The Asset Tracing and Recovery Review

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Chapter 1

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. A fair share of cross-border asset recovery disputes involves Swiss banks or financial intermediaries, or commodity trading companies, as assets, claims and evidence lie in Switzerland.

Switzerland has been for decades and remains the main offshore banking centre in the world, with more than one-quarter, or US$2.4 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] The war in Ukraine, however, raises many issues in the field, as 75 per cent of Russian oil and coal were exported through Switzerland by companies mainly based in Geneva and Zug respectively.[4]

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.

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.

1 Yves Klein is a partner at Monfrini Bitton Klein and Antonia Mottironi is founding partner at Ardenter Law.

2 Banking Barometer 2022, Swiss Banking Association, August 2022, p. 35 (https://publications.swissbanking.ch/banking-barometer-2022/).

3 Swiss Commodity Trading Association SUISSENÉGOCE (www.suissenegoce.ch/know/key-figures).

4 According to a report of the NGO Public Eyes published in June 2022, the 'Coal Valley' Zug has specialised in hosting large Russian mining groups that produce more than 225 million tonnes of coal a year, 3.5 times more than Victorian Britain ('La Suisse, centrale à charbon de Poutine' (publiceye.ch)). STSA estimates that 'Geneva ties with London as Europe's Number One oil trading hub with roughly one-third or about 700 million tons per year of the world's free oil trade in terms of physical trade. About 75 per cent of Russian exports of crude oil and oil products are managed through Geneva' (STSA).

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[5] within the meaning of Article 10(1) and (2) SPC: embezzlement,[6] fraud,[7] criminal mismanagement,[8] felonies committed in bankruptcy,[9] forgery[10] and public bribery.[11]

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.[12]

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 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

5 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.

6 Article 138 SPC.

7 Article 146 SPC.

8 Article 158 SPC.

9 Article 163 ff SPC.

10 Article 251 SPC.

11 Article 322 *ter* ff SPC.

12 Article 102 SPC.

plaintiff.[13] 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.[14]

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,[15] have been directly harmed by a crime subject is deemed to be an aggrieved person.[16]

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[17] supporting the prosecution or suing for damages, or both.[18]

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);[19]

b to attend the examination of witnesses or suspects and have questions put to them;[20]

c to receive notification of the decisions of the prosecutor and appeal against those that aggrieve his or her rights[21] and file observations in respect of other parties' appeals;[22] and

d to access the file, with the right to take a copy.[23]

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.[24]

In addition to the right to participate in the criminal investigation, the person aggrieved by the crime, who made the civil plaintiff declaration[25] during the criminal investigation, 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.[26]

13 Article 301 SCPP.

14 Article 309(1)(a) SCPP.

15 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.

16 Article 115 SCPP.

17 Article 118 SCPP.

18 Article 119 SCPP.

19 Article 109 SCPP.

20 Article 147 SCPP.

21 Articles 393 and 382 SCPP.

22 Article 390 SCPP.

23 Article 101 SCPP.

24 Article 313 SCPP.

25 Article 119(2)(b) SCPP.

26 Article 122 SCPP.

Civil remedies[27]

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[28] is given when the claimant proves that the defendant committed an unlawful act.

In addition to civil fraud[29] 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[30] 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.[31]

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,[32]where restitution is required for what has been received without valid cause, and agency without authority,[33] 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 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.

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

28 Article 41 SCO.

29 Article 28 SCO.

30 Article 25 SPC.

31 Article 8 SCC.

32 Article 62 SCO.

33 Article 419 SCO.

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.[34] 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.[35] Under Swiss criminal law, limitation is of 15 years for felonies and of 10 years for money laundering.[36] Criminal law limitation only stops running when a criminal judgment is issued in first instance.[37] 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.[38] 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.[39]

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.[40]

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 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.

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

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

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

a criminal freezing orders;[41]
b civil attachment orders;[42] and
c insolvency freezing orders.[43]

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.[44] 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[45] can be any of the following:

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;

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

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.[46]

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.[47]

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.[48] 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.[49] 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.[50]

46 FCD 139 III 135.

47 Article 272(1) SDCBA.

48 Article 279 SDCBA.

49 Article 260 SDBCA.

50 Articles 172–174a SPILA.

ii Obtaining evidence

The main obstacles in the obtention of evidence in Switzerland are bank secrecy,[51] 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 SPC, 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 SPC.

