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ESSENTIAL INTELLIGENCE:

Fraud, Asset Tracing & Recovery

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THE INTERNATIONAL ACADEMY OF FINANCIAL CRIME LITIGATORS

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I Executive summary

Switzerland is a small but, nevertheless, very important banking country and commodity trading hub. It is thus not surprising that Switzerland is also a prominent jurisdiction for national and transnational asset recovery disputes. Swiss law enforcement authorities are committed to investigate money laundering, and to assist crime victims in the recovery of criminally obtained assets.

To achieve this goal, Swiss law recognises very effective criminal and civil law mechanisms for the seizure and confiscation of illegally obtained assets, which are applied both in domestic and international cases. The advantage of the criminal law approach is that assets obtained in violation of criminal law can be seized by the investigating authorities *ex officio* through coercive measures, not only from the perpetrator/direct beneficiary but also along the paper trail from third parties who benefited from the offence, and can be confiscated for the privileged satisfaction of the victim. Such coercive measures are not available under civil law. So-called civil "attachment" proceedings are therefore only successful if the claimant has clear indications of where the illegally obtained assets are located. The advantage of the civil law approach, however, can be that the claimant remains in control of the proceedings, and out-of-court settlements with the other party regarding the type and scope of compensation are therefore more likely than in criminal proceedings.

II Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

1. Legal background

The Swiss legal system belongs to the tradition of civil law. Thus, its primary legal framework is established in written statutes. Whilst the common law rule of binding precedent is not present in Switzerland, judicial decisions do play an important role within the legal framework. Judicial opinions and interpretations of the law that have been confirmed in multiple rulings over time may indeed be viewed as legal precedent. In addition, the view of legal scholars is often taken into consideration in the application and interpretation of the codified law and established precedents.

Whilst the Swiss procedural rules are regulated at a federal level, the cantons retain the autonomy to organise their judiciary. They are free in the organisation of their courts, but must fulfil the requirements set forth within federal law. Cantons are required to provide courts of two instances – a court of first instance as well as a court of appeal – within their judiciary system, and are further granted the power to establish specialised courts, e.g. commercial courts that may serve as the court of first and sole instance

for commercial disputes in that canton. The cantons Zurich, Bern, St. Gallen and Aargau have enacted commercial courts. Additionally, many cantons have other specialised courts for labour and tenant disputes.

The cantons further remain autonomous in how they choose to compose their courts. Switzerland does not have a jury system; any remnants of a similar system within the cantons ceased upon the introduction of the Federal Criminal Procedure Code (CPC) of 2011.

Disputes that pertain to fraud, asset tracing and recovery may be addressed either in civil litigation, i.e. in civil courts or, in the cantons that have established specialised commercial courts, in said commercial courts (see "Civil litigation" below). These disputes may further be addressed within criminal proceedings that may take place at either the cantonal or federal courts (see "Criminal proceedings" below). The civil and the criminal route may be combined in parallel proceedings (see "parallel proceedings" below).

2. Civil litigation

a) Civil proceedings in general

Civil litigants in Switzerland may enact civil tort law, which allows the plaintiff to seek recovery or compensation of the damages that he or she has incurred through unlawful and, in particular, criminal acts of the defendant. The plaintiff is entitled to compensation of its negative interest, i.e. to be put back in the situation in which it would have found itself if the loss-causing event had not occurred.

To begin Swiss civil proceedings, a claimant must normally initiate a pre-suit conciliation hearing. The aim of such pre-suit conciliation hearing is to reach an agreement between the parties. If the parties cannot agree, the claimant may file a written claim with the courts.

Within Swiss civil proceedings there is the option for the defendant to extend the liability by bringing the claim against them to a third party by "notice of litigation". Whilst there are no class action suits in Switzerland, there is the possibility of joinder claims that are admissible if two or more claims subjectable to the same type of proceedings are in the same matter and raise a common question of either law or fact.

