THE ASSET TRACING AND RECOVERY REVIEW

NINTH 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. 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.

Modern times pose fresh challenges for everyone involved in fraud, from those who commit it to those who suffer from it. As Warren Buffet famously said, 'only when the tide goes out do you discover who has been swimming naked'. The coronavirus pandemic has offered the global economy another opportunity to prove him right. Not only are new frauds being discovered, but the growing recession will challenge the budgets of victims, regulators and criminal enforcement bodies to bring those responsible to justice and to retrieve the proceeds. Remote interpersonal dealings are increasing the distance between business counterparties in a way that the internet did, and the growth of cryptocurrency transactions continues to do.

It is not possible to predict the trajectory of these developments. While it is now a cliché to speak of the 'new normal', nobody can be actually sure what that normal will be. Some even dispute that it is useful to speak of a normal at all. Nassim Taleb has argued that the financial world is more frequently and radically affected by extreme and unpredictable occurrences (which he calls 'Sigma' or 'Black Swan' events) than we acknowledge. According to Taleb, we live in 'extremistan' and not 'mediocristan'. He has suggested that it is part of our makeup to blind ourselves to the influence of what we cannot predict.

Taleb may be right. For my part, I rather think that he is. But amid all the unpredictability, there are nevertheless some certainties. Society depends upon trust, and there will always be some people who abuse it. So some people will always commit fraud. Globalisation has ensured that major fraud will usually have an international element. Fraud lawyers will therefore have to be internationally minded.

Perhaps the growing international and technical complexity of fraud will continue to outstrip the ability of any one person to understand or remedy it. One of the heartening things about the legal profession over the past 25 years or so, however, is the growth of an international community of lawyers specialising in fraud and asset tracing work who share knowledge and experience with each other about the events in their fields. This book continues to be a useful contribution to that community.

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 review 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 six. 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
Robert Hunter Consultants
August 2021

Chapter 23

SWITZERLAND

Yves Klein and Antonia Mottironi[1]

I OVERVIEW

Despite its small size (8 million inhabitants), Switzerland is a leading jurisdiction in asset recovery disputes, as there is rarely a global asset recovery case that does not have at least one Swiss element.

Switzerland has been for decades and remains the main offshore banking centre in the world, with more than one-quarter, or US$2.3 trillion, of the world's foreign assets under management.[2] Furthermore, Switzerland has more recently become the world's number one commodity trading and trade finance hub.[3] Its global market share is estimated at 35 per cent for oil, 60 per cent for metals and 50 per cent for sugar and cereals respectively.[4] Shipping through Swiss companies represents 22 per cent of global movements of commodities.[5]

It is therefore not surprising that a fair share of cross-border asset recovery disputes involve Swiss banks or financial intermediaries, or commodity trading companies, as assets, claims and evidence lie in Switzerland.

Of particular importance is the commitment of the Swiss law enforcement authorities to investigate money laundering and to assist victims of crime when they participate as plaintiffs in criminal proceedings. A recent judgment of the Federal Court has also recognised the status of plaintiff of assignees of tort claims in the case of subsequent acts of money laundering, which opens new avenues for litigation funding.

The situation has recently improved with the adoption of a new cross-border insolvency regime, in force since January 2019, which aims at simplifying the recognition of foreign insolvencies and the work of foreign officeholders. The most recent federal case law has also improved the position of foreign liquidators in the collection of pretrial evidence in support of civil claims against Swiss banks.[6]

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1 Yves Klein is a partner at Monfrini Bitton Klein and Antonia Mottironi is an independent attorney-at-law, Geneva.

2 Swiss Banking Association (www.swissbanking.ch/_Resources/Persistent/d/5/9/d/d59d602bd5570e7aeb167a246b1b6fa9b6cf3368/SBA_Banking%20Barometer_2020_EN.pdf).

3 Swiss Trading and Shipping Association (www.stsa.swiss/know/key-figures).

4 www.publiceye.ch/en/topics/commodities-trading/switzerland/commodities-hub.

5 ibid.

6 FDC 5A_126/2020. The Federal Court ruled in particular that besides the contractual obligations of the banks, in the context of insolvency, there is a public interest in the disclosure by banks of internal information that may enable foreign insolvency office holders to identify claims, to assess their amounts and to collect all supporting evidence.

II LEGAL RIGHTS AND REMEDIES

In Switzerland, as in most civil law jurisdictions, civil remedies need to be supplemented with criminal remedies to achieve a successful asset recovery strategy.

Due to the lack of a proper discovery process under the Swiss rules of civil procedure, civil proceedings in fraud-related matters are in most cases preceded by criminal proceedings so as to obtain evidence and secure assets in support of civil claims.

Rather than opting for the civil route, the institution of criminal proceedings enables the victims of fraud participating as plaintiffs to request that the law enforcement authorities issue broad freezing and disclosure orders from defendants and third parties holding assets or information. The Swiss criminal system enables plaintiffs, to a certain extent, to be compensated with their losses.

Fraud has a narrower meaning under Swiss law than the general meaning it is given by asset recovery practitioners. Pursuant to Article 146(1) of the Swiss Penal Code (SPC), a fraud is committed by 'any person who with a view to securing an unlawful gain for himself or another wilfully induces an erroneous belief in another person by false pretences or concealment of the truth, or wilfully reinforces an erroneous belief, and thus causes that person to act to the prejudice of his or another's financial interests'. For the purpose of this chapter, the term 'fraud' is defined broadly to include, in particular but not limitedly, the following felonies[7] within the meaning of Article 10(1) and (2) SPC: embezzlement,[8] fraud,[9] criminal mismanagement,[10] felonies committed in bankruptcy,[11] forgery[12] and public bribery.[13]

Swiss law provides for two types of criminal corporate liability for Swiss or foreign legal entities:

a subsidiary criminal liability if it is not possible to attribute to a specific person a felony or misdemeanour committed within a company due to its inadequate organisation; and

b primary liability with regard to money laundering, organised crime and bribery independently of the criminal liability of individuals if a company did not take all the reasonable and necessary organisational measures to prevent such offences.[14]

i Civil and criminal remedies

Criminal remedies

The Swiss Code of Penal Procedure (SCPP) provides ample rights to persons harmed by a crime, and Swiss criminal proceedings are in most cases the key to obtaining evidence and freezing assets.

