International Trust and Divorce Litigation

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Second Edition

JORDANS

Family Law

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> 'coming from the company law principles, and a trust is precisely not such a legal entity ... the theory of piercing the corporate veil should be applied in a very exceptional way to trusts, and require a very specific examination of the conditions of each particular case.'

However this decision is certainly the evidence of a new trend to prevent a spouse hiding assets in trusts to avoid them being taken into account in divorce procedures.

As Aude Peyrot also notes in her article regarding this decision:[178]

> 'though in principle the piercing the corporate veil principle is submitted to the foreign law which governs the entity, the Supreme Court has decided that Swiss law could apply as the procedure was summary proceedings requiring a quick procedure.'

One has also to note that this decision was rendered within the framework of provisory measures, and so with the restrictive approach of likelihood of facts, and was not a decision on the merits. It is quite possible, or even likely that on the merits a decision rendered to protect temporarily the rights of one party and avoid the disappearance of assets, could be different. It has also to be pointed out that the final decision of the Supreme Court on these provisory measures was rendered within the restrictive scope of the violation of law. This means the Supreme Court only had to examine if the decision of the lower court was legally abusive. The practitioner should not deduce from this decision that a Swiss court will in all cases decide that the assets held by a trust are to be considered as if they had remained within the possession of the settlor.

Tina Wüstemann and Debora Gabriel

7.16.3 Treatment of trusts in Switzerland

Introduction

When it comes to structures, which are established to amass and protect a family's wealth, Swiss law follows a restrictive approach. According to art 335 para 1 of the Swiss Civil Code ('CC'), a fortune can be tied to a family by means of a Swiss family foundation only if the foundation's purpose is to defray the costs of education or to support family members in relation to specific needs. Family foundations with other purposes are not admissible.[179] In particular, it is not permitted to set up a family foundation with the purpose of providing a higher or more comfortable standard of living for the beneficiaries without a particular link to any

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[178] Ibid.

[179] For example, the Swiss Federal Tribunal has considered the purpose of maintaining a family residence and other family assets as an invalid purpose for a Swiss family foundation (BGE 108 II 339). See also Oliver Arter *The Swiss Family Foundation, Trust Law International* vol 26, No 3, 2012, 152 et seq.

requirements of special life circumstances. Swiss law explicitly prohibits family entailments,[180] thereby further limiting the possibilities to set up family wealth structures. It is, however, noteworthy that the Swiss Federal Supreme Court, in its decision of 17 November 2009, allowed the establishment of a foreign (Liechtenstein) family maintenance foundation by a Swiss resident founder.[181]

In light of the above, it is not surprising that the number of Swiss family foundations is very limited.[182] Whether the Swiss Federal Supreme Court will revise its long-standing case-law concerning the prohibition of family maintenance foundations in the future remains to be seen. Other concepts to structure a family's wealth for the benefit of the family members are largely unknown under Swiss law. In particular, Swiss law does not know the concept of trust and there seem to be no legislative efforts to introduce a Swiss trust law in the near future.

However, Switzerland recognises foreign trusts (sharing the same or a similar purpose that proscribed family maintenance foundations fulfill under Swiss law) as a result of the ratification of the Hague Trust Convention ('the Hague Convention'),[183] which became effective in Switzerland in 2007. Prior to the ratification of the Hague Convention, the Swiss Supreme Court held that a trust comprises elements of a fiduciary agreement, a donation, a deposit agreement and a mandate agreement, thereby trying to explain the concept of trust by means of different types of contracts known under Swiss law.[184]

Hague Convention

Based on the Hague Convention, Swiss courts and authorities consider foreign trusts as distinct legal institutions under the relevant trust legislation.[185] To recognise the trust does not mean integration of trust law concepts into Swiss law but implantation of the Anglo-Saxon trust in the Swiss civil law jurisdiction by means of clear and practicable rules in a flexible conflict of law system and thereby recognition of the foreign legal institution. The Hague Convention covers all types of internal trust

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[180] Article 355 para 2 CC.

[181] BGE 135 III 614 E. 4.3.3.

[182] By contrast, the number of charitable foundations is on the increase due to the very liberal provisions governing Swiss charitable foundations and the attractive, stable Swiss environment.