The parties are free, within the submission of their briefs, to evaluate what they deem to be relevant evidence and facts of the case, and are not bound by any general pre-trial disclosure regulations. The claimant filing the suit is expected to submit all the facts and evidence supporting his or her claim from the beginning of the proceedings. Accordingly, the defendant will then be given the opportunity to either refute the claimant's facts or submit his or her own facts and evidence. Both parties must submit all evidence available to them without delay, i.e. generally with their initial briefs. Each party must submit proof to support the facts of his or her claim or defence. The courts are given broad discretion in the evaluation of the evidence submitted and will declare which evidence is admissible in the form of a procedural order.

Witnesses and experts, if they are called to provide testimony, are not subjected to cross-examination, but the parties have a right to make statements on the questions put forth by the court and may put forth their own questions. Privately commissioned expert opinions as well as affidavits do not qualify as evidence under the Swiss Civil Procedure Code (CivPC); however, since the courts may freely assess the evidence submitted, they are often not rejected entirely but rather merely given the same influence as that of a party pleading.

Within Swiss civil litigation, persons who are called upon to provide testimony or evidence within civil proceedings have a duty to cooperate and provide testimony, unless they are prohibited from doing so by confidentiality obligations (professions with statutory confidentiality, e.g. doctors, lawyers) or may refuse due to the threat of self-incrimination or their relationship with one of the parties to the proceedings. Contacting and preparing witnesses is generally not allowed within Swiss litigation proceedings.

Whilst Switzerland does not have the principle of contempt of court *per se*, indifference or lack of cooperation with the courts may lead to unfavourable conjecture with the court.

Before the court reaches its ruling, the parties may give a final opening to provide statements on the evidence submitted to the courts. In most civil proceedings, the courts are bound by the principle of party presentation, and may not go beyond the facts brought forth by the parties.

Within the final judgment, the court decides on the costs of the proceedings and the obligation to bear such costs. Under Swiss civil procedure law, the party that does not prevail before the court must bear the costs of the proceedings and the legal cost of the prevailing party as set by the court. Punitive damages as such are not awarded or recognised within Swiss law.

b) Injunctive relief/attachment proceedings

Beyond the ordinary procedures, Swiss civil law additionally provides for injunctive and interim relief within civil litigation and allows for the enforcement of a court ruling in favour of the claimant.

The remedy that is utilised the most is so-called "attachment" proceedings. In order for a petition of attachment to be granted by the court, the petitioner must fulfil the following three main requisites:

- firstly, the petitioner must have a *prima facie* claim, i.e. the petitioner must credibly show that such claim exists;
- secondly, the petitioner must identify assets which are located within Switzerland; and
- lastly, the petitioner bases the request on valid grounds meriting an attachment.

In most cases, petitioners base their petition of attachment on grounds of the defendant's lack of a domicile or registered office in Switzerland. A petitioner may further base the petition on a ruling that was passed in the petitioner's favour against the defendant or on a certificate of unpaid debt from the defendant.

If the petition is filed on the grounds that the defendant lacks a domicile or registered office in Switzerland, the petitioner must show a sufficient nexus between the claim put forth and Switzerland.

The requirement of a nexus to Switzerland is usually fulfilled when one of the parties has its domicile in Switzerland, the place of execution or performance of the contract is in Switzerland or, in the case of a tort claim, the unlawful act took place in Switzerland or the harmful result of that act transpired in Switzerland.

The Swiss attachment degree is an *in rem* order and may only seize property located within Switzerland that was identified by the petitioner. The attachment order may extend to claims that the defendant holds against a third party, provided that said third party also has its domicile or registered office within Switzerland.

3. Criminal proceedings

a) Seizure and forfeiture of illegal proceeds

In accordance with art. 70 para. 1 of the Swiss Criminal Code (SCC), the court orders the forfeiture of assets that have been acquired through the commission of a criminal offence, unless the assets are to be passed on to the person harmed for the purpose of restoring the prior lawful position. Thus, in case of fraud or other criminal offences against financial interests, the forfeiture operates in favour of the victim.

The forfeiture extends to assets that have a natural and adequate causal link to the criminal offence. However, they do not necessarily have to be the direct and immediate consequence of the offence. For example, income from legal transactions that have been concluded based on bribery can also be forfeited. Also, it is undisputed that surrogates of assets acquired through a criminal offence can be forfeited as well.