Where fraud is committed, in Switzerland or abroad, criminal proceedings may be opened if Swiss jurisdiction is given pursuant to Articles 3–8 SPC to pursue the predicate offence or the subsequent money laundering of the proceeds of the felonies committed, or

7 Felonies are distinguished from misdemeanours according to the severity of the penalties that an offence carries. Felonies are offences that carry a custodial sentence of more than three years.

8 Article 138 SPC.

9 Article 146 SPC.

10 Article 158 SPC.

11 Article 163 ff SCP.

12 Article 251 SPC.

13 Article 322 *ter* ff SPC.

14 Article 102 SCP.

both. Criminal proceedings can be opened *ex officio* (e.g., after a suspicious activity report is sent by the Money Laundering Reporting Office Switzerland (MROS), the Swiss financial intelligence unit, to the criminal authorities) or upon a criminal complaint by a private plaintiff.[15] Criminal proceedings are opened by the office of the attorney general (through a prosecutor) when the reports or the first investigations show that there exists a sufficient suspicion that a criminal offence was committed.[16]

Any individual or legal entity (including a Swiss or a foreign public entity) whose rights, as legally protected by the applicable provision of the Swiss Penal Code,[17] have been directly harmed by a crime subject is deemed to be an aggrieved person.[18]

Only persons or entities that have been directly harmed by a crime may be admitted as plaintiffs. Persons who are indirectly aggrieved by a crime, such as the shareholders, the directors, the employees, the creditors or the assignees of the direct victim of the crime are not considered to be aggrieved persons.

An aggrieved person may file a criminal complaint or join existing criminal proceedings by declaring his or her intention to become a plaintiff[19] supporting the prosecution or suing for damages, or both.[20]

During a criminal investigation, the plaintiff has essentially the same party rights as the suspect, in particular:

a to require orders from the prosecutor (including freezing, production and search orders);[21]

b to attend the examination of witnesses or suspects and have questions put to them;[22]

c to receive notification of the decisions of the prosecutor and appeal against those that aggrieve his or her rights[23] and file observations in respect of other parties' appeals;[24] and

d to access the file, with the right to take a copy.[25]

The prosecutor has a duty to gather evidence relating to the civil claims of the plaintiff, inasmuch as it does not unduly expand or delay the procedure.[26]

In addition to the right to participate in the criminal investigation, the person aggrieved by the crime, who made the civil plaintiff declaration[27] during the criminal investigation,

15 Article 301 SCPP.

16 Article 309(1)(a) SCPP.

17 When a provision is meant to exclusively protect public or collective interests, its breach, even if it causes damage to a person, does not entitle such person to be considered as injured under the law of criminal procedure.

18 Article 115 SCPP.

19 Article 118 SCPP.

20 Article 119 SCPP.

21 Article 109 SCPP.

22 Article 147 SCPP.

23 Articles 393 and 382 SCPP.

24 Article 390 SCPP.

25 Article 101 SCPP.

26 Article 313 SCPP.

27 Article 119(2)(b) SCPP.

may, in the context of a criminal trial, request the award of damages against the accused person. The award part of the criminal judgment has the same effect as a judgment issued by a civil court.[28]

Civil remedies[29]

It is only if the Swiss conflict of law rules, governed by the Private International Law Act (SPILA), designate Swiss law as the substantive law that it shall apply (see below).

The Swiss law of obligations is governed by the Swiss Code of Obligations (SCO).

Tort liability[30] is given when the claimant proves that the defendant committed an unlawful act.

In addition to civil fraud[31] and infringement of absolute rights such as property rights, tort liability will exist in cases of criminal offences when the goal of these offences is to protect assets or interests that were harmed. Complicity or inducement to commit a criminal offence[32] will entail liability for tort.

Under Article 55(2) SCC, the governing officers bind the legal entity by concluding transactions and by their other actions. Under Article 55(1) SCO, the employer is liable for the damage caused by its employees in the performance of their work unless it proves that it took all due care to avoid damage of this type or that the loss or damage would have occurred even if all due care had been taken.

The burden of proof lies with the plaintiff.[33]

In addition to the unlawful act, the claimant has to prove a loss, causation between the unlawful act and the loss, and a fault.

Most offences against property are intentional offences and thus may only form the basis of an unlawful act in the sense of Article 41 SCO if wilful intention can be established. Likewise, complicity in or inducement to commit an offence has to be intentional.

In the case of loss resulting from an unlawful act, the injured party is entitled to compensation of its negative interest, that is, to be put back in the situation in which it would have found itself if the loss-causing event had not occurred. Compensation of damage only consists of direct losses, to the exclusion of indirect losses.

Swiss substantive law does not know the concept of constructive trust. However, certain similar results may be achieved through the provisions governing unjust enrichment provision,[34]where restitution is required for what has been received without valid cause, and agency without authority,[35] where the agent who acted against the principal's interests must compensate the principal for its losses and remit its gains to the principal.

Civil proceedings are governed by the Swiss Code of Civil Procedure (SCCP).

The filing of a claim needs in principle to be preceded by an attempt at conciliation. If the conciliation fails, the claimant may file its particulars of claim. Particulars of claim must contain a precise allegation of the facts, with the exhibits supporting them and the additional

28 Article 122 SCPP.

29 Civil liability for breach of contract is excluded from this chapter.

30 Article 41 SCO.

31 Article 28 SCO.

32 Article 25 SPC.

33 Article 8 SCC.

34 Article 62 SCO.

35 Article 419 SCO.

proof proposed (examination of witnesses, provision of documents held by the defendant or third parties, mutual assistance, expert reports, etc.; affidavits or witness statements are not admissible evidence). There is no discovery process, and the production of documents is usually limited to a few documents, which must be precisely described by the party requesting them.

In principle, evidence is administered only after the parties have exchanged their briefs and rejoinders. It is only under specific conditions that a claimant may make new factual allegations or amplify the reliefs sought.

Consequently, in cases where many of the facts are initially unknown to the victim of a fraud, it is advisable to collect evidence and secure assets through criminal proceedings before starting civil proceedings.

