N4 Switzerland

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INTRODUCTION

N4.1 Switzerland, due to its highly professional banking system, its banking secrecy, and its monetary and political stability, is one of the most important financial centres on a worldwide scale. This position of Switzerland leads to the situation that, among legitimate funds, funds of criminal, corrupt or dictatorial origin attempt to find their way into Switzerland, making it indispensable that funds can be efficiently traced. In this regard, Switzerland has not been passive in attempting to remove abuse from its banking system.

First, it is important to remember that banking secrecy has never been absolute. It has always been understood that it has to give way to other legal requirements, such as those existing in civil and criminal procedure, family, succession, debt-collection and bankruptcy law. The task of the legislature is to weigh the interest of the right to protection of the private sphere against other private or public interests.

Second, it is to be noted that Switzerland has made a continual legislative effort, ratifying numerous treaties. In addition, some economic sectors, such as the banking sector, have adopted self-regulatory instruments that set rules of behaviour for their members. The most important steps in legislative and treaty development have been as follows:

(1) Anti-money laundering measures:

- (a) 1977, 1982, 1987, 1992, 1998—due diligence agreements between the Swiss Bankers' Association and the banks (Swiss Bankers' Association, 1977, 1982, 1987, 1992, 1998, Agreements on the Swiss Bankers' Code of Conduct with regard of the Exercise of Due Diligence, CDB 1977, 1982, 1987, 1992, 1998);
- (b) 1990—art 305bis and ter of the Swiss Penal Code (CP), making money laundering and the lack of identification by financial intermediaries of the beneficial owner of the assets a criminal offence;
- (c) 1991—Money laundering guidelines of the Federal Banking Commission of 18 December 1991, revised in 1994 (Circular 91/3), replaced in 1998 by Circular 98/1;
- (d) 1994—art 58 (confiscation), art 260 ter (criminal organisation) and art 305ter al 2 (right to denounce suspicious operations) of the CP enter into force;
- (e) 1995—Federal Law on the Central Offices of Criminal Police enters into force (RS 172.213.71);

(f) the Federal Law on the Fight against Money Laundering in the Financial Sector entered into force on 1 April 1998 (RO Message du Conseil Fédéral concernant la lutte contre le blanchissage d'argent dans le secteur financier (LBA) du 17 juin 1996, FF 1996 III 1057); 1998 892, RS 955.0,

(g) Switzerland is also a member of the Financial Action Task Force on Money Laundering (FATF) of 7 February 1990 (Bulletin de la Commission Fédérale des Banques, No 20, 1990 p 35ff) and since the LBA entered into force its legal system is adapted to the 40 FATF recommendations; and

(h) Switzerland, though not a member of the European Union, is following Directive 91/308/CEE of the Council of the European Community, in its Law on Money Laundering (LBA), by making it an obligation for financial intermediaries to denounce suspicious operations, and not only a right to do so.

(2) Supervision of financial markets:

The Federal Law on Stock Exchanges and Securities Trading (LBVM) RS 954.1) entered into force on 1 February 1997, except for the articles on the publicity of participations and on the public offers of acquisitions to existing shareholders, in the case of Swiss companies of which at least part of their shares are listed on a Swiss Stock exchange:[1]

The following articles entered into force on 1 January 1998:

(a) art 2, letter e (Public offers of acquisitions to existing shareholders, definition)

(b) art 20, 1st to 4th alinea and 6th alinea and art 21 (Publicity of participations)

(b) art 22, art 23, 3rd to 5th alinea, art 24 to 27, art 29, 1st and 2nd alinea, art 30, 1st alinea, art 31, 1st to 4th alinea, art 32, 1st to 5th alinea and 7th alinea, art 33 (Public offers of acquisitions to existing shareholders)

(c) art 35, 2nd alinea, letters d and e (Supervision by the Federal Banking Commission)

(d) art 41, 1st alinea, letters a and b and 2nd alinea, art 42 (Penal stipulations)

(e) art 51 to art 54 (Transitory stipulations)

The following application ordinances to the LBVM have entered into force:

(a) 1 February 1997—Ordinance of the Federal Council on stock exchanges and securities trading (RS 954.11)

(b) 1 January 1998—Ordinance of the Federal Banking Commission on stock exchanges and securities trading (RS 954.193)

(c) 1 January 1998—Ordinance of the OPA commission on Public offers of acquisitions (954.195.1)

(d) 1 January 1998—Regulation of the OPA commission (RS 954.195.2)

(3) Judicial assistance in penal matters:

(a) 1967—entry into force for Switzerland to the 1959 European Convention on Mutual Assistance in Criminal Matters (CCEJ) (RS 0.351.1);

(b) 1977—a Treaty on judicial assistance in criminal matters between Switzerland and the United States came into force;

(c) 1981—entry into force of the Federal Law on Judicial Assistance in Penal Matters (EIMP) (RS 351.1);

(d) 1988—signature of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the 1988 Vienna Convention) in course of ratification (FF 1189 II 961);

(e) 1993—entry into force for Switzerland of the Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (the 1990 Strasbourg Convention) (RS 0.351.9379.2); and

(f) 1997—entry into force of a revised Federal Law on Judicial Assistance in Penal Matters (EIMP) (RS 351.1).

However, tracing is not limited to the discovery of funds of criminal, corrupt or dictatorial origin. There are numerous legal causes for tracing, such as those found in family law, contract law, company law, administrative law, debt collection and bankruptcy law. The aim of this chapter is to enable the practitioner, lawyer or not, to locate rapidly specific tracing needs within the complex system of norms regarding tracing of assets in Switzerland, and to choose among the legal means at one's disposal.

The chapter is divided into four parts. The first part describes the broader legal and political environment of the rules regarding the tracing of assets in Switzerland, ie Switzerland's legal structure, banking secrecy and anti-money laundering measures. The second, third and fourth parts answer the basic questions in this matter, respectively how to obtain information on assets, how to block assets, and how to recover assets.

The scope of the chapter has been kept as wide as possible, in order to serve a wide variety of tracing needs. It examines tracing in the broadest sense of the word, ie obtaining information, blocking and recovering assets. It deals with all types of assets, including real estate, not only with those assets deposited in a bank. It examines tracing from a domestic and an international angle. The latter leads to the examination of legal means to provide tracing across cantonal and national borders, in particular by the recognition of foreign judgments and by the application of intercantonal and international judicial assistance. However, due to the wide area covered, comment throughout can only be of a summary nature.

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1 Neue Zürcher Zeitung, 29/30 November 1997, p 33

THE FEDERAL STRUCTURE OF SWITZERLAND

N4.2 Before the core of the subject can be discussed, a few facts about Switzerland's legal structure should be examined.

Switzerland is a federal state, composed of 26 cantons. As a rule, the cantons have full competence to exercise the public power except where the Federal Constitution expressly attributes a competence to the Confederation, and the Confederation effectively exercise it. According to this distribution, the confederation has, *inter alia*, exclusive jurisdiction over private law, criminal law, debt collection and bankruptcy law, and jurisdiction in all international matters. There are therefore a Penal Code (hereinafter CP), a Civil Code (hereinafter CC), and an Obligations Code (hereinafter CO) in Swiss law.

Criminal and civil procedural law are within the cantons' competence, with the exception of a few federal crimes such as terrorism and high treason, and of the procedure before Switzerland's supreme court, the Federal Tribunal. Other matters are both within the Confederation's and the cantons' jurisdiction, such as administrative law and procedure, and tax law and procedure.

Such a division of competencies makes the Swiss law on the tracing of assets quite a complicated one, as 27 different (and often unco-ordinated) legal orders should be described. This chapter will limit itself to the description of the federal law, the common principles that can be distinguished in cantonal law, and the rules of intercantonal and international judicial assistance permitting the tracing of assets across cantonal and national borders.

PROFESSIONAL SECRECY

N4.3 The right to privacy is an unwritten constitutional right, protected by art 28 of the Swiss Civil Code (CC) and applicable to both natural and legal persons. A person's private sphere includes information relating to his financial affairs and his personal fortune (ATF 64 (1938) II 162).

Persons who, by their profession, are entrusted with information on another person's assets have an obligation of discretion, and may only disclose such information with the agreement of that person or as a result of a specific legal provision. A violation of this duty may give rise to the payment of damages according to art 41 of the Swiss Code of Obligations. In addition, the rules of the mandate (art 394 ff of the CO) are applicable to most contracts involving the keeping or managing of assets. An obligation of loyalty to the client derives from the mandate (art 398 para 2 of the CO), and disclosing information on a client's assets is considered a breach of this obligation, subject to the payment of damages according to art 97 of the CO. Such liability arises even for pre-contractual negotiations and after the end of a contract.

In addition to those civil law provisions that give rise to the payment of damages, the disclosure of confidential information may give rise to criminal prosecution. Pursuant to art 162 of the Swiss Penal Code, any person who discloses a manufacturing or business secret that he had a legal or contractual obligation to

protect, as well as the person who uses such secret for his own benefit or that of a third party, shall be punished with a prison term or a fine. A breach of art 398 para 2 of the CO is thus also a criminal offence. A secret is deemed to exist when the owner of the information wants to restrict its disclosure to a limited circle of persons (ATF 103 IV 283 ff).

In order to prevent foreign authorities from seeking to obtain information without using international assistance procedures, art 273 was introduced into the Swiss Penal Code. This provision punishes whoever seeks to obtain or provides a manufacturing or business secret in order to make it available to a foreign public authority or foreign organisation, or to a private organisation or to its agents, with a prison term and with a fine. Such secrets are similar to those protected by art 162 of the CP. However, because the legislator's intent is not only to protect private interest but also national sovereignty, the consent of the owner of the information, such as the compelled waivers of banking secrecy, does not always make it legal to seek to obtain such information (see N4.4 below).

In addition to art 273 of the CP, art 271 of the CP punishes anyone who, without authorisation, takes upon itself in Switzerland for a foreign state any action that is within the powers of public authorities. The gathering of evidence by foreign authorities or private parties for use in foreign proceedings is considered a prohibited act pursuant to art 271 of the CP, and may only by performed by Swiss authorities under the rules of international judicial assistance. Direct services of subpoena, summons and other orders from abroad are prohibited as well. Article 271 of the CP has been applied several times recently in the sentencing of foreign attorneys trying to gather evidence in Switzerland (Peter Honegger, 'Swiss Banking Secrecy', *Butterworth Journal of International Banking and Financial Law* (August 1990) 344–53, at p 348).

Article 321 of the CP prohibits clergymen, advocates, notaries public, members of the medical profession, and auditors from secrets learned while exercising their trade. However, the Federal Tribunal recently deemed that secrecy is not protected when advocates or notaries public engage in activities that are not typical of their trade, such as investment advising or the management of companies (ATF 112 (1986) Ib 606; ATF 114 (1988) III 105; ATF 115 (1989) Ia 197).

BANKING SECRECY

N4.4 In addition to the above rules concerning professional secrets, banks are subject to a specific provision contained in art 47 of the Swiss Federal Law on Banks and Savings Banks (the Swiss Banking Law, LB) (RS 952.0). Any person or company performing a banking activity is requested to obtain an authorisation from the Federal Banking Commission, which monitors banking activity and may take administrative sanctions against banks that do not respect the banking laws. Any entity with financial functions that publicly solicits customer deposits is deemed to perform banking activities. The rules set out in the Banking Law are applicable to Swiss banks and to the subsidiaries, branch offices or agencies of foreign banks established in Switzerland.

Article 47 of the Swiss Banking Law reads:

1. Whoever discloses a secret entrusted to him in his capacity as officer, employee, mandatory, liquidator or commissioner of a bank, as a representative of the Federal Banking Commission, officer or employee of a recognised auditing company, or who has become aware of such a secret in this capacity, and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed six months or by a fine not exceeding 50,000 [Swiss] francs.

2. If the act has been committed by negligence, the penalty shall be a fine not exceeding 30,000 [Swiss] francs.

3. The violation of professional secrecy remains punishable even after termination of the official or employment relationship or the exercise of the profession.

4. Federal or cantonal regulations concerning the obligation to testify and to provide information to a government authority shall apply.

Information covered by banking secrecy therefore not only includes secrets entrusted to the bank by its clients, but also information related to third parties that came to the attention of the bank in the course of its business.

In addition to a fine, a breach of art 47 of the Swiss Banking Law may be a ground for the Federal Banking Commission to cancel its authorisation to the financial institution to perform banking activities in Switzerland.

The case of numbered accounts

There is a common misconception about Swiss numbered accounts, which are often confused with anonymous accounts. Anonymous accounts do not exist in Switzerland. A numbered account is a bank account that is identified by most employees of the bank with a number or a code name rather than a person's name. However, the identity of the owner of the account is known by at least one person within the bank, and may be disclosed to judicial authorities when the conditions thereof are fulfilled. In addition, the bank's auditors may exercise any control to ascertain that the numbered accounts are not anonymous.

Exceptions

A bank has no subjective right to maintain banking secrecy, but only an obligation to do so. If the client waives his right to secrecy, the bank has an obligation to disclose the information requested by the client to third parties such as courts and tax authorities, unless still other persons are affected by such information.

If the client waives his right to secrecy because a foreign authority compelled him to do so ('a compelled waiver'), the bank may only disclose the information if it deems that the client would have waived his right even in the absence of a threat of a sanction.

Legal provisions, such as rules of civil and penal procedure, family law, succession law, debt collection and bankruptcy law and administrative law, exist for other exceptions to banking secrecy, and these are described later in this chapter (*see* N4.12 onwards).

ANTI-MONEY LAUNDERING MEASURES

N4.5 In the framework of growing international concern about money laundering and the identifying and confiscating of the financial means of criminal organisations, Switzerland has participated in the following international instruments:

(1) Recommendation No 80 of the Council of Europe, adopted on 27 June 1980, (Conseil de l'Europe, Comité des Ministres, Recommendations et Résolutions 1980, Strasbourg, 1980).

(2) Declaration of Principles of the Basle Committee on Banking Supervision of the Bank of International Settlements of December 1988 (Swiss Bankers' Association, Annex to the Circular No 85 of 10 February 1989).

(3) 40 Recommendations of the Financial Action Task Force on Money Laundering (FATF) of 7 February 1990 (Bulletin de la Commission Fédérale des Banques, No 20, 1990, p 35ff).

(4) Convention No 141 of the Council of Europe Regarding the Laundering, the Search, the Seizure and Confiscation of the Product of Crime of 8 November 1990, (RS 0.351.9379.2).

(5) It should be mentioned that Switzerland, although not a member of the European Union, is following Directive 91/308/CEE of the Council of the European Community by adopting the Law on Money Laundering (LBA).

On the national level, Switzerland has adopted the following rules:

(1) Two provisions (arts 305bis and 305ter of the CP) dealing with money laundering were introduced in 1990 into the Swiss Penal Code and were complemented in 1994 by another (art 305ter para 2 of the CP).

(2) A law on money laundering (LBA) was adopted by the Swiss Parliament on 10 October 1997 and entered into force on 1 April 1998.

(3) The Federal Banking Commission (CFB) issued its guidelines concerning the measures that banks and financial intermediaries monitored by the CFB must adopt to comply with money laundering provisions contained in the Penal Code and the LBA.

(4) The Swiss Bankers' Association adopted a due diligence convention that binds all its members, and also *de facto* binds non-members since it sets out the level of diligence required when accepting assets into a bank account.

Article 305bis of the Penal Code

N4.6 The first provisions concern money laundering *per se*, ie activities aimed at preventing the identification and confiscation of proceeds from a criminal activity. Article 305bis of the Swiss Penal Code reads:

1. Whoever commits an act of a nature to hinder the identification of the origin, the discovery or confiscation of assets which he knew or should have presumed that they were the product of a crime shall be punished with prison or a fine.