It is an issue of controversy whether the amount to be recovered in forfeiture and compensation claims should be determined on a net or gross basis. For generally prohibited activities (e.g. drug trafficking), gross calculations apply, whereas for acts that are permitted in principle but are only tortious in specific instances (e.g. a contract that has been obtained based on corruption), net calculations are used, i.e. the production costs are deducted.

Law enforcement authorities may order the provisional seizure of assets if they are likely to be returned to the persons harmed, to be forfeited or to serve to enforce the compensation claim (art. 263 para. 1 *lit.* c, d and e CPC). The provisional seizure of assets, which may be requested by victims of fraud or other criminal activities, is regularly a very effective and efficient tool for recovering assets. In particular, it is noteworthy that in criminal proceedings only, any assets resulting directly or indirectly (surrogates) from a criminal offence will be used to compensate the person harmed to the exclusion of all other creditors pursuing the civil route. These preferential rights should be kept in mind when deciding on whether to seek recovery by way of criminal or civil proceedings.

If the assets which are subject to forfeiture no longer exist, e.g. because they have been consumed or disposed of, the court will order a compensation claim for the same amount (art. 71 para. 1 SCC), which can be awarded to the person harmed (art. 73 SCC). The compensation claim may be enforced in any assets, including assets which may have been legally acquired. However, the seizure of unrelated assets does not accord the state preferential rights in the enforcement of the equivalent claim (art. 263 para. 1 lit. e CPC).

As forfeiture and compensation claims involve objective measures and not penalties, these sanctions are applied regardless of the criminal liability or conviction of a particular person; provided, however, that all objective and subjective elements of the underlying offence can be proven.

Another efficient way to obtain a *de facto* freezing of assets consists of giving a reasoned written notice to the bank where the assets are deposited, indicating

the risk to the bank of being held criminally and civilly liable in the event that it allows the assets to be withdrawn and/or transferred. In view of the fact that Swiss law criminalises money laundering (see art. 305*bis* SCC), the bank faces not only a civil but also a criminal liability risk in this regard. This will usually prompt it to comply with the freezing request. Furthermore, in cases of suspicion of money laundering or another felony, the bank must notify the Money Laundering Reporting Office (MROS), which in turn involves the criminal authorities if a reasonable suspicion exists. Thus, the victim's interest in recovering his or her assets is also protected by the criminal provision of money laundering.

In addition to the freezing of assets, victims of fraud and other financial misconduct can request that the prosecutor orders the seizure of an accused's or a third party's bank documents in order to be able to establish the paper trail. The prosecutor will order such seizure if the bank documents are expected to be relevant as evidence for proving the crime or the existence of criminal proceeds (art. 263 para. 1 *lit.* a CPC).

It is noteworthy that in criminal proceedings, the state attorney will *ex officio* establish the relevant facts and, in particular, seek and freeze criminally acquired assets in favour of the person harmed regardless of whether these assets are still held by the accused or have meanwhile been transferred to a third party (*in rem* forfeiture). In contrast, in civil proceedings the burden of proof lies with the plaintiff and a civil attachment requires that the plaintiff establishes a *prima facie* claim and clearly indicates where the assets to be attached are located (no search arrest). If the assets are no longer there, e.g. in the bank account of the offender, the attachment will fail without the plaintiff being informed as to whether and where the assets have been transferred. This should also be kept in mind when deciding on whether to take the criminal or civil route.

b) Pursuing civil compensation claims in criminal proceedings

Under Swiss law, victims of fraud and other financial offences have the possibility to assert their civil claims in the course of the criminal proceedings conducted against the accused (so-called "adhesion claims"; see art. 122 para. 1 CPC). They are thus not obliged to bring a separate civil action, but shall be spared the burden of conducting two separate proceedings. In practice, these adhesion claims are very common, especially as the state attorney establishes the facts *ex officio* in criminal proceedings, whereas in civil proceedings the parties have to investigate and present the facts.

