

Asset Recovery

Contributing editors

Jonathan Tickner, Sarah Gabriel and Hannah Laming



2018

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Asset Recovery 2018

Contributing editors

Jonathan Tickner, Sarah Gabriel and Hannah Laming
Peters & Peters Solicitors LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2017
No photocopying without a CLA licence.
First published 2012
Sixth edition
ISSN 2051-0489

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between August and September 2017. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global overview	5	Kazakhstan	80
Jonathan Tickner, Sarah Gabriel and Hannah Laming Peters & Peters Solicitors LLP		Yerzhan Manasov and Ratmir Abdrashitov Linkage & Mind LLP	
Australia	9	Korea	87
Tobin Meagher, Andrew Moore and Alice Zheng Clayton Utz		Michael S Kim, Robin J Baik and S Nathan Park Kobre & Kim Yoon-Hee Kim and Jae Hwan Lee Shin & Kim	
Bermuda	16	Liechtenstein	93
Kevin Taylor, Nicole Tovey and Kai Musson Taylors (in association with Walkers)		Thomas Nigg and Eva-Maria Rhomberg Gasser Partner Attorneys at Law	
British Virgin Islands	21	Monaco	99
Tim Prudhoe and Alexander Heylin Kobre & Kim		Donald Manasse Donald Manasse Law Offices	
Canada	28	Nigeria	105
Maureen Ward and Nathan Shaheen Bennett Jones LLP		Babajide O Ogundipe and Cyprian Nonso Egbuna Sofunde, Osakwe, Ogundipe & Belgore	
Cayman Islands	35	Qatar	110
Jalil Asif QC, James Corbett QC and Pamela Mitchell Kobre & Kim		Fouad El Haddad Lalive in Qatar	
Cyprus	41	Serbia	114
Andreas Erotocritou and Antreas Koualis AG Erotocritou LLC		Tomislav Šunjka Law Office of Tomislav Šunjka	
Greece	48	Switzerland	121
Ilias G Anagnostopoulos and Alexandros D Tsagkalidis Anagnostopoulos		Marc Henzelin, Sandrine Giroud and Maria Vinogradova Lalive	
Hong Kong	54	United Arab Emirates	129
Nick Gall and Ashima Sood Gall		Ibtissem Lassoued Al Tamimi & Company	
Ireland	60	United Kingdom	134
Gavin Smith and William Greensmyth Walkers		Jonathan Tickner, Sarah Gabriel and Hannah Laming Peters & Peters Solicitors LLP	
Italy	65	United States	144
Roberto Pisano, Valeria Acca and Chiara Cimino Studio Legale Pisano		Carrie A Tendler, Jef Klazen and Michael A Sanfilippo Kobre & Kim	
Jersey	74		
Simon Thomas and William Redgrave Baker & Partners			

Switzerland

Marc Henzelin, Sandrine Giroud and Maria Vinogradova

Lalive

Civil asset recovery

1 Legislation

What are the key pieces of legislation in your jurisdiction to consider in a private investigation?

There is no specific Swiss legislation regulating private investigation. Certain cantons (eg, Geneva, Neuchâtel and Thurgau) have enacted specific cantonal regulations regarding private investigators.

The general rules regarding the gathering of information and evidence can be found in the Swiss Code of Civil Procedure (SCCP). There is no discovery process under Swiss civil procedural law. Additional rules pertaining to asset recovery can be found in the following statutes:

- the Swiss Code of Criminal Procedure (SCCrP);
- the Swiss Code of Obligations (CO);
- the Swiss Civil Code (CC);
- the Swiss Criminal Code (SCC);
- the Swiss Debt Enforcement and Bankruptcy Act (DEBA);
- the Swiss Federal Act on Banks and Saving Banks (Banks Act);
- the Swiss Data Protection Act;
- the Swiss Act on Freedom of Information in the Administration;
- the Swiss Private International Law Act (PILA); and
- the Federal Act on the Freezing and Restitution of Assets of Politically Exposed Persons Obtained by Unlawful Means (FIAA).

2 Parallel proceedings

Is there any restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter?

Civil proceedings can be conducted in parallel with, in advance of, or within criminal proceedings. Swiss law provides for several procedural means by which civil and criminal proceedings can be coordinated. For example, civil courts can suspend or stay proceedings, if appropriate (article 126 of the SCCP). The proceedings may be stayed in particular if the decision depends on the outcome of other proceedings such as criminal proceedings. In practice, only in limited cases will the existence of parallel criminal proceedings be sufficient grounds to stay civil proceedings. Indeed, the two proceedings are subject to different sets of rules, and findings made in the context of criminal proceedings cannot be incorporated as such without reservation in civil proceedings. Civil and criminal proceedings can also be coordinated by granting victims of criminal offences the right to bring civil claims as private claimants in criminal proceedings (article 122 of the SCCrP).

3 Forum

In which court should proceedings be brought?

Civil proceedings are generally brought before cantonal civil courts. In certain cases, however, civil claims can also be brought before the competent criminal authority for proceedings concerning the same subject matter (article 122 of the SCCrP) (see question 2).

As a rule, ordinary civil proceedings should be brought before the courts at the defendant's domicile (natural person), or seat (legal person) (article 10 of the SCCP). Swiss civil procedural rules also set forth special venues depending on the subject matter of the dispute (eg, family law, employment law, inheritance law, property law, contract law,

torts, company law), the existence of other relevant connections (eg, place of business establishment), as well as the nature of the claims or parties involved (eg, counterclaims or third-party claims). In particular, for contractual matters, a claim can be filed before the courts either at the domicile or registered office of the defendant or at the place where the characteristic performance must be rendered (article 31 et seq of the SCCP).