2. In severe cases, the punishment shall be of penal servitude for at least five years or imprisonment. In addition to this penalty, a fine up to 1 million Francs shall be imposed. A severe case is deemed to have occurred when, among others, the perpetrator:

    a. Acts as a member of a criminal organisation;

    b. Act as a member of an organisation which purpose is the systematic practice of money laundering;

    c. Realises a large turnover or considerable profit from professional money laundering activities.

3. The perpetrator will also be subject to sentencing if he committed the principal offence abroad and if such act was also punishable at the place of perpetration.

The provisions of art 305bis concern even the persons who are the perpetrators of the principal offence, according to a recent decision of the Federal Tribunal (ATF 120 IV 329)—although many legal scholars deem that one should not be punished for laundering one's own money. And all kinds of assets are concerned: real and movable property, securitised and non-securitised rights, etc.

The assets must have their origin in a crime. A crime is defined in art 9 of the CP as 'an offence that is punished by penal servitude (one to 20 years)', such as homicide (arts 111–113 of the CP), fraudulent conversion of funds (art 138), robbery (art 139), assault (art 140), stealing of electronic data (art 143), fraud (art 146), fraudulent use of a computer (art 147), extortion and blackmailing (art 156), usury (art 157), dishonest management with appropriation (art 158), concealment of assets that are the product of an offence against property (art 160), fraudulent bankruptcy (arts 163–5), kidnapping (art 183), hostage taking (art 185), sexual offences (arts 187–190), procuring (art 195), human trade for sexual purposes (art 196), use of explosives (art 224), money forging (art 240), falsification of documents (art 251), participation in a criminal organisation (art 260ter), high treason (art 265), severe cases of espionage including economic espionage (arts 271–74), severe cases of money laundering (art 305bis para 2), false declaration to justice and false testimony (arts 306 and 307), passive corruption (art 315), and drug trafficking (art 19 of the Federal Law on Narcotics—RS 812.121).

Money laundering may take place even if the crime was committed abroad. In such a case, the act must be punishable as an offence in the country where it was committed and as a crime in Switzerland.

The assets must be derived from a crime, and both the direct product of the crime *(producta sceleris)* and the consideration for the crime *(praetium sceleris)* are relevant. Very often, the question will arise as to the treatment of assets that replace assets derived from a crime. According to the Federal Council's Message and to legal writings of authoritative scholars, the criteria to apply as to the criminal origin of assets is whether such assets could be confiscated according to arts 58 and 59 of the CP: when tangible assets that would be confiscatable are replaced with other assets, the latter are not confiscatable. In the case of money assets, however, the replacement of one by another is still confiscatable as long as the paper trail is maintained (for further discussion, *see* N4.24 *below* concerning confiscation).

The prohibited acts are those of a nature to hinder the identification of the origin, the discovery or confiscation of the assets. There is no need that such hindering be successful, but only that such act be objectively able to have such a result. It is only on a case-by-case basis that one may decide whether such acts have taken place or not. The Federal Council's Message (FF 1989 II 965) mentions several examples, such as the conversion of paper money into bank money and back-to-back loans, but it expects that case law shall better define what is considered an act of money laundering.

However, case law is not extensive yet and has above all concerned itself with the concealment of assets. In a decision of 20 January 1993, the Federal Tribunal stated that art 305bis does not only relate to typical money laundering activities (via use of the financial and banking systems) but also concealing the product of a crime in a cellar (ATF 119 IV 59). In a later decision, the Federal Tribunal held that 'any means likely to allow the injection of assets derived from a crime into the legal economy in such a manner as to conceal its criminal origin is of concern to the law', and that depositing fiduciarily an amount received on various small accounts or investments so as to avoid to have to declare its origin was punishable (ATF 119 IV 242).

Finally, regarding the condition of intention, negligence is not punished *per se*. 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 person acted by recklessness (ATF 119 IV 242). It is important to note that 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.

Article 305ter of the Penal Code

N4.7 Because it was decided not to punish money laundering by negligence (contrary to the first draft of art 305bis), a provision was also introduced into the Swiss Penal Code to impose on persons providing financial services a duty of identification of the beneficial owner of the assets. Article 305ter reads:

> Whoever professionally accepts, keeps safe, or assists in investing or transferring assets belonging to a third person without checking with due diligence the identity of their beneficial owner shall be punished with prison up to one year or a fine.

The article is only applicable to persons active by trade in the financial sector, ie those who receive money deposits: banks, financial institutions, fiduciaries, investment advisers, financial managers, money changers, precious metals traders, and advocates or notaries public when exercising such activities as investment advising or receiving fiduciary deposits. The act of accepting, receiving in deposit, assisting in investing, or transferring assets belonging to a third party are included under the provision.

The beneficial owner or ultimate beneficiary is the person who owns the assets from an economical point of view. Such owner is the person who may dispose of such assets. The Federal Council's Message refers to the definition of the beneficial owner contained in the Swiss Bankers' Association agreement on due diligence (*see*

N4.10). The degree of diligence of the person receiving the assets is also a matter of circumstances for which the Federal Council referred to in the bank diligence agreement.

Article 305ter para 2 of the Penal Code

N4.8 The first provisions did not lift clearly the banker's obligation of secrecy. It was nevertheless commonly admitted that, according to the state of necessity doctrine, banks were allowed to break banking secrecy when they suspected a case of money laundering. In 1994, to clarify the situation, a second paragraph was added to art 305ter of the CP, which reads:

> The persons mentioned in paragraph one [of art 305ter] have a right to communicate to Swiss criminal authorities and to Federal authorities designated in the law clues sustaining their suspicion that assets may have their origin in a criminal offence.

There exists, on the basis of the Swiss Penal Code, no duty to inform the authorities of such suspicion. In practice, however, the existence of such a suspicion creates a sufficient degree of intent (recklessness) to allow for the application of art 305bis of the CP (*see above*). However, the entry into force of the Law on Money Laundering makes the fact of wilfully omitting information on assets known or suspected to be of criminal origin, an administrative offence (*see* N4.9 *below*).

The Law on Money Laundering

Situation before the law

N4.9 In 1994, the Federal Council felt the need to complement the provisions regarding money laundering contained in the Swiss Penal Code with a law directed at the financial sector. As one will see in the following sections, in 1991, the Federal Banking Commission had adopted a circular directed at the banking sector, and in 1992, the Swiss Bankers' Association had adapted its self-regulatory instrument, the Due Diligence Convention, to the new criminal provisions. The banking sector had thus a precise set of rules with respect to money laundering, but those rules did not apply to the rest of the financial sector (fiduciaries, money changers, etc), and, although in practice banks had to denounce suspicious transactions, no express rule compelled them to do so. In addition, as was shown above, the Swiss Penal Code only provided for a right to denounce suspicious assets, but no obligation to do so. Switzerland therefore did not comply with FATF recommendations.

Adoption of the law

On 10 October 1997, the Swiss Parliament adopted the Law on Money Laundering (Loi sur le Blanchiment d'Argent (LBA)), based on the Federal Council's draft of 17 June 1996 (*Message du Conseil Fédéral concernant la lutte contre le blanchiment d'argent dans le secteur financier du 17 juin 1996*, FF 1996 III 1057).

This law is chiefly based on the rules already applying to bankers. Its object is to extend to all participants in the financial market the obligation to respect a set of precise rules regarding due diligence, and to provide for an obligation to inform

authorities of the existence of suspicious assets. The task of monitoring the activity of financial intermediaries rests with self-regulation bodies, which are themselves monitored by a new Control Authority in matters of Money Laundering.

Scope of the law

The law applies to all financial intermediaries, including banks, investment funds directions, insurances, securities traders, and all persons who professionally keep in deposit, assist in investing or transferring assets belonging to third persons (this includes attorneys and notaries public who manage their clients' money).

Due diligence obligations of financial intermediaries

All financial intermediaries must comply with the following six rules:

(1) To verify the identity of the contracting party at the beginning of a relationship by requesting a document evidencing it. Such verification must also take place in the case of a single transaction involving an important amount (cashier transactions) or when there exists a clue that money laundering is taking place. The definition of what an important amount is will be decided by the Banking Commission and the self-regulating bodies, which should take into account the European Union's Directive on Money Laundering (art 3 LBA).

(2) To request from the contracting party a statement about the identity of the beneficial owner of the assets if there exists a doubt that the contracting party is not the beneficial owner; if the contracting party is a domiciliary company; if a cashier transaction involves an important amounts (art 4 LBA).

(3) To renew the above two verifications if a doubt arises about the identity of the contracting party or the beneficial owner of the assets (art 5 LBA).

(4) To clarify the economic background of the transaction in cases of unusual transactions (unless they are clearly legal), or if clues exist indicating that the assets could be of a criminal origin or are controlled by a criminal organisation (art 6 LBA).

(5) To keep documents concerning all the transactions that took place and all the above-mentioned clarifications. This obligation lasts for ten years after the end of the business relationship (art 7 LBA).

(6) Financial intermediaries must organise themselves and inform their employees in order to prevent money laundering (art 8 LBA).

Obligation to communicate

If a financial intermediary suspects that assets involved in a business relationship may be related to a violation of art 305ter of the Penal Code, are of a criminal origin, or are controlled by a criminal organisation, he must inform without delay the Office of Communications in matters of Money Laundering (a new governmental body from the Central Office on the Fight against Organised Crime).

While the Office of Communications in matters of Money Laundering examines the information provided, the financial intermediary must block the related assets and keep such blocking and communication secret. The blocking ceases if, within five days of the communication, the authorities have not made a decision.

Supervision

The LBA establishes three types of supervision, depending on the type of financial intermediary:

(1) Financial intermediaries already supervised by an authority existing in application of a special law (banks, investment funds management, insurers and securities dealers) remain under the supervision of that authority (art 12, LBA).

(2) Financial intermediaries affiliated to a recognised self-regulatory body will be supervised by said body.

(3) Financial intermediaries that are neither supervised by an authority nor affiliated to a recognised self-regulatory body will be directly supervised by the Control Authority in matters of Money Laundering. These financial intermediaries must now request from that Authority an authorisation to perform their trade.

In addition to its direct supervisory powers, the Control Authority in matters of Money Laundering monitors the activity of the recognised self-regulatory bodies.

Sanctions

The intentional violation of the duty to communicate information is punished by a fine of up to CHF 200,000. The intentional or negligent omission from requesting an authorisation to perform the trade of financial intermediary is punished by a fine of CHF 200,000.

Administrative assistance

Administrative assistance is granted by the Control Authority in matters of Money Laundering to foreign authorities monitoring financial markets provided that the three following conditions are respected:

(1) The foreign authority will use the information to the exclusive purpose of directly monitoring financial intermediaries.

(2) The foreign authority is bound by functional or professional secrecy.

(3) The information will be communicated to other authorities only with the express consent of the Control Authority in matters of Money Laundering or in application of an international treaty.

Administrative assistance of the authorities existing in application of a special law is governed by that special law (*see* N4.14 *below*).

Transitory provisions

The law entered into force on 1 April 1998. The Federal Council issued two ordinances of application:

(1) Ordinance concerning the Office of Communications in matters of Money Laundering (RO 1998 905, RS 955.23).

(2) Ordinance concerning the fees of the Control Authority in Matters of Money Laundering (RO 1998 912, RS 955.22).

The obligation to communicate applies to all financial intermediaries as of the entry into force of the LBA. The obligation to be affiliated to a self-regulatory body will be compulsory only or to submit oneself to the direct supervision of the Control Authority in Matters of Money Laundering two years after the entry into force of the law (as of 1 April 2000).

The administrative basis: The guidelines of the Federal Banking Commission concerning the fight against and the prevention of money laundering

N4.10 As was mentioned in N4.4 *above*, the Federal Banking Commission monitors the activities of banks in Switzerland. One of the aspects of such monitoring is the verification by the Commission that banks are complying with their obligations under art 3 para 2 of the Swiss Banking Law of an adequate internal organisation and of providing guarantees of an irreproachable activity.

After the adoption of the 1990 anti-money laundering legislation, the Federal Banking Commission adopted on 18 December 1991 a circular (91/3), revised in August 1994, concerning the prevention and combating of money laundering. This circular partly codified the Commission's previous administrative practice, interpreted arts 305bis and 305ter of the CP with regard to the obligation of banks, and took into account the recommendations of the Basle Committee of the Financial Action Task Force (FATF) and of the EC Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering.

Until 30 June 1998, only banks operating under the Swiss Banking Law had to respect the Federal Banking Commission's Circular 91/3. Because of the entry into force of the Law on Money Laundering, the Federal Banking Commission adopted a new Circular adapted to the LBA, which scope is extended to all financial intermediaries that are submitted to its monitoring, pursuant to art 2 al 2 lit a, b and d LBA (banks, directions of investment funds, securities dealers). The new Circular (Circ CFB 98/1) was adopted on 26 March 1998 and entered into force on 1 July 1998. The following rules from the Circular may be outlined:

(1) *Groups* (para 5 of the Circular) Financial intermediaries must not use their branches, subsidiaries or the companies belonging to their group that are abroad and active in the financial sector to bypass the guidelines contained in the Circular. They must ensure that their branches and the companies belonging to their group that are not located in a state member of FATF respect FATF recommendations Nos 10, 11, 12, 14, 15, 18 and 19.

(2) *Negligence* (para 8 of the Circular) Although money laundering by negligence is not punishable (art 305bis, CP), such negligence may be a violation of the obligation of the guarantees of an irreproachable activity pursuant to art 3 al 2 of the Swiss Banking Law, of art 3 al 2 of the Federal Law on Stock Exchange and Securities Trading (LBVM), or of the obligation of a good reputation pursuant to art 11 al 5 of the Federal Law on Investment Funds.

(3) *Proceeds of corruption* (para 9 of the Circular) Financial intermediaries must not accept funds that they know or should suspect to be the proceeds of corruption or misappropriation of public funds. They must therefore pay a special attention to business relationships with high officers of foreign governments, or persons or companies that are close to them.

(4) *Internal organisation* (paras 15 to 19 of the Circular) Financial intermediaries must issue internal written instructions to their employees to implement the guidelines contained in the circular and create a department in charge of money laundering issues, as well as make sure that internal auditors (if they exist) include money laundering prevention in their tasks.

(5) *Beneficial owner* Financial intermediaries must identify the contracting party and, as the case may be, the beneficial owner (if not identical), pursuant to art 305ter and arts 3 to 5 LBA.

(6) *Obligation to verify unusual transactions* (para 23 of the Circular) Unusual transactions are defined as: at the beginning of the contractual relationship, a deposit in paper money or precious metal of more than 100,000 Francs; during the contractual relationship, a deposit or withdrawal in paper money or precious metal which is abnormally high with respect to the activities or financial situation of the client; transactions where there are clues of money laundering (as an enclosure to the Circular, the Federal Banking Commission lists 39 clues that may give rise to suspicion that money laundering is taking place).

(7) *Behaviour to adopt in cases of unusual transactions* (paras 24 and 25 of the Circular) In the instance of unusual transactions, financial intermediaries must gather information on the economic background of the transactions and evaluate the verisimilitude of such information. They must request from their client a written explanation regarding the transaction (goals, financial situation of the client, trade of the client, origin of the deposited funds).

(8) *Behaviour to adopt in cases of doubt* (paras 27 and 28 of the Circular) If there is no well-founded suspicion that money laundering is taking place, and therefore no obligation to make a communication pursuant to the LBA, but that doubts remain with that respect, the financial intermediary has three choices: (1) the financial intermediary may communicate said doubts to criminal authorities or to the Office of Communications in Matters of Money Laundering, pursuant to art 305ter al 2 of the Swiss Penal Code; (2) the financial intermediary may maintain the business relationship with the client, but must then closely monitor that file; (3) the financial intermediary may terminate the business relationship with the client, but must maintain the paper trail when he returns the assets.

(9) *Behaviour to adopt in cases of suspicion of money laundering* (para 26 of the Circular) If the financial intermediary has a well-founded suspicion that money laundering is taking place, or if the client refuses to co-operate in the clarification process, the financial intermediary must immediately inform the Office of Communications in Matters of Money Laundering. Such communication must even take place if the financial intermediary declined to establish a business relationship with a client, but there were evident well-founded suspicions that the client's assets had a criminal origin (para 22 of the Circular).

