THE ASSET TRACING AND RECOVERY REVIEW

SIXTH EDITION

Editor
Robert Hunter

THE LAWREVIEWS

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PREFACE

'Fraud' is a word that people find easier to use than to define. Partly for this reason, it is difficult for lawyers to summarise the way in which their particular jurisdictions deal with it. Some of the sources of their laws will be domestic and will have evolved over time. Others will be recent international conventions, where regard must be had to the decisions of other jurisdictions.

But these difficulties aside, the problems that fraud generates pose unique challenges for the legal system of any country. First, there will be forensic issues: to what lengths should the court go to discover what actually happened? Here different jurisdictions place different priorities on what their courts are for. Some treat the court process as an almost sacrosanct search for truth. The courts of my own jurisdiction tend towards this end of the spectrum. Others regard it as a means of resolving disputes efficiently and providing certainty for the litigants. Often courts in this category allow no witness evidence and no procedure for disclosure of documents, regarding both as disproportionately burdensome for any benefit they might provide.

Second, there is the question of whether the court should mark conduct that is 'fraudulent' as particularly abhorrent, in civil proceedings. All will criminalise fraudulent behaviour, but not all will penalise fraudulent conduct by enhancing the victim's compensation or by depriving the fraudsters of arguments that might have been available to them if they had been careless rather than dishonest.

Third, there is the question of innocent parties: to what extent should victims of fraud be given enhanced rights over 'victims' of ordinary commercial default? In some jurisdictions, it is said that victims of fraud part with their assets – at least to some extent – involuntarily while commercial counterparties take risks with their eyes open. Hence, victims of fraud can, in some circumstances, be allowed to retrieve assets from an insolvency before ordinary trade counterparties or 'general creditors' do so.

Lawyers have been mulling over the rights and wrongs of solutions to the problems that fraud presents for centuries. They will never stop doing so. The internationalisation of fraud in the past 40 years or so, however, has meant that they argue about these problems not only with lawyers of their own country, but also with lawyers from other jurisdictions. Rarely nowadays will a fraudster leave the proceeds of fraud in the jurisdiction in which they were stolen. The 1980s and early 1990s saw quite pronounced attempts by fraudsters to 'arbitrage' the various attitudes and priorities of different jurisdictions to retain what they had taken. Perhaps the highest-profile example of this was the use of jurisdictions in which banking secrecy was a priority as a conduit to which the proceeds of fraud would be transmitted. Another well-known strategy was the use of corporate devices and trusts as a means of sheltering assets from those who deserved to retrieve them.

A number of factors have served to make this more difficult. The growth of international conventions for the harmonisation of laws and enforcement of judgments is clearly one factor. Perhaps more notable, however, has been the international impetus to curb money laundering through criminal sanctions. These have, however, been first steps, albeit comparatively successful ones. There is still a huge amount to be done.

I have specialised in fraud litigation – virtually exclusively – since the late 1980s. My chosen area has brought me into contact with talented lawyers all over the world. I remain as fascinated as I was at the outset by the different solutions that different countries have to the problems fraud creates. I am sometimes jealous and sometimes frustrated when I hear of the remedies for fraud that other jurisdictions offer or lack. When I talk to lawyers who enquire about my own jurisdiction, I frequently see them experiencing the same reactions too. The comparison is more than a matter of mere academic interest. Every month brings some study by the government or private sector tolling the cost of fraud to the taxpayer or to society in general. My own interest goes beyond ordinary 'balance-sheet' issues. When I deal with fraudsters, particularly habitual or predatory ones, I still retain the same appalled fascination that I experienced when I encountered my first fraudster, and I share none of the sneaking admiration for them that I sometimes see in the media; they are selfish, cruel and immature people who not only steal from their victims, but also humiliate them.

No book sufficiently brief to be useful could ever contain all the laws of any one jurisdiction relating to fraud. The challenge, unfortunately, for a contributor to a book like this lies as much in what to exclude as in what to say. This guide contains contributions from eminent practitioners the world over, who have, on the basis of their experience, set out what they regard as critical within their own jurisdictions. Each chapter is similarly structured for ease of reference with similar headings to enable the reader to compare remedies with those in other jurisdictions, and each contributor has been subject to a strict word limit. Despite there being a huge amount more that each would have been perfectly justified in including, I still believe this book to be an enormous achievement.

Once again, we have some of the foremost experts in the area from an impressive array of jurisdictions contributing. I have often thought that true expertise was not in explaining a mass of details but in summarising them in a meaningful and useful way. That is exactly the skill that a work like this requires and I believe that this edition will continue the high standard of the previous four. I have come across a number of the authors in practice, and they are unquestionably the leaders in their fields. I hope that other readers will find the work as useful and impressive as I do.

Robert Hunter
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Chapter 29

SWITZERLAND

Miguel Oural, Mark Barmes and Jean-René Oettli[1]

I OVERVIEW

Switzerland has traditionally held an important position in the worldwide financial sector landscape. Swiss authorities, be they administrative or judicial, have accordingly been frequently called on to intervene in cases of dishonesty (e.g., misappropriation or misuse of company or individual funds). Over the past decade, Swiss law has considerably evolved to meet the international standards in combating white-collar criminality.

The Swiss legislator has developed a number of tools that are intended to compensate victims of dishonesty or of any other crime affecting the assets of the rightful owner. The Swiss law enforcement authorities are generally willing to assist injured parties seeking to recover their assets or obtain compensation.