[183] Hague Convention on the law applicable to trusts and on their recognition of 1 July 1985, RS 0.221.371.

[184] 'Harrison Case' BGE 96 II 79.

[185] It has been discussed by the Swiss doctrine if trusts violate the ban of family entailments (art 335 para 2 CC) and the multiple appointments of reversionary heirs (art 488 para 2 CC). The predominant Swiss doctrine is of the opinion that the trust needs to be recognised since Switzerland has joined the Hague Convention, which is also in line with the recent decision of the Swiss Federal Supreme Court.

disputes, eg applications for directive and constructive summonses and requests for the replacement of a trustee.[186]

Hence, foreign trusts are recognised in Switzerland and, where applicable, Swiss courts and authorities will apply foreign trust law when dealing with trust-related matters or adjudicating internal trust disputes. At the same time, Swiss law may be applicable if and in so far as the Hague Convention excludes certain aspects from its scope of application.

For example, according to art 4 of the Hague Convention, the Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to a trustee. Accordingly, while a Swiss court will assess the validity of a foreign trust based on the relevant trust statute, it will examine the validity of the transfer of assets by a spouse to a trustee based on the law applicable to the respective transaction. As a consequence, the recognition of a foreign trust under the relevant trust legislation does not exclude the challenge of a transfer of assets by a spouse to a trustee under the law applicable to such transfer.[187]

Further restrictions of the scope of application of the Hague Convention are contained in art 15 of the Hague Convention (mandatory provisions of the law designated by the conflict of law rules of the forum),[188] art 16 (so-called *lois d'application immediate*)[189] and art 18 (public policy).[190] These restrictions may also result in the application of Swiss substantive law instead of the foreign trust law depending on the matter in question.

In order to reflect the ratification of the Hague Convention in Swiss legislation and to ensure smooth interaction between Swiss law and the relevant trust legislation, several new provisions have been enacted in Switzerland over the past five years. In particular, the Swiss legislator introduced new conflict of law rules, including jurisdictional rules, dealing

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[186] Article 8 Hague Convention.

[187] Delphine Pannatier-Kessler, *Le droit de reconnaissance et de suite selon la Convention de la Haye sur les trusts* (2011) 79.

[188] Article 15 Hague Convention: the convention '... may not prevent the application of provisions of law designated by the conflict rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters ... the personal and proprietary effects of marriage.'

[189] Article 16 HTC: 'The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws. If another State has a sufficiently close connection with a case then, in exceptional circumstances, effect may also be given to rules of that State which have the same character as mentioned in the preceding paragraph. Any Contracting State may, by way of reservation, declare that it will not apply the second paragraph of this Article.'

[190] Article 18 Hague Convention: 'The provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy (ordre public).'

with (internal) trust matters as defined under the Hague Convention.[191] In addition, provisions on debt enforcement and bankruptcy involving a trustee or trust assets[192] as well as detailed provisions regarding the entry of trust properties in the Swiss land registry have been enacted.[193]

When dealing with trusts in the context of Swiss divorce proceedings or related Swiss family law aspects, the following *rules under Swiss matrimonial property law*[194] must be kept in mind:[195]

- Swiss matrimonial property law contains specific rules limiting transfers of assets to trusts by spouses such as the right to dispose of the family home,[196] the transfer of community[197] or co-owned property,[198] which requires the other spouse's consent. In case the transfer of assets by a spouse to a trust is invalid, a trustee may be ordered to transfer trust assets to the deprived spouse based on a vindication claim in rem.[199] The deprived spouse, as the owner of the matrimonial assets invalidly transferred, can pursue a vindication claim in rem based on art 641 para 2 CC against the trustee for his or her part of ownership in the assets (unless the trustee could make a defence based on his bona fide acquisition, which should practically hardly be admitted). However, against offshore trustees in jurisdictions that enacted firewall provisions, such claims are unlikely

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191 Chapter 9a PIL, arts 149a to 149e PIL.