Trials in first instance typically last from one to three years but may last even longer in the case of preliminary objections or obtaining evidence abroad. Appeals to the cantonal court of appeal usually last less than a year, as well as those to the Federal Supreme Court.

ii Defences to fraud claims

The main defences to fraud claims are limitations and waivers. Limitations in tort claims are of one year from the moment the injured party became aware of the loss and the person who caused it and, in any case, 10 years from the day on which the loss-causing event occurred.[36] However, if the losses derive from a punishable act subject to a longer limitation period under criminal law, this longer limitation period applies to civil claims.[37] Under Swiss criminal law, limitation is of 15 years for felonies and of 10 years for money laundering.[38] Criminal law limitation only stops running when a criminal judgment is issued in first instance.[39] Actions for illicit enrichment are subject to limitation after one year from the day on which the injured party became aware of its right of recovery and, in any case, after 10 years from the emergence of this right.[40] Civil limitation (whether for contractual, tort or unjust enrichment claims) may be interrupted, launching a new full limitation period, by initiating debt enforcement proceedings, filing an application for conciliation, submission of a statement of claim or defence to a court or arbitral tribunal, or a petition for bankruptcy.[41]

General terms of conditions, notably of Swiss banks, usually contain waivers of liability and transfer of risk clauses. However, such clauses do not apply to gross negligence.[42]

The *ex turpi causa non oritur actio* is not available as such under Swiss law, except under the narrow perspective of abuse of rights and public policy. Under Article 44 SCO, however, the judge may reduce the losses, or even not award them, when the injured party has consented to the injury or when facts for which he or she is responsible have contributed to creating the loss or increasing it, or aggravating the debtor's situation. Under case law, the injured party may be accused of not having exercised the necessary care to safeguard its own interests, provided, however, that it should have been able to foresee the occurrence of

36 Article 60 SCO.
37 Article 60(2) SCO.
38 Article 97 SPC.
39 Article 97(3) SPC.
40 Article 67 SCO.
41 Article 135 SCO.
42 Articles 100 and 101 SCO.

a possible loss and still did not adapt its conduct. The contributory negligence is assessed objectively and the injured party's conduct must be compared with that of a reasonable person in an identical situation.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

There are three ways of securing assets and proceeds in Switzerland:

a criminal freezing orders;[43]
b civil attachment orders;[44] and
c insolvency freezing orders.[45]

Article 263(1) SCPP provides that items and valuables belonging to the accused or to a third party may be frozen if it is expected that the items or assets:

a will be used as evidence;
b will be used as security for procedural costs, monetary penalties, fines or costs;
c will have to be returned to the persons suffering harm; or
d will have to be forfeited.

All assets that are likely to be forfeited at the end of proceedings based on Article 70 SPC must be seized during the investigation. These assets may be in Switzerland or abroad, in which case they must be seized by rogatory commission. The freeze takes precedence over any other decision obtained by creditors.

Freezing orders also extend to assets that may be seized to guarantee the replacement claim of the state in respect of crime proceeds that are no longer available for confiscation.[46] In respect of those assets, the state has no preferable rights over those of other creditors.

Freezing orders may be issued in view of the restitution of assets to their rightful owner, but not to secure a claim for damages of an aggrieved person. Consequently, the aggrieved person may have to also obtain freezing orders through civil proceedings, namely attachments obtained in the context of debt collection proceedings or enforcement of foreign freezing orders.

The accounts targeted by a freezing order may be described in a generic form, such as 'any account of which designated persons are holders, beneficial owners, signatories or introducers, as well as any account that may have received transfers from or made transfers to, that account'.

Civil attachment orders have a narrower scope, as those can only affect the assets held at the moment when an order is received. The requirements for obtaining these orders are also stricter. The main difficulty for creditors is to identify assets located in Switzerland, as the likelihood of the existence of Swiss assets has to be brought before the civil court. Pre-enforcement discovery is not available.

The cause for a civil attachment by a creditor[47] can be any of the following:

43 Articles 263–268 SCPP.
44 Articles 271–281 SDCBA.
45 Articles 221–223 SDCBA.
46 Article 71 SPC.
47 Article 271 SDCBA.

a the debtor has no fixed place of residence or abode anywhere, in Switzerland or abroad;
b the debtor has dissipated assets, and has fled the jurisdiction or is preparing to flee in order to defeat enforcement of undischarged debts;
c the debtor is in transit or is a person visiting markets or fairs, provided the relevant claim is of a nature that requires immediate payment;
d the debtor has no residence in Switzerland, and no other causes for an attachment are fulfilled, but the claim has a sufficient nexus with Switzerland or is based on a written acknowledgment of debt;
e the creditor holds certificates evidencing former unsuccessful attempts at enforcement in respect of undischarged debts of the debtor; and
f the creditor holds a title for final enforcement under the Swiss Debt Collection and Bankruptcy Act (SDCBA), typically a domestic or foreign judgment or arbitral award.[48]

The court at the place where assets are located issues a freeze order *ex parte* if the creditor demonstrates, through documentary evidence, the likelihood that it has a monetary claim; there exists a cause for an attachment order as listed above; and there are assets at hand belonging to the debtor.[49]

The likelihood of the existence of the assets to be attached may be demonstrated by direct or circumstantial evidence.

The attachment order describes specific assets and may target assets in several locations, including outside of the canton of the court.

The debtor may file proceedings of objection to the attachment. In parallel, the creditor must validate the attachment by requesting that an order to pay be issued against the debtor, who may object to it.[50] The setting aside of the objection may take place through the enforcement of an existing Swiss or foreign judgment or by filing a civil action on the merits in Switzerland or abroad. The final seizure of the attached assets and distribution to the creditors cannot occur before the end of the proceedings on the setting aside of the objection to the order to pay.