In substance, the remedies available to the victims of dishonesty are of both civil and criminal nature. Civil remedies often amount to a claim for liability in tort or liability in contract, as the case may be. Criminal remedies are intended either to secure the victim of dishonesty's civil claims or to provide compensation.

II LEGAL RIGHTS AND REMEDIES

Before outlining the legal rights and remedies available to retrieve the victim's property or obtain compensation, it is worth mentioning how 'fraud' is defined in Swiss law and which other crimes may trigger compensatory claims on the victim's part.

Article 146 of the Swiss Criminal Code (SCrC) defines the crime of fraud as follows: '[w]hoever, with the intent of unlawfully enriching himself or another, maliciously misleads another person by false representation or dissimulation of facts, or maliciously reaffirms the error of another, and thus causes the deceived person to act detrimentally against his own or another's property, shall be punished with imprisonment for up to five years or a monetary penalty'.

In addition to fraud, other punishable acts against property should also be taken into consideration when dealing with fund misappropriation or misuse and other similar situations. Article 137 SCrC (unlawful appropriation) punishes '[w]hoever appropriates a movable object belonging to another to unlawfully enrich himself or another party'. Embezzlement is dealt by Article 138 and sanctions '[w]hoever appropriates a movable object belonging to another that is entrusted to him, with the unlawful intent to enrich himself or

1 Miguel Oural and Mark Barmes are partners and Jean-René Oettli is an associate at Lenz & Staehelin.

another'. Further, disloyal management[2] is often invoked by victims of persons who have fraudulently misused funds of which they have control (for instance, traders or directors and officers). Article 158 SCrC punishes '[w]hoever is entrusted by law, with an official mandate, or a legal transaction to manage the assets of another or to supervise such asset management and, in violation of his duties, causes or permits that these assets are damaged'.

These criminal offences protect the broad notion of patrimony that is defined as 'the sum of economic values protected by civil law'.[3] This notion therefore encompasses patrimony as protected by property law as well as its economic value,[4] such as assets held in bank accounts.[5]

The SCrC contains a number of provisions to which a victim may resort to obtain compensation or restitution. Assets that result from a crime will be confiscated unless they are to be handed over to the person injured to restore his or her rights in application of Article 70(1) SCrC. Under Article 73 SCrC, a victim may be awarded damages to be paid out, *inter alia*, from the monetary penalty paid by the convicted person or the confiscated objects and assets, or the proceeds of their sale. Article 73(1)(c) SCrC provides that the victim may be awarded the 'claim for compensation' that is generally awarded to the state (see Section II.i).[6]

Besides these criminal remedies, civil remedies are also available to the victims of dishonesty. The Swiss legal system marks a clear divide between claims *in rem* relating to objects (such as real estate, works of art or precious stones) and claims pertaining to recovery of a debt sounding in money, such as assets held in a bank account, that are subject to debt enforcement proceedings under the Federal Debt Collection Proceedings Act (DCPA).

According to Article 641(2) of the Swiss Civil Code (SCivC), the owner of an object may claim restitution against whoever unlawfully possesses that object. Further, Article 41 of the Swiss Code of Obligations (SCO) deals with liability in tort; the aggrieved party may rely on this provision in cases in which the parties are not bound by a contract. Swiss law also contains rules on unjust enrichment[7] and *negotiorum gestio*.[8] *Negotiorum gestio* is a particular form of agency in which the agent acts for the principal without the consent of the latter; in particular, the principal did not give any mandate to the agent. Conversely, if the parties entered into a contract and misappropriation was committed in relation to such a contract, the victim will rely on Article 97 SCO (liability in contract), or any other provision specifically dealing with the contract in dispute (for instance, Article 398 SCO, which deals with the liability of the agent with regard to the principal).

In cases involving fraud or any other criminal offence, the victim is, under certain circumstances, entitled to bring a civil claim within the criminal proceedings.[9] The same judge will, therefore, make a decision that deals with both the criminal and the civil complaint.

2 Article 158 of the SCrC.

3 ATF 126 IV 165, c. 3a; 122 IV 179 c. 3b/cc & d; 117 IV 139 c. 3d/aa.

4 BSK SGB II- Niggli/Riedo, *In rem* Article 137 Nos. 13–14.

5 Corboz, *Les infraction en droit suisse*, Vol. I, 3rd Ed, Berne 2010, Article 138 No. 17.

6 Article 71 of the SCrC.

7 Article 62 et seq. of the SCO.

8 Article 419 et seq. of the SCO.

9 Article 122(1) of the Swiss Code of Criminal Procedure.

i Civil and criminal remedies

The choice of the remedy, be it civil or criminal, will depend on the specific circumstances of the case.

The person who has proprietary rights on an object may claim restitution under Article 641(2) SCivC.[10] This is a claim *in rem*, which may be brought against the direct and indirect possessor of the asset. In substance, the claimant must show that he or she is the legitimate owner of the asset. The claim for restitution under Article 641(2) SCivC is not subject to any limitation period.[11]

Obligations sounding in money (including assets held in a bank account) are to be recovered through debt enforcement (Article 38(1) DCPA). Aside from the specific case of insolvency (see Section IV.ii), the DCPA provides for the enforcement of an unsecured claim by a specific creditor leading to seizure and realisation of assets belonging to the debtor to the extent necessary to cover the claim (Article 38(2) DCPA). When the debtor is domiciled abroad, the creditor may first seek a freezing order against the assets located in Switzerland and the enforcement proceedings shall then be instituted at the place where the frozen assets are situated (Article 52 DCPA). Debt enforcements require that the creditor holds either an executed recognition of debt or a judgment or an arbitral award against the debtor. Such a judgment can also be obtained during the course of the debt enforcement proceedings (Article 79(1) DCPA) and could be sought on the basis of one of the following claims.