(10) *Blocking of the assets after a communication took place* (paras 31 to 33 of the Circular) If the financial intermediary made a communication, he must block the client's assets that are related to the communication until the Communication Authority has made a decision, but no longer than five days (art 10 LBA). If the Communication Authority has made no decision, the financial intermediary is authorised to make cash payments to the client. The financial intermediary may not inform the client or third parties that he made a communication, unless he has received an authorisation to do so from the competent criminal authorities.

(11) *Documents to be kept* (paras 35 to 38) The financial intermediary must keep documents concerning transactions able to evidence all individual transactions taking place with each client, so that the paper trail may be reconstituted *a posteriori* within a reasonable time frame by the authorities in case of a demand of information or seizure. The financial intermediary must be able to advise the authorities within a reasonable time frame whether a person is his client, is the beneficial owner of assets he holds, or has a power of attorney with respect to said assets, and what are the accounts or assets related to such persons. This documentation must also allow the auditors and competent authorities to determine whether the financial intermediary has complied with his duties under the Circular, the LBA and arts 305bis and 305ter of the CP.

The self-regulation basis Agreement on Due Diligence of the Swiss Bankers' Association

N4.11 In 1977, the Swiss Bankers' Association concluded with all its members an agreement on banks' due diligence (the *Agreement on Bank Diligence*), containing the standards of behaviour expected from Swiss banks with respect to the identification of the owner of funds deposited. This Agreement has been renewed every five years, the last revision dating from 1992, each revision being more stringent and precise (Swiss Bankers' Association, 1992, Agreements on the Swiss Bankers' Code of Conduct with regard of the Exercise of Due Diligence, CDB 1992). In 1998, the Swiss Bankers' Association adopted a new Due Diligence Convention adapted to the Law on Money Laundering (LBA), whch entered into force on 1 July 1998.

The enforcement of the Agreement is primarily ensured by the external auditors of each bank, who may communicate any violation of the Agreement to the Federal Banking Commission or to an ad hoc monitoring commission of the Swiss Bankers' Association. The latter's commission may designate inspectors to investigate whether a violation of the Agreement took place and, if so, impose a conventional

penalty up to 10 million Francs, and communicate its information to the Federal Banking Commission and to the competent Swiss criminal authorities (arts 10–12 of the Agreement).

The main rules contained in the Agreement on Banking Diligence are as follows:

(1) A bank must verify the identity of its client, if the latter opens an account, a deposit, or contracts fiduciary transactions, rents a safe, grants a portfolio management mandate, requests security trading or cashier transactions in an amount exceeding 25,000 Francs. A precise set of rules is provided for in the comments to the Agreement (art 2).

(2) Although a bank is entitled to presume that its client and the beneficial owner of the assets are the same person, a special verification must take place when doubts arise, due to the noticing of unusual transactions, or when an over-the-counter transaction of an amount superior to 25,000 Francs takes place. In such instances, the client must fill out 'Form A', in which he either declares that he is the beneficial owner of the funds or discloses the beneficial owner's identity (art 3 of the Agreement).

(3) Domiciliary companies, ie those that do not have a trade or manufacturing activity (covering domiciliary companies, trusts, foundations, etc), must disclose the name of the persons or the non-domiciliary companies that control them (ie their beneficial owner). With respect to discretionary trusts, where no beneficial owner can be identified, a declaration with that respect must be requested, and the name of the effective settlor must be disclosed, as well as the circle of the potential beneficiaries (eg 'members of the settlor's family'), and any person entitled to give instructions to the trustee (including protector, etc). With respect to revocable trusts, the identity of the effective settlor must be disclosed. The disclosure must in principle be repeated in case of change in the authorised signatures.

(4) Advocates or notaries public must either declare that they are opening an account for a typical activity of their trade and fill out 'Form R', or disclose the identity of the beneficial owner (art 5 of the Agreement).

(5) If a bank suspects that it has received incorrect information about the identity of a beneficial owner, it must request that the beneficial owner be disclosed, or else it must break its business relationship unless the conditions for a compulsory communication under the LBA are met (art 5 of the Agreement).

(6) Finally, banks must refuse to assist any client in capital flight or tax fraud (arts 7 and 8 of the Agreement).

Other self-regulatory instruments

Even before the entry into force of the Law on Money Laundering, the banking sector was not the only one to have adopted a self-regulatory instrument to provide written instructions to its members with respect to money laundering. The Swiss Union of Life Insurers and the Swiss Federation of Advocates had similarly adopted their own rules, while the Swiss Association of Investment Advisers had decided that its members should submit to the Agreement on Bank Diligence.

With the entry into force of the Law on Money Laundering, all financial intermediaries will have to join a recognised self-regulatory body or to submit themselves directly to the supervision of the Control Authority in Matters of Money Laundering before 1 April 2000. In order to be recognised, the self-regulatory bodies will have to submit by-laws containing the due diligence obligations of their members, the means of control of compliance, and sanctions. While no self-regulation body has adopted by-laws concerning the implementation of the Law on Money Laundering yet, the Control Authority in Matters of Money Laundering has issued on 1 April 1998 guidelines concerning said by-laws, which main interest rests in that they indicate how the Control Authority interprets the provisions of the LBA. The most interesting provisions are the following:

(1) The self-regulation body should maintain a list of its members, as well as a list of the persons to whom membership was denied, and communicate said list to the Control Authority in Matters of Money Laundering.

(2) The by-laws should provide that the members maintain an independent audit of their compliance with the LBA, especially with respect to the keeping of documentary evidence of transactions, that the auditor's report be communicated to the self-regulation body, who should also perform random compliance controls among its members.

(3) Disputs concerning the violation of the by-laws could be settled by arbitration.

(4) The identity of the contracting party should be verified for all cashier transactions in excess of 25,000 Francs (including transactions with respect to cheques securities or precious metal).

(5) Domiciliary companies (for which the beneficial owner must always be disclosed, pursuant to art 4 LBA) are deemed to be companies, trusts, fiduciary companies that do not perform a commercial activity in the country where they have their headquarters, or that have no offices or employees of their own, or if they have employees of their own, said employees only have an administrative activity. With respect to discretionary trusts, where there is no beneficial owner, a declaration with that respect must be requested, and the name of the effective settlor must be disclosed, as well as that of any person entitled to give instructions to the trustee (including protector, etc). With respect to revocable trusts, the identiy of the effective settlor must be disclosed.

(6) If a financial intermediary terminates his business relationship with a client because he has a well-founded suspicion that the real beneficial owner was not disclosed to him (because, for example the contracting party refuses to co-operate), but that the conditions for an obligation to communicate said suspicion to the Office of Communications in Matters of Money Laundering are not met, he must at least maintain the paper trail of the assets returned to the client.

(7) The economic background of a transaction must in particular be clarified (art 6 LBA) if: the transaction involves a cash transaction or linked cash transactions (including with respect to cheques, securities or precious metal)

in excess of 100,000 Francs; the assets deposited by the contracting party with the financial intermediary are sent by a third party who is not a bank submitted to money laundering monitoring complying with the 40 FATF recommendations.

OBTAINING INFORMATION FOR TRACING ASSETS

N4.12 The first way to obtain information about assets or a debtor is to consult public registers:

(1) All persons or entities established in Switzerland performing a trading, manufacturing or other business activity must be registered with the Register of Commerce of the district of their domicile or headquarters. Share corporations, limited liability corporations and co-operative corporations only come into existence when they are registered with the Register of Commerce. Branch offices of Swiss and foreign business organisations must also be registered at their place of business. The Register of Commerce contains basic information about these persons or entities, such as the date of creation, the type of activity (corporate objective), the persons empowered to represent it, the amount and type of registered capital of share corporations, and the identity and address of their directors and managers. All changes must be registered. All new entries are published in the Swiss Official Gazette. In addition, it is possible to consult the documents, such as articles of incorporation, by-laws, excerpts of General Assembly's or of Board of Directors' minutes, that were provided to the Register of Commerce as documentary evidence to obtain a registration.

(2) Information about real property may be obtained from the Land Register. Any person may be informed about the identity of the owner of real property (for more extended information, see the appropriate portion of N4.13 *below*).

(3) If a creditor can show *prime facie* evidence that a payment from a debtor is overdue, the Debt Collection Office of the domicile of the debtor may provide information on the number of debt-collection processes directed against the debtor during the past two or three years.

In addition to such official information, Chambers of Commerce may sometimes provide further useful information. And information agencies can also be used: in addition to their access to public registers, such agencies have their own data base on the creditworthiness of debtors.

Information available to the public may, however, be too scarce to locate assets of a debtor or author of a criminal offence. Legal provisions grant certain persons a right to obtain information about assets in certain circumstances. Such rights, examined hereunder, are contained in private law, administrative law, debt collection and bankruptcy law, civil procedure and penal procedure.

Information rights under private law

N4.13 Set out below is the right to information under the Swiss Civil Code (RS 210) and the Swiss Obligations Codes (RS 220) whenever Swiss law is applicable according to the rules of Swiss private international law.

When such a right to information is proved to exist, under all cantonal procedural laws, a judgment condemning the holder of the information to disclose it can be obtained. Because such judgments are definitive, they do not need to be validated.

The right to information may also be based on foreign law. The Swiss Federal Law on Private International Law of 18 December 1987 hereinafter (LDIP RS 291) or relevant treaties determine applicable law whereby foreign decisions may be recognised and executed in Switzerland under the conditions stated in art 25 onwards of the LDIP. When a decision is taken in a European country that, like Switzerland, is a member of the 1988 Lugano Convention (in force in Switzerland on 1 January 1992 (RS 0.275.11)) the judgment is recognised and executed in Switzerland according to art 26 onwards of that Convention. The 1988 Lugano Convention is, however, not applicable to family and succession law (art 1 of the LDIP) (*see* N4.23 *below*). Definitive judgments condemning a person to disclose information will be recognised if the conventional law's (mainly the Lugano Convention and the Hague Conventions) or the Swiss International Private Law's (LDIP) condition are fulfilled.

Spouses

According to art 170 al 2 of the CCS, a judge may require that a spouse inform the other spouse, on the latter's request, about his assets, or alternatively that a third party (for instance a bank but not advocates, notaries public, clergymen and physicians) inform the spouse requesting the information.

Parents

According to art 318 of the CC, parents exercising parental authority administer the assets belonging to their children and have therefore the right to be informed by a third party, including banks, regarding assets belonging to their children.

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The so-called 'child-separate estate' under art 321 al 1 of the CC is exempted from parental administration and, therefore, from the right to information. These are assets donated to the children and placed at interest or in a savings account, or donated under the express instruction that the parents should not use them. According to art 321 al 2 of the CC, these assets are only exempt from parental administration if the donor has expressly excluded parental administration. According to art 323 of the CC, the income derived from a professional activity exercised by the children is also exempted from parental administration.

Guardian, curator, and quasi-guardian

A guardian, according to art 407 of the CC, represents the ward, who is deprived of the exercise of his civil rights. Thus, according to art 414 of the CCS, the guardian administers the ward's assets. Like the minor under arts 321 and 323 of the CCS, the ward, according to art 414 of the CC, may also own a so-called 'child-separate estate', which is exempt from the guardian's right of administration and information.

The nomination of a curator according to art 392 of the CC does not deprive the assisted person from the exercise of his civil rights. A curator is nominated to assist a person for a particular circumstance or affair.

The nomination of a quasi-guardian according to art 395 al 1 of the CC deprives the assisted person under the quasi-guardianship only partially from the exercise of his civil rights, ie the approval of the quasi-guardian is necessary only for certain important legal acts. The nomination of a quasi-guardian according to art 395 al 2 of the CC deprives the assisted person from the total administration of his assets, except the administration of his income.

Like the parents, the guardian, and in some instances the quasi-guardian and curator have a right to be informed from third parties on the ward's assets.

Heirs

At the death of a person, the heirs automatically replace the deceased in all his rights and duties, including the right to information on the assets from third persons (art 560 of the CC). If the assets are deposited with a bank, the practice is that each heir may individually ask for information on the assets of the deceased upon presentation of a death certificate and a document establishing his successoral quality, such as an inheritance certificate, an *acte de notoriété*, or a probate of will.

The executor of a will (art 517 onwards of the CC) and the person charged with drawing up an inventory of the deceased's assets (arts 581 al 2 and 553 of the CC), also have a right to information. Furthermore, a right to information exists in conjunction with the following circumstances:

(1) *Powers of attorney valid after death* A power of attorney ends with the death of the grantor of the power. However, the grantor of a power of attorney may extend its validity beyond his death (art 35 al 1 of the CO). Banks usually provide for such an extension in their proxy forms. At the death of the grantor of the power of attorney, each heir individually may revoke the power of attorney[1], even without the approval of the others. The post-

mortem effect of the power is that at the death of its grantor the latter's heirs jointly become the attorney's principals and it is to them that the attorney is accountable, as long as the power is not revoked.

The responsibility of a bank may be engaged, if it is or should be aware of the death of the client and the violation of successoral rights and nevertheless allows the use of a power of attorney. In this case, the instructions given by the attorney must be ratified by the heirs.[2]

(2) *Post-mortem powers* Post mortem powers of attorney are powers that are to take effect only after the grantor's death. The validity of such powers is not admitted as a power because such powers are deemed testamentary dispositions for which specific forms must be respected. Most banks refuse to recognise post-mortem powers except if drafted and registered as a last will.

(3) *Joint accounts* Joint accounts are bank accounts opened in the name of two or more persons, whereby each person has the right to operate the account independently according to the joint-account contract. The relationship between the bank and the joint-account holders is exclusively governed by the joint-account contract. The internal relationship between the account-holders is for the bank *res inter alios acta.*

In principle, heirs acquire the rights, including the right to information, and the duties of the deceased joint account-holder. Each individual heir has a right to information. However, the contract between the bank and the account holders may include a clause stipulating that, in the case of the death of one of the account-holders, the joint-account contract may continue with the surviving account-holders only. The validity of such a clause, although contested by some authors, has been expressly recognised by the Federal Tribunal. By such a clause, heirs are excluded only from becoming account-holders, not from their successoral rights regarding the funds deposited in the joint account. Therefore, each heir has an individual right to be informed on the deposited funds[3], if not a direct right on the funds.

As for the question of whether information provided by a bank should cover only the status of the assets at the moment of a person's death or earlier movements should be included, the answer depends on the heir's rights. Heirs enjoying by law a right to a compulsory part of the estate (*réserve héréditaire*)—right granted to children and spouses in civil law countries—may challenge the gifts or attributions granted during the years preceding the *de cujus*' death that spoil their hereditary part; so that they may exercise their right, those heirs have not only a right to information about the assets present on the account at the time of the death, but also on the movements during the past ten years. On the contrary, heirs that do not have such a right to a compulsory part of the estate have only a right to information about the assets present on the account at the time of the death.

(4) *Competence* The Swiss judicial and administrative authorities at the last domicile of the deceased are competent to take the measures in order to liquidate the succession and to deal with judicial actions. The exclusive competence claimed by the state in which real property is located is reserved (art 86 of the LDIP).

Law of real property

Any person that proves to have a legitimate interest may obtain information about specific real property from the Land Register (art 970 of the CC). The extent of information provided by the Land Register beyond the name of the current owner of the real property, such as the price of sale, the previous owner, the mortgages etc, depends on the legitimate interest of the person requesting the information and, to a certain extent, on the practice of each Land Register office.

Law applicable to moveable property

On the basis of art 759 of the CC, the owner of assets under usufruct has the right to be informed by the bank on the administration of these assets.

A creditor whose right is secured by a pledge of assets deposited with a third party has the right to be informed by the holder of the assets on the state of these assets. When the owner of the pledged assets is not the debtor, he has the right to be informed by the creditor on the status of the debt guaranteed by his assets (arts 884–98 of the CC).