If a company in bankruptcy is involved in a fraudulent scheme, as a victim or as a tool of the perpetrator, the judgment of bankruptcy, respectively the judgment on recognition of a foreign insolvency decree, triggers the opening of bankruptcy. Upon receipt of the judgment, the local bankruptcy office must immediately take all necessary measures in view of its execution, such as the freezing of bank accounts. These orders are issued *ex officio* and sent to the main Swiss banks. Only the accounts of the debtor can be frozen in the frame of insolvency proceedings. The assets and claims of the bankruptcy estate are listed in the inventory of the estate. If the Swiss liquidator of the bankruptcy does not intend to bring certain claims of the bankruptcy estate, creditors may request the assignment of the right to bring such claims on behalf of the bankruptcy estate at their own cost and risk against the right to be paid in priority over the recovery proceeds.[51] In relation to foreign insolvent companies, Swiss privileged creditors have a priority right on the distribution of the Swiss assets, before the balance can be repatriated to the main foreign bankruptcy estate.[52]

48 FCD 139 III 135.
49 Article 272(1) SDCBA.
50 Article 279 SDCBA.
51 Article 260 SDBCA.
52 Articles 172–174a SPILA.

ii Obtaining evidence

The main obstacles in the obtention of evidence in Switzerland are bank secrecy,[53] trade and business secrets and data protection. However, these pitfalls can be overcome, in particular in criminal and insolvency proceedings, where bank secrecy cannot be opposed to the state authorities. Recent Swiss case law on mutual assistance in civil matters also shows a trend in favour of the lifting of banking, trade and business secrets in favour of the manifestation of the truth in a foreign civil trial.

It is important to note that Switzerland has a blocking statute, contained in Article 271 SCP, which punishes with up to three years of imprisonment unauthorised activities conducted on Swiss territory on behalf of a foreign authority. The gathering of evidence in support of foreign proceedings is considered a breach of Article 271 SCP.

There are several alternative ways of obtaining evidence in Switzerland: by criminal disclosure[54] and search[55] orders, by the civil precautionary taking of evidence[56] and civil production orders, and by orders of disclosure of information by the bankruptcy authorities.[57] Together with the right of the parties to request that further evidence be taken (see above), the parties to criminal proceedings have the right to consult the file,[58] which includes the right to levy copy, and to use such in other proceedings of any kinds, both in Switzerland or abroad. In principle, under Swiss law, parties do not have the obligation to keep an investigation secret. Therefore, they can access and use all the evidence in file, in particular the result of the disclosure orders issued by the prosecutor. Article 108(1) and (3) SCPP provides, however, that restrictions may temporarily apply when there is justified suspicion that a party is abusing its rights or when this is required for the safety of persons or to safeguard public or private interests in preserving confidentiality.[59]

The type of documents that may be obtained include banking statements, KYC documents, visit reports and compliance reports.

Subject to exceptions deriving from the constitutional right to remain silent and not to self-incriminate,[60] the holder of documents, information and other items is obliged to hand them over to the prosecutor.[61]

Given that Switzerland is a civil law country, obtaining pretrial evidence is difficult. In that particular context, Article 158 SCCP provides for the possibility of taking evidence located in Switzerland at any time if the applicant shows likelihood that the evidence is at risk or that it has a legitimate interest to obtain the requested evidence. The Swiss Federal Court ruled that a legitimate interest is sufficiently demonstrated if the applicant wants to appraise the chances of success of a contemplated legal action.[62] Precautionary taking of evidence is even granted if a trial will occur outside of Switzerland. The proceedings are conducted

53 Article 47 of the Swiss Banking Act (SBA).

54 Articles 263–268 SCPP.

55 Article 244–250 SCPP.

56 Article 158 SCCP.

57 Article 222 SDCBA.

58 Articles 107(1)(a) and 147 SCPP.

59 There is one important exception to this principle: a state requesting mutual legal assistance in criminal matters is restricted in its right as a plaintiff in the Swiss criminal proceedings to access the file and to use evidence contained in the file as long as the execution of letters of request in Switzerland is pending.

60 Article 265(2) SCPP.

61 Article 265(1) SCPP.

62 FCD 5A_295/2016.

inter partes. In principle, gag orders are not available. This domestic tool is an interesting alternative route to requesting international judicial assistance (see below). It can be faster, and the rights of the civil plaintiff are broader than under a request for judicial assistance. However, the grounds for refusing the taking of evidence are much more limited in the context of the execution of a request for judicial assistance than in an independent request on the precautionary taking of evidence.

A civil claimant may also obtain evidence after the institution of a civil action. Production orders issued by the civil judge are, however, very narrow as the claimant has to target specific documents or evidence (see above). As the claimant has to quantify its damage by detailed prayers of relief and to allege all the facts necessary to prove the damage immediately in its first submissions,[63] requesting the production of evidence during a civil trial is an inefficient strategy in fraud-related cases.

In bankruptcy proceedings, the debtor is obliged under threat of penal law sanctions to divulge all assets to the bankruptcy office and to hold himself or herself at the office's disposal.[64] The debtor must open premises and cupboards at a bankruptcy official's request. If necessary, the official may use police assistance.[65] Third parties who have custody of assets belonging to the debtor or against whom the debtor has claims have the same duty to divulge and deliver up as the debtor.[66] Creditors and other interested parties have a right to consult the bankruptcy file[67] and to use the evidence that it contains.[68]

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Money laundering usually is a key element of Swiss asset recovery cases, essentially for three reasons:

a the presence of a Swiss bank account or Swiss financial intermediary often is the only connection to Switzerland of an asset recovery case;

b the willingness of Swiss law enforcement authorities to investigate money laundering will help fraud victims to obtain access to key evidence and assets; and

c banks or other financial intermediaries may be held liable for the losses caused by money laundering.

Article 305 bis (1) SPC defines money laundering as 'an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he knows or must assume originate from a felony'. Only proceeds of felonies, namely crimes liable to a prison term of more than three years,[69] can be laundered.

Money laundering by negligence is not punishable. However, the intention is based on the violation of a due diligence duty. It is enough that the person should have known from

63 Article 321(1) SCCP.

64 Article 222(1) SDCBA.

65 Article 222(3) SCDBA.

66 Article 222(4) SDCBA.

67 FCD 93 III 4.

68 The Court of Justice of Geneva ruled that a person accused of mismanagement causing a bankruptcy has a legitimate interest to consult the bankruptcy file (DSCO/303/18).

69 Article 10(1) and (2) SPC.

the circumstances that the assets were the product of some kind of severe offence, without necessarily knowing exactly which, and that the offender acted recklessly.[70] If a person has accepted funds without knowing their criminal origin and only learns it afterwards, any transaction made with respect to these assets after that moment is deemed to be money laundering. Money laundering by abstention is also punishable.[71]

The purpose of the Federal Law on the Prevention of Money Laundering in the Financial Sector (LML) is to create a precise set of due diligence rules for all financial intermediaries, and to provide for an obligation to report suspicions of money laundering. In practice, this provision is very important for asset recovery, as such reports, made to the MROS, often reveal the existence of assets connected to fraudsters that would otherwise not have been found, notably when the media report on large criminal investigations. Upon receiving credible reports, the MROS communicates them to Swiss law enforcement authorities, who initiate criminal investigations, issue freezing orders and usually send requests for mutual assistance to the authorities of the countries where the alleged predicate offences took place.

