

A Civil Perspective on Asset Recovery (with a focus on Swiss Law)

AUGUST 2014 | [ASSET RECOVERY](#)

[Yves Klein](#) of Monfrini Crettol & Associés explores the civil perspective on asset recovery in Switzerland:

"While the tools at the disposal of the civil law asset recovery lawyer may be less sophisticated than those of his common law counterpart, they do not lack efficiency and may also be less costly for the victim."



Attorneys in civil law countries (continental Europe, most of Latin America, as well as some countries in Africa and Asia) often feel envious when comparing their asset recovery toolbox to that of their common law counterparts.

Nevertheless, they are not left without remedies when they are approached by clients who have been fraudulently or corruptly deprived of their assets. While the tools at the disposal of the civil law asset recovery lawyer may be less sophisticated than those of his common law counterpart, they do not lack efficiency and may also be less costly for the victim.

Indeed, some of the largest and most famous cases of recovery have taken place in Switzerland, where banking secrecy was until not so long ago considered impenetrable.

This paper will show, based on examples from the *Nigeria v Abacha*, *Brazil v Dos Santos Neto*, *Haiti v Duvalier*, *Tunisia v Ben Ali*, and *Joint Liquidators of Stanford International Bank Ltd in liquidation v Stanford & al* cases, how civil law tools may be put to the service of asset recovery.

A civil law asset recovery lawyer will work hand in hand with law enforcement authorities, representing the victim as a plaintiff in criminal proceedings, and may complete a case without ever before appearing before a civil court.

However, a complex asset recovery case will involve, in addition to criminal proceedings, bankruptcy, civil and enforcement proceedings (usually in that order). This is particularly true when an asset recovery lawyer looks beyond recovering the proceeds of the crime, which may have been dissipated or transferred to

jurisdictions where asset recovery tools do not exist, and brings actions for damages against the facilitators of the offences.

Right of the victim of a crime to participate as plaintiff in criminal proceedings

As mentioned above, civil remedies in support of asset recovery in civil law jurisdictions are very limited:

- a plaintiff will not obtain from a civil court an order compelling a defendant or a third party to disclose information or evidence for use in other proceedings;
- judgments will only be enforceable against the listed defendants, and will only exceptionally extend to the offshore companies or trusts they beneficially own;
- civil attachment orders will in most cases only be available when the plaintiff has an enforceable judgment.

This lack of civil remedies is, however, at least partially compensated by the right of the victim of a crime to participate as a party in criminal proceedings, from the very start of the criminal investigation.

The victim will typically lodge a criminal complaint stating the circumstances of the crime and how it caused a prejudice (there is no requirement at this stage to quantify the damage). Only direct prejudice will be considered (indirect prejudice, such as the damage caused to a shareholder by a crime against a company will not qualify).

In Switzerland, once admitted as plaintiff, the victim is entitled to full access to the criminal file with a right to copy it and to use the evidence collected in support of proceedings in Switzerland or abroad (restrictions may apply, notably when mutual assistance proceedings at the request of a foreign state are pending). The plaintiff is also entitled to participate in the examination of suspects and witnesses, and to request from the prosecutor conducting the investigation production and freeze orders in Switzerland and abroad. The plaintiff may thus become the engine that powers the investigation, notably when it has the capacity to provide in its support an interdisciplinary and multi-jurisdictional team of professionals (lawyers, investigators, forensic accountants, experts, etc).

Swiss criminal law favours settlements between perpetrators and victims, which are a prerequisite to exemption from prosecution or formal plea-bargaining procedure.

Absent a settlement, the victim may bring a claim for damages against the perpetrator(s) in the context of the criminal trial. In addition to a judgment on damages, the victim shall be entitled to the allocation of the assets forfeited by the court, as well as to the fines, in reparation of its damage. The judgment on damages issued by the criminal court is recognised as an enforceable foreign civil judgment in most foreign jurisdictions, including of common law tradition. The victim may also reserve its rights to damages in the criminal trial and use the evidence to bring damages proceedings before a civil court, in Switzerland or abroad.

When a criminal trial is impossible, an order of forfeiture shall be issued even in the absence of a conviction against proceeds of crime (or their replacement value when forfeiture is no longer possible).

It is important to realise that under Swiss law, the victim has the right to obtain the proceeds of forfeiture in compensation of its damage (to the extent it is recognised in a judgment or a settlement). The forfeiture and allocation of its proceeds are not discretionary but must be ordered when their legal conditions are met.

It often happens, however, that the damage caused by economic crimes exceeds by far the assets that can be recovered from the main perpetrators. In a strategy of value recovery, actions for damages against facilitators need to be undertaken.

One possibility is to take control, through insolvency or receivership proceedings, of the Swiss or foreign companies that have been plundered in the perpetration of the crime and sue for damages the agents of such companies (banks, professional service providers, etc) that acted in breach of their contractual duties.

When such contracts do not exist, tort actions may be brought. Swiss case law provides that the victim of a predicate offence may have a claim for damages against individuals who committed money laundering acts and thus prevented the recovery of crime proceeds. Money laundering must be intentional in order to be a basis for such liability, though, and breaches of anti-money laundering due diligence rules are not a basis for such liability, unless they can be deemed to be evidence of intent by recklessness. Proof of intent is often difficult to bring. However, article 102§2 of the Swiss Penal Code allows crimes of corruption, money laundering and support of a criminal or terrorist organisation to be imputed irrespective of the criminal liability of any individual, provided the company can be found responsible for having failed to take all the reasonable organisational measures that were required in order to prevent such an offence. This provision is thus a basis for the liability of companies for damage caused by acts of corruption or money laundering.