In this context, it is important to note that the CPC differentiates between the person suffering harm and the so-called "private claimant". The person suffering harm is defined as either the person whose rights have been directly violated by the offence (art. 115 para. 1 CPC) or the person entitled to file a criminal complaint (art. 115 para. 2 CPC).

The private claimant is defined as a person suffering harm who expressly declares that he or she wishes to participate in the criminal proceedings as a criminal and/or civil claimant (art. 118 para. 1 CPC). The role of a private claimant therefore requires explicit confirmation that he or she wishes to act either as a criminal or civil claimant, or both, within the proceedings, whilst the role of a person suffering harm is granted *ex lege*.

In the latter case, the person suffering harm may do either or both of the following (art. 119 para. 2 CPC):

- request the prosecution and punishment of the person responsible for the offence (a criminal complaint); and/or
- file private law claims based on the offence (a civil claim).

The degree of participation the person suffering harm wishes to take within the proceedings is at his or her discretion. He or she may further extend his or her participation, e.g. from that of a solely civil claimant to that of a criminal and civil claimant, or *vice versa*, within the course of the proceedings.

The person suffering harm who declares that he or she wishes to join the proceedings as a private claimant is deemed an official party to the proceedings alongside the accused, and, once the stage of the main hearings have begun, the public prosecutor (art. 104 para. 1 CPC).

The private claimant therefore enjoys all rights provided to a party within criminal proceedings. These include, but are not limited to, the right to be heard and inspect the files (art. 107 CPC), the right to

file submissions to the prosecutor and/or the court (arts 109 and 346 CPC), the right to appoint legal counsel (art. 127 CPC), the right to participate in the taking of evidence (art. 147 CPC) and the right to appeal (art. 382 CPC).

Civil claims which are filed in the course of the criminal proceedings are subject to special procedural rules: with the declaration of the person suffering harm to participate in the criminal proceedings as a civil claimant, the civil claim becomes pending as of that point. The quantification and statement of the grounds on which the civil claims rely must be specified, at the latest, prior to the court hearing within the deadline set by the court (art. 123 para. 2 CPC). However, in a recent judgment, however, the Federal Supreme Court explicitly left the question open whether and when the conclusions of the civil claim must be quantified and reasoned in order to interrupt the limitation period. Thus, the statute of limitations must be kept in mind, especially in the case of long-lasting criminal proceedings.

The criminal court's jurisdiction over the civil claims is established by its jurisdiction over the criminal proceedings. The prayers for relief which the private claimant may submit have their basis in civil law and would, without a connection to the criminal proceedings, be customarily submitted to civil courts.

The criminal court decides on pending civil claims in the event that it:

- convicts the accused; or
- acquits the accused and the court is in a position to make a decision (art. 126 para. 1 CPC).

However, the civil claim filed in the criminal case will be referred to separate civil proceedings in the following circumstances (art. 126 para. 2 CPC):

- the criminal proceedings are abandoned;
- the criminal proceedings are concluded by means of a summary penalty order procedure;
- the private claimant has failed to justify or quantify the claim sufficiently;
- the private claimant has failed to lodge a security in respect of the claim; or
- the accused has been acquitted but the court is not in a position to make a decision on the civil claim.

If a full assessment of the civil claim would cause unreasonable expense and inconvenience to the criminal court, it may make a decision over whether the merits of the civil claim are given, and refer it to civil proceedings for quantification (art. 126 para. 3 CPC).

4. Enforcement of foreign judgments

According to Swiss law, foreign judgments or orders are required to be recognised and affirmed to be enforceable by a Swiss Court under exequatur proceedings before they may be enforced in Switzerland.

The requirements for the recognition and enforcement of foreign judgments are regulated within the Federal Act on Private International Law (PILA; see arts 25–27). Switzerland further has ratified the Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters of 30 October 2007 (Lugano Convention). Art. 32 of the Lugano Convention defines judgment as "*any judgment given by a court or tribunal of a State bound by this Convention, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court*". Subsequently, interim orders of another court, e.g. worldwide freezing orders, are included within the definition of a judgment according to the Lugano Convention and thus may be recognised and enforced within Switzerland.