Money laundering is an offence that is notably meant to protect the person harmed by the predicate felony and, consequently, the person, company or bank[72] who wilfully launders such proceeds may be liable to compensate the loss caused by the acts of money laundering. Acts of money laundering in the meaning of Article 305 *bis* SPC may entail civil liability for tort towards the person aggrieved by the predicate offence, if the acts of money laundering prevented its compensation, notably from assets that could have been forfeited and allocated in its favour.[73] However, the breach of due diligence rules contained in the LML do not entail civil liability, as the objective of those provisions is to safeguard the reputation of the Swiss financial industry and not to protect private interests.[74]

ii Insolvency

Swiss criminal law provides for specific provisions on fraud in an insolvency context[75] that are a subcategory of the crimes committed against property. There exist three felonies, namely fraudulent bankruptcy and fraud against seizure,[76] reduction of assets to the prejudice of creditors[77] and mismanagement causing bankruptcy.[78] There are also five misdemeanours, namely failure to keep proper accounts,[79] undue preference to creditors,[80] subornation in enforcement proceedings,[81] disposal of seized assets[82] and obtaining a judicial composition agreement by fraud.[83] Where the debtor is a company, its corporate bodies are deemed the perpetrators of these offences. There is little case law on the commission of these specific

70 ATF 119 IV 242.
71 FCD 6B_908/2009.
72 Article 102 SCP.
73 FCD 129 IV 322; FCD 133 III 323.
74 FCD 134 III 529.
75 Articles 163–171 *bis* SPC.
76 Article 163 SPC.
77 Article 164 SPC.
78 Article 165 SPC.
79 Article 166 SPC.
80 Article 167 SPC.
81 Article 168 SPC.
82 Article 169 SPC.
83 Article 170 SPC.

offences. The general trend is that the threshold to prove that a specific behaviour of a *de facto* or *de jure* body triggered the insolvency of the company is high. Criminal law being subsidiary to other legal remedies, a wrong choice of management may more easily trigger civil liability of the corporate bodies than their criminal liability.

Civil legal actions for damages in tort, where the commission of a criminal offence is proved,[84] and for damages for breaches of their duties in the administration, business management and liquidation,[85] are available to a company, the shareholders and the creditors against the members of the board of directors and all persons engaged in the business management or liquidation of the company. Outside insolvency, the company itself and each shareholder are entitled to sue for any losses caused to the company. A shareholder's claim is for payment of compensation in favour of the company.[86] In the event of bankruptcy, the creditors are also entitled to request that the company be compensated for the losses suffered. However, in the first instance the administration of the bankruptcy may assert the rights of the shareholders and the company's creditors.[87] In other words, any legal action of a creditor or a shareholder in an insolvency context is made on behalf of the bankruptcy estate. Where the rights of the estate are assigned to the creditors,[88] the assigned creditors that bring the claim before courts are paid first.[89]

Clawback actions are also available where the debtor carried out actions during the five years prior to the opening of bankruptcy proceedings with the intention, apparent to the other party, of disadvantaging his or her creditors or of favouring certain creditors to the disadvantage of others.[90]

iii Arbitration

Tort claims are arbitrable under Swiss law.

Consequently, if a tortious act is in connection with the arbitration clause contained in a contract, the claimant will not be able to bring civil proceedings against a defendant who is party to the arbitration clause, but only arbitration proceedings. This does not apply to non-parties to the arbitration clause, however. This means that the victim of a fraud may have to bring both civil and arbitration proceedings (in addition to criminal proceedings, which are not affected by the existence of an arbitration clause), depending on who the defendants are.

The use of parallel civil and criminal proceedings to gather evidence in support of arbitration proceedings that involve an element of criminality is a powerful tool to supplement the lack of powers of arbitral tribunals to compel third parties to give evidence.[91] If fraud affects an arbitral award issued in Switzerland, this may be a cause for revision.[92]

84 Article 41 SCO, see above.

85 Article 754 SCO.

86 Article 756(1) SCO.

87 Article 157(1) SCO.

88 Article 260 SDCBA.

89 Article 757(2) SCO.

90 Article 288 SDCBA.

91 See FCD 1B_521/2017 – Republic of Guinea.

92 Article 123 Federal Tribunal Act: 'Revision may be requested if criminal proceedings have established that the decision was influenced by a criminal offense to the detriment of the applicant; sentencing by the criminal court is not required. If the criminal proceedings cannot be carried through, proof may be

If the arbitral award was issued outside of Switzerland, the existence of fraud may be an obstacle to its enforcement in Switzerland due to its contrariety to public policy (see below).

iv Fraud's effect on evidentiary rules and legal privilege

There is no specific legal regime on evidentiary rules and legal privilege in fraud-related cases. Article 321 SPC on professional secrecy only protects secrets held by ecclesiastics, lawyers, notaries, auditors, medical doctors, dentists and midwives, as well as their auxiliaries.

Non-typical activities of attorneys, such as investment advice, financial intermediation or management of companies, are not covered by professional secrecy.[93] Banking secrecy is not protected by the Swiss Penal Code but by the Swiss Banking Act (SBA).[94] Lawyers may always refuse to cooperate even if they have been released from duty of secrecy.[95] Attorney–client privilege cannot be invoked by a lawyer to protect him or herself from legal actions brought by a client.

In civil proceedings, a party may refuse to cooperate if the taking of evidence would expose a close relative to criminal prosecution or liability in torts,[96] or the disclosure of a secret would be an offence under Article 321 SPC. Any third party may refuse to cooperate in establishing facts that would expose it or a close relative to criminal prosecution or civil liability in torts[97] or to the extent that the revelation of a secret would be punishable by virtue of Article 321 SPC. With the exception of lawyers and clerics, third parties must cooperate if they are subject to a disclosure duty or if they have been released from the duty of secrecy, unless they show credibly that the interest in keeping the secret takes precedence over the interest in finding the truth.