If no contract exists between the perpetrator and the victim, the latter may claim damages under Article 41 SCO, which deals with liability in tort. For the claim to be successful, the following requirements must be met: (1) a tortious act; (2) damage suffered by the claimant; (3) causation between the tortious act and the damage; and (4) a fault on the respondent's side. The limitation period for an action brought for liability in tort is 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, but in any event 10 years after the date on which the loss or damage was caused.[12] However, if the claim for damages is brought as a result of an offence for which criminal law provides a longer limitation period, the longer period also applies to the civil-law claim.[13]

The victim of dishonesty may also seek legal redress by resorting to the rules of unjust enrichment.[14] Accordingly, a person who is enriched without just cause at the expense of another is obliged to make restitution.[15] A claim for restitution for unjust enrichment becomes time-barred one year after the date on which the injured party learned of his or her claim, and in any event 10 years after the date on which the claim first arose.[16] Commentators argue that the rule of Article 60(2) SCO, which prioritises the limitation periods of the SCrC over those of the civil action if the former are longer, should also apply to actions for unjust enrichment.[17]

10 According to Article 641(2) of the SCivC, '[the owner] has the right to reclaim [the object] from anyone withholding it from him or her and to protect it against any unwarranted interference'.

11 ATF 48 II 38 c. 2.c.

12 Article 60(1) of the SCO.

13 Article 60(2) of the SCO.

14 Article 62 et seq. of the SCO.

15 Article 62(1) of the SCO.

16 Article 67(1) of the SCO.

17 Chappuis, Article 67 of the SCO, N 7, in Thévenoz/Werro (eds), *Commentaire romand, Code des obligations*, 2nd ed, Basel 2012, with further references.

The SCO also contains provisions relating to 'agency without authority' (*negotiorum gestio*). If such agency is not conducted by the agent in the interest of the principal, the latter may bring an action against the former to recover the gain that the agent obtained.[18] This provision applies only if the agent acted in bad faith; in particular, if the person knew or ought to have known that he or she was interfering in somebody else's sphere.[19]

In cases in which the victim and the perpetrator are bound by a contract, the victim may obtain compensation by resorting to Articles 97 ff. SCO, which deal with liability in contract. The requirements to be met are similar to those of liability in tort: (1) a breach of contract; (2) damage suffered by the claimant; (3) causation between the breach of contract and the damage; and (4) a fault on the respondent's side. In contract liability, the fault is presumed, and it is therefore for the respondent to show that he or she was not at fault. A claim based on liability in contract becomes time-barred after 10 years.[20]

If the victim and the perpetrator entered into a mandate agreement, Article 398 SCO deals specifically with the agent's liability. According to this Article: (1) the agent generally has the same duty of care as the employee in an employment relationship; (2) the agent is liable to the principal for the diligent and faithful performance of the business entrusted to him or her; and (3) he or she must conduct the business in person unless authorised or compelled by circumstance to delegate it to a third party or where such delegation is deemed admissible by custom. Article 398(1) SCO refers to Article 321e SCO,[21] which, in turn, according to the majority view of commentators, refers to the general rule of Article 97 of the SCO described above.[22]

Criminal law also provides for remedies in cases of fraud, in particular under Articles 70, 71 and 73 SCrC. Article 70 SCrC deals with confiscation and provides in its first subsection that '[t]he judge shall order the confiscation of assets that were acquired as the result of a criminal offence or were intended to bring about or reward a criminal offence, provided that they are not handed over to the person injured to restore his rights'.[23] In principle, the assets that may be confiscated are not only those that result directly from the criminal offence, but also those that have been obtained from or financed by the crime proceeds, provided that there is a sufficient paper trail.[24]

Confiscation is not an option if the assets are to be handed over to the victim.[25] It may, however, be ordered if, at the moment such a decision is taken, the victim is not yet known

18 Article 423(1) of the SCO.

19 Chappuis, Article 62 of the SCO, N 66, in Thévenoz/Werro (eds), *Commentaire romand, Code des obligations*, 2nd ed, Basel 2012.

20 Article 127 of the SCO.

21 Article 321e of the SCO reads as follows: '(1) The employee is liable for any loss or damage he causes to the employer whether wilfully or by negligence. (2) The extent of the duty of care owed by the employee is determined by the individual employment contract, taking due account of the occupational risk, level of training and technical knowledge associated with the work as well as the employee's aptitudes and skills of which the employer was or should have been aware.'

22 Tercier/Favre, *Les contrats spéciaux*, N 5195, 4th edn, Geneva/Zurich/Basel 2009; Werro, Article 398 of the SCO, N 37, in Thévenoz/Werro (eds), *Commentaire romand, Code des obligations*, 2nd edn, Basel 2012.