192 Articles 284a and 284 b of the Swiss Federal Act on debt enforcement and bankruptcy.

193 Revised Swiss Federal Land Registry Ordinance. With regard to trusts with a connection to Switzerland it should be noted that foreign trustees may hold Swiss trust assets. Swiss real estate which is owned by a foreign trustee is subject to authorisation under the Swiss Federal Act on the acquisition of real estate by persons abroad (BewG; Lex Koller), if there is no reason for exemption.

194 If divorce takes place in Switzerland, the division of matrimonial property rights is subject to the law chosen by the spouses (art 52 para 1 PIL). The parties can choose between the law of the state where both are domiciled or will be domiciled after marriage and the law of the state of which one of them is a citizen (art 52 para 2 PIL). Absent such choice of law, the matrimonial property rights are governed by the law of the state, where both are domiciled or had their last common domicile, respectively, if they never had their domicile in the same state, the law of their common citizenship. Subsidiarily, the Swiss separation of property regime applies (art 54 PIL).

195 Tina Wüstemann and Delphine Pannatier Kessler 'Trusts in the context of Swiss divorce proceedings', in (2011) 17(9) *Trusts & Trustees* 883–92; see also Tina Wüstemann and Delphine Pannatier Kessler, 'Nuptial Agreements and Trusts in the Context of Divorce in Switzerland', in *Newsletter IBA Legal Division* (Family Law Committee, 2010) 18–21.

196 Article 169 CC.

197 Article 222 para 3 CC.

198 Articles 201 para 2 CC, it being noted that in case of doubt there is a presumption under the marital property regime of participation in acquisitions that assets are co-owned until sole ownership is proven by a spouse. Other issues may be equally relevant to ensure a valid transfer of assets to a trust such as the capacity of the settlor spouse, the formal requirements or the validity of the underlying contract.

199 Article 641 para 2 of the Swiss Civil Code (CC); see also Wüstemann and Pannatier, at footnote 195 above, 889.

to be successful, unless the vindicated assets are located in the realm of the Swiss judge, eg Switzerland, or in Lugano Convention jurisdictions.[200]

- Assuming assets have been validly transferred by a spouse to a trust, they are no longer considered that spouse's property and are thus in principle not taken into account in Swiss divorce proceedings. Switzerland recognises in application of art 11 of the Hague Convention the fact that the trust assets are held by the trustee as a separate entity.

However, such trust assets may nevertheless to a certain extent be vulnerable to division in case of divorce if the spouses are subject to the Swiss default matrimonial property system of participation in acquisitions:[201] transfers made to a trust by a spouse during marriage are taken into account when calculating the spouses' matrimonial property claims[202] if the following conditions are met:[203] (1) the transferred assets constitute acquisitions; (2) the assets were transferred without consideration; (3) the assets were transferred without the other spouse's consent; and (4) the transfer took place during the five years preceding the dissolution of the matrimonial property regime, or, alternatively, the transfer was made during the matrimonial property regime with the intention of diminishing the other spouse's share. If these requirements are met, the assets are notionally added to the transferring spouse's remaining acquisitions and, in principle, increase the other spouse's monetary claim in case of divorce. In addition, to the extent the remaining assets of the transferring spouse are insufficient to satisfy the divorce judgment in the other spouse's favour, the deprived spouse has a direct claim against the trustee up to the amount of the shortfall (art 220 CC, which is mandatory in the sense of art 15 of the Hague Convention).[204]

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[200] Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (SR 0.275.11); Wüstemann and Pannatier, at footnote 195 above, 889; Delphine Pannatier Kessler, 'Trusts and Matrimonial Law – Challenges Against the Trust Assets by Deprived Spouses', in *Der Schweizer Treuhänder* (2011) vol 3 169.

[201] Articles 196 et seq CC. Under this regime, each spouse participates in half of the other spouse's acquisitions, ie mainly income from work and revenues from own property acquired during marriage (own property being pre-marital or inherited assets and/or assets received by gratuitous transfer). Such participation is reflected in a monetary claim by a spouse.

[202] Article 215 CC provides that a spouse's claim is equivalent to half of the value of the other spouse's acquisitions, less half of the value of her or his own acquisitions; the spouses' mutual claims are set off.