The Federal Supreme Court has opted this view, but declared that the defendant must be given the opportunity to seek the discharge or adaption of the freezing order.

A foreign judgment may be declared enforceable based on the Lugano Convention if the judgment is deemed enforceable within the state of the judgment's origin, and if the following documents set out in art. 53 *et seqq.* of the Lugano Convention are submitted:

- a copy of the judgment that meets the conditions necessary to establish its authenticity;
- a certificate issued by the court or the competent authority where the judgment was given; and
- a certified translation of the aforementioned documents.

5. Outcome of legal action

Within civil litigation, if successful, the claimant acquires a settlement or judgment in his or her favour. If the defendant's assets have been successfully attached, the claimant may then pursue enforce-

ment action against those assets within the scope of the Federal Act on Debt Collection and Bankruptcy.

In the course of criminal proceedings, multiple results may be possible. If the accused has accepted responsibility for the offence in the preliminary proceedings or if his or her responsibility has otherwise been satisfactorily established, the public prosecutor often issues a summary penalty order. In this case, the public prosecutor may decide on the civil claim, if the accused recognised the civil claims or if their assessment is possible without further evidence and the amount does not exceed CHF 30,000. If the amount is over CHF 30,000 – and the accused has accepted the civil claims of the private claimant – this will be recorded in the summary penalty order. Otherwise, the claims are referred to civil proceedings.

The proceedings may further be concluded through simplified proceedings in which the accused is required to acknowledge his or her unlawful conduct as well as, if only in principle, the civil claims in exchange for a milder sentence.

Finally, criminal proceedings may be conducted through an ordinary trial procedure. In this instance, the criminal court will either decide on pending civil claims or refer them to civil proceedings. In addition, the court or the prosecution may order the restitution of the proceeds of the crime to the person suffering harm, the forfeiture or a compensation claim.

III Case triage: main stages of fraud, asset tracing, and recovery cases

1. Preliminary steps

When mapping out the legal strategy, it is of course essential to have a clear understanding of all of the facts available and keep the objectives of the client in the centre of focus. This includes, in particular, establishing whether multi-jurisdictional efforts need to be made and, if so, coordinating the action to be taken with the client's legal counsel in other jurisdictions to establish the most effective legal strategy.

Strategic considerations will often begin by determining in which jurisdictions recoverable assets are located and what measures would be required in the respective jurisdictions to seize and forfeit said assets, or to assist in the proceedings in other jurisdictions where there are recoverable assets. For example, if the defendant holds assets mainly in Switzerland, a priority could be made towards filing for interim or injunctive relief, with a potential request for an attachment order for relevant assets.

However, if substantial assets are held abroad in one or various jurisdictions, the focus would be on having any judgments pertaining to assets of the defendant, e.g. a worldwide freezing order, recognised and enforced in Switzerland.

2. Legal action in Switzerland

If it is established that fraud assets are located in Switzerland, and thus it is the most prudent decision to pursue legal action in Switzerland, the next step is to establish which steps are the most efficient in order to achieve the required results.

When initiating civil attachment proceedings, it is important to keep in mind that the successful attachment of the defendant's assets may establish Swiss jurisdiction within civil proceedings. However, the claimant is free to prosecute the attachment in another jurisdiction. Thus, if it would be more prudent to file claims against the defendant in another jurisdiction, the plaintiff should be ready to file such claim within the timeframe that Swiss law prescribes for the timely prosecution of an attachment order.

Where the claimant has different options as to where to litigate his or her claim, the unique benefits and disadvantages of each legal system available should be weighed, to establish under which jurisdiction the claimant would have the best procedural options at his or her disposal.

As explained above, the claimant may further consider taking the necessary steps to initiate criminal proceedings if the necessary requirements for criminal procedure are met. Key requirements are that sufficient evidence is available in order for the public prosecutor to open a case, and that Swiss jurisdiction can be established. The claimant should thus ensure that he or she has sufficient evidence to back his or her claim and/or suspicions, and especially enough evidence to convince the prosecuting authorities.