Contracts

The conclusion of a contract very seldom allows for a right to information. Usually, the parties to a contract may only obtain such a right through the means of civil procedure (*see* N4.16 *below*). However, in a few instances, a contract or a legal relationship may give rise to a right to information. This right may derive from the explicit intent of the parties as expressed in the contract, from their implicit intent, or from the law applicable to the contract when the intent of the parties is impossible to establish.

The most obvious instance is when the owner of assets designates another person who is entitled to receive information, eg through a banking power of attorney (*see* N4.18 *below*). The right to information may also derive implicitly from a mandate (art 394 ff of the CO) with, say, an attorney. A mandate may be terminated at any time by both parties (*see above* for the effects of the death of the client on the mandate). After the termination of the contract, the agent has no more right to information, even though he might still have a power to represent his client.[4]

Another instance is the case of the fiduciary contract. In a fiduciary contract, a person (the grantor) transfers a property or a right to another person (the fiduciary), on the condition that he will restore it to him. The fiduciary contract or relationship is legal and is often used in Switzerland. The rules of the mandate (arts 394–405 of the CO) are usually applicable to such contract. When the fiduciary opens a bank account, he has to disclose the identity of the beneficial owner of the assets due to the money laundering provisions of the Penal Code (art 305ter of the CP) (*see* N4.7 *above*). However, as a beneficial owner, the grantor has no right to information from third parties, including the bank, because, from a legal point of view, the fiduciary is the sole owner of the assets and the grantor has no contractual relationship with the third party.[5]

An example of a contract giving rise to a right to information is the guarantee contract (arts 492–512 of the CO), that provides the guarantor with a right to be informed at any time by the creditor about the current amount of a debt (art 505 of the CO).

Company law

Eight types of companies exist in Swiss law. However, only the share corporation (art 620 ff of the CO), which is the most frequently encountered type of company in Switzerland, will be examined here.

Shareholders depend on the board of directors to receive information on the corporation's assets and only have a right to information to the extent necessary for the exercise of their shareholder's rights. Information can be withheld if business secrets or other legitimate interests would be jeopardised by the disclosure of such information (art 697 of the CO).

Any shareholder may propose during a meeting of shareholders that specific facts be investigated in a special audit, provided such audit is necessary for the exercise of the shareholders' rights. If the meeting of shareholders rejects the proposal, shareholders whose combined holdings represent at least 10 per cent of the capital stock or a par value of SF2 million may petition the court at the place of the principal office of the corporation to appoint a special auditor. To obtain the nomination of said special auditor, the petitioners must substantiate the allegation that the founders or corporate bodies of the company have violated the law or the articles of incorporation and caused damage to the corporation or the shareholders thereby (arts 697*a*, 697*b* and 697*c* of the CO). Even in such an instance, however, said special auditor is not granted a right to information from persons external to the company, but only from the founders, corporate bodies, delegates, employees, directors and liquidators of the company (art 697*d* of the CO). The regular auditors of the corporation also depend entirely on the board of directors to receive information from third parties.

The right to obtain information about the company from third parties therefore rests exclusively with its board of directors. The question of the right to information of individual members of the board depends upon whether the information is requested from a person external to the company or not. A director has a right, during a meeting of the board, to request information on all affairs of the corporation from the other members of the board and from the managers of the company (art 715*a* al 1 and 2 of the CO). Outside a board meeting, any director may request from the managers information concerning the course of business and, with the president of the board's authorisation, concerning particular aspects thereof (art 715*a* al 3 of the CO).

With regard to information from third parties, any director is presumed to be authorised to act individually for and represent the corporation (art 718 of the CO), and therefore to perform all legal acts on behalf to the corporation (art 718*a* of the CO). Many corporations' statutes or by-laws do not, however, allow all directors to act individually for the corporation. Directors who are not granted the right to

represent the corporation individually are not therefore permitted to request alone information from a third party. The restrictions of directors' rights to represent the corporation individually are published in the Register of Commerce.

Foreign decisions are recognised in Switzerland if they are rendered in the country in which the defendant has his domicile or habitual residence, or in the country where the company has its seat, or if the decision is recognised there provided the defendant is not domiciled in Switzerland (art 165 of the LDIP).

[1] Aubert, Haissly and Terracina, 'Responsabilité des banques suisses à l'égard des héritiers' in *Revue Suisse de Jurisprudence* (1996) Vol 92 No 8, pp 137–49.
[2] *Ibid* p 142/143; decision of the Court of Justice of Geneva of 24 June 1994, *Semaine Judiciaire* (1995) 212.
[3] Daniel Guggenheim, *Les contrats de la pratique bancaire suisse* (Georg, Geneva, 1981) p 240 and decisions mentioned there, ie ATF 94 II 167 and ATF 94 II 313.
[4] Aubert, Béguin, Bernasconi, Graziano-von Burg, Schwab, Treuilland, *Le secret bancaire suisse,* 3rd edn (Staempfli, Berne, 1995) pp 360–1.
[5] *Ibid*, at p 366.

Information rights under administrative law

N4.14 Administrative law provides for waivers to banking secrecy. These are found in the Banking Law (LB), the Law on Investment Funds (LFP), the Stock Exchange Law (LBVM), and tax law.

Banking Law

The Federal Banking Commission which supervises all banking activity in Switzerland, is entitled to request any document from banks in order to check their compliance with the Banking Law. However, as is the case with any administrative activity, such monitoring is subjected to the principle of proportionality, so that the Federal Banking Commission may only request information on a specific client or transaction if it is necessary to the performance of its tasks. Members and officials of the Federal Commission are subject to secrecy of function (art 320 of the CP).

Article 23sexies of the Swiss Banking Law, entered into force in 1995, authorises the Federal Banking Commission to exchange information and documents with foreign supervising authorities. This information, however, very seldom contains data on clients themselves and very strict precautions are taken to prevent such information from being used other than for supervisory functions.

The Investment Fund Law

The Federal Banking Commission also supervises Swiss investment funds and investment funds distributed in Switzerland. Investment funds must publish their by-laws and accounts. The investment fund management and its depositary bank must provide the Federal Banking Commission with all information useful to the performance of its tasks.

Administrative assistance is granted by the Federal Banking Commission to foreign authorities monitoring investment funds provided that the three following conditions are respected:

(1) The foreign authority will use the information to the exclusive purpose of directly monitoring investment funds.

(2) The foreign authority is bound by functional or professional secrecy.

(3) The information will be communicated to other authorities only with the express consent of the Federal Banking Commission or in application of an international treaty.

The Stock Exchange Act of 1997

The new Swiss Stock Exchange Act entered into force in 1997 and 1998 (*see* N4.1 *above*). It subjects the operation of a stock exchange (arts 3 ff) and the carrying out of activities of securities dealer (arts 10 ff) to authorisation and supervision from the Federal Banking Commission. In addition, any person who acquires or sells equity securities in a listed Swiss company (admitted to trading on the principal or second stock exchange) and thereby exceeds or falls below the threshold percentages of 5, 10, 20, 33, 50, or 66 per cent must notify the company and the stock exchanges on which the equity securities are listed.

The Federal Banking Commission is endowed with all the powers necessary to supervise compliance with the legal and regulatory provisions. Persons and companies that are subject to supervision, including persons who hold a significant financial interest in a stock exchange or securities dealers, auditors, persons and companies who are subject to duty of disclosure, offerors in public take-over offers, and offeree companies, shall provide the Federal Banking Commission with all information and documents that the latter may request in order to carry out its duties (art 35 of the Stock Exchange Act).

The Federal Banking Commission may forward information and documents to foreign supervisory authorities only if said authorities (art 38 para 2 of the Stock Exchange Act, based on art 23sexies of the Swiss Banking Law):

(1) use such information exclusively for the purpose of direct supervision of the stock exchanges and the trading in securities;

(2) are bound by official or professional secrecy; and

(3) do not, without the prior consent of the Federal Banking Commission or by virtue of a general authorisation clause in an international treaty, forward such information to competent authorities and to other bodies which carry out supervisory functions in the public interest. Forwarding information to [crime prevention] authorities is not permitted if mutual assistance in criminal matters would be excluded. The Federal Banking Commission shall make its decision in consultation with the Federal Office for Police Matters.

The conditions of art 38 alinea 2, letter a–c of the LBVM correspond to the directives of the European Union. (see Nobel, *ipso loco*, p 81.)

The Swiss Federal Act on Administrative Proceedings is applicable in so far as the information concerns the clients of a securities dealer. It is not permitted to forward any information on persons who are manifestly not involved in the subject matter of the investigation (art 38 para 3 of the Stock Exchange Act).

1 Peter Nobel, *Das Bundesgesetz über die Börsen und den Effektenhandel, Swiss review of business law, special issue, Schulthess Polygraphischer (Verlag, Zürich 1997)*

2 Dr Helena Glaser Tomasone *Amtshilfe und Baniegeheimnis, Schulthess Polygraphischer* (Verlag, Zürich 1997)

Tax law

The principle applicable to information in Swiss tax law is that the taxpayer himself, and not a third person (for instance a bank) provides relevant information and documentation to the tax authorities.

It is only in the framework of a procedure regarding tax fraud, which is a criminal offence, that banking secrecy may be waived. The Federal Tribunal distinguishes between tax subtraction, ie the absence of or the incomplete declaration of relevant elements of a person's financial situation (which does not generate a right to gather information from third parties) and tax fraud, ie the use of means of deception such as false documents—which does indeed generate a right for the competent authority to obtain information from third parties.

The investigative power of the tax authorities with respect to bank secrecy depends on the purpose of the investigation. The following generally apply:

(1) Usually, the Swiss tax authorities ask the taxpayer direct for documents covered by banking secrecy.

(2) In a case of tax avoidance, the tax authorities have no power to compel the bank to waive banking secrecy.

(3) In a case of severe violation of tax law, the tax authorities dispose of a limited power of subpoena.

(4) In a case of tax fraud, ie fraud or falsification of documents in the meaning of arts 146 and 251 of the CP, the prosecution of the taxpayer has a criminal character, and the veil of banking secrecy may be lifted (*see below*).

Switzerland systematically refuses to provide international administrative assistance with respect to tax matters, except in the following cases:

(1) Within the framework of treaties aiming at avoiding double taxation. Most of these treaties provide for the protection of commercial, professional, and manufacturing secrets. Switzerland's practice is of granting the exchange of information only for the purpose of applying the double taxation treaty and not for the assessment of taxes covered by the treaty. However, if the taxpayer claims for treaty benefits, exchange of information may take place.

(2) In cases of tax fraud that may be judged by Swiss law as criminal offences. In such instances, international assistance in criminal proceedings is applicable (*see below*).

(3) Co-operation with the United States of America in cases of tax fraud committed by a person belonging to the higher ranks of a criminal organisation (art 6 of the Treaty on Judicial Assistance in Criminal Matters between Switzerland and the United States).

Information through debt collection and bankruptcy proceedings

N4.15 The Federal Debt Collection and Bankruptcy Law of 1889 (LP), a revision of which came into force on 1 January 1997 does not provide the creditor with independent means of obtaining information. It is only in the framework of bankruptcy proceedings for the debtor that a creditor will be able to obtain a full disclosure of the debtor's assets. The procedures leading to the freezing of the debtor's assets through attachment and seizure under the Debt Collection and Bankruptcy Law are described in N4.20 onward. The recovery of assets by way of seizure and by way of bankruptcy proceedings are described in N4.23 onward. The following paragraphs thus exclusively concentrate on the information that a creditor may gather thanks to these proceedings.

Attachment and debt collection by way of seizure

In the case of an attachment or a seizure (*see* N4.20 *below*), the third party in which hands the debtor's assets are seized or attached has only the obligation to proceed with the seizure or attachment of the assets, and to announce that the seizure or attachment was performed, up to the amount requested (arts 91 and 106 of the LP). Beyond the assets necessary to satisfy the creditor(s), the third party has no obligation to disclose any information concerning other assets of the debtor it may hold or other transactions effected on the account.

In case of debt collection by way of seizure (*see* N4.23 *below*), the debtor must, under the penalty of the penal code (art 164, CP), indicate to the Debt Collection Office the location of his assets in Switzerland and abroad, and the origin of his income, up to the amount claimed by the creditor. Third parties domiciled in Switzerland and holding assets belonging to the debtor or indebted to the debtor must also inform the Debt Collection Office under the penalty of the penal code (324 CP).

Regarding the lifting of the corporate veil in the case of seizure, ie when the bank knows that the debtor is the ultimate beneficiary of an account held, for example, by a company that he controls completely, the scholar's opinion and the practice of most banks is that the bank has no obligation to disclose such information or to perform the seizure on such assets (Maurice Aubert et al, *Le secret bancaire suisse*, 3rd edn (Staempfli, Berne, 1995) pp 189 and 206).

Bankruptcy

As we shall see, in the case of a bankruptcy, the trustee in bankruptcy has a right to the disclosure of all information concerning the assets of the bankrupt person or company, including that from third parties like banks. The obligation to disclose information may begin if an inventory is requested as an interim measure. This inventory may be pronounced by the judge who has jurisdiction to pronounce the bankruptcy, after he has pronounced the threat of bankruptcy. Such may be the case if the judge deems that an inventory is necessary to secure the creditors' rights, and that there are clues that a jeopardy to these rights exists.

The inventory will allow the creditor to obtain information about all the assets of the debtor and to control at any moment the use he makes of them. Though a very useful tool to the creditor, the inventory does not prevent the debtor from disposing of his assets and must therefore be considered a mere informational instrument.

The practice regarding international bankruptcy is that no interim measures, such as the inventory mentioned above, may be requested for a bankruptcy abroad. Unless a separate bankruptcy proceeding is conducted in Switzerland for, say, a branch of the bankrupt organisation, no information shall be available through debt collection and bankruptcy procedure.

Information through civil procedure

N4.16 The principal rule for the sharing of competencies between federal and cantonal authorities regarding legislation in matters of civil procedure is contained in art 64 para 3 of the Swiss Federal Constitution (CF). According to this provision, 'legislation on judicial organisation, procedure and administration of justice remains within the competence of the cantons, as it has done in the past'. However, there are exceptions to this cantonal competence, such as the competence of the federal authorities to legislate on the organisation and procedure of the Federal Tribunal and on matters of intercantonal procedure. Switzerland has, therefore, 26 cantonal laws on civil procedure, in addition to the federal law on civil procedure of 4 December 1947 (PCF).

Procedural means

The most important procedural means to obtain information are as follows:

(1) *Inspection on the spot* The judge may want to view the facts himself.

(2) *Expertise* An expert is nominated in cases where the examination, interpretation and appreciation of proofs demands technical knowledge that the judge does not possess.

(3) *Documentary proof* A document is the surest of all proofs (*probatio probatissima*) of legally pertinent facts, subject only to the proof that the document is a forgery, which in most cases is brought about by the means of a penal procedure. There are three types of documents, namely notarised documents, privately signed documents and unsigned documents. If a party is not in possession of a document, it may ask the judge to constrain the other party to present the document. Affidavits are not recognised as a means of proof, except in the canton of Basle-Stadt.

(4) *Testimony and interrogation of the parties* Testimony is an act by which the existence or non-existence of facts is affirmed by a person not party to the civil procedure. Through interrogation, the existence or non-existence of facts is affirmed by the parties themselves.

A witness giving testimony has a triple obligation: to be present at the hearing, to depose and, according to most cantonal laws, to depose under oath. Civil servants will only be summoned within the limits of the administrative law applicable to their function.

A witness may refuse to depose:

(a) if he is a family member of one of the parties;

(b) if his honour is at stake, or if he would encounter a civil or penal sanction;

(c) if he or his family would risk criminal prosecution or financial damages; or

(d) if a professional secret would be violated.

A party under interrogation, on the contrary, has no obligation to depose. However, the judge is free in his interpretation of the refusal of a party to respond.