[203] Article 208 CC: 'The following are added to the property acquired during marriage: 1. the value of dispositions made without consideration by one spouse without the other's consent during the five years preceding the dissolution of the marital property regime, save for the usual occasional gifts; 2. the value of assets disposed of by one spouse during the marital property regime with the intention of diminishing the other's share.'

[204] Luc Thévenoz, *Trusts en Suisse* (2001) 61; see also Angelo Schwizer 'Trusts in Ehescheidungen: Güterrechtliche Fragen', in (2012) AJP 1119 et seq and 1125; such

According to the prevailing Swiss doctrine, the third party recipient, ie the trustee, has thereby the right to choose whether to satisfy the claim of the deprived spouse by transferring back assets in kind up to the amount of the shortfall. In case the value of the transferred assets (eg shares etc) decreased since they have been vested to the trustee, some Swiss authors hold that the deprived spouse has a monetary claim in the amount of the shortfall.[205] Moreover, according to Swiss practice, a trustee, which acted in good faith when accepting the assets, must only restitute to the extent still enriched.[206]

Whether or not such action is successful depends on the seat of the trustee (jurisdiction) and the location of the trust assets (enforcement). If the trustee and/or the trust assets are located in an offshore jurisdiction, the offshore conflict of law rules are likely to prevent the application of the Swiss matrimonial law or the enforcement of a judgment rendered based on Swiss matrimonial law. The claimant spouse's situation would be more favourable if the trust assets and/or the trustee were to be located in Switzerland.[207]

7.16.4 Treatment of trusts in the context of Swiss divorce proceedings

Switzerland is seen by many foreigners as an attractive place to live and trusts are thus often 'imported' by spouses relocating to Switzerland. Swiss courts have not yet had much experience in dealing with trusts in the context of divorce, mostly because these cases have been settled before reaching judgment. However, on 26 April 2012, five years after the Hague Convention became effective in Switzerland, the Swiss Federal Supreme Court gave its judgment in the matter *Rybolovlev v Rybolovleva,*[208] dealing for the first time with trusts in the context of divorce proceedings pending before the court of Geneva.

In this case, which is still ongoing, the spouses, both Russian citizens, got married in Russia in 1987 without entering into a pre-nuptial agreement at that time. They moved to Geneva, Switzerland in 1995. In April 2005, the husband, a Russian billionaire, submitted a Swiss post-nuptial agreement to his wife, based on the default Swiss matrimonial regime of participations in acquisitions containing a number of exceptions, which the wife refused to sign. A couple of months later, the husband set up two irrevocable discretionary trusts governed by Cyprus law, to which he transferred a large part of his assets, including art collections, real estate,

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claim can be filed separately or be included in the divorce proceedings based on a third party notice based on article 78 et seq of the Swiss Federal code of civil procedure.

205 *BSK-Commentary*, Hausheer/Aebi-Müller, no 34 ad article 220 et seq CC, Basle 2012; *BK-Commentary*, Hausheer/Reusser/Geiser, no 58 ad article 220 CC, Berne 1992.

206 *BSK-Commentary*, Hausheer/Aebi-Müller, no 24 ad article 220 et seq CC, Basle 2012.

207 Wüstemann and Pannatier Kessler, 890 (footnote 195).

208 Decision of the Swiss Supreme Court 5A 259/2010.

a yacht and shares he held in various companies, without consideration. The principal beneficiaries of the trusts were the husband together with his two daughters. The husband was also appointed as protector of the two Cyprus trusts with the powers to hire and fire the trustees and to add or exclude beneficiaries. According to the husband, he created the trusts to protect certain assets from foreign attachment orders while retaining certain managing powers over those assets.

In 2008, the wife filed for divorce with the courts in Geneva, claiming under the Swiss matrimonial property regime of participation in acquisitions half of the husband's wealth accrued during marriage. The wife also requested an order compelling her husband to provide her with an inventory of all assets that he directly or indirectly held, as well as all relevant information relating to all companies, trusts and other entities directly or indirectly owned by him. The court ordered the husband to disclose such information. The appeal of the husband against that decision was (partially) dismissed by the Geneva Court of Appeal.