In criminal proceedings, the accused may not be compelled to incriminate itself. In particular, the accused is entitled to refuse to make a statement or to cooperate in the criminal proceedings. It must, however, submit to the compulsory measures provided for by the law, such as disclosure or seizure orders.[98] The victim[99] and the witness, but not the plaintiff, have the right to remain silent.[100] Functional secrecy of public officers and attorney–client privilege may be opposed to criminal authorities. The scope of attorney–client privilege in the context of internal investigations conducted within the framework of FINMA enforcement proceedings is currently debated.

furnished by other means.' A bill was sent to the Swiss parliament on 24 October 2018 to amend SPILA provisions on arbitration, notably on revision of arbitral awards. We will report in an upcoming edition once the bill is adopted.

93 FCD 112 Ib 606; FCD 114 III 105; FCD 115 Ia 197, FCD 131 III 660.

94 Article 47 SBA.

95 Articles 171(3) SCPP and 166(1)(b) SCCP.

96 Article 163(1)(a) SCCP.

97 Article 166(1)(a) SCCP.

98 Article 113(1) SCPP.

99 A victim within the meaning of Article 116(1) SCCP is a person suffering harm whose physical, sexual or mental integrity has been directly and adversely affected by the offence.

100 Article 117(1)(d) SCPP and Articles 169(1)–(2) SCPP.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

Swiss conflict of laws is governed by SPILA.

Regarding tort claims, Article 133 SPILA provides that when the tortfeasor and the injured party have their habitual residence in the same state, claims in tort are governed by the law of that state; when the tortfeasor and the injured party do not have a habitual residence in the same state, these claims are governed by the law of the state in which the tort was committed; however, if the result occurred in another state, the law of that state applies if the tortfeasor should have foreseen that the result would occur there; notwithstanding the above, when a tort breaches a legal relationship existing between the tortfeasor and the injured party, claims based on such tort are governed by the law applicable to such legal relationship.

Claims for unjust enrichment are governed by the law that governs the legal relationship, either existing or assumed, on the basis of which the enrichment occurred. Failing such a relationship, these claims are governed by the law of the state in which the enrichment occurred.[101]

ii Collection of evidence in support of proceedings abroad

Alternatively to civil letters of requests, parties to foreign proceedings may consider instituting proceedings on the precautionary taking of evidence in Switzerland pursuant to Article 158 SCCP (see above).

Switzerland is a contracting state of the Hague Convention of 1954 on civil procedure (CLaH 1954) and the Hague Convention of 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (CLaH 1970).

The Conventions apply to requests for obtaining evidence or performing some other judicial acts. The extent of the information requested is determined by the requesting judge.[102] The findings that led the requesting judge to send letters of requests cannot be questioned by the requested judge. The sole elements that the requested judge has to check are the likelihood of the reasons given by the third party that holds the requested information not to collaborate[103] and the existence of reasons to refuse to grant assistance that the requested state can invoke pursuant to Articles 12 CLaH 1970 and 11 CLaH 1954.[104] The prohibition on fishing expeditions is a limitation that applies to the scope of letters of request.

Persons involved in proceedings of international assistance can be affected in their rights to obtain a decision on the execution of the request for assistance (prohibition of denial of justice) and to refuse to collaborate (secrets protected by law or by a predominant interest), and to the minimum guarantees of fundamental rights (sovereignty or public policy, or both).

To date, Swiss case law ruled that a party to foreign proceedings is only entitled to invoke a denial of justice. The reason given by the courts is that a request for assistance is based on the public law relationship that exists between two states. As such, the parties to the main civil proceedings in the requesting state are not involved in the execution of the request

101 Article 128 SPILA.

102 FCD 4A.340/2015 and 5A.284/2013.

103 FCD 5P.423/2006.

104 FCD 4A.340/2015c.

for assistance.[105] Parties have no legal standing to appeal against the decision to execute the letter of request if they invoke rights that they could have invoked in the civil proceedings pending in the requesting state.[106]

The beneficiary of the secret is entitled to invoke a violation of its right to be heard. The Swiss Federal Court ruled that both the account holder and the beneficial owner of the targeted account have legal standing to appeal against a decision to execute a letter of request.[107] Apart from standing, the Federal Court decided to pierce the corporate veil that separated the account holder from the beneficial owner of the account on the sole ground that the account holder invoked the privacy of the beneficial owner, which is a right to which the sole beneficial owner was entitled to. As long as the beneficial owner and the account holder form a single economic unit, the account holder cannot intervene in the proceedings on execution of the request for assistance, provided that it was able to exercise its rights before the judge of the main civil proceedings in the requesting state.[108] The Federal Court ruled in particular that the violation of the minimum guarantees of neither the account holder nor the beneficial owner can invoke bank secrecy, which is the prerogative of sole banks as third parties that hold the requested information.

The third party that holds the requested information is entitled to invoke a predominant interest in keeping the requested information secret. Spouses and close relatives have an absolute right to refuse to collaborate.[109] Any other third party may refuse to cooperate in establishing facts that would expose itself or a close relative to criminal prosecution or civil liability, or to the extent that the revelation of a secret would be punishable by virtue of Article 321 SPC.[110] Bank and business secrecy are not protected by Article 321 SPC (see above).

The holders of other legally protected secrets may refuse to cooperate if they show likelihood that the interest in keeping the secret prevails over the interest in establishing the truth.[111] Banks usually invoke this legal provision together with Article 47 SBA (banking secrecy) to object to orders of production of documents. The Swiss Federal Court stressed in this regard that banking secrecy is only an exception to the duty of collaboration of the third party that holds information.[112] Although the circumstances in which banking secrecy can be successfully invoked are not clearly defined by case law, it never applies in divorce[113] and inheritance[114] matters, or in the context of debt collection proceedings or civil attachments.[115]

105 See, e.g., Judgments of the Court of Justice of Geneva ACJC/1367/2012 and ACJC/1078/2014.

106 FCD 4A_340/2015.

107 FCD 5A_284/2013 and 4A_340/2015.

108 FCD 4A_340/2015 and 4A_167/2017.

109 Article 165 SCCP.

110 Article 166(1)(a) and (b) SCCP. This chapter does not discuss the requirements of Article 166 Paragraph 1 Lit. c and d.