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1 See Habscheid Walter J., *Droit judiciaire privé Suisse*, 2nd edn, Georg & Cie, Genève, 1981; Guldener, Max, *Schweizerisches Zivilprozesvrecht*, Schulthess, Zürich, 1979.

Professional secrecy

The protection of professional secrecy is an important feature of Swiss civil procedure.[1] It is a logical consequence of art 28 ff of the CC, which protects personal privacy. It means that if a person, in his dealings with professionals, has passed on personal information, this information should be legally protected just as his personal privacy is legally protected.

In Switzerland and Germany, contrary to France, the protection of professional secrecy protects the owner of the secret and not its bearer. This means that if the owner of a secret discharges its bearer from keeping the secret, the bearer of the secret cannot refuse to testify as a witness.

According to art 42 para 1b PCF, persons who have a duty to keep secrets pursuant to art 321 of the Penal Code, ie physicians, advocates, notaries public, clergymen, and members of the medical profession, are discharged from witnessing. Other professions, bound by an obligation of secrecy—among them bankers—may be discharged from duty by the judge if, after weighing the interests involved, the interest of the protection of personal privacy proves to be stronger than the interest of revealing the facts concerned (art 42, para of the PCF).

Among cantonal laws, three groups may be distinguished:

(1) Cantonal laws adopting the solution of the PCF, ie that specific professions are discharged. In the case of other professions bound by an obligation of secrecy, the interest of secrecy and the interest of revealing the facts concerned are weighed against each other. (Argovie, Appenzell AR, Grisons, Fribourg, Nidwald, Tessin, Uri, Zug take this approach.)

(2) Cantonal laws generally discharging persons bound by professional secrecy from witnessing. Among the persons bound by professional secrecy, bankers figure by definition. (Berne, Genève, Neuchâtel, St Gall, Valais, Vaud.)

(3) Cantonal laws specifying which professions are discharged from witnessing, without mentioning bankers. Therefore, bankers are not discharged from providing information. (Appenzell AI, Bale Land, Basel Stadt, Glaris, Lucerne, Obwald, Schaffhouse, Soleure, Thurgovie.)

Intercantonal judicial assistance in civil matters

Judicial assistance between cantons in civil matters is regulated by the Intercantonal Concordat on Judicial Assistance in Civil Matters of 26 April and 8/9 November 1974, to which all cantons have adhered (RS 274). A concordat is an intercantonal agreement approved by the Confederation and which applies only to the cantons that have adhered to it. The Concordat contains the following principles:

(1) Judicial authorities correspond directly with each other.

(2) There are two types of assistance:

(a) Procedural acts are executed by the judicial authorities of the requested canton and according to the procedural law of the requested canton.

(b) Procedural acts are executed by the judicial authorities of the requesting canton, according to the procedural law of the requesting canton, except in matters in which the requested canton has an exclusive competence according to art 9 of the Concordat.

International judicial assistance in civil matters[2]

The principal sources are:

(1) The 1954 Hague Convention on Civil Procedure (RS 0.274.12);

(2) The 1965 Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents (RS 0.274.131); and

(3) The 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (RS 0.274.132).

In the context of obtaining information on assets, as set out in the present chapter, the 1954 and 1970 Hague Conventions ((1) and (3) above) are particularly important.

Bilateral treaties exist with members of the above conventions to give direct relations between their reciprocal judicial authorities. Such conventions exist with Germany, Austria, Belgium, France, Italy and Luxembourg. Bilateral conventions completing particular Hague conventions exist with Greece, Pakistan, Poland, Turkey, Hungary, Slovakia and the Czech Republic.

The absence of an international convention between states does not mean that assistance is not granted. In such cases, assistance is usually granted according to an internal law of the state granting assistance. Switzerland, not having such a domestic civil law on judicial assistance in civil matters as it has in criminal matters, applies the principles of the 1954 Hague Convention.

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[1] See Maurice Aubert *et al, Le Secret bancaire*, p 133 ff.

[2] Federal Office for Police Matters, *Entraide judiciaire en matière civile, Directive* (Berne, 1984) updated 1996; *Guide pratique de l'entraide judiciaire internationale en matière civile et pénale* (Berne, 1991) updated 1996.

Information through penal law procedure

N4.17 Article 64 para 3 of the CF, as in matters of civil procedure, is the legal basis for the sharing of competencies between federal and cantonal authorities for legislation in matters of penal procedure. Therefore, legislation in matters of penal procedure is a cantonal matter, with the exception of the federal penal procedure applicable to the Federal Tribunal.

Switzerland has therefore 26 cantonal laws on penal procedure and the federal Law on Penal Procedure (PPF) of 15 June 1943 (RS 312.0).

Text continues on p N4/25

Procedural means

The procedural means to obtain proofs are in principle those applied in civil procedure, ie inspection on the spot, expertise, documentary proof, testimony and interrogation.[1] However, in view of the public interest implied in penal procedure, there is a major difference from civil procedure, which is that, in certain cases, procedural means are extended to cover certain coercive measures. These are as follows:

(1) *Mandates* The so-called 'mandates' are designed to make sure that a person whose co-operation is essential to the search for truth in a penal procedure is present at a specific procedural stage (for instance a meeting with the examining magistrate). Through a mandate, a judge requires the presence of a person under the threat of use of public force in case of non-appearance.

(2) *Preventive detention* Preventive detention is an exceptional measure to which stringent rules for the protection of the person concerned apply. Preventive detention may be defined as the imprisonment of a person gravely suspected of having committed a serious penal infraction during the whole or part of the period extending from the beginning of the penal procedure to the day of judgment. The principal aims of preventive detention are to ensure that the suspected person is at the disposal of the examining magistrate and to avoid flight, collusion, the destruction of proofs and security risks.

(3) *Search* Search is the research of documents and other means of proof by the competent penal authority in a private location. Because art 8 of the 1950 European Convention for the Protection of Human Rights, as well as the federal and the cantonal constitutions guarantee the inviolability of the domicile of a person, search shall only take place within the limits of specific legal stipulations.

(4) *Seizure* Seizure means the seizing of documents and other means of proof by the competent penal authority during a search or other act of penal procedure in order to keep such documents at the disposal of the examining magistrate and, later on, of the judge in charge of the final decision.

Professional secrecy[2]

Article 77 of the PPF only discharges advocates, notaries public, physicians, pharmacists and midwives from giving testimony. Bankers are not so discharged.

Cantonal laws on penal procedure, with the exception of Neuchâtel and Vaud, stipulate a general dispensation in favour of bearers of professional secrets and follow the same principle as the federal penal procedure by discharging only certain categories of bearers of professional secrets, none of those including bankers. However, even in the cantons of Neuchâtel and Vaud, a restrictive interpretation of the provision protecting bearers of professional secrets in general is imperative, in view of the public interest implied in penal procedure. Therefore, in a penal case, a banker, even in these cantons, is unlikely to be discharged from giving information.

Intercantonal judicial assistance in penal matters

This matter is regulated by art 352 ff of the CP and by the Concordat on Judicial Assistance and Co-operation in Penal Matters of 5 November 1992 (RS 351.71), to which all cantons have adhered.

The Concordat constitutes an important instrument in the fight against organised crime in Switzerland. It allows that a penal procedure take place in several cantons according to the same procedural rules. Indeed, the Concordat authorises a judge of a canton to perform procedural acts in another canton according to its own procedural rules. It also allows that the judicial authority of one canton can itself perform procedural acts in another canton by simply informing the judicial authority of the other canton that such acts will take place.

International judicial assistance in penal matters

International judicial assistance regarding the obtaining of information on assets related to a penal procedure, as contained in s 3 of the Federal Law on Judicial Assistance in Penal Matters of 20 March 1981 (hereinafter EIMP) (RS 351.1) belongs to what is called 'la petite entraide', ie the assistance between states in matters of acts of penal procedure, such as the hearing of witnesses, the seizure of documents and the notification of judicial acts. However, the concept of judicial assistance in penal matters is much larger and includes, apart from 'la petite entraide', the whole spectrum of co-operation between states in penal matters, such as extradition, delegation of powers of prosecution of penal infractions and execution of penal decisions.[3]

Swiss judicial assistance in penal matters is regulated by international multilateral or bilateral treaties. In the absence of such treaties or in order to complete them, the EIMP applies and is executed according to the *Ordonnance* of the Federal Council of 24 February 1982 (OEIMP) (RS 351.11). The EIMP has been revised, the revision entering into force on 1 February 1997.[4]

The most important treaties are:

(1) The 1990 Strasbourg Convention (RS 0.351.9379.2), which regulates specifically judicial assistance in the field of tracing assets. Its aim, apart from facilitating investigations against persons accused of money laundering, is to install efficient measures for the search, seizure and confiscation of the proceeds of crime. Its preamble makes this aim clear by saying:

> Considering that the fight against serious crime, which has become an increasingly international problem, calls for the use of modern and effective methods on an international scale;
>
> Believing that one of these methods consists in depriving criminals of the proceeds of crime;
>
> Considering that for the attainment of this aim a well-functioning system of international co-operation also must be established. ...

It obliges member states to take measures, particularly legislative measures, to introduce sanctions against money laundering and to facilitate the search, seizure, and confiscation of proceeds of crime in general. It establishes,

regarding the proceeds of crime, an obligation to grant investigative assistance, to take provisional measures and to confiscate. Investigative assistance even includes 'spontaneous information', ie that a party may, without prior request, forward information to another party in order to assist the receiving party to initiate proceedings etc, this being a novelty in judicial assistance matters.

(2) The 1959 European Convention on Mutual Assistance in Criminal Matters (CEEJ) (RS 0.351.1).

(3) The treaty on Judicial Assistance in Criminal Matters between Switzerland and the United States of 25 May 1973 (TEJUS) (RS 0.351.933.6) and numerous bilateral treaties with other countries.

(4) Extradition treaties with various other countries also contain stipulations on judicial assistance in penal matters.

(5) Furthermore, declarations of reciprocity exist with Japan, India and Australia.

(6) Further stipulations on matters of 'la petite entraide' are to be found in the 1977 European Convention on the Repression of Terrorism (RS 0.353.3), the 1979 International Convention Against the Taking of Hostages (RS 0.351.4), and other multilateral treaties ratified by Switzerland.

The most recent status of conventions ratified by Switzerland can be found in the *Guide pratique de l'entraide judiciaire internationale en matière civile et pénale* edited by the Federal Office for Police Matters in 1991, last updated 1996.

As regards channels of communication as a result of the above international treaties and conventions, direct correspondence between judicial authorities is taking place with Germany (art VIII of the *accord complémentaire,* RS 0.351.913/61/62), Austria (art IV of the *accord complémentaire,* RS 0.351.916.32/321), and Italy as far as courts of second instance or appeal courts are concerned (art III of the Protocol of 1 May 1869, RS 0.142.114.541.1). Judicial acts are transmitted directly between Swiss and French judicial authorities (art 13 of the extradition treaty, RS 0.353.934.9). A practice of direct correspondence between judicial authorities, without there being an international convention, also exists between Switzerland and the Principality of Liechtenstein.

With all other members of the CEEJ, except Sweden and Israel who have pronounced reserves in favour of diplomatic channels, correspondence takes place between ministries of justice, except in case of urgency, where direct correspondence between judicial authorities is admitted (art 15 para 2 of the CEEJ). And with non-CEEJ states, correspondence takes place through diplomatic channels, although the EIMP also admits transmission through ministries of justice and in urgent cases judicial authorities may correspond directly with each other, with a copy of the request following through official channels. Channels for transmission regarding requests coming from the United States are regulated by the L-TEJUS.

When the Federal Office for Police Matters receives a request for judicial assistance in penal matters from a foreign state, it decides on admissibility and as appropriate transmits the request to the cantonal authorities or, in the case of

infractions falling under the competence of the federal authorities (art 340 of the CP), to the federal prosecutor. In order to decide on admissibility and transmission, the Federal Office for Police Matters examines:

(1) whether or not the request is *'manifestly inadmissible'*;

(2) whether or not the formal aspects of the request are complied with (art 78 para 1 of the EIMP);

(3) which canton, in case of operations in several cantons, will lead the operation (art 80 of the EIMP);

(4) whether or not the principle of reciprocity is respected by the requesting state (art 8 of the EIMP); and

(5) whether or not other principles of judicial assistance are respected, such as the principle of the judicial character of the foreign penal procedure, double incrimination, proportionality, *ne bis in idem*, and non-assistance in political and military obligations and fiscal matters.

In cases of doubt, the request is nevertheless transmitted to the cantonal authorities for decision.

The Federal Office for Police Matters has greater competency within the framework of the TEJUS (arts 5 and 8 TEJUS). In general, the Federal Justice Department also decides whether a request conflicts with Swiss sovereignty, security or other substantial interests of the Swiss State and is therefore unacceptable (art 17 para 1 of the EIMP).

Once the Federal Office for Police Matters has declared a request admissible and transmitted it, the cantonal authorities decide on granting or refusing judicial assistance (art 79 para 1 of the EIMP). The cantonal authorities then execute the request.

According to a general principle of judicial assistance, judicial assistance requests are executed according to the law of the requested state. However, upon express request from a foreign state, foreign procedural law may be applied on condition that this does not result in a substantial prejudice to the persons participating in the procedure (art 65 lit c of the EIMP).

Within Switzerland, the situation is as follows. As the Confederation has used its legislative powers in the field of judicial assistance in penal matters, cantonal law is only applicable when this is expressly stated by the EIMP. The most important reference to cantonal law arises in art 12 of the EIMP, which stipulates that procedural acts are regulated by the applicable law of penal procedure. As the cantons are competent to legislate in matters of penal procedure, this means that cantonal law is applicable. This situation thus applies to all requests for judicial assistance, except those dealt with by the federal prosecutor according to art 340 of the CP, to which the federal Law on Penal Procedure is applicable (PPF) (RS 312.0).

Cantonal decision on granting or refusing judicial assistance

Cantonal authorities must verify that the following conditions are fulfilled before they grant international assistance:

(1) *Judicial character of the foreign penal procedure* Assistance is only granted within the framework of a proper penal procedure in the requesting state that will lead to a judicial decision (art 1 para 3 of the EIMP; art 1 of the CEEJ). In the so-called 'Marcos case', provisional measures according to art 18 of the EIMP were ordered at the request of the government of the Philippines, with family confirmation that it was to initiate a criminal procedure against Mr Marcos (ATF 113 Ib 271).

(2) *Double incrimination* The facts giving rise to the assistance request must be qualified as an offence in the requesting state and as a criminal offence in Swiss Penal Law. Even if the facts in an assistance request do not correspond to facts sanctioned by Swiss penal law, judicial assistance is granted, except in procedures where coercive measures are applied (art 64 of the EIMP).

(3) *Proportionality* According to the principle of proportionality, the means the authorities apply must be proportionate to the aims they wish to attain. This principle is an unwritten principle of Swiss constitutional law and finds a wide application in administrative law, to which the EIMP belongs. Proportionality forms the basis of arts 4, 10 and 63 para 1 of the EIMP, but it must be taken into account throughout the various procedures established by the EIMP.

(4) *Ne bis in idem. Ne bis in idem* means that once a final judicial decision has been made in Switzerland or in the requesting state, the same facts cannot be the object of a new decision. This leads to the extinction of the criminal complaint and, *mutatis mutandis*, to the non-admissibility of the request for judicial assistance (art 5 of the EIMP).

(5) *Speciality* Speciality means that the information gathered may not be used for other proceedings outside the procedure mentioned in the judicial assistance request. For example, information transmitted by Switzerland through the channels of international judicial assistance must not be used by tax authorities.

In addition, cantonal authorities must refuse to grant judicial assistance in the following cases:

(1) *Grave faults in the foreign penal procedure* Judicial assistance will not be granted if the foreign penal procedure violates basic principles, such as those incorporated in the European Convention on the Protection of Human Rights (art 2 para 1 of the EIMP).