As to interim measures, unless the law provides otherwise, they can be ordered either by the court that has jurisdiction to decide the main action or the court found at the place where the measure is to be enforced (article 13 of the SCCP). The same is also provided in the context of international proceedings (article 10 of the PILA). As to attachment proceedings in support of a monetary claim, they are regulated specifically by the DEBA (see question 10).

4 Limitation

What are the time limits for starting civil court proceedings?

The initiation of civil proceedings is limited by the statute of limitation applicable to the underlying claim. However, there is no procedural statute of limitation limiting civil court proceedings as such.

As a rule, claims that arise out of a breach of contract become time-barred after 10 years unless otherwise provided by law (article 127 of the CO). Some specific contractual claims become time-barred after five years such as claims for rent, interest on capital and all other periodic payments, claims in connection with delivery of foodstuffs, as well as claims in connection with work carried out by tradesmen and craftsmen, purchases of retail goods, medical treatment, professional services provided by advocates, solicitors, legal representatives and notaries, and work performed by employees for their employers (article 128 of the CO). A few contractual claims become time-barred after one year such as a customer's claims for defects in a contract for work (article 371(1) of the CO).

In general, the limitation period commences as soon as the debt is due (article 130 of the CO). The limitation period is interrupted if the debtor acknowledges the claim and, in particular, if the debtor makes interest payments or partial payments or if debt enforcement proceedings are initiated by the creditor (article 135 of the CO). The effect of such interruption is that a new limitation period commences as of the date of the interruption (article 137 of the CO).

A claim for damages based on tort becomes time-barred one year from the date on which the injured party became aware of the loss or damage and of the identity of the person liable for it, or 10 years after the date on which the loss or damage was caused, whichever is earlier. It is important to note that if the action for damages is derived from an offence for which criminal law provides for a longer limitation period, that longer period also applies to the civil law claim (article 60 of the CO).

There is, however, no statutory limitation regarding the enforcement of a judgment (Swiss or foreign).

5 Jurisdiction

In what circumstances does the civil court have jurisdiction? How can a defendant challenge jurisdiction?

The civil courts mainly have jurisdiction for contentious civil matters, court orders in non-contentious matters and court orders in matters of debt collection and bankruptcy law as well as arbitration (article 1 of the SCCP).

The court examines *ex officio* whether the procedural requirements of a claim are satisfied. This includes, in particular, the subject matter, territorial jurisdiction of the court seized (articles 59 and 60 of the SCCP) as well as the immunity defence. A party can, however, object to the jurisdiction of the court as a preliminary matter. The court may thereupon decide to clarify this issue before entering into the merits of the case as a means to simplify the proceedings (article 125 of the SCCP).

If the court decides that it lacks jurisdiction, it closes the proceedings by deciding not to consider the merits of the case (article 236 of the SCCP). This decision is subject to either appeal (article 308 of the SCCP) or objection (article 319 of the SCCP), depending on the circumstances of the case. Conversely, the court may confirm its jurisdiction either in the final judgment on the merits or by way of an interim decision (although rare in practice) if a contrary appellate decision could end the proceedings and thereby allow a substantial saving of time or cost. The interim decision can be challenged separately, but cannot be challenged later as part of the final judgment (article 237 of the SCCP).

6 Admissibility of evidence

What rules apply to the admissibility of evidence in civil proceedings?

Under Swiss civil procedural rules, each party is entitled to have the court accept the evidence that he or she offers in the required form and time frame (article 152 of the SCCP).

As to the form, the SCCP provides an exhaustive list of admissible means of evidence, which encompasses witness testimonies, documents, expert opinions, inspection, written statements from official authorities or individuals (if witness testimony appears to be unnecessary), and interrogation of the parties (article 168 of the SCCP). Documentary evidence comprises audio recordings, films, electronic files and the like (article 177 of the SCCP).

Illegally obtained evidence is only considered by the court if there is an overriding interest in finding the truth (article 152(2) of the SCCP).

7 Publicly available information

What sources of information about assets are publicly available?

There are several publicly available sources that provide information on assets located in Switzerland. In particular:

- the commercial register provides information on companies (eg, share capital, legal seat, address, corporate purpose). Each canton maintains its own commercial register, which is freely accessible. A summary version of the commercial register is available online;
- the Swiss Official Gazette of Commerce, in addition to gathering some of the information published in every cantonal commercial register, provides information regarding bankruptcies, composition agreements, debt enforcement, calls to creditors, lost titles, precious metal control, other legal publications, balances and company notices;
- the land register records every single plot of land in Switzerland, with the exception of those in the public domain. Each canton maintains its own land register, which can be consulted upon showing of a legitimate interest (eg, for purposes of contractual negotiations for the purchase of a property);
- the Swiss aircraft registry contains the records of all Swiss-registered aircraft and provides detailed information regarding the owner and the holder, the type of aircraft, its year of construction, the serial number, the maximum take-off mass and the fee according to its noise level;
- the debt enforcement and bankruptcy register records include all debt collection proceedings filed against a debtor, and can be consulted by anyone showing a *prima facie* legitimate interest and upon request;

- there also exists an unofficial will register that records wills and other testamentary dispositions. This register is, however, not exhaustive and only contains information that has been provided freely;
- in certain cantons (eg, Vaud and Fribourg), it is possible, under specific conditions, to access information contained in a person's tax certificate; and
- judgments rendered by civil courts are in principle made accessible to the public (article 54 of the SCCP); a copy thereof will be provided upon showing of a legitimate interest and depending on the practice of the courts after having been made anonymous.