111 Article 166(2) SCCP.

112 FCD 4A_340/2015. See also Article 47 Para. 5 SBA: 'The provisions of federal and cantonal legislation on the obligation to disclose information to the authority and to testify in court are reserved'.

113 FCD 5P.423/2006 of 12 February 2007.

114 FCD 5A_284/2013.

115 FCD 129 III 239 and 125 III 391.

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

As a participant in Swiss criminal proceedings, a plaintiff may request that the prosecutor issue freezing orders against assets that are the proceeds of crime or, if these assets are no longer available, against replacement assets.

All assets that are proceeds of felonies or misdemeanours must be forfeited, even if the perpetrator is not identified.[116] If crime proceeds are no longer available for forfeiture, replacement claims must be issued against assets that are not crime proceeds.[117] Third parties are only protected against these measures to the extent that they were in good faith and provided adequate consideration against the assets.

Under Article 73 SPC, if a crime has caused loss not covered by insurance and if it must be presumed that the offender will not pay compensation for the crime, the aggrieved person is entitled to receive, upon its request, up to the amount of the damages established by a judgment (including foreign) or by agreement with the offender:

a the fines paid by the offender;
b the forfeited assets (or the proceeds of their sale);[118]
c the replacement assets (when the direct proceeds of crime are no longer available to be forfeited); and[119]
d the good behaviour bond.[120]

The rights of persons harmed or third parties expire five years after the date on which official notice is given.[121]

iv Enforcement of judgments granted abroad in relation to fraud claims

There are no specific provisions on the enforcement of foreign judgments in relation to fraud claims in Switzerland. Civil foreign judgments on fraud cases are considered as civil judgments pursuant to Article 32 of the Convention of Lugano on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 (CLug) and Article 25 SPILA. They are recognised and enforced following the ordinary rules that apply to any foreign judgment.[122]

Swiss law makes a distinction between the enforcement of money and non-money judgments. This chapter only discusses the enforcement of money judgments that are enforced pursuant to the SDCBA, with assistance from cantonal debt collection offices. The recognition and enforcement of foreign judgments are governed by SPILA and, where applicable, by bilateral or multilateral treaties, in particular by the Lugano Convention between the EU and EFTA countries. Enforcement follows the domestic procedures.

Interlocutory measures ordered in *ex parte* proceedings are not capable of being recognised in Switzerland. Under SPILA, instead of seeking (uncertain) enforcement of foreign interim measures, a claimant can file an application for autonomous interim measures under Article 10(b) SPILA. A foreign interim order is not binding, but the Swiss judge will

116 Article 70 SPC.
117 Article 71 SPC.
118 Article 70 CP.
119 Article 71 CP.
120 Article 66 CP.
121 Article 70(4) SPC.
122 These ordinary rules also apply to domestic and foreign arbitral awards.

generally rely on it. Similarly, with regard to CLug judgments, an application can be made to the Swiss enforcement judge for provisional measures available under the law of that state even if, under the Convention, the courts of another state have jurisdiction over the substance of the matter (Article 31 CLug). Within the scope of application of the Convention, foreign interlocutory orders can be enforced, provided that the defendant was given the opportunity to be heard.

Interlocutory injunctions ordering *in rem* conservatory measures are enforceable pursuant to the provisions of SDCBA. Interlocutory injunctions ordering *ad personam* conservatory measures, like common law world freezing orders, are enforceable pursuant to the provisions of SCCP.[123]

The enforceability of a foreign money judgment is decided in the context of debt collection proceedings where the judge decides to set aside the objection to the order to pay under Article 80 SDCBA. For CLug judgments, debt collection proceedings commence concurrently with the request for a declaration of enforceability before the court. The decision on the declaration of enforceability is binding throughout Switzerland. For other foreign judgments, there is no declaration of enforcement, and a decision on enforcement rendered in one particular debt collection proceeding is not binding on another debt collection proceeding. A review of the merits of foreign judgments is expressly excluded by Article 27 SPILA and Article 36 CLug.

An *ex parte* civil attachment order can be granted prior to the filing of the request for an order to pay (see above).

Pursuant to Article 25 SPILA, a foreign judgment is recognised if the judicial or administrative authorities of the state where the decision was rendered had jurisdiction under SPILA, the decision is no longer subject to an ordinary appeal or is final, and there is no ground for denial under Article 27 SPILA. Recognition must be denied *ex officio* if it is manifestly incompatible with Swiss public policy.[124] Recognition must also be denied if a party establishes that (under Article 27(2)–(4) SPILA) it did not receive proper notice under the law of its domicile or its habitual residence, unless:

a the party proceeds on the merits without reservation;

b the decision was rendered in violation of the fundamental principles of Swiss procedural law, including the fact that the party did not have an opportunity to present its defence;

c a dispute between the same parties and with respect to the same subject matter is the subject of pending proceedings in Switzerland or has already been decided there; or

d the dispute has previously been decided in a third state, provided that the latter decision fulfils the prerequisites for recognition.[125]

Under the New Lugano Convention, judgment given in a state that is a party to the Convention must be recognised in the other states without any special procedure being required (Article 33 CLug). The judgment must be declared enforceable immediately and *ex parte* on completion of the formalities provided for at Article 55 CLug without any review. The decision on the application for a declaration of enforceability can be appealed by either party on the grounds in Articles 34 and 35 CLug.

123 FCD 5A_899/2016.

124 Article 27(1) SPILA.

125 Article 27(2)–(4) SPILA.

The European Court of Justice explained that recourse to a public policy clause can be envisaged only where recognition or enforcement of a judgment delivered in another state party to the CLug is at variance to an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle.[126]

Typical examples of Swiss public policy incompatibility are:

a punitive damages entirely disproportionate to the damage caused;

b usurious interest rates;

c serious violation of the right to be heard, including lack of proper notice and disproportionate costs of the proceedings; and

d serious breach of rights of defence.

v Fraud as a defence to enforcement of judgments granted abroad

A foreign judgment obtained by fraud is contrary to public policy and will, therefore, not be recognised and enforced in Switzerland (see above).