There are several alternative ways of obtaining evidence in Switzerland: by criminal disclosure[52] and search[53] orders, by the civil precautionary taking of evidence[54] and civil production orders, and by orders of disclosure of information by the bankruptcy authorities.[55] 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,[56] 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.[57]

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,[58] the holder of documents, information and other items is obliged to hand them over to the prosecutor.[59]

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.[60] Precautionary taking of evidence is even granted if a trial will occur outside of Switzerland. The proceedings are conducted

51 Article 47 of the Swiss Banking Act (SBA).
52 Articles 263–268 SCPP.
53 Article 244–250 SCPP.
54 Article 158 SCCP.
55 Article 222 SDCBA.
56 Articles 107(1)(a) and 147 SCPP.
57 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.
58 Article 265(2) SCPP.
59 Article 265(1) SCPP.
60 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,[61] 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.[62] The debtor must open premises and cupboards at a bankruptcy official's request. If necessary, the official may use police assistance.[63] 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.[64] Creditors and other interested parties have a right to consult the bankruptcy file[65] and to use the evidence that it contains.[66]

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,[67] can be laundered.

61 Article 321(1) SCCP.

62 Article 222(1) SDCBA.

63 Article 222(3) SCDBA.

64 Article 222(4) SDCBA.

65 FCD 93 III 4.

66 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).

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

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 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.[68] 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.[69]

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[70] 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.[71] 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.[72]

ii Insolvency

Swiss criminal law provides for specific provisions on fraud in an insolvency context[73] that are a subcategory of the crimes committed against property. There exist three felonies, namely fraudulent bankruptcy and fraud against seizure,[74] reduction of assets to the prejudice of creditors[75] and mismanagement causing bankruptcy.[76] There are also five misdemeanours, namely failure to keep proper accounts,[77] undue preference to creditors,[78] subornation in enforcement proceedings,[79] disposal of seized assets[80] and obtaining a judicial composition

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

agreement by fraud.[81] 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 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,[82] and for damages for breaches of their duties in the administration, business management and liquidation,[83] 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.[84] 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.[85] 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,[86] the assigned creditors that bring the claim before courts are paid first.[87]

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.[88]

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.

Since 2021, foreign arbitral tribunals or parties with their consent may apply to Swiss courts to obtain evidence in Switzerland.[89]

81 Article 170 SPC.
82 Article 41 SCO, see above.
83 Article 754 SCO.
84 Article 756(1) SCO.
85 Article 157(1) SCO.
86 Article 260 SDCBA.
87 Article 757(2) SCO.
88 Article 288 SDCBA.
89 Article 185a(2) SPILA.

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.[90] If fraud affects an arbitral award issued in Switzerland, this may be a cause for revision.[91]

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.[92] Banking secrecy is not protected by the Swiss Penal Code but by the Swiss Banking Act (SBA).[93] Lawyers may always refuse to cooperate even if they have been released from duty of secrecy.[94] 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,[95] 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[96] 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.[97] The victim[98] and the witness, but not the plaintiff, have the right to remain silent.[99] Functional secrecy of public officers and attorney–client

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

91 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 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.

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

93 Article 47 SBA.

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

95 Article 163(1)(a) SCCP.

96 Article 166(1)(a) SCCP.

97 Article 113(1) SCPP.

98 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.

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

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.

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.[100]

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.[101] 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[102] 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.[103] 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).

100 Article 128 SPILA.

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

102 FCD 5P.423/2006.

103 FCD 4A.340/2015c.

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 for assistance.[104] 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.[105]

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.[106] 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.[107] 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.[108] 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.[109] 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.[110] 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

104 See, e.g., Judgments of the Court of Justice of Geneva ACJC/1367/2012 and ACJC/1078/2014.
105 FCD 4A_340/2015.
106 FCD 5A_284/2013 and 4A_340/2015.
107 FCD 4A_340/2015 and 4A_167/2017.
108 Article 165 SCCP.
109 Article 166(1)(a) and (b) SCCP. This chapter does not discuss the requirements of Article 166 Paragraph 1 Lit. c and d.
110 Article 166(2) SCCP.

party that holds information.[111] Although the circumstances in which banking secrecy can be successfully invoked are not clearly defined by case law, it never applies in divorce[112] and inheritance[113] matters, or in the context of debt collection proceedings or civil attachments.[114]

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.[115] If crime proceeds are no longer available for forfeiture, replacement claims must be issued against assets that are not crime proceeds.[116] 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);[117]
c the replacement assets (when the direct proceeds of crime are no longer available to be forfeited); and[118]
d the good behaviour bond.[119]

The rights of persons harmed or third parties expire five years after the date on which official notice is given.[120]

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.[121]

111 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'.
112 FCD 5P.423/2006 of 12 February 2007.
113 FCD 5A_284/2013.
114 FCD 129 III 239 and 125 III 391.
115 Article 70 SPC.
116 Article 71 SPC.
117 Article 70 CP.
118 Article 71 CP.
119 Article 66 CP.
120 Article 70(4) SPC.
121 These ordinary rules also apply to domestic and foreign arbitral awards.