If the claimant is able to gather the sufficient amount of evidence and the public prosecutor consequently opens criminal proceedings, the claimant then has the benefit of the powers given to the criminal prosecution to compel the disclosure of information and documents and to seize or freeze assets. These benefits are accompanied by the disadvantage that during criminal proceedings, although the claimant may have the role of a party, he or she shall not have any control over the timeframe or decisions made within the criminal proceedings.

IV Parallel proceedings: a combined civil and criminal approach

As stated above in section I, Swiss law allows for parallel criminal and civil proceedings in the same matter.

The specific case at hand should determine whether victims of fraud and other financial misconduct shall file a criminal complaint or bring a civil action, or both. The question as to whether a criminal complaint shall be filed is often dependent on the amount of information or evidence available to the plaintiff prior to the commencement of civil proceedings. In cases of lack of evidence, criminal proceedings can assist the plaintiff in obtaining disclosure of valuable information for his or her claim, such as bank documents, as well as the freezing of assets.

Where a criminal complaint is filed, it has to be assessed whether it is prudent not only to participate in the criminal proceedings as a criminal complainant,

but also to assert civil claims in the course of the criminal proceedings instead of bringing a separate civil action. In this context, it is important to note that filing civil claims within criminal proceedings invokes *lis pendens* and thus would prevent the plaintiff from filing his or her claims in separate civil proceedings.

Pursuing a combined civil and criminal approach may be advisable in cases where the determination of the civil claim and/or its quantification proves to be complex and can thus be better resolved through civil litigation. However, there may also be cases where criminal proceedings are sufficient to trace and ensure the recovery of the assets. This is especially the case where assets have been provisionally seized by the prosecution in order to be returned to the injured person or to serve to enforce the compensation claim awarded to the injured person.

V Key challenges

As mentioned above, certain challenges may arise when pursuing claims within Swiss civil proceedings. In particular, there is no cross-examination of witnesses within proceedings, nor is there the principle of general discovery or disclosure prior to proceedings. Within pending proceedings, a civil court may order the defendant or third parties to disclose specific documents relevant to the case, but this remains an exception. However, if a party requests the opposing side to produce a document, non-compliance with such request may lead to an unfavourable inference by the court.

Another limitation within civil proceedings in Switzerland is that any attachment orders issued within Switzerland are of an *in rem* nature, with the consequence that only assets within Swiss territory may be seized or frozen.

On the other hand, and as stated above, worldwide freezing orders may be recognised under the Lugano Convention in Switzerland. Interim or injunctive relief in Switzerland, however, does not grant the same provisions to the claimant as such foreign orders. A claimant who seeks recognition in Switzerland will most likely pursue a declaration of bare enforceability from a court as the sole remedy.

In sum, if the possibility is given to litigate the claim under a further jurisdiction, the legal mechanisms provided to the claimant in said jurisdiction should be evaluated to determine whether they may be preferable to the claimant than those provided for in Switzerland.

That being said, many of the hindrances within civil proceedings may be alleviated through pursuing claims within criminal proceedings. Within criminal proceedings, the injured party or plaintiff is far more likely to be able to have the defendant or third parties, e.g. the defendant's bank, forced to disclose information in his or her favour and have assets traced and confiscated to serve as his or her compensation.

VI Cross-jurisdictional mechanisms: issues and solutions in recent times

Large-scale fraud regularly operates on an international level. Thus, asset tracing and recovery often needs to be conducted within a multi-jurisdictional context.

As a caveat, practitioners should first take note of the blocking statute of art. 271 SCC. This criminal law provision prohibits the commission of acts on behalf of a foreign state which, from a Swiss perspective, would fall within the competence of a public official. Thus, the collection of evidence for foreign proceedings, to the extent it is characterised as an official act under Swiss law, would be deemed unlawful and in violation of art. 271 SCC.