There is no register of bank accounts in Switzerland. Swiss banking secrecy protects the privacy of banks' clients. However, banking secrecy is not unlimited and can be lifted, among others, in the context of criminal proceedings (see question 21).

8 Cooperation with law enforcement agencies

Can information and evidence be obtained from law enforcement and regulatory agencies for use in civil proceedings?

A civil court may obtain information in writing from all official authorities (article 190 of the SCCP). There is no list of entities falling under the definition of 'official authorities', but it should be interpreted broadly as encompassing every entity financed or subsidised by a public agency. Swiss courts are, moreover, obliged to provide mutual assistance to each other (article 194 of the SCCP). A party to civil proceedings may request the civil court in charge of the matter to order the adverse party or another authority to provide specific information. Moreover, a civil court may be requested to take evidence at any time (ie, even before the initiation of proceedings) if the law grants such right to do so and the applicant credibly shows that the evidence is at risk or that it has a legitimate interest (article 158 of the SCCP).

As mentioned above (see question 7), information may be obtained from the Debt Collection Office regarding the debt enforcement and bankruptcy register records as well as from civil courts. Moreover, a party to a civil dispute that is also a party to criminal proceedings, if granted the right to access the criminal file, can use such information in the context of civil proceedings.

9 Third-party disclosure

How can information be obtained from third parties not suspected of wrongdoing?

Parties and third parties have a duty to cooperate in the taking of evidence. In particular, they have the duty to:

- make a truthful deposition or statement as a party or a witness;
- produce physical records, with the exception of correspondence with lawyers provided that such correspondence concerns the professional representation of a party or third party; and
- allow an examination of their person or property by an expert (article 160 of the SCCP).

In certain cases, third parties may, however, refuse to cooperate. Third parties have an absolute right to refuse to cooperate if they have a family link or a close personal relationship to one of the parties (article 165 of the SCCP). In other specific cases, third parties only have a qualified right to refuse to cooperate, which must be justified (article 166 of the SCCP). This relates, for instance, to cases where in establishing facts, third parties would expose themselves or a close associate, as specified by law, to criminal prosecution or civil liability, or where a third party is bound by professional secrecy (eg, lawyers and clerics).

If a third party refuses to cooperate without justification, the court may impose:

- a disciplinary fine of up to 1,000 Swiss francs;
- threaten sanctions under article 292 of the SCC (see question 12);
- order the use of compulsory measures; or
- charge the third party the costs caused by the refusal (article 167 of the SCCP).

There is, however, no such sanction as contempt of court under Swiss law.

Furthermore, the confidants of other legally protected secrets may refuse to cooperate if they credibly show that the interest in keeping

the secret outweighs the interest in establishing the truth (article 166(2) of the SCCP). This provision could apply, for instance, to bankers who are otherwise bound by banking secrecy (article 47 of the Banks Act).

10 Interim relief

What interim relief is available pre-judgment to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud?

Swiss law distinguishes between non-monetary and monetary claims. While enforcement of the former is regulated by the SCCP, enforcement of the latter is regulated by the DEBA. Interim relief, both before a claim has been filed or during the proceedings, can be requested by way of interim measures for non-monetary claims and attachment for monetary claims.

Swiss courts can order any interim measure suitable to prevent imminent harm in support of a non-monetary claim (article 262 of the SCCP). In particular, such interim relief can take the form of:

- an injunction;
- an order to remedy an unlawful situation;
- an order to a registry or third party;
- a performance in kind; or
- the remittance of a sum of money (if provided by law).

In practice, interim measures that are often requested are the registration of property rights in a public register such as the land register. Interim measures can also be requested to prevent a party from disposing of assets such as company shares or moveable property. In cases of special urgency, and in particular where there is a risk that the enforcement of the measure will be frustrated, the court may order the interim measure immediately and without hearing the opposing party (ie, *ex parte*) (article 265 of the SCCP). Moreover, while pretrial discovery is alien to Swiss civil procedure, the SCCP allows the taking of evidence before the initiation of legal proceedings exclusively in cases where evidence is at risk or where the applicant has a justified interest (article 158 of the SCCP).

In the context of a monetary claim, assets could be frozen by way of attachment proceedings (article 272 et seq of the DEBA). Such attachment is granted *ex parte* and must thereafter be validated. In support of its application, the applicant must *prima facie*:

- show a claim against the debtor;
- identify assets of the debtor that can be attached; and
- show that one of the specific grounds for attachment, as set out by law, exists (eg, if the debtor does not live in Switzerland and the claim has sufficient connection with Switzerland or is based on a recognition of debt; or if the creditor holds an enforceable title – judgment or award – against the debtor).

11 Right to silence

Do defendants in civil proceedings have a right to silence?

Under Swiss civil procedural rules (article 163 of the SCCP), both the defendant and the plaintiff have a right to refuse to cooperate if:

- the taking of evidence would expose a close associate (ie, a spouse, child or other kin) to criminal prosecution or civil liability; or
- if they are bound by statutory secrecy obligations under criminal liability (eg, if they are a member of the clergy or a lawyer (article 321 of the SCC)).

Other confidants entrusted with legally protected secrets may refuse to cooperate if they credibly demonstrate that the interest in keeping the secret outweighs the interest in finding the truth (article 163(2) of the SCCP). This typically applies to banking secrecy and the persons bound by it.

If a party refuses to cooperate without valid reasons, this will be taken into consideration by the court when appraising the evidence (article 164 of the SCCP).

