment of the judiciary due to COVID-19, the system works. The English courts have succeeded in dealing with cases, particularly urgent applications in a timely manner. Various examples were provided by the Courts rejecting delaying strategies and making Court Orders at short notice.

The courts can assist in tracing the whereabouts of assets in several ways, including disclosure, search orders and the ability to cross-examine. Recently, the Courts have demonstrated their ability to combat the increase in cyber fraud by making disclosure and freezing orders even where the identity of those concerned are unknown.

*Key points to consider:*

#### 1. Choose your target wisely

The paramount consideration must always be to recover losses. One should therefore investigate the possibility of bringing claims not only against the Fraudster but also against those who may have assisted in the fraud (such as an Insurance Company which provided cover in respect of losses caused by Fraud).

#### 2. Time is of the essence

Urgent action is crucial in fraud cases. If the fraudster suspects a claim he is likely to transfer his assets in an attempt to prevent enforcement.

#### 3. Think global

Fraud cases very often have a cross-border element. It is crucial to adopt a global approach and to be in close contact with lawyers from the relevant jurisdiction.

#### 4. Assess the claim carefully with the following considerations

- What are the realistic prospects of financial recovery?
- Will robust action, even if not financially rewarding, persuade the fraudster not to make further attempts? This is particularly relevant for cases of cyber fraud.
- Has the victim's reputation been damaged by the fraud? If so, they may wish, or indeed be obliged to, take steps to attempt to recover their losses.

### Can arbitration help in fighting fraudsters?

- While litigation is the most well-known way of recovering assets, one can also turn to arbitration. All arbitration institutions have in fact seen a rise in the number of fraud-related matters.
- Two key considerations in international fraud cases:
  - » Some jurisdictions do not allow arbitration for fraud cases.
  - » The arbitrator cannot make binding orders against third parties.

Perceptions of Arbitration	Actual reality of Arbitration
The first formal step in an arbitration is the service of a <b>notice</b> or request for arbitration to the other side. This can be problematic because the fraudster is likely to fritter away their assets very quickly.	Arbitration and the court system are closely linked. Most arbitral laws and institutional rules allow for parties to seek <b>emergency and ex parte relief</b> from the Court <b>before an arbitrator is appointed</b> . This, therefore, makes it <b>unnecessary to wait and to give the other side notice</b> .
It takes <b>time</b> to appoint an arbitrator/panel of arbitrators.	The English Courts frequently grant <b>worldwide freezing injunctions</b> in support of international arbitrations. They are also able to <b>appoint receivers to hold assets</b> until the outcome of a claim, thereby ensuring <b>that the claimant “holds the ring”</b> before the arbitration even commences. There are specific caveats to this and claimants should seek the advice of a specialist in this field.
Arbitration <b>lacks the necessary procedural and disciplinary tools</b> to uncover the true factual position in a dispute.	Arbitrators are increasingly concerned about awards being overturned by subsequent findings of fraud at the enforcement stage. Accordingly, there is a global trend for <b>arbitrators to take a more pro-active approach</b> to uncover fraud during the arbitration process.  A task force of arbitration practitioners under the auspices of <b>the International Chamber of Commerce</b> are working on a paper which will set out global trends and <b>suggested guidelines for arbitrators</b> in fraud/corruption cases.
<b>Arbitration is less expensive</b> than litigation	In practice, the costs of arbitration, end up being <b>comparable</b> with the costs of commercial court litigation.

### How can third party funding can help fraud victims to bring a claim?

It is very difficult to predict the outcome of litigation with any certainty. Most funders will consider cases where they consider the funded party is more likely than not to succeed in their claim. Often, before funders will decide to fund a case, an investigator will be asked to locate the assets and make sure they have not been dissipated.

*Third-party funders look at four aspects when deciding whether to fund a specific case:*

1. What **fraudster’s assets** exist and where they are located. Without some knowledge of the assets, no funder will agree to fund the case
2. What is the realistic minimum **value of the claim**?
3. **How much funding** will need to be provided (include all own side solicitors’ costs, counsel fees, experts’ costs, arbitration expenses and adverse costs/cross-undertaking provision?)
4. What are the **strengths and weaknesses** of the legal merits of the case?

»

*Engaging an investigator:*

An investigator’s role is essential to evidence wrongdoing. This is achieved through open-source and public database research, in-depth interviews and surveillance methods. The information they provide to lawyers has to be admissible in court as evidence, and so is gathered by legal and legitimate means. Investigators also advise on pressure or PR strategies.

Solicitors should engage an investigator at the moment of crisis, as they are vital in understanding two key questions: has your client been defrauded; are there any accessible funds.

Investigators are often engaged by lawyers at three stages:

1. **Pre-litigation**, to establish if a fraud has occurred.
2. When seeking **seed-funding** from third party funders, to establish the likelihood of funds recovery by establishing if the assets still exist.
3. When establishing the **location of assets** as part of a full-blown dispute.

### When should you call an investigator and what does an investigator do?

- Often, before funders decide to fund a case an investigator will be asked to locate the assets and make sure they have not been dissipated.
- Investigators work closely with the fraud victim, their lawyers and funders and will do thorough public record searches and conduct an interview of people with knowledge of the case and assets to find the relevant funds.