This applies in particular to any processes in relation to the serving of documents and the taking of witness interviews or statements, but also to the gathering of information and evidence for, or upon request of, a foreign authority. In contrast, the prohibition does not apply to the voluntary production of evidence in foreign proceedings which a party has in its possession or control, where such production constitutes a purely procedural act of such party.

Finally, based on the respective application, the competent federal departments may grant an exception to art. 271 SCC and allow direct cooperation with a foreign authority if it is deemed in the interest of the applicant. Such authorisations have been granted, e.g. in order to allow Swiss banks to cooperate in the US Department of Justice (DOJ) programme to settle the tax dispute between the Swiss banks and the USA.

In civil proceedings, cross-jurisdictional judicial assistance – in particular, serving persons with judicial documents and the obtainment of evidence within foreign jurisdictions – is regulated through the titular Hague Conventions. The Convention on Civil Procedure of 1 March 1954, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965, and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 are particularly noteworthy. The same procedure and regulations derived from the conventions are applicable when foreign proceedings require Swiss assistance. For the recognition and enforcement of foreign judgments, see section I above.

As for criminal proceedings, any international coordination or cooperation needed is regulated within the unilateral Federal Act on International Mutual Assistance in Criminal Matters (IMAC). In addition, as is the case in civil matters, there are various bi- and multilateral treaties, such as the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959. The main goal of such international cooperation is usually the gathering of information from, or the freezing and restitution of illegally acquired assets held by, Swiss banks.

In addition, in the case of so-called "failed states", the Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons allows the precautionary freezing and repatriation of illicitly acquired assets even where, due to the total or substantial collapse of the judicial system of the relevant state, the ordinary channels of mutual assistance in criminal matters are not successful.

VII Using technology to aid asset recovery

The steady advancement of technology comes with the advancement and adaptation of the tactics used by fraudsters. With the ever-increasing amount of data being stored digitally, this simultaneously allows for potential data breaches, giving fraudsters potential access to bank accounts, digital currency, electronic devices, or even personal information.

This has led to more specialised approaches within law enforcement and increased security within the private sector. Banks, in particular, through necessity, have been required to improve their security technologies to safeguard their customers from fraud. Artificial intelligence may also be used by banks to flag unusual patterns in transactions and block transfers. In general terms, however, the improvement in technology has increased the difficulty in tracing unlawfully acquired assets, and the engagement of companies specialising in international asset recovery has become more commonplace.

In law enforcement, the Swiss Federal Police have established specialised cybercrime divisions, with certain cantonal police departments (e.g. Zurich) following suit. On an international scale, cooperation in the fight against cybercrime is further aided through the Convention on Cybercrime (the Budapest Convention) and the coordination channels of the European Union Agency for Criminal Justice Cooperation (Eurojust).

VIII Highlighting the influence of digital currencies: is this a game changer?

Cryptocurrency is not a game changer; it is widely accepted that cryptocurrency can be seized and confiscated, pursuant to art. 263 para. 1 CPC in conjunction with art. 70 SCC, although it does not represent a physical object but rather encrypted, machine-readable information, i.e. data. The term "assets" as used in art. 70 SCC is to be interpreted broadly and includes non-physical objects such as claims or other rights. Data constitute confiscatable assets if they can be sold for a consideration, which is the case with cryptocurrency. Thus, cryptocurrency is in principle a suitable object for seizure and confiscation in criminal proceedings.

However, the seizure of cryptocurrency raises a variety of practical problems. First of all, the criminal authorities need access to the cryptographic key in order to access the cryptocurrency. Second, it is also necessary to gain access to the password-protected wallet. The discovery of a wallet alone does not guarantee power of disposal over cryptocurrency.

In addition, it is possible that the person concerned does not store the cryptocurrency himself, but has it managed in a special web wallet by a commercial service provider. In this case, the difficulty lies in the fact that the private keys, which enable the power of disposal over the assets, are not stored with the accused, but with a provider.

Another challenge is that after gaining knowledge of the private keys, the criminal authority must ensure that the accused person can no longer dispose of the seized object. This requires the immediate transfer of the virtual currency to a state wallet, i.e. independent infrastructure for the secure storage of cryptocurrency.