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

If the court order provides for an obligation to act, to refrain from acting or to tolerate something, the enforcement court may:

- issue a threat of criminal penalty under article 292 of the SCC;
- impose a disciplinary fine not exceeding 5,000 Swiss francs;
- impose a disciplinary fine not exceeding 1,000 Swiss francs for each day of non-compliance;
- order a compulsory measure such as taking away a moveable item or vacating immovable property; or
- order performance by a third party (article 343 of the SCCP).

Moreover, failure to comply with an official order issued by a court under the threat of criminal penalty for non-compliance in terms of article 292 of the SCC is a criminal offence and gives rise to a fine.

Swiss courts can accompany their orders directly with the above-mentioned execution measures. Such measures can also be requested separately by one of the parties to the enforcement court if the other fails to comply with the court order.

13 Obtaining evidence from other jurisdictions

How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?

Requests for judicial assistance for the taking of evidence abroad must follow the legal framework applicable between Switzerland and the requested state (eg, bilateral or multilateral treaties such as the 1954 Hague Convention relating to Civil Procedure or the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters). In Switzerland, in the absence of a specific international instrument, such requests must be addressed to the Swiss Federal Office of Justice, which then transfers the requests abroad (article 11 of the PILA).

14 Assisting courts in other jurisdictions

What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?

Swiss courts will assist foreign courts in relation to proceedings of asset recovery (eg, service, taking of evidence, recognition and enforcement of foreign awards, interim measures) within the legal framework applicable between Switzerland and the requesting state. Save for the existence of other bilateral or multilateral agreements between the two states (eg, the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters or the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters), by default, Switzerland will apply the 1954 Hague Convention on Civil Procedure to foreign requests for service and the taking of evidence (article 11a(4) of the PILA).

It is noteworthy that service of judicial or extrajudicial documents from abroad in Switzerland as well as the taking of evidence in support of foreign proceedings is considered as being the exercise of public authority on Swiss territory. Accordingly, the execution of such measures on Swiss territory, without passing through the channel of judicial assistance, constitutes a violation of territorial sovereignty and is a crime under Swiss law (article 271 of the SCC).

15 Causes of action

What are the main causes of action in civil asset recovery cases, and do they include proprietary claims?

Under Swiss law, a civil asset recovery action may be brought to court on the basis of many different causes of action (eg, contract law, tort law, inheritance law, property law).

In particular, contract-based claims may be filed for breach of contract (article 97 of the CO). If there is no contract between the parties and if a person unlawfully causes a loss or damage to another, a tort-based action may be lodged (article 41 of the CO). This applies particularly to cases of fraud. Proprietary claims are also possible, notably in the event the owner has been deprived of its ownership (article 641 of the CC). In insolvency and bankruptcy law, if the debtor has transferred assets or favoured certain creditors to the detriment of others, an avoidance action may be brought (article 285 et seq of the DEBA).

16 Remedies

What remedies are available in a civil recovery action?

The remedies available under Swiss law generally depend on the cause of action.

In the context of a contract, the plaintiff may request that the defendant be ordered to perform the contract in accordance with its precise terms (specific performance) (article 107(2) of the CO). Instead of asking for specific performance, the plaintiff may also choose to claim damages (article 97 of the CO). Other remedies are available for specific contracts (eg, contracts for work). Similarly, the remedy available for tort-based actions is damages.

Swiss law provides for restitution in the event of unjust enrichment (article 62 et seq of the CO). In general, the claim for unjust enrichment is considered subsidiary to other, more specific, claims. Restitution is also the remedy available to the owner of an object deprived of its ownership (article 641 of the CC).

Swiss law provides for an account of profits under specific circumstances. For instance, in the case of a contract of agency without authority, the principal is entitled to appropriate any resulting benefits where the agency activities were not carried out with the best interests of the principal in mind, but with those of the agent's (article 423(1) of the CO). An account of profits is also foreseen in relation to profits realised by the infringement of personality rights (article 28a(3) of the CC).

17 Judgment without full trial

Can a victim obtain a judgment without the need for a full trial?

In certain circumstances, Swiss law allows a judgment to be issued without a full trial. For instance, civil proceedings can continue and a judgment by default can be rendered even if the defendant is in default (articles 147, 206, 223 and 234 of the SCCP). In other specific cases, the trial is conducted pursuant to simplified or summary proceedings. Simplified proceedings apply, inter alia, to small cases (ie, where the value in dispute is below 30,000 Swiss francs) (articles 243 to 247 of the SCCP). Summary proceedings go even further in terms of simplification and expediency. They apply, in particular, to urgent requests and requests for interim measures (articles 248 to 270 of the SCCP). They also apply to 'clear-cut cases', which are non-contentious matters or matters where the facts can be immediately proven or where the legal situation is straightforward and non-disputable (article 257 of the SCCP).

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

The successful claimant of a monetary claim can launch debt collection proceedings under the DEBA, which also allows for attachment proceedings depending on the circumstances (see question 10).

For a non-monetary claim, if the judgment provides for an obligation to act, to refrain from acting or to tolerate something, the successful claimant may request the court execution measures as set out in question 12. If the judgment relates to a declaration of intent, the enforceable decision takes the place of the declaration. If the declaration concerns a public register, such as the land register or the commercial register, the court making the decision must issue the required instructions to the registrar (article 344 of the SCCP).

19 Enforcement

What methods of enforcement are available?

As mentioned, the successful party can request execution measures in support of a non-monetary claim such as, for instance, the issuance of a threat of a criminal penalty under article 292 of the SCC or performance by a third party (article 343 of the SCCP) (see questions 12 and 18). Moreover, the successful party may demand damages, if the unsuccessful party does not follow the orders of the court, or conversion of the performance due into the payment of money.