In addition, the wife brought legal actions in the BVI, London, Singapore, Cyprus and the United States, respectively, for the attachment of assets directly or indirectly owned by her husband. These foreign courts issued freezing injunctions against the husband and the companies of which he was the beneficial owner.

In parallel, she also sought an order for the provisional attachment of various assets held by her husband or third parties such as the trustees of the Cyprus trusts until the rendering of a final and enforceable judgment concerning the liquidation of their matrimonial property. While the Geneva court of first instance rejected in 2009 the wife's application for provisional attachment, the Geneva Court of Appeal ordered in 2010 the provisional attachment over (1) the husband's personal worldwide assets (by prohibiting him to dispose of them) as well as over (2) the foreign trust assets, pending the liquidation of the couple's matrimonial property regime. Such decision was subsequently confirmed in April 2012 by the Swiss Supreme Court.

In particular, the following arguments of the Swiss Federal Supreme Court's decision are noteworthy:

- The court held that it could order the attachment over the husband's assets (by prohibiting him to dispose of them) not only with regard to assets located in Switzerland, but also with regard to assets located abroad, thereby confirming the decision of the Geneva Court of Appeal, which reversed its previous jurisprudence in that regard.

- The court has also not only restricted the powers of the husband to dispose of these assets 'directly or through the management of these

structures', but also said that this order would 'be extended to the companies themselves, their management, the trusts and their trustees'.

- The decision of the Court of Justice of Geneva was based on the theories of piercing the corporate veil and the abuse of law. As regards the foreign trust assets, the question facing the Swiss Supreme Court was whether the lower Court of Appeal acted arbitrarily in deciding that the husband remained sole beneficial owner of the Cyprus trusts. While the court considered the Cyprus trusts to be valid, they concluded that the husband was the sole beneficial owner or in a position of control of the Cyprus trusts, which justified treating the trust assets as still belonging to the husband. In reaching this conclusion, the Swiss Federal Supreme Court, quite strikingly, followed the Court of Justice of Geneva in applying Swiss law in relation to receivership and the principle of piercing the corporate veil as applied under Swiss company law (rather than Cyprus trust law).[209] The Swiss Federal Supreme Court justified the application of these Swiss principles by reference to art 15 of the Hague Convention, referring to the clawback claims provided for under art 220 CC (see above)[210] designed to prevent

[209] Decision of the Swiss Supreme Court 5A 259/2010, recit 7.3.2.2. (author's unofficial translation): 'As for the case-law published in the decision of the Swiss Supreme Court 126 III 95, the appellant gives it a scope that it does not have in an attempt to justify its non-relevance in this particular case. In this decision, the Swiss Federal Supreme Court limited itself to specifying (on the principles: decision of the Swiss Supreme Court 107 III 33, recit. 2, p. 35) under what conditions a creditor can obtain a receiving order for assets formally in the names of third parties. For example, it ruled that reference to the third party is indispensible, as the creditor cannot merely indicate all the assets belonging to the debtor while adding, without details, whether they are in the debtor's name or in the name of a third party. It noted however that this requirement does not mean that those who avoid their creditors by transferring their assets to front men, shell companies or professional agents that dispose of collective deposits are protected. It held that, indeed, in such cases, the degree of plausibility of the debtor's ownership of the assets, required by the judge, must take into account the fraudulent situation and that all evidence to this effect must be duly taken into consideration. In other words, if it seems plausible that the debtor is hiding behind the legal duality of persons in order to evade its obligations, there are grounds to exclude them and to order the receivership. It does not appear untenable to apply these principles by analogy to the attachment of assets formally in the names of third parties handed down by virtue of Art. 178, section 2 CC.'