In a domestic civil or criminal judgment, a party may apply for the revision of a judgment if criminal proceedings have established that the decision was influenced to the detriment of the party concerned by a felony or misdemeanour, even if no one has been convicted by the criminal court; if criminal proceedings are not possible, proof may be provided in some other manner.[127]

VI CURRENT DEVELOPMENTS

i Improvement of the status of plaintiff of assignees of tort claims in cases of money laundering

In a case[128] where a tort claim based on fraud, misappropriation and money laundering deriving from Spanish proceedings was assigned to a third party after the commission of the predicate offence, the Swiss Federal Court found that the plaintiff alleged that certain acts of money laundering had been committed after the assignment of the Spanish claim. These alleged subsequent acts of money laundering may have the effect of endangering the interests of the assignee, insofar as they impede the assignee from obtaining payment of the assigned claim, in particular by means of Article 73 SPC on the award of the proceeds of forfeiture or equivalent claim to the benefit of the person suffering harm. Therefore, the assignee is a person directly harmed (an injured party) by subsequent acts of money laundering aiming to conceal the proceeds of the predicate offences committed abroad.

The Federal Court confirmed, however, that the assignment of a claim based on the damage caused by an offence does not confer on the third-party assignee the status of an injured party, as the latter is neither a close relative of the injured party nor a subrogated third party. Thus, as a mere assignee 'of the claims for damages in connection with the misappropriations committed in Spain', the plaintiff is not directly affected by the acts of misappropriation and therefore does not have the status of an injured party in relation to those offences.

126 C-394/07 – *Gambazzi*, by reference to C-7/98 – *Krombach*.

127 Article 328(1)(b) SCCP and 410(1)(c) SCPP.

128 FCD 6B_931/2020 of 22 March 2021.

It is therefore only the crimes that have harmed the assignee that may qualify them as an injured party.

This recent judgment opens new avenues for litigation funding in Switzerland when acts of money laundering are still ongoing, as it may enable the assignment of claims from the original victim of fraud to special purpose vehicles with a decrease of the risk for the litigation funder of losing the rights of plaintiff in criminal proceedings.

ii Covid-19-related fraud cases in 2020

The Money Laundering Reporting Office Switzerland (MROS) Annual Report 2020[129] provides a typology of the main frauds directly or indirectly related to the covid-19 pandemic in Switzerland. The first type of fraud concerns the misappropriation or misuse of loans granted on facilitated terms to companies and guaranteed by the Swiss authorities.[130] Frauds consisted of the withdrawal or transfer to personal accounts of money granted under emergency assistance, by artificially inflated levels of turnover reported or by the misuse of loans. MROS received over 1,000 suspicious activity reports involving more than 1,100 loans, totalling approximately 150 million francs.

Online scams involving phishing and social engineering have also been amplified by the pandemic. Lockdown measures have driven vulnerable people who would normally stay away from the internet into the arms of online scammers. While the sums of money involved in such online scams are generally modest, this is not the case with the trade in healthcare products and protective equipment, which often generates millions of francs. Mass orders by state authorities and private companies at the outset of the pandemic for emergency equipment such as face masks, disinfectant and other protective equipment prompted cases of abuse and fraud. Some of the equipment sold was unusable, of poor quality or overpriced. In some cases, the equipment did not even exist. The fear of catching coronavirus also prompted many people to procure their own material or fake medicines, often on the internet. These suspected frauds are usually committed outside of Switzerland. The main causes for suspicion were dubious sales contracts, the sudden change in the business field of a company, suspicious increase in the number of intermediaries, press articles and requests by aggrieved customers to their bank for refund.

Other serious pandemic-related risks exist whose gravity was not reflected in the number of suspicious activity reports. MROS points out in particular criminal organisations that are taking advantage of the pandemic to extend their influence, for example by buying up Swiss companies in distress or by purchasing real estate from legal entities or natural persons that have become financially strapped during the crisis. MROS received only two suspicious activity reports in this regard. MROS notes, however, that some of the reported cases of loan fraud appear to have been committed by individuals cooperating with each other, or at least using the same modus operandi. To date, MROS declares it has no indication that known criminal organisations are involved in such schemes.

129 www.fedpol.admin.ch/dam/fedpol/en/data/kriminalitaet/geldwaescherei/jabe/jb-mros-2020-e.pdf.download.pdf/jb-mros-2020-e.pdf.

130 Federal Act of 18 December 2020 on Granting Loans and Guarantees in connection with the Coronavirus Pandemic (the COVID-19 Loan Guarantees Act).

Appendix 1

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Admitted to the bars of Geneva and Switzerland since 1995, Yves Klein is an international asset recovery lawyer, partner at Monfrini Bitton Klein. In 2019, he received the *Who's Who Legal* Asset Recovery Lawyer of the Year Award.

His main activity is litigating and coordinating transnational asset recovery proceedings before civil, criminal and bankruptcy courts on behalf of victims of economic crimes.

He is also active in anti-corruption investigations and in offshore litigation, such as the enforcement of foreign judgments and arbitral awards, the obtaining of evidence and the freezing of assets concealed in Switzerland and abroad.

He is recognised in asset recovery, litigation and business crime by *Chambers* (Band 1, Global-wide, Asset Tracing and Recovery) and *Who's Who Legal* (WWL Thought Leader Global Elite, Asset Recovery).

Yves Klein has published on tracing and recovery of assets and anti-corruption issues since 1996, and regularly speaks at international conferences on these matters. He is the past chair (2016–2017) of the Asset Recovery Subcommittee of the International Bar Association's Anti-Corruption Committee and is representative for Switzerland of ICC FraudNet, the world's leading asset recovery network, operating under the auspices of the International Chamber of Commerce.

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Antonia Mottironi is a Swiss international civil, business crime and tax lawyer in Geneva. She was admitted to the Geneva and Swiss Bar in 2013, after graduating in law and economics.

She focuses on civil and criminal litigation, especially in the area of international business crime, international judicial assistance, enforcement of foreign arbitral awards and judgements, and cross-border insolvency.

Over the past years, she has handled a great number of international asset recovery cases which included the laying of civil and criminal attachments and the enforcement of foreign judgements. She also assisted clients in preparing and coordinating multi-jurisdictional disputes, in particular in common law jurisdictions.

In her asset recovery practice, she has developed a strong experience in cross-border insolvency cases involving foreign bankrupt banks and fraud schemes (Ponzi schemes, VAT carousels). She has been involved over the past years in one of the largest art law disputes of the last decade between a Russian oligarch and his Swiss art dealer.

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