In turn, monetary claims can be enforced under the DEBA. Eventually, the proceedings set forth by the DEBA will lead to the seizure of any of the unsuccessful defendant's assets as well as garnishes

(article 89 et seq of the DEBA) and their auctioning (article 125 et seq of the DEBA). The seizure of a real estate property will be automatically registered in the land register (article 101 of the DEBA).

20 Funding and costs

What funding arrangements are available to parties contemplating or involved in litigation and do the courts have any powers to manage the overall cost of that litigation?

Swiss law does not prohibit litigation funding arrangements. While a rather limited phenomenon in practice, funding of civil litigation may be available through specialised litigation financing companies. Swiss law further allows lawyers and their clients to negotiate fee arrangements to a certain degree. While purely contingency fee arrangements are prohibited, arrangements according to which an incentive may be paid depending on the success of the case are allowed.

In principle, the court will charge the procedural costs, which encompass court costs and party costs as determined based on cantonal tariffs (article 95 et seq of the SCCP), to the unsuccessful party (article 106 of the SCCP). Party costs include the reimbursement of necessary outlays, the costs of professional representation and, in justified cases, compensation for personal efforts if a party is not professionally represented. In general, the cantonal tariffs are established based on the value in dispute, the complexity of the matter and the time spent. Unnecessary costs are, however, charged to the party that caused them (article 108 of the SCCP). In practice, the party costs awarded by the courts to the successful party do not cover the full costs of the litigation, which usually acts as a barrier for wanton proceedings. Swiss courts have, however, no power to issue costs management orders.

Criminal asset recovery

21 Interim measures

Describe the legal framework in relation to interim measures in your jurisdiction.

The SCCrP provides for interim measures, in particular, in relation to the seizure of assets or items under specific conditions (articles 224 et seq and 263 et seq of the SCCrP).

Such interim measures can only be ordered if:

- it is permitted by law;
- there is reasonable suspicion that an offence has been committed;
- the aims cannot be achieved by less stringent measures; and
- the seriousness of the offence justifies the measure (article 197(1) of the SCCrP).

According to article 263(1) of the SCCrP, items or assets belonging to a suspect, accused or a third party may be seized, if it is expected that such items or assets will:

- have to be confiscated or will be used for the purpose of a claim for compensation (see questions 23 and 29);
- be used as evidence;
- be used as security for procedural costs or monetary penalties; or
- have to be returned to the persons suffering harm.

Furthermore, except in the case of a seizure ordered to secure procedural costs and monetary penalties or claim for compensation, there must be a connection between the items or assets seized and the offence committed. Fishing expeditions are not allowed under Swiss law.

During the preliminary proceedings (which start when the police begin an inquiry or the prosecutor opens an investigation), the seizure is ordered by the cantonal or the federal prosecutor, depending on the offence under investigation (article 22 et seq of the SCCrP). During the trial proceedings (which start with the receipt by the court of the indictment rendered by the prosecutor), jurisdiction for seizure lies with the court (article 198(1) of the SCCrP).

A seizure is usually ordered on the basis of a written warrant (a 'seizure order') containing a brief statement of grounds (article 263(2) of the SCCrP). In cases of banking assets, the competent authorities can order the bank not to disclose the seizure to the suspect or accused or any third party for a certain period of time. It is noteworthy that Swiss banking secrecy is lifted in the context of criminal proceedings.

The continued fulfilment of the conditions underlying a seizure order must be regularly examined by the criminal authorities. The longer the seizure is maintained, the stricter the review of such conditions will be. In case of seizure of assets for the purpose of a future confiscation, it must appear *prima facie* that the assets could be confiscated (ie, that there exist sufficient grounds to suspect that an offence has been committed and that the assets seized have been used for, or are the proceeds of, this offence). To maintain the seizure of assets over a prolonged period, these suspicions must heighten and there must be a high likelihood of the existence of a causal link between the seized assets and the offence. If the conditions are no longer met, the seizure order must be revoked and the property or assets handed over to the person entitled to them (article 267(1) of the SCCrP). According to Swiss case law and doctrine, the persons affected by the seizure can request the seizure order to be revoked when there is a change in the circumstances of the case and in particular, if the length of the proceedings becomes disproportionate.

Once a seizure order or an order refusing to revoke the seizure has been rendered, the suspect or accused, as well as third parties whose rights have been directly affected by the order, can file an objection within 10 days after they have been served with the order or have been informed of the order (articles 393 and 396 of the SCCrP). Such an objection is, however, subject to the demonstration of a legitimate interest in the quashing or amendment of the order (article 382(1) of the SCCrP). It is noteworthy that for assets held with a bank, only the account holder (by contrast to the beneficial owner) have such legitimate interest and therefore the right to appeal, to the exclusion of the beneficial owner of assets.

22 Proceeds of serious crime

Is an investigation to identify, trace and freeze proceeds automatically initiated when certain serious crimes are detected? If not, what triggers an investigation?

Criminal authorities have the duty (*ex officio* or upon a criminal complaint) to investigate and, if necessary, to prosecute offences under their jurisdiction. In particular, they have to identify, trace and seize the proceeds provided that the conditions for seizure are met (see question 21).

