



# Navigating Fraud & Tracing Assets in International Arbitration



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# Navigating Fraud and Tracing Assets in International Arbitration

Recovery of the resulting award is the main target of international arbitration; however, securing a favorable award is merely the first step in pursuing justice. The challenge often begins post-ruling, as the enforcement of these awards can become complex, especially when it involves tracing and recovering assets that have been lost due to fraud or other causes, or are dispersed across global jurisdictions. Such efforts require not only skill and judgment but also rapid thought and action, coupled with deep legal intelligence. To mitigate the risk of a futile arbitration process, it is essential to engage an asset-tracing firm at the early stages of the arbitration.

This essay explores the critical role of asset tracing in international arbitration, where skilled professionals utilize a combination of legal expertise and investigative skills to uncover concealed assets and ensure that justice is not only served but also achieved.

## **1- Bankruptcy and Creditors' Rights :**

Often, a counterparty may declare bankruptcy before an arbitration award is rendered or during its enforcement. In such cases, to satisfy debts owed to all creditors, assets may need to be liquidated. Taking into consideration that the enforcing party lacks reliable or up-to-date information about these assets. The likelihood of the successful enforcement of the award and the recovery of the full amount owed by the losing party will depend on several factors, including the priority of creditors' claims, the timing of the registration of those claims, and the available assets for distribution among creditors.

## **2- Dissolution and Transfer of Assets :**

If the losing party is dissolved before the award is enforced, and its assets are transferred to a new legal entity, enforcing the award at a later stage against this new entity becomes challenging. The assets are no longer in the possession of the original party involved in the arbitration at the time of the enforcement of the award. In this scenario, the enforcing party shall initiate separate legal proceedings against the new entity and may need to request the seizure of assets under third-party possession.

## **3- Fraud and Money Laundering :**

In complex commercial fraud matters, money laundering is often a significant factor, as fraudsters attempt to place assets beyond the reach of recovery efforts. They will try to ensure those funds or assets are out of reach of anyone who may be looking to retrieve them. This is where the law of asset tracing plays a vital role. Fraudsters tend to be sophisticated in hiding and moving assets, often through different forms, and without regard for borders, often through multiple jurisdictions to mask their trail. Unless action is taken early to lock down those assets, there may not be anything to fight about through litigation.

Assets obtained by fraud may have been transferred across international borders. In such cases, tracing, identifying, and freezing these assets to ensure their return to the rightful owner may require experience in various countries' legal systems, expertise in coordinating a multinational case, and knowledge of how best to manage and schedule proceedings from country to country.





#### **4- State Immunity :**

When the losing party is a state that benefits from sovereign immunity, the protection of the State's commercial assets depends on the local laws of the country where the state's assets are located. In order to evade the payment of the arbitral awards, some states conceal their commercial assets that do not fall under sovereign immunity through state-owned companies, creating significant challenges when it comes to enforcing the award against these entities, as they are recognized as legal entities distinct from the state.

In the case where the losing party is a sovereign entity, the prevailing party might attempt to demonstrate that the state-owned entity is under "extensive control" by the state, to target its commercial assets for recovery. The success of this approach depends on several factors, such as the level of economic control the government exercises, whether the profits of the state-owned entity are returned to the government and the extent of involvement of the state officials in the management of the state-owned entity.

### **Strategic Asset Tracing in International Arbitration**

Asset tracing is an essential tool to overcome the challenges facing award enforcement. It enables early detection of asset origins before an entity's dissolution, to facilitate the enforcing party to file for seizure and secure its rights. However, it is necessary to promptly assign a tracing firm at the early stages of the arbitration. The asset tracing firm's main duties shall include the examination of financial records, transactions, and any other documents concerning the counterparty. To maximize the chances of obtaining enforcement of the arbitral award, it is important for the prevailing party to adopt a mechanism of reducing the risk of an unenforceable arbitration award that cannot be subsequently enforced against the debtor. This can be achieved by developing an enforcement plan alongside some key strategies as follows:

#### **1- Pre-contractual Asset Investigation:**

Initiate an informal investigation into the opposing party's assets before finalizing any contract. It is highly important because once the opposing party becomes aware of the risk of potential liability for damages, it might begin restructuring the ownership of its assets to avoid paying the damage amount. The opposing party may dissolve the entity, create a new one, and transfer the ownership of the assets to the new entity. Early localization and iden-

tification of the opposite party's assets can help in requesting emergency interim measures to prevent assets from dissipating and check the financial stability of the opposing party. This includes conducting basic research through press and public registers, and also verifying if the opposing party enjoys any form of immunity, especially in cases involving states, central banks, diplomats, consuls, and international organizations.

#### **2- Early Engagement of Tracing Firms:**

It is essential to select an asset tracing firm at early stages and according to definite needs. If the opposite party's assets are located in different countries, appointing an asset-tracing firm with international exposure and capabilities becomes crucial. Directing the assigned assets tracing firm with accurate already gathered information and detailed instructions is highly important for effective coordination throughout the entire process to ensure compliance with legal standards and avoid civil or criminal liability associated with the use of unlawful methods for information gathering. Acting swiftly is key to identifying the whereabouts of the misappropriated funds and reducing the risk of their dissipation. Being the first to take legal action to secure and lock the assets is a big indicator of the success of the award enforcement.