23 English translation by the Swiss-American Chamber of Commerce, Swiss Penal Code, 2nd edn, Zurich 2008.

24 ATF 126 IV 97 c. 3, JdT 2004 IV 3.

25 Article 70(1) of the SCrC.

by the authorities or if restitution is temporarily impossible for any other reason. As described below, if the victim's claim succeeds, he or she will eventually receive the confiscated assets. Confiscation is in principle excluded from use against a *bona fide* third party.[26]

The right to order confiscation lapses after seven years. In cases in which the prosecution of the criminal offence is subject to a longer statute of limitations, however, the longer period applies to the confiscation as well.[27]

If the assets to be confiscated are no longer available, the judge may, under Article 71(1) SCrC, order a 'claim for compensation' against third parties to the extent to which they did not provide equivalent consideration for the assets or that such a claim for compensation would not represent a disproportionate hardship for them.[28]

The importance of Article 71 SCrC (claim for compensation) becomes apparent if read in conjunction with Article 73 SCrC:

> *If a felony or an offence has caused damage not covered by insurance and if it must be presumed that the offender will not compensate for the damage or pay moral damages, the judge shall award the injured person, upon his request, up to the amount of the damages or the moral damages fixed by the judge or by settlement: (a) the monetary penalty or fine paid by the convicted person; (b) confiscated objects and assets or the proceeds from their sale after deduction of the costs; (c) claims for compensation; (d) the amount of the preventive bond.*[29]

Should this provision be applied by the judge, the victim will benefit from a claim against the state within the criminal proceedings.[30] Of course, the victim cannot make the same claim against the offender, as this would amount to (an unlawful) double compensation.

The right to claim certain remedies in criminal proceedings is open to whoever qualifies as a 'private claimant', namely, a 'person suffering harm' who has explicitly declared his or her wish to participate in the criminal proceedings as a (civil or criminal) claimant.[31] Under Article 115(1) of the Swiss Code of Criminal Procedure (SCCrP), a person suffering harm is a person or entity whose rights have been directly violated by the offence. To establish whether a person qualifies as a person suffering harm, the offence must fall within the scope of a provision that aims to protect the right invoked by the person suffering harm.[32] The Swiss Federal Tribunal recently refused to recognise an investment fund shareholder as a person suffering harm through disloyal management of fund assets, considering that the shareholder suffered indirect harm, with the fund alone suffering direct harm.[33]

26 Article 70(2) of the SCrC reads as follows: '[t]he confiscation shall be precluded if a third party acquired the assets without knowledge of the facts that would justify their confiscation and to the extent he provided equivalent consideration for the assets or the confiscation would represent a disproportionate hardship for him' (English translation by the Swiss-American Chamber of Commerce, Swiss Penal Code, 2nd edn, Zurich 2008).

27 Article 70(3) of the SCrC.

28 See Articles 71(1) and 70(2) in fine of the SCrC.

29 Article 73(1) of the SCrC (English translation by the Swiss-American Chamber of Commerce, Swiss Penal Code, 2nd edn, Zurich 2008).

30 ATF 118 Ib 263 c. 3.

31 Article 118(1) of the Swiss Code of Criminal Procedure (SCCrP).

32 For instance, Article 138 of the SCrC (embezzlement) and Article 158 of the SCrC (disloyal management) aim at protecting the victim's assets.

33 ATF, 6B_857/2017 of 3 April 2018, c. 3.

Whereas the above-described compensatory remedies may certainly be sought against the person who committed the fraud, the question whether other persons may face claims by the person suffering harm needs further elaboration. As a general rule, an accomplice may also be sued in the criminal proceedings;[34] the same consideration applies to the instigator.[35] In a claim for damages for liability in tort, Article 50(1) SCO provides that '[w]here two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the injured party'. Accordingly, compensation may also be sought against the persons who instigated or assisted the perpetrator to commit the fraud.

With regard to third parties who may receive or help transmit the proceeds of fraud, Article 160 SCrC sanctions '[w]hoever acquires, receives as a gift or takes in pawn, conceals, or assists in alienating an object of which he knows or should have known that another has obtained it through a criminal offence against property'.[36] Thus the receiver may face criminal as well as civil claims to compensate the victim. The same applies to a person guilty of money laundering within the meaning of Article 305 *bis* SCrC; in other words, whoever commits an act intended to frustrate the determination of the origin, the discovery or the confiscation of assets that he or she knows or must assume derive from a crime.

ii Defences to fraud claims

In general terms, the persons who are sued for fraud may resist the victim's claims by arguing that one or more of the requirements described above are not met. If a person claims restitution of an object, the defendant may argue that he or she obtained title to it. This may be the case if a person acquires an object in good faith from a person who was merely entrusted with that object, without having title to it. 'Entrusted' means that the person gained possession of the object with the consent of the original owner. If the original owner was dispossessed without his or her consent, the subsequent acquirer may not obtain title even if he or she was in good faith.

Another typical defence to fraud claims is limitation. As mentioned above, different limitation periods will have to be taken into account depending on the specific remedy relied on by the victim. The limitation period may vary from one year (liability in tort) to 10 years (liability in contract). That said, if the civil claim derives from a criminal offence for which the Criminal Code provides for a longer limitation period, the longer limitation period will also apply to the civil claim.[37]

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

A victim aiming at securing assets and proceeds of fraud can act either under civil or criminal law.

Under civil law, a creditor of an obligation sounding in money may apply for an order freezing the assets of the debtor with respect to an unsecured enforceable claim if, *inter alia*:

a the debtor lives in Switzerland and is concealing his or her assets or making preparations to abscond so as to evade the fulfilment of his or her obligations; or

34 Article 25 of the SCrC.

35 Article 24 of the SCrC.

36 English translation by the Swiss-American Chamber of Commerce, Swiss Penal Code, 2nd edn, Zurich 2008.

37 Article 60(2) of the SCO.

b the debtor does not live in Switzerland and the claim has a sufficient connection with Switzerland (Article 271 DCPA).