Additionally, pursuant to Swiss law provisions against money laundering, financial intermediaries or even, since 1 January 2016, in certain circumstances, dealers (ie, natural persons and legal entities that deal with goods commercially and in doing so accept cash) must immediately file a report with the Money Laundering Reporting Office Switzerland (MROS) if they know or have reasonable grounds to suspect that the assets:

- are the proceeds of a felony or, since 1 January 2016, a serious tax offence within the meaning of article 305-bis (1-bis) of the SCC;
- are connected to an offence of money laundering or of participation or support to a criminal organisation;
- are subject to the power of disposal of a criminal organisation; or
- serve to finance terrorism (article 9(1) and 9 (1-bis) of the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector (AMLA)).

Financial intermediaries are prohibited from informing the persons concerned or third parties that they have filed a report (article 10a of the AMLA).

The MROS has the power to forward the report to the competent prosecution authority for further investigation. It shall inform the financial intermediary concerned within 20 working days whether it will pass on the report to a prosecution authority or not (article 23 of the AMLA).

According to the new provisions of the AMLA, which entered into force on 1 January 2016, financial intermediaries froze assets only once apprised by the MROS that their report has been forwarded to the competent prosecution authority (article 10 of the AMLA). Previous to this information and during the analysis conducted by the MROS, financial intermediaries shall execute customer orders relating to the assets reported (article 9a of the AMLA). Upon transmission of the report by the MROS to the prosecution authority, this authority then becomes the competent authority for the seizure of the assets (article 10(2) of the AMLA).

23 Confiscation – legal framework

Describe the legal framework in relation to confiscation of the proceeds of crime, including how the benefit figure is calculated.

Confiscation is regulated by article 69 et seq of the SCC that provides for the confiscation, irrespective of the criminal liability of any person, of:

- assets that have been acquired through the commission of an offence or that were intended to be used to persuade the offender in the commission of an offence or as payment thereof; and
- assets of a criminal organisation (ie, assets that are subject to the power of disposal of a criminal organisation, in particular, assets of a person who participated in or supported a criminal organisation).

Assets other than assets belonging to a criminal organisation can only be confiscated if the assets:

- are directly and immediately connected to the commission of an offence;
- are still available; and
- have not been passed on to the person harmed for the purpose of restoring the prior lawful position (article 70 of the SCC).

Regarding the calculation of the value of the benefit unlawfully obtained, see question 29.

As to the confiscation of assets acquired by a third party, see question 27.

The right to order the confiscation of assets is limited to seven years since the commission of the offence. However, if the prosecution of the offence is subject to a longer limitation period (article 97 of the SCC), this period applies (article 70(3) of the SCC).

24 Confiscation procedure

Describe how confiscation works in practice.

Confiscation can be ordered within pending criminal proceedings with the final decision (article 267(3) of the SCCrP) or outside any criminal proceedings (articles 376 to 378 of the SCCrP).

In the first case, the prosecutor has the competence to:

- order the confiscation by way of any decision ending the proceedings (ie, a no-proceedings order (article 310 of the SCCrP);
- order a ruling of abandonment of proceedings (article 320(2) of the SCCrP); or
- order a summary penalty order (article 352(2) of the SCCrP).

Similarly, the court has the competence to order confiscation within its final decision (article 351(1) of the SCCrP). When the requirements for the confiscation are fulfilled, the criminal authority must order the confiscation. The confiscation order is subject to appeal or objection depending on the nature of the decision which has been rendered (articles 322(2), 354 et seq and 399 of the SCCrP).

In case of separate confiscation proceedings (ie, when a decision is made on the confiscation of property or assets outside criminal proceedings (eg, because the Swiss authorities do not have jurisdiction over the offence)) (articles 376 to 378 of the SCCrP, see question 33), confiscation proceedings must be carried out at the place where the items or assets to be confiscated are located (article 37(1) of the SCCrP). The confiscation order can be challenged within 10 days by the person affected by the confiscation (articles 377(4) and 354 et seq of the SCCrP). Following the opposition, the court will render a decision or order, which can be further challenged within 10 days (article 393 et seq of the SCCrP).

Finally, both in cases where confiscation is ordered within pending criminal proceedings or in separate confiscation proceedings, official notice must be given of the confiscation in order to protect the third parties' right on confiscated assets. If the person harmed or third parties are identified only after the final decision has entered into force, the assets or items confiscated may be restored to them provided that they claim their rights on the assets within five years of the date on which official notice is given (article 70(4) of the SCC).

Update and trends

Switzerland continues to be an important jurisdiction for asset recovery, as highlighted by the recent 1MDB and Petrobras scandals, which have strong ramifications within the country.

In 2017, the Swiss government also adopted the PILA regarding the recognition and coordination of foreign insolvency proceedings in Switzerland. Currently, the PILA provides for a very cumbersome and complex recognition procedure for foreign insolvency proceedings. The current regime conditions the recognition of the foreign insolvency proceedings to the existence of reciprocal recognition of Swiss insolvency decrees in the country that issued the insolvency decree. Once recognition is obtained, the PILA foresees the opening in Switzerland of an ancillary bankruptcy, the 'mini-bankruptcy', in which a local liquidator is appointed to liquidate the assets located in Switzerland, with priority given to Swiss privileged and secured creditors in the distribution of the proceeds of such liquidation.

The envisaged revision aims at facilitating the procedure for recognising foreign insolvency and enhancing international cooperation. First, the requirement of reciprocity would be abolished. Second, the insolvency decrees rendered at the 'centre of main interests' (COMI) could be recognised in Switzerland. Third, in the absence of privileged or secured creditors, as well as of creditors of a Swiss branch of the foreign insolvent entity, the court of the recognition could, upon request, waive the ancillary bankruptcy procedure in favour of recognising the powers of the foreign insolvency trustee. Fourth, a legal basis would be created to allow Swiss authorities and bodies to cooperate with foreign bankruptcy authorities and bodies. Finally, ordinary (non-secured and non-privileged) creditors of Swiss branches of foreign entities in bankruptcy could be listed in the schedule of claims of the ancillary bankruptcy.