[210] Decision of the Swiss Supreme Court 5A_259/2010, recit. 7.1. (author's unofficial translation): 'based on article 15 of the Hague Convention of 1 July 1985 relating to the law applicable to trusts and their recognition (RS 0.221.371; CLHT) reserving the application of the mandatory provisions designated by the choice-of-law rules of the lex fori, i.e. more particularly on the principle of the restriction of the abuse of right which it deemed was part of positive public policy reserved by article 18 Swiss Federal Act on Private International Law. In this respect, it deemed that the transfer of acquisitions to a trust by a spouse under conditions enabling the application of article 208 CC and subsequently of article 220 CC, an action comparable to an action to reduce the value of inheritance rights, constitutes a situation that would be an abuse of right if the wronged spouse were denied the option of attaching as a precautionary measure the assets that would secure his or her share in the profit.'

abuse of rights. The court held that the attachment could be ordered against the foreign assets held in the Cyprus trusts in order to guarantee the wife's matrimonial share. The court noted in particular that (author's unofficial translation):

> 'the transfer to a trust of acquired assets, made by a spouse in conditions which would allow at a later stage the application of article 208 CC and further of article 220 CC ... would constitute a situation creating an abuse of law if the provisional seizure of such assets could not be ordered.'

- The court finally noted that the existence of other attachment measures pending abroad did not prevent its own attachment order, given the lack of international *lis pendens* in this area, referring, however, to potential enforceability problems abroad.

Given that the Swiss Supreme Court applied Swiss law rather than Cyprus trust law for their analysis (arguing that in the framework of summary proceedings requiring a quick response Swiss law could be applied) when ordering the attachment of the Cyprus trust assets located outside Switzerland, the judgment led to some criticism among common law trust practitioners as regards Switzerland's willingness to respect the settlor's chosen trust law as embodied in the Hague Convention.[211]

In any event, it is important to note that the respective decisions were rendered within the framework of provisional measures on the basis of the likelihood of facts and that there were no decisions on the merits. Moreover, the Supreme Court only had to examine whether the lower court acted arbitrarily (violation of law). A Swiss court may thus not always decide that the assets held by a trust are to be considered as if they had remained within the possession of the settlor.

7.16.5 'Firewall provisions' and enforcement of foreign divorce court orders in Switzerland

As Swiss law does not know the concept of trust, there are no provisions under Swiss law providing for the protection of trusts from foreign divorce court orders.

In general, the recognition and enforcement of foreign divorce and separation decrees is governed by art 65 PIL.[212] According to this provision, foreign divorce and separation decrees are recognised and enforced in Switzerland if they are granted in the countries of domicile, usual place of residence or citizenship of one of the spouses or if they are

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[211] Toby Graham 'The Hague Trusts Convention five years on: The Swiss Federal Supreme Court's decision in *Rybolovlev v Rybolovleva*', in (2012) 18(8) *Trusts & Trustees*.

[212] The Lugano Convention (SR 0.275.11) is not applicable in divorce and matrimonial matters, except for maintenance issues.

recognised in one of these countries. If a decree is granted in a country of which none of the spouses or only the plaintiff spouse is a citizen, such decree is recognised in Switzerland only if (1) at least one of the spouses had his or her domicile or usual place of residence in this country when the action was filed and the defendant spouse was not domiciled in Switzerland; (2) the defendant spouse submitted to the jurisdiction of the foreign court without reservation; or (3) the defendant spouse consents to the recognition of the decree in Switzerland.

In matrimonial property law matters the recognition and enforcement of foreign court orders is governed by art 58 PIL. This provision states that foreign decisions on matrimonial property regimes are recognised in Switzerland if (1) they were rendered or are recognised in the country of domicile of the defendant spouse; (2) they were rendered or are recognized in the country of domicile of the plaintiff spouse, provided that the defendant spouse was not domiciled in Switzerland; (3) they were rendered or are recognised in the country whose law applies under the PIL provision; or (4) they concern real estate and were rendered or are recognised where the real estate is located. However, if a decision with regard to a matrimonial property regime is rendered in connection with divorce or separation proceedings the rules governing the recognition and enforcement of foreign divorce and separation decrees apply (see para 19 above).

In case of divorce proceedings pending abroad, according to the Swiss doctrine, provisional measures (including blocking of a bank account or information gathering in relation to Swiss assets of a spouse) can be ordered under certain circumstances based on art 10 PIL.[213]

[213] Elisabeth Schönbucher Adjani 'Ehescheidung: Internationale Zuständigkeiten und vorsorgliche Massnahmen', Stiftung juristische Weiterbildung Zürich, Seminar Scheidungen mit Auslandbezug, 3. September 2009 (www.sjwz.ch).