The prior relies on an endangerment of the creditors rights and is fulfilled when objective elements show that the debtor has the intent to avoid its obligations through deduction, concealment, destruction or escape.[38] The latter requires a sufficient connection with Switzerland that is given when, *inter alia*, the creditor is domiciled in Switzerland or Swiss courts would have jurisdiction over the merits of the claim.[39] The mere location of assets in Switzerland is, however, insufficient, although this connection can be appreciated in the light of further elements.[40] Finally, the creditor in possession of a final judgment or arbitral award can also seek the freezing of assets under Article 271 DCPA.

A civil seizure of an object (e.g., works of art or precious stones) could be sought through *ex parte* interim measures provided that the applicant credibly shows the existence of a case of special urgency where there is a risk that the enforcement of the measure will be frustrated (Article 265(1) of the Swiss Civil Procedure Code). However, the creditor must convincingly reverse the legal presumption that the possessor of the object is its owner (Article 930(1) SCivC).

Under criminal law, the relevant provision is Article 263 SCCrP, which deals with 'sequestration'. Sequestration is a provisional measure that is decided on the basis of a *prima facie* analysis.[41] This measure can be granted only if it is provided for by the law, if there is sufficient suspicion that an offence was committed, if the measure meets the proportionality test and if it is justified in view of the seriousness of the offence.[42] In practice, however, the Federal Criminal Court (FCC) has developed case law relating to the criterion of 'probability' that most often results in seizures lasting throughout the (often lengthy) criminal investigations.[43]

Under Article 263(1)(b) SCCrP, sequestration may be ordered against the perpetrator's assets to guarantee the payment of penalties or indemnities owed to the state. The assets covered by this provision are not necessarily connected with the offence committed. If read in conjunction with Article 71(3) SCrC, resort may then be made to Article 263(1)(b) to award the indemnities to the victim (and not to the state).

According to Article 263(1)(c) SCCrP, '[o]bjects and assets belonging to the accused person or to third parties may be seized if it is likely that: . . . they will have to be handed over to the injured person'. This type of sequestration consists in placing certain objects or assets with the authorities with a view to being handed over to the victim to restore his or her rights. The final decision on restitution, which has priority over confiscation if the victim's claims are not challenged, will in principle take place at the moment of judgment in accordance with Articles 70(1) and 71 SCrC, unless the objects or assets can be handed over before the end of the proceedings under Article 267(2) SCCrP;[44] this article provides that '[i]f it is not

38 CR LP- Stoffel/Chabloz, Article 271 No. 56.

39 CR LP- Stoffel/Chabloz, Article 271 No. 78; ATF 124 III 219 c. 3bb.

40 CR LP- Stoffel/Chabloz, Article 271 N. 81.

41 Decision No. 1B_103/2012 of 5 July 2012, c. 2.1.

42 ATF 139 IV 250 c. 2.1.

43 ATF, 1B_390/2013 of 10 January 2014, c. 2.1, 1B_175/2012 of 5 September 2012, c. 4.1 ; 1P.405/1993 of 8 November 1993, c. 3.

44 Lembo/Julen Berthod on Article 263 of the SCCrP, N 12, in Kuhn/Jeanneret (eds), *Commentaire romand, Code de procédure pénale Suisse*, Basel 2011.

disputed that a certain person has been directly deprived of objects or assets by a criminal offence, the criminal authority hands them over to the entitled person before the termination of the proceedings'.

A special type of sequestration is provided for in Article 268 SCCrP. According to this provision, the accused person's assets may be seized to secure, *inter alia*, the legal indemnities to be paid to the victim as may be ordered by the tribunal at the end of the proceedings. The assets that may be seized under Article 268 SCCrP comprise all the assets of the accused person, including those that have no connection with the offence committed.[45] Although the provision under consideration is not intended to secure the victim's civil claims,[46] it remains of particular interest for the purpose of securing the costs relating to the proceedings.

The question of seizure or securing of assets or the proceeds of fraud pending the outcome of a foreign claim will be outlined below (see Section V.iii).

ii Obtaining evidence

Article 263 SCCrP also deals with sequestration for evidentiary purposes. According to Article 263(1)(a) SCCrP, '[o]bjects and assets belonging to the accused person or to third parties may be seized if it is likely that: (a) they will have to be used as evidence'. The criminal authorities therefore may, of their own motion or following a successful request by a party, seize any objects or assets that are to be used as evidence.

Certain legally privileged documents cannot be sequestrated, for instance the correspondence between the accused person and his or her lawyer.[47] However, legal privilege does not apply to objects, documents and assets that must be sequestrated with a view to being handed over to the victim or that must be confiscated.[48]

The holder of objects or assets that must be sequestrated has a duty to deposit these objects or assets with the criminal authority.[49] This duty is not incumbent, in particular, on the accused person.[50]

The public prosecutor may also seek from the 'compulsory measures court'[51] an authorisation to the effect of monitoring the banking transactions between the accused person and a bank, or any other similar institution; such monitoring may only be requested to investigate a felony or a misdemeanour.[52] If the court grants the request, it will inform the bank (1) about the type of documents and information to be provided; and (2) the secrecy measures to be taken.[53]

The question of obtaining evidence for the pursuit of foreign fraud proceedings from the parties to the claim and from third parties will be outlined below (see Section V.ii).