The bill is now subject to parliament's review and, if approved, may enter into force in 2018.

25 Agencies

What agencies are responsible for tracing and confiscating the proceeds of crime in your jurisdiction?

Generally, prosecutors have jurisdiction to investigate, trace and seize the proceeds of crime and to confiscate said proceeds, while the courts limit their role to the confiscation of assets. As to the competence and duties of the financial intermediaries and the MROS, see question 22.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Pursuant to Swiss case law and doctrine, the prosecutors or the courts are allowed to confiscate secondary proceeds (assets or items). However, there must be a paper trail that demonstrates a connection between the secondary proceeds to be confiscated and the offence committed. If the proof of such a connection cannot be provided, the authorities would have to, should the requirements be fulfilled, uphold a claim for compensation (see question 29).

27 Third-party ownership

Is it possible to confiscate property acquired by a third party or close relatives?

Confiscation is not permitted if a third party (ie, any natural person or legal entity) has acquired the assets (after the commission of the offence); he or she has done so in ignorance of the grounds for confiscation; and provided such person has paid a sum of equal value, or confiscation would cause him or her to endure disproportionate hardship (article 70(2) of the SCC). However, regardless of the foregoing, the assets are subject to confiscation if the third party (eg, a corporation) received the assets directly from the offence.

28 Expenses

Can the costs of tracing and confiscating assets be recovered by a relevant state agency?

There is no specific provision under Swiss law dealing with the recovery by the criminal authorities of the costs of tracing and confiscation of assets. Such costs can, however, be considered part of the procedural costs and can be borne by the accused if he or she is convicted (article 426(1) of the SCCrP) or paid by means of seized assets (article 268 of the SCCrP) or both.

29 Value-based confiscation

Is value-based confiscation allowed? If yes, how is the value assessment made?

Value-based confiscation is permitted if the assets subject to confiscation are no longer available (ie, in particular if there is a breach in the paper trail between the proceeds to be confiscated and the offence committed). In such a case, the court may uphold a claim for compensation by the state in respect of a sum of equivalent value (article 71 of the SCC). The amount of compensation must be equivalent to the value of the assets, would the assets still be available for confiscation.

To calculate the amount of compensation, the question of whether the gross or the net income shall be taken into consideration is controversial. Swiss courts apply usually, and under certain exceptions, the criterion of the gross income in relation to illicit trade. The value must be determined at the time the assets became unavailable.

30 Burden of proof

On whom is the burden of proof in a procedure to confiscate the proceeds of crime? Can the burden be reversed?

As a rule, the burden of proof in a confiscation procedure lies with the criminal authorities. However, regarding the assets of a person who participated in or supported a criminal organisation, it is presumed that the assets are subject to the power of disposal of the organisation, and can thus be confiscated, until the contrary is proven (article 72 of the SCC).

31 Using confiscated property to settle claims

May confiscated property be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction?

If the assets have not been passed on to the person harmed for the purpose of restoring the prior lawful position and hence are subject to confiscation, confiscated property or compensatory claims may be used in the satisfaction of civil claims for damages or moral satisfaction arising from an offence, up to the amount set by a court or agreed in a settlement, and subject to the following conditions:

- the person claiming compensation has suffered harm as a result of a felony or a misdemeanour;
- the person is not entitled to benefits under an insurance policy;
- it is anticipated that the offender will not pay damages or satisfaction; and
- the person harmed assigns the corresponding element of the claim to the state (article 73(1) and (2) of the SCC).

32 Confiscation of profits

Is it possible to recover the financial advantage or profit obtained though the commission of criminal offences?

Under article 70 of the SCC, all financial advantages obtained through the commission of a criminal offence can be confiscated. For instance, in case of a company's profit obtained after a corrupt public procurement process, such profit must be confiscated. Even if it is considered that the corporation is not criminally liable and hence is a third party, article 70(2) of the SCC does not apply when the company profited directly from the corrupt public procurement process (see question 27). Finally, as already underlined, the question of whether the gross or the net income shall be taken into consideration is controversial (see question 29).

33 Non-conviction based forfeiture

Can the proceeds of crime be confiscated without a conviction? Describe how the system works and any legal challenges to in rem confiscation.

The SCCrP provides specific procedural rules allowing for a confiscation decision to be made independently of criminal proceedings (articles 376 to 378 of the SCCrP). First, property or assets that will probably be confiscated in independent proceedings are seized (article 377(1) of the SCCrP). If the requirements for confiscation (article 69 et seq of the SCC) are fulfilled, the prosecutor orders their confiscation and gives the person concerned the opportunity to file observations (article 377(2) of the SCCrP). Conversely, if the requirements are not fulfilled, the prosecutor must order the abandonment of the proceedings and return the property or assets to the entitled person (article 377(3)).

The prosecutor or the court must also decide whether to accept the applications made by the person suffering harm for the confiscated property or assets to be used for his or her benefit (article 378 of the SCCrP).

For legal challenge see question 24.

Finally, within criminal proceedings, the prosecutor can order a confiscation within a no-proceedings order or a ruling of abandonment of proceedings (see question 24).

34 Management of assets

After the seizure of the assets, how are they managed, and by whom? How does the managing authority deal with the hidden cost of management of the assets? Can the assets be utilised by the managing authority or a government agency as their own?