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 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.[122]

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.[123] 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

122 FCD 5A_899/2016.

123 Article 27(1) SPILA.

d the dispute has previously been decided in a third state, provided that the latter decision fulfils the prerequisites for recognition.[124]

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.

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.[125]

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.[126]

VI CURRENT DEVELOPMENTS

i Criminal corporate liability for failure to prevent money laundering and participation in a criminal organisation

The collapse of Credit Suisse in March 2023 led 2,500 investors to lodge 230 appeals with the Federal Administrative Court. In parallel, Credit Suisse filed a request for provisional measures, which the Federal Administrative Court made subject to the filing of an appeal. Credit Suisse eventually decided not to lodge an appeal.[127] The 2,500 appellants were not given access to FINMA's two decisions of 19 and 22 March 2023 until after they had lodged their appeals, as ordered by the Court. These decisions were disclosed to the public in

124 Article 27(2)–(4) SPILA.

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

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

127 Press release of the Federal Administrative Court of 23 May 2023, https://www.bvger.ch/bvger/en/home/media/medienmitteilungen-2023/keinebeschwerdecc.html.

foreign newspapers on 15 May 2023.[128] The first main objection relates to the legality of the emergency ordinance of the Swiss government adopted on 19 March 2023 pursuant to its constitutional powers provided for at Articles 184 Paragraph 3 and 185 Paragraph 3 of the Swiss Federal Constitution, which authorised FINMA to order the write down. The second main objection relates to the lack of contractual basis between Credit Suisse and the investors, and it is argued that the write down did not constitute a 'viability event' within the meaning of the prospectus as it did not result in an increase of the capitalisation of the bank.[129]

On 8 June 2023, Switzerland's two chambers of parliament have approved the setting up of a parliamentary enquiry committee to investigate the emergency takeover of Credit Suisse by UBS.[130]

ii Money laundering as a sufficient nexus to Switzerland to obtain a pre-judgment attachment

As mentioned above, under Article 271 Paragraph 1 let. D DCBA, a creditor may obtain a pre-judgment attachment against a debtor who has no residence in Switzerland if the claim has a sufficient nexus with Switzerland. The mere presence of assets in Switzerland is not deemed to be a sufficient nexus.

As also mentioned above, a person harmed by a predicate offence to acts of money laundering has a tort claim against the money launderer if such acts prevented its compensation, notably from assets that could have been forfeited and allocated in its favour.

In a ruling 5A_709/2018 of 11 July 2022, published in FCD 48 III 377, the Federal Court confirmed that a tort claim based on acts of money laundering committed in Switzerland constituted a sufficient nexus to obtain an attachment against a foreign resident.

In the specific case, however, the court of appeal had made findings about such a tort claim on it own, without any factual allegations by the creditor of a damages claim based on acts of money laundering, and the Federal Court admitted the debtor's appeal on that ground.

Beyond its relevance to attachment proceedings, this decision underlines the complexity of tort claims based on money laundering acts from causation and quantification perspectives.

iii Applicability of the Lugano Convention to UK judgments issued before the end of the Brexit transition period

The issue of the applicability of the Lugano Convention to judgments issued in the United Kingdom after Brexit has continued to keep Swiss courts busy.

Article 63(1) of the Lugano Convention contains the following transitional provision:

> *This Convention shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after its entry into force in the State of origin and, where recognition or enforcement of a judgment or authentic instruments is sought, in the State addressed."*

The Lugano Convention does not contain any provisions indicating what would be the consequence of a Member State leaving the European Union.

128 www.antiguanews, Credit Suisse AT1 Bonds write-down: Swiss Courts orders FINMA to disclose documents to plaintiffs, article dated 15 May 2023.

129 ibid. See also PHH note of Dr iur Philipp H Haberbeck, 'Claims of Credit Suisse AT1 Investors?'.

130 www.swissinfo.ch, 'Swiss parliament gives green light to Credit Suisse commission of enquiry'.