45 Decision No. 1B_274/2012 of 11 July 2012, c. 3.1.

46 FF. 2006 1229.

47 Article 264(1) of the SCCrP.

48 Article 264(2) of the SCCrP.

49 Article 265(1) of the SCCrP.

50 Article 265(2)(a) of the SCCrP.

51 The compulsory measures court is a specific judicial body that deals exclusively with measures affecting the accused persons and third parties, such as secret investigative measures or decisions on custody.

52 Article 284 of the SCCrP.

53 Article 285(1)(a) and (b) of the SCCrP.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

The Federal Supreme Court and the FCC have held that Article 305 *bis* SCrC (money laundering) not only protects the administration of justice, but also the assets of the person who was injured by the preceding offence, provided that the offence was committed against personal interests.[54] This means that the injured person is considered a person suffering harm within the meaning of Article 115 of the SCCrP and thus may participate in the proceedings as a private claimant (see Section II.i). The injured person is, therefore, entitled to resort not only to civil remedies, but also to criminal remedies in the criminal proceedings.

ii Insolvency

Articles 285 ff. DCPA provide that certain acts of the insolvent party may be revoked. Revocation will have the effect of submitting certain assets to the debt collection proceedings.[55] In particular, the Swiss legislator enacted a rule that provides for revocation of any and all acts made by the debtor in the five years preceding the attachment of assets or the declaration of insolvency, and that were made with the recognisable intention of the other party to harm the debtor's creditors, or to advantage certain creditors to the detriment of others.[56]

When Swissair was grounded and initially placed under a provisional debt moratorium, the Swiss Federal Supreme Court held that the payment made by Swissair to Zurich Airport one day before the provisional debt moratorium amounted to a wilful misconduct within the meaning of Article 288 of the DCPA.[57] The federal judges found that the intention to harm other creditors was apparent and that this intention was clearly recognisable by Zurich Airport. The payment made by Swissair was therefore revoked and repaid to Swissair's estate.

iii Arbitration

Fraud can have a criminal connotation or, in other cases, amount to a 'mere' breach of contract. In arbitration having its seat in Switzerland, arbitral tribunals cannot find a person guilty of a criminal offence and punish that person. However, claims for liability in tort are in principle arbitrable[58] as long as the tortious act is in connection with the contract containing the arbitration agreement.[59] Therefore, depending on the circumstances of the specific case, disputes involving claims for liability in tort and in contract may be adjudicated upon by an arbitral tribunal in Switzerland.

54 ATF 129 IV 322; TPF BB.2012.174 c. 3.2.

55 Article 285(1) of the FDCPA.

56 Article 288 of the FDCPA.

57 ATF 135 III 265.

58 Mabillard/Briner, Article 177 of the PILA, N 9, in Honsell/Vogt/Schnyder/Berti (eds), *Internationales Privatrecht – Basler Kommentar*, 3rd edn, Basel 2013.

59 Patocchi, Switzerland, in Kolkey/Chernick/Reeves Neal (eds), *Practitioner's Handbook on International Arbitration and Mediation*, 3rd edn, New York 2012, p. 1038.

iv Effect of fraud on evidentiary rules and legal privilege

As stated above (see Section III.ii), certain legally privileged documents cannot be sequestrated. This restriction applies to the correspondence not only between the accused person and his or her Swiss or EU lawyer,[60] but also between any lawyer and his or her client (irrespective of who the accused person is), provided that the lawyer is not under investigation.[61]

However, the restrictions mentioned above do not apply to objects, documents and assets that are to be sequestrated with a view to being handed over to the victim or that must be confiscated.[62]

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

In Switzerland, issues of conflicts of law and choice of law are governed by the Federal Private International Law Act (PILA). In cases of fraud (i.e., a tortious act), the '[p]arties may, at any time after the damage occurred, agree to apply the law of the forum'.[63] In other words, the parties are allowed to enter into a choice-of-law agreement, provided that the agreement is made after the damage occurred, but they are only entitled to opt in favour of Swiss law.

If the parties did not agree to have their dispute decided according to the law of the forum, the provision to be considered is Article 133 PILA. If the author of the tortious act and the victim have their habitual residence in the same state, claims for liability in tort are governed by the law of that state.[64] If the author of the tortious act and the victim do not have their habitual residence in the same state, the claims will be governed by the law of the state in which the tortious act was committed.[65] However, if the result occurred in another state, the law of that state will apply if the author of the tortious act should have foreseen that the result would occur there.[66]

Article 133(3) PILA specifically deals with cases in which the parties are bound by a legal relationship, for instance a contract. In those scenarios, if the tortious act breaches a legal relationship, the claims based on the tort are governed by the law applicable to the legal relationship under consideration. Claims for liability in tort and in contract often coincide. This provision therefore facilitates the tribunal's task, as both claims will be governed by one and the same system of law.

ii Collection of evidence in support of proceedings abroad

When dealing with collection of evidence in support of proceedings abroad, the specific rules that will apply very much depend on the state that requested international assistance. If that state did not conclude a bilateral treaty on mutual assistance, Swiss authorities will apply

60 Article 264(1) of the SCCrP.

61 Article 264(1)(d) of the SCCrP, which entered into force on 1 May 2013.

62 Article 264(2) of the SCCrP.

63 Article 132 of the PILA (English translation in Bucher (ed), *Commentaire romand, Loi sur le droit international privé, Convention de Lugano*, Basel 2011).