As a rule, the holder of the assets or items that have been seized must hand them over to the competent criminal authority (article 265(1) of the SCCrP). As an exception, in certain circumstances, the following persons can refuse to hand over seized property:

- the suspect or accused;
- the persons who have the right to remain silent or to refuse to testify; and
- the corporate undertakings, if by doing so they could incriminate themselves (article 265(2) of the SCCrP).

The authority must safeguard the property and assets appropriately (article 266(2) of the SCCrP). It cannot use the assets as its own. Property that is subject to rapid depreciation or that requires expensive maintenance, as well as securities or other assets with a stock exchange or market price, may be sold immediately in accordance with the DEBA and the proceeds of sale seized (article 266(5) of the SCCrP).

The investment of seized assets is further regulated by the Federal Ordinance on the Investment of Seized Assets.

In practice, the private managers of assets continue to manage them under the surveillance of the prosecutor. If taxes have to be paid or costs have been incurred, the prosecutor has to give its consent before the payments are made.

35 Making requests for foreign legal assistance

Describe your jurisdiction's legal framework and procedure to request international legal assistance concerning provisional measures in relation to the recovery of assets.

Requests for international legal assistance concerning provisional measures must follow the legal framework applicable between Switzerland and the requested state (eg, bilateral and multilateral agreements such as the 1959 European Convention on Mutual Assistance in Criminal Matters, the 2001 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters and the 1985 Convention Implementing the Schengen Agreement). If there is no applicable agreement, the request must follow the rules set up by the law of mutual legal assistance in criminal matters of both countries (ie, in Switzerland, the Federal Act on International Mutual Assistance in Criminal Matters (IMAC)).

36 Complying with requests for foreign legal assistance

Describe your jurisdiction's legal framework and procedure to meet foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets.

In an international context, Swiss authorities may grant a foreign state request for interim measures (eg, the seizure of assets) in order to preserve the existing situation, to safeguard threatened legal interests or to protect jeopardised evidence, provided that proceedings under the IMAC do not clearly appear inadmissible or inappropriate (article 18(1) of the IMAC).

Upon the request of a foreign state, seizure of assets is usually ordered by the prosecutor after delegation from the Federal Office of Justice (article 198(1)(a) of the SCCrP). Moreover, if any delay would jeopardise the proceedings and if there is sufficient information to determine whether all the conditions are met, the Federal Office of Justice may order the seizure of assets as soon as a request is announced. However, such measures are revoked if the requesting state does not make the request of mutual legal assistance within the deadline set by the Federal Office of Justice (article 18(2) of the IMAC).

It is noteworthy that the seizure of assets on Swiss territory is considered to be within the exclusive jurisdiction of Swiss public authorities, and the execution of such measure on Swiss territory

Lalive

Marc Henzelin
Sandrine Giroud
Maria Vinogradova

mhenzelin@lalive.ch
sgiroud@lalive.ch
mvinogradova@lalive.ch

35 Rue de la Mairie
PO Box 6569
1211 Geneva 6
Switzerland
Tel: +41 58 105 2000
Fax: +41 58 105 2060

Stampfenbachplatz 4
PO Box 212
8042 Zurich
Switzerland
Tel: +41 58 105 2100
Fax: +41 58 105 2160

www.lalive.ch

without passing through the channel of legal assistance constitutes a violation of Swiss territorial sovereignty and is a criminal offence (article 271(1) of the SCC).

Usually, the provisional measures remain in force until a final decision on the request for legal assistance is rendered. If objects and assets are to be handed over to the requesting state based solely on a final and enforceable order of that state (article 74a(3) of the IMAC), assets will remain seized until such order is issued or the requesting state notifies the competent executing authority that such an order may no longer be issued, in particular owing to the lapse of time (article 33a of the Ordinance on International Mutual Assistance in Criminal Matters).

Switzerland enacted specific rules regarding the seizure, confiscation and restitution of illicit assets of politically exposed persons (PEPs) located in Switzerland, which provides for a subsidiary solution to mutual legal assistance such as the FIAA. The FIAA provides in particular the preventive administrative seizure of assets of PEPs for the purposes of mutual legal assistance, when:

- the government of the state of origin has lost power or a change in power appears inexorable;
- the level of corruption in the state of origin is notoriously high;
- the assets are likely to have been acquired through corruption, misappropriation or other crimes; and
- the safeguard of Switzerland's interests requires such seizure.

The FIAA further provides for the continuous administrative seizure of assets of PEPs already seized within mutual legal assistance proceedings for the purposes of confiscation. This applies in case of failure of mutual legal assistance because the state of origin qualifies as a failing state (ie, it is unable to satisfy the requirement of mutual legal assistance proceedings owing to the total or substantial collapse or failures of its national judicial system) or proceedings in the state of origin may not meet the basic procedural requirements of the European Convention on Human Rights or the International Covenant on Civil

and Political Rights. The assets frozen can further be confiscated if the PEP's assets are of illicit origin, which is presumed when the wealth of the PEP increased inordinately, facilitated by the exercise of a public function and the level of corruption in the state of origin or surrounding the PEP in question was notoriously high during his or her term of office.

37 Treaties

To which international conventions with provisions on asset recovery is your state a signatory?

Switzerland is party to several international conventions with provisions on asset recovery. In particular:

- the European Convention on Mutual Assistance in Criminal Matters 1959;
- the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990;
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997;
- the European Criminal Law Convention on Corruption 1999;
- the UN Convention for the Suppression of the Financing of Terrorism 1999;
- the UN Convention against Transnational Organized Crime 2000; and
- the UN Convention against Corruption 2003.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

Not applicable.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation

Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans

Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



Asset Recovery
ISSN 2051-0489



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law