(2) *Violation of essential interests of Switzerland* Judicial assistance will not be granted if it violates any of the essential interests of the Swiss State, such as sovereignty, security or public order (art 2 para 2 of the EIMP).

(3) *Infractions in political matters* Judicial assistance will not be granted in matters regarding political infractions. However, assistance will be granted, in spite of

the political nature of the offence, if human life is at stake, in particular in cases of genocide, hostage taking or hijacking of aeroplanes (art 3 paras 1 and 2 of the EIMP).

(4) *Infractions regarding obligations of military service* Judicial assistance will not be granted regarding infractions relating to military service obligations (art 3 para 1 EIMP).

(5) *Infractions regarding tax matters* Judicial assistance is in principle not granted in fiscal matters, although there are three exceptions:

(a) if the aim of the request is to discharge the person being the object of the fiscal procedure (art 63 para 5 of the EIMP);

(b) if the request comes from the United States and concerns leading figures of organised crimes (art 2 ch 2 and art 7 of the TEJUS); and

(c) if the request concerns an infraction that under Swiss law would be deemed as tax fraud and therefore be qualified as criminal offences in Swiss law (art 3 para 3 *in fine* of the EIMP).

(6) *Infractions regarding monetary, commercial or economic policy matters* In principle, in these matters, assistance is not granted—although it is granted when the maintenance of order in commercial life is at stake, such as in cases of insider trading, trade in goods under embargo and others which qualify as criminal offences in Swiss law.[5]

Federal and cantonal decisions must indicate the possibility of appeal, specifying the form of appeal, the competent authority and the deadline (art 22 of the EIMP). Cantonal decisions can be appealed against according to cantonal procedure; in general there is a deadline of five to ten days after the notice of the decision depending on the canton concerned. The decisions of the Federal Office for Police Matters may generally be opposed within a deadline of ten days after the notice of the decision (art 24 of the EIMP).

However, under the EIMP, the decisions of the Federal Office for Police Matters on admissibility and transmission cannot be appealed, and this means that a person concerned by the execution of a request can only appeal against the decision to grant the assistance by the cantonal authority (art 78 para 1 of the EIMP; art 14 of the OEIMP). This does not apply under the L-TEJUS, where the decisions of the Federal Office for Police Matters on admissibility and transmission, and the decision of the cantonal authorities in granting or refusing a request, can be attacked (art 16 of the L-TESUS). However, the same grounds may not figure in appeals against the decisions of the cantonal authorities (ATF 110 Ib 91ff).

All final decisions by the cantonal authorities and some final decisions by the Federal Office for Police Matters may be appealed by means of an administrative appeal to the Federal Tribunal (art 25 of the EIMP; art 17 of the L-TEJUS). Some decisions of the Federal Office for Police Matters may be appealed against at the Federal Justice Department (art 26 of the EIMP; art 18 para 2 of the L-TEJUS).[6]

Revision of the EIMP

A revised EIMP and L-TEJUS entered into force on 1 February 1997. The principal objective of the revision is the simplification and acceleration of the assistance procedure, which under the present law is hindered by procedural complexity and multiple opposition and appeal possibilities. The basic principles of the EIMP and the L-TEJUS, however, do not change by the revisions.

The new aspects, introduced into the third chapter of the EIMP, may be summarised as follows:[7]

(1) *Shortening of the procedure*

Only the final cantonal decision on the admissibility and extent of the assistance may be appealed against the Federal Tribunal.

The cantonal decision on entering into the matter may only be appealed against if a plausible case for an immediate and irreparable prejudice can be made out.

Appeals will not suspend the execution of a decision.

Opposition to the decisions of the Federal Office for Police Matters is abolished.

Only persons directly and personally concerned may appeal.

The execution procedure has been streamlined.

(2) *Enlargement of the competencies of the Federal Office for Police Matters*

Where provisional measures must be taken.

Where a request concerns several cantons or a federal authority.

Where the executive authority does not execute the request within a reasonable period of time.

Where information must be obtained from the requesting state.

Where the request must be subordinated to certain conditions.

(3) *Streamlining of the procedure*

Regarding the transfer of means of proof to the requesting state.

Regarding the confiscation of assets and their restitution to the rightful owner in the requesting state.

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1 Gérard Piquerez, *Précis de Procédure Pénale Suisse*, 2nd edn (Payot, Lausanne, 1994) 234 ff.
2 See Maurice Aubert *et al*, *Le secret bancaire*, p 149 ff.
3 Federal Office for Police Matters, *L'entraide judiciaire en matière pénale*, legal status as of 1 July 1990, p 2.
4 Message of the Federal Council of 29 March 1995, *Feuille Fédérale* (1995) III 1.
5 Maurice Aubert *et al*, *Le secret bancaire*, pp 466–7.
6 *Ibid*, p 496 ff; Federal Office for Police Matters, *op cit*, pp 9 ff.
7 Message regarding the revision of the EIMP and the L-TEJUS of 29 March 1995, *Feuille Fédérale* (1995) III 1.

FREEZING ASSETS

N4.18 Once information on the location of relevant assets has been gathered, one has to face the problem of preventing them from moving out of reach. The basic choices are between the means provided by civil procedure, by debt collection and bankruptcy, and by criminal procedure. Depending on the case, a combination of those may be available.

In addition to those legal means, in bank matters one may also take advantage of informal ways of blocking assets. It is indeed the practice of banks to internally freeze bank accounts when there is a fear that the bank's civil or criminal liability may be involved.[1]

Thus, when the holder of a power of attorney, in the case of the death of an account-holder, gives an order to move the assets to another account, the bank will usually not execute the order, if it has a doubt that successoral rights could be violated; it will block the account until the matter is settled.

In criminal matters, a telephone call from a prosecutor, before a measure of criminal seizure can be performed, will often cause the bank to internally freeze an account until the said seizure is decided.

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[1] Aubert, Haissly and Terracinta, *Responsabilité des banques suisses à l'égard des héritiers*, RSJ (1996) No 8, p 138 ff.

Use of civil law procedure

Interim measures

N4.19 Interim measures correspond in Swiss law to a practical necessity, to avoid the passage of time during a civil procedure rendering judicial protection illusory.

Interim measures before a suit is filed take the form of *probatio ad perpetuam rei memoriam*, in other words the taking of evidence that might no longer be available by the time the law suit is filed.[1]

Interim measures during proceedings are threefold:

(1) *conservatory measures*, ie measures to ensure the enforceability of a future judgment, such as a prohibitory order against the sale of the assets in dispute;

(2) *regulatory measures*, ie measures to regulate the situation between parties to an on-going relationship for the duration of the proceedings, such as an order to pay alimonies until the coming into force of the decision on the merits of the case; or

(3) *provisional performance measures*, ie measures through which a party or a third person is ordered to perform or not to perform an act for the duration of the proceedings, in order to avoid damage or even the futility of the final decision on the essence of the case, such as an order not to complete, not to publish a statement, to freeze a bank account, etc.

There are interim measures tied to a specific civil action, as in art 145 of the CC (divorce), art 178 (marriage), art 281 (alimony), art 598 al 1 (succession), art 961 (real

estate register); and there are interim measures of a general nature, called 'unnamed interim measures' (*mesures provisonnelles innommées*), which are applied according to the circumstances and their appreciation by the judge.[2]

The main interim measures of interest for the freezing of assets is the order against the transfer or disposal of assets. The Confederation has fully exercised its competence with respect of interim measures of freezing assets aimed at ensuring the payments of a money claim or enforcement of a judgment with respect of such a claim. Such interim measure, the attachment procedure, is a part of the debt collection and bankruptcy procedure, described hereunder (*see* N4.20). Pursuant to the Federal constitution (art 64 al 1), cantonal procedural law may therefore not provide for interim measures aimed at freezing assets with the objective of ensuring the payment of a money claim.

It is, however, possible for cantonal procedural law to set out interim measures aimed at preventing the selling or assigning of the assets in dispute, and most cantons have done so. Therefore, a creditor wishing to freeze assets which are not related to the dispute must use the attachment of debt collection and bankruptcy law, while a person wishing to freeze the asses in dispute may use civil interim measures.

Thus, the plaintiff may obtain an injunction prohibiting the defendant from the transfer or the disposal of the assets at issue; this prohibition may be combined with the threat of a penal sanction (art 292 of the CP). The injunction may also be directed to a third party, like a bank.

Such interim measures may be requested before or while the main procedure is pending. The condition is usually that the claim on the assets be made likely by the claimant, and that a danger of distraction of the assets be made likely. In case of emergency, when the injunction is directed at a third party, it is usually possible to obtain that the injunction be decided and executed without hearing the other party, who is heard at a later stage of the procedure (super-provisory measures—in Geneva, art 327 of the LPC-GE)

All interim measures must be validated by the filing of an action on the merits (in Geneva, within 30 days, or a longer period decided by the judge—art 330 of the LPC-GE).

As for the intercantonal aspects, the 1977 *Concordat sur l'execution des jugements civils* (RS 276), to which the majority of cantons have by now adhered, stipulates (art 1) that decisions on interim measures are considered as civil judgments, and it sets the modalities of intercantonal execution. Article 5 al 3 of the Concordat provides for urgent cases.

International aspects[3]

The questions in relation to international co-operation are:

(1) Is a final foreign decision on interim measures recognised and executed in Switzerland? and

(2) Is a Swiss judge competent to order an interim measure, even though he is not competent for the essence of the case?

According to art 25 of the LDIP (RS 291), a final foreign decision is, under certain conditions (art 27 of the LDIP), recognised and executed in Switzerland. The cantonal laws on civil procedures contain stipulations on the *exequatur* procedure (eg Geneva, art 472 A ff of the LPC), that is the procedure leading to a judicial decision ordering the execution of a foreign decision. However, in jurisprudence and doctrine, contradictory opinions exist as to whether this principle also applies to interim measures: there are contradictory cantonal decisions, and no decision has yet been rendered by the Federal Tribunal. A detailed view on the tendencies in jurisprudence and doctrine is to be found in a recent article by Nicolas Piérard and Philippe Houman in the *International Litigation News* of July 1996, pp 29 ff.

This state of affairs is made easier by art 10 of the LDIP, which authorises a Swiss judge to order interim measures even if he is not competent regarding the essence of the case. This means that a foreign claimant may request an interim measure from a Swiss judge. The place of jurisdiction is based on art 3 of the LDIP, which says:[4]

> If this code does not provide for jurisdiction in Switzerland and if proceedings abroad are impossible or cannot reasonably be required to be brought, the Swiss judicial or administrative authorities at the place with which the facts of the case are sufficiently connected shall have jurisdiction.

Article 10 of the LDIP corresponds to art 24 of the 1988 Lugano Convention (RS 0.275.11). A Swiss judge ordering an interim measure according to art 10 of the LDIP will have to ascertain whether or not the claim underlying the request for an interim measure has a reasonable likelihood of success, whereby he will apply the foreign law applicable to the case according to art 16 of the LDIP. All procedural aspects will be governed by the applicable cantonal law.

Contrary to other legislations, Swiss federal law imposes the principle that an interim measure must always be validated by an action regarding the merits of the case. This action must be opened at the place stipulated by Swiss international private law.[5]

International conventions ratified by Switzerland rarely stipulate the recognition and execution of a foreign judicial decision that is not definitive, and this is the case with interim measures. However, the following four international conventions admit, at more or less favourable conditions, the execution of interim measures:

(1) the 1958 Hague Convention on the Recognition and Execution of Decisions in Matters of Alimony for Children (RS 0.211.221.432);

(2) the 1973 Hague Convention on the same subject (RS 0.211.213.02);

(3) the 1980 European Convention on the Recognition and Execution of Decisions in Matters of Custody of Children (RS 0.211.230.01); and

(4) the 1988 Lugano Convention (RS 0.275.11).

Due to its importance, we shall examine the Lugano Convention more closely, it having been ratified by Switzerland and became effective on 1 January 1992. The

LDIP applies only to persons *not* domiciled in one of the Lugano Convention countries, and only to the extent that Switzerland has no bilateral treaties with the country of domicile.

As for interim measures, the 1988 Lugano Convention:

(1) constitutes the competence of the judge of the place of execution to order an interim measure, even if he is not competent for the essence of the case (art 24);

(2) extends its system of recognition and execution of foreign decisions to interim measures on condition that the defendant has had the opportunity to be heard in the procedure leading up to the measure (arts 25 and 27 ch 2); and

(3) provides for interim measures within the framework of the procedure of execution of the foreign decision in order to ensure its efficiency (art 39).

As for the recognition and execution of a decision on interim measures according to arts 25 and 27 ch 2 of the 1988 Lugano Convention, the obligation to cite the adverse party in front of the jurisdiction that deals with the essence of the case takes away the surprise effect of the interim measure and might therefore reduce to nothing the interim measure's *raison d'être*.[6]

[1] Daniel Hochstrasser and Nedim Peter Vogt, *Commercial Litigation and Enforcement of Foreign Judgments in Switzerland* (Helbing and Lichtenhahn, Basle, 1995) pp 39 ff.
[2] Maurice Aubert, *Le secret bancaire suisse* at pp 203 ff.
[3] See in general Olivier Merkt, *Les mesures provisoires en droit international privé* (Schulthess, Zurich 1993) and Louis Gaillard, *Les mesures provisioneles droit international privé* (Semaine Judiciaire 1993) p 152 ff.
[4] Patocchi and Geisinger,'Relation de l'art 3 avec l'art 10' in *Code DIP annoté* (Payot, Lausanne 1995) p 80.
[5] Louis Gaillard, *Les measures provisionnelles en droit international privé,* SJ (1993) pp 152 ff.
[6] *Ibid*, pp 156 ff.

Use of debt collection and bankruptcy procedure

N4.20 The Federal Debt Collection and Bankruptcy Law (LP), to the exclusion of cantonal law, governs imperatively all interim measures aiming at guaranteeing the payment of a sum of money. This law (hereinafter LP) was first enacted in 1889 but has been revised as at 1 January 1997 (RS 281.1). The interim measures provided for by the LP are the attachment (arts 271 ff), the provisional seizure (arts 89 ff), and the inventory (arts162 ff).

Attachment

The revision of the LP that came into force on 1 January 1997 has not modified the principal aims of the institution of attachment. Attachment remains a super-provisional conservatory measure aiming at conserving the assets of the debtor in order to satisfy the creditor, if the creditor manages to make his claim likely.

Pursuant to art 271 of the LP, the attachment of assets located in Switzerland is granted if the creditor can substantiate through documents that *prime facie* there exists evidence for the following:

(1) There exists a case for attachment. This is the case if one of the five following conditions is met:

(a) the debtor has no fixed domicile;

(b) the debtor intends to evade his obligations, or is about to escape, or tries to conceal his assets;

(c) the debtor's presence in Switzerland is only temporary;

(d) the debtor has no domicile in Switzerland and no other case for attachment applies, and one of the three following conditions is fulfilled:

(i) there is a sufficient link between the claim and Switzerland, for instance Switzerland is the place of payment, the creditor is domiciled in Switzerland;

(ii) there exists a legally binding judgment; or

(iii) there exists a written recognition of debt; or

(e) the creditor has a definitive or provisional certificate of loss against the debtor.

(2) The creditor has a matured money claim against the owner of the assets. (In cases (a) and (b) above, it is not necessary that the claim has matured.)[1]

(3) The debtor has assets in Switzerland. Exploratory or 'fishing expedition' attachment requests, directed against a large number of banks without further substantiation that the debtor maintained a business relationship with them, are usually not granted. However, assets may be described in a generic way.[2]

In addition, if the creditor is domiciled in a country that has ratified the 1988 Lugano Convention (CL), and if he is in possession of a final foreign decision for which he has requested the *exequatur*, he can ask for conservatory measures according to art 39 of the CL. The decision of *exequatur* will permit that the creditor requests an attachment, even without grounds for attachment according to art 271 of the LP.[3]

According to art 272 of the LP, the competent authority is the authority designated by the cantonal law, in general a judge, at the place of situation of the assets. As a creditor is liable for damage caused by an unjustified attachment, the judge may ask the creditor to provide a financial guarantee (art 273 of the LP). The judge will render an attachment order that will be executed according to one of the methods defined by cantonal law (art 274 of the LP).