64 Article 133(1) of the PILA.

65 Article 133(2) of the PILA.

66 Article 133(2) of the PILA.

the Federal Act on International Mutual Assistance in Criminal Matters (IMAC). Where the request for assistance comes from a European country, Switzerland will resort to the European Convention on Mutual Assistance in Criminal Matters (ECMA) of 20 April 1959.

All the instruments mentioned above contain specific provisions for the purpose of collecting evidence in support of proceedings taking place outside Switzerland.[67] In the case of *bona fide* third parties, Article 74(2) IMAC provides that the evidence will be handed over to the requesting state only if it gives assurances that it will return the evidence to the third parties at the end of the proceedings and without costs. The ECMA contains a similar rule.[68]

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

Seizure of assets and proceeds was developed at a later stage than mutual assistance for evidentiary purposes. A provision dealing with the seizure of assets and proceeds was included in the Second Additional Protocol to the ECMA. According to Article 12(1) of the protocol, '[a]t the request of the requesting Party and without prejudice to the rights of *bona fide* third parties, the requested Party may place articles obtained by criminal means at the disposal of the requesting Party with a view to their return to their rightful owners'.

For its part, Article 74a IMAC enables Swiss authorities to hand over certain objects and assets, which have been seized, to their international counterpart for the latter to hand them over to the rightful owner. The handover may take place at any stage of the foreign proceedings; in principle, following a final and enforceable decision by the requesting state.[69]

Another question that often arises is whether civil interim measures granted by a foreign court may be recognised and enforced in Switzerland. One must first draw a line between interim measures granted by the tribunals of a signatory state of the Lugano Convention (see Section V.i) and those granted in countries with which Switzerland did not enter into any specific convention on recognition and enforcement. However, *ex parte* interim measures can not be recognised and enforced in Switzerland.[70]

In the first case, it is well settled that judgments granting interim measures may be recognised and enforced in Switzerland like any other (final) judgment.[71]

In the second case, academic writers debate the question whether Article 25(b) of the PILA on recognition of foreign judgments also applies to foreign interim measures.[72] The issue is currently unsettled and the Swiss Federal Supreme Court has to date still not rendered a definitive ruling on this issue.[73]

67 Article 74 of the IMAC; Articles 3 and 6 of the ECMA.

68 Articles 3 and 6 of the ECMA and Article 12(2) of the Second Additional Protocol to the ECMA.

69 Article 74a(3) of the IMAC.

70 CR LDIP-Bucher, Article 25 No. 31.

71 Bucher on Article 32 of the Lugano Convention, N 7, in Bucher (ed.), *Commentaire romand, Loi sur le droit international privé, Convention de Lugano*, Basel 2011; Schuler/Marugg on Article 32 of the Lugano Convention, No. 31, in Oetiker/Weibel (eds), *Basler Kommentar, Lugano-Übereinkommen*, 2nd edn, Basel 2016.

72 See, for instance, Bucher on Article 25 of the PILA, in Bucher (ed), *Commentaire romand, Loi sur le droit international privé, Convention de Lugano*, Basel 2011.

73 ATF, 5P.252/2003, c. 3.3: without answering the question, the Swiss Federal Supreme Court mentioned that most legal scholars are opposed to the recognition of interim measures.

If a party seeks recognition and enforcement of interim measures, the party will in principle have to file a separate request before the competent tribunal where enforcement is sought.[74]

iv Enforcement of judgments granted abroad in relation to fraud claims

Recognition and enforcement of foreign judgments in relation to fraud claims is essentially governed by two instruments: the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 (Lugano Convention) and the PILA.

The Lugano Convention is applicable to the European Union, Norway, Iceland, Denmark and Switzerland. One of the purposes of the Lugano Convention was to facilitate the circulation of judgments. Accordingly, a judgment given in a state bound by the Lugano Convention will be recognised in the other states bound by the Convention without any special procedure being required.[75] Enforcement is governed by Articles 38 ff. of the Convention. As with recognition, Switzerland will declare foreign judgments enforceable if the applicant so requests.[76] The foreign judgment will not be reviewed as to its substance.[77]

If no treaty applies to a particular international situation, Swiss tribunals will deal with issues of recognition and enforcement by resorting to the PILA. Under Article 25 PILA, a foreign judgment will be recognised in Switzerland if (1) the judicial or administrative authorities of the state in which the decision was rendered had jurisdiction; (2) if the decision is no longer subject to an ordinary remedy (as opposed to an extraordinary remedy that is available only in limited and exceptional circumstances, for instance if a tribunal decided *infra* or *ultra petita*) or if it is final; and (3) if there is no ground to refuse recognition according to Article 27 PILA.[78] If the decision was recognised, it may be declared enforceable if the applicant so requests.[79]

Finally, pursuant to Article 194 PILA, the recognition and enforcement of foreign arbitral awards is governed by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

v Fraud as a defence to enforcement of judgments granted abroad

Articles 27(1) PILA and 34(1) Lugano Convention provide that the judge may refuse recognition of a foreign judgment if the judgment 'manifestly' runs counter to public policy. When dealing with cases of public policy under Article 27(1) PILA, the Swiss Federal Supreme Court has held that a decision would breach substantive public policy only if the decision contravenes material mandatory rules of Swiss law.[80] As a consequence, recognition

74 Article 338 of the Swiss Code of Civil Procedure.

75 Article 33(1) of the Lugano Convention.

76 Article 38(1) of the Lugano Convention.

77 Articles 36 and 45(2) of the Lugano Convention.

78 Recognition may be refused under Article 27 of the PILA in the following cases: (1) the decision is manifestly incompatible with Swiss public policy; (2) a party did not receive proper notice; (3) the decision was rendered in violation of fundamental principles pertaining to the Swiss conception of procedural law; and (4) the dispute between the parties is already pending in Switzerland or has already been decided there or in a third state.