In practice, criminal authorities may become aware of the existence of "tainted" cryptocurrency as a result of interrogations, a house search or the analysis of other seized documents such as (email/WhatsApp) correspondence or transcripts of phone conversations. Whilst third parties such as specialised vault providers may be obliged to disclose additional information, this is, in view of the privilege against self-incrimination, not the case with the accused person. Thus, the latter is in principle not obliged to disclose any holdings in cryptocurrency, the private key or its location, nor the password to the wallet.

However, under certain circumstances, the accused may commit the offence of money laundering in the sense of art. 305*bis* SCC if he or she not only refuses to provide information but actively uses or transfers the cryptocurrency in order to avoid its confiscation.

The realisation of seized cryptocurrency is similarly associated with difficulties. In this regard, the Federal Supreme Court recently ruled (Judgment of 18 October 2021, 1B_59/2021) that seized assets with an exchange and market price can in principle be realised immediately. However, according to the Federal Supreme Court, early and complete realisation can have a negative effect on the realisable proceeds, especially in the case of large crypto holdings. In such cases, the prosecution authorities must proceed with adequate care and, where necessary, involve an external expert.

IX Recent developments and other impacting factors

Funds derived from criminal activities are often commingled in a bank account with funds derived from lawful activities. The extent to which such commingled funds may be forfeited and, even more importantly, qualified as an object of money laundering, has always been the subject of controversy.

In a landmark decision of 1 June 2021 (6B_379/2020), the Federal Supreme Court confirmed the so-called "sediment theory". It means that in the case of withdrawals from a commingled asset or bank account, there can be no money laundering provided these withdrawals do not exceed the legal portion of the account, with the consequence that the tainted "sediment" remains untouched and thus can still be secured and confiscated by the criminal authorities.

The "sediment theory" allows it to be argued that, e.g. in case of a company having profited from corruption or other criminal activities, payments to shareholders, employees, organs and suppliers do not constitute money laundering provided the tainted "sediment" on the profiting account remains unattained and can still be confiscated.

In March 2021, the Federal Parliament passed the revision of the Anti-Money Laundering Act (AMLA) to take account of international standards and the recommendations of the Financial Action Task Force (FATF). The revised law entered into force on 1 January 2023. It entails extended due diligence obligations for financial institutions: the identity of the beneficial owner (e.g. of a bank deposit) must now be *verified* (not only *established* as before) and customer data must be regularly updated for *all clients* (not only for *PEPs* as before). Furthermore, the revised law abolishes the current time limit of 20 working days for the processing of a report by Money Laundering Reporting Office (MROS) and, in return, provides for a right of the financial intermediary according to which he or she may terminate the reported business relationship if the MROS does not inform him or her within 40 working days that the reported information will be transmitted to a prosecution authority. Based on the Federal Act on the Implementation of International Sanctions (Embargo Act, EmbA), Switzerland, adopting European sanctions, has frozen financial assets worth CHF 7.5 billion against sanctioned Russian politics and oligarchs. It is an issue of controversy whether and under what conditions such seized assets could ultimately be confiscated and used for Ukraine's recovery. On

23 November 2022, the Federal Council adopted further sanctions against Russia in response Russia's military aggression against Ukraine. The Federal Council is thus adopting, in principle, the latest measures adopted by the European Union (EU) as part of its eighth package of sanctions. The measures include, *inter alia*, a new ban on the provision of legal services to the Russian government and to Russian companies, as well as on holding seats on the boards of certain Russian state-owned companies. The Federal Council has ensured, nevertheless, that access to Swiss law shall be preserved and that the rule of law shall be fully guaranteed. This was the Federal Council's condition for adopting the new ban. However, it remains that there is a strong tension between the ban on legal advisory services and the right to an effective legal remedy. The new ban will cause a substantial uncertainty for legal advisors as to what services are still allowed or indeed prohibited.

On 1 January 2024, several selective amendments to criminal procedure law came into force, which are particularly aimed at increasing the efficiency of criminal prosecution. These improvements should also work in favour of asset recovery efforts of the injured party. **CDR**

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