The law provides for a defence to be filed by the debtor or any other person concerned by the attachment, and this defence has to be deposited within ten days after the notification of the attachment (art 278 of the LP).

Within ten days of the attachment, the creditor must initiate legal proceedings against the debtor to validate the attachment. If the debtor is domiciled in Switzerland, the standard debt-collection proceedings may be initiated. If the debtor is not domiciled in Switzerland, the validation process depends on whether or not he is domiciled in a country that is party to the 1988 Lugano Convention,[4] as follows:

(1) If the debtor is not domiciled in a country that is party to the 1988 Lugano Convention, art 4 of the LDIP provides that a lawsuit in validation of

attachment or debt collection proceedings may be brought at the Swiss place of attachment. In such a procedure the decision on the merits will only have *quasi in rem* effects, because it will only be enforced against the assets under attachment (ATF 110 III 29).

(2) If the debtor is domiciled in a country that is party to the 1988 Lugano Convention, then art 4 of the LDIP will not apply (art 3 para 2 of the CL) and the procedure on the merit will have to take place before the jurisdiction designated by the Lugano Convention. Even if an attachment can still be obtained in Switzerland regarding a debtor domiciled in a country of the 1988 Lugano Convention, the attachment can only be validated at such place.[4]

All final foreign judicial decisions, in order to be executed effectively in Switzerland, must be recognised and declared executory (*exequatur*) according to arts 25 ff of the LDIP (in the case where the debtor is not domiciled in a country that is a member of the 1988 Lugano Convention) or arts 26 ff of the 1988 Lugano Convention (if the debtor is so domiciled).

Seizure

The revision of the LP that came into force on 1 January 1997 has also not profoundly modified the articles regarding seizure (*saisie*). Seizure is a phase of the debt collection procedure and not a conservatory measure.

The term 'seizure' is applied in a narrow sense to the freezing of assets by debt collection authorities (arts 89–115 of the LP), and in a broad sense to the procedure of freezing and realising these assets (arts 89–150 of the LP). The following paragraphs only concern the seizure in a narrow sense. The seizure in a broad sense, ie the debt collection by way of seizure is described at N4.23 *below*).

As for seizure in the broad sense, the seizure procedure applies to all debtors who are not entered in the Register of Commerce, while the bankruptcy procedure (arts 159 ff of the LP) applies to debtors that are entered in that Register. The seizure in a narrow sense is only possible when a debt collection procedure by way of seizure is taking place. When bankruptcy proceedings are taking place, the freezing of the debtor's assets is possible through the inventory (see Inventory *below*).

The Swiss debt collection procedure by way of seizure consists of three different phases:

(1) establishment of the money claim, ie the order to pay (art 69 of the LP), defence (art 74) and removal of the defence (arts 80 ff);

(2) seizure of assets (arts 89 ff of the LP); and

(3) public sale of assets and the distribution of the proceeds to the creditors (arts 116 ff of the LP).

Money paper, securities, and other assets of value are taken away from the debtor and third parties by the Debt Collection Office, which keeps them (art 98 of the LP). The other assets seized by the Debt Collection Office remain in possession of the debtor or the third party, neither of whom may dispose of them without

committing a criminal offence (art 169 of the CP). If the creditor makes it likely that the assets remaining in the debtor's or third party's possession would be in jeopardy, those assets are taken under the Debt Collection Office's guard (art 98 para 3).

According to arts 110 ff of the LP, creditors who request seizure within a period of 30 days since the execution of a previous seizure can participate in the seizure. All creditors participating within this 30-day period form a 'series' of creditors. Additional property will eventually be seized to cover the claims of all the series. Within a series, the proceeds of the asset sale are distributed in proportion of the claims. Successive series, receive what is left after the previous series of creditors have been satisfied. According to art 96 of the LP, the debtor remains owner of the seized assets until their forced sale, but he may not dispose of them.

Inventory

The revision of the LP that came into force on 1 January 1997 has only slightly modified the articles regarding inventory (*inventaire*) in the bankruptcy. The inventory is a phase of the bankruptcy procedure and not a real conservatory measure.

The inventory, pursuant to arts 162 ff of the LP, is a measure taken by a judge at the request of a creditor in the course of a bankruptcy procedure. The inventory is a list of all assets of the debtor drawn up by the bankruptcy office. It is noted that the inventory in the bankruptcy, contrary to the seizure (which concerns only the assets necessary to cover the total of the claims registered in the procedure), comprises all the assets of the debtor.

A judge may or may not order an inventory. He orders the inventory when it is, according to his judgment 'necessary', ie when it must be feared that the debtor will aggravate the situation by disposing of assets.

An inventory is the second stage of the ordinary Swiss bankruptcy procedure, which consists of five different phases:

(1) *commination de faillite*, that is, threat of bankruptcy (arts 159 ff of the LP);

(2) inventory of assets (arts 162 ff of the LP);

(3) *réquisition de faillite*, ie the creditor making a request for bankruptcy (arts 166 ff of the LP);

(4) bankruptcy judgment (arts 171 ff of the LP); and

(5) liquidation of the bankruptcy (arts 221 ff of the LP).

According to art 164 of the LP, the debtor must be able to represent the inventoried assets at all times, with the exception of those inventoried assets that the bankruptcy authorities have left at the debtor's disposal for his and his family's upkeep. If he violates this obligation, he commits, as in the case of seizure, a criminal offence (art 169 of the CP).

International aspects

In relation to international bankruptcy law, the question is whether or not a bankruptcy procedure has effect abroad if the debtor owns assets in different

countries. There are two theories: the theory of universality states that all assets of the debtor form one single aggregate under one single law, and this system ensures equality amongst creditors; the theory of territoriality, on the other hand, states that only the assets situated in the country of the bankruptcy form the aggregate, which leads to the opening of different bankruptcies in different countries so that the equality among creditors is not guaranteed

Switzerland, by the adoption of the LDIP, arts 166–75, has not opted for the universality theory but for the opening of a 'mini-bankruptcy' parallel to the principal bankruptcy opened abroad. In this mini-bankruptcy, assets may be frozen by an inventory according to Swiss law. The general principles of this system are:

(1) the foreign bankruptcy decision is recognised and declared executory (*exequatur*) by the Swiss tribunal of the place of situation of the assets, provided certain conditions are fulfilled (such as the condition of reciprocity);

(2) regarding the bankrupt person's assets located in Switzerland, the *exequatur* decision will have the effect of a Swiss bankruptcy (a mini-bankruptcy), with some important derogations (art 170 al 1 of the LDIP);

(3) a 'mini-aggregate' contains all assets of the bankrupt person that are located in Switzerland;

(4) the proceeds of liquidation in the mini-bankruptcy will be transmitted to the aggregate of the principal foreign bankruptcy; and

(5) it is to be noted that the mini-bankruptcy procedure is simplified (no creditor's assembly etc).

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[1] Pierre Robert Gilliéron, *Poursuite pour dettes faillite et concordat* (Payot, Lausanne, 1985) p 345.
[2] ATF 109 III 59. See also Gilliéron, at pp 349 ff.
[3] Olivier Merkt, *Les mesures provisoires en droit international privé* (Schulthess Polygraphischer Verlag, Zürich, 1993) p 109.
[4] Bernard Dutoit, 'La convention de Lugano du 16 septembre 1988 concernant la compétence judiciaire et l'exécution des décisions en matière civiles et commerciale?' (*Fiches Juridiques Suisses* No 157, 1993, p 1 ff.)

Use of criminal law procedure

Seizure

N4.21 Seizure of an object by the penal authorities is a provisional measure valid during the duration of a criminal procedure.[1] Its aim is to prevent the object being changed or disposed of during the procedure. Unlike confiscation (arts 58 ff of the CP), it does not affect legal title to the object.

The types of seizures are:

(1) probatory seizure, aiming at the conservation of the means of proof; and

(2) conservatory seizure, aiming at the restitution of the object to its rightful owner or at its confiscation (arts 58 ff of the CP).

The Federal Law on Penal Procedure of 15 June 1943 (PPF) (RS 312.0) only authorises probatory seizure (art 65 of the PPF); there is no mention of a conservatory seizure in art 65. However, this is a gap that the Federal Tribunal has filled by interpretation. It has admitted a seizure within the framework of the federal

Law on Penal Procedure if there are serious indications that an object is directly related to a criminal offence and that the object is likely to be confiscated according to arts 58 ff of the CP (ATF 74 IV 213).

In view of the existence of arts 58 ff of the CP, this being a federal stipulation, the cantons are obliged to have stipulations in their law of penal procedure authorising conservatory seizure in order to permit the subsequent confiscation of an object according to art 58 of the CP (SJ 1978, p 33). And in view of art 58, a cantonal judge may pronounce a conservatory seizure even where there is silence on the matter in the cantonal law on penal procedure (ZBI 80 (1979) 174).

There are certain limitations to seizure under the criminal law. Persons exempted from giving testimony according to art 321 of the CP or relevant cantonal law are also exempted from the seizure of objects they hold, as far as these objects are related to facts on which they are exempted from giving testimony (probatory seizure). This applies even when the cantonal law on penal procedure does not mention the exemption (ATF 107 Ia 45). As mentioned above within N4.17, bankers do not, however, figure among the persons exempted from giving testimony in a penal procedure (ATF 119 IV 175).

This exemption does not apply if the person exempted from giving testimony holds objects that are likely to be confiscated according to arts 58 ff of the CP, that is they are likely to be subject to conservatory seizure (ATF 71 IV 170; BJP (1956) No 152, p 112). Nor does the exemption apply if the person concerned has been discharged from their secrecy obligation, or if the person is accused in the penal procedure.

In any case, the penal authorities are bound to apply the principle of proportionality and to weigh in each case the public interest of revealing and the private interest of not revealing a professional secret (SJ (1978) 569).

The threat of seizure is lifted in certain circumstances. The principle is as follows:[2]

> The seizure of objects and assets ordered in the course of a penal procedure, in particular in view of guaranteeing their confiscation according to art 58 ff of the Swiss penal code, constitutes a measure restricting private property. Therefore, such a measure can neither go further than what is strictly necessary to safeguard the attempted aims nor be maintained when the conditions which permitted such measures no longer exist. The person concerned has therefore the right to demand a partial or total lifting of such a measure, if a change in circumstances requires or justifies such a lifting of measures.

Furthermore, the lifting of a seizure must also take place on the basis of the principle of proportionality, ie the weighing of the public interest in the continuation of the seizure and the private interest of its lifting.[3]

Intercantonal judicial assistance is regulated by art 352 of the CP and by the 1992 Concordat on judicial assistance and co-operation in penal matters (RS 351.71). The concordat authorises the penal authority of a canton to perform procedural acts, such as seizure, in another canton by (except in urgent cases) simply informing the

competent judicial authority of the other canton of the acts that will take place. These acts are executed according to the procedural rules of the requesting penal authority.

International judicial assistance

Swiss judicial assistance in penal matters is regulated by international multinational or bilateral treaties (*See* N4.17 *above*). In the absence of such treaties or in order to complete them, the federal Law on Judicial Assistance in Penal Matters of 1 February 1997 (EIMP), which replaces the former law of 1981, is applied. Article 18 of the EIMP (in general) and art 45 (in the case of extradition) regulate provisional measures including seizure, which may be of a probatory or a conservatory kind. With the new 1997 law, not only the cantons but also the Federal Office for Police Matters may order provisional measures.

The foreign practitioner should first check if his country has ratified a treaty with Switzerland or if it is a member of a multilateral treaty also ratified by Switzerland. Then he should check whether or not the treaty concerned contains stipulations on provisional measures. If not, or if they needed to be completed, art 18 or 45 of the EIMP would apply. It is to be noted that Switzerland, in the case of stipulations in a treaty *and* in the EIMP, will always apply the rule most favourable to judicial assistance.

As international conventions containing stipulations on provisional measures go, one of the most detailed in terms of regulations is the 1990 Strasbourg Convention (RS 0.351.9379.2). This convention has been ratified by Switzerland and came into force on 1 September 1993. Up to the beginning of 1997, the following additional countries have ratified the Convention: Bulgaria, Finland, France, Italy, Ireland, Lithuania, The Netherlands, Norway and the United Kingdom. Switzerland with the coming into force of the rules contained in the 1997 EIMP, largely fulfils the norm set by the 1990 Convention.

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[1] Gérard Piquerez, *Précis de procédure pénale Suisse*, p 237 onwards.
[2] Federal Tribunal of 7 July 1988 (*Medenica v MP GE*), unpublished.
[3] GE/Chamber of accusation No 113 of 25 May 1987 (Giordanengo and De Siebenthal), unpublished.

THE RECOVERY OF ASSETS

N4.22 Once the information on the location of the assets has been ascertained and the necessary freezing of assets applied, one has to consider the recovery of the assets. The basic choices are amongst the means provided by debt collection and bankruptcy procedure and criminal procedure, and a combination of both of them.

It is a fact that a final judicial decision would be useless if there were no enforcement measure provided for by the law. The legislator must therefore establish an execution procedure which can be enforced if necessary. This matter must be considered for Swiss and for foreign final decisions.

Debt collection and bankruptcy

N4.23 In Switzerland the federal and the cantonal legislators share competencies in this matter as follows:

(1) article 64 of the CF stipulates that the federal legislator is competent in matters of debt collection and bankruptcy, ie the execution and enforcement in pecuniary matters; and

(2) the execution and enforcement in non-pecuniary matters is a cantonal competence.

There are, therefore, in matters of final non-pecuniary judicial decisions, 26 systems of execution and enforcement.[1] Debt collection and bankruptcy matters, however, are regulated by the federal Law on Debt Collection and Bankruptcy (LP)(RS 281.1).

The procedure for execution and enforcement is set out immediately below, including procedural flow diagrams on pp N4/45 and N4/46 for seizure and bankruptcy.