79 Article 28 of the PILA.

80 ATF 134 III 661 c. 4.1.

and enforcement are usually to be considered the rule, and the Swiss judge will refuse to recognise a foreign decision only in exceptional cases. However, if the foreign judgment is tainted with fraud and the respondent successfully proves the fraud allegations, Swiss judges do have a tool to refuse recognition and enforcement. In a recent decision involving debt collection proceedings in Switzerland brought to enforce two Swedish arbitral awards, the debtor argued that the awards could not be recognised in Switzerland for reasons of public policy under Article V(2)(b) of the New York Convention. The debtor contended that the arbitration proceedings were tainted with fraud (false testimony). While the debtor's defence was ultimately not successful for lack of evidence, the Swiss Federal Supreme Court held that an award influenced by a procedural fraud may breach public policy and consequently not be enforceable in Switzerland.[81]

VI CURRENT DEVELOPMENTS

After about seven years investigating the *Gazprom* corruption case, the Office of the Attorney General of Switzerland (OAG) was notified in 2016 of the FCC ruling ordering the acquittal of the defendants.

The heart of the case lies in the payments of *circa* US$7 million by Siemens Industrial Turbomachinery Ltd (SIT), a company acquired by Siemens in 2003, to senior executives of the Russian energy giant Gazprom. The OAG suspected that these payments, which occurred between 2001 and 2006 via bank accounts held by the end recipients in Geneva, were bribes that helped SIT secure contracts to build compressor stations and to supply gas turbines during the construction of a gas pipeline that runs from the gas fields on the Russian Yamal peninsula to Germany.

In November 2013, the OAG agreed to close the criminal proceedings against SIT on the basis of Article 53 SCrC that allows the prosecutor to refrain from prosecuting an offender who has made every reasonable effort to right the wrong he or she has caused. SIT thus admitted basic failures in checking consultancy agreements, turned over its US$10.6 million of unlawful gain to the Swiss State (Article 71(1) SCrC) and paid reparation of 125,000 francs – in the form of a donation to the International Committee of the Red Cross.[82] In recent years, the criminal authorities' recourse to Article 53 SCrC has considerably increased, as shown in Geneva by HSBC paying 40 million francs in June 2015[83] and Addax Petroleum settling for 31 million francs in July 2017.[84] This provision, which is considered by some as a means to favour wealthy offenders who can brush criminal proceedings aside by paying a certain amount, is currently being reviewed by the Swiss parliament.[85]

Alongside the proceedings against the company, measures were taken against the individuals involved in the bribing scheme. During December 2010, the OAG issued two seizure orders based on Article 263(1)(b) SCCrP over the assets held by a retired manager in two Swiss bank accounts that amounted to about 1,376 million francs. The retired

81 Decision No. 5A_165/2014 of 25 September 2014, c. 6.2.

82 www.admin.ch/gov/en/start/documentation/media-releases.msg-id-50913.html.

83 http://ge.ch/justice/sites/default/files/justice/common/actualites/communiques_de_presse/PJ_MP_COMMUNIQUE_CLASSEMENT_BANQUE_20150604.pdf.

84 http://ge.ch/justice/sites/default/files/justice/common/actualites/communiques_de_presse/PJ_MP_COMMUNIQUE_CLASSEMENT_ADDAX_20170705.pdf.

85 https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20100519.

manager was suspected of having benefited from an amount of US$2.2 million between April 1999 and October 2006: a period that only briefly overlapped with the criminalisation of passive bribery on 1 July 2006. These seizures were maintained by the FCC in its rulings of 12 November 2014 and 12 June 2015.[86]

In these rulings, the FCC refused to remove the contested payments prior to 1 July 2006 from the scope of the investigation by applying Article 70 SCrC that allows the confiscation of payment for an offence, even if the proceeds are held by third parties. By doing so, the Court actually shifted the focus to the offence of active bribery committed by the author of the payment. Since active bribery was already criminalised as of 1 May 2000, the FCC ruled that the proceeds relating to the payment that were from the seized bank account could, as such, be subject to confiscation.

Further, while most of the amounts were seized from the account into which the alleged bribe was transferred, a share of the assets was seized from an unrelated bank account. However, the FCC upheld the seizure by ruling that, since the alleged bribe was estimated at about US$2.2 million, even assets that were not a direct payment for the offence could be seized as a compensatory measure under Article 71 SCrC.

In 2016, the individuals were finally tried by the FCC on the merits. The FCC ruled that Gazprom was not a public organisation and that its senior executives were therefore not public officials, thereby annihilating the OAG's indictment based on public bribery. As a consequence, the Court acquitted the accused, ordered the seized assets to be released and the expenses of the proceedings, including the defendants' costs, to be borne by the OAG.[87] The new Articles 322 *octies* and 322 *novies* SCrC entered into force on 1 July 2016. These new provisions, that provide for automatic prosecution of individuals engaging in private bribery, would have certainly lead to a different outcome in the *Gazprom* case.

86 FCC, BB.2014.79 of 12 November 2014; BB.2014.191 of 12 June 2015.

87 FCC, SK.2015.17 of 1 April 2016; SK.2016.17 of 12 July 2016.

Appendix 1

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