Swiss asset recovery law is therefore far from toothless.

Practical examples

The recent examples below from our firm's practice illustrate how victim rights may be exercised in Switzerland:

Decision 6B_688/2011 of the Federal Court dated 21 August 2012
(http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=21.08.2012_6B_688/2011)

Following investigations initiated 2000, a former president of the Regional Labor Court of Sao Paulo was convicted in first instance in Brazil for fraud, embezzlement, corruption, unfaithful management and money laundering in the context of the works of the new court building he supervised between 1992 and 1998, for a total cost of US\$165 million, of which at least US\$86 million was embezzled and US\$6.8 million was paid between 1991 and 1994 to a Geneva bank

account owned by said Brazilian judge (the judgments became final by decision of the Brazilian Supreme Court of 2 April 2013). In 2000, following a suspicious transaction report by the Geneva bank, the Attorney General of Geneva initiated criminal proceedings for money laundering in parallel with the Brazilian criminal proceedings. The Federative Republic of Brazil was admitted as a plaintiff as victim of the predicate offences to money laundering. In 2009, upon the conclusion of the investigation, the Attorney General of Geneva issued a non-conviction based forfeiture order against the Geneva bank account and allocated the forfeited assets and the claim for replacement value to the Federative Republic of Brazil as the victim of the crimes. The order was appealed against by the former Brazilian judge, who notably claimed that the forfeiture was statute-barred under Swiss law. In the above decision, the Federal Court, Switzerland's supreme court, confirmed the forfeiture order. It notably ruled that when proceeds of crimes committed abroad that have been laundered in Switzerland are forfeited, the applicable statute of limitation is that of the predicate offence under the law of the jurisdiction where it was committed, in that case Brazilian law.

Decision of the Federal Criminal Court BB.2011.130 dated 20 March 2012

http://bstger.weblaw.ch/pdf/20120320_BB_2011_130.pdf 

Following the Arab Spring, the Federal Attorney General's Office of Switzerland initiated in February 2011 criminal proceedings on suspicions of money laundering, corruption and participation in a criminal organisation against several members of the entourage of former Tunisian head of state Zine El Abidine Ben Ali. In October 2011, the Republic of Tunisia was admitted as plaintiff in the said proceedings. One of the defendants in the criminal proceedings appealed the decision, challenging Tunisia's plaintiff status and its modalities of access to the criminal file. In the above decision, the Federal Criminal Court ruled that Tunisia was directly harmed by the investigated crimes of money laundering, corruption and participation in a criminal organisation, and had consequently to be admitted as plaintiff. The right of access of Tunisia to the criminal file was also confirmed in its principle, but amended in its modalities.

Decision 6B_422/2013 of the Federal Court dated 6 May 2013

http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=06.05.2014_6B_422/2013

In November 1999, the Federal Republic of Nigeria lodged with the Attorney General of Geneva a criminal complaint against members of the entourage of former head of state of Nigeria the late General Sani Abacha, for fraud, embezzlement, participation in a criminal organisation and money laundering, and was admitted as plaintiff. Between 1999 and 2005, all Abacha-related assets identified in Switzerland (ie, more than US\$700 million) were recovered by Nigeria through Swiss criminal and mutual assistance proceedings. In addition, in the context of the criminal prosecution of General Abacha's younger son, who had been extradited to Switzerland by Germany in April 2005, the Geneva Examining Magistrate obtained in April 2006 the freeze by Luxembourg of all assets he beneficially owned in a Luxembourg bank, totalling about US\$400 million. In a

sentencing order of November 2009, General Abacha's younger son was found guilty of participation in a criminal organisation and the assets frozen in Luxembourg were forfeited. In the above decision, the Federal Court confirmed that General Sani Abacha and his entourage formed a criminal organisation (thus confirming its decisions 1A.215/2004 of 7 February 2005 in the Nigeria v Abacha case and 1C_374/2009 of 12 January 2010 in the Haiti v Duvalier cases), and that Switzerland had jurisdiction to forfeit its assets in Luxembourg.

Order of the Federal Attorney General's Office of Switzerland of 21 February 2014
(<http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=52261>)

In February 2009, the Federal Attorney General's Office of Switzerland initiated criminal proceedings on suspicions of money laundering following the collapse of the financial empire of Robert Allen Stanford. In May 2009, the Joint Liquidators of Stanford International Bank Ltd (in liquidation), Antigua, applied with the Swiss Financial Market Supervisory Authority FINMA for recognition of the Antiguan insolvency proceedings, which was granted in June 2010, and led to the opening of a Swiss ancillary bankruptcy. In January 2012, Stanford International Bank Ltd (in liquidation) was admitted as a plaintiff in the Swiss criminal proceedings. In February 2014, the Federal Attorney General's Office of Switzerland issued a sentencing and forfeiture order against a Swiss subsidiary of the Stanford Group, found to have committed acts of money laundering through lack of organisational measures to prevent such offences, forfeited its assets, as replacement value of proceeds of embezzlement, and allocated them, as well as the fine, to the ancillary bankruptcy of Stanford International Bank Ltd in compensation of its damage, in view of distribution to its creditors.

More information on the above cases may be obtained on the website of ICC FraudNet (www.icc-fraudnet.org).

[Back to top](#)

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