Order to pay

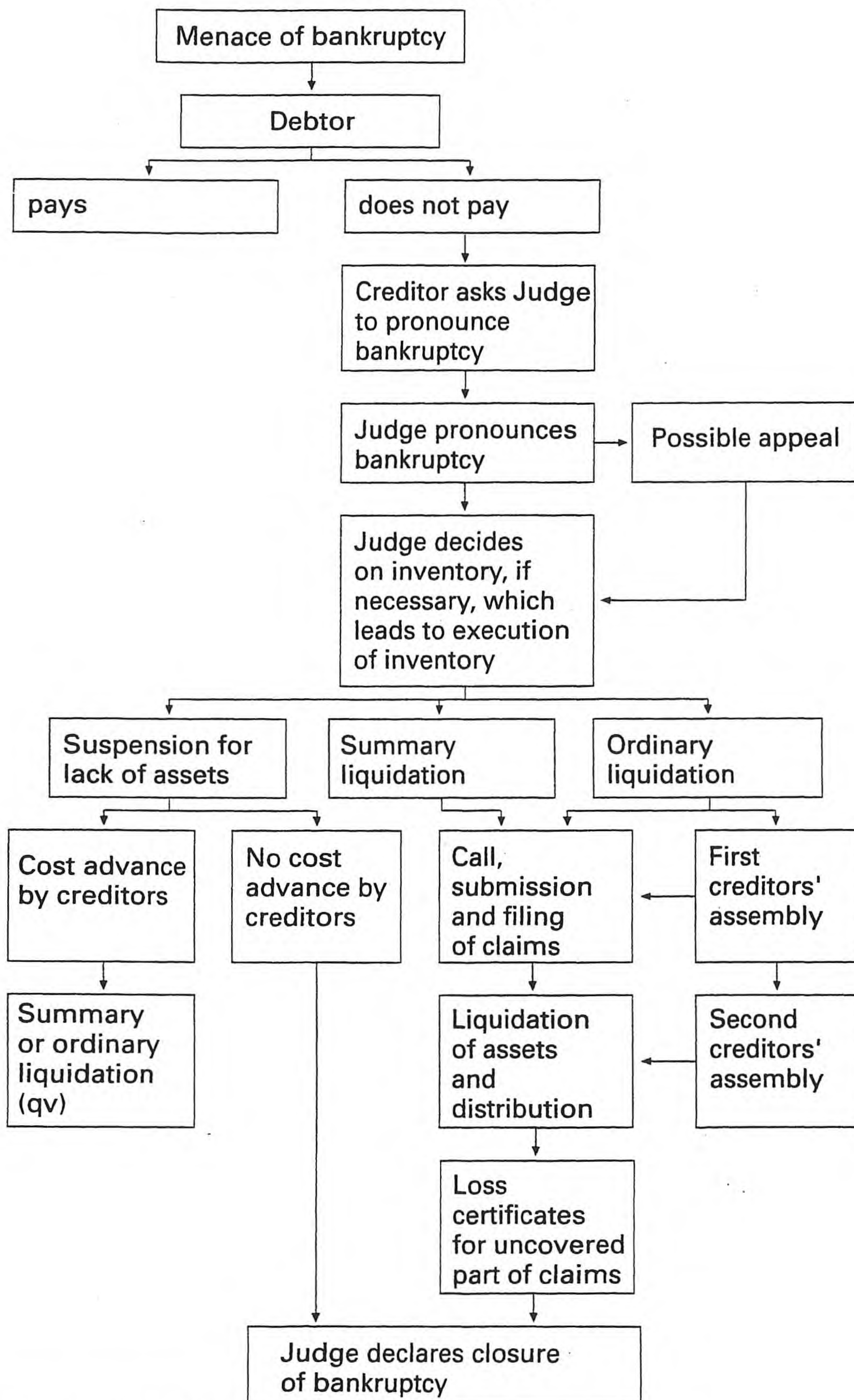
A creditor may file an application with the Debt Collection and Bankruptcy Office of the domicile of the debtor requesting that an order to pay be notified to the debtor. The notification is automatic and the Debt Collection and Bankruptcy Office does not assess the merit of the claim. When notified of the order to pay, the debtor may file a defence with the Debt Collection and Bankruptcy Office within ten days.

If the debtor does not file any defence, the creditor may request from the Debt Collection and Bankruptcy Office the continuation of the debt collection proceedings (*réquisition de continuer la poursuite*) within one year after the order to pay was issued. The type of proceedings depends upon whether the debtor is registered in the Commercial Register or not. If he is, the proceedings will lead to a bankruptcy (arts 159 ff of the LP); if he is not, they lead to the seizure procedure (arts 89 ff of the LP).

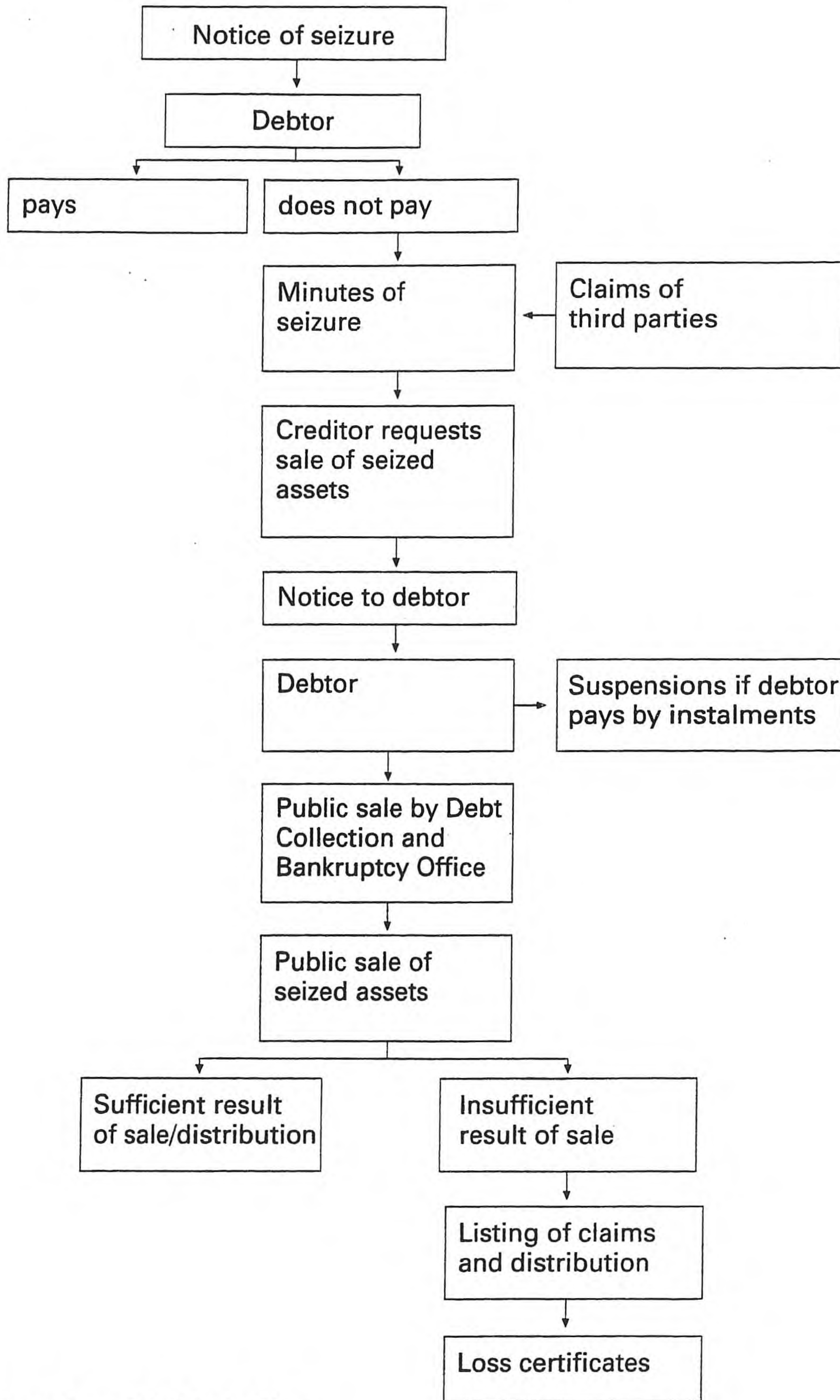
Set-aside of a defence

The creditor in possession of a final judicial decision may request from the civil judge of the place of debt collection a decision on the definitive set-aside of the debtor's defence under arts 79–80 of the LP (*mainlevée définitive*). A creditor in possession of a debt recognition may also request the provisional set-aside of the defence from the civil judge at the place of debt collection (art 82 of the LP) (*mainlevée provisoire*). Against this decision the debtor may file an action on the merits tending to the declaration that the debt does not exist.

The following graphics published by the Geneva Debt Collection and Bankruptcy Office show the unfolding of the procedure in case of seizure and in case of bankruptcy up to distribution of the outcome and closure:



Source: Geneva Debt Collection Office.



Source: Geneva Debt Collection Office.

Execution and enforcement in non-pecuniary matters

One of the fundamental notions in Swiss private law is the concept of the *obligation*, namely the right a person has towards another person that that person does something or abstains from doing something. The content of a judicial decision thus falls into one or the other of two categories: judicial decisions requiring the accomplishment of an act, or judicial decisions requiring the abstention from an act. The aim of execution and enforcement in non-pecuniary matters is therefore to ensure that the beneficiary of the judicial decision obtains the accomplishment of an act or the abstention from an act as set out in the judicial decision.

As said above, any execution not concerning pecuniary matters is a cantonal competence. Even the execution of the decisions of the Federal Tribunal are executed by the cantonal authorities as if they had been rendered by a cantonal tribunal (art 39 of the OJF). In addition, cantonal laws on civil procedure provide different solutions for dealing with the object of the decision, such as the transfer of the object by the police, the threat of penal complaint in case of resistance (art 292 of the CP), or the payment or execution of the obligation by a third party at the cost of the condemned party.

For instance, the Code of Civil Procedure of the Canton of Geneva (LPC-GE) has adopted the following solution via art 474 al 1 of the LPC-GE: 'if the condemned party does not perform the imposed obligations, the judgment is executed by order of the Public Prosecutor'.

International aspects

In cases of a foreign decision on a money claim against a debtor domiciled abroad, the seizure and bankruptcy procedures regarding the assets of the debtor located in Switzerland are not applicable, even if the foreign decision is recognised and declared executory in Switzerland, because the seizure and bankruptcy procedures require that the debtor has his domicile at the place of debt collection, ie in Switzerland (art 46 of the LP).

However, the remedy is the attachment procedure (arts 271 ff of the LP). Its conditions, etc have been discussed in N4.20 *above*. Indeed, art 52 of the LP offers the place of attachment as the place of debt collection and as a place to validate the attachment, even if the debtor is not domiciled in Switzerland. (It should be remembered, in addition, that if the debtor has his domicile in a country that is a member of the 1988 Lugano Convention, validation must take place at the place designated by the Convention.) Another remedy, provided that there exists a bankruptcy procedure abroad, is use of the provisions of the LDIP regarding the effects of a foreign bankruptcy in Switzerland (arts 166 ff of the LDIP)—*see* N4.20 *above*.

In order that a foreign final judicial decision in a non-pecuniary case can be executed and if necessary enforced in Switzerland, the foreign decision must be recognised and declared executory by the competent Swiss authorities. After that, the decision has the same value as a Swiss decision and is executed, if necessary by force, like a Swiss decision (*see above*).

Two situations must be envisaged. First, the person against whom the decision must be executed is not domiciled in a country that is a member of the 1988 Lugano Convention, in which case arts 25 ff of the LDIP applies. A foreign decision recognised according to arts 25 to 27 of the LDIP is declared executory at the request of the interested person according to art 28 of the LDIP. *Exequatur* decisions are rendered by the cantonal judge in front of which the matter is invoked (art 29 of the LDIP) and, for practical reasons, the judge of the place where the decision will effectively be executed will be chosen by the interested party.

Second, where the person against whom the decision must be executed is domiciled in a country that *is* a member of the 1988 Lugano Convention, a foreign decision recognised according to arts 26 to 30 of the 1988 Lugano Convention is declared executory at the request of the interested party according to art 31 of the CL, and for Switzerland this is the cantonal judge (art 32 ch 1 of the LDIP).

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[1] Habscheid, at pp 529 ff.

Use of criminal law procedure

N4.24 For the recovery of assets using criminal law procedure, a judge, after having made a judgment in the criminal proceedings based on the Swiss Penal Code decides, if necessary, on the damages claimed by the victim from the perpetrator through a civil action within the penal proceedings. Furthermore, the confiscation procedure (arts 58 ff of the CP), which serves primarily the interests of the state, in subsidiary fashion provides compensation for the victim. Therefore, we will examine below the procedure of the civil action within the penal proceedings, and also the procedure for confiscation.

Civil action within penal proceedings

As we have seen above, penal procedure is a cantonal matter. In this context, for practical reasons, we will only deal with the principles of cantonal penal procedure regarding civil action.

In repressive matters, the infraction gives rise to two actions, one of public interest (the penal action) and the other of private interest (the civil action). The civil action is based on the fact that the infraction not only causes a social damage, but, in most cases, also a material or moral damage to the victim. It is subsidiary to the penal action (*Adhäsionsklage*), in the sense that it can only be exercised if a penal procedure has been initiated. However, the victim, ie the civil party, has the choice between a civil action within a penal procedure or a civil action within a civil procedure. It is noted that the civil action within a civil procedure regarding damages resulting from a penal infraction is usually suspended until the closure of the penal procedure regarding that infraction.

The civil party is a party to the penal proceedings, just as the public prosecutor and the alleged perpetrator are parties to the proceedings. The civil party has all rights the other parties have—for example, it fully participates in the examination of the case before the examining magistrate. The civil party may enter the proceedings at any time, up to the opening of the judgment hearing.

The decisive moment is when the civil party formulates its conclusions at the judgment hearing, thereby indicating the factual and legal basis of the action and presenting the means of proof. The civil party may be assisted by an advocate admitted to the bar of the place concerned. The penal judge will either include the conclusions of the civil party in the text of the judgment or send the civil party to act before the civil tribunal. The civil party, in most cases, may conclude in advance that the judge should reserve the rights of the civil party.

Unfortunately, the above procedure, in the case of a lengthy examination by the examining magistrate or where the civil party has to act before a civil judge after the penal procedure is closed, may last for years, in particular because the Swiss system allows appeals at almost any stage of the penal and civil procedure. Therefore, in practice, it might be preferable for the civil party to negotiate with the alleged perpetrator and submit the result of the negotiations to the public prosecutor who, particularly in the case of economic crime, will agree to shelve the case, provided the agreement on compensation is equitable.

Confiscation

Confiscation is a decision of an authority to attribute objects to the state, on special grounds such as illicit profit or public danger. These objects may have been the result of an infraction, they may have been used to commit an offence or were destined to do so. Confiscation is possible even when no person is punishable (art 58 al 1 of the CP).

The confiscation of dangerous or immoral objects is outside of the scope of this chapter and will not be examined. The conditions under which the confiscation of pecuniary property may take place are the following:

(1) The considered object is a pecuniary property.

(2) The property is the result of a criminal offence or was meant to reward or to instigate the author of an offence; the object acquired in replacement of a confiscatable property is not confiscatable; in case of banking assets, the paper trail must be maintained.

(3) The property does not belong to the victim: in that case, the object may be immediately returned to the victim (if the object is a fungible, such as paper money, it is deemed to be mixed with the perpetrator's assets and is not returnable).

(4) A third person did not acquire the object in good faith. Such good faith acquisition is deemed to exist when the third party ignored the criminal origin of the object and either paid it adequately or would be disproportionally hurt by the confiscation.

(5) The statute of limitation of five years, or the longer statute of limitation applicable to the offence linked with the confiscatable object has not elapsed.

If those conditions are met, the judge will be compelled to pronounce the confiscation.

The law also provides for a compensatory claim, which is a subsidiary measure to confiscation. If, at the time of the judgment, the confiscatable objects do not appear

anymore in the economic sphere of the perpetrator because the latter has disposed of them etc, confiscation is no longer possible. The legislature, as a remedy, has replaced confiscation by a 'compensatory claim in favour of the state' against the perpetrator. This claim may be exercised against the totality of assets belonging to the perpetrator (art 59 al 2 of the CP).

With reference to the difference between seizure and confiscation, it should be noted that seizure is an interim conservatory measure, destined to preserve the above objects in order to permit their confiscation at the end of the penal procedure. Seizure does not affect the title to the objects, whereas confiscation procures a right of property to the state.

The competent authority is the judge that is prosecuting the perpetrator. When no perpetrator can be condemned, confiscation may take place anyway, provided that the confiscatability of the object is proved. In such an instance, the judge at the place of the location of the assets to confiscate is competent, provided that Swiss authorities would have been competent to prosecute the author of the offence (art 3 to 7 of the CP). The latter condition is not necessary for offences of the Federal Law on Narcotics (art 24 of LStup).

The judge competent for confiscation, once confiscation has been pronounced, will allocate to the victim, at the victim's request, the proceeds of confiscation in proportion of the damages to be covered, under deduction of the costs incurred by the state in the affair (art 60 of the CP).

There is also an international aspect to confiscation as set out in the 1990 Strasbourg Convention. Article 13 of that convention stipulates two options for the requesting state who wants to confiscate objects or assets situated in another member state: the requesting state can request the enforcement of its own confiscation order or request the requested state to confiscate the objects or assets situated in the latter's territory. The requested state will apply its own law in both procedures.[1]

[1] Dr W C Gilmore, *International Efforts to Combat Money Laundering* (Grotius Publications Ltd, Cambridge 1992).