The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 January 2020 (the Withdrawal Agreement) provides at its Article 67 that for proceedings commenced before 1 January 2021, both the jurisdiction rules and the recognition and enforcement of judgment rules in the Brussels Recast Regulation will continue to apply on a reciprocal basis.

However, there is no similar agreement in relation to the Lugano Convention.

The United Kingdom adopted legislation to ensure that the English courts would continue to apply the Lugano Convention to proceedings issued before 1 January 2021, but Switzerland did not do so.

The Federal Court has now shed some light on the issue in two decisions.

The first decision is a ruling 5A_697/2020 dated 22 March 2021. The case dealt with the enforcement of a High Court of Justice of England and Wales judgment dated 17 October 2019, which enforcement and recognition in Switzerland had been sought in the context of an attachment request filed in the Canton of Vaud on 26 November 2019. After the dismissal of its objection to the attachment order on 3 April 2020 and of its appeal against that judgment on 24 July 2020, the debtor appealed to the Federal Court on 28 August 2000. In the context of the appeal proceedings, the debtor wrote on 29 January 2021 to the Federal Court that the enforcement of the High Court judgment was no longer governed by the Lugano Convention but by the rules of the Private International Law Act.

Invited to file determinations, the Federal Office of Justice indicated that the recognition of United Kingdom judgments issued before 1 January 2021 continued to be governed by the Lugano Convention.[131]

The Federal Court ruled that the decision of the Court of Appeal during the transition period regarding a judgment rendered before Brexit rightly applied the Lugano Convention.

On the issue of whether the proceedings before the Federal Court, which were continuing after the end of the transition period, should be governed by the Private International Law Act or the Lugano Convention, the Federal Court decided for the latter, for three reasons:

a the English order was rendered before Brexit took effect;

b all the cantonal proceedings and the filing of the appeal took place before the end of the transition period; and

c there would be no public interest to apply the Private International Law Act before the Federal Court for the first time, notably taking into account the principle of non-retroactivity should apply to Article 196ff PILA.

The Federal Court therefore did not firmly decide that the enforcement of United Kingdom judgments issued before the end of the transition period should still be governed by the Lugano Convention if the enforcement proceedings were begun after 31 December 2020.

131 The Federal Office of Justice stated in a note published on its website on 9 December 2020: 'According to Article 126 of the EU–UK withdrawal agreement, there was a transition period until 31 December 2020. Based on Article 129 of the withdrawal agreement, the United Kingdom was to continue to be treated as a state bound by the Lugano Convention until the end of this period. Brexit therefore only has an impact on the Lugano Convention since 1 January 2021. (…) The recognition and declaration of enforceability of judgments made before the withdrawal date shall continue to be governed by the Lugano Convention even after the date of withdrawal.'

In a more recent decision 5A_720/2022 dated 31 March 2023, however, the Federal Court stated, in the context of an appeal against a decision of the Supreme Court of Zug, that the Lugano Convention continues to govern the recognition of United Kingdom judgments issued before the end of the Brexit transition period, even though the Swiss recognition and enforcement process is initiated after this date. It should be noted, however, that this position was not the *ratio decidendi* of the decision, as the appeal was essentially rejected on procedural grounds.

There still therefore remains a small possibility that the Federal Court should reverse its position that the Lugano Convention still applies to the recognition of United Kingdom issued before the end of the Brexit transition period.

YVES KLEIN

Monfrini Bitton Klein

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 and 2022, 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. He is fluent in French, English, Portuguese and Spanish, and speaks some Italian and German.

MONFRINI BITTON KLEIN

Place du Molard 3
1204 Geneva
Switzerland
Tel: +41 22 310 22 66
Fax: +41 22 310 24 86
yklein@mbk.law
www.mbk.law

ANTONIA MOTTIRONI

Ardenter Law

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 founded Ardenter Law in October 2021.

She focuses on civil and criminal litigation, especially in the area of international business crime, international judicial assistance, enforcement of foreign arbitral awards and judgments 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 judgments. 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 in recent years in one of the largest art law disputes of the past decade between a Russian oligarch and his Swiss art dealer.

Antonia Mottironi has published on tracing and recovery of assets as well as on cross-border insolvency. She regularly speaks at international conferences on these matters.

She is a board member of the steering committee of the European network of the International Women's Insolvency and Restructuring Confederation.

ARDENTER LAW

Rue Verdaine 6
1204 Geneva
Switzerland
Tel: +41 22 319 21 20
amottironi@ardenterlaw.ch
www.ardenterlaw.ch