#### **3- Bank Trust Orders :**

Utilizing bank trust orders enables the enforcing party to trace funds through bank accounts. They are considered an effective method of policing any potential freezing injunction. Bank orders can compel banks to turn over all relevant documents, such as account balances, cheques, payment slips, and records of any money transfers. Obtaining Bank orders requires a decision from the court. In scenarios marked by clear signs of fraud, securing these orders might be straightforward. Conversely, in more complex cases, the party needs a legal team that can make robust representations and convince the court that such an order will be of genuine assistance in locating or preserving assets that are the subject of a claim. The applicant for the bank trust order shall disclose whether the alleged fraud is subject to any ongoing internal or criminal investigations. Notably, if the applicant has narrowed the scope of their request down to specific bank accounts and/or defined a certain period, the court's decision to grant a bank trust order is more likely to happen, thereby minimizing the chances for asset dissipation.



Passport order requests should also be included in the assets tracing plan, especially when there is evidence that the losing party may leave the country to avoid enforcement proceedings. This legal action consists of requesting the losing party to surrender their passports and travel documentation. If a passport order is guaranteed, it pressures the losing party to settle the claimed amounts to regain their freedom, essential in cases of fraud where the distance from the proceeds can hinder recovery efforts. Therefore, requesting a passport order or travel ban promptly is favorable in such cases taking into consideration that perpetrators are looking to stay one step ahead of those looking to recover what they have lost due to fraud. The main challenge is to trace and/or follow the assets.

The distinction between tracing and following an asset is crucial in legal proceedings. “Following” an asset means investigating to see where that particular asset ends up, while “Tracing” an asset requires investigating and identifying the historical changes and transactions of the asset about where and how the original asset has been sold, traded, or exchanged for another asset, to locate its value, even if it has been transformed or substituted.

As per the Financial Action Task Force (FATF) report, Qatar's Financial Intelligence Unit (QFIU) is well-equipped but underutilizes its sophisticated analytical capabilities. The Qatari Anti Money Laundering (AML) framework has yet to be fully tested in court. To enhance Qatar's anti-money laundering and counter-terrorism financing (AML/CTF) measures, FATF has recommended the following improvements:

Providing in-depth training to Qatar's law enforcement agencies on investigating and prosecuting money laundering and terrorist financing offenses. This training should cover, for example, the scope of predicate offenses, investigation techniques, and familiarization with the use of information technology.

Introducing enhanced due diligence requirements for higher risk categories of customers, business relationships, or transactions.

Ensuring that financial institutions have appropriate risk management systems to determine whether a customer is a politically exposed person, including obtaining senior management approval for establishing business relationships with such customers, taking reasonable measures to establish the source of wealth and source of funds, and conducting enhanced ongoing monitoring of the business relationship.

Pursuing confiscations as a matter of course in the criminal justice framework and developing more specific policy objectives in relation to a recovery strategy, including asset seizure and confiscation targets.





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## A Qatari law firm with a regional reach and a global outlook

Over the course of its twenty-year history, Al Sulaiti Law Firm has built a reputation as one of Qatar's most prominent and reputable firms. As a result of our broad range of experience, our clients benefit from not only the geographical and substantive diversity of our work, but also the broad range of industries we serve. Providing a wide range of services from simple legal services to more complex, multijurisdictional matters, we are dedicated to protecting and serving the interests of our clients.

Al Sulaiti Law Firm prides itself on having one of the largest litigation and dispute resolution departments in Qatar. Our industry expertise includes but is not limited to: Civil Litigation, Criminal Litigation, ADR, Construction, Energy, Corporate, Intellectual Property, Sports, Media and Telecommunications, Employment, Banking and Finance and Tax. We handle a range of high-value and complex disputes representing high end and prominent clients, one of our primary objectives is to resolve our clients' disputes in a timely and efficient manner with as little disruption to their business as possible. In addition to the benefits and cost efficiency of our services, we provide tailored advice to meet the requirements and challenges of each of our clients. We ensure that the right team is involved to offer reliable insights and advice. Our firm understands that the importance of a good relationship based on trust cannot be overstated for a successful outcome.

Our diverse, multilingual, multicultural, and qualified lawyers are able to bridge linguistic and cultural differences between clients and their legal needs. The team consists of lawyers and consultants from Qatar, Egypt, France, Italy, and the United Kingdom. We offer our services in French, English, Arabic, and Italian and are therefore able to provide a level of service that exceeds local expectations. Our business involves becoming intimately familiar with the markets, industries, and organizations of our clients. This level of knowledge and understanding enables us to work through a solution-oriented approach, we strive to provide excellent customer service. Due to our highly experienced, innovative team of attorneys who adhere to the highest standards of professional integrity, we are able to provide the highest level of legal services.







## OUR VALUES

Maintain a high standard of excellence in providing high quality client service.

Invest in the development of long-term, trusting relationships with colleagues as well as clients.

Keep integrity, professionalism, cooperate as a team, and uphold the reputation of the firm.

Respect the rule of law, one another, support one another, and embrace diversity.



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